



April 11, 2016

via Email (without exhibits)¹ and Federal Express

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Re: Petition for Objection to Utah DAQ's Proposed Title V Permit No. 1500101002 for the Operation of the PacifiCorp Hunter Power Plant, Castle Dale, UT 84513.

Dear Administrator McCarthy:

Enclosed is a petition requesting that the U.S. Environmental Protection Agency object to the Title V Operating Permit issued by the Utah Department of Air Quality to PacifiCorp's Hunter Power Plant for the operation of the power plant in Castle Dale, Utah.

Thank you for your consideration.

Sincerely,

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¹ Please note exhibits to this Petition will be burned to a DVD and sent VIA Federal Express; they and are also available at this Box.com: <https://app.box.com/s/9zzjtr3e82566we0aiinnerpgggyk9vb>.

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

In the Matter Of:

PacifiCorp Hunter Power Plant
Title V Operating Permit
Permit No. 1500101002

Issued by United States Environmental
Protection Agency

PETITION FOR OBJECTION

**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE
OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE PACIFICORP
HUNTER POWER PLANT, PERMIT NO. 1500101002**

The Sierra Club hereby petitions the Administrator of the U.S. Environmental Protection Agency to object to Title V Operating Permit No. 1500101002 reissued on March 3, 2016, by the Utah Division of Air Quality (UDAQ) for the Hunter Power Plant operated by PacifiCorp Energy in Castle Dale, Utah.²

The Administrator must object to the issuance of the Title V Permit because, as demonstrated below and in Sierra Club’s November 13, 2015 comment letter to UDAQ and associated exhibits,³ the Permit does not meet the requirements of the Clean Air Act, the federal operating permit regulations, or the Utah State Implementation Plan (SIP). This Petition seeks an objection by the Administrator for the following reasons:

² The Permit is attached at Exhibit A. This petition is filed pursuant to section 505(b)(2) of the Clean Air Act, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R §§ 70.7(f), 70.7(g), and 70.8(d).

³ Sierra Club’s November 13, 2015 comment letter to UDAQ on the Draft Title V Renewal Permit (hereinafter “Comment Letter”) is attached as Exhibit B, along with all the associated exhibits, which are designated in this Petition by their original exhibit numbers (*e.g.*, “Ex. 1 to Comment Letter”). In addition to this Petition, Sierra Club explains in exceeding specificity in its Comment Letter what the legal requirements of the Utah SIP are with respect to PSD permitting, Approval Order requirements, and PALs; why the Hunter Title V permit and/or past permitting actions do not comply with those applicable requirements; and what needs to be done to assure compliance with those requirements. Sierra Club incorporates by reference all of the portions of its Comment Letter relating to each issue raised in this Petition and all of the associated exhibits. (Ex. B).

- The company constructed projects pertaining to boiler components and turbine upgrades in the late 1990's that should have been permitted pursuant to the applicable Prevention of Significant Deterioration (PSD) and Approval Order permitting requirements, including emissions limits reflecting Best Available Control Technology (BACT) and assurance of compliance with the national ambient air quality standards (NAAQS) and PSD increments, among other things.
- Utah's 10-year Plantwide Applicability Limits (PAL) limits for the Hunter Plant for SO₂ and NO_x set in 2008 were unlawful and invalid for several reasons. Significantly, EPA did not approve Utah's revised PSD rules that allow for ten-year PALs into the Utah SIP until 2011. Additionally, Utah set the PALs too high because they were based on actual emissions reflecting unpermitted modifications to each of the Hunter Plant's units that should have triggered PSD and BACT for SO₂ and NO_x, and correspondingly lower emissions limits. Moreover, the state should have set the PAL levels lower to reflect forthcoming regional haze requirements.
- The Permit fails to impose Utah Approval Order requirements, including BACT, on Hunter Unit 1 for unpermitted modifications in 2010, including the replacement of Unit 1's economizer, low temperature superheater, finishing superheater, and pulverizer components, as well as high pressure/intermediate pressure/low pressure turbine upgrades. This stands in stark contrast to Utah's Approval Order rules, and Utah's representations to EPA that the rule would require the application of BACT to such projects.
- UDAQ failed to satisfy its obligation to provide a meaningful response to approximately one hundred pages of Sierra Club's detailed comments on the crucial permitting issues discussed above.

I. INTRODUCTION

The Hunter Plant, located at Highway 10, Castle Dale, Utah 84513, includes three large coal-fired electric utility steam generating units that are designated as Units 1, 2 and 3. The plant releases an enormous amount of air pollution, including 4,238 tons per year (tpy) of SO₂, 13,720 tpy of NO_x, 1,0283,993 short tons per year of carbon dioxide (CO₂),⁴ 8,740 tpy of carbon monoxide (CO), 63.52 tpy of mercury compounds, 550 tpy of particulate matter up to 10 microns (PM₁₀), 348 tpy of particulate matter up to 2.5 microns (PM_{2.5}),⁵ and others. Hunter is a "major

⁴ EPA Air Markets Program Database, available at <https://ampd.epa.gov/ampd/>.

⁵ 2011 Statewide Point Sources by County at p. 8, available at <http://www.deq.utah.gov/ProgramsServices/programs/air/emissionsinventories/docs/2013/03Mar/2011%20StatewidePointSources-DetailByCounty.pdf> (PM and CO); 2011 Statewide Hazardous Air Pollutants – Point Sources at 3,

stationary source” of SO₂, NO_x, PM₁₀, CO, greenhouses gases and other pollutants under section 302 of the Clean Air Act, subject to the operating permit requirements of Title V of the Act.⁶

Individually and collectively, these pollutants contribute to global warming, acid rain, regional haze, pollution of surface waters, and other processes harmful to human health and the environment.⁷ Significantly, pollution from the Hunter plant causes or contribute to visibility impairment in the crown jewels of America’s national park and public lands system, including Capitol Reef National Park, Canyonlands National Park, Arches National Park, Bryce Canyon National Park, Zion National Park, Grand Canyon National Park, Black Canyon of the Gunnison Wilderness, and Mesa Verde National Park. The region is endowed with unparalleled landforms, stunning geologic features, irreplaceable scenic vistas, and a rich diversity of ecosystems. Visitors from across the nation and globe are drawn to these lands and their tourist dollars benefit state and local economies.

II. PETITIONERS

Sierra Club is the oldest and largest grassroots environmental group in the United States, with almost 650,000 members nationally, including over 4,000 members in Utah. Sierra Club’s members live, work, attend school, travel, and recreate in and around areas affected by the

available at

<http://www.deq.utah.gov/ProgramsServices/programs/air/emissionsinventories/docs/2013/03Mar/2011%20Statewide%20Point%20Sources-HAPsCountyDetails.pdf> (mercury).

⁶ Permit at 2 (Ex. A); *see* 42 U.S.C. at §§ 7661(2)(B), 7661a(a); *see also* 40 C.F.R. §§ 71.2, 71.3(a)(1).

⁷ For example, Sierra Club’s modeling shows the Hunter Plant’s harmful SO₂ emissions are projected to cause violations of the 1-hour SO₂ NAAQS, whether based on allowable emissions, plantwide actual maximum hourly emissions in 2012, or even Hunter Unit 1’s projects maximum allowable hourly SO₂ emission rate upon the upgrade of control equipment. *See* Air Dispersion Modeling Analysis For Verifying Compliance with the One-Hour SO₂ NAAQS: Hunter and Huntington Power Plants, Prepared by Lindsey Sears, April 28, 2014 (Ex. 50 to Comment Letter); SO₂ Emissions Scenarios Modeled for the Hunter Power Plant and the Huntington Power Plant in the Air Dispersion Modeling Analysis for Verifying Compliance with the One-Hour SO₂ NAAQS Conducted by Lindsey Sears, prepared by Vicki Stamper (Ex. 51 to Comment Letter); *see generally* Comment Letter at 98-100 (Ex. B).

Hunter Plant's emissions. These members enjoy and are entitled to the benefits of natural resources including air, water and soil; forests and cropland; parks, wilderness areas and other green space; and flora and fauna, all of which are negatively impacted by air pollutants emitted from the Hunter Plant.

III. PROCEDURAL BACKGROUND

EPA approved the Utah operating permit program on June 8, 1995, with an effective date of July 10, 1995.⁸ The Division of Air Quality of the Utah Department of Environmental Quality is the Utah agency responsible for issuing Title V operating permits. The requirements of the Utah operating permit program are set forth in the Air Conservation Act, Utah Code Ann. § 19-2-109.1 et seq., and its implementing regulations, Utah Admin. Code r. 307-415-1 et seq.

The Title V Permit for the Hunter Plant was originally issued on January 7, 1998, and that permit was to expire January 7, 2003. PacifiCorp submitted a Title V permit renewal application in December of 2001, but UDAQ did not issue a draft Title V renewal for public comment until September 15, 2015,⁹ after Sierra Club filed a mandamus action in state court against UDAQ to issue the renewal.¹⁰

On November 13, 2015, Sierra Club submitted extensive and timely¹¹ comments on the Draft Title V Renewal Permit to UDAQ, which are attached as Exhibit 2 to this Petition and incorporated in full.¹² The objections raised in this Petition were raised with specificity in Comment Letter.¹³

⁸ 60 Fed. Reg. 30,192, 30,194-95 (June 8, 1995).

⁹ Draft Title V Renewal Permit for Hunter Power Plant (Ex. C).

¹⁰ See *Sierra Club vs. Bryce Bird, et al.*, Civil Case No. 150905990 (3rd District Utah) (filed Aug. 21, 2015).

¹¹ Stipulated Order Regarding Deadline to Answer the Complaint at ¶ 2, *Sierra Club v. Bryce Bird, et al.*, (filed Oct. 15, 2015) (public comment period on Hunter Title V renewal permit deadline November 13, 2015).

¹² See Comment Letter (Ex. B).

¹³ Comment Letter (Ex. B); 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

UDAQ issued a brief “Response to Public Comments” memorandum on January 11, 2016, which largely ignored Sierra Club’s Comments,¹⁴ and submitted the proposed Title V Permit to EPA.¹⁵ EPA’s 45-day review period ended on February 26, 2016.¹⁶ EPA apparently did not object to the Permit, as UDAQ issued it in final form on March 3, 2016.¹⁷ This Petition to Object is timely filed within 60 days of the conclusion of EPA’s review period on February 26, 2016, and failure to raise objections.¹⁸

IV. LEGAL REQUIREMENTS

All major stationary sources of air pollution are required to apply for operating permits under Title V of the Clean Air Act.¹⁹ Title V permits must provide for all federal and state regulations in one legally-enforceable document, thereby ensuring that all requirements are applied to the facility and that the facility is in compliance with those requirements.²⁰ Each operating permit must include, *inter alia*, enforceable “emission limitations and standards, including . . . operational requirements and limitations” to “assure compliance with all *applicable requirements* at the time of permit issuance”²¹ “Applicable requirement” means: “(a) Any standard or other requirement provided for in the State Implementation Plan [including the requirements of the Prevention of Significant Deterioration (PSD) program in R307-405] . . . , [and](b) Any term or condition of any approval order issued under R307-401 . . .” . . . [as well as]

¹⁴ See January 11, 2016 Memorandum to PacifiCorp Hunter Title V Source File from Jennifer He, UDAQ, Response to Public Comments (hereafter “RTC”) at 2-7 (Ex. D).

¹⁵ Ltr from Jennifer He to Mike Owens, Re: Operating Permit# 1500101002 for PacifiCorp- Hunter Power Plant (dated Jan. 11, 2016) (Ex. E).

