BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: Anadarko Uintah Midstream, LLC, Archie Bench Compressor Station, Permit No. SMNSR-UO-000817-2016.001 Bitter Creek Compressor Station, Permit No. SMNSR-UO-000818-2016.001 East Bench Compressor Station, Permit No. SMNSR-UO-000824-2016.001 North Compressor Station, Permit No. SMNSR-UO-000071-2016.001 North East Compressor Station, Permit No. SMNSR-UO-001874-2016.001 Sage Grouse Compressor Station, Permit No. SMNSR-UO-001875-2016.001	Appeal No. NSR 18-01

EPA Region 8's Response to Petition for Review

Table of Contents

Table of Authorities ii

Table of Exhibits iv

Introduction 1

Factual and Procedural Background 2

Scope and Standard of Review 8

Argument 9

1. Guardians fails to show clear error associated with its contention that, under 40 C.F.R. § 49.158(c)(3), the facilities should have applied for synthetic minor permits by September 4, 2012. 10

2. Guardians' arguments concerning the Consent Decree fail to demonstrate clear error. 16

3. Guardians' argument concerning the definition of construction at 40 C.F.R. § 52.21(b)(8) fails to demonstrate clear error. 19

4. Section 49.154(d) of the regulations affords Region 8 discretion and does not require the permit applicant to conduct and submit an AQIA. 20

5. Even if Guardians had alleged an abuse of discretion concerning the sole issue identified for review, EPA Region 8 properly exercised its discretion — in the absence of any evidence that the permits would harm air quality — in deciding not to require an AQIA. 21

6. Guardians' argument based on air quality does not establish clear error. 23

Conclusion 23

Table of Authorities

Cases

Conservancy of Southwest Fla. v. United States Fish & Wildlife Serv., 2010 U.S. Dist. LEXIS 136265 (M.D. Fla. Nov. 2, 2010) 20

In re City of Attleboro, MA Wastewater Treatment Plant, 14 E.A.D. 398 (EAB 2009) 12

In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility, 12 E.A.D. 235 (EAB 2005) 12, 13

In re City of Palmdale, 15 E.A.D. 700 (EAB 2012). 12, 21

In re ConocoPhillips Co., 13 E.A.D. 768 (EAB 2008) 12

In re Indeck-Elwood, LLC, 13 E.A.D. 126 (EAB 2006)) 8, 9

In re MHA Nation Clean Fuels Refinery, 15 E.A.D. 648 (EAB 2012). 11

In re Salt River Project Agric. Improvement & Power Dist. — Navajo Generating Station, 17 E.A.D. 312 (EAB 2016) 8, 9, 12

Takeda Pharms., U.S.A., Inc. v. Burwell, 78 F. Supp. 3d 65 (D.D.C. 2015) 20

United States v. Colorado, 937 F.2d 505 (10th Cir. 1991) 18

United States v. Kerr-McGee Corp., 2008 U.S. Dist. LEXIS 24494, Civ. Action No. 07–CV–01034–EWN–KMT (D. Colo. March 26, 2008) 2, 6, 22

Wildearth Guardians v. Jackson, 2011 U.S. Dist. LEXIS 109800 (D. Colo. Sep. 27, 2011) 17

Statutes

33 U.S.C. § 1251 *et seq.* 12

42 U.S.C. § 6901 *et seq.* 12

42 U.S.C. § 7407(d) 4

42 U.S.C. § 7412 5

42 U.S.C. § 7413 2

42 U.S.C. § 7601(d)(4) 5

42 U.S.C. §§ 7470–7492 5

42 U.S.C. §§ 7661–7661f 5

Other Authorities

Revised Order Governing Petitions for Review of Clean Air Act New Source Review Permits (EAB March 27, 2013) 9

Regulations and Preambles

40 C.F.R. part 49 ..... 8, 12, 13, 22

40 C.F.R. §§ 49.151–49.161 ..... 5, 11

40 C.F.R. § 49.151(b)(3) 5

40 C.F.R. § 49.151(c)(1)(ii) 5
40 C.F.R. § 49.151(c)(1)(iii) 5
40 C.F.R. § 49.151(c)(2) 5
40 C.F.R. §§ 49.154(a)(2)(vii), (viii) 5
40 C.F.R. § 49.154(a)(3) 6
40 C.F.R. § 49.154(d) 1, 9, 10, 14, 15, 19, 20, 22
40 C.F.R. § 49.154(d)(1) 14, 20
40 C.F.R. § 49.157 ..... 6, 13
40 C.F.R. § 49.157(c)(1) 11
40 C.F.R. § 49.158 ..... 6, 13
40 C.F.R. § 49.158(c) 10
40 C.F.R. § 49.158(c)(2) 11
40 C.F.R. § 49.158(c)(3) 10, 11, 13, 14
40 C.F.R. § 49.158(c)(4)(iii) 14, 15
40 C.F.R. § 49.159(d)(1) 8
40 C.F.R. § 49.159(d)(2) 8, 16
40 C.F.R. § 49.159(d)(3) 8, 9, 17
40 C.F.R. § 49.159(d)(3)(i) 21
40 C.F.R. § 49.159(d)(3)(ii) 21
40 C.F.R. § 52.21(b)(8) 10, 19
40 C.F.R. § 81.345 4
40 C.F.R. part 124 ..... 8, 12
40 C.F.R. § 124.19(a) 12
40 C.F.R. § 124.19(a)(2)-(4) 8
Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards, 83 Fed. Reg. 25776 (June 4, 2018) 4
Final Rule, Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38748 (July 1, 2011) 5, 20
National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65292 (October 26, 2015). 4
Proposed Rule, Amendments to Federal Implementation Plan for Managing Air Emissions From True Minor Sources in Indian Country in the Oil and Natural Gas Production and Natural Gas Processing Segments of the Oil and Natural Gas Sector, 83 Fed. Reg. 20775 (May 18, 2018) 4
Proposed Rule, Review of New Sources and Modifications in Indian Country, 71 Fed. Reg. 48696 (Aug. 21, 2006) 4

Table of Exhibits

1. Consent Decree (entered by *United States v. Kerr-McGee Corp.*, Civ. Action No. 07–CV–01034–EWN–KMT, 2008 U.S. Dist. LEXIS 24494 (D. Colo. March 26, 2008)) [Administrative Record (AR) Index No. 4.1.]

