

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

In re:

Deseret Power Electric Cooperative,
Bonanza Power Plant,

Permit #V-UO-000004-00.00

PETITION FOR REVIEW

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INTRODUCTION

Pursuant to 40 C.F.R. § 71.11(l), Sierra Club hereby petitions the Environmental Appeals Board (“Board”) to review the December 2, 2014 decision by Region 8 of the Environmental Protection Agency (“EPA” or “Region”) to issue a federal operating permit pursuant to subchapter V of the Clean Air Act, 42 U.S.C. §§ 7661-7661f, and 40 C.F.R. pt. 71 (“Title V permit”) for the Deseret Power Electric Cooperative’s Bonanza Power Plant (“Bonanza”).¹

A Title V permit must assure compliance with all applicable Clean Air Act requirements, including Prevention of Significant Deterioration (“PSD”) requirements set forth in a state, federal, or tribal implementation plan which apply to the facility, including those in 40 C.F.R. § 52.21.² EPA has acknowledged that a physical and operation change to the Bonanza facility in 2000 constitutes a “major modification” within the meaning of 40 C.F.R. § 52.21(b)(2)(1980-2002). Consequently, the PSD requirements in 40 C.F.R. § 52.21, including best available control technology emission limits, § 52.21(j)(3), are “applicable requirements” that the Title V permit at issue here must ensure compliance with.³ Yet, the Region

¹ See Exhibit 1, Permit No. V-UO-000004-00.00, Air Pollution Control Permit to Operate, 40 CFR Part 71, Bonanza Power Plant, Deseret Power Electric Cooperative (Issued Dec. 5, 2014).

² 42 U.S.C. §§ 7661(3), 7661b(b)(1), 7661c(a); 40 C.F.R. §§ 71.1(b) (each source must have a permit that assures compliance with all applicable requirements), 71.2 (“Applicable requirement means all of the following as they apply to emissions units in a part 71 source (including requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future compliance dates): (1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter”), 71.5(c)(8)(ii)(A), (iii)(C), 71.6(a)(1) (requiring all permits to include emissions limitations and standards to “assure compliance with all applicable requirements at the time of permit issuance”), (c)(3), (4).

³ 42 U.S.C. §§ 7661(3), 7661b(b)(1), 7661c(a); 40 C.F.R. §§ 71.1(b), 71.2, 71.5(c)(8)(ii)(A), (iii)(C), 71.6(a)(1), (c)(3), (4).

contends that it may instead punt determinations of best available control technology and other requirements to comply with 40 C.F.R. § 52.21 to an ongoing permitting process under that section, and not address those applicable requirements in the Title V permit. There is no such authority and, in fact, Part 71 explicitly precludes the Region's attempt to sidestep compliance with § 52.21 requirements in the Title V permit.

BACKGROUND

The Bonanza plant is a 500 megawatt coal-fired electric utility boiler located on the Uintah and Ouray Indian Reservations, 7.5 miles northwest of Bonanza and 28 miles southeast of Vernal, Utah, where EPA has jurisdiction to administer the Clean Air Act permitting program.⁴ Although the facility began operating in 1984, the Region has never issued Bonanza a Title V permit to operate.⁵

The statement of basis for the draft operating permit provides a complete description of Bonanza's permitting history.⁶ In short, the state of Utah originally issued Deseret Power a PSD permit to construct the facility in 1981. In 1998, the State issued a permit authorizing a modification to the plant known as the ruggedized rotor project. Subsequently, after the United States Court of Appeals for the Tenth Circuit determined that the land where the Bonanza plant is located is part of the Uintah and Ouray Reservation, EPA asserted federal jurisdiction over

⁴ See Exhibit 2, Statement of Basis for Draft Title V Operating Permit No. V-UO-000004-00.00 (Apr. 28, 2014), hereinafter ("SOB").

⁵ *Id.*

⁶ *Id.* at 2-4, 34-50.

