BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	)	
	)	
Public Service Company of New Mexico	)	
San Juan Generating Station	)	
	)	ORDER RESPONDING TO
	)	PETITIONERS' REQUEST THAT
Permit Number: P062R2	)	THE ADMINISTRATOR
	)	OBJECT TO ISSUANCE OF A
	)	STATE OPERATING PERMIT
Issued by the New Mexico	)	
Environment Department	)	
Air Quality Bureau	)	Petition Number: VI-2010-___
	)	

ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR OBJECTION TO PERMIT

The United States Environmental Protection Agency ("EPA") received a Petition to Object to Issuance of a State Title V Operating Permit ("Petition") on November 19, 2010, from WildEarth Guardians (WEG), San Juan Citizens Alliance (SJCA), and Carson Forest Watch (collectively "Petitioners"). The Petitioners request that the EPA object, pursuant to section 505(b)(2) of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §7661d(b)(2), to the renewal, by the New Mexico Environment Department Air Quality Bureau ("NMED") of the title V operating permit issued to Public Service Company of New Mexico ("PNM") to operate the San Juan Generating Station ("SJGS"), a coal-fired power plant in San Juan County, New Mexico.

Specifically, the Petitioners claim that the SJGS title V permit ("Permit" or "SJGS permit"): (1) fails to ensure compliance with the Prevention of Significant Deterioration ("PSD") requirements; (2) fails to ensure compliance with source impact analysis requirements in the New Mexico State Implementation Plan; (3) fails to require prompt reporting of deviations; (4) fails to require sufficient periodic monitoring; and (5) includes a condition that is contrary to applicable requirements.

The EPA has reviewed the Petitioners' allegations pursuant to the standard set forth in section 505(b)(2) of the Act, which requires the Administrator to issue an objection if the

Petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of the Act. *See also* 40 C.F.R. § 70.8(d); *New York Public Interest Research Group v. Whitman,* 321 F .3d 316,333 n.ll (2d Cir. 2003).

Based on a review of the Petition and other relevant materials, including the Permit and Permit record, and relevant statutory and regulatory authorities, I grant in part and deny in part the Petition requesting that the EPA object to the Permit.[1]

STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act, 42 U.S.C. § 7661a(d)(1), calls upon each state to develop and submit to the EPA an operating permit program to meet the requirements of title V. The EPA granted interim approval to the title V operating permit program submitted by the state of New Mexico, effective December 19, 1994. 59 Fed. Reg. 59656 (November 18, 1994). Subsequently, the EPA granted full approval of the New Mexico title V operating permit program, effective December 26, 1996, and approved a revision to the program in 2004. 40 C.F.R. Part 70, Appendix A; *see also* 61 Fed. Reg. 60032, 60034 (November 26, 1996) and 69 Fed. Reg. 54244, 54247 (September 8, 2004). New Mexico State Implementation Plan ("SIP") revisions related to references from the SJGS permit terms include approval of 20.2.7 New Mexico Administrative Code (NMAC) - Excess Emissions. 74 Fed. Reg. 46910 (September 14, 2009).

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act, including requirements of the applicable SIP. CAA sections 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a). The title V operating permits program does not generally impose new substantive air quality control requirements (referred to as "applicable requirements"), but it does require permits to contain monitoring, recordkeeping, reporting, and other requirements to assure compliance by sources with applicable requirements. *See* 57 Fed. Reg. 32250 (July 21, 1992) (EPA final action promulgating 40 C.F.R. Part 70). One purpose of the title V program is to "enable the source, states, EPA and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements." 57 Fed. Reg. 32250, 32251 (July 21, 1992). Thus, the title V operating permits program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

For a major modification of a major stationary source, applicable requirements include the requirement to obtain a preconstruction permit that complies with applicable new source review requirements (e.g., PSD requirements). Part C of the CAA establishes the PSD program, the preconstruction review program that applies to areas of the country, such as San Juan

[1] EPA acknowledges Petitioners' alternative requests that the Administrator treat this petition as a petition to reopen the Permit for cause in accordance with 40 C.F.R. § 70.7(f), or that the Administrator treat this petition as a petition to reopen the Permit for cause in accordance with 40 C.F.R. § 70.7(f) pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 553(e) and 555(b). Petition at 3. EPA is not responding to these alternative requests in today's Order.

County, that are designated as attainment or unclassifiable for the national ambient air quality standards (NAAQS). CAA §§ 160-169, 42 U.S.C. §§ 7470-7479. New Source Review, or "NSR," is the term used to describe both the PSD program as well as the nonattainment NSR program (applicable to areas that are designated as nonattainment with the NAAQS). In attainment areas, such as San Juan County, New Mexico, where SJGS is located, a major stationary source may not begin construction or undertake certain modifications without first obtaining a PSD permit. CAA § 165(a)(l), 42 U.S.C. § 7475(a)(l). The PSD program analysis must address two primary and fundamental elements before the permitting authority may issue a permit: (1) an evaluation of the impact of the proposed new or modified major stationary source on ambient air quality in the area, and (2) an analysis ensuring that the proposed facility is subject to Best Available Control Technology (BACT) for each pollutant subject to regulation under the PSD program. CAA § 165(a)(3),(4), 42 U.S.C. § 475(a)(3), (4); *see also* 20.2.74.200 NMAC (New Mexico's PSD program).

The EPA implemented PSD through rule initially on December 5, 1974. 39 FR 23836. The CAA amendments of 1977 set out PSD requirements within the Act. The EPA implemented the amendment's PSD requirements in two largely identical sets of regulations: one set found at 40 C.F.R. § 52.21, contains the EPA's federal PSD program, which applies in areas without a SIP-approved PSD program; the other set of regulations, found at 40 C.F.R. § 51.166, contains requirements that state PSD programs must meet to be approved as part of a SIP.

New Mexico's implementation of PSD included both a partially delegated program at its outset and later switched to a fully approved program as part of the SIP. On December 20, 1980, New Mexico requested a partial program delegation from EPA Region 6. EPA Region 6 evaluated and acted on that request by granting NMED (known as the NM Environmental Improvement Division at the time) partial delegation that included the administrative review of PSD permit applications and the technical development of PSD permits, including authority for source inspection for compliance and review of compliance test reports. This authority extended to sources in those parts of New Mexico that did not include San Bernalillo County or Indian governed lands. This approval was effective on February 16, 1982. 47 FR 11318, March 16, 1982. With that partial delegation, both EPA Region 6 and NMED had to sign the permits, which NMED was responsible for developing and enforcing.

On June 27, 1983, the governor of New Mexico submitted a SIP revision that included NM Regulation 707 (PSD program implementation and enforcement requirements), for which approval was proposed on September 22, 1983 (*See* 48 FR 43194). New Mexico supplemented that submittal on February 21, 1984, and May 14, 1985. In February 1987, the EPA published a notice of conditional approval of the SIP, which incorporated PSD into NM Regulation 707, which was effective on March 30, 1987 (*See* 52 FR 5964, February 27, 1987). The conditional approval was related to pending modifications to NM and federal stack height rules, which were successfully completed. The PSD requirements in the NMAC were recodified in 20 NMAC Chapter 2 Part 74 on July 20, 1995; *see also* 40 C.F.R. § 52.793. The applicable requirements of the Act for construction of new major sources, or major modifications at major sources, such as at SJGS, include the requirement to comply with PSD requirements under the New Mexico SIP (*See,* e.g., 40 C.F.R. § 70.2). In this case, New Mexico's rules require a source to apply for a

PSD permit, which is then incorporated into the existing title V permit as a revision to the title V permit.

