BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION NO. IX-2022-6
	)	
TUCSON ELECTRIC POWER COMPANY	)	ORDER RESPONDING TO
SPRINGERVILLE GENERATING STATION	)	PETITION REQUESTING
APACHE COUNTY, ARIZONA	)	OBJECTION TO THE ISSUANCE OF
PERMIT NO. 65614	)	TITLE V OPERATING PERMIT
	)	
ISSUED BY THE ARIZONA	)	
DEPARTMENT OF ENVIRONMENTAL QUALITY	)	
	)	

ORDER DENYING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated June 20, 2022 (the Petition) from Sierra Club and National Parks Conservation Association (NPCA) (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that EPA Administrator object to the significant permit revision No. 91093 to the final operating permit No. 65614 (the Final Title V Permit) issued by the Arizona Department of Environmental Quality (ADEQ) to the Tucson Electric Power Company Springerville Generating Station (Springerville or the facility) in Apache County, Arizona. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and Title 18, Chapter 2, Article 3 of the Arizona Administrative Code (A.A.C.). *See also* 40 Code of Federal Regulations (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.

Based on a review of the Petition and other pertinent materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained in Section IV of this Order, EPA denies the Petition requesting that the EPA Administrator object to the Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 766la(d)(1), requires each state to develop and submit to EPA an operating permit program to meet the requirements of title V of the CAA and EPA's implementing regulations at 40 C.F.R. part 70. EPA granted interim approval of ADEQ's title V operating permit program in 1996, 61 Fed. Reg. 55910 (October 30, 1996). EPA granted full approval of Arizona's title V operating permit program in 2001. 66 Fed Reg. 63175 (December 5, 2001). This program, which became effective on November 30, 2001, is codified in Title 18, Chapter 2, Article 3 of the Arizona Administrative Code (A.A.C.).

All major stationary sources of air pollution and certain other sources are required to apply for and operate in accordance with 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. 42 U.S.C. §§ 7661a(a), 7661b, 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 compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* 42 U.S.C. § 7661c(c). One purpose of the title V program is to "enable the source, States, 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 compiling the air quality control requirements as they apply to the source's emission units and for providing adequate monitoring, recordkeeping, and reporting to assure 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) 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 EPA for review. 42 U.S.C. § 7661d(a). Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the proposed permit if EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of EPA's 45-day review period, petition the Administrator to object to the permit. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

Each petition must identify the proposed permit on which the petition is based and identify the petition claims. 40 C.F.R. § 70.12(a). Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under part 70. 40 C.F.R. § 70.12(a)(2). Any arguments or claims the petitioner wishes EPA to consider in support of each issue raised must generally be contained within the body of the petition.[1] *Id.*

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). 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); *see also* 40 C.F.R. § 70.12(a)(2)(v).

[1] If reference is made to an attached document, the body of the petition must provide a specific citation to the referenced information, along with a description of how that information supports the claim. In determining whether to object, the Administrator will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. *Id*.

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. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).[2] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to EPA.[3] 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," under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part 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)).[4] When courts have reviewed 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.[5] Certain aspects of the petitioner's demonstration burden are discussed in the following paragraph. A more detailed discussion can be found in the preamble to EPA's proposed petitions rule. *See* 81 Fed. Reg. 57822, 57829–31 (August 24, 2016); *see also 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*).

EPA considers 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 a petitioner has provided the relevant analyses and citations to support its claims. For each claim, the petitioner must identify (1) the specific grounds for an objection, citing to a specific permit term or condition where applicable; (2) the applicable requirement as defined in 40 C.F.R. § 70.2, or requirement under part 70, that is not met; and (3) an explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under part 70. 40 C.F.R. § 70.12(a)(2)(i)–(iii). If a petitioner does not identify these elements, EPA is left to work out the basis for the 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

[2] *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (*NYPIRG*).
[3] *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.
[4] *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)).
[5] *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

legal reasoning, evidence, and references is reasonable and persuasive.").[6] Relatedly, EPA has pointed out in numerous previous orders that 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).[7] Also, the failure to address a key element of a particular issue presents further grounds for 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).[8]

Another factor EPA examines is whether the petitioner has addressed the state or local permitting authority's decision and reasoning contained in the permit record. 81 Fed. Reg. at 57832; *see Voigt v. EPA*, 46 F.4th 895, 901-902 (8th Cir. 2022); *MacClarence*, 596 F.3d at 1132–33.[9] This includes a requirement that petitioners address the permitting authority's final decision and final reasoning (including the state's response to comments) where these documents were available during the timeframe for filing the petition. 40 C.F.R. § 70.12(a)(2)(vi). Specifically, the petition must identify where the permitting authority responded to the public comment and explain how the permitting authority's response is inadequate to address (or does not address) the issue raised in the public comment. *Id*.