Bonanza.⁷ EPA first asserted its jurisdiction over Bonanza in 1997 by phone to the State and by issuing an Acid Rain Program Permit to Deseret.⁸

In 2001, without conducting its own independent analysis, the Region incorporated the contents of Utah's 1981 and 1998 permit analyses into an updated after-the-fact federal PSD permit.⁹ In 2002, Region 8 issued a draft operating permit for Bonanza. At that time, the National Park Service commented that the EPA should investigate Utah's PSD applicability for the ruggedized rotor project constructed in June of 2000 because it appeared that the project was a major modification that should have gone through PSD review.¹⁰

Over twelve years after receiving this comment, the Region recognized that it issued the 2001 PSD permit for Bonanza in error because it failed to apply the PSD regulations correctly to the ruggedized rotor project.¹¹ EPA has made the preliminary determination that the 2000 ruggedized rotor project at Bonanza should have undergone PSD review for nitrogen oxides ("NOx"), including a Best Available Control Technology ("BACT") analysis.¹²

On April 28, 2014, Region 8 published a public notice of the proposed Title V permit for Bonanza along with supplemental materials.¹³ In the statement of basis, EPA made a preliminary determination "that the Federal PSD permit issued in

⁷ *Id.* at 2, 32.

⁸ *Id.*

⁹ *Id.* at 49.

¹⁰ *Id.* at 33-34.

¹¹ *Id.* at 49.

¹² *Id.*

¹³ See Exhibit 2, SOB, Exhibit 3, Draft Permit No. V-UO-000004-00.00, Air Pollution Control Permit to Operate, 40 CFR Part 71, Bonanza Power Plant, Deseret Power Electric Cooperative (Apr. 28, 2014), hereinafter ("Draft Permit"), and Exhibit 4, Public Notice, Notice of Intent to Issue Clean Air Act Permit, 40 CFR Part 71, Bonanza Power Plant (Apr. 28, 2014).

2001 failed to apply the PSD regulations correctly because the Region relied on a faulty analysis conducted by the State and did not conduct a complete, independent analysis of whether the ruggedized rotor project was subject to PSD review based on the regulations in place at that time and whether a revision of the emission limits in the 1981 Federal PSD permit for the Bonanza plant was appropriate.”¹⁴ Instead of correcting this longstanding error along with the overdue operating permit, however, the Region proposed to undertake a separate “error correction PSD permitting action” that will be incorporated into the operating permit at some unspecified later date.¹⁵

Sierra Club submitted comments during the public comment period to Region 8 regarding the draft Title V permit.¹⁶ Among other issues, Sierra Club explained that the Title V permit must include BACT limits and other applicable PSD requirements triggered by the 2000 ruggedized rotor major modification at Bonanza.¹⁷

On December 5, 2014, Region 8 issued Deseret Power a final Title V permit for Bonanza that does not include applicable PSD requirements for the ruggedized rotor project. The same day, in a separate PSD permitting proceeding, the Region proposed a PSD correction permit regarding the ruggedized rotor project.¹⁸

¹⁴ *Id.* at 36.

¹⁵ *Id.*

¹⁶ See Exhibit 5, Sierra Club Comments on Bonanza Power Plant Draft Title V Operating Permit (Jun. 16, 2014), hereinafter (“Sierra Club Comments”).

¹⁷ *Id.* at 1-6.

¹⁸ See Exhibit 6, Response to Comments on Deseret Bonanza Draft Title V Permit (Dec. 2, 2014), hereinafter (“RTC”).

ISSUE RAISED FOR REVIEW

Sierra Club respectfully requests that the Board review the following issue: Whether the Bonanza Title V permit fails to incorporate and ensure compliance with all “applicable requirements” triggered by the 2000 “major modification” at Bonanza, including the requisite compliance plan, by postponing and shunting those determinations to a parallel but unfinished permitting process. To the extent that the Region’s decision not to include applicable requirements triggered by the 2000 major modification in the Title V permit was based on a finding of fact, it is clearly erroneous because the record (including the Region’s explicit findings) demonstrate that § 52.21 requirements are applicable requirements triggered by that project. To the extent that the Region’s permit decision is based on a conclusion of law that it has discretion not to require compliance with all applicable requirements and include a compliance schedule in the final permit, it conflicts with the Clean Air Act and 40 C.F.R. pt. 71 and is therefore clearly erroneous. Furthermore, even if the decision was not clearly erroneous, the Board should exercise discretion and review the decision because it raises an important policy consideration.