Consistent with the Act and the EPA's regulations, to obtain a PSD permit in New Mexico pursuant to NMAC 20.2.74.200, the applicant must show that the source will not cause or contribute to a violation of any NAAQS and satisfy the BACT requirement for any pollutant subject to regulation. As we have previously stated, if a PSD permit that is incorporated into a title V permit does not meet these requirements of the SIP, the title V permit will not be in compliance with all applicable requirements.[2]

Under CAA section 505(a), 42 U.S.C. § 766ld(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 permit, if it is determined not to be in compliance with applicable requirements or requirements under 40 C.F.R. Part 70. 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act provides that any person may petition the Administrator, within 60 days of expiration of the EPA's 45-day review period, to object to the permit. 42 U.S.C. § 7661d(b)(2) and 40 C.F.R. § 70.8(d). The petition must "be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)." CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2).

In response to such a petition, the Administrator must issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the CAA. 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(c)(1); *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 333 n. 11 (2d Cir. 2003) ("NYPIRG 2003"). Under CAA section 505(b)(2), the burden is on the petitioner to make the required demonstration to the EPA. *Sierra Club v. Johnson*, 541 F.M. 1257, 1266-67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677-78 (7th Cir. 2008); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) (discussing the burden of proof in title V petitions); see also *NYPIRG 2003*, 321 F.3d at 333 n. 11. In evaluating a petitioner's claims, the EPA considers, as appropriate, the adequacy of the permitting authority's rationale in the permitting record, including the response to comment. If, in responding to a petition, the EPA objects to a permit that has already been issued, the EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures set forth in 40 C.F.R. §§

[2] In our 2009 Columbia Generating Order we stated: Where a petitioner's request that the Administrator object to the issuance of a title V permit is based in whole, or in part, on a permitting authority's alleged failure to comply with the requirements of its approved PSD program (as with other allegations of inconsistency with the Act) the burden is on the petitioners to demonstrate that the permitting decision was not in compliance with the requirements of the Act, including the requirements of the SIP. Such requirements, as EPA has explained in describing its authority to oversee the implementation of the PSD program in states with approved programs, include the requirements that the permitting authority (1) follow the required procedures in the SIP; (2) make PSD determinations on reasonable grounds properly supported on the record; and (3) describe the determinations in enforceable terms. *See In the Matter of Wisconsin Power and Light, Columbia Generating Station,* Permit No. Ill 003090-P20; Petition Number V -2008-1 (October 8, 2009) at 8.

70.7(g)(4), (5)(i)-(ii) and 70.8(d).

BACKGROUND

I. The Facility

SJGS is a 1,848-megawatt (MW) power plant consisting of four coal-fired generating units and associated support facilities located approximately three miles north-northeast of the city of Waterflow, in San Juan County, New Mexico. The area is in attainment for all criteria pollutants. Each of the coal-fired boilers (Units 1-4) burns pulverized coal received by conveyors from the adjacent San Juan Mine to generate high-pressure steam that powers a steam turbine coupled with an electric generator. Electric power produced by the units is supplied to the electric power grid for sale. Units 1 and 2 have a unit capacity of 350 and 360 MW, respectively, while Units 3 and 4 have a unit capacity of 544 MW each. The Units began operations in 1976, 1973, 1979, and 1982, respectively. *See* Statement of Basis ("SOB") for the April 2, 2010 draft Permit ("draft SOB") at 1.

PNM, the operator of the SJGS, entered into a consent decree in 2005 with The Grand Canyon Trust, Sierra Club, and NMED to reduce emissions of nitrogen oxides (NO_X), sulfur dioxide (SO_2), particulate matter (PM), and mercury. *See* Consent Decree (CD) entered in *The Grand Canyon Trust, et. al. v. Public Service Co. of New Mexico*, CV 02-552 BB/ACT (ACE)(D.N.M. 2005). The CD also required SJGS to obtain any necessary authorizations and to comply with all "federal, state, and local laws and regulations and orders of this Court." CD at 35. In addition, the CD required that the emissions controls and limitations, emissions monitoring, and all definitions relied upon in the CD be incorporated into the title V operating permit at renewal. CD at 38-39.

II. The SJGS Permit Renewal Action and Petition to Object

On February 3, 2009, NMED received an application from PNM for the renewal of the SJGS Permit - Permit Number P062R2 ("draft Permit"). A copy of the draft Permit along with the draft SOB was submitted for a 30-day public comment period beginning April 2, 2010. On May 7, 2010, WEG submitted comments on the draft Permit on behalf of themselves, SJCA, and Carson Forest Watch to NMED ("WEG Comments"), raising several concerns. On the same day under separate cover, SJCA submitted comments on their own behalf and on behalf of five additional citizens groups ("SJCA Comments") on the draft Permit. The five additional groups included the Northern New Mexico Group of the Sierra Club, the Center for Biological Diversity, Dooda Desert Rock, the Coalition for Clean Affordable Energy, and Dine Care. NMED prepared a separate response to comments ("RTC"), dated August 4, 2010, for each group ("WEG RTC" and "SJCA RTC," respectively) and submitted the proposed Permit along with a revised SOB ("proposed SOB") to the EPA on the same date. On September 20, 2010, the last day of the 45-day EPA review period, the EPA submitted preliminary comments to NMED ("EPA Comments") on the proposed Permit but did not object to the proposed Permit. On November 19, 2010, Petitioners submitted an electronic copy of the Petition to the EPA,

requesting that the EPA object to the renewal of the Permit. The NMED issued the final permit on January 24, 2011.

The Petition claims that the Permit does not comply with 40 C.F.R. Part 70 in that it: (1) fails to ensure compliance with the PSD requirements; (2) fails to ensure compliance with source impact analysis requirements in the New Mexico SIP; (3) fails to require prompt reporting of deviations; (4) fails to require sufficient periodic monitoring; and (5) includes a condition that is contrary to applicable requirements.

ISSUES RAISED BY PETITIONERS

I. The Permit Fails to Ensure Compliance with PSD Requirements

Petitioners' Claim 1: Petitioners generally assert that the "evidence indicate[s] that PSD requirements are, in fact, applicable to [SJGS] and that the facility is currently in violation of PSD requirements." Petition at 4. Specifically, Petitioners allege that "according to information brought to light by the EPA and both expressly and impliedly confirmed by NMED," SJGS never obtained the required PSD permits for the initial construction of at least Units 1, 3 and 4, and likely Unit 2, and for the recent addition of low-NOx burners on all four units." Petition at 5. Petitioners therefore claim that NMED was required to prepare a Permit that includes PSD requirements, including BACT requirements and a compliance plan to bring SJGS into compliance with applicable PSD requirements in accordance with 42 U.S.C. §§ 7661b(b) and 7661c(a) and 40 C.F.R. § 70.6(b)(3). *Id.* Since the Permit does not contain these requirements, Petitioners assert that the Administrator must object to the issuance of this Permit.

Petitioners' Claim 1A: Petitioners assert that despite evidence indicating the applicability of PSD requirements, SJGS never obtained PSD permits for the initial construction of the Units. Petition at 4. Petitioners allege that "it appears the construction of Units 1, 3 and 4 occurred after the effective date of EPA's PSD program [June 1, 1975]," which would require SJGS to obtain PSD permits for these Units; however, Petitioners assert that the evidence suggests that no PSD permits were issued. *Id.* at 5. Petitioners further assert that NMED did not address this issue in proposing the Permit. *Id.* Petitioners point to the proposed SOB and EPA Comments to express their "serious concerns over whether [SJGS] is operating in compliance with PSD" and to assert that NMED was "obligated to investigate whether [SJGS] was in compliance with PSD to ensure compliance with applicable requirements in accordance with Title V." *Id.* at 6.