The information that EPA considers in determining whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. 40 C.F.R. § 70.13. 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 required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis'); any comments the permitting authority received during the public participation process on the draft permit; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; and all 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). *Id.* If a final permit

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[6] *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*).

[7] *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); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007) (*Georgia Power Plants Order*); *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (March 15, 2005).

[8] *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.

[9] *See also, e.g.*, *Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. App'x *11, *15 (2d Cir. 2018) (summary order); *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 why 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); *Georgia Power Plants Order* at 9–13 (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).

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 when determining whether to grant or deny the petition. *Id*.

III. BACKGROUND

A. The Springerville Facility

The Springerville facility, owned by Tucson Electric Power Company (TEP), is located in Apache County, approximately 15 miles north of Springerville, Arizona, on U.S. Highway 191. The Springerville Generating Station operates four pulverized coal-fired units and includes various ancillary facilities such as an oil-fired auxiliary boiler, a coal preparation plant, coal storage piles, lime storage and handling facilities, and two mechanical-draft wet cooling towers. The four units have a combined electrical output capacity of 1,765.8 MW. The facility is a major source under title V for particulate matter (PM_{10}), sulfur dioxide (SO_2), nitrogen oxides (NO_x), carbon monoxide (CO), volatile organic compounds (VOCs), sulfuric acid, hazardous air pollutants (HAPs), and the individual HAPs of one or more cyanide compounds, hydrogen chloride, and hydrogen fluoride. In order to control HAP emissions, the facility is subject to the Mercury and Air Toxics Rule at 40 C.F.R. part 63, subpart UUUUU. The facility is also subject to the Acid Rain Program of the Clean Air Act.

EPA conducted an analysis using EPA's EJScreen[10] to assess key demographic and environmental indicators within a five-kilometer radius of the Springerville Generating Station. This analysis showed a total population of approximately 0 residents within a five-kilometer radius of the facility.

B. Permitting History

On September 11, 2017, ADEQ issued a title V renewal permit for Springerville. On September 22, 2021, TEP submitted an application for a significant revision to its title V permit to establish SO_2 emissions limits for Units 1 and 2 in support of ADEQ's planning under the Regional Haze program. TEP amended its application with a request for an additional voluntary SO_2 emission limit for Unit 3 on December 17, 2021. ADEQ published notice of a draft title V permit revision (Draft Permit) and accompanying technical support document (TSD) on January 20, 2022, subject to a public comment period that ran until February 23, 2022. On March 7, 2022, ADEQ submitted an initial proposed title V permit, along with its responses to public comments (RTC), to EPA for its 45-day review. On April 15, 2022, ADEQ then submitted a revised Proposed Title V Permit to the EPA (Revised Proposed Title V Permit,) along with the Amended RTC. EPA's 45-day review period ended on May 31, 2022, during which time EPA did not object to the Revised Proposed Title V Permit. ADEQ issued the Final Title V Permit for the Springerville Generating Station on May 2, 2022.

[10] EJScreen is an environmental justice mapping and screening tool that provides EPA with a nationally consistent dataset and approach for combining environmental and demographic indicators. *See https://www.epa.gov/ejscreen/what-ejscreen*.

C. Timeliness of Petition

Pursuant to the CAA, if 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). EPA's 45-day review period expired on May 31, 2022. Thus, any petition seeking EPA's objection to the Final Title V Permit was due on or before August 1, 2022. The Petition was received June 20, 2022, and, therefore, EPA finds that the Petitioners timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

EPA is responding to Claims I, II, and III together due to the similarity of the issues raised in the Petition. EPA's response to these claims is located after the claim summary for Claim III.

Claim I: The Petitioners Claim That "The Permit Revision is Deficient Because It Incorporates 'Voluntary' SO_2 Emission Limits That Circumvent the Regional Haze Program."

Petitioners' Claim: The Petitioners claim that the incorporation of voluntary emission limits into the Final Title V Permit prior to EPA approval of ADEQ's State Implementation Plan (SIP) for the Regional Haze Program contravenes the purposes of title V and the Regional Haze Program and is invalid under Arizona state regulations. Petition at 8–9.