¹⁶ E-mail from EPA Atty Brian Joffe to Andrea Issod (dated March 2, 2016) (Ex. F).

¹⁷ Permit at 1 (Ex. A).

¹⁸ 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

¹⁹ 42 U.S.C. § 7661a(a); Utah Code Ann. § 19-2-109.1 (2) & (3), Utah Admin. Code r. 307-415-6a(2).

²⁰ 42 U.S.C. §§ 7661a(a), 7661c(a); see also 40 C.F.R. § 70.6(a)(1).

²¹ Utah Admin. Code r. 307-415-6a(1) (emphasis added); r. 307-415-5c(4) &(5); *see also* 42 U.S.C. §7661c (a); 40 C.F.R. § 70.1(b).

. . . “[a]ny standard or other requirement under rules adopted by the Board.”²² Under Utah’s rules, “applicable requirement” plainly includes the requirement to obtain a PSD permit or Utah Approval Order, BACT emission limits, and limits necessary to ensure protection of air quality standards and increments. As EPA has explained:

For a major modification of a major stationary source, applicable requirements include the requirement to obtain a preconstruction permit that complies with applicable new source review requirements (e.g., Prevention of Significant Deterioration, or PSD, requirements). . . . The PSD program analysis must address two primary and fundamental elements before the permitting authority may issue a permit: (1) an evaluation of the impact of the proposed new or modified major stationary source on ambient air quality in the area, and (2) an analysis ensuring that the proposed facility is subject to BACT for each pollutant subject to regulation under the PSD program. CAA § 165(a)(3),(4), 42 U.S.C. § 7475(a)(3), (4).²³

UDAQ must determine the “applicable requirements” at the time of Title V permit issuance, determine whether the facility will be in compliance at the time of permit issuance, and if not, include a compliance schedule that sets forth enforceable steps leading to compliance with the applicable requirements.²⁴ Where a state or local permitting authority issues a Title V operating permit, EPA will object if the permit is not in compliance with any applicable requirements.²⁵ However, if the EPA does not object on its own, then “any person may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period

²² Utah Admin. Code r. 307-415-3(2)(a) and (k).

²³ *In re Duke Energy Indiana Edwardsport Generating Station*, Permit No. T083-271 38-00003 at 2 (Dec. 13, 2011) (“*Edwardsport* Petition Order”), available at https://www.epa.gov/sites/production/files/2015-08/documents/edwardsport_response2010.pdf; see also *In re Columbia Generating Station*, Petition No. V-2008-1, Order at 3 (EPA Adm’r, Oct. 8, 2009) (“*Columbia Station* Order”), available at https://www.epa.gov/sites/production/files/2015-08/documents/columbia_county_response2008.pdf; e.g., U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Florida Power Corporation Crystal River Plant, Permit No. 0170004-004-AV, at 7 (Nov. 1, 1999) (“*Crystal River* Objection”) (Ex. G).

²⁴ Utah Admin. Code R307-415-1; 307-415-5c(3)(c), (4), (5) and (8); 307-415-6a(1); and 307-415-6c(1), (3), (4) and (5).

²⁵ 40 C.F.R. § 70.8(c).

to make such objection.”²⁶ The Administrator must grant or deny a petition to object within 60 days of its filing.²⁷

The Administrator “shall issue an objection . . . if the petitioner demonstrates to [the EPA] that the permit is not in compliance with the requirements of [the Clean Air Act].”²⁸ While the burden is on the petitioner to demonstrate to EPA that a Title V Permit is deficient, once that showing has been made, “EPA has no leeway to withhold an objection.”²⁹

V. GROUNDS FOR OBJECTION

A. The Administrator Must Object to the Hunter Permit Because It Fails to Include PSD Requirements For Major Modifications Constructed at Hunter in the Late 1990s.

Hunter’s Title V permit is deficient because it does not include the “applicable requirements” of the PSD permitting program triggered by major modifications constructed during 1997-1999,³⁰ nor does the permit include an enforceable schedule of compliance to ensure the PSD permitting requirements are met.³¹

In August of 1997, PacifiCorp submitted a “Notice of Intent” (1997 NOI) permit application to UDAQ that identified numerous boiler projects and turbine upgrades to be completed on each Hunter unit in the 1997 through 1999 timeframe.³² PacifiCorp’s 1997 NOI

²⁶ 40 CFR § 70.8(d); 42 U.S.C. § 7661d(b)(2).

²⁷ 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); Utah Admin. Code r. 307-415-8(4).

²⁸ 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(c)(1); *N.Y. Public Interest Group v. Whitman*, 321 F.3d 316, 333-34 (2nd Cir. 2003) (“NYPIRG”) (“[O]nce NYPIRG demonstrated to the EPA that the draft permits were not in compliance with the CAA, the EPA was required to object to them.”).

²⁹ *Sierra Club v. EPA*, 557 F.3d 401, 405 (6th Cir. 2009); *see also* NYPIRG, 321 F.3d at 332-34.

³⁰ For the purpose of this petition, we refer to the projects as completed in 1997-1999. There were two other projects identified by PacifiCorp as completed at Hunter Unit 3 in 1995 and 1996, but PacifiCorp did not request approval of these projects along with several other projects to be completed in 1997-1999 until its submittal of the 1997 NOI. *See* Ex. 1 to Comment Letter.

³¹ *Sierra Club* raised all of these issues with specificity in its Comment Letter at 6-49 (Ex. B).

³² *See* August 18, 1997 Request for Approval Order Modifications to Limit the Potential to Emit at the Hunter Plant (“1997 NOI”), at 1, Table 1 (Ex. 1 to Comment Letter). An “Approval Order” is Utah’s regulatory term for an air

indicated that the hourly heat input capacity would increase significantly above the levels PacifiCorp identified as the “baseline hourly heat input” at all three Hunter units.³³

To avoid applicability of PSD for these modifications, PacifiCorp requested limits on potential to emit of all three units ostensibly so that post-project emissions would not exceed the “PSD baseline emission inventory.”³⁴ According to PacifiCorp, “the PSD baseline inventory was established at the time the Hunter Plant received a permit for Hunter units 3 and 4.”³⁵ However, as discussed extensively in Sierra Club’s comments, PacifiCorp’s PSD baseline inventory was not based on actual emissions at the Hunter Plant, as required by the applicable PSD regulations in the Utah SIP. Instead PacifiCorp’s baseline was much higher than actual emissions and appeared to be akin to allowable emissions.³⁶

Under the PSD permitting program, major sources cannot make physical or operational changes that would result in a significant net emissions increase of any regulated pollutant unless a PSD permit is obtained.³⁷ The PSD regulations in effect under the Utah SIP at the time of the projects were based on the same applicability test in the EPA’s 1980 federal PSD regulations.³⁸ That is, PSD applicability was based on an analysis of actual emissions prior to the projects to potential to emit after the projects. *See* definitions of “major modification,” “net emissions increase,” and “actual emissions” in Utah Air Conservation Regulation (UACR) R307-1-1

pollution permit, and it can include requirements of Utah’s Approval Order rules and/or Utah’s PSD or nonattainment new source review rules. *See also* Comment Letter at 8-9, Table 1 (Ex. B).

³³ *See* Comment Letter at 10, Table 2 (Ex. B); *see also* 1997 NOI, Attachment, Tables with headings “Hunter Plant and Coal Prep Plant Annual Emissions Inventory Production Data Input Sheet for Calendar Year: EPA Baseline Emissions” and “Hunter Plant and Coal Prep Plant Annual Emissions Inventory Production Data Input Sheet for Calendar Year: Future Potential Emissions.” (Ex. 1 to Comment Letter).

³⁴ *See* 1997 NOI at 1 (Ex. 1 to Comment Letter). Sierra Club explained the history of these projects, PacifiCorp’s NOI, and Utah’s Approval Orders in its Comment Letter at 6-12 (Ex. B).

³⁵ *Id.*

³⁶ UDAQ initially issued an Approval Order for these projects on November 20, 1997 (Ex. 2 to Comment Letter). On December 18, 1997, UDAQ issued a slightly revised Approval Order for these projects (Ex. 3 to Comment Letter). Subsequently, in 2005, UDAQ revoked the November 20, 1997 Approval Order (Ex. 4 to Comment Letter).

³⁷ 42 U.S.C. § 7475; 40 C.F.R. § 52.21(a)(2)(ii).

³⁸ 45 Fed. Reg. 52,676-52,748 (Aug. 7, 1980).

(1995).³⁹ Although EPA adopted revised rules for PSD applicability in 1992, EPA did not approve those rule changes into the Utah SIP until August 19, 2004.⁴⁰

The PSD provisions do contain a limited exemption for projects that can be classified as routine maintenance, repair, and replacement.⁴¹ However, PacifiCorp did not claim any of these projects to be routine maintenance, repair, or replacement in its August 18, 1997 NOI,⁴² nor would these projects qualify for the exemption had PacifiCorp made such a claim.⁴³

Although Utah did evaluate PSD applicability based on potential emissions after the projects in the 1997 Approval Order for the Hunter projects, Utah compared potential to emit to a “PSD Baseline Inventory” that was similar to an allowable emissions baseline and that was much higher than the Hunter Units’ actual emissions during the baseline period. Sierra Club’s Comment Letter provides calculations of an actual emissions baseline, using data from the Energy Information Administration’s database and EPA’s AP-42 emission factors. We calculated actual emissions baselines for the two year period prior to commencement of construction on the projects and also based on the highest 2-year average over the 5 years prior

³⁹ See Sierra Club’s detailed explanation of the applicable definitions and provisions under the Utah SIP in its Comment Letter at 13-17 (Ex. B). The Utah air permitting rules have been recodified since 1997 and the PSD rules have been significantly revised, and EPA does not have the older versions of the SIP-approved on its SIP website. However, we know that in 1994, EPA approved the entire Utah Air Conservation Regulations as in effect January 27, 1992. See 40 C.F.R. § 52.2320(c)(25)(i)(A); 59 Fed. Reg. 35,036 (July 8, 1994). Further, revisions to Utah’s definitions and PSD provisions effective in 1994 were approved by EPA in 1995. See 40 C.F.R. § 51.2320(c)(28)(i)(A) and (B); 60 Fed. Reg. 22,277 (May 5, 1995), and 40 C.F.R. § 51.2320(c)(31)(i)(A) and (B); 60 Fed. Reg. 55,792 (Nov. 3, 1995). Since the 1995 version of the rules in effect on January 1, 1995 were available on Utah’s Department of Administrative Services website at <http://www.rules.utah.gov/publicat/codeudt.htm#U1995>, we are citing to this version of Utah’s PSD rules as reflective of the PSD permitting requirements that were approved as part of the Utah SIP at the time of the Hunter 1997 NOI. A copy of Utah Air Conservation Rules R307-1 as in effect on January 1, 1995 is attached as Ex. 5 to the Comment Letter.

⁴⁰ 69 Fed. Reg. 51,368-51,370 (Aug. 19, 2004); see also 40 C.F.R. § 52.2320(c)(58)(i)(A); Section VIII.A.4. of the Utah SIP. See the detailed explanation of the applicable definitions and provisions under the Utah SIP in Sierra Club’s Comment Letter at 13-17 (Ex. B).