Petitioners did not raise these concerns in the public comments they submitted to NMED on the draft Permit on May 7, 2010. *See* WEG Comments and SJCA Comments. Instead, Petitioners now assert that "the grounds for [their] concerns over this issue arose after the public comment period" and "came to light only after Petitioners received EPA's comments" on the Permit. Petition at 8. Petitioners allege that "[d]uring the public comment period and based on the information provided by NMED to the public, Petitioners had no reason to believe that the issue of PSD applicability as it relates to the construction of units

1, 3, and 4, remained relevant." *Id.*

EPA's Response to Claim 1A: I deny the Petitioners' request for an objection to the Permit on this claim on the basis that Petitioners have not shown that it was impracticable to raise this objection during the public comment period or that the grounds for this objection arose after the public comment period. Additionally, I deny the Petitioners' request for an objection to the Permit on this claim on the alternative basis that Petitioners have not demonstrated that the SJGS permit is not in compliance with the requirements of the Act, specifically the PSD requirements. *See generally* CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. 70.8(c)-(d).

Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. 70.8(d) state that a petition to object to a title V permit shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period unless the petitioner demonstrates that it was impracticable to raise such objections during the public comment period or unless the grounds for such objection arose after the public comment period. Petitioners have not satisfied this requirement. Petitioners concede that they did not raise this claim in their public comments submitted on May 7, 2010. Petition at 8.[3] Instead, they argue that the grounds for this claim "arose after the public comment period" and "came to light only after Petitioners received EPA's comments" on the proposed Permit. *Id.* As a factual matter, the grounds for this claim arose when the Units were originally constructed in the 1970s and 1980s, allegedly without required PSD permits. The fact that Petitioners may have only now realized that they have questions regarding PSD applicability for the initial construction of the Units does not mean that the *grounds* or the *basis* for this issue arose *after* the public comment period. The grounds for this particular claim in this permit action were clearly present *during* the public comment period. Petitioners also cannot show that it was impracticable for them to have raised this claim in their public comments. Information was available in the record to alert Petitioners to this potential concern. For example, section 4.0 in the draft SOB for the draft Permit provides a permit history table and while the table references the installation of Units 1, 3 and 4, it does not mention PSD applicability for these units under the initial entries. Draft SOB at 4-5. Petitioners could have relied on the *absence* of PSD permitting information in this table in the draft SOB regarding the initial construction of the Units to raise questions in their public comments regarding PSD compliance at SJGS. Additionally, the permit history table includes an entry that indicates that Grand Canyon Trust and Sierra Club filed a lawsuit against PNM on May 16, 2002, alleging CAA violations because "units 3 and 4 did not have a PSD permit." Draft SOB at 4; *Grand Canyon Trust et.al. v. Public Service Co. of New Mexico*, 283 F.Supp.2d 1249 (D.N.M. 2003) (addressing allegations that PNM violated CAA by failing to obtain PSD permits for initial construction of Units 3 and 4). However, Petitioners did not raise such concerns in their comments, but instead focused their PSD applicability questions in their public comments on other issues. For example, instead of raising questions in their public comments about PSD applicability to the initial construction of the Units, Petitioners raised questions regarding whether PSD requirements apply to the greenhouse gas

[3] The only comments submitted during the public comment period were the WEG Comments and the SJGA Comments. Neither of these comments raised this issue during the public comment period.

emissions at SJGS. WEG Comments at 1-2. But even these comments demonstrate that Petitioners had an understanding of the permitting history for SJGS and that Petitioners had an opportunity to raise their questions regarding PSD applicability to the initial construction of the Units in their public comments. Petitioners stated in their comments:

> The Statement of Basis indicates that a number of permitting actions allowing construction and modifications of the coal-fired boilers have been undertaken since 1973, likely leading to significant increases in CO_2 emissions. There is no indication that NMED assessed greenhouse gas emissions as part of those permitting actions, meaning NMED has no basis to conclude that the San Juan Generating Station is in compliance with applicable requirements, or that the Title V Permit ensures compliance with applicable requirements.

Id. at 2. Petitioners were obviously aware of the permitting history at SJGS, yet they failed to show why they could not raise this particular PSD permitting claim in their public comments. *See In the Matter of Public Service Company of Colorado, dba Xcel Energy, Hayden Station*, Petition VIII-2009-01, at 10-13 (March 24, 2010) ("*Hayden Order*") (finding issue was "one that was reasonably ascertainable and could have been raised by the Petitioner before the public comment period closed"). Therefore, I deny their request for an objection to the Permit on this claim.

I also deny the Petitioners' request for an objection to the Permit on this claim on the alternative basis that Petitioners have not demonstrated that the SJGS permit is not in compliance with applicable PSD requirements under the Act with regards to installation of Units 1, 3 and 4. Petitioners allege that "it appears the construction of at least units 1, 3 and 4 occurred subsequent to the effective date of EPA's PSD program [June 1, 1975]. Therefore, it appears that PNM was required to obtain PSD permits for at least units 1, 3, and 4 in accordance with 40 C.F.R. 52.21 (1975)." Petition at 5. Petitioners further claim that "there is no evidence that, at least with regards to units 1, 3, and 4, the units have been subjected to PSD requirements since their initial construction, in violation of the Clean Air Act." In support of their allegation, Petitioners claim that "EPA has flagged PSD applicability as an area of concern" and that a related District Court holding "does not absolve NMED from assuring that [SJGS] is in compliance with all applicable requirements." Petition at 5-6.

Petitioners' reference to EPA's Comments (framed by EPA as "preliminary comments") is not sufficient to demonstrate for purposes of CAA section 505(b)(2) that PSD applied to Units 1, 3, and 4. See *In the Matter of Chevron Products Company, Richmond, California Facility*, Petition IX-2004-10, at 4-5 (March 15, 2005) (finding petitioners' reference to an EPA comment letter to be insufficient to demonstrate that a permit is not in compliance with the Act under section 505(b)(2)); *see also, In the Matter of Georgia Power Company, Bowen Steam- Electric Generating Plant,* Final Order at 5-9 (January 8, *2007); In the Matter of East Kentucky Power Cooperative, Inc., Hugh L. Spurlock Generating Station, Petition IV-2006-4,* Final Order at 13-18 (August 30, *2007);* and *In the Matter of CEMEX, Inc., Petition VIII-2008-01,* Final Order at 6 (April 20, 2009) (all noting that reference to a Notice of Violation and

information contained therein alone are not sufficient to demonstrate for purposes of CAA section 505(b)(2) that a title V permit is not in compliance with the Act); *Sierra Club v. Johnson*, 541 F.3d 1257, 1259 (11th Cir. 2008) (EPA's filing of a complaint for the alleged violations in the NOV is not sufficient to demonstrate applicability and violation of a requirement under CAA section 505(b)(2)). Petitioners provide no additional evidence to support their allegation that these Units should be subject to PSD. For example, Petitioners provide no additional evidence that Units 1, 3, and 4 were major stationary sources pursuant to the requirements in place when the Units were constructed. Petitioners also provide no explanation or rationale showing how the PSD requirements in place at the time applied to the initial construction of these Units. Therefore, Petitioners have not demonstrated that PSD applies, which is a threshold determination for demonstrating that SJGS is not in compliance with the PSD requirements.