The Petitioners first note that the SO_2 emissions limits in the Final Title V Permit are similar to limits described in a preliminary reasonable progress demonstration submitted to EPA by ADEQ under the Regional Haze Program, and that the terms of Attachment "E" of the Final Title V Permit states that the limits imposed on Units 1 and 2 will become effective one year after EPA approval of ADEQ's Regional Haze SIP.[11] *Id.* at 9–10. The Petitioners claim that since EPA has not yet approved ADEQ's SIP and the SIP that is finally approved may contain different emissions limits with which the source must comply, the Final Title V Permit terms may never be enforceable. *Id.* at 10–11. The Petitioners claim that the potential for inconsistencies between the Final Title V Permit and an EPA-approved SIP runs counter to the objective of title V permits. *Id.* at 13.

The Petitioners also claim that ADEQ has no legal basis for incorporating voluntary emissions limits into the Final Title V Permit. *Id.* at 10. For support, the Petitioners identify A.A.C. R18-2-306.01,[12] which they contend only provides for the establishment of voluntary title V permit terms where a source is either avoiding classification as a major source or avoiding compliance

[11] EPA notes that on August 15, 2022, ADEQ submitted a SIP revision to EPA intended to fulfill the state's regional haze obligations for the second planning period, pursuant to CAA § 169A and 169B, and 40 CFR Part 51, Subpart P. That SIP revision is referred to as ADEQ's "Regional Haze SIP."

[12] "A source may voluntarily propose in its application, and accept in its permit, emissions limitations…that are permanent, quantifiable, and otherwise enforceable as a practical matter in order to avoid classification as a source that requires a Class I permit or to avoid one or more other applicable requirements…The emissions limitations, controls, or other requirements to be imposed for the purpose of avoiding an applicable requirement [must be] at least as stringent as the emissions limitations, controls, or other requirements that would otherwise be applicable to that source." A.A.C. R18-2-306.01.

with certain applicable requirements; if the latter, the source must show that the voluntary emission requirements are "at least as stringent" as the requirements that would otherwise be applicable. *Id.*at 10–11. The Petitioners argue that since Springerville is not adopting the voluntary emission limits in order to avoid any applicable requirement, and there is no guarantee that the voluntary emission limits are at least as stringent as limits that may be required under Arizona's forthcoming final Regional Haze SIP, there is no legal basis under the Clean Air Act or under state law for the Final Title V Permit to contain voluntary emission limits. *Id.* at 10–11. The Petitioners argue that the authorities cited by ADEQ in the permit—A.R.S., Section 49-426(E) and A.A.C. 18-2-306(A)(2)—do not provide sufficient legal basis for designating the title V permit terms voluntary or "State-Enforceable Only." *Id.* at 10–12. The Petitioners conclude that ADEQ should wait to revise Springerville's title V permit until EPA has approved a final Regional Haze SIP, and only then should ADEQ incorporate the relevant SO_2 limits into the title V permit. *Id.* at 13.

Claim II: The Petitioners Claim That "The Permit Revision is Deficient Because It Fails to Provide the Legal and Factual Basis for the SO_2 Emission Limits."

Petitioners' Claim: The Petitioners claim that ADEQ failed to meet the requirements of 40 C.F.R. § 70.7(a)(5) and A.A.C. R18-2-304(J)(4) by not identifying the legal authority for incorporating voluntary SO_2 emission limits in the statement of basis and not providing factual support for the emissions limits. *Id.* at 13–15. The Petitioners contend that neither the public notice nor the draft TSD satisfy the requirements of 40 C.F.R. § 70.7(a)(5), (h)(2) because they do not identify any legal authority that would allow ADEQ to incorporate the "voluntary" SO_2 limits into Springerville's title V permit. *Id.* at 14. The Petitioners acknowledge that the Revised Proposed Title V Permit labels the requirements in Attachment "E" as "State Enforceable Only;" however, the Petitioners assert "even 'state only' limits must have a valid legal basis, and the record must show that any 'voluntary' 'state only' limits are at least as stringent as the otherwise applicable requirements." *Id.* The Petitioners claim that "a state permitting authority may not pick and choose when it provides the statement of basis—that document is 'require[d] . . . at all points in the permit review process for every permit.'" *Id.* at 15 (quoting 85 Fed. Reg. 6431, 6436 (Feb. 5, 2020)).

Claim III: The Petitioners Claim That "The Permit Revision is Deficient Because the Public Notice Failed to Inform the Public of the Permit Revision's Significance to the Regional Haze Program."