PRESERVATION OF ISSUES

Sierra Club satisfies the requirements for filing this petition for review under 40 C.F.R. § 71.11(l), which provides that “any person who filed comments on the draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision.” Sierra Club filed

comments on the draft Title V operating permit during the public comment period, and it incorporates these in full into this petition.¹⁹ The issues raised in this petition were raised in Sierra Club's comments. Specifically, Sierra Club's comments stated:

A Title V permit must include all operational requirements and limitations to ensure compliance with all applicable requirements. 40 C.F.R. § 71.6(a)(1). Applicable requirements include the obligation to obtain a Prevention of Significant Deterioration (PSD) permit, Best Available Control Technology (BACT) emission limits, and limits necessary to ensure protection of air quality standards and increments. 40 C.F.R. § 71.2 ("Applicable requirement means... (1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter..."); *In re Columbia Generating Station*, Petition No. V-2008-1, Order at 3 (EPA Adm'r, Oct. 8, 2009); Statement of Basis (SOB) at 29.

The fact that EPA issued a PSD permit for Bonanza in 2001 in error does not affect the obligation to correctly determine PSD applicability in the current Part 71 permit. *In re Duke Energy Indiana Edwardsport Generating Station*, Permit No. T083-271 38-00003 (Dec. 13, 2011) at 3 (a previously issued PSD permit that does not meet the requirements of 40 C.F.R. § 52.21 means that the current, pending, Title V permit is not in compliance with all "applicable requirements.") Thus, to the extent that EPA intends to postpone a determination of whether the 2000 ruggedized rotor, pulverizer, and burner modifications¹ trigger BACT and air impact PSD obligations, SOB at 9 (suggesting that a future proceeding will address "PSD requirements that might have been triggered"), EPA's proposal conflicts with its obligation to make the applicability determination in the Part 71 permit.

...

Not until all steps are taken to incorporate BACT emission limits and any additional limits required to ensure protection of NAAQS and increments will the plant be in compliance with all applicable requirements. To the extent that EPA decides to ensure compliance through a compliance schedule, rather than immediately upon permit issuance, the compliance

¹⁹ See Exhibit 5, Sierra Club Comments.

schedule must conform to the Clean Air Act and Part 71. The compliance schedule in the draft permit fails to do so.

Pursuant to 42 U.S.C. § 7661(3), a “schedule of compliance (which is required in the permit pursuant to 42 U.S.C. § 7661c(a)) must “includ[e] an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission, standard, emission limitation, or emission prohibition.” That is, the steps required must be sufficient to lead to compliance—not merely lead part way to compliance but omit the additional steps that would ultimately result in compliance.

The implementing regulations similarly require a compliance schedule, 40 C.F.R. § 71.6(c), which must comply with the following:

(C) A schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance. Such a schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, *leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance*. This compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. Any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.

40 C.F.R. § 71.5(c)(8)(iii). Like the statute, the implementing regulation also requires that the schedule contain all steps necessary to “lead to compliance” and not merely contain some steps but omit others that are necessary to bring the plant into compliance.²⁰

In the draft permit, the Region proposed a compliance schedule that would have required the facility to submit a request for an administrative permit amendment to revise the Title V permit to include terms and conditions of a PSD permit correction.²¹ Sierra Club’s comments noted that this failed to comply with Part 71 because it failed to include BACT limits as applicable requirements, failed to include limits to protect the ambient air quality standards and increments, and failed to require an “enforceable sequence” of actions necessary to bring the plant

²⁰ Exhibit 5, Sierra Club Comments at 1-2, 7.

²¹ Exhibit 3, Draft Permit at Condition § III.D.1.

into compliance with those applicable requirements by a date certain.²² In its response to comments, the Region stated that it was withdrawing the compliance schedule from the draft permit altogether and that it would “not be providing substantive responses to comments relating to [the Region’s] preliminary PSD applicability determination or other PSD issues regarding the ruggedized rotor project in this title V permitting action” and “instead, those issues will be addressed in the separate PSD proceedings initiated today.”²³ The Region went on to explain that, although at the time of the draft permit it had made a preliminary determination that PSD requirements were triggered by the ruggedized rotor project, at the time of the final permit, the Region was still not “making a final determination” and “will not, in the final title V permit, be... making a final determination regarding PSD applicability for the 2000 ruggedized rotor project, or including a compliance schedule regarding that project.”²⁴ Instead, the Region’s final decision was to make the determination “during the separate and ongoing PSD permitting process” and to, at some unspecified future time, “reopen[]” the Title V permit using 40 C.F.R. § 71.5(a)(1)(ii) & 71.7(f)(1)(i) and Final Permit section IV.K, to include the results of that separate permit process.²⁵

The Region’s rationale appears to be that, while it agrees that “title V requires that title V permits assure compliance with all applicable requirements, 40 CFR 71.6(a)(1) and 71.2,” it cannot include the correct PSD requirements unless

²² Exhibit 5, Sierra Club Comments at 8.