Similarly, to the extent Petitioners intended it as a separate claim, I deny Petitioners' claim that NMED was obligated to investigate whether SJGS was in compliance with PSD for the installation of these Units. First, as discussed above, this claim was not raised in public comments, and there is no showing that it was not practicable to raise it, or that the grounds for this claim arose after the public comment period. Second, Petitioners have not demonstrated that NMED was obligated to investigate whether SJGS was in compliance with PSD for installation of Units 1, 3 and 4. NMED summarized the permitting history and related activities regarding the installation of these Units. Petitioners' reference to the EPA's "preliminary" comment letter does not demonstrate that PSD had been triggered for installation of these Units, nor that SJGS had an obligation to investigate this matter further in this title V proceeding.

Petitioners' Claim 1B: Petitioners assert that the Permit fails to assure compliance with applicable PSD requirements because "it fails to address significant increases in [CO] emissions that occurred as a result of the installation of low-NO_x burners on all four units at [SJGS] in 2006." Petition at 8. Petitioners quote extensively from communications between the EPA and NMED in support of their assertion that the EPA also raised these concerns in their comments on the proposed Permit and that NMED, in their October 27, 2010, response ("NMED's Response to EPA"), "conceded that, in fact it had failed to address the increases in [CO] emissions and that, upon further investigation, the Title V Permit failed to assure compliance with PSD [for] recent significant increases in [CO] emissions." *Id.* at 8-10. Petitioners cite NMED's Response to EPA that included NMED's October 4, 2010, re-evaluation of PSD applicability at the four Units as a result of installing the low-NO_x burners in 2006. *Id.* at 9. Petitioners quote from NMED's Response to EPA in which NMED concludes that its own analysis "clearly shows that all four units individually and combined exceed the 100 tons/year increase threshold for PSD significance," which NMED said meant that "NSR Permit 0063M4 should have been a PSD Permit." *Id.* at 10. Petitioners quote NMED as stating in their response: "It is our intent to add a Compliance Plan in the current Title V Permit P062R2 for PNM to submit a PSD application to address the significant increase in CO from the construction of the low-NO_x burners." *Id.* Petitioners assert, however, that the proposed Permit, which does not include a Compliance Plan, "does not bring the facility into compliance with PSD" and therefore "fails to assure compliance with applicable requirements." *Id.*

Petitioners did not raise these concerns in the public comments they submitted to NMED on the draft permit on May 7, 2010. *See* WEG Comments at 1-7; SJCA Comments at 1-7. Instead, Petitioners assert that "the grounds for [their] concerns over this issue arose after the public comment period" and "came to light only after Petitioners received EPA's comments" on the Permit. Petition at 10. Petitioners allege that "[d]uring the public comment period and based on the information provided by NMED to the public, Petitioners had no reason to believe that the issue of PSD applicability as it related to units 1- 4 was an issue [for CO] emissions." *Id.* Petitioners state that NMED only completed its re-evaluation of actual CO emissions increases as a result of the low-NO_x burner installations after the public comment period, so Petitioners "could not have possibly commented on the adequacy of the Title V Permit in this regard." *Id.*

EPA's Response to Claim 1B: I grant the Petitioners' request for an objection on this claim because NMED failed to provide an adequate basis and rationale for not addressing PSD requirements in the Permit for the low-NO_x burner installations at each Unit in 2006.

As explained in my response to Claim 1A, a petition to object to a title V permit shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period unless the petitioner demonstrates that it was impracticable to raise such objections during the public comment period or unless the grounds for such objection arose after the public comment period. CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. 70.8(d). Petitioners assert that the grounds for this claim arose after the public comment period because information regarding CO emissions increases from the low-NO_x burner installations was only made available to them after the public comment period. As Petitioners note: "NMED only completed an actual analysis of the [CO] increases" from the low-NO_x burner installations in October 2010, and the new results, analysis and conclusions were only made available to the EPA and Petitioners well after the close of the public comment period. Petition at 10. After conducting that analysis, NMED seems to conclude in its October 29, 2010, response to EPA that PSD permits were needed for the low-NO_x burner installations at these Units. *See* NMED's Response to EPA at 2-3. Since this information was only made available to Petitioners after the public comment period, Petitioners note the impracticability of raising this claim earlier when they assert that they "could not [have] possibly commented on the adequacy of the Title V Permit in this regard" without this additional information. Petition at 10. While the Petitioners could have raised comments regarding PSD and the installation of low-NO_x burners on all four Units in 2006 during the public comment period, the apparent conclusion by NMED that PSD had been triggered at these Units, and NMED's expression of intent to add a title V compliance schedule to the Permit, occurred after the public comment period. I therefore find that Petitioners may raise this claim and I will consider its merits below.

I grant Petitioners' request to object to the Permit on this claim because NMED has not provided an adequate explanation in the record regarding its decision not to address PSD requirements in the Permit for the low-NO_x burner installations on the Units. As NMED itself states:

This comparison clearly shows that all four units individually and combined

> exceed the 100 tons/year increase threshold for CO PSD significance. Therefore, it is our conclusion that NSR Permit 00063M4 should have been a PSD Permit or processed as a PSD permit. It is our intent to add a Compliance Plan in the current Title V Permit P062R2 for PNM to submit a PSD application to address the significance increase in CO from the construction of the low NOx Burners.

NMED's Response to EPA at 3. However, NMED issued the final Permit on January 24, 2011, *without including* the compliance plan for addressing PSD requirements. The only explanation NMED offers for this apparent change is the following:

> Considering adding Compliance plan for submitting PSD netting analysis for NSR Permit 00634M4 that was issued /8/2006. May not be appropriate to do this in TV permit, since it has nothing to do with the facility being out of compliance and bring them back into compliance. Was not added to Permit P062R2.

Final SOB at 14. This explanation clearly does not provide sufficient detail or reasoning regarding why NMED did not include the compliance plan in the Permit as previously indicated in NMED's Response to EPA. These confusing and contradictory statements in the record regarding PSD applicability for the 2006 low-NO_x burner installations at each Unit require further clarification by NMED so that the public may clearly understand its basis for the Permit that was issued on January 24, 2011. Therefore, given the unresolved nature of this claim in the record, NMED must clarify the record, explain its final decision regarding this issue, and make any necessary changes to the Permit consistent with its SIP and title V.

II. The Permit Fails to Ensure Compliance with Source Impact Analysis Requirements in the New Mexico State Implementation Plan

Petitioners' Claim 2: Petitioners assert that "NMED failed to ensure that the applicable NOx and [PM] emission limits set forth in the Title V Permit were based on an actual analysis of ambient air quality impacts, as required by the New Mexico SIP at NMAC 20.2.72.208.D." Petition at 11; WEG Comments at 2-3. Petitioners specifically assert that this failure was of serious concern regarding several new permits, including permits 0063M3, 0063M4, 0063M6, and 0063M6R1. Petition at 11. Petitioners assert that this SIP provision requires NMED to deny any permit for construction, modification or revision if the project would cause or contribute to the exceedance of any NAAQS or New Mexico Air Quality Standards (NMAQS), unless the ambient air impacts are offset under the applicable requirements in New Mexico regulations. *Id.* Petitioners assert that NMED did not follow these requirements because "it is not apparent that NMED assessed the NOx and [PM] limits to specifically ensure that [SJGS] would not cause or contribute to exceedances" of the applicable NAAQS or NMAQS. *Id.* In support of this claim, Petitioners only assert that "there is simply no indication that any analysis of [applicable NAAQS or NMAQS] impacts has even been completed for any NSR permit issued for any pollutant

emitting activity at" SJGS. Petition at 12. Petitioners note that "NMED only asserts that 'air dispersion modeling [was] conducted for [NSR permit 0063M6R1] or previous permitting action(s) [and] demonstrated compliance with the NAAQS." Petition at 12. Petitioners again allege that "no information or analysis [was] presented, cited, or otherwise referenced by NMED indicating that any analysis of the impacts of [SJGS] to ambient concentrations [of NAAQS or NMAQS] has ever been completed." *Id.* Petitioners assert that the Permit must contain provisions to bring SJGS into compliance with these underlying source impact analysis requirements. *Id.*

EPA's Response to Claim 2: I deny the Petitioners' request for an objection to the Permit on this claim on the basis that Petitioners have not demonstrated that the Permit fails to address applicable requirements. Petitioners have not demonstrated that NMED failed to conduct the appropriate source impacts analysis under the applicable New Mexico NSR permitting regulations. Petitioners generally assert that NMED failed to provide the citations for the permitting actions under which the source impacts analyses were conducted. Without providing additional evidence, they further generally assert that the source impact analyses were not conducted and that therefore the permit limits are not protective of the NAAQS or NMAQS and violate applicable requirements. These general assertions, however, are not sufficient to show that the Permit does not address applicable requirements.

