

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	
Public Service Company of Colorado,)	
dba Xcel Energy,)	
Hayden Station)	ORDER RESPONDING TO
)	PETITIONER'S REQUEST THAT
Permit Number: 96OPRO132)	THE ADMINISTRATOR OBJECT
)	TO ISSUANCE OF A
)	STATE OPERATING PERMIT
Issued by the Colorado Department of)	
Public Health and Environment, Air)	
Pollution Control Division)	
)	Petition Number: VIII-2009-01
)	
)	

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

The United States Environmental Protection Agency ("EPA") received a petition dated March 10, 2009, from Wild Earth Guardians ("Petitioner") requesting that EPA object, pursuant to section 505(b)(2) of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. § 7661d, to the issuance of a state operating permit to Public Service Company of Colorado, dba Xcel Energy ("Xcel") to operate the Hayden Power Station, located near Hayden, Routt County, Colorado. The Hayden Power Station is a coal-fired power plant.

The Colorado Department of Public Health and Environment, Air Pollution Control Division ("CDPHE" or "Colorado"), issued the Hayden Power Station operating permit on April 1, 2009, pursuant to title V of the Act, the federal implementing regulations at 40 CFR part 70, and the Colorado State implementing regulations at Regulation No. 3 part C.

The petition alleges that the Hayden Power Station permit does not comply with 40 CFR part 70 in that: (I) the title V permit fails to assure compliance with the permit's particulate matter limits; and (II) the title V permit fails to ensure compliance with Prevention of Significant Deterioration (PSD) requirements in regard to carbon dioxide (CO₂) emissions.

Based on a review of the Petition and other relevant materials, including the permit and permit record, and relevant statutory and regulatory authorities, I grant in part and deny in part the petition requesting that EPA object to the Xcel Hayden Power Station title V permit.

STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act, 42 U.S.C. § 7661a(d)(1), calls upon each State to develop and submit to EPA an operating permit program intended to meet the requirements of CAA title V. EPA granted interim approval to the title V operating permit program submitted by the state of Colorado effective February 23, 1995. 60 *Fed. Reg.* 4563 (January 24, 1995); 40 CFR part 70, Appendix A. *See also* 61 *Fed. Reg.* 56367 (October 31, 1996) (revising interim approval). Effective October 16, 2000, EPA granted full approval to Colorado's title V operating permit program. 65 *Fed. Reg.* 49919 (August 16, 2000).

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

Under section 505(a), 42 U.S.C. § 7661d(a), of the CAA and the relevant implementing regulations (40 C.F.R. § 70.8(a)), states are required to submit each proposed title V operating permit to EPA for review. Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit if it is determined not to be in compliance with applicable requirements or the requirements under title V. 40 C.F.R. § 70.8(c). If 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 EPA's 45-day review period, to object to the permit. 42 U.S.C. § 7661d(b)(2), *see also* 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).” Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2). In response to such a petition, the CAA requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the CAA. 42 U.S.C. § 7661d(b)(2). *See also* 40 C.F.R. § 70.8(c)(1); *New York Public Interest Research Group (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2003). Under section 505(b)(2), the burden is on the

petitioner to make the required demonstration to EPA. *Sierra Club v. Johnson*, 541 F.3d 1257, 1266-1267 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677-678 (7th Cir. 2008); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) (discussing the burden of proof in title V petitions); *see also* NYPIRG, 321 F.3d at 333 n.11. If, in responding to a petition, EPA objects to a permit that has already been issued, 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. §§ 70.7(g)(4) and (5)(i) – (ii), and 40 C.F.R. § 70.8(d).

BACKGROUND

I. The Facility

The Hayden Power Station, which is owned and operated by Public Service Company of Colorado, is located four miles east of Hayden at 13125 U.S. Highway 40, in Routt County. The area in which the plant operates is designated as attainment for all criteria pollutants. Flattops and Mt. Zirkel National Wilderness Areas, federal class I designated areas, are within 100 km of this facility.