⁴¹ Definition of “major modification” in UACR R R307-1-1(1) (1995); 40 C.F.R. § 52.21(b)(3)(iii)(a) (1980). *United States v. So. Ind. Gas & Elec. Co.*, 245 F. Supp. 2d 994, 1009 (S.D. Ind. 2003) (“Giving the routine maintenance exemption a broad reading could postpone the application of NSR to many facilities, and would flout the Congressional intent evinced by the broad definition of modification.”). Comment Letter at 17-20 (Ex. B) discusses the routine maintenance exemption

⁴² See Ex. 1, 6, 8-14 to Comment Letter.

⁴³ See Comment Letter at 17-20 (Ex. B).

to the commencement of construction on the projects.⁴⁴ This analysis clearly showed that the PSD Baseline Inventory used by PacifiCorp and relied upon by UDAQ in issuing its 1997 Approval Order was significantly higher than the actual emissions for Hunter Unit 1, 2, and 3 during the baseline period for all of the pollutants that we determined actual emissions for (*i.e.*, particulate matter, SO₂, NO_x, and CO).⁴⁵

An evaluation of the emissions increases from the 1997-1999 projects at the Hunter units based on a comparison of actual emissions (as shown in Table 3 of Sierra Club's Comment Letter) to PacifiCorp's requested potential to emit shows that the 1997-1999 projects should have been projected to result in a significant emission increase of SO₂, NO_x, PM and other pollutants at each Hunter unit. This is discussed in detail in the Comment Letter at 27 to 30, and in Table 6 of our comment letter which we have provided below.

⁴⁴ The basis for the actual emissions calculations are provided in detail in Comment Letter at 20-27 and in Ex. 24. We evaluated the highest 24-month period of emissions over the 5 year period immediately preceding the projects based on EPA's statement in the WEPCO rulemaking that, for electric utility steam generating units, EPA considered any two year period of the five years before a project to be representative of normal source operations for such units. 57 Fed. Reg. 32,314, 32,323 (July 21, 1992). We determined that the 24-month period ending in November 1995 had the highest SO₂, NO_x and CO emissions. Comment Letter at 25 (Ex. B).

⁴⁵ Comment Letter at 25-27, and as demonstrated in Table 4.

Table 6: Proper Evaluation of Emission Increases for Hunter Projects Announced in 1997 NOI: Actual Emissions of the Hunter Units 1-3 Compared to Potential to Emit After the Hunter Projects⁴⁶

Total Hunter Units 1, 2 and 3				
Pollutant	PSD Significant Emission Rate, tpy	Annual Average Actual emissions for 24-month period ending Nov 1995, tpy	PacifiCorp's Post-Change Potential Emissions, tpy	Emission Increase/Decrease
SO2	40	7,019	10,253	+ 3,234 tpy
NOx	40	20,955	26,981	+ 6,026 tpy
TSP (PM)	25	1,187	2,124	+ 937 tpy
PM10 (Filterable)	15	867	1,566	+699 tpy
CO	100	1,084	1,305	+221 tpy
Hunter Unit 1				
SO2	40	2,857	4,107	+ 1,250 tpy
NOx	40	7,348	8,801	+1,453 tpy
TSP (PM)	25	463	858	+395 tpy
PM10 (Filterable)	15	310	579	+ 269 tpy
CO	100	368	429	+ 61 tpy
Hunter Unit 2				
SO2	40	2,641	4,107	+ 1,466 tpy
NOx	40	6,901	8,801	+ 1,900 tpy
TSP (PM)	25	438	858	+ 420 tpy
PM10 (Filterable)	15	293	579	+ 286 tpy
CO	100	344	429	+85 tpy
Hunter Unit 3				
SO2	40	1,521	2,039	+518 tpy
NOx	40	6,706	9,379	+2,673 tpy
TSP (PM)	25	286	408	+122 tpy
PM10 (Filterable)	15	263	408	+145 tpy
CO	100	372	447	+75 tpy

To determine net emissions increase, Sierra Club evaluated all other contemporaneous emission increases that PacifiCorp identified in its 1997 NOI, which were related to the increase

⁴⁶ *Id.* at Table 6 and Ex. 1 to Comment Letter (for PacifiCorp's Post-Change Potential Emissions) and Ex. 24 to Comment Letter (for annual average actual emissions for 24-month period ending November 1995).

in coal burned.⁴⁷ There were no creditable, contemporaneous emissions decreases at the Hunter Units identified in the 1997 NOI or that Sierra Club was otherwise aware of. Sierra Club found that, not only should the 1997-1999 projects been projected to result in a significant emissions increase of several regulated pollutants at each of the Hunter Units, but as shown in Table 8 of the Comment Letter, reprinted below, the projects also should have been projected to result in a significant net emissions increase of SO₂, NO_x, PM and other pollutants.

Table 8. Determination of Net Emissions Increase Considering Contemporaneous Emission Increases and Decreases,⁴⁸ Based on Proper Actual-to-Potential Test for Hunter Units 1-3⁴⁹

Pollutant	PSD Significant Emission Rate, tpy	Baseline Emissions (Actual Emissions for 24-month period ending Nov 1995 for Hunter Units 1-3 + PacifiCorp's baseline emissions for other units), tpy	Post-Change Potential Emissions, tpy	Emission Increase/Decrease
SO ₂	40	7,019	10,253	+ 3,234 tpy
NO _x	40	20,955	26,981	+ 6,026 tpy
TSP (PM)	25	1,541	2,525	+ 984 tpy
PM ₁₀ (Filterable)	15	1,069	1,789	+ 720 tpy
CO	100	1,084	1,305	+221 tpy

EPA recently recognized that Utah had been applying faulty PSD applicability analyses with respect to baseline emissions in its draft Title V permitting action for the Deseret Power Electric Cooperative's Bonanza Plant.⁵⁰ EPA highlighted that Utah's evaluation of the Ruggedized Rotor Project "failed to use actual pre-project emissions as the baseline for

⁴⁷ As discussed in Comment Letter at 31-33 (Ex. B).

⁴⁸ *Id.* at 31-34.

⁴⁹ Moreover, a review of actual emissions after the projects shows that significant actual emissions increases of SO₂, NO_x, and PM₁₀ did occur at the Hunter Plant after the projects. Comment Letter at 36-41 (Ex. B).

⁵⁰ See April 28, 2014 Statement of Basis, Title V Permit to Operate, Draft Permit No. V-UO-000004-00.00, Deseret Power Electric Cooperative, Bonanza Power Plant, Appendix A at pp. 27-28, 29, 33-36 (Ex. H). In particular, EPA made clear that its "2001 PSD permit decision incorporating the rationale of [UDAQ's Modified Source Plan Review] was defective...." *Id.* at 36.

determining the amount of increase.”⁵¹ That is the same major deficiency with Utah’s 1997 Approval Order for the Hunter plant projects.

Further, after issuance of the 1997 Approval Order with limits on potential to emit intended to keep the projects at the Hunter units from triggering PSD permitting requirements, UDAQ almost immediately relaxed the limits it had imposed in a 1998 Title V operating permit by incorporating carte blanche exemptions from those limits for startup, shutdown, maintenance/planned outage, and malfunction.⁵² Federal and state PSD regulations do not allow these limits to be relaxed unless the projects undergo further permitting review as though construction had not yet commenced.⁵³ Thus, even if the applicability test that Utah applied was lawful - which it clearly was not - the 1997 Approval Order and associated limits on potential to emit of the modified Hunter units became ineffectual due to the relaxation of those emission limits in the 1998 Title V operating permit for the Hunter plant.⁵⁴ Once the Title V operating permit was issued in January 1998, the projects at the Hunter plant should have been permitted as though construction had not yet commenced.⁵⁵

Despite the extensive comments provided by Sierra Club to Utah on the draft Title V permit for Hunter regarding these issues, and UDAQ’s obligation to respond to substantive comments,⁵⁶ UDAQ unlawfully claimed that “any concerns regarding previous permits should

⁵¹ *Id.*

⁵² *Id.* at 42-47. *See also* Title V Operating Permit for Hunter Power Plant, Permit Number 1500101001, issued January 7, 1998 (*e.g.*, Condition II.B.3.a, imposing NOx limit for Unit 3 except with exceptions for periods of startup, shutdown, maintenance/planned outage, or malfunction) (Ex. 25 to Comment Letter).

⁵³ 40 C.F.R. § 52.21(r)(4); UACR 307-1-3.1.11 of the Utah SIP (1995, as in effect under Clean Air Act § 110 at the time of the 1997 Approval Order and 1998 Title V Permit for the Hunter Plant).

⁵⁴ *See* Sierra Club Comment Letter at 47 (Ex. B); *see also* 40 C.F.R. §52.21(r)(4), 45 Fed. Reg. 52,676-52,748 at 52,689 (Aug. 7, 1980).

⁵⁵ 40 C.F.R. §52.21(r)(4); UACR 307-1-3.1.11 of the Utah SIP (1995, as in effect under Clean Air Act § 110 at the time of the 1997 Approval Order and 1998 Title V Permit for the Hunter Plant). This issue is described in detail in Sierra Club’s Comment Letter at 44-47.

⁵⁶ *See supra* Section V.F.

have been raised during the public comments period” for the prior permit and thus UDAQ provided no response to these comments.⁵⁷

For all of these reasons, EPA must object to the Hunter Title V Permit because it fails to include PSD permitting requirements including best available control technology (BACT),⁵⁸ lacks terms and conditions necessary to adequately protect NAAQS and PSD increments for SO₂, NO_x, CO and particulate matter, and fails to include a schedule of compliance to ensure that the Hunter Plant is brought into compliance with applicable PSD permitting requirements.

B. The Administrator Must Object to the Hunter Title V Renewal Permit Because It Includes 10-Year Plantwide Applicability Limits (PALs) for SO₂ and NO_x that Are Unlawful and Invalid.

In 2008, UDAQ issued an Approval Order to PacifiCorp for installation and/or upgrade of SO₂, NO_x and PM controls at Units 1 and 2 and NO_x controls at Unit 3 that also included 10-year PSD Plantwide Applicability Limits (PALs) for SO₂ and NO_x.⁵⁹ EPA adopted PAL provisions as part of 2002 changes to its PSD permitting regulations.⁶⁰ The establishment of a PAL for a particular pollutant allows a source to make physical or operational changes to existing emission units without having to individually review those changes for PSD

⁵⁷ See RTC at 2-3 (Ex. D).

⁵⁸ BACT is determined on a case-by-case basis in the context of issuing a PSD permit. Although UDAQ has not claimed that the Hunter units are already subject to or meeting BACT, Sierra Club provided extensive comments on what pollution controls would likely constitute BACT for the Hunter Units in its Comment Letter at 79-95. Sierra Club demonstrated that the currently pollution controls and/or emission limits of the Title V permit would not constitute BACT for the Hunter Units 1, 2 or 3. Although the Title V permit identifies the authority for the SO₂, NO_x, and PM limits, including the SO₂ and NO_x PALs as “R307-401-8(1)(a) [BACT],” the permit records for the Hunter Plant do not indicate that any recent evaluation of BACT was conducted for the Hunter units for any pollutant except CO in 2008. See November 27, 2007 NOI, Sections 5.0 and 6.0, at 5.1-6.3, pdf 21-27 (NOI only contains a BACT analysis for one pollutant, carbon monoxide) (Ex. 37 to Comment Letter); see also UDAQ Modified Source Plan Review, January 25, 2008, for 2008 Approval Order, Sections 1.3 and 6.0, at 8, 20-24 (confirming that no BACT review was conducted for SO₂, NO_x, or PM or any other pollutants other than CO) (Ex. 38 to Comment Letter).