2. Permit applications

    a. Archie Bench Compressor Station [AR Index No. 1.8 AB]

    b. Bitter Creek Compressor Station [AR Index No. 1.8 BC]

    c. East Bench Compressor Station [AR Index No. 1.8 EB]

    d. North Compressor Station [AR Index No. 1.8 N]

    e. North East Compressor Station [AR Index No. 1.8 NE]

    f. Sage Grouse Compressor Station [AR Index No. 1.8 SG]

3. E. Wortman email to public comment list — Notice of Public Comment Period – Proposed Permits to Construct on the Uintah and Ouray Indian Reservation (Jan. 8, 2018) [AR Index No. 1.1]

4. Permit Public Notice [AR Index No. 1.9]

5. Proposed Permit for Archie Bench Compressor Station [AR Index No. 1.11 AB]

6. Technical Support Document for proposed permit for Archie Bench Compressor Station [AR Index No. 1.10 AB]

7. Comment Letter from WildEarth Guardians [AR Index No. 2.1; cover email not included]:

    a. Comments

    b. Attachment to Comments: EPA document, "Intended Area Designations for the 2015 Ozone National Ambient Air Quality Standards, Technical Support Document (TSD)"

8. Response to Comments [AR Index No 3.1]

9. M. Morales cover letter to Wildearth Guardians with Final Permits and Response to Comments (enclosures not included in exhibit 9) [AR Index No. 3.4, pp. 1–2]

10. E. Wortman email to public comment list with notice of permit issuance and Response to Comments [AR Index No. 3.8]

Introduction

On June 7, 2018, under regulations governing Clean Air Act minor source permitting in Indian country, Region 8 of the U.S. Environmental Protection Agency (EPA), as permitting authority, issued six synthetic minor new source review permits to natural gas compressor stations in the Uintah Basin area of Utah. The stations have been operating for years under a federal consent decree, the requirements of which reduce the facilities' potential to emit New Source Review (NSR) pollutants and hazardous air pollutants (HAPs) below applicable major source thresholds, and have now been incorporated into the permits in question. No operational or physical changes of these stationary sources will result from the issuance of the synthetic minor permits. Emissions from these existing, operating facilities, including emissions of volatile organic compounds, nitrogen oxides, and carbon monoxide, will not change because of the permits.

Petitioner WildEarth Guardians (Guardians) impermissibly attempts to raise — for the first time in these proceedings on review — arguments that it failed to raise during the comment period. Even if it had properly preserved these arguments, Guardians fails to meet its burden of demonstrating that any permit condition or the permitting action was based on a clearly erroneous finding of fact or conclusion of law. In addition, Guardians makes no claim — and could not show in any event — that Region 8 abused its discretion in opting not to require the permit applicant to conduct and submit an air quality impacts analysis (AQIA) under 40 C.F.R. § 49.154(d). For all of these reasons, the Petition for Review should be denied and the permitting action should be sustained.

Factual and Procedural Background

The facilities. At issue in this petition are six natural gas compressor stations in Uintah County, Utah, in the region known as the Uinta Basin, on Indian country lands within the Uintah and Ouray Indian Reservation. The facilities are operated by Anadarko Uintah Midstream, LLC, a subsidiary of Anadarko Petroleum Corporation, and are subject to a federal Consent Decree entered on March 26, 2008. *United States v. Kerr-McGee Corp.*, Civ. Action No. 07–CV–01034–EWN–KMT, 2008 U.S. Dist. LEXIS 24494, at *37 (D. Colo.) (granting motion to enter Consent Decree); see Ex. 1. In relevant part, the Decree resolved claims by EPA under Clean Air Act (CAA) section 113, 42 U.S.C. § 7413, for civil penalties and injunctive relief against Kerr-McGee Corporation for violations in connection with natural gas production operations in Indian country within the Uinta Basin.[1]

Among other things, under the Consent Decree Kerr-McGee, a subsidiary of Anadarko Petroleum Corp., was required to retrofit reciprocating internal combustion engines (RICE) with oxidation catalysts at Uinta Basin minor sources, including five of the six facilities: the Archie Bench, East Bench, North, North East and Sage Grouse compressor stations. Ex.. 1 § IV.D., ¶¶ 40–48; Ex. 1 App. E. The Decree also required that high-bleed pneumatic controllers be retrofitted with low-bleed pneumatic controllers at the Archie Bench, East Bench, North, and North East stations. Ex. 1 § IV.E., ¶¶ 58–60; Ex. 1 App. G; *Kerr-McGee* at *6. Further, the Decree required that only low-emission dehydrators and (unless technically infeasible) low-bleed pneumatic controllers be installed at all new facilities; and that any new RICE rated at or above 500 horsepower at any facility in the Uinta Basin be lean-burn or achieve comparable emission

[1] The consent decree also resolved claims by the United States and the State of Colorado related to facilities in Colorado and arising under federal and state law.

reductions, and be equipped with catalyst controls. Ex. 1 § IV.A., ¶¶ 9–11; § IV.D., ¶¶ 49–57; § IV.E., ¶¶ 63–65. The Decree applied to Kerr-McGee's corporate affiliates owning or operating Uinta Basin facilities. Ex. 1 § III, ¶ 5.

The Decree provided that "control requirements established in Sections IV.A. (Low-Emission Dehydrators), …IV.D. (Compressor Engines in the Uinta Basin) and IV.E. (Pneumatic Controllers)…shall be considered 'federally enforceable' and, as applicable, 'legally and practicably enforceable' for purposes of calculating the PTE of a source or facility as may be applicable under the Act." Ex. 1 § VI, ¶ 74. As envisioned in the Decree, its requirements could later be incorporated into federally enforceable permits, after which the Decree could be partially terminated and as applicable superseded by the permits. Ex. 1 § XXV, ¶¶ 167–69.

The controls required by the Decree effectively limited the facilities' potential to emit several pollutants as follows:

Table 1: Facility Emissions Without and With the Controls Required By the Consent Decree

Facility	Uncontrolled / Controlled NOx emissions (tpy)	Uncontrolled / Controlled CO emissions (tpy)	Uncontrolled/ Controlled VOC emissions (tpy)	Uncontrolled/ Controlled HAP emissions (tpy)
Archie Bench	58.4 / 58.4	330.1 / 23.2	23.7 / 20.5	14.7 / 6.1
Bitter Creek	39.1 / 39.1	220.2 / 15.6	25.6 / 23.5	10.9 / 5.2
East Bench	39.0 / 39.0	220.1 / 15.5	13.6 / 11.5	9.5 / 3.8
North	75.0 / 75.0	346.7 / 24.4	25.5 / 21.6	17.4 / 7.0
North East	39.0 / 39.0	220.1 / 15.5	10.6 / 8.4	9.0 / 3.3
Sage Grouse	84.4 / 84.4	354.4 / 24.9	26.9 / 22.8	18.0 / 6.7