This source is classified as an electrical services facility under Standard Industrial Classification 4911. This facility consists of two coal-fired boilers. Unit 1 is rated at 205 MW and Unit 2 is rated at 300 MW. As part of a Consent Decree, the following emission control devices were required to be installed on both Units 1 and 2: low NO_x burners with over-fire air (to control NO_x emissions), lime spray dryers (to control SO₂ emissions) and fabric filter dust collectors (to control PM emissions). As of October 18, 1999, all control equipment required by the Consent Decree had been placed into service.

In addition to the coal-fired boilers, other significant sources of emissions at this facility include fugitive emissions from coal handling, ash handling and disposal, and vehicle traffic on paved and unpaved roads. Point source emissions of particulate matter include coal crushing and conveying, an ash storage silo, two ash recycle silos (recycle ash used with lime in the spray dryer), two lime storage silos, two ball mill slakers (prepares lime slurry for spray dryer) and two recycle mixers (prepares recycle as slurry for spray dryer). Additional emission units at this facility include two cooling towers.

II. The Permit

The original title V operating permit for the Hayden Power Station was issued on May 1, 2001. The expiration date for that permit was May 1, 2006. On April 1, 2005, Public Service Company of Colorado submitted a title V renewal application to CDPHE. CDPHE published a notice of the draft title V permit on October 8, 2008. The public comment period for the draft permit closed on November 7, 2008. CDPHE proposed the permit to EPA on December 9, 2008; EPA did not object to the permit. On April 1, 2009, CDPHE issued the final permit to Public Service Company of Colorado.

ISSUES RAISED BY PETITIONER

I. The Title V Permit Fails to Contain Monitoring Requirements That Ensure Compliance With the Permit's Particulate Matter Limits.

Petitioner's overarching claim is that the Colorado SIP does not require monitoring for the SIP's particulate matter limit of 0.03 lb/mmBtu, and, therefore, CDPHE was required to ensure the Hayden Power Station title V permit contains sufficient periodic monitoring to ensure compliance with the limit. Petition at 3-4. In Petitioner's view, CDPHE failed to do so, and, as a result, the permit does not comply with title V requirements. *Id.* Related to this overarching claim, Petitioner makes four specific claims, which we describe and respond to below.

Petitioner's First Three Claims. Petitioner's first three claims related to assuring compliance with the particulate matter limits fall under the headings A, B, and C in the petition:

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

Petitioner claims that the permit is inadequate because it does not require actual monitoring of particulate matter emissions. In Petitioner's opinion, compliance with the 0.03 lb/mmBtu particulate matter emission limit will not be ensured by "maintaining and operating the baghouse in accordance with"... "good engineering practices" and "conducting performance tests annually."¹ Petition at 4.

B. Stack Testing Is Too Infrequent, Even If It Is An Accepted Means Of Demonstrating Compliance

Petitioner claims that, even if stack testing is an accepted means of demonstrating compliance, the required stack testing is too infrequent. Petition at 4-5. Petitioner claims that, at most, the required testing would occur only once per year and then be based only on the average of three 2-hour tests, meaning that actual particulate matter emissions would be monitored only 6 hours per year, at most. *Id.* Petitioner argues that this would cause the title V permit to fail to assure compliance over the remainder of the year or years between testing. Petition at 5. However, Petitioner notes that the particulate matter limit applies continuously and argues that continuous monitoring is necessary.² *Id.*

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

¹ Petitioner also asserts, as part of claim I.A, that compliance with good engineering practices for operation and maintenance of the boiler baghouse, in Condition 11.1 of the permit, does not yield particulate matter data necessary to demonstrate compliance with the particulate matter emission limit. Petitioner asserts that Condition 11.1 is vague and unenforceable. Petition at 4.

² Petitioner also asserts, as part of claim I.B, that heat input variability at the main boilers over a 10-year period calls into question the ability of the CDPHE to reasonably rely on annual stack testing to assure compliance with the PM emission limit. Petition at 5.