⁵⁹ March 13, 2008 Approval Order (DAQE-AN0102370012-08) (Ex. 36 to Comment Letter). Notably, the Title V permit for the Hunter Plant does not identify Approval Order DAQE-AN0102370012-08 as the underlying authority of the PAL provisions. Instead, the permit states that the PAL condition originated from Approval Order DAQE-AN102370022-14, however, no PAL limitations “originated” in the 2014 Approval Order. See June 26, 2014 Approval Order DAQE-AN102370022-14 (Ex. 57 to Comment Letter).

⁶⁰ 67 Fed. Reg. 80,186, 80,284-89 (Dec. 31, 2002).

applicability for the PAL pollutant as long as total plantwide emissions remain under the level of the PAL.⁶¹ However, the PALs established by UDAQ for the Hunter Plant were unlawful, invalid and ineffective for the three main reasons described below,⁶² and must be removed from the Title V permit.⁶³

First, UDAQ lacked the legal authority to impose ten-year PALs in the 2008 Approval Order because EPA did not approve Utah's revised PSD rules that allow for ten-year PALs into the Utah SIP until 2011, which was three years after Utah's issuance of the 2008 PALs for the Hunter Plant.⁶⁴ EPA told UDAQ as much in its comments on UDAQ's draft Approval Order and PAL limits for the Hunter Plant proposed in 2007. Specifically, EPA informed UDAQ that "[u]ntil EPA approves Utah's NSR reform rules (including PAL provisions) into the SIP, PacifiCorp cannot rely on the ten-year PAL provisions in this permit to avoid federal enforcement of current SIP requirements for major NSR/PSD, in the event of a future major modification at the facility."⁶⁵ Utah's SIP is not considered legally amended until revisions are approved by EPA and cannot be changed or unilaterally altered by a state, even where a SIP revision is pending.⁶⁶ Thus, the PALs established in the 2008 Approval Order were not lawfully established.

⁶¹ 40 C.F.R. § 52.21(aa)(1)(ii). Note that this discussion pertains to the PSD permitting regulations only, as Utah has adopted a provision that a PAL does not exempt a source from the requirement to obtain an Approval Order as will be discussed further below.

⁶² Sierra Club raised all of these issues with reasonable specificity in its Comment Letter at 75-78 & 105-15 (Ex. B).

⁶³ Condition II.B.1.i of the Hunter Title V renewal permit (Ex. 1) includes PALs for SO₂ and NO_x of 7,187 tons per year (tpy) and 19,319 tpy, respectively.

⁶⁴ 76 Fed. Reg. 41,712-717 (July 15, 2011); *see also* 40 C.F.R. § 52.2320(c)(69)(i)(B) (effective August 15, 2011).

⁶⁵ *See* April 5, 2007 letter from EPA to UDAQ re EPA Region 8 Comments on Intent-to-Approve (Draft PSD Permit) for PacifiCorp's Hunter Power Plant, Enclosure at 5 (Ex. 56 to Comment Letter).

⁶⁶ *Gen. Motors Corp. v. United States*, 496 U.S. 530, 540 (1990); *Sierra Club v. TVA*, 430 F.3d 1337, 1346-47 (11th Cir. 2005) ("If a state wants to add, delete, or otherwise modify any SIP provision, it must submit the proposed change to EPA for approval ... and an unapproved revision of any part of an SIP is invalid under § 110(i) of the Clean Air Act.") (citing *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 92(1975) ("a polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the revision authority until they have been approved by both the State and the Agency."); *United States v. Ford Motor Co.*, 814 F.2d 1099, 1103 (6th Cir. 1987) (holding that "invalidation of a SIP on technical grounds by a state court ... cannot

Notwithstanding that Utah lacked authority under the SIP to establish 10-year PALs, the PALs were not established in accordance with the PAL provisions of the federal and SIP-approved PSD regulations. PALs must be premised on baseline actual emissions⁶⁷ which must be adjusted downward to exclude any non-compliant emissions.⁶⁸ As discussed above, the Hunter units should have been subject to PSD permitting and BACT requirements for SO₂ and NO_x for the projects constructed in 1997-1999. Therefore, the actual emissions of the units from the time frame of 2002 to 2007 upon which the SO₂ and NO_x PALs were based,⁶⁹ should have been lower due to the units being subject to SO₂ and NO_x BACT. *See infra*.

Moreover, the PAL regulations required UDAQ to “specify a reduced PAL level(s) . . . to become effective on the future compliance date(s) of any applicable Federal or State regulatory requirement(s) that the reviewing authority is aware of prior to issuance of the PAL permit.”⁷⁰ At the time that the PAL permit was issued, UDAQ was aware that Hunter Units 1 and 2 would be subject to NO_x best available retrofit technology (BART) requirements and SO₂ limitations under the regional haze plan requirements.⁷¹ Indeed, in a June 13, 2008 public notice for the Utah’s proposed regional haze SIP, Utah announced a determination that PacifiCorp’s pollution

be given effect, because . . . revisions and variances of properly promulgated SIPs require EPA approval”); 40 C.F.R. § 51.105 (“Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by [EPA] in accordance with this part.”); *see also Safe Air for Everyone v. United States EPA*, 475 F.3d 1096, 1105 (9th Cir. 2007) (once approved by EPA, the SIP becomes “federal law, not state law” and cannot “be changed unless and until EPA approved any change. Consequently, the state’s interpretation of the regulations incorporated into the SIP, even if binding as a matter of state law, [are] not directly dispositive of the meaning of the SIP.”).

⁶⁷ 40 C.F.R. § 52.21(aa)(2)(i) and (b)(48), incorporated by reference into Utah Admin. Code R307-405-21(1) and R307-405-3(1) (effective as part of the EPA-approved SIP on August 15, 2011 (76 Fed. Reg. 41,712-717 (July 15, 2011))).

⁶⁸ 40 C.F.R. § 52.21(b)(48)(i)(b), incorporated by reference into Utah Admin. Code R307-405-3(1) (effective as part of the EPA-approved SIP on August 15, 2011).

⁶⁹ *See* November 27, 2007 Hunter Power Plant Notice of Intent, at Table HTR-1 at 43-48 (Ex. 37 to Comment Letter).

⁷⁰ 40 C.F.R. § 52.21(aa)(6), incorporated by reference into Utah Admin. Code R307-405-21(1), approved into the SIP at 76 Fed. Reg. 41,712 (July 15, 2011).

⁷¹ *See* 40 C.F.R. § 51.308(e); § 51.309. The statutory deadline for Utah and all other states to submit regional haze plan submittals to EPA for SIP-approval was December 17, 2007. *See* 74 Fed. Reg. 2,392, 2,393 (Jan. 15, 2009).

control projects at Hunter Units 1 and 2 satisfied BART.⁷² Although EPA did not approve those controls as meeting BART,⁷³ EPA did subsequently propose to approve Utah's BART alternative for the low NOx burner/overfire air NOx pollution controls and limits (including the NOx controls at Hunter Unit 3).⁷⁴ EPA also concurrently proposed a rulemaking to impose a NOx BART FIP on Hunter Units 1 and 2 that would be based in part on the low NOx burner and overfire air NOx controls the company installed under its 2008 Approval Order.⁷⁵

Regardless of which option is selected by EPA, the fact remains that at the time UDAQ established the PALs for the Hunter Plant, it was aware that there would be future regional haze requirements affecting the allowable emission rates of at least Hunter Units 1 and 2. Accordingly, UDAQ should have "specif[ied] a reduced PAL level" for SO₂ and NO_x to reflect compliance with those requirements to become effective on the compliance date of those requirements. Thus, the PAL for SO₂ should have been adjusted from 7,187 tons per year to 5,562 tons per year after the scrubber upgrades at Units 1 and 2, and the NO_x PAL should have been adjusted from 19,319 tpy to 15,501 tpy after the installation of low NO_x burners and overfire air at Hunter Units 1 and 2.⁷⁶

UDAQ's limited response to Sierra Club's extensive comments submitted on the PALs were that (1) any concerns regarding previous permits should have been raised during the public comment period and (2) the comments "pertain to new source review" and that the "comments are not applicable to [a] Title V renewal permitting action."⁷⁷ As discussed *supra*, UDAQ's

⁷² See Utah Department of Environmental Quality, Air Quality, R307-110-28 Regional Haze, Notice of Proposed Rule (Amendment), Filed 6/13/2008, published in July 1, 2008 Utah State Bulletin, Vol. 2008, No. 13 (Ex. 86 to Comment Letter).

⁷³ 77 Fed. Reg. 74,355-74,372 (Dec. 14, 2012).

⁷⁴ 81 Fed. Reg. 2,004-2,052 (Jan. 14, 2016).

⁷⁵ *Id.*

⁷⁶ See Comment Letter at 105-11 (Ex. B).

⁷⁷ See RTC at 4-5 (Ex. D).

response is legally inadequate because it failed to respond to Sierra Club's substantive comments.

Moreover, the Title V renewal was Sierra Club's first legitimate opportunity to address the 2008 Approval Order and the PALs in the context of a Title V permit for the Hunter Plant.⁷⁸ UDAQ ignores the fact that EPA did state during the public comment period on the draft PAL permit that Utah did not have authority to establish 10-year PALs until EPA had given approval of the Utah SIP-provisions allowing for 10-year PALs.⁷⁹ Further, the PALs in the Title V permit set forth a PSD applicability test for future projects at the Hunter units that may occur through the March 13, 2018 effective date of the PALs.⁸⁰ Sierra Club's comments on this issue go well beyond questioning of a past permit action, because these PAL provisions in the Hunter Title V permit define the mechanism for whether PSD is triggered for SO₂ or NO_x in the future.⁸¹

Additionally, this Title V renewal permit is the first time that the public had notice and opportunity to comment on the incorporation of the PAL provisions into the Title V permit. As discussed previously, the original Hunter Title V permit expired by its own terms on January 7,

⁷⁸ As addressed above and more specifically in Section VI.F of this Petition, these PAL issues relate to New Source Review and PSD requirements triggered in the past that remain applicable requirements that must be addressed in a Title V renewal permit context. *See, e.g.*, In re: Tennessee Valley Authority, Paradise Fossil Fuel Plant, Drakesboro, Kentucky, Petition No. IV-2007-3, Order Responding to Petition to Object to Title V Permit at 5 (July 13, 2009) ("TVA Paradise Objection") at 1-2, 5, 14 (addressing historic alleged PSD modifications), available at https://www.epa.gov/sites/production/files/2015-08/documents/tvaparadise_decision2007.pdf; *NYPIRG*, 427 F.3d at 177-83 (granting Title V petition filed in 2002 to address alleged PSD modifications made in 1983-85); *Columbia Station Order* at 8-10; *In the Matter of Monroe Electric Generating Plant, Entergy Louisiana, Inc.*, Proposed Operating Permit, Petition No. 6-99-2, Order Responding to Petitioner's Request That the Administrator Object to Issuance of a State Operating Permit, at 2, 6-24 (EPA Adm'r. June 11, 1999) (granting Title V petition based PSD issues), ("Monroe Order"), available at https://www.epa.gov/sites/production/files/2015-08/documents/entergy_decision1999.pdf; May 20, 1999 Letter from John S. Seitz, Director of Office of Air Quality Planning and Standards, to Mr. Robert Hodanbosi and Mr. Charles Lagges, STAPPA/ALAPCO, Enclosure A at 2-3 (Ex. 85 to Comment Letter).

