

ATTACHMENT 17

October 13, 2023

Erica G. LeDoux
Environmental Engineer, Air Permits Section
U.S. EPA, Region 6
1201 Elm Street, Suite 500
Dallas, TX 75270

Re: Harvest Four Corners, LLC’s Response to EPA’s Request for Explanation of Why Draft Permit Conditions Exceed EPA’s Authority under Title V

Dear Ms. LeDoux:

On September 6, 2023, Harvest Four Corners LLC (“Harvest”) submitted a letter to the Environmental Protection Agency (“EPA”) in response to the draft Part 71 renewal permit dated August 30, 2023 for the Los Mestenos Compressor Facility (“Los Mestenos”).¹ Harvest’s September 6th letter noted that Title V of the Clean Air Act (“CAA”) does not authorize EPA to impose new substantive requirements in the draft renewal permit—specifically emissions limitations—on the condensate storage tanks (6.3.1.), truck loading (6.4.1), planned startup, shutdown, and maintenance (6.5.1), and equipment leaks (6.6.1) because Harvest’s current Title V permit has no such emissions limitations and this equipment is not subject to any other applicable requirements.

On September 29, 2023, EPA provided Harvest a revised draft renewal permit largely replacing the proposed emissions limitations with restrictions on the facility’s potential to emit (“PTE”). In response, Harvest noted that the recent changes to the draft permit still did not address the legal deficiencies raised in its earlier comments and respectfully requested that EPA further revise the draft permit to remove these restrictions. On October 4, 2023, EPA requested “a detailed account of why Harvest sees the conditions identified in your letter of Sept 6 as exceeding the scope of EPA’s authority.”

¹ Los Mestenos is an existing natural gas compressor station located within the boundaries of the Jicarilla Apache Reservation in Rio Arriba County, New Mexico. Los Mestenos consists of a single 1200 HP natural gas-fired Solar Saturn combustion turbine used to drive a natural gas compressor, one 400-barrel condensate tank, a 400-barrel overflow condensate tank, and an emergency generator engine. The Facility was first issued a Title V permit by EPA in 2003. EPA issued the most recent Title V permit (Number R6FOP-NM-04-R2) for the Los Mestenos facility to Williams Four Corners, LLC on August 8, 2017, with an expiration date of August 8, 2022. Harvest acquired the Facility from Williams Four Corners LLC in 2018. On February 4, 2022, Harvest submitted its Title V renewal application.

On behalf of Harvest, we are providing the requested detailed analysis demonstrating that neither Title V of the CAA nor EPA's Part 71 regulations authorize EPA to impose new, substantive requirements in Harvest's Title V renewal permit.

I. Title V is Procedural and Does Not Authorize EPA to Impose New Substantive Requirements

Title V of the CAA directs EPA to develop and implement an operating permit program for major sources of air pollutants. 42 U.S.C. §§ 7661a(a), 7661c(a); *see also In re Peabody Western Coal Co.*, 12 E.A.D. 22, 27 (E.P.A. February 18, 2005). The primary purpose of Title V is to “consolidat[e] into a single document all of a facility’s obligations under the Act . . . [to] include all ‘emissions limitations and standards’ that apply to the source, as well as associated inspection, monitoring, and reporting requirements.” *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 309, 323 (2014); *see also United States Sugar Corp. v. EPA*, 830 F.3d 579, 597 (D.C. Cir. 2016) (“Title V does no more than consolidate ‘existing air pollution requirements into a single document, the Title V permit, to facilitate compliance monitoring’ without imposing any new substantive requirements.”).

For this reason, “Title V *does not impose new obligations* rather, it consolidates pre-existing requirements into a single, comprehensive document....” *Ohio Pub. Interest Research Grp., Inc.*, 386 F.3d 792, 794 (6th Cir. 2004) (emphasis added); *Util. Air Regulatory Group*, 573 U.S. at 309; *see also Sierra Club v. Ga. Power Co.*, 443 F.3d 1346, 1348-1349 (11th Cir. 2006) (“The Title V permit program generally does not impose new substantive air quality control requirements.”). Similarly, EPA has long concluded that the Title V permitting program is “primarily procedural” and “not generally intended to create any new substantive requirements.” 57 Fed. Reg. 32,250, 32,384 (July 21, 1992); EPA, Whitepaper for Streamlined Development of Part 70 Permit Application (July 10, 1995) (“In general, this program was not intended by Congress to be the source of new substantive requirements.”).