²³ Exhibit 6, RTC at 1.

²⁴ *Id.* at 3.

²⁵ *Id.*

and until it completes the process to revise the “emission limits originating in a previously-issued PSD permit.”²⁶ In effect, the Region reads an exception into the Clean Air Act and 40 C.F.R. §§ 71.6(a) and 71.2 based on timing, where PSD requirements from 40 C.F.R. § 52.21 are “applicable requirements” that must be included in the permit (and for which compliance must be assured through the Title V permit), unless a PSD permit issuance is required to establish those requirements first—in which case the Region may choose to issue the Title V permit without assuring compliance and undertake a separate permitting action to address PSD issues.

Sierra Club adequately raised the issues in this appeal through its prior comments.²⁷ To the extent the final permit omitted PSD applicable requirements and a compliance schedule altogether, rather than correcting the deficiencies in the draft permit, the basis for appeal of that decision arose after the comment period, so it was not practicable to raise the specific issues in this petition.²⁸

TIMELINESS OF PETITION

This petition is timely filed by the deadline for filing as specified in EPA’s public notice, January 7, 2014.²⁹

²⁶ *Id.* at 3-4.

²⁷ 40 C.F.R. § 71.11(l)(1).

²⁸ *Id.*

²⁹ *See* 40 C.F.R. § 71.11(l)(1) (30-day appeal deadline “unless a later date is specified in that notice”); *See also* Exhibit 7, Letter from Carl Daly, Director, Region 8 Air Program, to Commenters of Draft Part 71 Operating Permit, Title V Permit #V-UO-000004-00.00 (Dec. 2, 2014).

ARGUMENT

The Region's decision to issue the Title V permit was based on "a finding of fact or conclusion of law which is clearly erroneous; or (ii) an exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review."³⁰

The Region's decision to finalize Bonanza's Title V operating permit without including all applicable PSD requirements, including those that apply because the ruggedized rotor project was a major modification, is clearly erroneous because the Clean Air Act and Part 71 make EPA's duty to include all applicable requirements mandatory. The Region does not have discretion to postpone including applicable requirements and the necessary compliance schedule based on a preference to do so later, after a separate permitting action. Indeed, the Region itself recognizes that "title V requires that title V permits assure compliance with all applicable requirements..."³¹ The analysis must stop there, because nothing in the Act or the regulations makes that duty conditional, or creates an exception for times when the Region would rather determine applicable requirements in a different, later, proceeding. To the extent a separate PSD permit proceeding was required to correct EPA's 2001 PSD permit (and its incorrect reliance on an erroneous Utah determination), the Region was required to complete that process before issuing the Title V permit in order to comply with the Act and Part 71. Otherwise it negates Congress' intent to make Title V permits the single repository of all applicable

³⁰ 40 C.F.R. §§ 71.11(1)(1)(i) and (ii).

³¹ Exhibit 6, RTC at 4 (citing 40 C.F.R. § 71.6(a)(1) and 71.2).

requirements and impose strict deadlines for EPA to act on such permits so that determinations do not languish. The Region's separately proposed PSD correction action has no deadline and does not mitigate the legally deficient Title V permit. Especially given that the Region has known about the PSD permitting error for over a decade, the Region cannot justify its further delay while the Bonanza facility continues to emit more harmful air pollution than it should.

A. Title V Permits Must Include All Emissions Limits to Ensure Compliance with Applicable Requirements or an Enforceable Compliance Schedule

A Title V permit must include all operational requirements and limitations to ensure compliance with all applicable requirements. The Clean Air Act is clear:

Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every six months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.³²

The implementing regulations are equally clear: Each permit issued under this part shall include the following elements:

(1) Emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.³³

“Applicable requirements” include the obligation under the state or federal implementation plan to obtain a PSD permit, BACT emission limits, and limits

³² 42 U.S.C. § 7661c(a).

