BEFORE THE ENVIRONMENTAL APPEAL BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re Deseret Generation and Transmission Co-operative Bonanza Power Plant Permit NO. V-UO-000004-2019.00	)	CAA Appeal No. 24-01

RESPONSE OF DESERET GENERATION AND TRANSMISSION CO-OPERATIVE TO PETITION FOR REVIEW

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INTRODUCTION

On December 4, 2023, the U.S. Environmental Protection Agency ("EPA"), Region 8 issued a Clean Air Act ("CAA" or "Act") renewal Title V permit ("Permit") to Deseret Generation and Transmission Cooperative ("Deseret") for the Bonanza Power Plant ("Bonanza"). The Ute Indian Tribe ("Tribe" or "Petitioner") challenged EPA's Title V permit which governs the continued operation of air emission units at Deseret's Bonanza facility in Uintah County, Utah. The facility is located on land privately owned and patented to Deseret by the United States Government, situated within an area deemed to lie within the undiminished boundaries of the Uintah & Ouray Indian Reservation in eastern Utah. Since Petitioner does not have a federally approved CAA Title V operating permit program, the EPA is responsible for issuing the Title V permit for Bonanza. On January 3, 2024, Petitioner filed the Petition with the Environmental Appeals Board ("EAB" or "Board").

The Board should deny the Petition. Petitioner has not demonstrated that EPA's permit decision involves a clearly erroneous finding of fact or conclusion of law, or that the decision involves an important policy consideration that the Board, in its discretion, should review. Far from it.

EPA determined that the Permit identifies applicable requirements of the CAA and contains all necessary monitoring, compliance certification, and reporting conditions to ensure compliance with applicable requirements. The Petition does not dispute that; it does not even purport to identify a single applicable requirement that the permit allegedly fails to include and assure compliance with.

Rather, the Petition argues that EPA failed to comply with certain procedural obligations during the permitting process, and from there leaps to wide-ranging claims that EPA should have

used this Title V renewal proceeding to *create* new applicable requirements based mostly on non-CAA considerations. Specifically, the Petition alleges EPA violated its federal "trust" duties to the Petitioner and environmental justice policies by disregarding Petitioner's comments and concerns about the Bonanza facility. To sufficiently address its comments, Petitioner argues that EPA's Permit should —but fails to— require Deseret to, among other things, reduce unspecified emissions at the Bonanza facility, fund mitigation projects, establish a trust fund or otherwise compensate the Petitioner, and/or pay a financial penalty. Petitioner's ire with EPA is misguided and, in any event, does not belong before this Board.

"Put simply, title V is a catch-all, not a cure-all."[1] A Title V permit does not establish new substantive air quality control requirements, and a permit renewal is not an enforcement action. Nevertheless, EPA engaged in extensive consultation with the Petitioner and conducted an environmental justice analysis to consider and respond to Petitioner's comments and concerns.[2] But EPA correctly declined Petitioner's invitation to use Deseret's Permit to grant Petitioner's wish list. Petitioner's arguments here disregard the limited focus of a Title V permit program, EPA's multiple government-to-government meetings with Tribal representatives, and the extensive environmental justice analysis conducted by EPA. In essence, Petitioner has

[1] "Clarifying the Scope of 'Applicable Requirements' Under State Operating Permit Programs and the Federal Operating Permit Program: Proposed Rule," 89 Fed. Reg. 1150, 1154 (Jan. 9, 2024) (proposed rule that would codify "EPA's current approach to 'applicable requirements' within the context of title V").

[2] Even if EPA had not done so, the Board should dismiss the Petition. Neither tribal consultation nor an environmental justice analysis is an applicable requirement of the CAA or a procedure required under 40 C.F.R.§ 71.11 (*i.e.*, Title V). Moreover, while EPA may be commended for responding thoroughly to comments on these issues, because these comments are untethered from any Title V requirements, such responses are not required under Title V. *See infra* Argument, Part I.

appealed the Permit because EPA *refused* to exceed its authority under the CAA. The Board should deny the Petition.

FACTUAL AND PROCEDURAL BACKGROUND

On February 9, 2021, EPA proposed to renew the CAA title V operating permit for Bonanza, which was originally issued in January 2015. As required under Title V permitting regulations, EPA provided public notice of the draft Permit and received public comments for thirty (30) days from February 9, 2023, to March 11, 2023. 40 C.F.R. §§ 71.11(a), (d). In its discretion, EPA also held a public hearing on the draft Permit on March 11th. *Id*. § 71.11(e).

In addition to providing the public notice, comment, and participation required under 40 C.F.R. § 71.11, EPA provided opportunities exclusively for Petitioner to consult with EPA during the permitting process. EPA held four consultation meetings with tribal representatives and received and responded to three comment letters from Petitioner relating to the Permit. The extensive engagement of EPA with Petitioner on this relatively simple renewal permit is illustrated in the chart below.

September 22, 2020	1st Meeting/Consultation with Tribal Representatives
October 14, 2020	1st Comment Letter from the Tribe[3]
January 12, 2021	2nd Meeting/Consultation with Tribal Representatives
February 9, 2021	Region publishes Draft Permit
February 9, 2021 – March 11, 2021	**Public Comment period**

[3] Letter from the Ute Indian Tribe to Carl Daly (Oct. 14, 2020) ("October 2020 Comments") [Attach. 3 to Pet.].