Petitioner claims that CDPHE cannot rely on Compliance Assurance Monitoring (CAM) to meet title V monitoring requirements. Petition at 6. Petitioner states that the permit does not specifically state that compliance with the particulate matter emission rate in the title V permit can be demonstrated by complying with the CAM requirements in the title V permit or with the CAM plan found within Appendix G of the permit. *Id.* In Petitioner's view, the permit does not support a relationship between compliance with the CAM requirements and compliance with the particulate matter emission rate. *Id.* Petitioner further states that it is inappropriate for CDPHE to rely solely on the CAM requirements to demonstrate compliance as it does not appear that CDPHE has established an accurate, quantitative correlation between compliance with CAM requirements and compliance with the particulate matter limit. *Id.* Petitioner notes that the permit contains opacity limits for the boilers but alleges that there is no information or analysis cited or incorporated into the permit that demonstrates compliance with these opacity limits automatically means compliance with the particulate emission limit. *Id.* Petitioner also asserts that CDPHE's claims regarding the relative stringency of CAM and periodic monitoring requirements under part 70 are misplaced, and that CAM does not supplant existing monitoring requirements, such as those under 40 C.F.R. part 70.³ Petition at 6-7.

EPA's Response. We view the three claims above as being logically related and are responding to them together. They all raise concerns with the approach that CDPHE has chosen in the Hayden Power Station title V permit to demonstrate compliance with the particulate matter emission limit for Boilers No. 1 and No. 2 (hereinafter referred to as the "PM limit"). The title V permit must contain sufficient monitoring to assure compliance with the terms and conditions of the permit. 40 C.F.R. § 70.6(c)(1); see also 40 C.F.R. § 70.6(a)(3)(i)(B). For the reasons stated below, I grant the petition on the issue that the permit does not contain sufficient monitoring for assuring compliance with the PM limit.

As CDPHE explains in its Response to Comment (RTC), the permit contains a three-pronged approach for assuring compliance with the PM limit: baghouse operation and maintenance in accordance with good engineering practice, performance testing, and a CAM plan. Response to Comments on Draft Renewal Operating Permit, Public Service Company – Hayden Station, FID #107001, OP # 96OPRO0132 (RTC) (December 9, 2008), at 4.

While Petitioner is correct that the permit does not explicitly state that compliance with the PM limit can be demonstrated by complying with the permit's CAM requirements and the CAM plan itself, we find it is readily apparent that the permit's CAM requirements and the attached CAM plan pertain to compliance assurance for the PM limit. Condition 1.18 of Section II of the permit states, "The Compliance Assurance Monitoring (CAM) requirements...apply to Boiler 1...and Boiler 2... with respect to the particulate matter limitations identified in Condition 1.1 as follows..." Although it would

³ Petitioner also notes, in a footnote to claim I.C., that neither the CAM plan nor the title V permit state that an "excursion" of the 15% opacity value, in the CAM provisions of the permit, equates to a violation of the PM emission limit. Petition at 6, n.4.

have been helpful if the CDPHE had cross referenced the CAM requirements as a monitoring requirement for the PM limit, the fact that this requirement is not reiterated in Condition 1.1 of Section II does not eliminate the CAM requirements as monitoring measures for the PM limit.

As stated above, Petitioner alleges that CDPHE has not established an accurate, quantitative correlation between compliance with CAM requirements and compliance with the PM limit. In particular, Petitioner alleges that there are no quantitative requirements set forth that ensure any level of performance for the control devices, and that no information or analysis is cited or incorporated into the permit demonstrating that compliance with the opacity limits⁴ automatically means compliance with the PM limit.

CAM monitors compliance “by requiring each major source owner to design a site-specific monitoring system sufficient to provide a reasonable assurance of compliance with emissions standards.” *Natural Resources Defense Council, Inc. v. EPA*, 194 F.3d 130, (D.C. Cir.1999). As explained in the preamble to the 1997 CAM rule,

[t]he CAM approach builds on the premise that if an emissions unit is proven to be capable of achieving compliance as documented by a compliance or performance test and is thereafter operated under the conditions anticipated and if the control equipment is properly operated and maintained, then there will be a reasonable assurance that the emission unit will remain in compliance. ... Thus a critical issue that the CAM approach must address is establishing appropriate objective indicators of whether a source is “properly operated and maintained.”

