

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTERS OF	)	PETITION NOS. V-2016-18 &
	)	V-2017-2
SUPERIOR SILICA SANDS	)	
BARRON COUNTY, WISCONSIN	)	ORDER RESPONDING TO
PERMIT No. 603110860-P01	)	PETITIONS REQUESTING
	)	OBJECTION TO THE ISSUANCE OF
WISCONSIN PROPPANTS, LLC	)	TITLE V OPERATING PERMITS
JACKSON COUNTY, WISCONSIN	)	
PERMIT No. 627026620-P01	)	
	)	
ISSUED BY THE WISCONSIN	)	
DEPARTMENT OF NATURAL RESOURCES	)	

**ORDER DENYING PETITIONS FOR OBJECTION TO PERMITS**

**I. INTRODUCTION**

The U.S. Environmental Protection Agency (EPA) received two petitions from the Ho-Chunk Nation and the Sierra Club - John Muir Chapter pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661d(b)(2). The first petition, dated October 25, 2016 (the Superior Silica Sands (SSS) Petition), requests that the EPA object to the proposed operating permit no. 603110860-P01 (the SSS Permit) issued by the Wisconsin Department of Natural Resources (WDNR) to Superior Silica Sands for industrial sand mining and processing facilities in Barron County, Wisconsin (the SSS Facilities). The second petition, dated January 25, 2017 (the Wisconsin Proppants (WP) Petition), requests that the EPA object to the proposed operating permit no. 627026620-P01 (the WP Permit) issued by WDNR to Wisconsin Proppants, LLC for an industrial sand mining and processing facilities (the WP Facilities) in Barron County, Wisconsin. The operating permits were proposed pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and Wis. Stat. §§ 285.60–285.69. *See also* 40 C.F.R. part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

As discussed further below, the claims in the SSS Petition and the WP Petition raise substantially similar issues; therefore, this Order responds to both Petitions. Based on a review of the SSS and WP Petitions and other relevant materials, including the SSS and WP Permits, the permit records, and relevant statutory and regulatory authorities, and as explained further below, the EPA denies both Petitions requesting that the EPA object to the SSS and WP Permits.

## **II. STATUTORY AND REGULATORY FRAMEWORK**

### **A. Title V Permits**

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. The state of Wisconsin submitted a title V program governing the issuance of operating permits on January 27, 1994. The EPA granted full approval of Wisconsin's title V operating permit program in 2001. 66 Fed. Reg. 62951 (December 4, 2001). This program, which became effective on November 30, 2001, is codified at Wis. Stat. §§ 285.60–285.69 and Wis. Adm. Code §§ 407.01–407.16.

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. CAA §§ 502(a), 504(a), 42 U.S.C. §§ 7661a(a), 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure sources' compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* CAA § 504(c), 42 U.S.C. § 7661c(c). One purpose of the title V program is to “enable the source, States, the EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements.” 57 Fed. Reg. at 32251. Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and for assuring compliance with such requirements.

### **B. Review of Issues in a Petition**

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, any person may petition the Administrator, within 60 days of the expiration of the EPA's 45-day review period, to object to the permit. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C.

§ 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).<sup>1</sup> Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.<sup>2</sup>

The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," to determine whether a petition demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).<sup>3</sup> When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g., MacClarence*, 596 F.3d at 1130–31.<sup>4</sup> Certain aspects of the petitioner's demonstration burden are discussed below; however, a more detailed discussion can be found in *In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA has looked at a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the state's response to comments, or RTC), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.<sup>5</sup> Another factor the EPA has examined is whether a

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<sup>1</sup> *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (*NYPIRG*).

<sup>2</sup> *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *cf. NYPIRG*, 321 F.3d at 333 n.11.

<sup>3</sup> *See also Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' . . . plainly mandates an objection *whenever* a petitioner demonstrates noncompliance." (emphasis added)).

<sup>4</sup> *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

<sup>5</sup> *See also, e.g., In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012) (denying a title V petition issue where petitioners did not respond to the state's explanation in response to comments or explain why the state erred or the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *In the Matter of Georgia Power Company*, Order on Petitions, at 9–13 (January 8, 2007) (*Georgia Power Plants Order*) (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).

petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for petitioner's objection, contrary to Congress's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 (“[T]he Administrator’s requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.”).<sup>6</sup> Relatedly, the EPA has pointed out in numerous orders that, in particular cases, general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013).<sup>7</sup> Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g., In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).<sup>8</sup>

The information that the EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) on a proposed permit generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement of basis for the draft and proposed permits; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; relevant supporting materials made available to the public according to 40 C.F.R. § 70.7(h)(2); and all other materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). If a final permit and a statement of basis for the final permit are available during the agency's review of a petition on a proposed permit, those documents may also be considered as part of making a determination whether to grant or deny the petition.

### **III. BACKGROUND**

#### **A. The SSS and WP Facilities**

Both the SSS Facilities and the WP Facilities are industrial sand mining and processing operations located in Wisconsin. The SSS Facilities, located in Barron County, include two existing industrial sand mines, existing wet processing plants associated with each mine, an existing dry sand processing plant, and the new Arland dry sand processing plant. All of these

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<sup>6</sup> *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (September 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring); *In the Matter of Portland Generating Station*, Order on Petition, at 7 (June 20, 2007) (*Portland Generating Station Order*).

<sup>7</sup> *See also Portland Generating Station Order* at 7 (“[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement].”); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (April 20, 2007); *Georgia Power Plants Order* at 9–13; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (March 15, 2005).

<sup>8</sup> *See also In the Matter of Hu Honua Bioenergy*, Order on Petition No. IX-2011-1 at 19–20 (February 7, 2014); *Georgia Power Plants Order* at 10.

facilities are treated as a single stationary source for permitting purposes (Facility ID No. 603108330).<sup>9</sup> The Arland dry processing plant includes a fluidized bed rotary drier controlled by a baghouse, as well as a screener, a dust collector on the dryer and screener tower building routing to a baghouse, enclosed conveyors, silos controlled by cartridge-style dust collectors, and loading operations.

The WP Facilities, located in Jackson County, include an existing industrial sand mine, existing wet and dry sand processing plants, and new wet and dry processing plants. All of these facilities are treated as a single stationary source for permitting purposes (Facility ID No. 627026620).<sup>10</sup> Both the existing and new dry plants include a gas-fired fluidized bed dryer controlled by a baghouse, with the dry plant building, storage tanks and silos, and loading operations also controlled by a baghouse.

## **B. Permitting History**

On April 14, 2014, SSS submitted an application requesting both an initial title V operating permit covering the SSS Arland Plant and associated existing facilities, as well as a preconstruction permit authorizing construction of the SSS Arland Plant.<sup>11</sup> Following a series of draft permits that were issued and subsequently modified, WDNR issued its latest draft title V permit for the SSS Arland Plant on May 6, 2016, along with its Preliminary Determination.<sup>12</sup> Following a public comment period, during which EPA Region 5, Midwest Environmental Advocates, and Environmental Integrity Project submitted comments, WDNR transmitted a proposed title V permit and WDNR's response to public comments (SSS RTC)<sup>13</sup> to the EPA on July 12, 2016. The EPA's 45-day review period ran until August 26, 2016, during which period the EPA did not object to the SSS title V Permit. WDNR issued a final title V permit for the SSS Arland Plant on June 23, 2017.