March 11, 2021	Public Hearing[4]
March 22, 2021	2nd Comment Letter from the Tribe
August 29, 2023	EPA emails the Tribe draft Response to Comments ("RTC") on the Permit
August 30, 2023	3rd follow-up Meeting/Consultation with Tribal Representatives
September 11, 2023	EPA emails the Tribe a 2nd copy of draft RTC requesting comments by September 22, 2023
September 20, 2023	4th follow-up Meeting/Consultation with Tribal representatives
October 10, 2023	3rd Comment Letter from the Tribe on the Permit and draft RTC

On December 4, 2023, the EPA issued the renewal Permit to Deseret. EPA also published its responses to comments package addressing comments it received during the permitting process, which included a cover letter ("RTC Cover Letter"), the response to comments document ("RTC Document"), and an environmental justice analysis ("RTC EJ Analysis").[5]

The Permit sets forth the same requirements for controlling air pollutant emissions as the prior January 2015 permit, including limits for particulate matter (PM), sulfur dioxide (SO_2), and nitrogen oxides (NO_X). The permit also contains the terms of a 2015 settlement among the EPA,

[4] Notably, while the purpose of Petitioner's October 2020 Comments was to request that EPA hold a public hearing on the renewal Permit, no Tribal representatives attended the hearing. *See* Attach. 8 to Pet.

[5] The RTC Cover Letter and RTC Document are provided in Attachment 8 to the Petition. The RTC EJ Analysis is in the permitting record as Attachment 2 to Doc. ID EPA-R08-OAR-2019-0350-0023, available at, https://www.regulations.gov/document/EPA-R08-OAR-2019-0350-0023.

WildEarth Guardians, Sierra Club, and Deseret. This settlement required Bonanza to install and operate combustion controls (*i.e.*, low NO_X burners with overfire air) no later than 2018. Emission limits included 1) a 365-day rolling average NO_X limit; 2) an annual NO_X cap; 3) a lower NO_X annual cap beginning on January 1, 2030; 4) a coal consumption cap of 20,000,000 short tons for the period from January 1, 2020 through the end of service. The cap can be lifted if Deseret, before December 31, 2029, applies for and receives approval from the EPA to construct, install, and operate post-combustion controls that are able to meet a lower monthly NO_X limit. The renewal Permit also includes monitoring, compliance certification, and reporting requirements sufficient to assure compliance with the terms and conditions of the Permit and all "applicable requirements" of the CAA.

LEGAL FRAMEWORK

I. Title V Permit Program

Under the CAA, major sources of air pollutants and certain other regulated sources must obtain and comply with a Title V operating permit. 42 U.S.C. § 7661a(a). The Act contemplates that most Title V permits will be issued and administered at the state and tribal levels but directs EPA to issue federal Title V permits where a state or tribe lacks or fails to administer an approved permitting program. *See* 42 U.S.C. § 7661a(b), (d)(3). The regulations prescribing procedures for permit applications, preparing draft permits, and issuing final permits by EPA are set forth in 40 C.F.R. part 71.

Part 71 also contains provisions for public notice of and public participation in federal permitting actions. 40 C.F.R. § 71.11(d) (public notice of permit actions and public comment period); *id*. § 71.11(e) (public comments and requests for public hearings); *id*. § 71.11(f) (public hearings). Once a draft permit is prepared, EPA must provide a public comment period. "This

requirement to provide a public comment period is the primary vehicle for public participation under part 71." *In re Peabody W. Coal Co.*, 15 E.A.D. 757, 760 (EAB 2013) ("*Peabody IV*"). Section 71.11(e) provides that "any interested person may submit written comments on the draft permit and may request a public hearing, if no public hearing has already been scheduled." *Id*. § 71.11(e). "At the time any final permit decision is issued, the permitting authority shall issue a response to comments" that, among other requirements, "respond[s] to all significant comments on the draft permit raised during the public comment period." *Id*. § 71.11(j); *see, e.g.*, *In re Russell City Energy Ctr., LLC*, 15 E.A.D. 1, 59-60 (EAB 2010) (explaining that the permit issuer must provide an adequate response to comments). "Significant comments in this context include … comments that concern whether the title V permit includes terms and conditions addressing federal applicable requirements and requirements under part [71]." Revisions to the Title V Permitting Program, 85 Fed. Reg. 6431, 6436 (February 5, 2020).

A Title V permit does not itself impose new substantive air quality control requirements, *See* Operating Permit Program, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992); 89 Fed. Reg. at 1,153. "[R]ather, it consolidates pre-existing requirements into a single, comprehensive document for each source, which requires monitoring, record-keeping, and reporting of the source's compliance with the Act." *Ohio Pub. Int. Rsch. Grp., Inc. v. Whitman*, 386 F.3d 792, 794 (6th Cir. 2004) (citing 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(3), (c)(1)); *see also In re Peabody W. Coal Co.*, 12 E.A.D. 22, 27 (EAB 2005) ("*Peabody I*").[6] A Title V permit must

[6] Title V permits must incorporate and assure compliance with, for example, pre-existing requirements from: (i) Federal Implementation Plans; (ii) preconstruction permits (iii) New Source Performance Standards (NSPS); (iv) National Emission Standards for Hazardous Air Pollutants (NESHAP); and (v) the acid rain program. *See* 40 C.F.R. § 71.2 (defining "applicable

contain "enforceable emission limitations and standards," compliance schedules, reporting requirements, and "such other conditions as are necessary to assure compliance with applicable requirements." 42 U.S.C. § 7661c(a). In addition, a Title V permit must include sufficient monitoring requirements to assure compliance with the permit's terms. 42 U.S.C. § 7661c(c) ("Each permit . . . shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions."). Thus, the Title V operating permit serves as a vehicle for ensuring that existing air quality control requirements are applied to a facility's emissions and that the facility complies with those requirements.

A Title V permit is issued for a fixed term not to exceed five years. 40 C.F.R. § 71.6(a)(2); *see* 42 U.S.C. § 7661a(b)(5)(B). A permit may be renewed, and renewals are subject to the same procedural requirements that apply to issuance of initial permits, including those for public participation. 40 C.F.R. § 71.7(c)(1).