⁷⁹ *See* April 5, 2007 letter from EPA to UDAQ re EPA Region 8 Comments on Intent-to-Approve (Draft PSD Permit) for PacifiCorp's Hunter Power Plant, Enclosure at 5 (Ex. 56 to Comment Letter).

⁸⁰ Hunter Title V Permit, Condition II.B.1.i (Ex. A).

⁸¹ Moreover, in the context of a Title V renewal permit, prior permitting actions that are relevant to the existence or application of applicable requirements are within the scope of permit review. *See generally infra* at Section VI.

2003,⁸² and it appears that PacifiCorp was allowed to continue operations under the “permit application shield” provisions of the Title V program.⁸³ However, in 2008, without any public notice, UDAQ administratively incorporated the PAL provisions from the 2008 Approval Order into the Hunter Plant’s expired Title V operating permit.⁸⁴ This amendment to an expired permit was not lawful because where a timely and complete application has been submitted, “*all of the terms and conditions of the permit . . . shall remain in effect until renewal or denial.*”⁸⁵ The plain language of this provision cannot be plausibly read as allowing for the creation of a new operating permit through amendments or modifications of terms and condition of an expired permit.⁸⁶

Further, irrespective of whether an expired Title V permit can be modified, UDAQ incorporated the PAL provisions into the Hunter Title V permit through an administrative permit amendment, which was not allowed because the 2008 Approval Order did not undergo “enhanced new source review” procedures that were “substantially equivalent” to Title V permit issuance and modification procedures.⁸⁷ At a bare minimum, these procedures mandated that the

⁸² January 7, 1998 Title V Operating Permit for the Hunter Plant. (Ex. 25 to Comment Letter).

⁸³ Utah Admin Code R307-415-5a(2)(e).⁸⁴ Utah Admin. Code R307-415-7e(3)(a) (“The director . . . may incorporate such changes without providing notice

⁸⁴ Utah Admin. Code R307-415-7e(3)(a) (“The director . . . may incorporate such changes without providing notice to the public or affected States provided that the director designates any such permit revisions as having been made pursuant to this paragraph.”). See Hunter Title V Permit Issued 3/3/2016 (Ex. 1) at 3, Operating Permit History.

⁸⁵ Utah Admin. Code R307-415-7c(3) (emphasis added). As used in this rule, the phrase “terms and conditions of the permit” clearly means the terms and conditions of the Title V permit as it existed at the time a “timely and sufficient” renewal application was submitted.

⁸⁶ This is confirmed by reference to Utah Admin. Code R307-415-7b, which prohibits a Title V source from operating without “a permit issued under these rules.” Utah Admin. Code R307-415-7b(2) clarifies that when a Title V permit expires, a Title V source, technically and legally, no longer has “an operating permit.” Nonetheless, rule (b)(2) expressly absolves such source from violations for operating without such a permit until the Director takes final action on a permit application.

⁸⁷ Utah Admin. Code R307-415-7e(1)(e) provides that an “ ‘administrative permit amendment’ is a permit revision that . . . [i]ncorporates into the operating permit the requirements from an approval order issued under R307-401, *provided that the procedures for issuing the approval order were substantially equivalent to the permit issuance or modification procedures of R307-415-7a through 7i* and R307-415-8, and compliance requirements are substantially equivalent to those contained in R307-415-6a through 6g” (emphasis added). See also 40 C. F.R. § 70.7(d)(v) (allowing for incorporation of the requirements of preconstruction review permits authorized under an EPA-approved program, but only where such a program “meets procedural requirements substantially equivalent to

2008 Approval Order's public notice reveal that an opportunity to comment on that Title V permitting action existed, but UDAQ's public notice failed to make that clear because it did not mention enhanced New Source Review procedures and did not describe any of the Title V permitting changes anticipated to be made.⁸⁸

The flaws in the public notice for the 2008 Approval Order violated Utah Admin. Code R307-415-7i(2) and Utah Admin. Code R307-415-7e(1)(e) and rendered the 2008 Hunter administrative amendment unlawful. More importantly, those flaws denied the general public, including Sierra Club, lawful and adequate notice that a Title V action was taking place in 2008.

Finally, the PAL provisions in the Hunter permit are not limited to the past because they define the mechanism for whether PSD is triggered for SO₂ or NO_x in the future.⁸⁹ For all of the above reasons, EPA must object to the PAL provisions in the Hunter Title V permit.

C. The Administrator Must Object to the Hunter Title V Renewal Permit Because It Fails to Include Approval Order Requirements, including BACT, for Unpermitted Modifications at Hunter Unit 1 in 2010.

The Title V permit does not identify, include and assure compliance all applicable requirements because PacifiCorp performed unpermitted "modifications" at Hunter Unit 1 in 2010 without obtaining a required Approval Order and without the application of BACT for SO₂, NO_x and PM for those modifications, which were applicable requirements under the Utah

the requirements of §§ 70.7 and 70.8 of this part that would be applicable to the change if it were subject to review as a [Title V] permit modification, and compliance requirements substantially equivalent to those contained in § 70.6 of this part. . . ."); 57 Fed. Reg. 3,225 (July 21, 1992) (Title V operating permit final rule, wherein EPA provided it would allow for administrative amendments of Title V permits to incorporate requirements for permits issued under state NSR programs but only "if the NSR program is enhanced as necessary to meet requirements substantially equivalent to the applicable part 70 requirements and clarifying that "[c]hanges that meet the requirements for minor permit modifications may be made under procedures substantially equivalent to those in § 70.7(e) (2) or (3). Changes that do not meet the requirements for minor permit modifications must be made under procedures substantially equivalent to those for permit issuance or significant permit modifications."); November 7, 1995 Letter from EPA's Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, to STAPPA/ALAPCO's Mr. William Becker, Executive Director (Ex. 93 to Comment Letter).

⁸⁸ See Comment Letter at 119-122 (Ex. B); February 3, 2008 Salt Lake Tribune Public Notice for 2008 Hunter Notice of Intent and Approval Order at 1 (Ex. 90 to Comment Letter).

⁸⁹ Hunter Title V Permit, Condition II.B.1.i (Ex. A).

SIP. The 2010 modifications and the Hunter Unit 1's operation thereafter without an Approval Order and without applying BACT have resulted in continuing violations of the Utah SIP.

Accordingly, EPA must object to the Title V permit because it fails to identify and include all applicable requirements and fails to include a schedule of compliance to bring Hunter Unit 1 into compliance with Approval Order and BACT requirements.⁹⁰

1. Applicable Utah SIP-Approved Air Permitting Rules and Procedures

Under Utah's SIP-approved rules, an Approval Order imposing BACT limits and meeting other Approval Order requirements must be obtained before the commencement of a planned modification whenever there is a reasonable expectation of any emission increase.⁹¹ Utah SIP's Approval Order Rule is broadly applicable whenever there is a reasonable expectation of any emission increase at the time a modification to an installation is planned.⁹² Although the

⁹⁰ Sierra Club raised all of these issues with reasonable specificity in its Comment Letter at 49-73 (Ex. B).

⁹¹ The air permitting rule in effect in the EPA-approved Utah SIP at the time of the 2010 Unit 1 work is set forth at Utah Air Conservation Regulation (UACR) R307-1-3 et seq. (Approval Order Rule). The pertinent portions of this rule, which, among other things, implements Utah's minor new source review (NSR) program, were approved by EPA as part of the Utah SIP in 1994, 1995 and in 2006. See 59 Fed. Reg. 35,036, 35,043 (July 8, 1994); 60 Fed. Reg. 22,277, 22,281 (May 5, 1995); see also 40 C.F.R. §§ 52.2320(c)(25)(i)(A) and (c)(28)(i)(A); EPA's Reproduction of SIP-Approved Portions of UACR R307-1-3 et seq. (Ex. 32 to Comment Letter). These Approval Order air permitting rules are currently codified in Utah Admin. Code R307-401-1 et seq., but that most recent codification was only partially approved by the U.S. EPA as part of the Utah SIP on February 6, 2014, see 79 Fed. Reg. 7,072-77 (Feb. 6, 2014), and that approval was not effective until March 10, 2014. For the purpose of addressing the 2010 unpermitted Hunter Unit 1 projects, this Petition cites to the older version of Utah's SIP because, as a general matter, those were the enforceable rules of the EPA-approved SIP applicable to the actions in question. In 2006, EPA approved a recodification of Utah's definitions in Utah Admin. Code R307-101-2 that include pertinent definitions to the Approval Order requirements. See 71 Fed. Reg. 7,679, 7,679-82 (Feb. 14, 2006); 40 C.F.R. § 52.2320(c)(59)(i)(A). Sierra Club provided a detailed explanation of the applicable definitions and regulations of the Approval Order requirements of the Utah SIP in its Comment Letter at 50-55 (Ex. B). UDAQ's website confirms that "[t]hese permits [Approval Orders] may include limits on both construction and operation activities. **A person must apply for an Approval Order before starting construction or operation of any emitting equipment.**" UDAQ Website at Division of Air Quality, Permitting Branch, Air Permit Requirements, General Permitting Information at (<http://www.deq.utah.gov/Permits/air/index.htm>) (Ex. 33 to Comment Letter) (emphasis added).

⁹² See Comment Letter at 53 (Ex. B); Utah State Bulletin, July 15, 2006, Vol. 2006, No. 14 at 42-43, 45 (stating that "Utah requires all sources, both major and minor, to apply best available control technology (BACT) when an emission unit is modified. Therefore, even when a modification is not considered a major modification, the source must still apply BACT.") (Ex. 34 to Comment Letter); February 24, 2006 Memorandum from UDAQ's C. Delaney and J. Schubach to Utah Air Quality Board, Enclosing NSR Reform Rules Comments and Responses at 2 (Ex. 35 to Comment Letter); UACR R307-1-3.1.8.A of the EPA-approved Utah SIP; definition of "Best available control

Approval Order Rule does provide for several narrow exemptions, none of these exemptions are applicable here and none of were invoked by UDAQ or the owners or operators of the Hunter Unit 1 at the time the 2010 modifications were performed.⁹³ Equally significant, while a lawfully established PAL may exempt modifications at a source from review under PSD regulations, PALs may not be relied on to exempt modifications at a source from the requirement to obtain an Approval Order.⁹⁴

2. Unpermitted Modifications at Hunter That Triggered Approval Order Rule

On November 27, 2007, PacifiCorp filed a Notice of Intent (2007 NOI)⁹⁵ seeking, *inter alia*, authorization for the installation of pollution control equipment on all three of the Hunter units,⁹⁶ the imposition of PAL limits for SO₂ and NO_x, and the installation of other identified projects at the Hunter Plant.⁹⁷ The 2007 NOI provided a list of proposed Unit 1 projects⁹⁸ and

technology” in Utah Admin. Code R307-101-2 of the EPA-approved Utah SIP; and UACR R307-1-3.1.8.B. of the EPA-approved Utah SIP. Pursuant to this rule, Approval Orders impose operational conditions upon facilities, including emission limitations to comply with BACT and other applicable emission limitations, requirements to operate air pollution control technology, and emissions monitoring requirements.

⁹³ Notably, the Utah Approval Order rule, unlike the PSD rule, does not include any exemption for routine maintenance, repair, or replacement.