On November 4, 2015, WP submitted an application requesting both an initial title V operating permit covering the new and existing sand mining and processing facilities, as well as a preconstruction permit authorizing construction of the new facilities.<sup>14</sup> WDNR issued a draft title

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<sup>9</sup> See Construction Permit Application for Superior Silica Sands – Arland Dry Sand Processing Plant, page 1 of the pdf document titled “603110860-P01\_application\_part\_1.pdf” on WDNR's public database (April 14, 2014).

<sup>10</sup> See Application, page 1 of the pdf document titled “62706620-F01\_revised\_application\_part\_1\_(3-10-2015).pdf” on WDNR's public database (March 10, 2015).

<sup>11</sup> WDNR processed the title V permit for the SSS Facilities (Permit No. 603108330-P01) concurrently with a minor source preconstruction permit (Permit No. 15-MHR-064) that authorized construction of the new facilities and superseded prior preconstruction permits covering existing units at the facility. See SSS Permit at 2. Permit No. 15-MHR-064 was issued/approved on June 29, 2016. *Id.* The requirements derived from both preconstruction and operating permits were ultimately issued in a single permit document.

<sup>12</sup> The Preliminary Determination serves as the statement of basis referenced in Section II of this Order.

<sup>13</sup> The SSS RTC is contained in the document titled “603110860-P01\_Addendum\_to\_PD3.pdf” on WDNR's public database.

<sup>14</sup> WDNR processed the title V permit for the WP Facilities (Permit No. 627026620-P01) concurrently with a minor source preconstruction permit (Permit No. 15-MHR-161) that authorized construction of the new facilities and superseded prior preconstruction permits covering existing units at the facility. See WP Permit at 3. Permit 15-MHR-161 was issued/approved on September 30, 2016. *Id.* The requirements derived from both preconstruction and operating permits were ultimately issued in a single permit document.

V permit on July 16, 2016, accompanied by its Preliminary Determination. Following a public comment period, during which EPA Region 5 and multiple private citizens submitted comments, WDNR transmitted a proposed title V permit and WDNR's response to public comments (WP RTC)<sup>15</sup> to the EPA on October 12, 2016. WDNR also submitted a supplemental RTC (WP Supplemental RTC) to the EPA on November 18, 2016, which was made publicly available. The EPA's 45-day review period ran until November 26, 2016, during which period the EPA did not object to the WP title V Permit. WDNR issued a final title V permit for the WP Facility on June 23, 2017.

### C. Timeliness of Petitions

Pursuant to the CAA, if the EPA does not object to a proposed title V permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The 60-day public petition period for the SSS Permit ran until October 25, 2016. The SSS Petition was dated and received October 25, 2016, and, therefore, the EPA finds that the Petitioners timely filed the SSS Petition. The 60-day public petition period for the WP Permit ran until January 25, 2017. The WP Petition was dated and received January 25, 2017, and, therefore, the EPA finds that the Petitioners timely filed the WP Petition.

## IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

The SSS Petition contains three claims, identified in the Petition and in this Order as Claims A, B, and C. The WP Petition contains two claims, Claims A and B. The first claim in both Petitions (Claim A) involves substantially similar issues regarding particulate matter equal to or less than 2.5 micrometers (PM<sub>2.5</sub>), and this Order responds to this claim as raised in both Petitions together. Similarly, the second claim (Claim B) raises substantially similar issues in both Petitions, and this Order addresses this claim in both Petitions together. Claim C is unique to the SSS Petition, and is addressed individually.

### **Claim A: The Petitioners' Claim that the Clean Air Act requires air permit applications to include emission estimates for PM<sub>2.5</sub> emissions, but the SSS and WP permit records do not include such estimates.**

**Petitioners' Claim:** The Petitioners claim that title V permit applications must include an estimate of all emissions of regulated air pollutants—including PM<sub>2.5</sub>—from both stack and fugitive sources. SSS Petition at 5; WP Petition at 5 (citing 40 C.F.R. § 70.5(c)(3)(i) and 70.2). The Petitioners assert that this requirement was not satisfied because the permit records do not include numeric PM<sub>2.5</sub> emission estimates from mechanical sources at the facilities. *Id.* The Petitioners claim that the EPA identified this alleged deficiency during the public comment period, and assert that WDNR did not correct the deficiency. *Id.* The Petitioners acknowledge and reproduce WDNR's RTC from each permit, wherein the state responded to the EPA's comments and explained, in sum, that PM<sub>2.5</sub> emissions from mechanical and low temperature operations are negligible. SSS Petition at 5; WP

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<sup>15</sup> The WP RTC is contained in the document titled "627026620\_P01\_15-MHR-161\_addendum\_to\_pd4.pdf" on WDNR's public database.

Petition at 6 (citing respective RTCs). The Petitioners challenge WDNR's explanation, contending that WDNR's explanatory statements "do not qualify as PM<sub>2.5</sub> emission estimates as required by the [CAA]." SSS Petition at 6; WP Petition at 6.<sup>16</sup>

The Petitioners also challenge the technical basis for WDNR's determination that PM<sub>2.5</sub> emissions from mechanical sources are negligible. The Petitioners claim that WDNR based this conclusion on WDNR's new "PM<sub>2.5</sub> Guidance and Technical Support Document" that states "mechanical processes such as crushing, grinding, sanding, sizing, evaporation of sprays, suspension of dusts, etc. are not sources of PM<sub>2.5</sub>." SSS Petition at 7; WP Petition at 6. The Petitioners assert that WDNR's reliance on the TSD is not sufficient to meet the title V requirement to estimate emissions. SSS Petition at 7; WP Petition at 7.<sup>17</sup> In the WP Petition, the Petitioners provide examples from studies that the EPA referenced in its comments on the WP Permit, and claims that these studies present "evidence that mechanical sources do emit PM<sub>2.5</sub> in more than negligible amounts." WP Petition at 8. Additionally, in both Petitions, the Petitioners cite comments by Midwest Environmental Advocates on the draft SSS Permit, and assert that WDNR "has sampling data confirming that mechanical processes emit PM<sub>2.5</sub>." SSS Petition at 8; WP Petition at 9.

The Petitioners also assert that WDNR's general policy concerning emissions from these activities directly conflicts with the EPA's May 20, 2014, "Guidance for PM<sub>2.5</sub> Permit Modeling," which specifies that "each permitting action will be considered on a case-by-case basis." SSS Petition at 7; WP Petition at 7.

The Petitioners conclude by requesting that the EPA object to the permits because WDNR's conclusions regarding PM<sub>2.5</sub> "are not sufficient to demonstrate compliance with the Part 70 CAA requirement that all facilities estimate emissions based on the best available emissions information," and because each "permit record fails to evaluate the source's emissions of PM<sub>2.5</sub> for major source applicability." *Id.* The SSS Petition also further alleges that "mechanical sources do emit PM<sub>2.5</sub> and may cause or contribute to violations of the national ambient air quality standards [NAAQS] for PM<sub>2.5</sub>." SSS Petition at 9.