II. Environmental Justice and Tribal Consultation

Executive Order ("EO") 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, directs federal agencies "to the greatest extent practicable and permitted by law," to "make achieving environmental justice part of its mission by identifying and addressing as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." EO 12898 § 1-101, 59 Fed. Reg. 7629 (Feb. 11, 1994). Issued in 2023, EO 14096 supplements and reinforces the federal government's

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requirements" as including list of 13 types of CAA-based requirements that qualify for inclusion in Title V operating permits).

commitments set forth in EO 12898 to advance environmental justice, equity, and civil rights. EO 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All*, 88 Fed. Reg. 25,251 (Apr. 21, 2023). The order reiterates that federal agencies should "continue to engage in consultation on Federal activities that have tribal implications and potentially affect human health or the environment." *Id.* § 3(a)(viii), 88 Fed. Reg. at 25,254.

Consistent with these environmental justice principles, as well as the federal government's special relationship with federally recognized tribes, EPA's policy is to have regular and meaningful, government-to-government consultations with federally recognized tribes when EPA actions and decisions may affect tribal interests.[7]

SCOPE AND STANDARD OF REVIEW

The Board's review of Title V permit decisions is governed by EPA's permitting regulations at 40 C.F.R. § 124.19.[8] In considering whether to grant or deny a petition for review, the Board is guided by the preamble to its regulations authorizing appeal under Part 124, in

[7] While there is "a general trust relationship between the United States and the Indian people," that general trust relationship does not, by itself, create legally enforceable obligations for the United States that might serve as a cause of action. *Ute Indian Tribe of the Uintah & Ouray Indian Rsrv. v. U.S. Dep't of Interior*, No. 221CV00573JNPDAO, 2023 WL 6276594, at *3 (D. Utah Sept. 26, 2023) (quoting *U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011)). Instead, the United States "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Jicarilla*, 564 U.S. at 177 (emphasis added); *see Arizona v. Navajo Nation*, 599 U.S. 555, 563-64 (2023) (holding that courts should not "apply common-law trust principles to infer duties not found in the text of a treaty, statute, or regulation"). Faced with similar claims that the Tribe is owed generalized "trust duties" by the federal government, the District of Utah concluded "that none of these treaties or acts [cited by the Tribe] creates a 'conventional' trust relationship by express language sufficient to allow this court to impose common-law trust obligations on the federal government." *Ute Indian Tribe*, 2023 WL 6276594, at 5.

[8] The regulations for federal operating permits provide that "[p]ermit decisions may be appealed under the permit appeal procedures of 40 CFR 124.19." 40 C.F.R. § 71.11(l).

which the Agency stated that the Board's power to grant review "should be only sparingly exercised," and that "most permit conditions should be finally determined at the [permit issuer's] level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also* Revisions to Procedural Rules Applicable in Permit Appeals, 78 Fed. Reg. 5281, 5282 (Jan. 25, 2013); *In re Tucson Elec. Power*, 17 E.A.D. 675, 678 (EAB 2018).

In any appeal of a permit decision under Part 124, the petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4). "[A] petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed." *Id*. § 124.19(a)(4)(i); *see City of Pittsfield v. EPA*, 614 F.3d 7, 11 (1st Cir. 2010) (affirming EAB's denial of review of a NPDES permit where the petition failed to identify specific objections to permit conditions). "The Board has interpreted this requirement as mandating two things: (1) clear identification of the conditions in the permit at issue, and (2) argument that the conditions warrant review." *In re Chukchansi Gold Resort*, 14 E.A.D. 260, 266 (EAB 2009). "Applying these principles, the EAB denies review where petitioners merely reiterate or attach comments previously submitted regarding a draft permit and do not engage the EPA's responses to those comments." *Native Vill. of Kivalina IRA Council v. EPA*, 687 F.3d 1216, 1220 (9th Cir. 2012) (citing *Chukchansi*, 14 E.A.D. at 264). A petitioner must demonstrate why the permit issuer's response to those objections is clearly erroneous or warrants review. *Id.*; *see* 40 C.F.R. § 124.19(a)(4)(ii); *In re City of Taunton Dep't of. Pub. Works*, 17 E.A.D. 105, 110-11 (EAB 2016) ("the petitioner must provide a record citation to the comment and response and also must explain why the permit issuer's previous response to that comment is clearly erroneous

or otherwise warrants review"), *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019); *Chukchansi*, 14 E.A.D at 264

The Board has discretion to grant or deny review of a permit decision. 40 C.F.R. § 124.19. Ordinarily, the Board will deny a petition for review and thus not remand the permit unless the underlying permit decision is based on a clearly erroneous finding of fact or conclusion of law, or an exercise of discretion that the Board, in its discretion, should review. 40 C.F.R. § 124.19(a)(4)(i).

ARGUMENT

I. The Board Should Deny Review Because, on its Face, the Petition Alleges No Violations of Title V of the Clean Air Act.

The Board should deny review for one simple reason: the Board's jurisdiction is limited to reviewing this Title V permit for compliance with Title V, and the Petition does not claim – much less demonstrate – that the Permit fails to comply with Title V. The Petition does not claim that the permit fails to identify or assure compliance with any applicable requirement of the CAA. Nor does the Petition establish violation of any procedures required under Title V.

While Petitioner argues the Permit should be remanded to correct "fatal flaws," none of these alleged flaws concern Title V of the CAA. Instead, the Petition alleges violations of EPA's "trust obligation to the Tribe and controverting law, Executive Orders, and its own policies on Environmental Justice." Pet. at 5. To rectify these alleged "flaws," Petitioner demands that Permit reissuance be conditioned on Deseret's establishment of a trust fund for Petitioner or civil penalties, as well as substantive emission limitations. Pet. at App. B. However, neither EPA's relationship with tribal governments nor federal environmental justice policies gives EPA authority to impose new, substantive conditions in Title V permits.

