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

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| In re: | ) |
| Harvest Four Corners, LLC | ) |
| Permit No. R6FOP-NM-04-R3-2023 | ) |

PETITIONER'S REPLY BRIEF

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## INTRODUCTION

"[T]itle V is a catch-all, not a cure-all,"[1] and Title V permits issued by the Environmental Protection Agency ("EPA") are limited to "consolidat[ing] 'existing air pollution requirements into a single document.'" *United States Sugar Corp. v. EPA*, 830 F.3d 579, 597 (D.C. Cir. 2016) (quoting *Sierra Club v. Leavitt*, 368 F.3d 1300, 1302 (11th Cir. 2004)). Here, EPA strayed beyond its Clean Air Act ("CAA" or "Act") statutory mandate and issued a Part 71 operating permit ("Final Permit") that imposed new enforceable limits on the potential to emit ("PTE") of Harvest Four Corners, LLC's ("Harvest") Los Mestenios Compressor Station Facility ("Los Mestenios" or the "Facility") without any basis in underlying applicable requirements.

EPA's Response to Harvest's Petition is nothing more than an attempt to muddy the waters in hopes the Environmental Appeals Board ("EAB" or "Board") will simply defer to its decision making. But deference is not appropriate where EPA's issuance of a Part 71 permit exceeds the CAA's grant of authority under Title V. And while EPA bobs and weaves around this issue, it ultimately concedes that the only authority on which the new enforceable conditions in the Final Permit rests is a 1996 minor source construction permit ("1996 Minor NSR Permit")—improperly issued under the major source construction provisions—which does not regulate the emissions units for which EPA imposes new emission limits (and associated Monitoring, Reporting and Recordkeeping ("MRR") conditions) in the Final Permit. EPA has not established the existence of applicable requirements for these new conditions in the Final Permit and, as such, EPA exceeded its statutory authority under Title V of the Act and inclusion of these conditions is clearly erroneous.

[1] *See* Clarifying the Scope of "Applicable Requirements" Under State Operating Permit Programs and the Federal Operating Permit Program, 89 Fed. Reg. 1150, 1154 (Jan. 9, 2024) (Proposed Rule) (to be codified at 40 C.F.R. pts. 70 and 71).

## THRESHOLD PROCEDURAL REQUIREMENTS

EPA makes the unsubstantiated argument that Harvest failed to raise EPA's improper reliance on the 1996 Minor NSR Permit during the comment period for the Draft Permit. EPA Resp. at 14. As Harvest explained, EPA raised the 1996 Minor NSR Permit for the first time as the justification for the substantive emission limits in its Response to Comments document accompanying the Final Permit. Harvest Pet. at 20. EPA, without citation, asserts that EPA "has consistently raised the 1996 Permit as the source of the applicable requirements that form the basis of *this permit decision*." EPA Resp. at 14 (emphasis added). EPA substantially overstates its position.

First, EPA did not assert that conditions of the 1996 Minor NSR Permit were applicable requirements and the legal basis for the emission limits or monitoring requirements at any point prior to the Response to Comments. During the permitting process, EPA and Harvest corresponded extensively regarding the source of the Agency's authority to impose the proposed new conditions. *See* Harvest Pet. at 15. At EPA's request, Harvest laid out the basis for its objections to these conditions—noting, first and foremost, the lack of underlying applicable requirements for the new emissions limits. *See* Harvest Pet., Attachment 17 – October 13, 2023 Letter from Harvest to EPA. EPA at no point asserted that the conditions in the 1996 Minor NSR Permit were applicable requirements; instead, EPA relabeled the restrictions on the facility's PTE as "work practice and operational requirements." *See* Harvest Pet., Attachment 10 – October 25, 2023 Draft Part 71 Permit, at 27, 29. But EPA remained silent regarding the basis for these restrictions. Neither the Draft Permit nor the Final Permit "specify and reference the origin of and authority for" these limits as the 1996 Minor NSR Permit, which is required by 40 C.F.R. § 71.6(a)(1). This citation would have given Harvest notice of the alleged applicable requirements on which EPA was relying for the new requirements and an opportunity to comment.