***EPA's Response:*** For the following reasons, the EPA denies the Petitioners' request for an objection on this claim.

### *Legal Background*

The EPA's part 70 regulations at 40 C.F.R. § 70.5(c) specify that "[a]n application [for a title V permit] may not omit information needed to determine the applicability of, or to impose, any applicable requirement . . ." Moreover, § 70.5(c)(3) requires that state part 70 programs provide permit application forms that must include, among other things:

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<sup>16</sup> For support, the Petitioners (in both Petitions) quote EPA Region 5 comments on the draft WP permit, where the EPA stated "WDNR's statement that [PM<sub>2.5</sub> emissions from] mechanical units are unlikely to negligible does not address the explicit Part 70 requirements to quantify emission rates." *Id.* (alteration in Petitions).

<sup>17</sup> For support, the Petitioners (in both Petitions) reproduce additional statements made by EPA Region 5 on the draft WP permit, wherein the agency stated that "EPA does not believe that the TSD provides sufficient evidence to substantiate the claim that there are zero or negligible emissions of PM<sub>2.5</sub> from mechanical sources"; that a study cited by WDNR "does not provide direct evidence that there are zero or negligible emissions of PM<sub>2.5</sub>"; and that "several scientific studies give EPA reason to believe that mechanical sources such as haul roads do emit some level [of] PM<sub>2.5</sub>." SSS Petition at 6-7, 8, WP Petition at 6, 7.

The following emission-related information: (i) All emissions of pollutants for which the source is major, and all emissions of regulated air pollutants. A permit application shall describe all emissions of regulated air pollutants emitted from any emissions unit, except where such units are exempted under this paragraph (c) of this section. The permitting authority shall require additional information related to the emissions of air pollutants sufficient to verify which requirements are applicable to the source . . . .

40 C.F.R. § 70.5(c)(3).

The EPA has provided guidance concerning the level of detail required of permit applications, and in particular the requirement of 40 C.F.R. 70.5(c) pertaining to “emissions related information.” *See generally* White Paper for Streamlined Development of Part 70 Permit Applications, 6–9 (July 10, 1995) (*White Paper 1*); White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program, 30–36 (March 5, 1996) (*White Paper 2*). In sum, “Permit applications should include information to the extent needed to determine major source status, to verify the applicability of part 70 or applicable requirements, to verify compliance with applicable requirements, and to compute a permit fee (as necessary).” *White Paper 1* at 6.<sup>18</sup> On the other hand, such emissions information “does not always need to be detailed or precise,” particularly when such information “would serve no useful purpose.” *Id.* at 3, 6.<sup>19</sup>

In prior title V petition orders, the EPA has considered claims alleging inadequacies with a permit application based on 40 C.F.R. 70.5(c)(3). For example, the EPA has granted claims where lack of available information in a permit application could have affected the ability of a permitting authority to determine whether the title V permit contained all applicable requirements, and where the public’s lack of access to this information deprived them of an opportunity to meaningfully participate in the permitting process. *See In the Matter of Cash Creek Generation, LLC*, Order on Petition No. IV-2010-4 at 8–12 (June 22, 2012). However, the EPA has denied claims where petitioners did not demonstrate that the lack of information in a permit application resulted in a flaw in the permit itself. *See In the Matter of Tesoro Refining and Marketing Co.*, Order on Petition No. IX-2004-6 at 11 (March 15, 2005) (*Tesoro Order*) (“Petitioner makes no claim that the inclusion of emission calculations in the application would have resulted in a different permit. Because Petitioner failed to demonstrate that the alleged flaw

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<sup>18</sup> *See also id.* at 9 (“[T]here is flexibility inherent in § 70.5 to tailor the level of information required in the application to be commensurate with the need to determine applicable requirements. The EPA believes this inherent flexibility encompasses the idea that certain activities are clearly trivial (i.e., emissions units and activities without specific applicable requirements and with extremely small emissions) and can be omitted from the application even if they are not included on a list of insignificant activities approved in a State’s part 70 program pursuant to § 70.5(c).”).

<sup>19</sup> *See also White Paper 2* at 30–31 (“[N]o emissions estimates need be provided for even regulated emissions streams where it would serve no useful purpose to do so. This should be the case for [insignificant emission units] where the amount of emissions from a unit is not relevant to determining applicability of, or compliance with, the requirement. [However,] where the contributions of [insignificant emission units] would need to be more precisely known to resolve issues of applicability or major source status[,] the permitting authority [would] need to request emissions estimates for part 70 purposes.”).

in the permitting process resulted in, or may have resulted in, a deficiency in the permit, EPA is denying the Petition on this ground.”); *In the Matter of Valero Refining Co.*, Order on Petition No. IX-2004-07 at 10–11 (March 15, 2005) (same as *Tesoro*); *In the Matter of Yuhuang Chemical Inc. Methanol Plant*, Order on Petition No. VI-2015-03 at 6–8 (August 31, 2016).

### *Permit History*

In response to comments from EPA Region 5 and Midwest Environmental Advocates concerning estimates of PM<sub>2.5</sub> emissions from the SSS Facilities, WDNR responded, in part:

In summary, the department has provided emission estimates of PM-2.5 for this permit review where credible emission factors and calculation methods are available. Where no credible emission factors or methods for estimating emissions were available, the WDNR has used engineering judgment, its [Technical Support Document, or TSD], and other peer-reviewed research results to conclude that PM-2.5 emissions from mechanical and low temperature operations are negligible.

SSS RTC at 6. WDNR initially responded to comments from EPA Region 5 on the WP Permit with a similar response. *See* WP RTC at 11. Moreover, in its supplemental RTC on the WP Permit WDNR explained, in part:

Based on the language in 70.5(c)(3)(i), the accuracy of emission information required for the permit record need only be as high as is necessary to determine applicable requirements.

...

The proposed operation permit for Wisconsin Proppants does not have applicable requirements for PM<sub>2.5</sub>. The only reason to estimate emissions is to determine source status. . . . PM<sub>10</sub> and PM<sub>2.5</sub> have the same major source thresholds . . . . [Because PM<sub>2.5</sub> particles are captured by the definition of PM<sub>10</sub>,] when WDNR estimates emissions of PM<sub>10</sub>, they have also estimated the absolute theoretical maximum emission rate of PM<sub>2.5</sub>.

...

As required by 40 CFR Part 70.5(c)(3), the addendum to the preliminary determination provided with the proposed operation permit lists, on page 38, potential emissions of PM<sub>10</sub> as 104.1 tons per year from stacks, 135.6 tons per year from fugitive emissions for a total of 239.7 tons PM<sub>10</sub> per year. The absolute maximum emission rate of PM<sub>2.5</sub> could never be greater than 104.1 tons per year from stacks. Since non-fugitive emissions of a pollutant regulated under the Act exceed 100 tons per year, the facility is considered a major source under Title V and Part 70. Further refinement of the PM<sub>2.5</sub> emission rate is not possible without requiring the facility to undertaking [sic] a major research project. Such a project is not justifiable since this level of accuracy of the emission estimates is sufficient to determine applicable requirements.

WP Supplemental RTC at 1–2.