NOx: Nitrogen oxides, a precursor chemical to the NAAQS pollutant ozone
CO: Carbon monoxide, a NAAQS pollutant
VOC: Volatile organic compounds, precursor chemicals to the NAAQS pollutant ozone
HAP: Hazardous air pollutants
tpy: tons per year
Source: Ex. 2a, 2b, 2c, 2d, 2e, 2f (Emissions Summary / Appendix E to permit application for each facility)

Air quality in the Uinta Basin. The EPA recently designated portions of the Uinta Basin as a Marginal nonattainment area for the 2015 ozone National Ambient Air Quality Standard (NAAQS).[2] The Uinta Basin is a winter ozone area, where violating ozone concentrations are dependent on stagnant winter conditions associated with strong temperature inversions, and on the bowl-like topography of the basin. Ex. 7b at 29, 42. Uintah County has not been designated nonattainment for any other NAAQS pollutant. 40 C.F.R. § 81.345.

The Tribal New Source Review Rule. When the Consent Decree was negotiated and entered, there was a regulatory gap affecting some of the facilities it covered, including those at issue here:

> Currently in Indian country, there is no permitting mechanism for new or modified minor sources; minor modifications at major sources; or new major stationary sources or major modifications of regulated NSR pollutants in nonattainment areas. In addition, there is no minor source permitting mechanism for major stationary sources looking to voluntarily limit emissions to become synthetic minor sources ….
>
> …
>
> Unlike for the PSD [Prevention of Significant Deterioration] program, there is currently no FIP [Federal Implementation Plan] to implement either the nonattainment major NSR program or the minor NSR program in Indian country. Hence, there is a regulatory gap in Indian country. Today's proposed rule will allow us to fully implement the NSR program in Indian country.

Proposed Rule, Review of New Sources and Modifications in Indian Country, 71 Fed. Reg. 48696, 48699, 48700 (Aug. 21, 2006). The gap existed until 2011, when EPA published a final

---

[2] Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards, 83 Fed. Reg. 25776, 25837–38 (June 4, 2018) (effective date Aug. 3, 2018). On October 1, 2015, the EPA promulgated revised primary and secondary ozone NAAQS, strengthening both standards to a level of 0.070 parts per million (ppm). National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65292 (Oct. 26, 2015). Under section 107(d) of the CAA, 42 U.S.C. § 7407(d), whenever the EPA establishes a new or revised NAAQS, the EPA must promulgate designations for all areas of the country for that NAAQS. *See* Proposed Rule, Amendments to Federal Implementation Plan for Managing Air Emissions From True Minor Sources in Indian Country in the Oil and Natural Gas Production and Natural Gas Processing Segments of the Oil and Natural Gas Sector, 83 Fed. Reg. 20775, 20782 (May 18, 2018) (describing CAA section 107(d) designation process).

rule: Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38748, 38753 (July 1, 2011) ("Tribal NSR Rule"). ("This final rule will allow us to address that gap…."). With respect to Indian country permitting requirements for new and modified minor stationary sources, and for minor modifications at existing major stationary sources, this rulemaking established the Federal Minor New Source Review Program in Indian Country ("Tribal Minor NSR Rule"). *See* 40 C.F.R. §§ 49.151–49.161, as amended. EPA is charged with direct implementation of these provisions in jurisdictions where there is no approved tribal implementation plan for implementation of the Tribal NSR regulations. 40 C.F.R. § 49.151(c)(2); *see also* CAA section 301(d)(4), 42 U.S.C. § 7601(d)(4) (authorizing EPA to promulgate regulations providing for direct EPA implementation of CAA programs in Indian country, as appropriate).

The Tribal Minor NSR Rule required true minor sources to register with the appropriate regulatory authority by January 1, 2013. 40 C.F.R. § 49.151(c)(1)(iii). In addition, the rule established a mechanism for a stationary source that would otherwise be deemed major under the PSD, nonattainment NSR, Title V, or HAP program to voluntarily accept restrictions on its potential to emit (PTE) and thereby to become a synthetic minor source. 40 C.F.R. §§ 49.151(b)(3), 49.158; *see* 42 U.S.C. §§ 7470–7492 (PSD), 7412 (HAP), 7661–7661f (CAA Title V). It recognized that synthetic minor sources could be established in several ways: the new Tribal Minor NSR Rule itself, existing federal implementation plans in specific areas, CAA Title V operating permits, or other mechanisms. 40 C.F.R. § 49.151(c)(1)(ii). Further, it provided for existing limitations on emissions, and for inclusion of permitting language reflecting such limitations. *See* 40 C.F.R. §§ 49.154(a)(2)(vii), (viii) (requiring permit applications to include information on "any existing air pollution control equipment and compliance monitoring devices

or activities" and "[a]ny existing limitations on source operation affecting emissions"); 49.154(a)(3) (allowing permittee to "propose emission limitations for each affected emissions unit, which may include pollution prevention techniques, air pollution control devices, design standards, equipment standards, work practices, [or] operational standards").

Application for permits: On November 8, 2016, Anadarko submitted applications for synthetic minor permits for the six facilities under the Tribal Minor NSR Rule. In its submission Anadarko said that it was seeking "to establish federally enforceable limits as required by the Civil Action No. 07-CV-01034-EWN-KMT (KMG Consent Decree)." *See, e.g.,* Ex. 2a at 1.

The permitting process. On January 8, 2018, EPA Region 8 opened a 30-day public comment period on proposed permits for the six facilities, in accordance with 40 C.F.R. §§ 49.157 and 49.158. Ex. 3; Ex. 4; *see also* Petition at 9. The public notice of the opportunity to comment on the proposed permits identified the subjects as "existing facilities," each of which "is a natural gas production source that compresses and treats natural gas from the surrounding field" and "currently operates under a Federal Consent Decree" entered in Civil Action No. 07-CV-01[0]34-EWN-KMT. Ex. 4 at 1; *see Kerr-McGee Corp.*, 2008 U.S. Dist. LEXIS 24494 (D. Colo. March 26, 2008); Ex. 1. The notice explained that the permits would incorporate enforceable requirements consistent with the Consent Decree, including emissions control efficiency requirements and requirements to install and operate only instrument-air-driven or low-bleed pneumatic controllers. Ex. 4 at 1. The permit for the Bitter Creek Compressor Station would also, consistent with the Decree, incorporate requirements for installation and operation of low-emission dehydration systems for control of volatile organic compound emissions. *Id.* As Region 8 explained in its notice, these permit actions would have "no adverse air quality impacts" because "emissions at these existing facilities will not be increasing due to this permit

action" and because "these actions do not authorize the construction of any new emission sources, or emission increases from existing sources, nor do they otherwise authorize any other physical modifications to the facility or its operations." *Id.*

