

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:

Finding of Failure of the State of Colorado to
Implement Requirements of its State
Implementation Plan;

Finding of Failure of the State of Colorado to
Adequately Administer and Enforce its Title V
Permitting Program; and

Applying Sanctions Against the State of Colorado

**PETITION TO THE ADMINISTRATOR TO MAKE A FINDING THAT COLORADO IS
FAILING TO IMPLEMENT ITS STATE IMPLEMENTATION PLAN;**

**TO MAKE A DETERMINATION THAT COLORADO IS NOT ADEQUATELY
ADMINISTERING AND ENFORCING ITS CLEAN AIR ACT TITLE V PERMITTING
PROGRAM; and**

TO APPLY SANCTIONS AGAINST COLORADO OVER THESE FAILURES

Pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(e), and the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, WildEarth Guardians hereby petitions the Administrator of the U.S. Environmental Protection Agency (“EPA”) to: (1) make a finding that the State of Colorado is not implementing requirements of its state implementation plan (“SIP”); (2) determine that the State of Colorado is not adequately administering and enforcing its Clean Air Act Title V permitting program; and (3) apply sanctions over the State of Colorado’s failure to implement its SIP and to adequately administer and enforce its Title V permitting program.

This Petition is filed in response to the Colorado Department of Public Health and Environment’s (“CDPHE’s”) ongoing failure to ensure protection of air quality and public health, to ensure transparency, and to ensure adequate public notice and involvement before permitting air pollution from oil and gas facilities in Colorado. Specifically, CDPHE is failing to ensure that pollutant emitting activities associated with oil and gas operations are appropriately aggregated together and permitted as single stationary sources to ensure necessary protection of air quality and public health and welfare. Put simply, CDPHE is not meeting the Clean Air Act’s fundamental purpose of protecting and enhancing the quality of Colorado’s air resources in order to promote public health and welfare and the productive capacity of its population.

In September 2009, the EPA made clear that States must rely on three regulatory criteria for identifying emissions activities that belong to the same source to ensure proper permitting

under the Clean Air Act. *See* Memo from Assistant Administrator Gina McCarthy to Regional Administrators, “Withdrawal of Source Determination for Oil and Gas Industries” (September 22, 2009). The three regulatory criteria are (1) whether the activities are under the control of the same person (or person under common control); (2) whether the activities are located on one or more contiguous or adjacent properties; and (3) whether the activities belong to the same industrial grouping. *See* 40 C.F.R. § 52.21(b)(6). Although these regulatory criteria are set forth in regulations implementing the Clean Air Act’s Prevention of Significant Deterioration (“PSD”) program, these same three regulatory criteria comprise the very definition of “stationary source” set forth in the Colorado SIP, and thus guide the permitting of all new and modified stationary sources in the State of Colorado, as well as all existing sources permitted in accordance with Title V of the Clean Air Act.

Less than one month later, the Administrator objected to CDPHE’s permitting of a natural gas compressor station under Title V of the Clean Air Act. *See In the Matter of Kerr-McGee/Anadarko Petroleum Corporation, Frederick Compressor Station*, Petition VIII-2008-02 (Order on Petition) (October 8, 2009). In issuing her objection, the Administrator held that CDPHE failed to appropriately assess whether oil and gas wells connected with the compressor station should be aggregated together as a single stationary source for permitting purposes in accordance with the three regulatory criteria, and therefore failed to make an appropriate source determination.

Since that time, CDPHE has not only continued to permit stationary oil and gas sources in contravention of the EPA’s guidance and objection, but also failed to address existing permitting inadequacies. In doing so, CDPHE has failed and continues to fail to properly implement its SIP and to adequately administer and enforce its Title V permitting program. The results are disturbing in light of the fact that oil and gas operations are increasingly adversely affecting air quality within the State. As the AQCC reported in 2009:

An energy development boom began in Colorado in 2004 as rising energy prices created greater incentives to develop oil and gas resources. Oil and gas development now accounts for about 50 percent of permitting activities of the [CDPHE] Air Pollution Control Division (APCD), and the industry is the largest source category of human-caused ozone-forming emissions in the state.

See Colorado Air Quality Control Commission, “Report to the Public 2008, 2009” at 13, available online at <http://www.cdphe.state.co.us/ap/down/RTTP08-09fullweb.pdf> (last visited July 19, 2010). Although CDPHE has taken steps to control emissions from oil and gas operations within the State, in failing to ensure that oil and gas operations are appropriately aggregated, Colorado is failing to ensure that emissions from oil and gas operations are fully controlled in accordance with applicable State and Federal requirements.