62 *Fed. Reg.* 54,909, 54926 (October 22, 1997).⁵

The renewal permit, as issued, contains an opacity indicator range, based on a 60-second period, for assuring compliance with the PM limit. (The opacity indicator range is defined in the permit as an opacity value greater than 15% for more than 60 seconds.) The permit also requires a second opacity indicator range, based on a 24-hour average, to be established through a future particulate matter performance test. Based on our review of the permit record, and as explained more fully below, we find that CDPHE has not established that either indicator is currently adequate to assure proper operation and maintenance of the PM control device in order to assure compliance with the PM limit.

(1) The permit record fails to explain the excursion value or range for the opacity indicator that is based on a 60-second period. The rationale for the selected monitoring requirements must be clear and documented in the permit record. 40 C.F.R. § 70.7(a)(5), See *IN THE MATTER OF CITGO REFINING AND CHEMICALS COMPANY L.P. WEST PLANT, Corpus Christi, Texas (CITGO)*, Petition 2007-01 (May 28, 2009), at 7.

⁴ In the footnote accompanying this allegation, Petitioner refers to the 15% opacity indicator range in the CAM plan. Petition at 6, n.4.

⁵ Thus, we reject Petitioner’s suggestion, in the footnote to claim I.C., that an opacity indicator under a CAM plan is only adequate to provide reasonable assurance of compliance if “an excursion equates to a violation of the particulate matter emission rate.”

The CAM provisions in the renewal permit include an indicator range of 15% opacity over a 60-second period as an indicator of proper operation and maintenance of the particulate matter control device (i.e., the fabric filter dust collector (FFDC)) and, therefore, compliance with the PM limit. However, the permit record fails to explain or provide supporting data for the selection of the indicator range of 15% opacity. In general, we believe an indicator range over a short term (e.g., 60-second) period can provide an appropriate means to detect the consistency of the bag cleaning operations, as well as detect any significant changes in filtering performance. However, there is no explanation or supporting data in the permit record showing that a 15% opacity level is truly representative of proper operation of the FFDC. In fact, the 15% level seems too high (i.e., too lenient) considering CDPHE is also relying on good engineering practices (e.g., bag cleaning operations) to assure compliance with the PM limit; bag cleaning operations for a well operated fabric filter may be expected to produce very low opacity levels (i.e., on the order of a few percent).

(2) The indicator range for opacity on a 24-hour average has not been established and incorporated into the permit, nor has it been justified. The CAM provisions in the permit also include a continuously monitored indicator of opacity on a 24-hour average to be established by a performance test 180 days from the issuance of the renewal permit. According to the CAM provisions in the permit, CDPHE included this indicator range on a 24-hour average upon finding that the initial indicator range proposed by the source was inappropriate. (Appendix G of the permit at page 4.) In general, we think opacity on a 24-hour average can provide a reasonable indicator of baghouse performance on a continuous basis and therefore reasonable assurance of compliance with the PM limit (provided that an appropriate excursion level is established and justified), particularly since stack test data cited in Appendix G of the permit indicate that the boilers' particulate matter emissions during the last stack test were only about one-third of the allowable emission limit of 0.03 lb/mmBtu. However, this indicator range for opacity on a 24-hour average has not been established in the issued permit, and there is no requirement in the permit for incorporating that indicator range into the permit.⁶

Although the general CAM approach set forth in the Hayden Power Station title V permit and the CAM plan (Appendix G of the permit) may be capable of providing an adequate means to assure particulate matter emission limit compliance at the boilers, for the reasons described above, the requirements from the CAM plan as specified in the permit are not adequate to assure compliance with the PM limit. The permit record does not show that the opacity indicator of 15% based on a 60-second period is appropriate, and the permit does not include, and the permit record does not justify, an appropriate 24-hour average opacity indicator. Since CDPHE relies on these opacity indicators for assuring compliance with the PM limit, CDPHE must include in its permit record