Petitioners' Claim: The Petitioners claim that the public notice issued by ADEQ violates requirements set forth in 40 C.F.R. § 70.7(h)(2) and A.A.C. R18-2-330(C)(3) by failing to "explicitly identify" the permit revision's relation to the Regional Haze Program. *Id.* at 15. The Petitioners assert that since ADEQ stated elsewhere in the permit record that the purpose of the permit revision was to support the submission of its Regional Haze State Implementation Plan to EPA, the Regional Haze program should have been identified in the public notice document as an "activity or activities involved in the permit action." *Id.*

For support, the Petitioners reference *In re Midwest Generation, LCC Waukegan Generating Station*, Order on Petition No. V-2004-5, 2005 WL 6588841 (Sept. 22, 2005), and claim that

EPA objected to the Midwest Generation title V permit on the grounds that the public notice was deficient because it failed to identify whether changes to Title I requirements had been made. *Id.* at 16.

EPA's Response to Claims I, II, and III.

For the following reasons, EPA denies the Petitioners' request for an objection on all three of the claims in the Petition.

As a result of public comments regarding similar issues raised in the Petition, ADEQ submitted the Revised Proposed Title V Permit and Amended RTC to EPA on April 15, 2022. In the Revised Proposed Title V Permit, ADEQ labeled all terms and conditions in Attachment "E" of the Revised Proposed Title V Permit as "State Enforceable Only." ADEQ explained:

> The updated citations reference the Department's authority to add the emission limits and associated monitoring, recordkeeping and reporting requirements under A.A.C. R18-2-306 and Arizona Revised Statutes (ARS) 49-426.E and are designated as state enforceable only. The requirements of Attachment "E" will become federally enforceable upon EPA approval of ADEQ's Regional Haze SIP. Because the permit citations were updated after the responsiveness summary was sent out to the commenters, an amended version of the responsiveness summary and draft permit have been sent out to the commenters prior to re-proposing the documents to EPA for review.

Amended RTC at 13.[13] ADEQ further explained that "the methodology used to create the Regional Haze Four Factor Analysis and associated limits is outside the scope of this permit revision." *Id.* at 7.

The permit terms and conditions that are the subject of the Petitioners' challenges in Claims I, II, and III are all within Attachments "E." ADEQ correctly explained in the Amended RTC that the terms and conditions of Attachment "E" are state-only enforceable, and therefore, those terms and conditions, and the basis for them, are not subject to the requirements of ADEQ's EPA-approved title V program or 40 C.F.R part 70. RTC at 6–7. As specified in 40 C.F.R part 70, permitting authorities may include terms and conditions in a title V permit "that are not required under the Act or under any of its applicable requirements" so long as such terms and conditions

[13] ADEQ also updated Condition III.D.1.a(3) of Attachment "B" with the label "State Enforceable Only" but that permit term is not at issue in the Petition or noted as being part of the Regional Haze SIP. *See* ADEQ, State Implementation Plan Revision: Regional Haze Program (2018–2028), Appendix G at 711–715 (August 15, 2022), available at https://static.azdeq.gov/aqd/sip/2021_regionalhaze.pdf.

are "specifically designate[d] as not being federally enforceable." 40 C.F.R. § 70.6(b)(2).[14] Such permit terms are not subject to the requirements of 40 C.F.R. §§ 70.6, 70.7, or 70.8 and will not be evaluated by EPA unless those terms are drafted in a way that might impair the effectiveness of the title V permit or hinder a permitting authority's ability to implement or enforce the title V permit. *See* 40 C.F.R. § 70.6(b)(2).[15] Because EPA has not taken final approval action on ADEQ's Regional Haze SIP, which contains the requirements in Attachment "E", the terms and conditions in Attachment "E" are correctly labeled as state-only enforceable and are not "applicable requirements" under title V. If EPA approves ADEQ's Regional Haze SIP as submitted, these requirements would become federally enforceable, applicable requirements under title V. At that time, EPA would expect the title V permit to be updated to remove the state-only enforceable label and include appropriate citations of authority. Therefore, at this time, the terms and conditions in Attachment "E" are not subject to any requirements of 40 C.F.R. part 70, including the public notice requirements under 40 C.F.R. § 70.7(h), the statement of basis requirements under 40 C.F.R. § 70.7(a)(5), and the public petition opportunity under 40 C.F.R. § 70.8(d).[16]

With regards to the Petitioners' argument that title V is "not generally intended to create any new substantive requirements,"[17] this general principle does not prohibit a permitting authority from adding new state-only limits or requirements if it sees fit under its own independent authority.[18] These voluntary, state-only limits are not subject to the requirements of 40 C.F.R. part 70 and