## *EPA Analysis*<sup>20</sup>

The Petitioners assert that permit applications “must include an estimate” of PM<sub>2.5</sub> emissions, citing 40 C.F.R. § 70.5(c)(3)(i), and claim that the SSS and WP permit records do not contain such an estimate. The Petitioners’ arguments are based on the premise that WDNR’s conclusions—that PM<sub>2.5</sub> emissions from mechanical operations are negligible—“do not qualify as PM<sub>2.5</sub> emission estimates.” SSS Petition at 6, WP Petition at 6. The Petitioners imply that permit applications must include quantitative and precise emissions estimates of all pollutants from all units, but offer no analysis to support this interpretation beyond a one-sentence characterization of § 70.5(c)(3)(i) and a reproduction of comments provided by EPA Region 5.<sup>21</sup> Notably, the Petitioners do not evaluate the text of § 70.5(c)(3)(i) or explain why this regulation necessarily mandates the type of precise emissions estimate that the Petitioners imply must be supplied.

As noted above, § 70.5(c)(3)(i) states that permit applications “shall describe all emissions of regulated air pollutants emitted from any emissions unit.” This provision centers around the requirement that permit applications “may not omit information needed to determine the applicability of, or to impose, any applicable requirement.” 40 C.F.R. § 70.5(c); *see* § 70.5(c)(3)(i) (“The permitting authority shall require additional information related to the

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<sup>20</sup> The EPA notes that the Petitions for both facilities raise issues that were in certain circumstances only raised in one of the two permit actions (e.g., some of the statements relied upon in the WP Petition were raised in comments on the SSS Permit, but not in comments on the WP Permit); thus, some of the issues in the Petitions were not raised with reasonable specificity during the respective permit actions. Specifically, the Petitioners’ claim in the SSS Petition that “WDNR’s statement that [PM<sub>2.5</sub> emissions from] mechanical units are unlikely to negligible does not address the explicit Part 70 requirements to quantify emission rates,” SSS Petition at 6, was not raised in public comments on the SSS Permit (this language came from public comments on the WP Permit). Similarly, the Petitioners’ claim in the WP Petition that WDNR “has sampling data confirming that mechanical processes emit PM<sub>2.5</sub>,” WP Petition at 9, was not raised in public comments on the WP Permit (the basis for this argument was presented in comments on the SSS Permit). Additionally, the Petitioners’ brief claim that WDNR’s policy concerning PM<sub>2.5</sub> directly conflicts with the EPA’s May 20, 2014, PM<sub>2.5</sub> permit modeling guidance was not raised with reasonable specificity during the public comment period for either Permit. Because title V petitions must be based on comments that were raised with reasonable specificity during the public comment period, the lack of such comments presents a threshold reason to reject these claims. 42 U.S.C. § 7661d(b)(2).

<sup>21</sup> The EPA acknowledges that EPA Region 5 requested, in its comments on both Permits, that WDNR attempt to quantify PM<sub>2.5</sub> emissions. However, as the EPA has previously explained, EPA comment letters (as opposed to formal EPA objections, for example) are generally not determinative and will rarely demonstrate grounds for an EPA objection without further analysis by petitioners. *See In the Matters of Linn Operating Inc. Fairfield Lease and Ethyl D Lease*, Order on Petition Nos. IX-2015-8 and IX-2015-9 at 11–12 (October 6, 2017). Moreover, as the EPA has previously explained, “Petitioners cannot merely attach comments from EPA (or any other commenter) to the Petition to support a claim that the Permit is deficient without providing any legal or factual analysis of an alleged deficiency in the Petition itself. Petitioners bear the burden of demonstrating that the alleged flaw – whether identified by the Petitioners or by EPA – resulted in, or may have resulted in, a deficiency in the Permit’s content. See 42 U.S.C. § 7661d(b)(2). . . . Petitioners’ reliance on EPA’s comments is also misplaced because it overlooks the fact that EPA, in overseeing the implementation of state Title V programs, frequently provides comments to Title V permitting authorities to suggest revisions, clarifications, and improvements. EPA’s comments in this regard do not necessarily constitute findings that permits fail to assure compliance with the Act. Petitioners confuse EPA’s suggestions and comments to improve permits with the legal standard EPA must apply in order to object to a permit. . . . Petitioners’ attempt to use EPA comments as per se legal evidence of actual deficiencies in the Permit is insufficient to demonstrate a deficiency in the Permit.” *In the Matter of Chevron Products Company*, Order on Petition No. IX-2004-10 at 5 (March 15, 2005).

emissions of air pollutants sufficient to verify which requirements are applicable to the source.”); *see also White Paper 1* at 6–9; *White Paper 2* at 30–36. In its Supplemental RTC to the WP Permit, WDNR explained its interpretation of the requirements of 40 C.F.R. § 70.5(c)(3)(i)—in sum, that “the accuracy of emission information required for the permit record need only be as high as is necessary to determine applicable requirements”—and explained why it believed these requirements were satisfied. WP Supplemental RTC at 1. The Petitioners neither acknowledge WDNR’s supplemental RTC nor offer a contrary interpretation of § 70.5(c)(3)(i) in the WP Petition.<sup>22</sup>

Here, the Petitioners have not demonstrated that the SSS or WP permit applications failed to satisfy the requirements of § 70.5(c)(3)(i). Both Petitions contain a brief one-sentence allegation that each “permit record fails to evaluate the source’s emissions of PM<sub>2.5</sub> for major source applicability.” SSS Petition at 7; WP Petition at 7. However, neither Petition contains any information to support this allegation, nor even an explanation of the type of “major source applicability” to which the Petitioners refer. Additionally, to the extent that the lack of PM<sub>2.5</sub> emission estimates in the permit applications is related to the issues in Claim B concerning the removal of PM<sub>2.5</sub> emission limits or protection of the NAAQS,<sup>23</sup> the Petitioners have not demonstrated that the title V permits are missing any applicable requirement or are otherwise flawed with respect to these issues. Overall, the Petitioners have not demonstrated whether or how, if the permittees had included quantitative estimates of PM<sub>2.5</sub> emissions in the permit applications (or if WDNR had subsequently requested such information), the title V permits would have been affected in any material way. Therefore, the Petitioners have not demonstrated that the purported deficiencies in the permit applications resulted in a flaw in the title V permits warranting an EPA objection. *See, e.g., Tesoro Order* at 11. Nor have the Petitioners demonstrated that the permit applications lacked information “needed to determine the applicability of, or to impose, any applicable requirement.” 40 C.F.R. § 70.5(c).

Regardless of whether the Petitioners—or the EPA—disagree with WDNR’s reliance on its “PM<sub>2.5</sub> Guidance and Technical Support Document” or its conclusion that PM<sub>2.5</sub> emissions from mechanical sources are negligible,<sup>24</sup> the Petitioners have not demonstrated that the treatment of

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<sup>22</sup> The failure to address this portion of the permit record provides further grounds for denial of the WP Petition. *See supra* note 5 and accompanying text. Because the WP Supplemental RTC was not part of the SSS Permit record and was not available until after the SSS Petition had been submitted, the EPA is not relying on the Petitioners’ failure to directly address the WP Supplemental RTC as a basis for denying the SSS Petition. However, the EPA notes that WDNR’s interpretations of § 70.5(c)(3), as articulated in the WP Supplemental RTC, is equally applicable to the determinations that WDNR made in the SSS Permit action. In any case, WDNR’s WP Supplemental RTC illustrates the type of legal and factual analysis of 40 C.F.R. § 70.5(c)(3) that is lacking from either Petition.