The Board has described the scope of the Title V permitting program as follows:

> In general, Title V of the CAA requires creation and implementation of an operating permit program for major sources of air pollutants. This section of the Act, however, does not itself establish substantive emission reduction requirements. That is, Title V contemplates a permit program that incorporates and ensures compliance with the substantive emission limitations established under other provisions of the Act, but that does not independently establish its own emission standards.

Peabody I, 12 E.A.D. at 27-8; *accord In re MPLX*, 18 E.A.D. 228, 230 (EAB 2020). EPA is without authority to deny or condition issuance of a Title V permit "where a permittee has demonstrated full compliance with all statutory and regulatory requirements" under the CAA. *In re Muskegon Dev. Co.*, 18 E.A.D. 88, 106 (EAB 2020) (citing *In re Envotech*, 6 E.A.D. 260, 280 (EAB 1996)).

Indeed, even if Petitioners claims relating to tribal consultation and environmental justice are construed as procedural claims (*i.e.*, a failure to adequately respond to comments), Petitioner would not have met the threshold requirements to have the Board consider those claims because they raise issues entirely outside the scope of the Title V permitting program. Tellingly Petitioner does not allege EPA violated any regulatory requirement governing public participation procedures for Title V operating permits. *See* 40 C.F.R. § 71.11(a)(5) (requiring all draft Title V permits be "publicly noticed and made available for public comment"); *id.* § 71.11(d) (outlining public notice and comment procedures).

For the permitting authority to be required to respond to comments and for the Board to consider claims that EPA failed to respond to them in a Title V permit appeal, the comments must pertain specifically to the Title V program. *See In re Jordan Dev. Co.*, 18 E.A.D. 1, 12-13 (EAB 2019) (denying review where EPA refused to respond to the petitioner's comments that were outside the scope of the UIC permitting program). "This is so, even if comments bear some relationship to EJ concerns, as the Executive Order on Environmental Justice provides that it is

to be applied 'consistent with' but only 'to the extent permitted by, existing law.'" *Id*. at 13 (quoting EO 12898); *cf. In re Matter of Plains Mktg. LP, Mobile Terminal at Magazine Point, et al.,* Order on Pet. Nos. IV-2023-1 & IV-2023, at 21 (EPA Sep. 18, 2023) (EPA Administrator explaining that comments related to environmental justice in that permit proceeding are not "significant comments" within the meaning of Title V).

Therefore, to demonstrate a basis for reviewing this Title V Permit, Petitioner would have to identify and establish a connection between (i) their tribal consultation and environmental justice concerns and (ii) inclusion or omission of a condition in the Permit that violates Title V of the CAA. *See Chukchansi*, 14 E.A.D. at 266; *cf. In re Matter of Intercontinental Terminals Co. LLC, Pasadena Terminal*, Order on Pet. No. VI-2023-13, at 9 (EPA Feb. 7, 2024) (denying claim in petition for objection on the ground the permitting authority failed to respond adequately to environmental justice comments where petitioner could not demonstrate connection between community health concerns and the Title V permit's compliance with CAA requirements). The Petition fails to make this connection.

Indeed, it is unclear how such a connection could be made in the Title V permitting context. As the Board has noted,

> [b]ecause Title V does not directly impose substantive emissions control requirements, *it is not clear whether or how EPA could take environmental justice issues into account in Title V permitting* – other than to allow public participation to serve as a motivating factor for applying closer scrutiny to a Title V permit's compliance with applicable CAA requirements. . . [A]side from the potential benefits accrued via public participation, the Title V permitting process is not a readily effective means of addressing substantive environmental justice concerns.

In re Shell Gulf of Mexico, Inc., 15 E.A.D. 103, 153-52 n.79 (EAB 2010) (emphasis in original) (citation and quotation omitted).

Quite simply, "[i]n this case, the Petitioner[] ha[s] not demonstrated that [EPA] failed to respond to any specific EJ-related comments *that concerned whether the permit complies with all federal applicable requirements and requirements under part [71]*." *In re Matter of Plains Mktg.*, Order on Pet. Nos. IV-2023-1 & IV-2023, at 21 (emphasis added). The Board should deny review of this Petition.

II. EPA Engaged in Extensive Consultation with Petitioner, and More than Adequately Considered and Responded to Comments Related to Environmental Justice.

Petitioner claims EPA failed to comply with its "federal fiduciary trust duties" and its environmental justice obligations set forth in Executive Orders and EPA policies. Pet. at 16. Petitioner's specific grievances relate to EPA allegedly (i) failing "to ensure meaningful and collaborative dialog with the Tribe" (ii) "summarily dismiss[ing] the Tribe's comments on deficiencies in the Bonanza Plant permit," and (iii) "failing to evaluate the cumulative impacts of environmental pollution affecting the Tribe that should have caused the Agency to take more precaution in protecting the health and welfare of this disadvantaged community when determining permit conditions for the Bonanza Plant." *Id*. These claims are without merit.

Although not required by Title V, EPA engaged in an extensive process to provide Petitioner with meaningful opportunities to consult and participate in the permitting process. EPA also conducted a detailed environmental justice analysis to respond to Petitioner's environmental justice concerns regarding cumulative effects. EPA's consultations and environmental justice evaluation were in addition to, and far exceeded, the public notice and comment process set forth in 40 CFR part 71. Moreover, Petitioner's dissatisfaction with EPA's responses to comments is due to Petitioner's misapprehension of the Title V permitting program – not error on the part of EPA. For these reasons also, the Board should deny the Petition.

A. EPA provided Petitioner meaningful opportunities to consult and participate in the permitting process.

Any suggestion that EPA's consultations with Petitioner about the Permit were inadequate is belied by the record. In fact, Petitioner even acknowledges that it was able to "voice[] its concerns" to EPA "during each step of the process." Pet. at 10.