⁹⁴ Utah Admin. Code R307-401-13 (2010). Further, UDAQ clearly stated in the context of responding to comments on its PSD rule revisions adopting the PAL provisions:

The Utah State NSR permitting rule [the Approval Order Rule] is applicable to any changes at a source. ***Any emission increases at a source will be reviewed under the State rule even in cases where the change is exempt from Federal NSR major source review under a PAL permit.***

February 24, 2006 Memorandum from UDAQ’s C. Delaney and J. Schubach to Utah Air Quality Board, Enclosing NSR Reform Rules Comments and Responses at 11 (Ex. 35 to Comment Letter) (emphasis added). *See also* Utah State Bulletin, July 15, 2006, Vol. 2006, No. 14 at 49 (Ex. 34 to Comment Letter).

⁹⁵ The 2007 NOI was comprised of a series of submissions provided “on May 2, 2007, July 19, 2007, September 17, 2007, September 21, 2007, October 26, 2007, November 27, 2007, December 5, 2007 and December 26, 2007.” *See* 2008 Approval Order at 3 (Ex. 36 to Comment Letter). However, UDAQ has apparently lost the December 5, 2007 and December 26, 2007 supplements, as it was unable to produce them to Sierra Club in response to a GRAMA request. The 2007 NOI, attached as Ex. 37 to the Comment Letter, is the most recent and complete version of the pertinent NOI.

⁹⁶ The 2007 NOI sought approval for the installation of low NO_x burners/overfire air at Hunter Units 1, 2 and 3, upgrades to the scrubbers to achieve 90% control via elimination of bypass at Hunter Units 1 2 and 3, and the replacement of electrostatic precipitators (ESPs) with baghouses at Hunter Units 1 and 2. (Ex.37 to Comment Letter at 2-1).

⁹⁷ *See* 2007 NOI at 1-1, pdf 4, 2-2, pdf 6 (Ex. 37 to Comment Letter).

asserted that the proposed pollution controls would be completed “between 2007 and May 2010.”⁹⁹ On March 13, 2008, UDAQ issued a corresponding Approval Order.¹⁰⁰

On December 18, 2009, PacifiCorp informed UDAQ that the Unit 1 pollution control projects were being deferred until 2014.¹⁰¹ However, the company asserted that it was going forward with the other “contemporaneous capital projects” at Unit 1 authorized by the 2008 Approval Order.¹⁰² PacifiCorp also stated that it would perform a series of additional Unit “capital and operations and maintenance projects” in 2010-11 which were not covered by the 2007 NOI or the 2008 Approval Order, including the replacement of Unit 1’s economizer, low temperature superheater, finishing superheater, and pulverizer components, as well as high pressure/intermediate pressure/low pressure turbine upgrades.¹⁰³ This latter set of unpermitted projects was performed at Hunter Unit 1 between approximately February 27, 2010 and April 13, 2010 along with other work.¹⁰⁴

⁹⁸ See Comment Letter at 55-56 and Table 13 (Ex. B); 2007 NOI at Appendix A, 26, pdf 31 (Ex. 37 to Comment Letter).

⁹⁹ 2007 NOI at 2-1, pdf 6 (Ex. 37 to Comment Letter).

¹⁰⁰ March 13, 2008 Approval Order DAQE-AN0102370012-08 for the Hunter Plant (Ex. 36 to Comment Letter); UDAQ Modified Source Plan Review, January 25, 2008, for 2008 Approval Order at 26 (listing Unit 1 projects) (Ex. 38 to Comment Letter).

¹⁰¹ Dec. 18, 2009 Letter from William K. Lawson, PacifiCorp, to Ms. Cheryl Heying, UDAQ, at 1, pdf 1 (Ex. 39 to Comment Letter). This correspondence was not publicly noticed.

¹⁰² *Id.*; see also UDAQ Modified Source Plan Review, January 25, 2008, for 2008 Approval Order, Section 7.1.7, at 26 (Hunter Unit 1 projects approved in the 2008 Approval Order) (Ex. 38 to Comment Letter). The projects that were approved by UDAQ for Hunter Unit 1 are listed in Table 13 to Comment Letter at 55-56).

¹⁰³ See Comment Letter at 57-60 and Table 14 (listing projects not approved by 2007 NOI or 2008 Approval Order) (Ex. B); December 18, 2009 Letter from William K. Lawson, PacifiCorp, to Ms. Cheryl Heying, UDAQ, at 2, pdf 2, and Attachment 2 at 1-2, pdf 6-7 (Ex. 39 to Comment Letter).

¹⁰⁴ Nov. 24, 2010 Letter from Jim Doak, PacifiCorp, to Ms. Cheryl Heying, UDAQ at 1, and at Attachment 2, at 2-3 (identifying these new projects, indicating they were not part of the permit application (*i.e.*, the 2007 NOI) associated with the 2008 Approval Order (DAQE-AN0102370012-08), and confirming that these projects were completed in April 2010) (Ex. 42 to Comment Letter). Table 1 of that letter identifies the modifications at Unit 1 exactly as they were described by PacifiCorp to UDAQ and which, individually and/or collectively, resulted in triggering the application of the Approval Order Rule of the EPA-approved Utah SIP. The outage dates associated with this work were determined by reviewing emissions and operational data submitted for each Hunter unit by PacifiCorp to the U.S. Environmental Protection Agency’s Air Markets Program Data, *available at* <http://ampd.epa.gov/ampd/>.

The unpermitted 2010 Unit 1 work, individually or collectively, had the potential to result in increases of emissions of air contaminants, including, but not limited to, SO₂, NO_x, and PM from Hunter Unit 1. It was reasonable to expect that this work might increase those air contaminants due to an expected increase in the maximum hourly fuel burning capacity of Unit 1, an increase in its operating capacity factor, and/or an increase in the total number of hours in a year that Unit 1 could operate as a consequence of improvements in reliability and/or availability and/or improvements in efficiency, which could lead to an increase in dispatching of the unit.¹⁰⁵

There are no exemptions from the requirement to obtain an Approval Order for routine maintenance,¹⁰⁶ or from the “replacement-in-kind” rule.¹⁰⁷

UDAQ either erroneously relied on inapplicable and unlawful PALs¹⁰⁸ or it simply ignored its Approval Order rules, which stands in stark contrast to Utah’s repeated representations about the operation of the Approval Order rules. For example, UDAQ argued that, regardless of whether the 2002 NSR reform rules would allow grandfathered plants to

¹⁰⁵ See Comment Letter at 65-68 (Ex. B).

¹⁰⁶ PacifiCorp’s suggested that many of the 2010 Unit 1 projects somehow satisfied the PSD program’s routine maintenance, repair and replacement (RMRR) exemption, *see* Dec. 18, 2009 Letter from William K. Lawson, PacifiCorp, to Ms. Cheryl Heying, UDAQ, at 2, pdf 2 (Ex. 39 to Comment Letter). However, that exemption is not applicable to Approval Order requirements. Comment Letter at 52, 63(Ex. B); *see* UACR R307-1-3.1.7.A through F. Similarly, UDAQ acquiescence in PacifiCorp’s contention that the delay in the installation of pollution controls did not violate the PSD program’s requirement to “commence construction” in accordance with 40 C.F.R. § 52.21(r)(2) and proposal to provide annual reports of emissions pursuant to the federal PSD rule found at 40 C.F.R. § 52.21(r)(6)(iv) as a “method to demonstrate continued compliance” did not reflect any consideration of whether the Utah’s Approval Order rules had been triggered. Feb.1, 2010 Letter from Cheryl Heying, UDAQ, to William K. Lawson, PacifiCorp, at 1-2 (Ex. 40 to Comment Letter). Moreover, even in the PSD context, the 2010 Unit 1 projects at issue could not legitimately be deemed RMRR.

¹⁰⁷ UACR R307-1-3 *et seq.*; *compare* Utah Admin. Code R307-401-11 *et seq.*; 79 Fed. Reg. 7,072, 7,077 (Feb. 6, 2014) (adopting Utah’s replacement-in-kind rule at Utah Admin. Code R307-401-11 *et seq.* into the Utah SIP in 2014).

¹⁰⁸ Not only are the PALs unlawful, *see supra*, but Utah Admin. Code R307-401-13 (2010) specifically provided at the time of the 2010 work that “[a] plantwide applicability limit under R307-405-21 does not exempt a stationary source from the requirements of R307-401,” which includes the Approval Order requirements. Moreover, PALs are included in the Utah SIP as a component of Utah’s PSD regulations and can only be integrated, read as whole and coherently applied within the PSD context, utilizing defined PSD applicability standards. *See, e.g.*, Utah Admin. Code R307-405-21. PALs are not incorporated the Approval Order rules set forth in Utah Admin. Code R307-401-1 *et seq.* and could not be coherently applied to Approval Order requirements, which adopt a different applicability standard than PSD.

upgrade or conduct life extension projects without triggering major source permitting, Utah's Approval Order Rule would likely require the application of BACT to such projects.¹⁰⁹ EPA relied on Utah's representations in rejecting comments that its approval of Utah's adoption of NSR Reform constituted an unlawful SIP relaxation under Section 110(l) of the Clean Air Act.¹¹⁰ Instead of responding to Sierra Club's extensive comments on this issue, UDAQ claimed that "[a]ny concerns regarding previous permits should have been raised during [the] public comments" period for the prior permit.¹¹¹ UDAQ did not question any of the analyses presented in Comment Letter, nor did UDAQ provide any explanation for the exemption of the 2010 projects at Hunter Unit 1 from the Approval Order requirements of the Utah SIP. As discussed below, EPA must object to the Permit because of UDAQ's failure to respond to these substantive comments, the Permit's failure to identify and include the Approval Order permitting requirements of the Utah SIP, including BACT¹¹² for SO₂, NO_x and particulate matter, as applicable requirements for Hunter Unit 1 as a result of the 2010 projects, and the Permit's failure to include a schedule of compliance to ensure that Hunter Unit 1 is brought into compliance with the applicable Approval Order permitting requirements.

¹⁰⁹ See Feb. 24, 2006 Memorandum from UDAQ's C. Delaney and J. Schubach to Utah Air Quality Board, Enclosing NSR Reform Rules Comments and Responses at 2 (Ex. 35 to Comment Letter).

¹¹⁰ See 76 Fed. Reg. 41,712, 41,714-15 (July 15, 2011); see also Utah State Bulletin, July 15, 2006, Vol. 2006, No. 14 at 42-43 (Ex. 34 to Comment Letter).

¹¹¹ See RTC at 2-3 (Ex. D).

¹¹² Sierra Club provided extensive comments on what pollution controls would likely constitute BACT for the Hunter Units in its Comment Letter at 79-95 (Ex. B). Sierra Club demonstrated that the currently pollution controls and/or emission limits of the Title V permit would not constitute BACT for the Hunter Units 1, 2 or 3. Although the Title V permit identifies the authority for the SO₂, NO_x, and PM limits, including the SO₂ and NO_x PALs as "R307-401-8(1)(a) [BACT]," the permit records for the Hunter Plant do not indicate that any recent evaluation of BACT was conducted for the Hunter units for any pollutant except CO in 2008. See November 27, 2007 NOI, Sections 5.0 and 6.0, at 5.1-6.3, pdf 21-27 (NOI only contains a BACT analysis for one pollutant, carbon monoxide) (Ex. 37 to Comment Letter); see also UDAQ Modified Source Plan Review, January 25, 2008, for 2008 Approval Order, Sections 1.3 and 6.0, at 8, 20-24 (confirming that no BACT review was conducted for SO₂, NO_x, or PM or any other pollutants other than CO) (Ex. 38 to Comment Letter).