⁶ 40 CFR §64.6(e)(2) states that if the permitting authority disapproves the proposed monitoring, the permit shall include a compliance schedule for the source owner/operator to submit revised monitoring no more than 180 days after permit issuance. More than 180 days have passed since the permit issuance.

justifications and supporting data for both indicators and specify the indicator ranges in the permit.⁷

In addition to CAM, CDPHE includes stack testing and good engineering practices to assure compliance with the PM limit. As mentioned above, the rationale for the selected monitoring requirements must be clear and documented in the permit record. 40 C.F.R. § 70.7(a)(5). See *CITGO Order* at 7. Although CDPHE identified stack testing and good engineering practices as monitoring requirements, CDPHE failed to explain in its permit record how these requirements assure compliance with the particulate matter limit as elements of the three-pronged monitoring approach. CDPHE must explain in the permit record how its monitoring approach assures compliance with the PM limit.

Although not raised by the Petitioner, we have identified another deficiency in the CAM provisions of the permit during our review of Petitioner's allegation regarding inadequate PM monitoring for the boilers. CDPHE must correct the following deficiency:

Startup, shutdown, malfunction exclusion must be removed from the permit. Section III.c of Appendix G of the permit says periods of startup, shutdown, and malfunction may be excluded from the 24-hour average opacity for reporting CAM excursions. However, the CAM rule at 40 CFR 64.7(c) requires the collection of data at all times the process is operating, which includes periods such as startup, shutdown, or malfunctions. Further, §64.7(c) requires the owner or operator to use all the data collected (other than data recorded during monitoring malfunctions, associated repairs, and related quality assurance or control activities) in assessing the operation of the control device and associated control system. CDPHE must remove from the permit this exclusion for collecting data during periods of startup, shutdown, and malfunction.

For the reasons stated above, I grant the petition on the issue that the permit does not include monitoring requirements sufficient to assure compliance with the particulate matter limit for Boilers No. 1 and No. 2 and order CDPHE to fix the deficiencies in the permit, the permit record, and the CAM plan as described in this order.

Petitioner's fourth claim: Petitioner's fourth claim related to assuring compliance with the particulate matter limits falls under the following heading in the petition:

D. The Division Inappropriately Rejected Particulate Matter Continuous Emission Monitors as a Means of Ensuring Compliance with Particulate Limits

Petitioner claims that CDPHE arbitrarily rejected a means to ensure continuous compliance with the particulate matter emission limit. Petitioner requested that CDPHE require the use of particulate matter continuous emission monitors (PM CEMS) to assure

⁷ In its RTC, CDPHE asserts that CAM is more rigorous than periodic monitoring. Petitioner claims that this is not accurate. We find that this issue of relative stringency of CAM versus periodic monitoring as a general matter is not relevant to our determination.

compliance with the title V particulate matter emission limit. Petitioner cited examples where EPA has required other coal-fired power plants to install PM CEMS as a result of consent decrees (*United States v. Tampa Electric Company*, *United States v. Minnkota Power Cooperative*, *United States v. Electric Power Company*, and *United States v. Illinois Power*).

EPA's response: A title V permit must include all applicable requirements. See 40 C.F.R. 70.5(c)(4). It must also include monitoring necessary to assure compliance with applicable requirements. See CAA §§ 504(a); see also 40 C.F.R. 70.6(c)(1). Petitioner fails to identify any applicable requirement that requires the use of PM CEMS for monitoring compliance with the PM limit. In fact, Petitioner acknowledges that the underlying applicable requirement (i.e., the Colorado SIP requirements relative to the boilers' PM limit) does not specify such monitoring. See Petition at 3. Petitioner also has not alleged or demonstrated that PM CEMS are the only monitoring that can assure compliance with the PM limit and therefore must be included in the title V permit. As discussed above, we believe that the general CAM approach set forth in the Hayden Power Station title V permit and the CAM plan (Appendix G of the permit) may be capable of providing adequate PM monitoring at the boilers provided that the mentioned issues above are addressed. Petitioner fails to demonstrate that PM CEMS is required as an applicable requirement or as monitoring necessary to assure compliance with an applicable requirement. Therefore, I deny the petition on the issue that the Hayden Power Station title V permit must include PM CEMS to assure compliance with the boilers' PM limit.