As an initial matter, there is no dispute that EPA satisfied the notice and comment requirements set forth in 40 C.F.R. § 71.11. That is all that EPA is required to do. *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 17 (EAB 2000) (permit issuer need not go beyond regulatory requirements in providing for public participation); *see also In re Shell Offshore, Inc.*, 13 E.A.D. 357, 401-403 (EAB 2007) (denying review of CAA permit based on claim that EPA's failed to adequately consult with tribal governments (but granting review on other grounds)).

Nevertheless, in addition to the standard public participation process provided under Section 71.11, EPA provided Petitioner with multiple opportunities to consult and comment on draft Permit before, during, and after the public comment period. As outlined in EPA's cover letter for the final Permit, the EPA held four consultation meetings with Petitioner's representatives and received three comment letters from Petitioner to which it responded thoroughly. *See* RTC Cover Letter (Dec. 4, 2023) [Attach. 8 to Pet.].

Petitioner now suggests that four government-to-government meetings and consideration of three comment letters were insufficient. Pet. at 17. Yet, it does not articulate any standard for determining the sufficiency of tribal consultation, let alone the number of additional meetings or letters that would have been satisfactory for this Permit. Moreover, there is no evidence that Petitioner requested but were denied an opportunity to consult with EPA concerning the Permit.

In the air permitting context, the Board has previously rejected similar claims that EPA denied tribes "meaningful participation in the permitting process" where EPA engages the tribe in consultation by providing adequate information about the permit process and meeting with the tribe to hear its concerns. *See Shell Offshore*, 13 E.A.D. at 401-403. Like it did for the permits at issue in *Shell Offshore*, EPA "sought out and encouraged" tribal and community output, invited Petitioner "to initiate government-to-government consultation if they desired[,]" "widely distributed" the permitting materials and "made copies of relevant materials available for public review[,]" held "informal" sessions with Petitioner's representatives "for questions and answers," and offered opportunities for oral and written comments. *Id*. at 403; *see* RTC Cover Letter [Attach. 8 to Pet.]. EPA's extensive consultation with Petitioner and consideration of its comments here matched or exceeded the tribal consultation efforts that were deemed sufficient in *Shell Offshore*. For example, EPA even gave Petitioner an opportunity to comment on a *draft* version of the environmental justice analysis. *See* Pet. at 10-11; Attach. 6 to Pet. Petitioner's disagreement with EPA's responses to its written comments and input during consultations does not make the consultation process deficient.

Even if Tribal consultation – untethered to any claim concerning whether the permit complies with all federal applicable requirements and requirements under part 71, as is the case here – were relevant to this appeal (and it is not, as explained in Part I, above), the Board should deny review. EPA's extensive consultation efforts were exemplary, and Petitioner has not established any clearly erroneous finding of fact or conclusion of law or an important matter of policy or exercise of discretion that warrants review.

B. EPA complied with applicable Executive Orders and policies relating to environmental justice in considering and responding to Petitioner's comments.

Petitioner confuses the nature of EPA's environmental justice responsibilities with a substantive right that supplements Title V permitting requirements. Pet. at 16. As the Board has recognized, there are "substantial limitations" on implementing environmental justice principles in the permitting context, because EPA's policies must be implemented in a "manner that is consistent with existing law." *Envotech*, 6 E.A.D. at 279; *see* EO 12898 § 6-608; EO 14096 § 11(b), 88 Fed. Reg. at 25,261 ("This order shall be implemented consistent with applicable law."). Moreover, environmental justice policies do not dictate any particular conditions or outcomes in a permit decision. *Muskegon*, 18 E.A.D. at 91. The scope of EPA's authority (and, therefore, the scope of the Board's review jurisdiction) is especially constrained for Title V permits:

> Because title V generally does not authorize the direct imposition of substantive emission control requirements, title V permitting does not appear to be an effective mechanism for establishing new, substantive control requirements to address environmental justice considerations regarding impacts on or participation by communities with environmental justice concerns.

EPA Office of General Counsel, *EPA Legal Tools to Advance Environmental Justice* 49 (May 2022), https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf. EPA simply has "no authority to deny or condition a … permit where the permittee has demonstrated full compliance with the statutory and regulatory requirements." *Envotech*, 6 E.A.D. at 280. Indeed, many of Petitioner's comments and related objections to EPA's responses reflect a fundamental misapprehension of EPA's authority under Title V. Federal tribal consultation and environmental justice policies do not supersede the Clean Air Act,

and do not allow EPA to use the Title V permit as a vehicle to impose impermissible conditions or to take the enforcement action against Deseret.

Regardless, the record demonstrates that EPA met the requirements of environmental justice directives and policies during the permitting process. To address Petitioner's environmental justice concerns, EPA prepared a separate environmental justice analysis document. EPA Response to Tribe Comments at 1 (Dec. 4, 2023) ("EJ Analysis"). The EJ Analysis outlines EPA's environmental justice policies and explains how EPA's environmental justice framework was applied to the renewal Permit:

> Executive Order 12898 directs federal agencies "to the greatest extent practicable and permitted by law," to "make achieving environmental justice part of its mission by identifying and addressing as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Executive Order 14096 reinforces the federal government's commitment to advancing environmental justice, equity, and civil rights, establishing a policy that every person must have clean air to breathe; clean water to drink; safe and healthy foods to eat; and an environment that is healthy, sustainable, climate-resilient, and free from harmful pollution and chemical exposure. The Order further recognizes that communities with environmental justice concerns exist in all areas of the country, including urban and rural areas and areas within the boundaries of Tribal Nations and U.S. Territories. Executive Order 14008 further directs federal agencies "to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts." In addition, Executive Order 13985 calls on each federal agency to "pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality." Accordingly, advancing environmental justice and equity is an EPA priority as set forth in the Agency's Fiscal Year 2022-2026 Strategic Plan.
>
> Consistent with these Executive Orders and the EPA policies, this analysis evaluates potential EJ concerns including the concerns raised by the Tribe related to air quality and other media. Section A discusses the results of EPA's Environmental Justice screening and mapping tool (i.e., EJScreen) as well as additional relevant information as a first step to considering EJ concerns. The analysis then discusses air quality in the Uinta Basin in Section B, and other media

> concerns raised by the Tribe relevant to Bonanza in Section C. Section D addresses the Tribe's request for a trust fund to promote cleaner air for Tribal members.