The Part 70 regulations require that certain information be made available to the public during its review of the draft Permit. In particular, 40 C.F.R. 70.7(h)(2) requires that the public notice announcing the availability of the draft Permit for review and public comment also include "the name, address and telephone number of a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, all relevant supporting materials, including those set forth in §70.4(b)(3)(viii) of this part, and all other materials available to the permitting authority that are relevant to the permit decision...." The Public Notice issued for this Permit included this information. Public Notice, April 2, 2010 ("Public Notice"). For example, the Public Notice stated: "This operating permit application is for a permit renewal. Per 20.2.70.401.C.(4) NMAC, this permitting action involves renewal of Operating and Acid Rain Permits and includes modification authorized by NSR Permits 0063M4 thru 63M6R1." *Id.* at 1. The Public Notice also identified the specific emissions limits that were "established in NSR Permit 0063-M3 and M4, and brought forward into this permit." *Id.* The Public Notice further stated:

> The permit application, draft permit and relevant supporting materials are currently available for review at the Air Quality Bureau, Operating Permits Unit, 1301-B Siler, Santa Fe, New Mexico 87507-3113. The Department contact in Santa Fe is Joseph Kimbrell at 505-476-4347.

Public Notice at 2. Additionally, the draft SOB provided information regarding these minor NSR permits, explaining that the Permit renewal "includes modification authorized by NSR 0063MR thru 63M6R1." Draft SOB at 1. A history of changes to the Permit, including

minor NSR actions, was listed in Section 4 of the draft SOB, which list specifically referenced NSR Permits 0063M3, 0063M4, 0063M6, and 0063M6R1. *Id.* at 3-5. Petitioners were thus provided the requisite information in the draft Permit record such that they could have contacted NMED and requested the source impact analyses for any of the emissions limits from the NSR permits that were included in the SJGS Permit. Moreover, in responding to this claim in Petitioners' comments, NMED explained:

> Permit modifications are submitted under 20.2.72 NMAC, Construction Permits, and emissions are modeled as required by regulation before the construction/modification to ensure compliance with the NAAQS. All allowable emission limits in the draft Title V permit were imposed by NSR permit 0063MR6R1, and air dispersion modeling conducted for that or previous permitting action(s) demonstrated compliance with the NAAQS.

WEG RTC at 2.

However, Petitioners do not claim that they requested the analysis, but were unsuccessful, or that they reviewed NMED permitting files and found no source impacts analyses, or that the analyses they reviewed were inadequate or showed violations. Petitioners simply state that "it is not apparent" that NMED performed the air quality assessment, without any further explanation regarding *why* it was not apparent to Petitioners. In other words, Petitioners do not demonstrate that they were unable to obtain or review any source impacts analyses for previous SJGS NSR permitting actions. Instead, when NMED explains to them that such analyses had been conducted as part of the NSR permitting actions, Petitioners appear to ignore NMED's response and continue to assert in their Petition that "no [source impact] information or analysis was presented, cited, or otherwise referenced" WEG Comments at 2; Petition at 12. This assertion appears incorrect, but, in any case, does not establish that the analysis *does not exist*, and Petitioners fail to explain, if such was the case, that they were unable to obtain this information when they requested it from NMED. Without this kind of explanation, Petitioners cannot demonstrate that NMED failed to perform the requisite analyses and therefore cannot demonstrate that the Permit fails to address all applicable requirements.

Therefore, based on a review of the record, Petitioners have not demonstrated that the Permit failed to address all applicable requirements or that NMED failed to conduct the appropriate source impact analyses as required by the New Mexico SIP. Petitioners were apparently aware of the relevant NSR permitting actions from which the PM and NOx emissions limits were incorporated into the Permit since they reference the same specific NSR permits in their Petition that NMED referenced in the permitting record. Petition at 11; Public Notice at 1; draft SOB at 1, 3-5; WEG RTC at 2-3. Yet, Petitioners did not show that they requested but were unable to obtain the analyses from NMED or otherwise show that the required analyses were not performed. Therefore, I deny the request to object to this claim.

III. The Permit Fails to Require Prompt Reporting of Deviations

Petitioners' Claim 3: The Petitioners assert that Condition B110.C of the Permit requiring reporting of permit deviations only once every six months does not meet the requirements of the Clean Air Act, 42 USC § 7661b(b)(2), and title V regulations, 40 CFR § 70.6(a)(3)(iii)(B) because it fails to require prompt reporting of all permit deviations. *See* Petition at 12-13.

According to Petitioners, 40 C.F.R. § 70.6(a)(3)(iii)(B) defines prompt reporting "in relation to the degree and type of deviation likely to occur and the applicable requirements." *Id.* at 12. Petitioners assert that in explaining the meaning of "prompt," the House Report for CAA Amendments of 1990 stated "the permittee would presumably be required to report that violation without delay." *Id.* (quoting H.F. Rep. No. 101-490, pt. 1, at 348 (1990)).[4] Petitioners further assert that the Second Circuit Court of Appeals in *New York Public Interest Group v. Johnson*, 427 F.3d 172 (2d Cir. 2005) has held that "prompt" for purposes of prompt reporting of permit deviations must be less than every six months depending upon the source's compliance history and public health risk. *Id.* at 12.

In their RTC to the issue of reporting deviations under Condition B110.C, NMED responded that Condition B110.D also requires that excess emissions be reported in accordance with 20.2.7.110.A NMAC which requires initial reports within two business days and final reports within 10 days of the end of the excess emissions event. *See* WEG RTC at 3. Petitioners assert that while NMED explained that certain emissions events that may be defined as deviations would be required to report more promptly than each 6 months, NMED failed to explain why it considered the stated reporting timeframes to be 'prompt.' *Id.* at 13. In addition, Petitioners cite to the 2005 CD for SJGS that mandates more stringent reporting of deviations than the current title V permit requires (*See* CD at 9) as evidence that "clearly, underlying applicable requirements demand more frequent reporting of deviations that the Title V permit currently provides for." Petition at 13.

EPA's Response to Claim 3: I grant this request for an objection to the Permit on the basis that the record does not adequately document or explain NMED's decisions regarding how it concluded that reporting each six months, or more frequently in the case of excess emissions under the SIP, constitutes 'prompt' reporting of all permit deviations.