Guardians' submission was the only set of comments that Region 8 received on the proposed permits. Ex. 7a, 7b. The comments asserted that applicable EPA regulations required an air quality impact analysis (AQIA) before the permits could be issued, because the facilities' emissions would contribute to violations of the ozone and NO_2 NAAQS. Ex. 7a at 2–3. According to the comments, the facilities were not "existing" because they had not previously been subject to air quality permitting and analysis, and because the permits would set synthetic minor limits. *Id.* at 3. Therefore, Guardians urged, the facilities should be treated as newly constructed for permitting purposes. *Id.*

After careful consideration of Guardians' comments on the proposed permits for the six facilities, Region 8 issued the final permits on June 7, 2018, along with a response to each comment and a public notice announcing the final permit decision. *See* Ex. 9, Ex. 10. The response to comments explained in detail the basis for Region 8's conclusion that issuance of the permits would not cause or contribute to ozone or NO2 NAAQS or PSD increment violations, and that no air quality impacts analysis was required. Ex. 8. Region 8 explained, for example, that the purpose of issuing the permits was "to permanently memorialize the requirements that were established in the CD [Consent Decree], so that the CD can be terminated and to allow for continued operation of the emissions units," and the Region stated that following this "regulatory procedure to transfer requirements from a federal CD to federal minor source permits" would not result in new construction or new emissions. Ex. 8 at 3.

Scope and Standard of Review

The Petition seeks review of Region 8's issuance of six tribal minor NSR permits under the Tribal Minor NSR Rule. In accordance with 40 C.F.R. § 49.159(d)(1), any person who filed comments on the draft permits "may petition the Board to review any condition of the permit decision." The petition "must include a statement of the reasons supporting the review, including a demonstration that any issues being raised were raised during the public comment period … and, when appropriate, a showing that the condition in question is based on: (i) a finding of fact or conclusion of law that is clearly erroneous or (ii) an exercise of discretion or an important policy consideration that the Board should, in its discretion, review." 40 C.F.R. § 49.159(d)(3).

In reviewing challenges to tribal minor NSR permits, the Board looks to EPA's 40 C.F.R. part 124 regulations governing review of PSD permits, and to Board decisions interpreting those provisions. *In re Salt River Project Agric. Improvement & Power Dist. — Navajo Generating Station,* 17 E.A.D. 312, 314-315 (EAB 2016). Under these procedures, a petitioner seeking to challenge a permit must first establish that threshold procedural requirements have been satisfied, including timeliness, standing, and issue preservation. *Id.* (citing 40 C.F.R. §§ 49.159(d)(2)-(3), 124.19(a)(2)-(4); *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006)). To establish that it has preserved an issue for appeal, a petitioner must show that it raised the issue "with reasonable specificity" during the comment period. *Indeck-Elwood*, 13 E.A.D. at 143.

The EAB's power to review permits is "to be sparingly exercised." *Salt River Project*, 17 E.A.D. at 315 (applying 40 C.F.R. part 124 precedent to review of petition brought under 40 C.F.R. part 49). In addition to preserving the issues for appeal, a petitioner bears the burden of specifying its objections to the final permit, and of explaining why the permitting authority's

response to those objections is clearly erroneous or otherwise warrants review. *Indeck-Elwood,*13 E.A.D. at 143; *see also, e.g., Salt River Project*, 17 E.A.D. at 315 (citing *Indeck-Elwood* and applying same standard in reviewing challenge to tribal minor NSR permit).[3] Accordingly, Guardians must either demonstrate that the challenged conditions of the permits were based on a "finding of fact or conclusion of law that is clearly erroneous" or that the permit conditions were based on an "exercise of discretion that the Board should, in its discretion, review." 40 C.F.R.§ 49.159(d)(3).

Here, Guardians requests that the Board review the permitting action "on the basis that the permits are based on findings of fact and/or conclusions of law that are clearly erroneous." Petition at 2. Petitioner nowhere contends that the Region's decision involved an "exercise of discretion or an important policy consideration" and the Petition makes no claim of abuse of discretion.

Argument

Guardians asserts that Region 8 made clearly erroneous findings of fact or conclusions of law, but fails to specify any such error. *See, e.g.*, Petition at 5, 11, 16. In a seeming attempt to simplify the issues for review, Guardians states that its Petition "presents a single question for resolution, namely whether EPA Region 8 violated the Tribal NSR rules by inappropriately concluding that issuance of the six permits did not constitute permitting actions warranting air quality scrutiny pursuant to 40 C.F.R. § 49.154(d)." Petition at 11. As discussed below,

[3] Similarly, under the Board's standing order governing NSR permit review, the petitioner must demonstrate that any issue challenged was raised in comments or was not reasonably ascertainable, and must explain why the response to its comments was inadequate. Revised Order Governing Petitions for Review of Clean Air Act New Source Review Permits (EAB March 27, 2013) at 4-5; *see Salt River Project*, 17 E.A.D. 314 n.3 (specifying that this standing order applies to tribal minor NSR permitting).

Guardians does not establish that Region 8 committed any clear error — of fact or of law — with respect to the question Guardians raises.

In support of its Petition, Guardians does offer several legal arguments:

(1) Under 40 C.F.R § 49.158(c)(3), the facilities were required to apply for synthetic minor permits by September 4, 2012, and the failure to do so somehow jeopardizes the later permit applications or undermines the Region's decision to issue the permits (Petition at 12-13);

(2) The Consent Decree does not "appear to" limit emissions at the facilities to levels below major source thresholds, and the assertion that the Decree "is 'enforceable as a practical matter' is suspect" (Petition at 13-14);

(3) Under 40 C.F.R. § 52.21(b)(8), "construction" occurs whenever there is a change in methods of operation that is associated with a "change" in emissions and that approving the permits resulted in a change in the method of operation for the facilities, triggering the need to conduct an AQIA (Petition at 15); and

(4) Under 40 C.F.R. § 49.154(d), Region 8 was required to demand that the permit applicant conduct and submit an AQIA (Petition at 12).

As to some of these arguments, Guardians cannot demonstrate that it raised the issue in its comments, and therefore it cannot attempt to do so here. Moreover, some of these arguments have little if any bearing on the question Guardians has identified as the subject of its Petition. As to each of these issues, Guardians fails to show that Region 8 committed any clear error of fact or law, much less any such error as fatally jeopardizes the basis for the permit conditions or the permitting decision.