³³ 40 C.F.R. § 71.6(a)(1).

necessary to ensure protection of air quality standards and increments.³⁴ As defined in 40 C.F.R. § 71.2, “*Applicable requirement* means... (1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter...”³⁵ The requirements of the PSD program, contained in the federal implementation plan at 40 C.F.R. § 52.21, are just such “applicable requirements.”

There is no exception to the requirement that a permit contain all applicable requirements, even when requirements are found in an existing Title I permit issued pursuant to a state or federal implementation plan. Rather, the appropriate process is to issue any required Title I permit revisions, corrections, or replacements first, and then incorporate the requirements into the Title V permit.^{36,37} This is

³⁴ 40 C.F.R. § 71.2; Exhibit 8, *In re Duke Energy Indiana Edwardsport Generating Station*, Permit No. T083-271 38-00003 at 2 (Dec. 13, 2011), hereinafter (“Edwardsport Petition Order”) (“For a major modification of a major stationary source, applicable requirements include the requirement to obtain a preconstruction permit that complies with applicable new source review requirements (e.g., Prevention of Significant Deterioration, or PSD, requirements). ...The PSD program analysis must address two primary and fundamental elements before the permitting authority may issue a permit: (1) an evaluation of the impact of the proposed new or modified major stationary source on ambient air quality in the area, and (2) an analysis ensuring that the proposed facility is subject to BACT for each pollutant subject to regulation under the PSD program. CAA § 165(a)(3),(4), 42 U.S.C. § 7475(a)(3), (4).”)

³⁵ See Exhibit 9, *In re Columbia Generating Station*, Petition No. V-2008-1, Order at 3 (EPA Adm’r, Oct. 8, 2009); see also Exhibit 2, SOB at 29.

³⁶ See, e.g., Exhibit 10, *In re E. Ky. Power Coop. Inc. Hugh L. Spurlock Gen. Station*, Order Granting In Part and Denying in Part Petition for Objection to Permit at 12 (EPA Adm’r, Aug. 30, 2007); Cf., *United States v. Ameren Missouri*, Case 4:11-cv-77-RWS, 2012 WL 262655 (E.D.Mo., Jan. 27, 2012) (rejecting utility’s argument that omission of BACT limits from a Title V permit application is not ripe until there is a determination that it was required to obtain a permit, a BACT determination is made, and a Title V permit is issued to include those requirements).

³⁷ If PSD program requirements, such as best available control technology emission limits, were not “applicable requirements” triggered by a modification, but instead required permits to be issued

why EPA has always reserved the right to object to a Title V permit that was issued before an emission unit goes “through the proper preconstruction permitting process (and therefore one or more applicable requirements are not incorporated in the draft or proposed title V permit).”³⁸ Such objections are only authorized where a permit is issued “not in compliance with the applicable requirements of [the Clean Air Act]...”³⁹ For EPA to be authorized to object to a Title V permit that is issued before a facility has undergone the appropriate preconstruction permitting process, as the Seitz letter claims, it must be true that the issuance of that Title V permit before the appropriate preconstruction permitting has occurred, is “not in compliance” with the Act; so too here. The Region’s attempt to issue a Title V permit for the Bonanza plant before the appropriate permitting has occurred and without “one or more applicable requirements... incorporated in the... proposed title V permit” was “not in compliance” with the Act.

The Act is not without a safety valve for use when necessary. The Act provides a specific mechanism to avoid requiring immediate compliance with an applicable requirement, such as a PSD program requirement in 40 C.F.R. § 52.21: a compliance schedule. If a pollution source is not in compliance with applicable limits when the permit issues, EPA can include a compliance schedule in the permit instead of requiring immediate compliance with all applicable limits in the permit at issuance. Pursuant to the Clean Air Act, a “schedule of compliance” (which is

first, the United States would not have enforcement claims against facilities that fail to identify PSD requirements in permit applications.

³⁸ Exhibit 11, Letter John S. Seitz, EPA OAQPS, to Robert Hodanbosi, STAPPA/ALAPCO, Enclosure A at 3 (May 20, 1999), hereinafter (“Seitz Letter”).