<sup>23</sup> The EPA notes that, although the permit application issues in Claim A and the various issues in Claim B are both based on the same underlying issues concerning WDNR’s conclusions regarding PM<sub>2.5</sub> emissions from mechanical sources, the Petitioners never expressly claim that the failure to include PM<sub>2.5</sub> emission estimates in the title V permit applications resulted in the alleged flaws discussed in Claim B.

<sup>24</sup> Although the Petitioners may disagree with WDNR, the Petitioners have not demonstrated that WDNR’s conclusions concerning PM<sub>2.5</sub> were incorrect. While the Petitioners challenge the general principles surrounding WDNR’s conclusions, they do not provide any evidence refuting WDNR’s conclusions with respect to any particular units at the SSS or WP Facilities. For example, the Petitioners do not attempt to refute WDNR’s conclusions by quantifying (with technical support) anticipated PM<sub>2.5</sub> emissions from any specific emission units at

PM<sub>2.5</sub> in the SSS and WP Permits fails to meet the requirements of 40 C.F.R. § 70.5(c)(3)(i). Therefore, the Petitioners have not demonstrated grounds for the EPA to object to the Permits.<sup>25</sup>

For the foregoing reasons, the EPA denies the Petitioners' request for an objection on this claim.

**Claim B: The Petitioners' claim that Wisconsin's State Implementation Plan prohibits issuance of the proposed SSS and WP permits because DNR has not made a defensible finding that the proposed permits will not cause or contribute to an exceedance of any ambient air quality standard.**

**Petitioners' Claim:** The Petitioners claim that Wisconsin Stat. § 285.63(1)(b) allows WDNR to approve air permits if it finds that the "source will not cause or exacerbate a violation of any ambient air quality standards," including the annual PM<sub>2.5</sub> standard. SSS Petition at 9; WP Petition at 9–10 (citing Wisconsin Stat. § 285.63(1)(b)). The Petitioners assert that this provision is part of the Wisconsin State Implementation Plan (SIP). *Id.*

The Petitioners also claim that both facilities previously had PM<sub>2.5</sub> limits, which the Petitioners claim "were based on the results of modeling to demonstrate that PM<sub>2.5</sub> emissions would not violate the PM<sub>2.5</sub> NAAQS," SSS Petition at 10; *see* WP Petition at 11–12. The Petitioners criticize WDNR's decision to remove the PM<sub>2.5</sub> limits in the current permit action without conducting additional modeling to demonstrate that the modifications associated with the current permit actions will not cause or contribute to a violation of the NAAQS.<sup>26</sup> In the WP Petition, the Petitioners specifically assert that WDNR's decision to remove the limits was premised on the conclusion that mechanical processes do not emit PM<sub>2.5</sub>, which relates to the Petitioners' challenges discussed above in Claim A. WP Petition at 12.

In the SSS Petition, the Petitioners provide a "rough estimate" of PM<sub>2.5</sub> emissions at the SSS facility and claim that PM<sub>2.5</sub> emissions at the facility would "likely" increase from previously modeled rates. SSS Petition at 12; *see id.* at 10–12 (discussing potential PM<sub>2.5</sub> emissions from the facility based on projected PM/PM<sub>10</sub> emissions and compared to the PM<sub>2.5</sub> NAAQS). The Petitioners contend that this potential for increased PM<sub>2.5</sub> emissions "and the lack of modeling to demonstrate compliance with the PM<sub>2.5</sub> NAAQS raises serious questions about compliance with Wisconsin's SIP." *Id.* at 10; *see id.* at 13 (citing Wis. Stat. § 285.63(1)(b)). The Petitioners similarly assert that "the proposed Title V permit violates the CAA and Wisconsin's SIP because the air permit record does not establish that the permit will not cause or contribute to a violation of ambient air standards." *Id.* at 13.

In the WP Petition, the Petitioners similarly discuss projected PM and PM<sub>10</sub> emissions increases. *See* WP Petition at 10–11. The Petitioners assert that WDNR has not adequately supported its decision to

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either the SSS or WP Facilities, nor do the Petitioners even identify any emission units for which they assert PM<sub>2.5</sub> emissions would be more than negligible.

<sup>25</sup> The issue before the EPA is whether the Petitioners demonstrated a flaw in the Permits with respect to an applicable requirement or the requirements of 40 C.F.R. part 70. In determining that the Petitioners have not met this burden, the EPA is not making a specific finding concerning WDNR's analysis or conclusions about potential PM<sub>2.5</sub> emissions from mechanical sources.

<sup>26</sup> For support, the Petitioners quote EPA Region 5 comments on both draft permits, in which the EPA stated: "EPA believes that prior to removing the emission limits, WDNR must provide additional, site-specific justification explaining why the removal of the PM<sub>2.5</sub> limits would not cause or contribute to a violation of the NAAQS." SSS Petition at 10; WP Petition at 12.

remove the PM<sub>2.5</sub> limits, and argue that “without the limits these sources had the potential to violate PM<sub>2.5</sub> air standards.” *Id.* at 10. Therefore, the Petitioners conclude that WDNR has not met its legal obligation to demonstrate that the “source will not cause or exacerbate a violation of any ambient air quality standards.” *Id.* at 12 (quoting Wis. Stat. § 285.63(1)(b)). Again, the Petitioners contend that “the proposed Title V permit violates the CAA and Wisconsin’s SIP because the air permit record does not establish that the permit will not cause or contribute to a violation of ambient air standards.” *Id.* at 13.

***EPA’s Response:*** For the following reasons, the EPA denies the Petitioners’ request for an objection on this claim.

In order to provide grounds for an EPA objection in response to a title V petition, the CAA requires petitioners to demonstrate that a title V permit is not in compliance with requirements of the CAA, including requirements of an EPA-approved SIP. 42 U.S.C. § 7661d(b)(2). The EPA’s regulations define “applicable requirement” to include “any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter.” 40 C.F.R. § 70.2. These regulations further define “applicable requirement” to include “any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act.” *Id.*

The Petitioners’ claims are fundamentally based upon the premise that Wisconsin Stat. § 285.63(1)(b)—the only statutory or regulatory provision cited in either Petition—“is part of Wisconsin’s approved [SIP].” SSS Petition at 9; WP Petition at 9. However, this assertion is incorrect; Wisconsin Stat. § 285.63(1)(b) is not part of Wisconsin’s EPA-approved SIP. *See* 40 C.F.R. § 52.2570 (identification of Wisconsin SIP). Thus, the state statutory provision that the Petitioners cite cannot give rise to an “applicable requirement” for title V permitting purposes and cannot provide grounds for an EPA objection. As this provision is the only legal authority that the Petitioners cite in support of their claim that WDNR “has not made a defensible finding that the proposed permits will not cause or contribute to an exceedance of any ambient air quality standard,” SSS Petition at 9; WP Petition at 9, the Petitioners have failed to demonstrate a flaw in the Permits with respect to an applicable requirement. Thus, the Petitioners have failed to present a basis for the EPA to object to the Permits.<sup>27</sup>

To the extent that the Petitioners’ claims relate more generally to the PM<sub>2.5</sub> NAAQS,<sup>28</sup> as the EPA has repeatedly explained, the promulgation of a NAAQS does not, in and of itself, result in

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<sup>27</sup> Additionally, the only reference to Wisconsin Stat. § 285.63(1)(b) during the public comment periods for either permit was in comments submitted by Midwest Environmental Advocates on the SSS Permit. This statutory provision was not cited or discussed in any comments on the WP Permits. Therefore, with respect to the WP Petition, the failure to raise this fundamental issue with reasonable specificity during the public comment period provides an additional basis for denying the Petitioners’ claims in the WP Petition as they relate to Wisconsin Stat. § 295.63(1)(b). 42 U.S.C. § 7661d(b)(2).