Petitioners claim that the SJGS permit does not provide for prompt reporting of all deviations in agreement with the regulations and the Act, specifically referencing Conditions B110.C and D. CAA section 503(b)(2), 42 U.S.C. § 7661b(b)(2), provides that EPA's regulations

[4] Petitioners state that "[i]n general EPA believes that 'prompt' should be defined as requiring reporting within two to ten days for deviations that may result in emissions increases. Two to ten days is sufficient time in most cases to protect public health and safety as well as to provide a forewarning of potential problems." *See* Petition at 12. (quoting Clean Air Act Proposed Interim Approval of Operating Permits Program: State of New York, 61 Fed. Reg. 39617-39602 [sic] (July 30, 1996)). As explained in *In the Matter of GCC Dacotah Cement Manufacturing Plant*, Petition VIII-2006-3 at 11, n. 5 (June 15, 2007): "To the extent Petitioners believe that EPA's position is currently that 'prompt reporting' should generally be defined as within 2-10 days, I note that, as reflected in the NYPIRG case and other Title V orders, EPA's experience with the Title V program since 1996 has led EPA to the conclusion that such a limited time frame for reporting is not necessary for all deviations."

must require permittees "to promptly report any deviations from permit requirements to the permitting authority." Part 70 provides that title V permits must require prompt reporting of deviations from permit requirements, and directs permitting authorities to "define 'prompt' in relation to the degree and type of deviation likely to occur and the applicable requirements." 40 C.F.R. § 70.6(a)(3)(iii)(B). Permitting authorities may specify prompt reporting requirements for each permit term on a case-by-case basis, or may adopt general reporting requirements by rule, or both. *See, e.g., In the Matter of Onyx Environmental Services*, Petition V-2005-1, at 15 (February 1, 2006) ("*Onyx Order*").

Condition B110.C addresses deviation reporting by generally requiring semiannual reporting for "all deviations from permit requirements." *See* Permit at 36. As indicated in NMED's RTC, in addition the Permit also specifies the time for submitting notice to NMED when emission limitations are exceeded under Condition B110.D. As stated in the RTC, under this condition NMED requires reporting of an exceedance of a quantity, rate, opacity or concentration specified by an air quality regulation or permit condition[5] within a business day of discovery per 20.2.7.110 NMAC. *See* WEG RTC at 3- 4. According to the RTC, this timeframe is meant to be consistent with EPA's guidance "that 'prompt' should be defined as requiring reporting within two to ten days for deviations that may result in emissions increases." *Id.* Condition B110.D provides that the permittee must submit reports of excess emissions as required under 20.2.7.110A NMAC, a provision of the federally enforceable New Mexico SIP.

While, as noted, NMED included Permit conditions providing for deviation reporting of excess emissions under the SIP and incorporated other deviation reporting requirements per Condition B110 of the permit, the RTC does not explain NMED's decisions on what constitutes "prompt" reporting of permit deviations in relation to the degree and type of deviation likely to occur and the applicable requirements. *See, e.g., In the Matter of GCC Dacotah Cement Manufacturing Plant*, PetitionVIII-2006-3, at 11 (June 15, 2007) (granting where a permitting authority failed to adequately explain its prompt reporting decisions). For example, NMED does not explain why it believes semiannual reporting is "prompt" for some permit deviations but why another timeframe is justified for others; nor does the RTC expressly reference any such analysis that NMED might have provided elsewhere. NMED also does not address Petitioners' assertions regarding the reporting requirements included in the CD, including how these should be included in the Permit. *Id.* NMED should explain how it is appropriately addressing prompt reporting requirements.

In response to Petitioners' point about *NYPIRG 2005*, I note that the *NYPIRG 2005* decision is not controlling in New Mexico. Moreover, although I am granting on Claim 3 of this Petition, the EPA is not subscribing to Petitioners' view that, in light of *NYPIRG 2005*, prompt reporting must be less than every six months. Instead, as explained above, I am granting due to inadequacies in NMED's permitting record on prompt reporting of permit deviations.

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[5] 20.2.7.6(B) NMAC defines "air quality regulation or permit condition" to mean "any regulation adopted by the board, including a federal new source performance standard adopted by reference, or any condition of an air quality permit issued by the department. National emission standards for hazardous air pollutants and maximum achievable control technology standards are not included in this definition." (emphasis added)

As explained above, I grant this claim based on the lack of justification in the permit record for NMED's decisions regarding reporting of permit deviations, in accordance with the requirements of 40 C.F.R. § 70.6(a)(3)(iii)(B). I direct NMED to consider whether the permit conditions for reporting of deviations are consistent with the requirements of 40 C.F.R. § 70.6(a)(3)(iii)(B) for all permit deviations and provide further explanation of its conclusions, in the SOB or elsewhere in the permitting record, or make appropriate changes to the Permit to ensure prompt reporting consistent with the Act and implementing regulations.

IV. The Permit Fails to Require Sufficient Periodic Monitoring

Petitioners' Claim 4: Petitioners allege generally that the SJGS Permit fails to contain monitoring that assures compliance with the terms and conditions of the permit, and that NMED must supplement this monitoring to ensure compliance with the Permit. Permit at 13-14; CAA section 504(c), 42 U.S.C. § 7661c(c), 40 C.F.R. §§ 70.6(a)(3)(i)(B), 70.6(c)(1); *Sierra Club v. EPA*, 536 F.3d 673, 680 (D.C. Cir. 2008)). Related to this general claim, Petitioners make two specific claims, which we describe and respond to below.

Petitioners' Claim 4A: The Petitioners allege that while "the Title V Permit establishes PM limits for the coal-fired boilers at Condition A106.A..., the prescribed monitoring fails to ensure compliance with these emission limits." *Id.* Their particular concern is with Condition B108.D, which they allege could allow SJGS to be exempt from PM monitoring requirements for two monitoring periods if SJGS operates any Unit individually for less than 25 percent of a monitoring period. Additionally, Petitioners assert that this Condition may allow for a longer exemption period if SJGS operates any Unit individually for less than 10 percent of any monitoring period. *Id.* Petitioners assert that this Condition is problematic because it could allow SJGS to forego PM monitoring altogether if SJGS operates any Unit individually less than 25 percent of a monitoring period. *Id.* Petitioners note that although NMED asserts that "[t]he intent of this exemption is to reduce the possibility that equipment that is not operating must be started up for the sole purpose of monitoring," the practical result of this exemption could allow SJGS to operate Units 1, 2, 3, or 4 for almost 90 days annually without being required to conduct any PM monitoring. *Id.* Petitioners assert that "[i]t is unclear how this would ensure continuous compliance with hourly or lb/mmbtu emission limits. The fact that PNM could be allowed to avoid monitoring altogether if it only operates units 1, 2, 3, or 4 for 10% or less than any monitoring period—9 days a quarter or 36 days a year—underscores the inappropriateness of including Condition B108.D in the Title V Permit due to its failure to ensure sufficient periodic monitoring that assures compliance with applicable PM limits." *Id.*

EPA's Response to Claim 4A: I grant the Petitioners' request for an objection on this claim on the basis that NMED's Permit record, including the draft SOB, does not adequately document the rationale for NMED's permitting decision supporting the monitoring exemptions contained in Condition B108.D. In its response to Petitioners' comments on this claim, NMED explained that the PM monitoring requirements in the Permit include a Compliance Assurance Monitoring (CAM) plan, quarterly stack testing, and Continuous Opacity Monitors (COM). WEG RTC at 4-6; Permit at 13-14 (*see* Table 106.C, Footnote 4), 22-23, Appendix B. NMED

also addressed Condition B108.D[6] which states:

> The requirement for monitoring during any monitoring period is based on the percentage of time that the unit has operated. However, to invoke monitoring exemptions at B108.D(2), hours of operation shall be monitored and recorded.
>
> (1) If the emission unit has operated for more than 25% of a monitoring period, then the permittee shall conduct monitoring during that period.
>
> (2) If the emission unit has operated for 25% or less of a monitoring period then the monitoring is not required. After two successive periods without monitoring, the permittee shall conduct monitoring during the next period regardless of the time operated during that period, except that for any monitoring period in which a unit has operated for less than 10% of the monitoring period, the period will not be considered as one of the two successive periods.
>
> (3) A minimum of one of each type of monitoring activity shall be conducted during the five year term of this permit.