1. Guardians fails to show clear error associated with its contention that, under 40 C.F.R. § 49.158(c)(3), the facilities should have applied for synthetic minor permits by September 4, 2012.

The Tribal Minor NSR Rule addresses the responsibilities of sources that already had synthetic minor source status before the effective date of the Rule (August 30, 2011), and differentiates among sources based on how the source's synthetic minor source status was "established." 40 C.F.R. § 49.158(c). Guardians asserts that the facilities did not submit

applications for synthetic minor permits by September 4, 2012, and that they were required to do so under 40 C.F.R. § 49.158(c)(3). Petition at 12–13. The consequence, Guardians suggests, is the facilities are ineligible for a synthetic minor permit under 40 C.F.R. § 49.158(c)(2), and should instead be treated as major sources. Further, according to Guardians, the submission deadline in 40 C.F.R. § 49.158(c)(3) prevents EPA from relying on the Consent Decree as a source of synthetic minor permit limits.

As a threshold matter, this argument fails because Guardians did not raise it in its comments. It should not be allowed to raise the issue for the first time now, in its Petition. Commenters must "raise any reasonably ascertainable issue with supporting arguments by the close of the public comment period." 40 C.F.R. § 49.157(c)(1). Guardians did not do so here. Its comments do not mention the § 49.158(c)(3) submission deadline or any requirement to submit a permit application. Nor do they assert that EPA should not treat the facilities as synthetic minor sources, or that the agency should treat the facilities as major sources. Because Guardians in fact did not raise the § 49.158(c)(3) issue in its comments, thereby failing to comply with 40 C.F.R. § 49.157(c)(1), it is no surprise that the Petition fails to satisfy the related threshold requirement that a petition include "a demonstration that any issues being raised were raised during the public comment period." 40 C.F.R. § 49.159(d)(3); *see* Petition at 11 (asserting that "the issues raised in this Petition were raised by Guardians during the public comment period," but providing no citation to demonstrate this as to the application deadline issue).

Petitioner has thus failed to meet its burden of demonstrating that review is warranted. "As the Board has stated on numerous occasions, it is not incumbent upon the Board to scour the record to determine whether an issue was properly raised below or determine what part of the Region's analysis the petitioner is challenging." *In re MHA Nation Clean Fuels Refinery*, 15

E.A.D. 648, 677 (EAB 2012). A failure to provide the required demonstration is grounds for denying review of the issue. *In re City of Palmdale*, 15 E.A.D. 700, 705 (EAB 2012).

A petitioner cannot comply with this requirement merely by pointing to a general discussion of a related topic. *See In re ConocoPhillips Co.*, 13 E.A.D. 768, 801 (EAB 2008) (denying review where petitioners stated that they had "express[ed] extensive concern with greenhouse gas emissions" related to the project, but did not identify any comment "that expressly raises the issue of whether a BACT limit was required for greenhouse gases"). Rather, "[t]he Board frequently has emphasized that, to preserve an issue for review, comments made during the comment period must be sufficiently specific," and has "often denied review of issues raised on appeal that the commenter did not raise with the requisite specificity during the public comment period." *In re City of Attleboro, MA Wastewater Treatment Plant*, 14 E.A.D. 398, 406 (EAB 2009) (internal citations omitted). For instance, in a part 124 proceeding[4] under the Clean Water Act, the Board denied review of a challenge to an interim pollutant limit where a petitioner mentioned the duration of the limit, but not its numerical level. *In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility*, 12 E.A.D. 235, 243–44 (EAB 2005). Under this standard, it is clear that Guardians' comments — which focus on their claim that an air quality impact analysis was required, but do not in any way refer to 40 C.F.R.

[4] As noted above, the Board has found that decisions under part 124 serve as relevant precedent in part 49 proceedings. *Salt River Project*, 17 E.A.D. at 314–15. Part 124 includes generally applicable program requirements as well as those specific to Clean Air Act PSD permits, to Clean Water Act National Pollutant Discharge Elimination System under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and to permits under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*. The pertinent provision in the water cases cited above is 40 C.F.R. § 124.19(a), which applies to permitting proceedings across all three statutes. *See City of Attleboro*, 14 E.A.D. at 444 (rejecting request for review of phosphorus limit when argument was not raised in comments below, and citing 40 C.F.R. § 124.19(a) requirement); *City of Marlborough*, 12 E.A.D. at 243 ("Because these issues were reasonably ascertainable but were not raised during the public comment period on the Draft Permit, the issues have not been preserved for review by the Board. 40 C.F.R. § 124.19(a)….[further case law citations omitted]).

§ 49.158(c)(3) or otherwise assert the issue it now seeks to pursue — fall far short of raising any issue related to that provision.

Unquestionably, Guardians had the opportunity to comment on 40 C.F.R. § 49.158(c)(3) issues: Region 8 identified the proposed permits as synthetic minor permits under 40 C.F.R. § 49.158 in its public notice of the opportunity to comment, included the permit applications in the public docket, and noted the reliance on the Consent Decree in the proposed permits and in correspondence placed in the docket for the rulemaking. *See, e.g.,* Ex. 3 ("In accordance with the regulations at 40 CFR 49.157 and 49.158, the EPA is hereby providing notification of the availability for public comment of the proposed Clean Air Act synthetic minor New Source Review permits"); Ex. 4 (citing Consent Decree and noting that the permits incorporate requirements consistent with the Decree); Ex. 2a at 3 (identifying facility as "Existing Source operating under synthetic minor limits, as regulated under Consent Decree, submitting an application for a synthetic minor permit under Part 49."); Ex. 5 at 2 (noting that application was for "synthetic minor permit" that would incorporate Consent Decree requirements.) This information was more than sufficient to allow Guardians to comment on an alleged deficiency in connection with the date the permit applications were submitted. But Guardians did not do so — not even generally, and certainly not with the required specificity.

The requirement that a petitioner raise an issue during the public comment period in order to preserve it for review "is not an arbitrary hurdle placed in the path of potential petitioners," but "[r]ather, the requirement serves an important function related to the efficiency and integrity of the overall administrative permitting scheme." *In re City of Marlborough*, 12 E.A.D. at 244 n.13. "The intent of the rule is to ensure that the permitting authority first has the opportunity to address permit objections, and to give some finality to the permitting process." *Id.* Because

Guardians did not raise the 2012 deadline question in its comments, the Region had no chance to respond to this argument in finalizing the permit, and the issue is not part of the record for the Region's decision. Therefore, because the Petition fails to provide the required demonstration that the 40 C.F.R. § 49.158(c)(3) issue was raised during the public comment period, the Board should deny review of Guardians' arguments related to section § 49.158(c)(3) and its 2012 application deadline.