[14] *See, e.g., In the Matter of Waupaca Foundry, Inc. Plants 2/3* Order on Petition No. V-2016-21 at 9 (June 7, 2017) (declining to address issues raised in the petition regarding Wisconsin's state-only hazardous air pollutant requirements); *In the Matter of Waupaca Foundry, Inc. Plant 1* Order on Petition No. V-2015-02 at 9 (July 14, 2016) ("These regulations are not part of Wisconsin's SIP, are not applicable requirements under title V, and are therefore not appropriate to address in a title V petition."); *In the Matter of Hu Honua Bioenergy Facility,* Order on Petition No. IX-2011-1 at 21 (February 7, 2014) ("[T]his provision is a state only requirement and not part of Hawaii's SIP; therefore, it is not an applicable requirement for purposes of title V and not subject to review in a title V petition."); *In the Matter of Harquahala Generating Station Project,* Order on Petition, at 5 (July 2, 2003) (*Harquahala Order*) ("State-only terms are not subject to the requirements of Title V and hence are not [to] be evaluated by EPA unless those terms are drafted in a way that might impair the effectiveness of the permit or hinder a permitting authority's ability to implement or enforce the permit.").

[15] *Harquahala Order* at 5.

[16] In addition to 40 C.F.R § 70.7(h)(2) not applying to state-only requirements, EPA notes that part 70 does not specifically require the public notice document itself to include the information specified in § 70.7(h)(2). When evaluating whether the public notice requirements of 40 C.F.R. § 70.7(h)(2) have been satisfied, EPA considers whether the permit record as a whole (not solely the text of the public notice document) contains all information necessary for the public to understand the permit action. *See e.g., In the Matter of Shaw Industries Plant No. 80,* Order on Petition, at 9 (November 15, 2002) ("[The permitting authority] adequately addressed the requirement to identify the 'activity or activities involved in the permit action' in accordance with § 70.7(h)(2) by identifying the facility's primary operation in the public notice of the draft permit. Interested parties may obtain more detailed information by reviewing the relevant documents as directed by the public notice."). In this case, the other materials publicly available at the time of the public notice, including the Draft Permit and TSD, explained that the permit revisions were establishing voluntary SO_2 limits for Regional Haze. *See* Draft Permit at 3; TSD at 2. Even if these provisions were federally enforceable requirements subject to 40 C.F.R. § 70.7(h)(2), which they are not, the Petitioners still would not have demonstrated that the permit record as a whole did not satisfy the public notice requirements of part 70.

[17] Petition at 10, citing *Operating Permit Program*, 57 Fed. Reg. 32,250 (July 21, 1992).

[18] *In the Matter of ConocoPhillips Company – San Francisco Refinery,* Order on Petition No. IX-2004-09, at 22 (March 15, 2005) ("While Title V generally does not authorize the creation of new federally enforceable limits, a permitting authority is not prohibited from adding new limits or requirements if it sees fit under its own independent authority.").

These voluntary, state-only limits are not subject to the requirements of 40 C.F.R. part 70 and accordingly, EPA will not consider claims related to the appropriateness of these limits, the legal authority, the adequacy of their monitoring, recordkeeping, and reporting, or any other requirement of part 70. *See* 40 C.F.R. § 70.6(b)(2).[20]

Lastly, EPA acknowledges the Petitioners' interest in public participation in ADEQ's Regional Haze planning process. However, such concerns are more appropriately addressed through ADEQ's public notice of their Regional Haze SIP and proceedings related to EPA's review of ADEQ's Regional Haze SIP, not through a title V petition. As noted by ADEQ in its response to the Petitioners' comments on the Draft Title V Permit, "the methodology used to create the Regional Haze Four Factor Analysis and associated limits is outside the scope of this permit revision… Comments on the stringency of the emission limits or on the baseline emissions used in the four-factor analysis will be addressed in the Regional Haze SIP public comment period." Amended RTC at 6. ADEQ noticed its Regional Haze SIP on June 13 and the public comment period ran through July 14, 2022.[21] EPA notes that the Petitioners, Sierra Club and National Parks Conservation Association, submitted comments on the Regional Haze Plan to ADEQ on July 14, 2022 and ADEQ provided responses to those public comments in their Regional Haze SIP submission to EPA.[22] Once EPA proposes to take action on ADEQ's Regional Haze SIP, members of the public will have an opportunity to comment on EPA's proposed action, and voice any concerns to EPA regarding the limits in Attachment "E" in the context of Regional Haze.

V. CONCLUSION

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

Dated: JAN 19 2023

Michael S. Regan
Administrator

[20] *Harquahala Order* at 5.
[21] ADEQ, State Implementation Plan Revision: Regional Haze Program (2018-2028), Appendix E (August 15, 2022), available at https://static.azdeq.gov/aqd/sip/2021_regionalhaze.pdf.
[22] *Id.* at 1154.