WEG RTC at 6; Permit at 34-35. Condition B108.D could be read to exempt SJGS from having to conduct PM monitoring at the Units based on the percentage of time that the Units have operated during an annual monitoring period. In response to Petitioners' comments regarding these monitoring exemptions, NMED provided the following justification for this Condition:

> The intent of this exemption is to reduce the possibility that equipment that is not operating must be started up for the sole purpose of monitoring. For a permittee to invoke this exemption, it must be able to produce records of the hours of operation for the specified semi-annual reporting period.
>
> Regardless of the facility's operating frequency, a minimum of one of each type of monitoring activity must be conducted during the five year period.
>
> NMED has also discussed these monitoring exemptions with EPA, Region 6 and they agreed that this is a reasonable policy for demonstrating compliance.

WEG RTC at 6. This response by NMED, however, does not adequately explain how the exemptions provided for in the monitoring provisions are consistent with the title V requirements. For example, NMED's explanation in its response to Petitioners that the exemption is needed "to reduce the possibility that equipment that is not operating must be started up for the sole purpose of monitoring" is not adequate because it does not provide NMED's reasoning to support the decision that the frequency of monitoring, considering exemption periods, is sufficient to assure compliance with the annual and hourly PM limits in the Permit. *Id.* While it may be appropriate not to require startup of a unit for the sole purpose of monitoring, NMED has not explained how

[6] Part B of the Permit includes General Conditions, which include Condition B108, General Monitoring Requirements. NMED cites NMAC 20.2.70. 302.A and C as authority for Condition B108.

the scope of the monitoring exemptions is consistent with this objective, nor how the monitoring in the permit is sufficient to assure compliance with the PM limits in the Permit. Additionally, NMED's response that a permittee "must be able to produce records of the hours of operation" to invoke this exemption does not explain *why* this exemption is even appropriate for inclusion in the Permit, or how, if utilized, the Permit would still contain sufficient monitoring to ensure compliance with the PM limits. *Id.* The rationale for the monitoring requirements selected by a permitting authority must be clear and documented in the SOB or elsewhere in the permit record. 40 C.F.R. § 70.7(a)(5); *In the Matter of Public Service Company, Hayden Station,* Petition Number VIII-2009-01, at 7-8 (March 24, 2010).[7] Accordingly, I grant Petitioners' objection on this issue because the Permit lacks an adequate justification in the record to explain NMED's decisions regarding the exemptions from compliance monitoring for the Units. In addressing this objection, NMED must discuss the adequacy of the permit monitoring requirements in support of the Permit's exemption for low operation periods, or make appropriate changes to the Permit to ensure it includes monitoring requirements consistent with the Act and implementing regulations.[8]

Petitioners' Claim 4B: Petitioners allege that the Permit "fails to require any monitoring of emissions related to duct leaks from units 1-4." Petition at 14. Petitioners assert that while the Permit "expressly limits emissions of NO_x, SO_2, [CO], and [PM] from duct leaks at Condition A106.D," the Permit "actually sets forth no explicit monitoring of such emissions to ensure compliance, and therefore fails to ensure sufficient monitoring." *Id.* Petitioners note that although the Permit requires that SJGS conduct a duct leak management program in accordance with Condition A402.C, it is unclear what this program entails or how it will ensure compliance with the emission limits for duct leaks. *Id.* The Petitioners also indicate that it does not appear "[that] the duct leak management program has been prepared, or that NMED has assured its effectiveness in appropriately limiting emissions of NO_x, SO_2, CO, and PM from duct leaks." *Id.* at 15. Petitioners note that Condition A402.C states that compliance with the duct leak management program will be determined "using data generated by the monitoring and by Department inspections of the units," but allege that it is unclear what monitoring data will be generated and what NMED will inspect to ensure compliance. *Id.* Petitioners also assert that the program is vague and does not appear to include any specific standards for ensuring that any duct leak management program is implemented to ensure compliance with applicable emission limits. *Id.* Petitioners are particularly troubled by the fact that there are apparently no limits on the number of leaking ducts allowed, or leaking points along any ducts. *Id.* Based on the above, Petitioners allege that the Permit "simply does not require sufficient monitoring to assure compliance with the duct leak emission limits for NOx, SO2, [CO], and [PM]." Petition at 15.

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[7] See also *In the Matter of Williams Four Corners, LLC, Sims Mesa CDP Compressor Station* Petition Number VI-2011—, at 16-17 (July 29, 2011); *In the Matter of Public Service Company of Colorado dba Xcel Energy, Pawnee Station,* Petition Number VIII-2010, at 12-13 (June 30, 2011) and *In the Matter of Public Service Company of Colorado dba Xcel Energy, Valmont Station,* Petition Number VIII-2010, at 10-12 (September 29, 2011).

[8] We note that Condition B108 also contains Condition B108.A, which states: "These [monitoring] requirements do not supersede or relax requirements of federal regulations." This provision was not addressed by Petitioners or NMED. It could be read to provide that a federally applicable monitoring requirement would prevail over the general monitoring exclusion under Condition B108.D, making it unclear whether this monitoring exemption has a place in the Permit.

EPA's Response to Claim 4B: I grant the Petitioners' request to object to the Permit on this claim on the basis that NMED failed to adequately respond to Petitioners' comment and explain how the duct leak monitoring requirements will ensure compliance with the applicable emissions limits in the Permit. As Petitioners note, *Sierra Club,* 536 F.3d at 678, makes it clear that CAA section 504(c) requires all title V permits to contain monitoring requirements to assure compliance with permit terms and conditions. EPA discussed the Part 70 periodic monitoring and sufficiency of monitoring requirements at length in two title V orders issued on May 28, 2009. *See In the Matter of CITGO Refining and Chemicals Company L.P.*, Petition VI-2007-01 (May 28, 2009) ("*CITGO Order*"); *In the Matter of Premcor Refining Group, Inc.*, Petition VI-2007-2 (May 28, 2009) ("*Premcor Order*"). The EPA's title V monitoring rules (40 C.F.R. §§ 70.6(a)(3)(i)(A) and (B) and 70.6(c)(1)) are designed to address 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 section 504(c), 42 U.S.C. § 7661c(c). As a general matter, permitting authorities must take three steps to satisfy the monitoring requirements in the 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. *See CITGO Order* at 7; *Premcor Order* at 7. 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); *see CITGO Order* at 7; *Premcor Order* at 7. 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). *E.g., CITGO Order* at 6-7; *In the Matter of Wheelabrator Baltimore, L.P.,* at 13 (April 14, 2010). Further, permitting authorities have a responsibility to respond to significant comments. *See, e.g., Onyx Order* at 7 ("It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments.") (citing *Home Box Office*, 567 F.2d at 35). This principle applies to significant comments on the adequacy of monitoring. *CITGO Order* at 7.

The determination of whether the monitoring is adequate in a particular circumstance generally will be made on a case-by-case basis considering site-specific factors. *See CITGO Order* at 7; *see also, In the Matter of United States Steel Corporation – Granite City Works*, Petition V-2009-3, at 7 (January 31, 2011) ("*US Steel Order*"). However, in many cases, monitoring from the applicable requirement will be sufficient to assure compliance with permit terms and conditions; consequently, the EPA recommends the monitoring analysis should begin by assessing whether the monitoring required in the applicable requirement is sufficient. *See CITGO Order* at 7; *US Steel Order* at 7. 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 emissions unit; and (5) the type and frequency of

the monitoring requirements for similar emission units at other facilities.[9] *See CITGO Order* at 7-8. In addition, the rationale for the monitoring requirements selected by a permitting authority must be clear and documented in the permit record. *Id.* at 7 (citing 40 C.F.R. § 70.7(a)(5)).