³⁹ 42 U.S.C. § 7661d(b)(1).

required in the permit pursuant to 42 U.S.C. § 7661c(a)) must “includ[e] an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission, standard, emission limitation, or emission prohibition.”⁴⁰ The implementing regulations similarly require a compliance schedule,⁴¹ which must:

...include a schedule of remedial measures, including an enforceable sequence of actions with milestones, *leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance.* ...⁴²

In short, the Act and implementing regulations require that the Region determine the “applicable requirements” the Bonanza plant must meet at the time of Title V permit issuance, determine whether the facility will be in compliance at the time of permit issuance, and if not, include a compliance schedule that sets forth enforceable steps leading to compliance with the applicable requirements. There are no exceptions to this regulatory framework, and there is no room for the Region to invent additional extra-statutory and extra-regulatory ways to avoid compliance assurance through the Title V permit.

Bonanza’s Title V permit is deficient because the Region did not determine as part of the permit issuance the “applicable requirements” triggered by the 2000 ruggedized rotor project or whether the plant was in compliance at the time of permit issuance, and if not, the enforceable sequence of events leading to

⁴⁰ 42 U.S.C. § 7661(3).

⁴¹ 40 C.F.R. § 71.6(c)(3).

⁴² 40 C.F.R. § 71.5(c)(8)(iii)(C) (emphasis added).

compliance. Rather, it punted those determinations to a proceeding outside Title V and Part 71.

B. Bonanza's Title V Permit Does Not Include All Terms to Ensure Compliance with Applicable Requirements That EPA Has Already Determined To Have Been Triggered.

This is also not a case where the record is unclear and EPA has not yet determined whether a major modification occurred, triggering PSD requirements.⁴³ EPA recognizes that Bonanza's 2001 PSD permit was issued in error because "the 2000 ruggedized rotor project should have undergone PSD review for NO_x, including a BACT analysis."⁴⁴ EPA also recognizes that the Bonanza PSD permit does not contain the proper emissions limits: "the emission limits in the 2001 PSD permit do not represent the outcome of a required BACT determination."⁴⁵

Sierra Club's and others' comments provide further evidence that the ruggedized rotor project triggered PSD review for NO_x, and in addition, that applying the correct analysis shows that the project was a major modification for particulate matter ("PM_{2.5}" and "PM₁₀"), sulfur dioxide and nitrogen oxides.⁴⁶ Thus the applicable Title V requirements must include BACT limits and the obligation to establish limits protective of national ambient air quality standards ("NAAQS") and increments for all of these pollutants.⁴⁷ The Region did not respond

⁴³ *E.g., Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 678 (7th Cir. 2008) (finding that EPA is not required to fully investigate *disputed* factual issues and resolve mere *allegations* in the Title V permitting context).

⁴⁴ Exhibit 2, SOB at 49. Exhibit 6, RTC at 4.

⁴⁵ *Id.*

⁴⁶ Exhibit 5, Sierra Club Comments at 1-6.

⁴⁷ In addition to PSD emission limits, a new PSD permit must also contain an analysis of ambient air quality impacts and increment consumption. 40 C.F.R. § 52.21(k). And because the 2000 ruggedized rotor modification constitutes "construction" of a major modification after the major source baseline

to these comments; instead, the Region stated it would address any PSD issues in a separate PSD correction action (that has no apparent deadline for action and no assurance of ever being completed).⁴⁸

The Region did not provide any support for its failure to include a schedule to mandate future compliance except that due to “unique circumstances present in this matter, including the initiation of a PSD permitting action for this facility, the Region has determined at this time it is not appropriate or equitable to include compliance provisions regarding the PSD correction permit in the final title V permit.”⁴⁹ The Act and implementing regulations do not give the Region discretion to make any seemingly “equitable” exceptions.⁵⁰ In any event, if equities are weighed, they would weigh on protecting public health and welfare by imposing the legally required emissions limits, “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population,”⁵¹ or at least by setting an enforceable schedule to do so in the future. Because the Region has no deadline to issue a corrected PSD permit

date for SO₂, NO_x and particulate matter, the plant’s actual emissions as defined in 40 C.F.R. § 52.21(b)(21), must be considered increment consuming. 40 C.F.R. § 52.21(b)(13)(ii)(a), (b)(14)(i).