<sup>28</sup> For example, the Petitioners’ claim that each title V permit “violates the CAA . . . because the air permit record does not establish that the permit will not cause or contribute to a violation of ambient air standards,” SSS Petition at 13; WP Petition at 13, may be intended to refer to the PM<sub>2.5</sub> NAAQS.

an applicable requirement in the form of an emission limit for title V sources. *See, e.g., In the Matter of Public Service of New Hampshire Shiller Station*, Order on Petition No. VI-2014-04 at 6 (July 28, 2015) (*Schiller Order*). Moreover, “A source is not obligated to reduce emissions as a result of the [NAAQS] until the state identifies a specific emission reduction measure needed for attainment (and applicable to the source), and that measure is incorporated into a SIP approved by EPA.” *Id.* (quoting Decision on Reconsideration of Petition to Object to Title V Permit for Reliant Portland Generating Station, Upper Mount Bethel Township, Northampton County, PA, 73 Fed. Reg. 64615 (October 30, 2008)). Here, the Petitioners have not cited any specific emission reduction measure included within the Wisconsin SIP that would give rise to the requirement for WDNR to include PM<sub>2.5</sub> emission limits at the SSS or WP Facilities.<sup>29</sup> Thus, while the Petitioners take issue with the removal of PM<sub>2.5</sub> emission limits from the SSS and WP Permits, the Petitioners have not demonstrated that these emission limits were required by any applicable requirement in Wisconsin’s SIP (related to the NAAQS or otherwise), and accordingly have not demonstrated that their removal from the title V permits was improper. Similarly, to the extent that the Petitioners’ claims implicate air dispersion modeling or the projected impacts associated with new projects at the SSS and WP Facilities, the Petitioners have not demonstrated that any applicable requirement would require WDNR to model PM<sub>2.5</sub> emissions in the current permit action or to establish emission limits as a result of such modeling.

The Petitioners’ concerns involve PM<sub>2.5</sub> emission limits established by, and removed from, minor source preconstruction permits issued by WDNR. Although these changes to the underlying NSR permits are now reflected in the sources’ title V permits, they were derived from underlying NSR permits. *See* WP Supplemental RTC at 2 (“The Operation Permit proposed for this facility did not establish or remove PM<sub>2.5</sub> emission limits. These limits were modified in construction permit number 15-MHR-161.”).<sup>30</sup> These revised preconstruction permits were finalized prior to the issuance of the current title V permits for the SSS and WP Facilities.<sup>31</sup> The propriety of WDNR’s decisions undertaken in the course of issuing or modifying duly issued preconstruction permits is not properly before the EPA in a petition to object to a source’s title V permit. *See In the Matter of PacifiCorp Energy Hunter Power Plant*, Order on Petition No. VIII-

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<sup>29</sup> Moreover, the Petitioners have not demonstrated that the state statutory provision that the Petitioners do cite—and which is not part of the Wisconsin SIP, as discussed above—would give rise to an obligation to impose source-specific emission limits through the title V permitting process.

<sup>30</sup> The PM<sub>2.5</sub> emission limits at issue in the WP Permit originated in preconstruction Permit No. 14-MHR-116, and were removed in the more recent preconstruction Permit No. 15-MHR-161, which superseded the prior preconstruction permit. *See* WP RTC at 11. While the WP Supplemental RTC explanation quoted above only directly implicated the WP Permit, the SSS Permit record explains that the PM<sub>2.5</sub> limits at issue there were also originally established in the source’s initial preconstruction permit (No. 14-MHR-069) and removed in the source’s latest preconstruction permit (No. 15-MHR-064). *See* SSS RTC at 7 (“[T]he department has not included a PM-2.5 emission limit for Process P01 in Permit #s 15-MHR-064 [the latest preconstruction permit] and 603108330-P01 [the latest operating permit] because the department has determined – using a weight of evidence approach laid out in the TSD attached to the preliminary determination – that the source will not cause or exacerbate violation of the PM-2.5 air quality standard or increment. The PM-2.5 emission limits in Permit # 14-MHR-069 [an earlier preconstruction permit] were based on modeling results that were based on grossly overestimated PM-2.5 emission estimates. It should be noted that regardless of the department’s position on the ability of low temperature and mechanical sources to emit PM-2.5 emissions, removal of the PM-2.5 emission limitations from this permit, will result in no increase in any potential emissions because the PM-10 emission limits in Superior Silica Sands – Arland Plant’s current permit . . . have been retained.”).

<sup>31</sup> *See supra* notes 11 and 14 and accompanying text.

2016-4 at 8–21 (October 16, 2017) (*PacifiCorp-Hunter Order*); *In the Matter of Big River Steel, LLC*, Order On Petition No. VI-2013-10 at 8–20 (October 31, 2017) (*Big River Steel Order*). Rather, these preconstruction permitting decisions define the NSR-related “applicable requirements” that must be included in the title V permit. *PacifiCorp-Hunter Order* at 8–11; *Big River Steel Order* at 9–11.<sup>32</sup> This holds true regardless of whether a permitting authority processes the issuance or modification of a preconstruction permit separately from—or concurrently with—the issuance, modification, or renewal of a title V permit. *See Big River Steel Order* at 11–12, 18. Here, the Petitioners had the opportunity to challenge the removal of the PM<sub>2.5</sub> emission limits through the appropriate title I process, and may not now use the title V petition process to raise these concerns.<sup>33</sup> The Petitioners have not alleged that WDNR failed to properly incorporate the terms and conditions of preconstruction permits “issued pursuant to regulations approved or promulgated through rulemaking under title I,” 40 C.F.R. § 70.2 (definition of “applicable requirement”), nor have the Petitioners otherwise demonstrated that the permits are deficient with respect to any applicable requirement. Therefore, the Petitioners failed to demonstrate that the title V permits at issue are “not . . . in compliance with applicable requirements” or the requirements of part 70. 40 C.F.R. § 70.8(c)(1); *see* 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

For the foregoing reasons, the EPA denies the Petitioners’ request for an objection on this claim.

**Claim C: The Petitioners’ claim that contrary to the Clean Air Act, the proposed SSS title V permit does not include monitoring to ensure continuous compliance with New Source Performance Standards particulate matter limits.**

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<sup>32</sup> As the EPA has explained, “[A] decision by the EPA not to object to a title V permit that includes the terms and conditions of a title I permit does not indicate that the EPA has concluded that those terms and conditions comply with the applicable SIP or the CAA. However, until the terms and conditions of the title I permit are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through some other mechanism, such as a state court appeal, the ‘applicable requirement’ remains the terms and conditions of the issued preconstruction permit and they should be included in the source’s title V permit.” *Big River Steel Order* at 19; *see PacifiCorp-Hunter Order* at 19; *id.* at 20 (“That the EPA views the incorporation of the terms and conditions of these preconstruction permits into the title V operating permit as proper for purposes of title V does not indicate that the EPA agrees that the state reached the proper decision when setting terms and conditions in the preconstruction permits. . . . The EPA’s lack of objection to the inclusion of that requirement in the title V permit does not indicate that the EPA agrees that it is legal or complies with the Act; it merely indicates that a title V permit is not the appropriate venue to correct any such flaws in the preconstruction permit.”).