Upon review of the Petition, the Permit, the incorporated preconstruction permit 0063M4 referenced by NMED to contain the duct leak program (See WEG RTC at 6), and the permit application, I find that NMED failed to adequately respond to Petitioners' comment. NMED must make clear in the record the details of and rationale for the duct leak monitoring program that is clearly required by the Permit. Permit at 8 and at 23-24. While the requirement for a program is clearly stated, the duct leak monitoring requirements themselves are unclear, vague, and lack adequate detail in the Permit. For example, the NMED fails to explain how to assess increases in leaking areas and time frames for leak repair. Additionally, the rationale for why NMED selected the particular duct leak monitoring requirements for demonstrating compliance with the applicable emissions limits must be clear and documented in the SOB or elsewhere in the Permit record. Again, NMED failed to explain, in either the Permit or the SOB, how the duct leak management program or the expansion joint maintenance program monitoring will generate adequate information to assure compliance with the applicable emission limits. Permit at 23-24. Consequently, I order NMED to either provide an adequate rationale for duct leak monitoring requirements in the Permit, or to make appropriate changes to the Permit to ensure it includes adequate duct leak monitoring requirements.

V. Condition B112.E Is Contrary to Applicable Requirements

Petitioners' Claim 5: Petitioners assert that permit Condition B112.E is contrary to the CAA in that NMED cannot automatically conclude that compliance with a title V permit assures compliance with the NAAQS. Petition at 15-16. Petitioners argue this is implied by condition B112. E, which states: "For sources that have submitted air dispersion modeling that demonstrates compliance with federal ambient air quality standards, compliance with the terms and conditions of this permit regarding source emissions and operation shall be deemed to be compliance with federal ambient air quality standards specified at 40 CFR 50 NAAQS." Petition at 15. Petitioners assert that in order for NMED to make such a finding, NMED must first prepare an analysis and assessment of emissions on a source-by-source basis, both individually and cumulatively. *Id.* Because the NAAQS are revised every five years, Petitioners assert that Condition B112.E is inappropriate given that permit terms and conditions are rarely revised and are not required to be revised as the NAAQS are revised. *Id.* Petitioners note that some of the construction permits for the SJGS were issued prior to the issuance of several of the NAAQS, including 1982, 1975, and 1973, predating the 1997 8-hour ozone NAAQS, the 1997 annual and 24-hour PM2.5 NAAQS, while other construction permits were issued in 1997, 2005, and 2006, predating the 2006 revisions of the annual and 24-hour PM2.5 NAAQS and predating the 2008

[9] EPA has also advised that "[s]everal rules and guidelines may prove helpful to States in establishing monitoring for compliance assurance purposes in Title V permits. Examples include the monitoring design criteria (appropriate data representativeness, frequency, and measures of quality assurance) outlined in the CAM rule, monitoring under several Maximum Achievable Control Technology ('MACT') standards (40 C.F.R. Part 63), and certain monitoring provided by acid rain rules (40 C.F.R. Parts 72-78)." *Premcor Order* at 8.

revisions of the 8-hour ozone NAAQS, and the 2010 revisions of the annual and hourly NO2 NAAQS and the 2010 hourly SO2 NAAQS. *Id.* Therefore, Petitioners contend that the SJGS title V permit cannot include a provision that automatically concludes that operation of the source in compliance with the title V permit will protect any and all NAAQS specified at 40 C.F.R. Part 50. *Id.* at 15-16.

EPA's Response to Claim 5: I grant this claim on the basis that NMED failed to fully respond to Petitioners' comments relating to permit Condition B112.E. Appearing in the section entitled B112 Compliance," of the SJGS permit, Condition B112.E states:

> For sources that have submitted air dispersion modeling that demonstrates compliance with federal ambient air quality standards, compliance with the terms and conditions of this permit regarding source emissions and operation shall be deemed to be compliance with federal ambient air quality standards specified at 40 CFR 50 NAAQS.

Permit at 39. During the public comment period, Petitioners submitted comments asserting, among other things, that Condition B112.E was inappropriate and that NMED could not automatically conclude that compliance with a title V permit assures compliance with the NAAQS. WEG Comments at 6-7. Rather, the commenters argued, NMED must first prepare an analysis and assessment of emissions on a source-by-source basis, both individually and cumulatively, to make such a finding. *Id.* In its RTC addressing Condition B112.E, NMED discusses the NSR permitting requirements, stating that they require construction permit applicants to conduct air dispersion modeling to demonstrate that the source's proposed emissions will comply with applicable NAAQS. WEG RTC at 7. The RTC continues by noting that after review and approval, NMED incorporates modeled emission rates that demonstrate compliance into the NSR permit, and the title V permit then incorporates the applicable requirements of the NSR permit together with additional monitoring, recordkeeping, and reporting as necessary to ensure compliance with the permit. *Id.* NMED also states SJGS submitted a permit renewal application and thus is "required to provide a certification of compliance with the relevant terms and conditions of the current operating permit as provided by 20.2.70.300.D(1) NMAC" for this application. *Id.* NMED's RTC further notes that Section 16 of the application addresses air dispersion modeling requirements to demonstrate compliance with standards. *Id.* In addition, the RTC states that under Condition B101.A(13) of the SJGS permit, the permittee is required to comply with all applicable requirements, including those requirements that become effective during the term of the permit, and that the permittee shall meet such requirements on a timely basis. *Id.* However, the RTC does not address Petitioners' comment that Condition B112.E was inappropriate because NMED could not automatically conclude that compliance with a title V permit assures compliance with the NAAQS.

Permitting authorities have a responsibility to respond to significant comments. *See, e.g., Onyx Order* at 7 ("It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments.") (citing *Home Box Office*, 567 F.2d at 35). This principle applies to significant comments on the appropriateness of a term or condition in a title V permit. *See CITGO Order* at 7. While NMED's WEG RTC provides a detailed discussion of the process by

which emission limitations from underlying SIP permits are carried forward into the source's title V permit, NMED failed to adequately respond to Petitioners' specific comment that Condition B112.E was contrary to the CAA in that NMED cannot automatically provide that compliance with the terms and conditions of the title V permit shall be deemed compliance with the NAAQS. Because of NMED's failure to respond to this comment, I grant the Petition on this claim. Furthermore, NMED's reference to Condition B101.A(13) of the SJGS permit (stating that the permittee is required to comply with all applicable requirements, including those requirements that become effective during the term of the permit) creates additional confusion as Condition B112.E and Condition B101.A(13) could be read to conflict with one another, yet NMED does not explain the relationship between these two conditions. WEG RTC at 7.

In responding to this Order, NMED must fully respond to the Petitioners' comment. In so doing, I also suggest that NMED consider the basis for Condition B112.E and clarify the purpose and scope of Condition B112.E, considering whether the term should be removed or revised for clarity, in accordance with the appropriate permit revision requirements. NMED may additionally wish to consider the relationship between Condition B112.E and Condition B101.A(13) and, as necessary, revise the permit to ensure that these terms will not conflict with one another.

CONCLUSION

For the reasons set forth above and pursuant to CAA section 505(b)(2) and 40 C.F.R. § 70.8(d), I hereby grant in part and deny in part the Petition from WildEarth Guardians, San Juan Citizens Alliance and Carson Forest Watch requesting that the EPA object to the title V permit issued to Public Service New Mexico for the San Juan Generating Station, San Juan County, New Mexico.

Dated: Feb. 15, 2012

Lisa P. Jackson
Administrator