Moreover, the chart of Applicable Requirements in the Statement of Basis includes no mention of the 1996 Minor NSR Permit. Harvest Pet., Attachment 11 – Statement of Basis for Draft Part 71 Title V Permit, at 19-20, Table 9. EPA's reliance on the Statement of Basis' permitting history narrative noting the existence of the 1996 Minor NSR Permit does not provide adequate notice where EPA acknowledges both in the Statement of Basis and in its brief that the "Facility is currently an existing true NSR minor source and was originally constructed and commenced operations before August 30, 2011." *See* EPA Resp. at 15 (citing Statement of Basis at 18). Enforceable emission limits on PTE are not necessary (or appropriate) for a true minor source.[2]

Second, as detailed in Harvest's Petition for Review, Section I.B, and discussed in Section II of this reply brief, EPA improperly relies on the incorporation of certain conditions from the 1996 Minor NSR Permit into the 2003 Title V renewal permit. Notwithstanding EPA's lack of authority to issue the 1996 Minor NSR Permit or the fact that the 1996 Minor NSR Permit was cancelled, EPA in 2009 "incorporate[ed] all applicable requirements from previous [1996 Minor] NSR permit, NM-791-M2, issued by EPA Region 6." Harvest Pet., Attachment 6 – 2009 Title V Permit Statement of Basis, at 2. As a result, there are no more applicable requirements to incorporate in the Title V permit and which explains why EPA determined that the Facility's "the Potential to Emit … is for *informational purposes only*, except where specifically noted as limited." *Id.* (emphasis added).

Finally, and most importantly, Harvest's claims do not hinge on the existence of the 1996 Minor NSR Permit. EPA cannot broadly rely on the 1996 Minor NSR Permit where none of the new requirements can be tied back to the 1996 Minor NSR Permit *because the emission units at issue in the Final Permit were not regulated by the 1996 Minor NSR Permit. See infra,* at II.C.

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[2] A "true minor source" is one that has a potential to emit less than major source thresholds but equal to or greater than tribal minor NSR thresholds "without the need to take an enforceable restriction to reduce its potential to emit to such levels. That is a *true minor source* is a minor source that is not a synthetic minor source." 40 C.F.R. § 49.152.

## STANDARD OF REVIEW

EPA misstates the applicable standard of review. The question of whether EPA exceeded its authority under the CAA when it included emission limits and monitoring requirements for the first time in Harvest's Final Permit should be reviewed under a "clearly erroneous" standard. This is not, as EPA asserts, a case properly reviewed under an abuse of discretion standard.[3] EPA Resp. at 13. As such, EPA's permitting decision does not implicate "matters that are fundamentally technical or scientific in nature," *In re City of Keene*, 18 E.A.D. 720, 724 (EAB 2022), and EPA's determinations are not due deference. *See Global Tel*Link v. FCC*, 866 F.3d 397, 417 (D.C. Cir. 2017) ("It goes without saying that if an agency action exceeds its statutory authority, the agency is entitled to no deference….").

## ARGUMENT

EPA exceeded its authority under Title V when it imposed new, substantive conditions in the Final Permit untethered to preexisting applicable requirements. EPA offers no cogent response to Harvest's claims, vacillating between an illogical and entirely unsupported argument that the permit conditions are nothing new and not substantive in nature and an erroneous assertion that the 1996 Minor NSR Permit authorizes EPA to impose limits on the Facility's emissions units. Ultimately, however, EPA's concession that the 1996 Minor NSR Permit does not even address those emission units for which it has added substantive requirements (and associated MRR requirements) is outcome determinative. EPA cannot create from whole cloth new, substantive requirements in a Part 71 permit issued under a "procedural rather than a substantive statute." *In re Shell Offshore, Inc.*, 15 E.A.D. 536, 572 (EAB 2012); *see also United States Sugar Corp.*, 830 F.3d at 597

[3] The cases on which EPA relies in support of its argument that the Board should evaluate whether EPA provided a "reasonable exercise of discretion" and "considered judgment" are inapposite as they all involved evaluations of the agency's discretion and not questions of whether the agency exceeded its statutory authority. *See* EPA Resp. at 12-13.

("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 requirement") (*quoting Sierra Club*, 368 F.3d at 1302).

## I. The Final Permit Includes New Enforceable Limits and Monitoring Requirements and EPA's Attempts to Downplay Their Effect Are Unavailing.

EPA attempts to minimize the importance of the new conditions in the Final Permit, incorrectly arguing that the MRR are nothing more than "supplemental monitoring" for pre-existing emission limits while at the same time downplaying the existence and effect of the new substantive emission limits. EPA Resp. at 16. EPA mischaracterizes the permit history, and the permit language belies EPA's strained arguments.