<sup>33</sup> As WDNR explained in its Supplemental RTC on the WP Permit: “The [title V] Operation Permit proposed for this facility did not establish or remove PM<sub>2.5</sub> emission limits. These limits were modified in construction permit number 15-MHR-161. This permit was placed in public comment on June 28, 2016. Comments were received and addressed and a final permit was issued on September 30, 2016. Third parties may petition for a contested case hearing or a judicial review on the provisions in a construction permit within 30 days of issuance of the permit. No petition for a contested case hearing or a judicial review was served on the department. As a result, the conditions in construction permit number 15-MHR-161 are permanent and enforceable. The terms and conditions of 15-MHR-161 have been included in the operation permit because they are applicable requirements as defined in 40 CFR Part 70.2, and must be included in the operation permit as required by 40 CFR Part 70.6(a)(1).” WP Supplemental RTC at 2. While this response concerned the WP Permit, the same principles and reasoning apply to the PM<sub>2.5</sub> emission limits initially established in and removed from the preconstruction permit (No. 15-MHR-064) associated with the SSS Facilities.

**Petitioners' Claim:** The Petitioners claim that the SSS Permit does not contain sufficient provisions to assure continuous compliance with emission limits contained in SSS Permit conditions I.A.1.a.(1)(a), I.B.1.a.(1)(a), and I.C.1.a.(1)(a). *See* SSS Petition at 13–15.

The Petitioners claim that the EPA, in commenting on the SSS Permit, indicated that it did not believe that the initial stack test included in the permit was sufficient to assure compliance. *Id.* at 13. The Petitioners claim that the EPA asked WDNR to include a requirement “to operate per the manufacturer’s design manual and per the design parameters included in the application which were relied upon in determining the manufacturer’s guarantee.” *Id.* at 13 (quoting EPA comments at 3). Alternatively, the Petitioners claim that the EPA asked WDNR to include alternative monitoring to ensure continuous compliance. *Id.* at 14.

The Petitioners acknowledge that, in response to the EPA’s comments, WDNR added a permit condition requiring the SSS Facilities to maintain the pressure drop across each bin vent filter between 1 to 6 inches of water column, or an alternate range approved by the department. *Id.* at 14. The Petitioners challenge the sufficiency of this condition on various grounds. The Petitioners claim that this condition “is not the same thing as including all design parameters and manufacturer specifications as enforceable permit conditions,” *id.* at 14, and claim that the SSS Permit does “not include other critical conditions and assumptions underlying the manufacturers’ guarantees,” *id.* at 15. The Petitioners assert that the manufacturer’s guarantees “are conditioned on the use of specified dust collector and filter bag models, proper operation and maintenance, specified temperature and production ranges, maximum inlet gain loads, and a specified pressure drop range.” *Id.* at 15. The Petitioners also claim that the SSS Permit does not specify the manufacturer or model of the dust collector or filter bags used for compliance, and note that the permit record for the proposed permit includes two manufacturer’s guarantees with different warranted control efficiencies. *See id.* at 14–15. Additionally, the Petitioners claim (without elaboration) that the pressure drop range requirement is required of only some of the sources with PM filters. *Id.* at 14.

The Petitioners conclude that the EPA “must object to the proposed Title V permit because it does not include the design parameters and operating conditions of the manufacturers’ guarantees in the permit, nor does the permit include alternative monitoring to ensure continuous compliance.” *Id.* at 15.

**EPA’s Response:** For the following reasons, the EPA denies the Petitioners’ request for an objection on this claim.

The SSS Petition challenges the adequacy of Permit Conditions I.A.1, I.B.1, and I.C.1, each of which apply to different emission units at the SSS Facilities. However, the public comment that discussed the issues now raised in the Petition (relating to manufacturer guarantees) implicated Condition I.C.1 only, and not Conditions I.A.1 or I.B.1.<sup>34</sup> The Petitioners have not demonstrated that it was impracticable to raise the same concern regarding conditions I.A.1 or I.B.1 during the

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<sup>34</sup> In addition to the comment concerning Condition I.C.1, the EPA also submitted comments on Conditions I.A.1.b.(6) and I.B.1.b.(5). However, these comments on Conditions I.A.1 and I.B.1 simply requested that “the pressure drop range should be incorporated into the draft permit.” SSS RTC at 8. WDNR, in responding to these comments, modified conditions I.A.1 and I.B.1 to specify the pressure drop range. The Petitioners have not demonstrated that WDNR’s treatment of Conditions I.A.1 or I.B.1 was inadequate.

public comment period.<sup>35</sup> Therefore, to the extent that the SSS Petition asserts that Conditions I.A.1 and I.B.1 must contain enforceable requirements related to manufacturer guarantees, this claim is denied because it was not raised with reasonable specificity during the public comment period. 42 U.S.C. § 7661d(b)(2).

The Petitioners assert that the EPA must object to the SSS Permit “because it does not include the design parameters and operating conditions of the manufacturer’s guarantees in the permit, nor does the permit include alternative monitoring to ensure continuance [sic] compliance.” SSS Petition at 15. However, as discussed below, the Petitioners have neither demonstrated that the monitoring currently contained in the permit is inadequate, nor that the permit must include additional enforceable conditions in order to assure compliance with all applicable requirements.

The EPA has explained the title V monitoring requirements:

To summarize, EPA’s part 70 monitoring rules (40 C.F.R. §§ 70.6(a)(3)(i)(A) and (B) and 70.6(c)(1)) are designed to satisfy the statutory requirement that “[e]ach permit issued under [title V] shall set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions.” CAA § 504(c). As a general matter, authorities must take three steps to satisfy the monitoring requirements in EPA’s part 70 regulations. First, under 40 C.F.R. § 70.6(a)(3)(i)(A), permitting authorities must ensure that monitoring requirements contained in applicable requirements are properly incorporated into the title V permit. Second, if the applicable requirement contains no periodic monitoring, permitting authorities must add “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit.” 40 C.F.R. § 70.6(a)(3)(i)(B). Third, if there is some periodic monitoring in the applicable requirement, but that monitoring is not sufficient to assure compliance with permit terms and conditions, permitting authorities must supplement monitoring to assure such compliance. 40 C.F.R. § 70.6(c)(1). EPA notes that periodic monitoring that meets the requirements of 40 C.F.R. § 70.6(a)(3)(i)(B) will be sufficient to satisfy the requirements of 40 C.F.R. § 70.6(c)(1) (i.e., will be sufficient to assure compliance with permit terms and conditions). In addition, in many cases, monitoring from applicable requirements will be sufficient to assure compliance with permit terms and conditions. For example monitoring established consistent with EPA’s Compliance Assurance Monitoring (CAM) rule (40 C.F.R. Part 64) will be sufficient to assure compliance with permit terms and conditions, thus meeting the requirements of 40 C.F.R. § 70.6(c)(1).