Title V’s umbrella operating permit program therefore incorporates and ensures compliance with the substantive emission limitations established under other provisions of the CAA. But Title V does not create any independent authority to establish emission standards independent of existing regulatory requirements. *See In re Peabody Western Coal Co.*, 12 E.A.D. at 27. Specifically, the regulations governing EPA-issued operating permits state that “[a]ll sources subject to the operating permit requirements of title V and this part [71] shall have a permit to operate that assures compliance by the source with all applicable requirements.” Title V’s “applicable requirements,” however, are limited to substantive emission limitations established under the other provisions of the CAA, such as “by state or federal implementation plans, preconstruction permits, the air toxics or acid rain programs, and other substantive CAA provisions.” *See* 40 C.F.R. § 71.2; *see also In re Shell Offshore, Inc.*, 15 E.A.D. 536, 572 (E.P.A. March 30, 2012). For this reason, federal courts and EPA’s Environmental Appeals Board have consistently held that Title V is “a procedural statute rather than a substantive statute,” which instead serves to compile pre-existing requirements in a single permit. *See e.g., Env’tl. Integrity Project v. United States EPA*, 969 F.3d 529, 543-545 (5th Cir. 2020); *In re Shell Offshore, Inc.*,

15 E.A.D. at 572 (citing Operating Permit Program, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992)).

Because Title V compiles existing requirements, “in most cases the only emissions limits contained in the permit will be emissions limits that are imposed to comply with the substantive requirements of the Act (including SIP requirements).” 57 Fed. Reg. at 32,384. For this reason, at Title V “permit itself will not impose any sort of independent “cap” on emissions *except where requested by the source.*” *Id.* (emphasis added).

II. EPA’s Draft Renewal Permit for Harvest Exceeds its Authority Under Title V

EPA’s draft renewal permit for Harvest exceeds the agency’s authority by imposing new substantive emissions requirements in the Title V permit that are not based on applicable requirements and have not been requested by Harvest. *See* 57 Fed. Reg. at 32,384.

In the draft permit, EPA cites 40 C.F.R. § 71.6(a)(1) for its authority to include new PTE limitations and other substantive requirements on condensate storage tanks, truck loading, maintenance, and equipment leaks in Harvest’s permit—but Section 71.6(a)(1) provides no such authority. Section 71.6(a)(1) states that each Title V permit shall include:

Emissions limitations and standards, including those operational requirements and limitations that *assure compliance with all applicable requirements at the time of permit issuance.* Such requirements and limitations may include ARMs identified by the source in its part 71 permit application as approved by the permitting authority, provided that no ARM shall contravene any terms needed to comply with any otherwise applicable requirement or requirement of this part or circumvent any applicable requirement that would apply as a result of implementing the ARM

40 C.F.R. § 71.6(a)(1). Contrary to the text of 40 CFR § 71.6(a)(1), the PTE limitations and other substantive requirements that EPA proposes to impose on Harvest in Table 4 and sections 6.3.1, 6.4.1, 6.5.1, and 6.6.1 of the permit have no basis in the applicable requirements set forth in the CAA and do not exist in Harvest’s current Title V permit. The PTE emission limits for the condensate storage tanks, truck loading, maintenance, and equipment leaks go beyond “assur[ing] compliance with all applicable requirements,” as these are new emission limitations that are not required under other substantive provisions of the CAA. *See* 40 C.F.R. § 71.6(a)(1).

While EPA may impose additional monitoring or recordkeeping under section 71.6(a)(3), these monitoring or recordkeeping requirements must relate back to an existing applicable requirement under the CAA.² Thus, EPA does not have the authority to impose the additional

² An “ARM,” or “approved replicable methodology,” is a permit term that “specif[ies] a protocol which is consistent with and implements an applicable requirement. . . .” 40 C.F.R. § 71. Thus, any ARM must also still be based on

PTE limitations and related monitoring and recordkeeping requirements included in the permit, as they are substantive requirements beyond what is required under the CAA.

Therefore, EPA is not permitted to impose the new PTE limitations and other substantive requirements on the condensate storage tanks (6.3.1.), truck loading (6.4.1), planned startup, shutdown, and maintenance (6.5.1), and equipment leaks (6.6.1) in Harvest's permit.

III. EPA May Not Unilaterally Impose Restrictions on the Facility's Potential to Emit In Lieu of Emissions Limitations

EPA's most recent draft permit replaces emissions limitations with restrictions on the facility's PTE. EPA, however, is similarly lacking in authority to impose substantive PTE restrictions in Harvest's Title V renewal permit.