II. The Title V Permit Fails to Ensure Compliance with Prevention of Significant Deterioration Requirements in Regards to CO₂ Emissions.

Petitioner's claims: Petitioner alleges that, in issuing the Hayden Power Station title V permit, CDPHE failed to assess whether CO₂ is subject to regulation in accordance with PSD requirements and therefore the title V permit fails to ensure compliance with PSD under the CAA, PSD regulations and the Colorado SIP. Petition at 9. Petitioner acknowledges that it “did not raise objections during the public comment period regarding the failure of the [CDPHE] to ensure compliance with PSD in relation to CO₂ emissions,” but claimed that “this was due to the fact that the grounds for such objection arose after the public comment period.” *Id.* Petitioner alleges that its “concern stemmed from the Environmental Appeals Board (EAB) ruling in *In Re Deseret Power Electric Cooperative* (“*Deseret Power*”), 14 E.A.D. ____, EAB PSD Appeal No. 07-03, slip op. at 63 (EAB November 13, 2008).” Petition at 9. Petitioner notes that, in the *Deseret Power* decision, the EAB “remanded a PSD permit back to Region 8 of the EPA ‘to reconsider whether or not to impose a CO₂ BACT [best available control technology] limit in light of the Agency’s discretion to interpret, consistent with the CAA [Clean Air Act], what constitutes a ‘pollutant subject to regulation under this Act.’” *Id.* Petitioner alleges that the “EAB determined this interpretation fails to set forth ‘sufficiently clear and consistent articulations of an Agency interpretation to constrain’ authority the EPA would otherwise have under the Clean Air Act.” *Id.*, quoting *Deseret Power Decision*, slip op. at 37. Petitioner claims that “[t]his EAB ruling held that EPA’s traditional, albeit

inconsistent and arbitrary, interpretations of the Clean Air Act were inadequate to justify a finding that CO₂ is not subject to regulation in accordance with PSD requirements under 42 USC §§ 7475(a) and 7479(3).” Petition at 9. Petitioner alleges that “[a]t issue is the fact that [CDPHE] relied on EPA’s interpretation of the phrase ‘subject to regulation’ when issuing the title V permit and completely ignored whether CO₂ emissions should be limited by the application of BACT as required by PSD provisions in the Colorado SIP, the Clean Air Act and PSD regulations.” *Id.* Petition argues that “[b]ecause the *Deseret* ruling was issued subsequent to the close of the comment period for the draft Title V permit, it was impracticable for Petitioner to raise with reasonable specificity objections related to this ruling.” *Id.*

Petitioner claims that “the Colorado SIP appears to support a finding that CO₂ emissions are subject to regulation, and therefore subject to PSD requirements” and provides three reasons to support interpreting the Colorado SIP in this manner. Petition at 10. First, Petitioner asserts that the U.S. Supreme Court recently held in *Massachusetts v. EPA*, 127 S.Ct. 1348 (2007) (“*Massachusetts* decision”) that CO₂ is a “pollutant” under the Clean Air Act. *Id.* Petitioner asserts that, in the *Deseret Power* decision, although the EAB notes that the *Massachusetts* decision did not address whether CO₂ is a pollutant subject to regulation under the CAA, the EAB did not reject this interpretation. Petition at 10. Petitioner claims that “the EAB noted that the *Massachusetts* decision rejected key EPA memos that EPA relied upon when interpreting the phrase ‘subject to regulation.’” *Id.* Second, Petitioner notes that the Colorado SIP contains specific provisions requiring CO₂ monitoring at coal-fired power plants, including Hayden. *Id.* Finally, Petitioner argues that CO₂ falls under the definition of “air pollutant” in the Colorado SIP and is therefore “subject to regulation” under the Colorado SIP. Petitioner at 10-11.