If Guardians had demonstrated that it had timely and adequately raised the issue, Guardians' application-deadline argument would still fail, because it is not germane to what the Petition identifies as the sole issue for the Board to consider: whether EPA should have required an air quality impact analysis under 40 C.F.R. § 49.154(d)(1). In particular, if Guardians' deadline argument is correct, then the consequence would be that each of the six facilities should "no longer [be] considered a synthetic minor source," and instead "become subject to all requirements for major sources." Petition at 4, 13. But if the facilities must be considered major sources, then the air quality impacts analysis provision at 40 C.F.R. § 49.154(d)(1) is irrelevant, because that provision concerns minor source permitting. Given that Guardians' entire comment is built around the assertion that EPA should have required an air quality impact analysis under this provision (not applicable to major sources), and that Guardians has identified this as the sole issue for the Board to consider in this Petition, Guardians cannot plausibly argue that a different requirement, not mentioned in its comment, now prevents section 49.154(d) from applying altogether.[5] This unpreserved side issue contradicts and renders moot the whole premise of Guardians' substantive claim.

[5] Guardians asserts that "there is no question the requirements of 40 C.F.R. § 49.154(d) are applicable to the Anadarko facilities." Petition at 12. But, again, the consequence of its contention that § 49.158(c)(4)(iii) subjects the facilities to major source requirements is that § 49.154(d) is inapplicable

Ultimately, Guardians fails to show how — even assuming for the sake of argument that it is correct that the facilities were existing synthetic minor sources that were required under the Tribal Minor NSR Rule to apply, for synthetic minor permits by September 4, 2012 — the failure to timely apply for synthetic minor status reveals a clear error of fact or law by Region 8 that is material to Guardians' "single question" presented for resolution by the Board. That single question is whether Region 8 "inappropriately" concluded that an AQIA "pursuant to 40 C.F.R. § 49.154(d)" was not warranted. Petition at 11. Guardians' contention that the sources failed to submit synthetic minor permit applications by September 4, 2012 does not demonstrate that an AQIA was warranted or that Region 8's failure to demand an AQIA was inappropriate. Indeed, the Tribal Minor NSR Rule does not mandate an AQIA under 49.154(d) when an existing synthetic minor source submits an untimely application, but simply states that if such a source fails to timely submit an application the "source will no longer be considered a synthetic minor source … and will become subject to all requirements for major sources." 40 C.F.R. § 49.158(c)(4)(iii).

Any remand of the permitting decision because the sources failed to apply by 2012 would not necessitate that Region 8 require an AQIA under 49.154(d), but might, at most, engender uncertainty about the status of the sources. Guardians appears to assert that Anadarko would instead need to seek major source permits for the facilities. There is, however, nothing compelling them to do so, as the Consent Decree remains in effect. Under the Consent Decree, as further discussed below, the facilities are existing minor sources; new major source permitting requirements do not apply to them. Thus, if Guardians were to prevail on its deadline argument, the likely outcome is that the facilities would remain covered by the Consent Decree

indefinitely.[6] The environmental outcome would remain the same; the difference would be that the parties to the Consent Decree would be unable, under its terms, to seek its termination with respect to these facilities, and governmental, public, and private entities would not have the convenience and clarity that will be afforded by the issuance of the permits.

2. Guardians' arguments concerning the Consent Decree fail to demonstrate clear error.

Guardians contends that any claim that the Consent Decree is "'enforceable as a practical matter'" is "suspect;" that there has been no "actual assessment" of whether the Decree meets the definition, under 40 C.F.R. § 49.152(d), of "enforceable as a practical matter;" and that the Decree "does not appear to actually limit emissions" at the facilities below major source thresholds. Petition at 13.[7] Guardians' vague assertions that it is "suspect" whether the Consent Decree is "enforceable as a practical matter," and that it "does not appear" that the Decree actually limits emissions, fall far short of meeting its burden of demonstrating clear error by Region 8 in the permit conditions or the permitting decision. Such sketchy contentions should not be deemed sufficient to raise a reviewable issue.

And as a threshold matter — just as with Guardians' claim that the sources failed to submit applications by September 4, 2012 — Guardians failed to raise any issue concerning the Consent Decree in its comments on the draft permits, despite having the opportunity to do so.

---

[6] In any event, these issues are not before the Board, because as discussed above they were not raised by Guardians in its public comment. Further, the question of whether an application for a different type of permit should have been submitted is not related to the conditions of the permit that Region 8 issued here, and therefore is not a proper subject of this review. *See* 40 C.F.R. § 49.159(d)(2) (providing for petitions for review of "any *condition* of the permit decision") (emphasis added).

[7] Guardians also states that the "Anadarko facilities have the potential to emit CO [carbon monoxide] above major source thresholds." Petition at 14. Even adopting Guardians' unproven and conclusory assertion that the Consent Decree does not reduce the facilities' potential to emit, this statement is incorrect, as even without the controls required under the Decree, three of the facilities' emissions would fall below the 250 tpy major source thresholds for new source review purposes. (They would exceed the 100 tpy major source threshold of CAA Title V, though.)

The Decree had clearly been identified as a relevant source of existing emissions limits, among other places in the technical support document prepared for each permit:

> This permit does not authorize the construction of any new emission sources, or emission increases from existing units, nor does it otherwise authorize any other physical modifications to the facility or its operations. This permit is only intended to incorporate required and requested enforceable emission limits and operational restrictions from a March 27, 2008, federal Consent Decree (CD) between the United States of America (Plaintiff)…and Kerr-McGee Corporation (Civil Action No. 07-CV-01034-EWN-KMT), and the November 8, 2016 synthetic MNSR application.

Ex. 6 at 3 (the other five permit records contain substantially similar statements). Guardians was aware of the technical support documents, referring to them (for other purposes) in its comments. *See* Ex. 7a at 2. Nonetheless, Guardians did not previously raise the issues concerning the Consent Decree that it now attempts to assert in its Petition. Unable to demonstrate, as required, that this issue was "raised during the public comment period," Guardians may not be permitted to raise the issue for the first time here. 40 C.F.R. § 49.159(d)(3).