EPA concedes that the MRR requirements are "new" but incorrectly asserts that they are appropriate because there were no prior MRRs for the condensate storage tanks, truck loading, equipment leaks, and startup, shutdown, and maintenance ("SSM") emissions in the 2017 Title Permit. EPA Resp. at 21 ("The issue, then, is whether EPA has the authority to require new MRRs."). But the 2017 Title V Permit does not include any limits that would trigger such MRR requirements and EPA's authority to impose additional MMR requirements in a Title V is limited to ensuring compliance with a pre-existing applicable requirement.[4] *See* Harvest Pet. at 30-32. Under the 2017 Title V Permit, only certain emissions from a single unit (the Solar Saturn 1200 turbine) are subject to "enforceable limitations on PTE [potential to emit]." Harvest Pet., Attachment 3 – 2017

[4] For this reason, EPA's reliance on the *South Louisiana Methanol* Order is misplaced. *See* EPA Resp. at 17-18, 22. The *South Louisiana Methanol* Order concerned the "enforceability" of pre-existing applicable requirement (*i.e.*, "how emissions will be measured or determined for purposes of demonstrating compliance.") not the authority to impose new emissions limits in a Title V permit. *See In the Matter of South Louisiana Methanol, LP,* Order on Petition Nos. VI-2016-24 & VI-2017-14 at 10 (May 29, 2018).

Title V Permit, at 3. For all other emission units, the 2017 Title V Permit notes that the PTE is "unregulated" and "for informational purposes." *Id.*

EPA is simply wrong when it claims that "[t]he 2017 Permit includes applicable emissions limits on the condensate storage tanks, planned SSM activities, and equipment leaks" and states that Table 2 of the 2017 Title V Permit "shows applicable emissions limits for T-1 and T-2 and SSM (labelled "MSS" in the Unit Id column)." EPA Resp. at 19. On the contrary, Table 2 in the 2017 Title V Permit lists the PTE for each emissions unit at the Facility and notes which units are subject to applicable enforceable limits on PTE and which units are not. Harvest Pet., Attachment 3 – 2017 Title V Permit, at 3. Importantly, as indicated by footnote 1 of Table 2, only oxides of nitrogen ("NOx"), volatile organic compounds ("VOC"), and carbon monoxide ("CO") emissions *from a single unit* (the Solar Saturn 1200 turbine) have "regulated emissions PTE" and are subject to "enforceable limitations on PTE" as listed in Table 4. *Id.* No other units besides the Solar Saturn Turbine are listed in Table 4. *Id.* at 9. EPA does not have authority to require new MRRs where the units and activities to which the MRR requirements are tied were not previously subject to enforceable limits. Harvest Pet. at 30-32.

In stark contrast to the 2017 Title V Permit, the Final Permit does include new enforceable emission limits. Ignoring the plain language of the Final Permit, EPA boldly asserts that it "is not imposing new restrictions on the Facility's emission rates in Section 6.3, 6.4, 6.5 and 6.6 of the 2024 Permit." EPA Resp. at 21. But the Final Permit for the first time treats *all of the Facility's emissions units* as "regulated emissions units" and imposes new enforceable limits on the PTE of *all of the Facility's units*—including the condensate tanks, truck loading, planned SSM activities, and equipment leaks. Section 2 of the Final Permit provides that "[t]he Permittee shall operate all emissions units in accordance with the representations provided in the Title V permit application" and includes Table 4 which lists the "Facility PTE for Each Regulated Emission Unit." Harvest Pet., Attachment 12 –

Final Permit, at 6-7. For instance, Harvest "shall maintain and operate" the condensate storage tanks "as represented in the application, such that the VOC and HAP PTE for each tank as shown in Table 4 will not be exceeded." *Id.* at 31 (Condition 6.3.1.1). Similarly, Harvest is required to "demonstrate compliance with the VOC and HAP PTE for truck loading as summarized in Table 4 by operating truck loading operations such that the PTE emission rates are not exceeded." *Id.* at 33 (Condition 6.4.1.1). Despite EPA's attempt to rewrite permit history, *see* EPA Resp. at 21, there is no question that—for the first time—the Final Permit treats all emission units' PTE as enforceable emissions limits.