D. The Administrator Must Object to the Hunter Title V Permit Because It Fails to Include PSD Requirements for NOx including BACT for the 2010 Projects at Hunter Unit 1.

Assuming that the NOx PAL was not validly established, the 2010 projects at Hunter Unit 1 discussed in Section C above, including the replacement of Unit 1's economizer, low temperature superheater, finishing superheater, and pulverizer components, as well as high pressure/intermediate pressure/low pressure turbine upgrades,¹¹³ should have triggered PSD for NOx emissions.

The applicable PSD provisions of the Utah SIP at the time of the 2010 projects were based on EPA's July 21, 1992 PSD rules commonly referred to as the "WEPCO Rule," under which PSD applicability was determined based on a comparison of actual emissions before the project(s) to representative actual annual emissions after the project.¹¹⁴ Although PacifiCorp claimed without providing any further information that "many" of the 2010 projects at Unit 1 were considered RMRR,¹¹⁵ the high pressure/intermediate pressure/low pressure turbine upgrades at Unit 1 which PacifiCorp conceded were not "like kind"¹¹⁶ would not be considered RMRR.¹¹⁷ And neither would the other large boiler component replacements performed as part of the 2010 projects.¹¹⁸

PacifiCorp's 2007 NOI reflects a 50 MMBtu/hour heat input increase, which was likely related to the HP/IP/LP turbine upgrades and possibly also the boiler component replacement

¹¹³ See Comment Letter at 57-60 and Table 14 (Ex. B) (listing projects not approved by 2007 NOI or 2008 Approval Order); December 18, 2009 Letter from William K. Lawson, PacifiCorp, to Ms. Cheryl Heying, UDAQ, at 2, pdf 2, and Attach.2 at 1-2, pdf 6-7 (Ex. 39 to Comment Letter).

¹¹⁴ 57 Fed. Reg. 32,314 (July 21, 1992) (EPA WEPCO rule). 69 Fed. Reg. 51,368, 51,369-70 (Aug. 19, 2004) (EPA approval of Utah's adoption of the PSD rule revisions of the WEPCO Rule); 40 C.F.R. § 52.2320(c)(58)(i); see definitions of "actual emissions" and "representative actual annual emissions" in R307-101-2, State-effective date of July 12, 2001, of the EPA-approved Utah SIP effective September 20, 2004. 69 Fed. Reg. 51,368 (Aug. 19, 2004).

¹¹⁵ December 18, 2009 Letter from William K. Lawson, PacifiCorp, to Ms. Cheryl Heying, UDAQ, at 2, pdf 2 (Ex. 39 to Comment Letter).

¹¹⁶ *Id.*

¹¹⁷ See Comment Letter, Section I.C.2.a, at 18-20 (Ex. B) and Ex. 6, 8, 10, 11, 12 and 13 to Comment Letter.

¹¹⁸ *Id.*

projects completed at Hunter Unit 1 in 2010.¹¹⁹ In its comments to UDAQ, Sierra Club's analysis demonstrated that the 50 MMBtu/hour heat input increase at Hunter Unit 1 should have been projected to result in a significant emissions increase of NOx.¹²⁰ Further, because the pollution control upgrades had been delayed at Unit 1 until 2014¹²¹ and because the NOx pollution controls at Hunter Units 2 and 3 were previously relied on in UDAQ's issuance of the 2008 Approval Order and thus the reductions were not creditable for netting,¹²² Sierra Club's analysis demonstrates that a significant net emissions increase of NOx should have been expected for the 2010 projects at Hunter Unit 1.¹²³

Again, UDAQ unlawfully provided no response to these comments, stating that “[a]ny concerns regarding previous permits should have been raised during [the] public comments” period for the prior permit.¹²⁴ UDAQ also did not respond to Sierra Club's comments that the 2008 PALs were unlawfully established because EPA did not approve Utah's PAL provisions as part of the Utah SIP until 2011.¹²⁵ Because the PALs were not lawfully established, the PALs should not have been relied upon to exempt the 2010 projects at Hunter Unit 1 from PSD permitting requirements. Moreover, as EPA informed UDAQ in comments, PacifiCorp could not rely on the 10-year PAL provisions to avoid PSD for a future project, and UDAQ could not implement 10-year PALs until EPA approved those provisions as part of the SIP.

¹¹⁹ See 2007 NOI at 2 (Ex. 46 to Comment Letter). See also 1997 NOI, Attach, Table entitled “Hunter Plant and Coal Prep Annual Emissions Inventory, Production Data Input Sheet for Calendar Year: Future Potential Emissions.” (Ex. 1 to Comment Letter).

¹²⁰ See Comment Letter at 72-73 (Ex. B). Specifically, Sierra Club assumed Hunter Unit 1 would operate at 50 MMBtu/hour higher heat input at 85% capacity factor, which is a reasonable expectation for a base loaded unit such as Hunter Unit 1. See Ex. 52-54 to Comment Letter (providing support for Hunter Unit 1 being considered a base load unit). For a projection of NOx emissions, Sierra Club based emissions on the annual average NOx emission rate achieved at Hunter Unit 1 based on Air Markets Program Data for the 2-years before the 2010 projects, which was 0.36 lb/MMBtu (Ex. 54 to Comment Letter).

¹²¹ See Dec. 18, 2009 PacifiCorp Letter to UDAQ at 1 (Ex. 39 to Comment Letter).

¹²² Definition of “net emissions increase,” subsection 2.E(4), in UACR R R307-1-1 (1995).

¹²³ See Comment Letter at 73 (Ex. B). 50 MMBtu/hour x 8760 hours/yr x 0.85 (cap factor) x 0.36 lb/MMBtu x 1 ton/2000 lb = 67 tons per year projected NOx emissions increase.

¹²⁴ See RTC at 2-3 (Ex. D).

¹²⁵ *Id.*

For all of these reasons, EPA must object because the permit fails to include PSD permitting requirements of the Utah SIP including best available control technology (BACT)¹²⁶ for NOx for the 2010 projects at Hunter Unit 1 and because it fails to include a schedule of compliance to ensure that the Approval Order permitting requirements are ultimately incorporated into the Hunter Title V permit.

E. The Administrator Must Object to the Hunter Title V Renewal Permit Because UDAQ has Failed to Consider and Respond to Sierra Club's Comments

Instead of considering and responding to the significant issues raised in Sierra Club's comments,¹²⁷ UDAQ rejected those comments out of hand, claiming that they were "not applicable to this Title V renewal action" and only "pertain to the underlying requirements that are now simply incorporated into the Title V operating permit."¹²⁸ Based on this erroneous position on the scope of this Title V renewal action, UDAQ chose not to substantively respond to Sierra Club's comments as required by law.¹²⁹ UDAQ vaguely asserted that some issues raised by Sierra Club related to compliance, stating that compliance was solely "an enforcement matter for UDAQ" and beyond the scope of this Title V permit renewal action.¹³⁰ UDAQ also claimed that other issues relating to prior New Source Review permitting actions and PALs,¹³¹ as well as

¹²⁶ See *supra* at n. 114.

¹²⁷ Sierra Club commented on all the other issues addressed in this Petition, including the late 1990s major modifications at the Hunter Plant, the 2010 modifications at Hunter Unit 1, the PAL issues, and the issues relating to failure to assure compliance with Utah SIP's requirement prohibiting air pollution at levels which exceed the 1-hr. SO2 NAAQS. This final objection is appropriate to raise in this Petition because the grounds for it arose after the close of the public comment period when UDAQ refused to substantively respond to over 100 pages of Sierra Club's comments. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

¹²⁸ RTC at 3 (Ex. D)

¹²⁹ See Utah Admin. Code R307-415-7i.

¹³⁰ RTC at 2 (Ex. D).

¹³¹ In RTC at 4-6 (Ex. D), UDAQ dismissed several sections of Sierra Club's comments related to PAL issues, without substantively responding to the issues raised. UDAQ indicated that Sierra Club's comments in Section VII of its Comment Letter relating to PAL issues "pertain[ed] to New Source Review" and cryptically argued that because the "renewal Title V permit for PacificCorp Energy's Hunter plant is based on the April 6, 2015 Approval Order and applicable State and Federal Rules," Sierra Club's "comments [we]re not applicable to the Title V

issues relating to the Utah SIP, were beyond the scope of this Title V action and could only have been raised in comments submitted at the time of those permitting and SIP determinations were being made.¹³² UDAQ's fundamental position that it need not consider whether the Hunter's Title V renewal permit assures compliance with all applicable requirements is wrong as a matter of law. UDAQ had an obligation to consider and substantively respond to Sierra Club's comments and, because it failed to do so, the Administrator must object to the Hunter Title V renewal permit.

The Administrator objected to Kentucky's TVA Paradise Title V renewal permit for the same types of shortcomings that were committed here; namely, the state permitting agency's failure to respond to public comments that a plant made modifications in the past that should have triggered PSD review requirements. Like the situation at hand, petitioners claimed that PSD should be an applicable requirement of the Title V permit based on past modifications that had avoided PSD review¹³³ but the state agency did not consider the petitioners' comments. In its objection, the EPA recognized, "[i]t is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments."¹³⁴ EPA concluded that Kentucky's response to

renewal permitting action." *Id.* at 4. Similarly, UDAQ dismissed Sierra Club's additional comments relating to PALs at Section IX of the Comment Letter and failed to provide any substantive response. *Id.* at 5-6. UDAQ characterized the issues raised by Sierra Club as pertaining to New Source Review and Approval Order permitting and a Title V administrative amendment in 2008 and vacuously maintained that since "the purpose of this permitting action is to renew the Hunter Title V operating permit as proposed," the question of [w]hether UDAQ properly followed permitting procedures in previous permitting actions is not at issue in this proceeding . . ." *Id.* at 5-6. Based on that muddled reasoning, UDAQ concluded that Sierra Club's comments were "are not applicable to this Title V renewal action." *Id.* at 6.

¹³² The 2010 Approval Order issues involving Unit 1 are analogous.

¹³³ *Id.*

¹³⁴ *TVA Paradise Objection* at 5 (citing *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) ("the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."); *In re Cemex, Inc, Lyons Cement Plant*, Petition No. VIII-2008-01, Order Responding to Petitioner's Request that Administrator Object to Issuance of State Operating Permit at 10 (Apr. 20, 2009), available at https://www.epa.gov/sites/production/files/2015-08/documents/cemex_response2009.pdf; *In re Alliant Energy WPL, Edgewater Generating Station*, Petition No. V -2009-02, Order Responding to Petitioner's Request That the

the petitioner's comments "does not address the substance of the comment" and the state's failure to respond to the significant comment "may have resulted in one or more deficiencies" in the permit.¹³⁵ EPA therefore ordered Kentucky to consider the information provided by the petitioner in support of its comments and, if appropriate, "to revise the permit to include a compliance schedule for addressing those requirements."¹³⁶ EPA must order UDAQ to do the same here.