In any case, even assuming for the sake of argument that the contentions relating to the Consent Decree were properly before the Board, Guardians' vague and conclusory assertions fail to prove any error of fact or law by the Region. Contrary to Guardians' "suspicions" and its cursory suggestion about "appearances," the Decree specifically provides that the relevant control requirements "shall be considered 'federally enforceable' and, as applicable, 'legally and practicably enforceable' for purposes of calculating the PTE of a source or facility as may be applicable under the Act." Ex. 1 at § VI., ¶ 74. Entry of a consent decree does not merely reflect an agreement among parties, but "bears the imprimatur of judicial approval." *Wildearth Guardians v. Jackson*, 2011 U.S. Dist. LEXIS 109800, *11 (D. Colo. Sep. 27, 2011). In deciding whether to approve a consent decree, "the district court must ensure that the agreement is not illegal, a product of collusion, or against the public interest," and further "has the duty to decide

whether the decree is fair, adequate, and reasonable." *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991). In light of the plain language of the Decree, which was evaluated and approved by a federal district court, it was unnecessary for Region 8 to more explicitly and fully address the enforceability of the Decree in issuing the permits.

In addition, Guardians' contention that the Consent Decree "does not appear to actually limit emissions at the Anadarko facilities to below major source thresholds" is incorrect. *See* Petition at 13. Guardians provides little support for this general statement, but seems to base the assertion on its misunderstanding of the absence in the Decree of specific, explicitly stated emissions limits for covered facilities. But even though the Consent Decree may not expressly set forth lower numerical emissions limits, it effectively limits emissions by establishing requirements for low-emission dehydrators, low-bleed pneumatic controllers, and reciprocating internal combustion engines. Ex. 1 § IV.A., ¶¶ 9–11; § IV.D., ¶¶ 49–57; § IV.E., ¶¶ 63–65. As shown in Table 1, above, these requirements have the effect of dramatically reducing the emissions of carbon monoxide, to well below major source levels, and also of reducing VOC and HAP emissions. It is not necessary that a numerical emissions limit be expressly stated in the Decree for it to be effective. The definition of "potential to emit" provides that "[a]ny physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is enforceable as a practical matter." 40 C.F.R. § 49.152(d). Despite Guardians' vague concerns about the appearances of the Consent Decree, the effect of the provisions of the Decree is to appropriately limit emissions that are enforceable as a practical matter.

3. Guardians' argument concerning the definition of construction at 40 C.F.R. § 52.21(b)(8) fails to demonstrate clear error.

Seeking to overcome the fact that the permits apply to existing facilities and do not authorize new construction or new emissions, Guardians argues that the issuance of the permits satisfies the regulatory definition of "construction." Petition at 14 (citing 40 C.F.R. § 52.21(b)(8)). Construction is defined in section 52.21(b)(8) of EPA's regulations as "any physical change or change in the method of operation … that would result in a change in emissions." The consequence of there being "construction" here, according to the Petition, is that "the requirements of 40 C.F.R. § 49.154(d)" apply; presumably, Guardians means by this that an AQIA is required. *See* Petition at 15–16. To support this argument, Guardians claims that the permits "would have the effect of establishing enforceable emission limits for the first time ever from the Anadarko facilities, effectively altering the method of operation of the facilities in order to reduce (i.e., change) emissions." *Id.* at 14. According to Guardians, the permits would "change emissions by setting, for the first time, federally enforceable limits to keep emissions reduced and below potential to emit levels." *Id.*

Guardians is incorrect. As discussed in the previous section, the Consent Decree already existed, and contrary to Guardians' unsupported assertion, provides effective and federally enforceable limits on the facilities' potential to emit. Guardians does not dispute that the facilities have complied with the terms of the Decree; this compliance means that the facilities will not be altering their method of operations by operating under permits that are based on the requirements of the Decree. Accordingly, Guardians has not shown any error in the Region's conclusion that the transfer of Consent Decree requirements into the permits does not constitute "construction."

4. Section 49.154(d) of the regulations affords Region 8 discretion and does not require the permit applicant to conduct and submit an AQIA.

Guardians repeatedly faults Region 8 for failing to require an AQIA under 40 C.F.R. § 49.154(d). Indeed, Guardians characterizes the "single question" presented in its Petition as the Region's conclusion that an AQIA "pursuant to 40 C.F.R. § 49.154(d)" was not warranted. Petition at 11. To the extent that this question turns on Guardians' other contentions, such as its assertions concerning the facilities' failure to submit applications by September 4, 2012; its concerns about the Consent Decree; and its contentions relating to the definition of construction, those matters have been addressed above. To the extent Guardians may be arguing that under the regulations Region 8 was *required* to direct the facilities to conduct and submit an AQIA, Guardians can make no showing that an AQIA was mandatory.

The Tribal Minor NSR Rule provides, in relevant part:

> If the reviewing authority has reason to be concerned that the construction of your minor source or modification would cause or contribute to a NAAQS or PSD increment violation, it *may* require you to conduct and submit an AQIA.

40 C.F.R. § 49.154(d)(1) (emphasis added). The permissive, as opposed to mandatory, language of this provision shows that the decision whether to require an AQIA — even if (and arguably only if) there may be "reason to be concerned" — is discretionary. In promulgating the Tribal NSR Rule, EPA explicitly confirmed the discretionary nature of this provision: "At the discretion of the reviewing authority, such sources may also be required to submit air quality impact analyses as part of their permit applications." 76 Fed. Reg. at 38750 [8] Thus, even if there were

[8] Federal courts interpreting other statutes and regulations have recognized the significance of "may" in analogous contexts. *See, e.g.*, *Takeda Pharms., U.S.A., Inc. v. Burwell*, 78 F. Supp. 3d 65, 117 (D.D.C. 2015) ("by the plain terms of these same regulations (specifically, the 'may') the agency has discretion regarding whether or not to require a product's label to include information related to off-label uses"); *Conservancy of Southwest Fla. v. United States Fish & Wildlife Serv.*, 2010 U.S. Dist. LEXIS 136265, *28 (M.D. Fla. Nov. 2, 2010) ("The Court agrees with Defendants that the plain language [using 'may'] of the ESA [Endangered Species Act] renders the decision to designate critical habitat for pre-1978 species discretionary with the Secretary….").

"reason to be concerned" about a "NAAQS or PSD increment violation" (which, for the reasons stated above, Guardians has not shown and is not in fact the case), the regulations would not mandate an AQIA, but merely provide that an AQIA *may* be required.