⁴⁸ Exhibit 6, RTC at 4. Note that unlike an original PSD permit issuance that must occur within a year of a complete application, 42 U.S.C. § 7475(c), EPA’s proposed error correction PSD action for Bonanza has no apparent deadline.

⁴⁹ *Id.* at 1.

⁵⁰ *Sierra Club v. EPA*, 762 F.3d 971, 981-82 (9th Cir. 2014) (rejecting EPA attempts to adjust statutory requirements “to resolve the matter as it sees fit,” to “revise clear statutory terms that turn out not to work in practice,” or “simply...waive” requirements “on an ad hoc basis by rewriting unambiguous statutory terms in order to service its own bureaucratic policy goals.” (internal quotations omitted)), *see also id.* at 983-84 (rejecting attempts to rely on “the equities” to “disregard the plain language of the Clean Air Act”); *see also Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (“if there is no statute conferring authority, a federal agency has none.”); *Louisiana Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 374-75 (1986) (“An agency may not confer power upon itself.”).

⁵¹ 42 U.S.C. § 7401(b)(1); *Sierra Club*, 762 F.3d at 984.

for Bonanza and the Title V permit contains no compliance schedule, even though PSD emissions limits for the ruggedized rotor project are applicable requirements by law, the facility could conceivably continue to operate forever without the appropriate restrictions to protect air quality and public health.

Instead of including all required terms and conditions or an enforceable schedule for compliance in the Bonanza Title V permit, the Region has proposed to correct the PSD error in a separate, open-ended permitting action to determine the applicable requirements triggered by the ruggedized rotor project. But the Region does not have discretion to indefinitely postpone the inclusion of the applicable requirements into the Title V permit. A Title V permit “*shall* include... operational requirements and limitations that assure compliance with all applicable requirements.”⁵² The regulations create a mandatory obligation for EPA to include all applicable requirements into Bonanza’s Title V permit.

The Region recognizes that it could have revised the erroneous emissions limits before issuing the Title V permit, or simultaneously.⁵³ And the Region has provided no support for its decision to delay its obligation pending the outcome of the indefinite PSD correction permitting process – the Region’s only explanation is that there are “specific, unique circumstances in this case.”⁵⁴ The Region’s response to Sierra Club’s comments on this issue is that “it has not completed the separate, ongoing PSD permitting action regarding the ruggedized rotor project, where the agency will be proposing a PSD applicability determination and may create new

⁵² 40 C.F.R. § 71.6(a)(1)(emphasis added).

⁵³ Exhibit 6, RTC at 3-4; *citing* SOB at 27.

⁵⁴ Exhibit 6, RTC at 4.

PSD permit terms, which would be new applicable requirements for the purposes of the facility's title V permit.⁵⁵ As noted above, there is no requirement in 40 C.F.R. § 52.21 that the Region complete a separate permitting procedure before the PSD requirements triggered by the 2000 ruggedized rotor project become "applicable requirements." If there were, EPA could not object to state-issued Title V permits where the Title V permit was issued before a facility underwent the "proper preconstruction permitting process (and therefore one or more applicable requirements are not incorporated in the draft or proposed title V permit)."⁵⁶ Moreover, if PSD requirements in § 52.21 are not "applicable requirements" unless or until a PSD permit action is taken establishing them, EPA could not enforce the requirement that permit applicants must identify all information to determine applicable requirements and compliance therewith in a Title V permit application,⁵⁷ or certify compliance with applicable requirements,⁵⁸ based on a major modification where no permit had yet been issued. Yet, EPA regularly brings such claims because PSD requirements in § 52.21 are "applicable requirements" under Title V even without the need for the facility to first undergo PSD permitting actions.⁵⁹

The fact that the Region issued a PSD permit for Bonanza in 2001 in error, and that it has not made a final applicability decision in the separate PSD permitting process, does not authorize the Region to issue a permit that fails to

⁵⁵ *Id.*

⁵⁶ Exhibit 11, Seitz Letter, *supra*.

⁵⁷ 40 C.F.R. §§ 70.5(a)(2), (b), (c)(3)(vii), (4), (5), (8).

⁵⁸ 40 C.F.R. § 70.5(c)(9).