UDAQ's failure to meet its obligation to respond to Sierra Club's substantive comments appears to be premised on a misunderstanding of the differences between a Title V renewal permit action and a Title V significant modification. "EPA interprets its Title V regulations at 40 C.F.R. part 70 to require different opportunities for citizens to petition on initial permit issuance, permit modifications, and permit renewals."¹³⁷ The scope of public comment on Title V significant modification permits is typically limited "to issues directly related to [the] modifications" in question.¹³⁸ But when a Title V renewal permit is proposed, which should occur roughly every five years,¹³⁹ the Title V process "provides the public with an opportunity to review, comment on, and object *to all aspects of the permit*."¹⁴⁰ This broad scope of review necessarily invites comments challenging the erroneous omission of applicable requirements

Administrator Object to Issuance of State Operating Permit, at 8 (Aug. 17, 2010) ("*Edgewater Order*"), available at https://www.epa.gov/sites/production/files/2015-08/documents/edgewater_response2009.pdf.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *In the Matter of Wisconsin Public Service Corporation - Weston Generating Station*, Permit No. 73700902 & P02, Petition No. V-2006-4, Order Responding to Petitioner's Request that the Administrator Object to the Issuance of State Operating Permit at 5 (Dec. 19, 2007), available at https://www.epa.gov/sites/production/files/2015-08/documents/wisconsin_public_service_weston_response2006.pdf.

¹³⁸ *Id.* at 5-6.

¹³⁹ One of the shameful aspects of this situation is that UDAQ sat on the application for the Hunter Title V renewal permit for thirteen (13) years after the mandatory deadline for final action by the agency had passed and only acted on the permit in response to Sierra Club's mandamus lawsuit. Because of UDAQ's delay, the public has been denied the opportunity to comment on the full scope of the Hunter Title V permit for around eighteen (18) years. Even now, in the context of this much belated Title V renewal permit, UDAQ is seeking to restrict the public's right to address the full scope of the Hunter Title V permit in contravention of the applicable law and regulations and without due regard to the significant public health threat posed by the Hunter Plant's continuing emissions.

¹⁴⁰ *Id.* at 6 (citing 40 C.F.R. § 70.7(c) (emphasis added)).

from Title V renewal permits, and comfortably encompasses all the issues raised in Sierra Club's comments and this Petition.¹⁴¹

Contrary to UDAQ's suggestions, the requirements implicated by Sierra Club's comments and addressed by this Petition are not "new" requirements. They are requirements that have been triggered in the past and remain presently applicable despite UDAQ's failure to incorporate them into the Hunter Title V permit.

Additionally, no potential jurisdictional bar exists¹⁴² to Sierra Club pursuing the issues raised in its comments and this Petition relating to historic modifications that triggered PSD or Approval Order requirements, prior state permitting decisions and omissions,¹⁴³ or any other applicable requirements of the Utah SIP through the Title V administrative process. Neither the original Title V permit, any subsequent revisions or modifications, the current Title V permit, nor any other Approval Orders imposed an effective permit shield¹⁴⁴ otherwise prohibited Sierra

¹⁴¹ UDAQ's repeated contention that the Hunter Plant's permit is "based on the April 6, 2015 Approval Order and applicable State and Federal Rules" does not change the permit's fundamental nature. RTC at 3. It remains a Title V renewal permit subject to a full review.

¹⁴² See generally *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1019-1023 (8th Cir. 2010) (addressing effect of Clean Air Act's jurisdictional bar set forth at 42 U.S.C. § 7607(b)(2) on federal citizen suit enforcement actions).

¹⁴³ Sierra Club's comments on unlawful PALs imposed in 2008 relate to PSD requirements that are ongoing and applicable to the Hunter Plant today and in the future. Those provisions will govern, among other things, how PSD applicability determinations will be made for the life of the PALs. Accordingly, these PAL provisions fall within the scope of review of the Hunter Title V permit renewal as applicable requirements, just as other New Source Review, PSD and Approval requirements triggered in the past, such as the obligation to obtain an appropriate permit and apply BACT, remain applicable requirements and subject to review in the Title V renewal permit context. See, e.g., *TVA Paradise Objection* at 1-2, 5, 14; *NYPIRG*, 427 F.3d at 177-83; *Columbia Station Order* at 8-10; *Monroe Order* at 2, 6-24; May 20, 1999 Letter from John S. Seitz, Director of Office of Air Quality Planning and Standards, to Mr. Robert Hodanbosi and Mr. Charles Lagges, STAPPA/ALAPCO, Enclosure A at 2-3 (Ex. 85 to Comment Letter). UDAQ's effort to restrict the scope of review for a Title V renewal permit by suggesting that the Hunter Title V renewal permit is only "based on the April 6, 2015 Approval Order and applicable State and Federal Rules" or by blanketing stating that questions relating to "whether UDAQ properly followed permitting procedures in previous permitting actions" is beyond the scope of this permitting action are unavailing. 40 C.F.R. § 70.7(c); Utah Admin. Code r. 307-415-7c(1).

¹⁴⁴ 42 U.S.C. § 7661c(f); 40 C.F.R. § 70.6(f); Utah Admin. Code r. 307-415-6f; *United States v. East Ky. Power Coop., Inc.*, 498 F. Supp. 2d 1010, 1016-18 (E.D. Ky. 2007) (recognizing that Title V's permit shield is only effective to bar court enforcement except where the applicable requirements in question are expressly set forth in the underlying permit and rejecting collateral attack arguments in enforcement case and contention that the "only remedy available" for a deficient Title V permit that fails to include applicable PSD limitations is to reopen the Title V permit and revise it under 40 C.F.R. § 70.7(f)(1)(iii)) (citing *Pennsylvania v. Allegheny Energy, Inc.*, 2006 U.S. Dist. LEXIS 38377, at *23-27 (W.D. Pa. Apr. 19, 2006)).

Club from pursuing such issues here.¹⁴⁵ On the contrary, Title V renewal actions are designed to serve as mechanisms for incorporating erroneously omitted applicable requirements into Title V permits.

Finally, UDAQ's contention that Sierra Club's comments and the issues addressed by this Petition are beyond the scope of review in a Title V permit renewal because they implicate compliance and enforcement matters is meritless. Many core issues in the Title V process can be viewed as broadly relating to compliance and enforcement matters.¹⁴⁶ However, nothing in the Clean Air Act or Title V regulations suggests that such issues are excluded from review in the Title V process, as doing so would eviscerate the Title V, which, in part, is designed to assure compliance with applicable requirements that are currently being violated.

For all the forgoing reasons, the Administrator must object to the Hunter Title V Permit because of UDAQ's failure to respond to Sierra Club's substantive comments associated with the issues raised in this Petition.

VI. CONCLUSION

For all the foregoing reasons, the Hunter Permit fails to meet the requirements of the Clean Air Act, the Utah SIP, and related regulations. These deficiencies require that the

¹⁴⁵ *TVA Paradise* Objection at 1-2, 5, 14 (addressing alleged PSD modifications performed between 1984-86 in petition filed on 2010); *NYPURG*, 427 F.3d at 177, 179-183 (granting Title V petition challenge filed in 2002 to address alleged PSD modifications made in 1983-85); *Columbia Station* Order at 8-10; *Edgewater* Order at 3-6; *Monroe* Order at 2, 6-24 (granting Title V petition based PSD issues); *Crystal River* Objection (Ex. G); see also May 20, 1999 Letter from John S. Seitz, Director of Office of Air Quality Planning and Standards, to Mr. Robert Hodanbosi and Mr. Charles Lagges, STAPPA/ALAPCO, Enclosure A at 2-3 (noting that the EPA "may object to or reopen a title V permit in response to a public petition showing that title I preconstruction permitting requirements have not been met" and, "where EPA believes that an emission unit has not gone through the proper preconstruction permitting process (and therefore one or more applicable requirements are not incorporated in the draft or proposed title V permit), EPA may object to the title V permit.") (Ex. 85 to Comment Letter).

¹⁴⁶ For example, central Title V questions involve determinations of whether permits adequately assure compliance with applicable requirements, 40 C.F.R. § 70.1(b); 42 U.S.C. § 7661c; Utah Admin. Code R307-415-6a(1), and include adequate schedules of compliance where sources are not complying with applicable requirements at the time of permitting. 40 C.F.R. § 70.5(c)(8)(iii)(C) and 70.6(c)(3); Utah Admin. Code R307-415-1; 307-415-5c(3)(c), (4), (5) and (8); 307-415-6a(1); and 307-415-6c(1), (3), (4) and (5).

Administrator object to the Permit pursuant to 40 C.F.R. § 70.8(c)(1). EPA has objected to Title V permits for failure to properly include applicable PSD requirements for major modifications many times in similar circumstances.¹⁴⁷ For example, EPA objected to the Columbia Title V permit because Wisconsin excluded a major modification from PSD requirements by applying a faulty analysis that ignored projected post-project emissions.¹⁴⁸ EPA ordered the state to:

do a proper applicability determination based on the correct post-project emissions standard, and clearly explain its analysis in the permit record. If WDNR concludes that the physical change, in fact, resulted in a significant net emissions increase for SO₂, WDNR must require WPL to obtain a PSD permit for the modification and will have to make appropriate changes to the source's title V permit and the permit record.¹⁴⁹

In another example, EPA objected to the Crystal River Title V permit because Florida unlawfully granted the facility an exemption from PSD requirements for a proposed major modification to burn petroleum coke.¹⁵⁰

As detailed in this Petition, the Hunter Title V permit does not include applicable PSD and Approval Order requirements, nor does it ensure compliance with the air quality standards, and it does not include a compliance schedule for these requirements. Thus, Utah's failures

¹⁴⁷ *Columbia Station* Order at 7-10; *Edgewater* Order 3-6; *Monroe* Order at 2, 6-24 (granting Title V petition based PSD issues); *Crystal River* Objection (Ex. G); *see also In the Matter of Consolidated Environmental Management, Inc. – Nucor Steel, Louisiana, Pig Iron and DRI Manufacturing in St. James Parish, Louisiana*, Permit Nos. 3086-VO and 2560-00281-V1, Partial Order Responding to Petitioner's May 3, 2011 and October 3, 2012 Requests that the Administrator Object to the Issuance of Title V Operating Permits Issued by the Louisiana Department of Environmental Quality, at 8 (EPA Adm'r. June 19, 2013) ("EPA has previously stated its view that if a PSD permit that is incorporated into a title V permit does not meet the requirements of the SIP, the title V permit will not be in compliance with all applicable requirements."), available at https://www.epa.gov/sites/production/files/2015-08/documents/nucor_steel_partialresponse2011.pdf (citing *Edwardsport* Order at 3).

¹⁴⁸ *Columbia Station* Order at 8.

¹⁴⁹ *Id.* at 10; *see also* May 20, 1999 Letter from John S. Seitz, Director of Office of Air Quality Planning and Standards, to Mr. Robert Hodanbosi and Mr. Charles Lages, STAPPA/ALAPCO, Enclosure A at 2-3 (noting that the EPA "may object to or reopen a title V permit in response to a public petition showing that title I preconstruction permitting requirements have not been met" and, "where EPA believes that an emission unit has not gone through the proper preconstruction permitting process (and therefore one or more applicable requirements are not incorporated in the draft or proposed title V permit), EPA may object to the title V permit.").

(Ex. 85 to Comment Letter); *NYPORG*, 427 F.3d at 183.

¹⁵⁰ *Crystal River* Objection at 9 (Ex. G).

require EPA to object to the Hunter Title V permit. To comply with the requirements of Title V and address these serious, longstanding and continuing violations, EPA must order that:

1. the Hunter Title V Permit contain a compliance schedule for obtaining a PSD permit for unpermitted major modifications in the late 1990s and 2010;
2. the Hunter Title V Permit contain a compliance schedule for obtaining an Approval Order, including a PSD permit, for the 2010 modifications at Hunter Unit 1;
3. UDAQ remove unlawful PAL provisions;
4. UDAQ fully consider and address the issues raised in Sierra Club's Comments.

Respectfully submitted on behalf of Sierra Club,



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