RTC EJ Analysis at 3-4 (citations omitted).

Moreover, as discussed below in connection with specific environmental justice claims, EPA provided detailed and careful responses to Petitioner's comments. In short, even if not required under Title V, EPA fulfilled all requirements pertaining to environmental justice.

Petitioner disagrees. It claims that EPA did not comply with its environmental justice responsibilities by "failing to evaluate the cumulative impacts of environmental pollution affecting Petitioner that should have caused the Agency to take more precaution in protecting the health and welfare of this disadvantaged community when determining permit conditions for the Bonanza Plant" in violation of Executive Orders[9] and EPA policies. *Id*. Specifically, the Petition asserts that EPA erred or abused its discretion by inadequately responding to five comments relating to environmental justice concerns. Appendix B to the Petition contains a summary of the five comments, EPA's responses to each of the comments as set forth in its RTC documents, and Petitioner's explanation for why EPA's responses were erroneous or an abuse of discretion. [10]

Not so. Putting aside that none of this is relevant to an appeal of a *Title V* permit because there is no connection between EPA's alleged failure to consider environmental justice to Petitioner's satisfaction and whether the permit complies with all federal applicable requirements and requirements under *Title V*, Petitioner in fact fails to substantively confront EPA's responses

[9] *See generally* EO 12898 and EO 14096.

[10] "If the petition raises an issue that the Regional Administrator addressed in the response to comments document issued pursuant to § 124.17, then petitioner must provide a citation to the relevant comment and response and explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review." 40 C.F.R. § 124.19(a)(4)(B)(ii).

and "explain why the permit issuer's response to comments is clearly erroneous or otherwise warrants consideration." *In re: Pio Pico Energy Ctr.*, 16 E.A.D. 56, 65 (EAB 2013); *see also* 40 C.F.R. § 124.19(a)(4)(B)(ii). The Petition rests on conclusory assertions that EPA's responses were erroneous and requests for permit conditions that exceed EPA's authority. Petitioner fails to challenge EPA's underlying explanations or analysis underlying its responses, and it fails to provide a legal basis under the CAA for imposing the conditions it seeks. Although Petitioner "may disagree with the content or conclusions of the Region's environmental justice analysis" or its response to comments, Petitioner "has not demonstrated that their difference of opinion is the equivalent of an insufficient effort on the Region's part in evaluating environmental justice or that the Region failed to properly analyze the impacts" of the Permit. *In re Energy Answers Arecibo, LLC*, 16 E.A.D. 294, 335 (EAB 2014).

i. Response to Comment #1 – Carbon Dioxide Emissions.

Petitioner objects to EPA's response to its comment that the "Bonanza Plant emits approximately 3.5MM [million] tons" of carbon dioxide ("CO_2") per year. Pet. at App. B. EPA acknowledges the Bonanza Plant's CO_2 emissions and explains that, "[t]o date, Bonanza has not changed or modified emissions units at the facility. Thus, there are no additional air quality impacts associated with the permit renewal." RTC EJ Analysis at 2. Petitioner asserts that it was an "abuse of discretion and inconsistent with [its] trust Duties [for EPA] to ignore [the] disproportionate impact/cumulative effect [of CO_2 emissions] on Tribal lands." Pet. at App. B.

The Petition reflects a fundamental lack of understanding of the purpose of a Title V permit. The Title V program does not itself establish substantive emission reduction requirements, nor does it independently establish its own emission standards. *See Peabody I*, 12 E.A.D. at 27. EPA did not err or abuse its discretion by not including limits on CO_2 emissions in

the Permit. To the contrary, had EPA included CO_2 emissions limits in the Permit, *that would have constituted clear error* justifying Board review.

ii. Response to Comment #2 – Concerns about air quality.

Petitioner next objects to EPA's response to its comment about poor air quality on the Reservation and EPA's purported "obligat[ion] to mitigate and prevent harmful impacts pursuant to its federal trust responsibility and [EO] 12898." Pet. at App. B; Tribe Comments at 1 (Attach. 4 to Pet.). Again, putting aside that this claim has nothing to do with Title V, and EPA's only obligation in the Title V renewal process is to comply with the requirements of Title V, which EPA did, here EPA did conduct an environmental justice analysis to evaluate Petitioner's concerns about cumulative impacts to air quality and other media. RTC EJ Analysis at 4-17. Petitioner claims that EPA's responses were deficient in two ways: (i) EPA used EJScreen to evaluate potentially impacted communities near the Bonanza Plant and, instead, "should have done an analysis of conditions on the Reservation," Pet. at App. B, and (ii) EPA "approv[ed] the Title V Permit renewal for the Bonanza Power Plant with no new measures to mitigate environmental harms." Pet. at 13; *see also* Pet. at App. B.

The first alleged deficiency is wrong. Petitioner's focus on EPA's discussion of EJScreen is misplaced and ignores the substance of EPA's environmental justice analysis. The EJScreen evaluation is merely a starting point for any environmental justice analysis and did not impede EPA's ability to evaluate Petitioner's specific air quality concerns affecting its members and lands. Contrary to Petitioner's summary of EPA's response, EPA did not conclude that it was not disproportionately affected by the Bonanza Plant based on the EJScreen results showing there "was no population within up to a 10-mile radius of the Plant." Pet. at App. B. Indeed, EPA "*expanded* its screening" beyond 10 miles to cover "approximately 2,626 square miles around

the facility" so that it could "more fully consider the Tribe's concerns and better understand the surrounding community." RTC EJ Analysis at 4 (emphasis added). Based on EPA's expanded EJScreen, EPA stated "communities in the census block group may be disproportionately impacted by total pollution, non-pollution, and climate change burdens. These same communities may also be disproportionately vulnerable to climate change impacts." RTC EJ Analysis at 7.