Petitioner claims that significant increases in CO₂ emissions have occurred at the Hayden Power Station plant. In support of this claim, Petitioner provided information regarding CO₂ emissions from Hayden Power Station between 1997 and 2006. Petitioner alleges that, if CO₂ is subject to regulation under the Colorado SIP, the increases in CO₂ emissions reported in 2000, 2002, 2005 and 2006 would be significant and would trigger BACT requirements.

EPA’s response: Section 505(b)(2) of the CAA, 42 U.S.C. § 7661d(b)(2), requires that a title V 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 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). As described above, the objection that Petitioner failed to raise during the public comment period for the draft Hayden Power Station title V permit is that CDPHE allegedly failed to assess whether PSD permitting requirements apply to CO₂ and therefore the title V permit fails to ensure compliance with the PSD requirements under the CAA, PSD regulations and the Colorado SIP. EPA finds that Petitioner has not demonstrated that it was impracticable to raise this issue

during the public comment period and that the grounds for its objection did not arise after the commenter period.

The issue raised by the Petitioner -- whether CO₂ is a pollutant “subject to regulation” under the Clean Air within the meaning of various PSD provisions -- is one that was reasonably ascertainable and could have been raised by the Petitioner before the public comment period closed on November 7, 2008. The Supreme Court’s *Massachusetts* decision, which Petitioner relies upon to establish that CO₂ qualifies as an “air pollutant” under the Clean Air Act, was issued in April 2007. The Colorado regulations (i.e., AQCC Regulations No. 1 § VII and Long-Term Strategy Review and Revision of Colorado's State Implementation Plan for Class I Visibility Protection: Part I: Hayden Station Requirements § VI.C.V.9) that Petitioner asserts require CO₂ monitoring were approved by EPA into the Colorado SIP on October 16, 2002 and February 18, 1997, respectively. Thus, the provisions and definition cited by Petitioner were in the Colorado SIP during the public comment period and have not changed since November 7, 2008. Nothing prevented Petitioner from making arguments based on these provisions during the public comment period.

Other parties have been raising substantially the same issue in permit appeals since as early as July 2007. *Christian County Generation, LLC*, PSD Appeal No. 07-01, Order Denying Review (EAB June 28, 2008). This earlier decision by the EAB, which declined to reach the merits of the question of whether the PSD requirements applied to CO₂, was issued on June 28, 2008, and accessible to the Petitioner. That decision determined that this issue was reasonably ascertainable to a party in the *Massachusetts v. EPA* case even before the Supreme Court reached its decision. Regardless of whether the Petitioner was a party to the Supreme Court case, the comment period for the Hayden Power Station draft title V permit closed after the Supreme Court decision was issued and available to the general public. Further, citing the Supreme Court case, Sierra Club raised this issue in an April 28, 2009, petition for EPA to object to a title V permit for a Louisville Gas and Electric Company facility in Trimble County, Kentucky. *See, In the Matter of Louisville Gas and Electric Company, Trimble County, Kentucky* (LG&E), Petition IV-2008-3 (April 28, 2008). This issue was raised during the public comment period for the draft LG&E permit, before the *Deseret Power* decision was issued. *See, LG&E*, Petition IV-2008-3 (Order on Petition)(August 12, 2009), at 14. Petitioner has not demonstrated why it could not have likewise raised this issue in public comments prior to November 7, 2008.