⁵⁹ See, e.g., Exhibit 12, *United States v. Ameren Missouri*, Case No. 4:11-cv-77-RWS, Complaint ¶¶ 75-92 (E.D.Mo., filed Jan. 12, 2011).

include the applicable requirements triggered by the 2000 ruggedized rotor major modification. The Region must determine PSD applicability before issuing the current Title V permit. As EPA has held, a current, pending Title V permit is not in compliance with all “applicable requirements” when a previously issued PSD permit does not meet the requirements of the PSD regulations.⁶⁰ “[I]f a PSD permit that is incorporated into a title V permit does not meet these requirements of the SIP, the title V permit will not be in compliance with all applicable requirements.”⁶¹ The Bonanza Title V permit is not in compliance with all applicable requirements because it incorporates an erroneous PSD permit.

CONCLUSION

The Region’s position that it has discretion to further delay correction of a twelve-year old PSD permitting error to set appropriate emissions limits at Bonanza is wrong. All applicable requirements must be included in the Title V permit without exception, though EPA may include an enforceable schedule for future compliance with the applicable requirements in the permit. PSD emission limits for the 2000 ruggedized rotor project are required at Bonanza, as Sierra Club has explained and EPA has recognized, and they are therefore applicable requirements that must be included in the Title V permit. The Region’s failure to correct this longstanding error does not excuse the legal error in the Bonanza operating permit. Sierra Club respectfully requests that the Environmental Appeals

⁶⁰ Exhibit 8, Edwardsport Petition Order at 3.

⁶¹ *Id.*

Board remand the Bonanza Title V permit with instructions to include all applicable PSD requirements in the permit, and give the Region a firm and timely deadline for doing so.

Dated: January 7, 2014

Respectfully submitted,

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LIST OF EXHIBITS

- Exhibit 1 Permit No. V-UO-000004-00.00, Air Pollution Control Permit to Operate, 40 CFR Part 71, Bonanza Power Plant, Deseret Power Electric Cooperative (Issued Dec. 5, 2014)
- Exhibit 2 Statement of Basis for Draft Title V Operating Permit No. V-UO-000004-00.00 (Apr. 28, 2014)
- Exhibit 3 Draft Permit No. V-UO-000004-00.00, Air Pollution Control Permit to Operate, 40 CFR Part 71, Bonanza Power Plant, Deseret Power Electric Cooperative (Apr. 28, 2014)
- Exhibit 4 Public Notice, Notice of Intent to Issue Clean Air Act Permit, 40 CFR Part 71, Bonanza Power Plant (Apr. 28, 2014)
- Exhibit 5 Sierra Club Comments on Bonanza Power Plant Draft Title V Operating Permit (Jun. 16, 2014)
- Exhibit 6 Response to Comments on Deseret Bonanza Draft Title V Permit (Dec. 2, 2014)
- Exhibit 7 Letter from Carl Daly, Director, Region 8 Air Program, to Commenters of Draft Part 71 Operating Permit, Title V Permit #V-UO-000004-00.00 (Dec. 2, 2014)
- Exhibit 8 In re Duke Energy Indiana Edwardsport Generating Station, Permit No. T083-271 38-00003 at 2 (Dec. 13, 2011)
- Exhibit 9 In re Columbia Generating Station, Petition No. V-2008-1, Order at 3 (EPA Adm'r, Oct. 8, 2009)
- Exhibit 10 In re E. Ky. Power Coop. Inc. Hugh L. Spurlock Gen. Station, Order Granting In Part and Denying in Part Petition for Objection to Permit at 12 (EPA Adm'r, Aug. 30, 2007); Cf., United States v. Ameren Missouri, Case 4:11-cv-77-RWS, 2012 WL 262655 (E.D.Mo., Jan. 27, 2012)
- Exhibit 11 Letter John S. Seitz, EPA OAQPS, to Robert Hodanbosi, STAPPA/ALAPCO, Enclosure A at 3 (May 20, 1999)
- Exhibit 12 United States v. Ameren Missouri, Case No. 4:11-cv-77-RWS, Complaint ¶¶ 75-92 (E.D.Mo., filed Jan. 12, 2011)

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the Rules of the Environmental Appeals Board of the U.S. Environmental Protection Agency, that on January 7, 2015, the foregoing was filed electronically with the Clerk of the Environmental Appeals Board using the EAB eFiling System. The foregoing will be served by Federal Express as paper copies on interested parties in this matter, who are listed below.

/s/ Derek Nelson

Derek Nelson

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