With respect to the second alleged deficiency, Petitioner cannot show that EPA erred or abused its discretion by failing to impose "mitigation measures, including but not limited to, tree planting, funding to address health impacts, [or] other action[s] such as [a] future trust fund." Pet. at App. B. As EPA has repeatedly explained to Petitioner, these measures are beyond the scope of EPA's authority under the CAA Title V program. The Board has previously emphasized in the context of other CAA permits that air permit decisions are "not an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bears on air quality." *In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121, 127 (EAB 1999); *see also In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 259-60 (EAB 1999). The Board has jurisdiction "to review issues directly related to permit conditions that implement the federal [permit] program," *In re Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999), but will deny review of issues not governed by the Title V regulations because it lacks jurisdiction over them. *See id*.; *see also Encogen*, 8 E.A.D. at 259 (noting that petitioners had not shown how the issues they requested the Board to review fell within the Board's PSD jurisdiction); *Jordan Dev. Co.*, 18 E.A.D. at 12 (denying review of a petitioner's request for funding). Moreover, there are often other regulatory programs in place that may address environmental concerns that fall outside the Board's scope of review. *Knauf*, 8 E.A.D. at 162; *see also Shell Offshore*, 13 E.A.D. at 405 n.66.

Indeed, in the RTC EJ Analysis, EPA attempted to assist Petitioner with identifying available funding resources:

> In response to the Tribe's request for funding, the EPA encourages the Tribe to apply, as appropriate, for environmental justice grants available through the EPA Office of Environmental Justice (OEJ). Current information about the availability of EJ grants can be found on the EPA's website. Tribes may also access information about opportunities for EJ and other EPA grants through the EPA Region 8's Tribal Resource Center. If the Tribe is interested, the Region 8 Children's Health, Equity, and Environmental Justice branch offers to meet with Tribal government representatives to discuss potential EJ funding opportunities.

RTC EJ Analysis at 16 (footnote omitted). Petitioner cannot demonstrate that EPA erred or abused its discretion by failing to impose mitigation measures that are beyond the scope of the Title V permitting.

iii. Response to Comment #3 – Ozone Impacts

In its comments, Petitioner expressed concern that NOx emissions from the Bonanza Plant combine with VOCs to form ozone which "disproportionally impacts the Tribe." Pet. at App. B; *see also* Tribe Comments at 4. EPA's environmental justice analysis evaluated, however, Petitioner's specific air quality concerns, including the potential impacts of NOx emissions on ozone formation. *Id*. at 8-11. EPA considered available peer-reviewed literature and scientific models to assess Petitioner's localized concerns about air quality. *Id*. at 9. EPA noted that "inversion height in the Uinta Basin and the Bonanza stack height are important considerations in assessing Bonanza's contribution to ozone formation during wintertime ozone events." *Id*. Based on its review of relevant studies and data, EPA concluded,

> Accordingly, while the contribution of ozone-forming emissions from Bonanza is not zero, considering the stack height of the NO_X and VOC emissions releases, the inversion layer height, and the small percentage of total Uinta Basin VOC emissions that the plant produces, we do not believe that Bonanza emissions significantly contribute to the wintertime ozone issues in the Uinta Basin.

Id. at 10; *see also* RTC Document at 7 [Attach. 8 to Pet.].

Notably, the Petition does not challenge EPA's conclusion. Rather, Petitioner criticizes EPA's reliance on "historic data on the inversion trapping 'emissions'" that support the conclusion. Pet. at 18. EPA addressed this point head-on in its analysis:

> While the intensive field studies were conducted a decade ago in 2013, the meteorological conditions that cause high ozone episodes have not changed, and it is expected that the plume from Bonanza continues to remain above the inversion layer during the persistent, strong inversion layers that cause ozone episodes in the Uinta Basin.

RTC EJ Analysis at 9.

Again, putting aside whether any of this is relevant to a Title V permit review, the Petition entirely fails to confront EPA's explanation for relying on 2013 field studies for this Permit action, other than in conclusory statements that EPA's "theory is unsupported and not predictive of future impacts of climate change in the Uinta Basin." Pet. at 22. The Petition does not attempt to identify other more reliable data or models that would show that meteorological conditions have changed or are likely to change during the life of the Permit. Nor does the Petition cite any evidence to dispute that the Bonanza Plant's plume continues to remain above the inversion layer. While Petitioner may not like EPA's conclusions, it cannot point to any error in EPA's analysis. *See Jordan Dev. Co.*, 18 E.A.D. at 21-22 (denying review where the petitioner failed to meet the heavy burden of demonstrating clear error in EPA's well-reasoned technical determinations).

While it could have ended the discussion there, EPA went on to explain how new regulations, beyond this permitting decision, will improve ozone air quality and reduce exposure to air toxics on the Reservation. *Id*. at 10-11 (citing Federal Implementation Plan for Managing Emissions from Oil and Natural Gas Sources on Indian Country Lands within the Uintah and

Ouray Indian Reservation in Utah, 87 Fed. Reg. 75334 (Dec. 8, 2022) ("U&O FIP")). Petitioner objects to EPA's discussion of the U&O FIP in its cumulative impacts analysis. The Petition asserts "EPA cannot disregard alternative sources of pollution. EPA must reduce emission levels in the Bonanza Permit to compensate for the cumulative effects of other facilities" until EPA acts to further regulate "oil and gas sources impacting the reservation." Pet. at App. B. Petitioner's argument (in addition to being irrelevant to a Title V appeal) is substantively without merit.