Second, the inclusion of these new, substantive restrictions is not—as EPA attempts to argue—a minor issue. Regardless of whether the permit requires installation of control technologies, classifying all *units* as "regulated emission units" with enforceable limits on their PTE will now require Harvest to "calculate the total emissions in tons per year (tpy) for each pollutant listed in Table 4 for all emissions units at the Los Mestenios and report any amount above the values listed in Table 1 *as deviations of this permit*." Harvest Pet., Attachment 12 – Final Permit, at 6 (emphasis added). The compliance and enforcement implications are real. Consistent with Part 71, the Final Permit defines a deviation as "any situation in which an emissions unit fails to meet a permit term or condition" including "[a] situation where emissions exceed an emission limitation or standard" as well as requires the Permittee to report "all instance of deviations" and "any corrective actions or preventive measures taken." *Id.* at 20-21. While the Final Permit notes that "[a] deviation is not always a violation," it also states that "[a]ny permit noncompliance, including violation of any applicable requirement; any permit term, condition or emissions limitation; … constitutes a violation of the CAA and is grounds for: [40 C.F.R. § 71.6(a)(6)(i)] 4.4.1.1 enforcement action. 4.4.1.2 permit termination, revocation and reissuance, or modification; or 4.4.1.3 denial of a permit renewal application." *Id.* at 11; *see also* 40 C.F.R. § 71.12 ("Violations of any applicable requirement; any

permit term … issued by the permitting authority pursuant to this part are violations of the Act and are subject to full Federal enforcement authorities available under the Act.").

## II. EPA Lacks the Authority to Impose New Requirements in the Title V Permit.

EPA doubles down on its assertion—first raised in the Response to Comments—that the 1996 Minor NSR Permit includes conditions adequate to impose new enforceable limits on emission units at the Facility. Indeed, EPA's entire justification for the new conditions in the Final Permit hinges on the "emissions restrictions drawn" from the 1996 Minor NSR Permit, which EPA argues were then incorporated into the 2003 Title V permit. *See* EPA Resp. at 18, 20, 35. But EPA's arguments that the new limits in the Final Permit were properly drawn from the 1996 Minor NSR Permit are unavailing and EPA fails to (1) establish it had authority to issue the 1996 Minor NSR Permit in the first place, (2) explain why the permit as a whole can be relied upon as the basis for applicable requirements when it was cancelled in 2009, and (3) demonstrate the relevance of the 1996 Minor NSR Permit when that permit did not regulate any of the emissions units for which EPA imposes substantive conditions and MRR requirements in the Final Permit.

### *A. EPA Fails to Establish that It Had Authority to Issue the 1996 Minor NSR Permit.*

EPA fails to demonstrate it had authority to issue the 1996 Minor NSR Permit—which cites as authority the Prevention of Significant Deterioration (PSD) program for major sources at 40 C.F.R. § 52.21—where Los Mestenios was a true minor source with a PTE below the ton per year major source threshold. *See* Harvest Pet., Attachment 5 – 1996 Minor NSR Permit, at 9; *see also* Harvest Pet. at 25-26.

While EPA initially makes the erroneous claim that the 1996 Minor NSR Permit was "not a minor NSR permit," EPA Resp. at 24 (calling it "an authorization to construct and operate permit"), EPA later contradicts itself by admitting that "[t]he 1996 Permit was issued as a de-facto minor source permit because there was no federal permitting mechanism for a minor source in Indian

country." EPA Resp. at 26; *see also id.* at 15 ("Facility is currently an existing true NSR minor source and was originally constructed and commenced operations before August 30, 2011"). EPA cannot have it both ways.

The major source PSD rules for major sources and major modifications did not and do not authorize EPA to issue preconstruction permits to minor sources, including true minor sources on tribal lands. *See* 40 C.F.R. § 52.21. And EPA did not have a program in place for issuance of the minor NSR permit in 1996. EPA did not establish rules for minor source NSR permitting on tribal lands until 2011, which were promulgated ***after*** both the issuance of the 1996 NSR Permit and 2003 Permit. Harvest Pet. at 25-26; *see* 2011 Minor Source Rule, Review of New Sources and Modifications in Indian Country, 76 Fed. Reg. 38,748 (July 1, 2011). EPA acknowledges this point, conceding that "there was no federal permitting mechanism for a minor source in Indian country." EPA Resp. at 26. But EPA then attempts to justify its reliance on the 1996 Minor NSR Permit by arguing, without citation to any authority, that the 1996 Minor NSR Permit was "nevertheless, a preconstruction permit (for Title V purposes) with applicable requirements that could be incorporated into a Title V Permit." EPA Resp. at 26.

Ultimately, EPA fails to provide a legal basis for its authority to issue the 1996 Minor NSR Permit. As such, the permit and any conditions derived from it cannot constitute applicable requirements under 40 C.F.R. § 71.2.

### *B. EPA Cancelled the 1996 Minor NSR Permit and EPA's Arguments to the Contrary are Without Merit.*

In response to Harvest's documentation that the 1996 Minor NSR Permit was cancelled, *see* Harvest Pet. at 26-27, EPA argues that it was not, in fact, cancelled because the final 2009 Statement of Basis accompanying and explaining the issuance of the final 2009 Title V Permit was not a "final agency action." EPA Resp. at 27. EPA's argument strains credulity.