"In reviewing an exercise of discretion by the permitting authority, the Board applies an abuse of discretion standard." *City of Palmdale*, 15 E.A.D. at 704. As noted previously, however, Guardians has made no claim that Region 8 abused its discretion and does not seek review, under 40 C.F.R. § 49.159(d)(3)(ii), of an "exercise of discretion." Instead, Guardians only seeks review under 40 C.F.R. § 49.159(d)(3)(i), of alleged clearly erroneous findings of fact or conclusions of law associated with a permit condition or the permitting decision. *See, e.g.,* Petition at 5 (quoting § 49.159(d)(3)(i) for the proposition that a petition for review must show a clearly erroneous finding of fact or conclusion of law and making no reference to § 49.159(d)(3)(ii)). As discussed in the following section, though, even if the Petition had asserted that Region 8 abused its discretion in deciding not to require an AQIA, Guardians would still fail to meet its burden of demonstrating any such abuse of discretion.

5. Even if Guardians had alleged an abuse of discretion concerning the sole issue identified for review, EPA Region 8 properly exercised its discretion — in the absence of any evidence that the permits would harm air quality — in deciding not to require an AQIA.

Even assuming that the Petition had alleged an abuse of discretion, the facts establish that the Region properly exercised its discretion. Region 8 had no "reason to be concerned" that the permits might cause or contribute to violations, because the permits would not, in fact, lead to emissions increases. Under such circumstances, it was reasonable, and certainly not an abuse of discretion, for the Region to decline to require an AQIA. Likewise, although the standard of review of the action at issue here is "abuse of discretion," rather than "clear error," the Region

did not commit error in declining to require an air quality impact analysis under 40 C.F.R. § 49.154(d).

Guardians does not genuinely dispute that the permitting action taken will not, in fact, lead to increased emissions by these already operating facilities. While it attempts to raise arguments about the meaning or application of various provisions of the regulations, Guardians does not dispute that the facilities here were, in fact, already existing and operating, and had been for years before the permit actions at issue. These permits were simply incorporating federally enforceable limits that had previously been established through a consent decree duly entered in federal court, so that the underlying federal litigation could be closed, in the interests of judicial and administrative economy.

In issuing synthetic minor permits to these six facilities, the Region appropriately used its discretion under the part 49 regulations to ensure that the federally enforceable requirements originally established under the Consent Decree will continue in the form of federally enforceable permits. This approach was anticipated in and is consistent with the original consent decree, which was approved and entered by the federal district court in 2008. *Kerr-McGee* at *37. The Consent Decree was not intended to persist indefinitely, but provided for termination on request after January 1, 2017, provided all obligations under the decree had been fulfilled. *See* Ex. 1, § XXV, ¶ 166. Also, the Consent Decree may be terminated in relevant part whenever any "control requirement, recordkeeping requirement, reporting requirement or other requirement of this Consent Decree is incorporated into a federally enforceable permit." *Id.* at § XXV, ¶ 167. Consistent with the Consent Decree, Anadarko sought federally enforceable permits for the six facilities to incorporate its pertinent requirements, and the Region has appropriately processed these permits under applicable regulations.

6. Guardians' argument based on air quality does not establish clear error.

Guardians asserts that the air quality problems in the Uinta Basin "should compel the EPA to assess the air quality impacts of emissions at existing sources via its permitting actions." Petition at 16. But while the Agency is abundantly aware of the ozone problem in the Uinta Basin, as acknowledged in the response to comments, air quality problems do not mandate that EPA require an impact analysis under the Tribal Minor NSR Rule from existing facilities that are not undergoing construction or modification. And, as explained above, EPA Region 8's use of the synthetic minor permit mechanism to transfer the enforceable requirements from a consent decree to a permit is not equivalent to new construction or modification. Nor does it otherwise create a "reason to be concerned" that new emissions will occur.

Conclusion

In service of laudable air quality goals, Guardians seeks to establish a fiction that the six existing facilities should be treated as new sources of harmful emissions. They are not. Rather, they have been operating under the requirements of a federally enforceable consent decree. They could continue to do so indefinitely, with the only consequence being that the Consent Decree could not be terminated. The agency's choice to use the synthetic minor permitting mechanism to transfer the requirements from the Consent Decree to a permit provides benefits to the permittee, the public, and the government in terms of transparency, clarity, and efficiency. But it does not somehow render the facilities "new" sources of emissions, under simple logic or under any regulation that Guardians cites.

There was no reason for Region 8 to be concerned that issuance of the permits could cause or contribute to a violation of the NAAQS because the permits do not authorize an increase in emissions. The six facilities were already existing at the time of permit issuance and were

already subject to federally enforceable limits on their emissions that will continue under the permits. The six permits did not establish new requirements but merely transferred requirements already applicable under the federal Consent Decree. Since there are no "new" emissions from these sources, there was thus no need for an air quality impact analysis or requirement that Region 8 request one. The Region did not commit error or abuse its discretion in declining to require an air quality impact analysis or issuing the synthetic minor permits.

For all of the reasons stated above, EPA Region 8 respectfully requests that the Board deny review of the six final minor NSR permits.

Date: August 6, 2018

Respectfully submitted,

/s/ *Michael Boydston*
Michael Boydston
Office of Regional Counsel
EPA Region 8 (8RC)
1595 Wynkoop
Denver CO 80202
Telephone: (303) 312-7103
Fax: (303) 312-6859
boydston.michael@epa.gov

Of counsel:

Charles Starrs
Air and Radiation Law Office
Office of General Counsel (MC 2344A)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, DC 20460
Telephone: (202) 564-1996
Fax: (202) 564-5433
starrs.charles@epa.gov

STATEMENT OF COMPLIANCE WITH WORD COUNT LIMITATION

I certify that this Response to Petition for Review submitted by EPA Region 8 (excluding the Table of Contents, the Table of Authorities, the Table of Exhibits, the Exhibits attached to this Response, this Statement of Compliance, and the Certificate of Service) contains 7988 words, as calculated using Microsoft Word.

/s/ *Michael Boydston*
Michael Boydston
Office of Regional Counsel
EPA Region 8

CERTIFICATE OF SERVICE

I certify that on this date copies of EPA Region 8's Response to Petition for Review, with the attached exhibits, in the Matter of Anadarko Uintah Midstream, LLC, NSR Appeal No. 18-01, were served by email on these parties:

Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians
jnichols@wildearthguardians.org

Julia A. Jones
Senior Counsel
Anadarko Petroleum Corp.
julia.jones@anadarko.com

Mr. Nichols and Ms. Jones each informed me in writing of their consent to service by email.

August 6, 2018

/s/ *Michael Boydston*
Michael Boydston
Office of Regional Counsel
EPA Region 8 (8RC)
1595 Wynkoop
Denver CO 80202
(303) 312-7103

Attorney for Appellant