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<sup>35</sup> Conditions I.A.1, I.B.1, and I.C.1 all involve similar, but not identical, sources of emissions and emission controls, as well as similar monitoring provisions. WDNR, in responding to comments, modified all three conditions to specify pressure drop ranges. However, fundamentally, the SSS Petition does not involve problems arising out of the changes that WDNR made to the SSS Permit after the comment period, but rather the changes that WDNR *did not* make (and which the Petitioners assert are necessary). It is, therefore, appropriate to conclude that the purported grounds for objection concerning conditions in I.A.1 and I.B.1 did not arise after the comment period. *See* 42 U.S.C. § 7661d(b)(2). However, to the extent that the purported grounds for objection concerning conditions I.A.1 and I.B.1 arose after the public comment period, the EPA’s response below would also apply equally to these claims.

The determination of whether the monitoring is adequate in a particular circumstance generally will be a context-specific determination. The monitoring analysis should begin by assessing whether the monitoring required in the applicable requirement is sufficient to assure compliance with permit terms and conditions. In many cases, such as with monitoring developed pursuant to the CAM rule, monitoring from the applicable requirement will be sufficient. Some factors that permitting authorities may consider in determining appropriate monitoring are (1) the variability of emissions from the unit in question; (2) the likelihood of a violation of the requirements; (3) whether add-on controls are being used for the unit to meet the emission limit; (4) the type of monitoring, process, maintenance, or control equipment data already available for the emission unit; and (5) the type and frequency of the monitoring requirements for similar emission units at other facilities. The preceding list of factors is only intended to provide the permitting authority with a starting point for their analysis of the adequacy of the monitoring. As stated above, such a determination generally will be made on a case-by-case basis and other site-specific factors may be considered.

*In the Matter of CITGO Refining and Chemicals Co. L.P.*, Order on Petition No. VI-2007-01 at 6–8 (May 28, 2009).

As an initial matter, the Petitioners have not included a single citation to a statutory or regulatory authority governing the issues they raise. Moreover, the Petitioners have not evaluated the SSS Permit conditions in light of the EPA’s well-established framework for evaluating monitoring issues. Although the Petitioners briefly characterize the PM limits at issue as New Source Performance Standards (NSPS) limits, the Petitioners offer no explanation of what the relevant NSPS provisions require for this type of emission unit, including any monitoring prescribed by these standards, whether such monitoring is included in the Permits, or why such monitoring needs to be supplemented. Regarding the last point, as explained below, the Petitioners have not provided the context-specific analysis supporting their claim that the existing monitoring contained in the permit is inadequate, or consequently that additional monitoring must be required.

The Petitioners briefly refer to Condition I.C.1 (and Conditions I.A.1 and I.B.1), but do not provide any analysis of these conditions or the associated emission-generating processes and control devices involved. The EPA notes that Condition I.C.1 governs PM emissions from five sand storage silos. The SSS Permit requires the facility to control emissions from the storage silos and demonstrate compliance with these limitations through the use of individual bin vent filters. Specifically, Condition I.C.1.b. requires the facility to: operate the filters at all times the storage silos are in operation (I.C.1.b.(2)); install and properly operate instrumentation to monitor the pressure drop across each bin vent filter (I.C.1.b.(3)); measure and record the pressure drop across each bin vent filter once every 8 hours of operation or once per day (I.C.1.b.(4)); maintain the pressure drop across each bin vent filter between 1-6 inches of water column, or an alternate range approved by the department (I.C.1.b.(5)); and to inspect the bin vent filters every 6 months and conduct repairs as necessary (I.C.1.b.(6)). With the exception of Condition I.C.1.b.(5) (mandating a pressure drop range), the Petitioners fail to acknowledge these permit conditions related to demonstrating compliance with the applicable PM limits. The

Petitioners have not fully evaluated these monitoring conditions, nor explained how they function in relation to the emission units at issue, the processes by which emissions are formed, the applicable requirements limiting such emissions, or how such emissions are controlled. Moreover, the Petitioners do not explain why, as a technical matter, maintaining and monitoring pressure drop across the bin vent filters is inadequate to assure compliance with the PM limits.

Instead of explaining why the current permit terms are inadequate to assure compliance, the Petitioners present arguments concerning why the permit must contain additional conditions, including “all operating requirements and design parameters in the manufacturers’ guarantees.” Petition at 15.<sup>36</sup> Specifically, the Petitioners assert that the manufacturer’s guarantees “are conditioned on the use of specified dust collector and filter bag models, proper operation and maintenance, specified temperature and production ranges, maximum inlet grain loads, and a specified pressure drop range.” *Id.* However, beyond simply identifying these variables, the Petitioners have not presented any explanation of why all (or any) of these variables must be made enforceable or otherwise monitored in order to assure compliance with the applicable permit limits. The Petitioners have not attempted to explain why any of these conditions or assumptions—in addition to the pressure drop ranges and other requirements that are currently specified in the SSS Permit—are “critical” to assuring that the control devices operate effectively such that the permit assures compliance with relevant emission limits on the sand storage silos at issue in Condition I.C.1. *Id.*

In summary, the Petitioners make general allegations concerning the monitoring they assert is necessary, but do not demonstrate, with citation or analysis, why the existing permit terms and conditions are inadequate or that any particular additional terms are necessary to assure compliance with applicable requirements.<sup>37</sup>

For the foregoing reasons, the EPA denies the Petitioners’ request for an objection on this claim.

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<sup>36</sup> These allegations, like those in the other claims, are based on EPA comments. As noted above, reliance on EPA comments alone, without any further analysis, is rarely sufficient to demonstrate grounds for an EPA objection in a title V petition. *See, e.g., In the Matters of Linn Operating Inc. Fairfield Lease and Ethyl D Lease*, Order on Petition Nos. IX-2015-8 and IX-2015-9 at 11–12 (October 6, 2017); *In the Matter of Chevron Products Company*, Order on Petition No. IX-2004-10 at 50 (March 15, 2005). Moreover, the EPA notes that the EPA’s comments on the SSS Permit did not require WDNR to adopt this strategy as the only means by which the permit could assure compliance; the EPA indicated that WDNR could also “incorporate an alternative monitoring to ensure continuous compliance with the particulate matter limits.” The Petitioners have not demonstrated that the current permit, which incorporates an alternative strategy including daily monitoring of pressure drop ranges in response to the EPA’s comments, is insufficient to ensure compliance with the relevant PM limits.

<sup>37</sup> While the EPA’s response specifically relates to the requirements in Condition I.C.1, as noted above, to the extent that the basis for arguments concerning conditions I.A.1 and I.B.1 arose after the comment period, the rationale presented above applies equally to those Conditions, which contain similar provisions to Condition I.C.1.

**V. CONCLUSION**

For the reasons set forth above and pursuant to CAA § 505(b)(2) and 40 C.F.R. § 70.8(d), I hereby deny the Petitions as described above.

Dated: FEB 26 2018

A handwritten signature in black ink, appearing to read "Scott Pruitt", written over a horizontal line.

E. Scott Pruitt  
Administrator