EPA's federal minor new source review program in Indian Country—and not Part 71—is the appropriate mechanism for restricting a facility's PTE. 40 C.F.R. § 49.158 serves as the primary method that EPA can impose PTE emission limitations on a source in Indian Country.³ Under section 49.158, an operator may “obtain a synthetic minor source permit . . . to establish a synthetic minor source for purposes of the applicable PSD, nonattainment major NSR or Clean Air Act title V program and/or a synthetic minor HAP source for purposes of part 63 of the Act or the applicable Clean Air Act title V program.” But this regulation only applies when an operator “wish[es] to obtain a synthetic minor source permit” and “submit[s] a permit application” with proposed emission limitations. *See* 40 C.F.R. § 49.158(b)(1).

Here, EPA was not permitted to establish PTE limitations, as Harvest did not “wish to obtain a synthetic minor source permit” or “submit a permit application” with proposed emission limitations. *See id*; *see also* 57 Fed. Reg. at 32,384 (“The [Title V operating] permit itself will not impose any sort of independent “cap” on emissions except where requested by the source.”). Because the PTE limitation policy only applies where the operator requests PTE emission limits, EPA lacks authority to unilaterally impose PTE emission limitations in Harvest' Title V permit. Similarly, the Environmental Appeals Board has allowed EPA to include additional PTE limits in Title V permits, but only in those cases where a source has specifically requested the Agency limit their PTE in order qualify as a “synthetic minor” source rather than a major source. *See In re Peabody Western Coal Co.*, 12 E.A.D. at 32 (describing that Peabody requested that EPA issue a PTE limit for its part 71 Permit to qualify as a synthetic minor source for purposes of PSD); *see also In re Shell Offshore, Inc.*, 15 E.A.D. 536, 551-52 (E.P.A. March 30, 2012)

pre-existing applicable CAA requirements. Here, the PTE limitations and other requirements proposed in Harvest's permit are not based on any pre-existing applicable requirements, and thus, are not permissible as “ARMs.”

³ In 1999, EPA implemented a guidance document titled, the “Potential to Emit (PTE) Transition Policy for Part 71 Implementation in Indian Country” (“Transition Policy”), which provided a process for operators of sources in Indian country to obtain synthetic minor permits by “obtain[ing] limits on their operations to avoid major source status under title V.” John S. Seitz, Potential to Emit (PTE) Transition Policy for Part 71 Implementation in Indian Country 1-5 (EPA 1999). In 2011, EPA officially codified the Transition Policy into regulation, 40 C.F.R. § 49.158, and terminated the guidance document. 76 Fed. Reg. 38,748, 38,769 (July 1, 2011).

(describing that Shell requested PTE limitations from EPA to operate as a synthetic minor source in evaluating EPA's imposition of PTE limits on applicable PSD thresholds for NO_x, CO, SO₂, and GHGs). In those cases, EPA was permitted to establish PTE limits and resulting monitoring requirements to ensure compliance as a synthetic minor source. *See id.* However, as described above, this is only applicable where the operator requests to be treated as a synthetic minor source. Here, unlike *Peabody* and *In re Shell Offshore*, Harvest did not request PTE limits to qualify as a synthetic minor source.⁴ Accordingly, EPA is not permitted to unilaterally establish new PTE limits in Harvest's Title V permit when it was not requested by the source.

IV. Conclusion

The PTE limitations and other requirements on the condensate storage tanks (6.3.1.), truck loading (6.4.1), planned startup, shutdown, and maintenance (6.5.1), and equipment leaks (6.6.1) in Harvest's Permit are substantive requirements that have no basis in the applicable requirements of the CAA or any other permit. For this reason, EPA has no authority to impose new substantive requirements in a Title V permit. To the extent that EPA is imposing these requirements under the synthetic minor source program for Indian Country, the program does not apply and Harvest has made no request to limit its PTE. Based upon these facts and a desire to work collaboratively with EPA, Harvest respectfully requests EPA remove these new substantive requirements as well as the related monitoring and recordkeeping requirements from the draft permit.

Sincerely,



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⁴ While Harvest maintains that the PTE of the Los Mestenos facility is below the Title V threshold and disputes EPA's calculation of PTE from the condensate storage tank, Harvest has not requested that EPA limit its PTE.