The issue of whether CO₂ is a pollutant subject to regulation under the CAA did not arise from EAB’s *Deseret Power* decision; this was an issue raised in the *Deseret Power* matter and was therefore addressed in the resulting EAB decision (as well as being discussed in the earlier *Christian County* opinion). It was well known that this issue was before the EAB. The Petition for Review in the *Deseret* matter was filed in October 2007 and the EAB granted review on this issue on November 21, 2007. Subsequently, EPA Region 8 published a notification of the grant of review in newspapers in Colorado and Utah in December 2007. In Re: Desert Power Electric Cooperative, PSD Appeal No. 07-03, Notification of Public Notice of Grant of Review (Dec. 18, 2007).

Further, in arguing that the *Deseret Power* decision is a new ground for objection, Petitioner claims that CDPHE relied on EPA's interpretation of the phrase "subject to regulation" and therefore has not addressed CO₂ emissions in accordance with the *Deseret Power* decision. However, Petitioner provides no evidence that CDPHE relied on the interpretation applied by Region 8 in the *Deseret* matter in administering the PSD requirements in the Colorado SIP or, even if Colorado had, that the EAB found this interpretation to be erroneous. In the *Deseret Power* decision, the EAB remanded the PSD permit EPA Region 8 issued to Deseret Power Electric Cooperative because EPA Region 8's permit record did not set forth "sufficiently clear and consistent articulations of an Agency interpretation [of the phrase "subject to regulation"] to constrain the authority [EPA Region 8] acknowledges it would otherwise have under the terms of the statute." *Deseret Power*, slip op. at 37. The decision does not find the interpretation of the phrase "subject to regulation" applied by Region 8 in that case to be impermissible under the CAA. On the contrary, the EAB finds "no evidence of a Congressional intent to compel EPA to apply BACT to pollutants that are subject only to monitoring and reporting requirements." *Id.* at 63.

The three reasons provided in this petition for interpreting the Colorado SIP to apply PSD to CO₂ are not clearly grounded on a conclusion or instruction in the *Deseret Power* decision. Petitioner's first reason was based on certain EAB statements in the *Deseret Power* decision, which are provided above in the summary of Petitioner's claims in Issue II. None of the statements identified by the Petitioner, nor any other statement in the *Deseret Power* decision, contain any instructions directed to States, including Colorado, when administering their PSD programs. The Petitioner's allegation that somehow CDPHE must now assess CO₂ in accordance with the particular instructions the EAB gave Region 8 upon remanding the *Deseret Power* permit is not logical and is unsubstantiated. The remaining two reasons are Petitioner's own interpretation of the Colorado SIP. Petitioner notes that the Colorado SIP requires BACT for "air pollutants subject to regulation under the Federal Act." Petition at 8, citing to *Air Quality Control Commission Regulation Number 3, Part D § VI.A.1.a*. Petitioner argues that CO₂ is regulated under the Colorado SIP because the Colorado SIP contains CO₂ monitoring requirements for coal-fired power plants. Petition at 10. Petitioner further argues that CO₂ falls under the definition of "air pollutant" in the Colorado SIP and therefore is an "air pollutant subject to regulation" under the Colorado SIP. Petition at 10-11. The *Deseret Power* decision does not establish a controlling interpretation of the phrase "subject to regulation" whether in the context of the CAA, EPA PSD regulations, or any state SIP. Petitioner's objection is based on its own interpretation of provisions of the Colorado SIP that (as noted above) existed during the public comment period.

For the reasons stated above, we conclude that, during the public comment period for the Hayden Power Station title V permit, Petitioner could have objected based on its allegation that CDPHE failed to ensure compliance with PSD in relation to CO₂ emissions, as required by the CAA and the Colorado SIP. The *Deseret Power* decision gives rise to no independent ground for Petitioner to raise this issue now for the first time

in this petition. Petitioner failed to demonstrate that it was impracticable to raise this issue during the public comment period. I therefore deny the petition on this issue.

CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act and 40 C.F.R. § 70.8(d), I hereby grant in part and deny in part the petition from WildEarth Guardians objecting to the title V permit issued to the Public Service Company of Colorado for the Hayden coal-fired power plant.

Dated: 3/24/10



Lisa P. Jackson
Administrator