Petitioner ignores EPA's underlying conclusion that Bonanza Plant is not a significant contributor to the ozone issues in the Uinta Basin, which Petitioner has failed to refute. Moreover, Petitioner fails to explain why EPA's conclusion "that regulation of oil and gas sources is the most effective way to address ozone-related air quality concerns in the Uinta Basin" is wrong. RTC EJ Analysis at 11. Petitioner does not challenge EPA's assertion that "approximately 98% of VOC emissions are from existing oil and natural gas operations" and that "[a]pproximately 70% of active producing oil and natural gas wells in the Uinta Basin are on Indian country lands within the U&O Reservation." RTC EJ Analysis at 10. Finally, Petitioner does not contest EPA's conclusion that the "U&O FIP will improve ozone air quality and reduce exposure to air toxics on the U&O Reservation and surrounding areas in the Uinta Basin through a reduction of over 27% of the existing ozone-forming VOC emissions." *Id*. at 10-11.

Even if the Bonanza Plant was a significant contributor to ozone formation, Petitioner "cites no authority to support its contention that the Agency's ability to address cumulative impacts is confined to the [Title V] program, and provides no further explanation of how cumulative impacts from multiple existing sources can be effectively addressed solely through the [Title V] permitting process" for the Bonanza Plant. *Cf. In the Matter of Avenal Power Ctr., LLC.*, 15 E.A.D. 384, 404 (EAB 2011). Moreover, Petitioner does not dispute that the U&O FIP

is "further regulat[ion] [of] oil and gas sources impacting the reservation," Pet. at 10, so it is unclear what further action Petitioner believes is necessary.

iv. Response to Comment #4 – Impacts to wildlife and vegetation on Tribal lands.

In its comments, Petitioner states that "Deseret's operation of the Bonanza Plant has had deleterious impacts on vegetation and wildlife on tribal lands in the surrounding area." Tribe Comments at 1; *see also* Pet. at App. B. EPA's environmental justice analysis contains an extensive discussion responding to Petitioner's comment, which includes a discussion about groundwater, cultural resources, wildlife, and plant species within the Reservation. RTC EJ Analysis at 11-16. Petitioner claims that EPA's response was insufficient because it failed to evaluate potential impacts to groundwater from one of the Bonanza Plant's evaporation ponds. Pet. at App. B. However, this claim is outside the scope of the CAA and of this permitting decision and does not constitute clear error or an abuse of discretion by EPA. As EPA explains, a Title V operating permit "does not authorize the discharge of pollutants in wastewater and stormwater to surface or groundwater. . . . Thus, while Bonanza's CCR units and the North Evaporation Pond may contribute to elevated concentrations of regulated constituents in nearby groundwater and Bonanza's cumulative environmental burden to the surrounding community, the EPA concludes that the proposed Title V permit will have no effect on groundwater." RTC EJ Analysis at 12-13.

Petitioner also appears to criticize EPA's response regarding potential groundwater impacts from the Bonanza Plant's *air emissions*, citing "comments above on inversion" as the basis for challenging response. Pet. at App. B. As the RTC EJ Analysis explains, "given Bonanza's high stack height at approximately 600 feet, the EPA does not expect Bonanza's air

emissions to impact local groundwater resources." *Id*. at 12. As discussed above, the Petition makes no attempt to refute EPA's analysis or supporting data concerning the height of the inversion layer in the Uinta Basin and the Bonanza Plant's stack height. Thus, Petitioner has failed to confront EPA's response on this issue also.

v. Response to Comment #5 – Lifetime limit on coal use at the Plant.

Lastly, Petitioner claims that EPA erred in responding to its comment that "EPA should impose a lifetime limit on coal use at the Plant." Pet. at App. B. However, the Petition does not cite the source of this comment or the source of EPA's purported response that "Title V does not require [a] lifetime limit." *Id*. Accordingly, it is not a proper claim under 40 C.F.R. § 124.19. And even it was, it should be denied for the same reasons as above. It is not germane to the Title V program. EPA has no authority to create new applicable requirements under Title V.

III. The Board Should Deny Review of the Petition's Claims Regarding the RCRA Investigation.

The Petition also claims that EPA erred by failing to inform Petitioner until after the Permit was issued that the EPA's National Enforcement Investigations Center ("NEIC") had identified six potential instances of non-compliance at the Bonanza Plant. Pet. at 11. However, as the Petition acknowledges, these investigations were undertaken at "the Bonanza Plant under the authority of the Resource Conservation and Recovery Act ("RCRA")." *Id*. "The Board does not have authority to review every environmental concern associated with" the Bonanza facility. *Knauf*, 8 E.A.D. at 162.

The scope of a CAA permit proceeding does not extend to non-air-quality issues, including issues of RCRA regulation. *Id.* (denying review of issues pertaining to waste disposal in a CAA permit appeal)*; see In re Chem. Waste Mgmt. of Indiana, Inc.,* 6 E.A.D. 66, 72 (EAB

1995); *see also In the Matter of: Sequoyah Fuels Corp.*, 4 E.A.D. 215, 219 (EAB 1992) (denying a petition for review of a Clean Water Act permit based on issues concerning regulation of the same facility under RCRA). The Board's jurisdiction "extends to those issues directly relating to permit conditions that implement the federal [Title V] program." *Knauf*, 8 E.A.D. at 161. Thus, an investigation relating to the Bonanza Plant's management of coal combustion residuals and their potential effect on *groundwater* quality, which are specifically regulated pursuant to rules issued under RCRA, is beyond the scope of this permits and not subject to EAB review in this action.

CONCLUSION

For the foregoing reasons, the Board should deny review of the Petition.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

The undersigned attorneys certify that this Response to the Petition does not exceed 14,000 words.

Respectfully submitted,

Date: March 22, 2024

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