According to EPA, to be a final agency action, "'[f]irst, the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.'" EPA Resp. at 27 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Despite its reliance on this proposition, its relevance is unclear. For example, EPA argues the final 2009 Statement of Basis is interlocutory in nature because it states EPA's intention in the public notice to permit to "cancel permit NM-791-M2" prospectively. EPA Resp. at 27. However, the statements in the final 2009 Statement of Basis do not demonstrate EPA's intent to cancel the permit "prospectively;" rather, the final 2009 Statement of Basis states that the permit would be cancelled "upon effective date of the permit renewal." Harvest Pet., Attachment 6 – 2009 Title V Permit Statement of Basis, at 2. Finally, EPA fails to produce the public notice accompanying the final 2009 Title V Permit refuting that the 1996 Minor NSR Permit was cancelled.

EPA argues that "[t]here is nothing in the administrative record to show that EPA took a final agency action to cancel the 1996 Permit. For example, EPA never notified the prior owner of the Facility of such a cancellation as would have been required." EPA Resp. at 28. However, the final 2009 Statement of Basis was a part of the administrative record and formed the legal basis for the final permit. Part 71 states that "[f]or preparing a draft permit, the administrative record shall consist of … [t]he statement of basis," among other requirements. *See* 40 C.F.R. § 71.11(c)(2)(iii). Similarly, Part 71 requires "[t]he permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." 40 C.F.R. § 71.7(a)(5). Thus, the Part 71 rules confirm that the final 2009 Statement of Basis was part of the administrative record and required to support the legal basis for the permit.

Finally, EPA incorrectly states that the only support for the cancellation is a "solitary sentence" in the 2009 Statement of Basis. EPA Resp. at 28. However, EPA's makes several statements in its 2009 Statement of Basis that support the Permit was cancelled beyond a "solitary sentence." As quoted by EPA, EPA in the 2009 Statement of Basis states that the 2009 Title V Permit (1) "[i]ncorporate[d] *all applicable requirements* from previous NSR permit, NM-791-M2, issued by EPA Region 6," (2) "[i]nclude[d] language in public notice to permit to *cancel permit NM-791-M2* upon effective date of this Title V permit renewal," (3) that "[t]he construction permit for Williams Four Corners, LLC, Los Mestenios Compressor Station, Permit No. 791-M-1-Revision will be *superseded* by issuance of the Title V renewal of R6FOPP71-04 as R6NM-04-09R1," and (4) that "[c]ertain non-applicable conditions that existed in Permit No. 791-M-1-Revision will not be carried over into the Title V renewal." Harvest Pet., Attachment 11 – 2009 Title V Permit Statement of Basis, at 2, 18. In addition, the final 2009 Permit stated that the permit "replace[d]" the prior 1996 and 2003 permit number, providing further support that the prior permits were cancelled. *Id.* at 18.

### *C. The EPA Concedes that the 1996 Minor NSR Permit Does Not Address the Regulated Units and Therefore Cannot Establish Applicable Requirements.*

Finally, even if the 1996 Minor NSR Permit were an appropriate legal vehicle from which to draw applicable requirements—which it is not—EPA concedes that the 1996 Minor NSR Permit "does not include the emission units for which EPA added MRR requirements in the 2024 Permit." EPA Resp. at 28-29. Yet EPA provides no further justification for including enforceable emissions limits or MRR Requirements for these units in the Final Permit. This concession should be the end of the inquiry. Without established applicable requirements that provide the underlying authority for inclusion of substantive emission limits, EPA has exceeded its authority under Title V. And if these emission limits are not legally justified, the associated MRR requirements also must fall.

## CONCLUSION

EPA has not established that there are applicable requirements that appropriately apply to the Facility and would justify new monitoring requirements. For these reasons, the legal basis for the disputed conditions in the Final Permit is clearly erroneous and Harvest requests that the Board reverse and remand EPA's permitting decision with instructions to strike the new substantive obligations that are not grounded in applicable requirements.

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## STATEMENT OF COMPLIANCE WITH WORD LIMITATION

The Reply Brief is 3,907 words in length and complies with the word limitation of 7,000 words in 40 C.F.R. § 124.19(d)(3).

*/s/Emily C. Schilling*

## CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of Harvest Four Corners LLC's Reply Brief of Permit No. R6FOP-NM-04-R3-2023 were served by electronic filing and electronic mail to the following persons, the 10th day of September, 2024:

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