WildEarth Guardians requests the Administrator exercise her authority under the Clean Air Act and issue findings that CDPHE is failing to implement its SIP, failing to adequately administer its Title V operating permitting program, and apply sanctions against the State of Colorado over these deficiencies. Specifically, WildEarth Guardians requests the Administrator:

1. Pursuant to 42 U.S.C. §§ 7410(m) and 7509(a)(4) of the Clean Air Act, find that requirements of Colorado's SIP are not being implemented by CDPHE with regards to the permitting of stationary sources within the oil and gas sector, both inside and outside of designated nonattainment areas, within the State of Colorado;
2. Pursuant to 42 U.S.C. § 7661a(i) of the Clean Air Act, determine that CDPHE is not adequately administering and enforcing its Title V permitting program with regards to the permitting of stationary sources within the oil and gas sector, both inside and outside of designated nonattainment areas, within the State of Colorado; and
3. Apply the sanctions set forth at 42 U.S.C. § 7509(b) against the State of Colorado in accordance with the requirements of 42 U.S.C. §§ 7410(m), 7509(a)(4), and 7661a(i). We request the Administrator exercise its discretion to apply sanctions, where allowed, and where the application of sanctions are nondiscretionary, to apply them as expeditiously as possible. We further request the Administrator withhold Clean Air Act Section 105 grant funding from Colorado, as authorized by 42 U.S.C. § 7509(a)(4), unless and until Colorado rectifies both the finding of failure to implement its SIP and the determination of failure to adequately administer and enforce its Title V permitting program. We further request that the Administrator partially withdraw Title V permitting program approval from Colorado with regards to the permitting of oil and gas operations subject to Title V, and promulgate, administer, and enforce a Federal Title V Permitting program in place, as authorized by 40 C.F.R. § 70.10(b)(2)(ii) and (iii).

WildEarth Guardians requests EPA expedite resolution of this matter and respond within sixty days. Since EPA has made perfectly clear that Colorado has failed and continues to fail to implement its SIP and Title V Permitting program, this request is more than reasonable. This request is all the more reasonable given the public health and welfare implications of CDPHE's failure to meet basic Clean Air Act requirements. Should the EPA fail to make a finding that Colorado is failing to implement its SIP and failing to adequately administer and enforce its Title V Permitting program within sixty days, we will consider such delay unreasonable.

PETITIONER

WildEarth Guardians is a Santa Fe, New Mexico-based conservation group with offices in Denver and Phoenix. WildEarth Guardians is dedicated to protecting and restoring the wildlife, wild rivers, and wild places of the American West. To this end, WildEarth Guardians seeks to safeguard clean air and the climate by promoting cleaner energy, efficiency and conservation, and alternatives to fossil fuels.

THE ADMINISTRATOR'S DUTIES AND AUTHORITIES UNDER THE CLEAN AIR ACT

WildEarth Guardians petitions the Administrator of the EPA pursuant to the APA. *See* 5 U.S.C. § 551, *et seq.* The APA specifically requires that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). The APA therefore requires the Administrator to conclude matter raised in rulemaking petitions within a reasonable timeframe. *See* 5 U.S.C. § 555(b).

The SIP is the backbone for protecting and improving a State’s air quality. Pursuant to the Clean Air Act, individual States develop SIPs to attain and maintain health and welfare-based National Ambient Air Quality Standards (“NAAQS”) promulgated by the EPA. *See* 42 U.S.C. § 7410(a)(1).

A SIP must contain a permitting program that provides for the regulation of the modification and construction of stationary sources to ensure the NAAQS are achieved. *See* 42 U.S.C. § 7410(a)(2)(C). Such a permitting program must meet the requirements of Title I, Parts C and D of the Clean Air Act related to the prevention of significant deterioration (“PSD”) of air quality and permitting in nonattainment areas. *See* 42 U.S.C. §§ 7410(a)(2)(I) and (J). Such permitting programs ensure that new and modified stationary sources of air pollution, whether located in areas designated as attainment or nonattainment, adequately protect public health and welfare through careful evaluation of air quality impacts and application of appropriate pollution control technologies. *See e.g.*, 42 U.S.C. §§ 7470 and 7503.

Colorado’s SIP includes both permitting requirements for new and modified major sources under PSD and for new and modified major sources in nonattainment areas, as well as general permitting requirements for minor sources, which emit pollutants below major source thresholds. These SIP provisions have all been approved by EPA and are set forth under Air Quality Control Commission (“AQCC”) Regulation No. 3, Parts A, B, and D. *See* 5 CCR 1001-5.

In addition to adopting SIP requirements for the permitting of new and modified stationary sources, States must also adopt an operating permit program that meets the minimum requirements of Title V of the Clean Air Act. *See* 42 U.S.C. § 7661a. A primary purpose of Title V is to reduce violations of the Clean air Act and improve enforcement by recording in a single document all of the air pollution control requirements that apply to a major source of air pollution. *See New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 320 (2nd Cir. 2003). Among other things, Title V requires that State permitting authorities issue operating permits to major sources of air pollution and “assure compliance by all sources required to have a permit...with each applicable standard, regulation or requirement under [the Clean Air] Act.” *See* 42 U.S.C. § 7661a(b)(5)(A).

Colorado has adopted a Title V permitting program, the requirements of which are set forth under AQCC Regulation No. 3, Part C. The EPA fully approved of Colorado’s Title V permitting program in 2000. *See* 65 Fed. Reg. 49919 (Aug. 16, 2000).

The Administrator is authorized by the Clean Air Act to make a finding that a State is failing to implement its SIP. *See* 42 U.S.C. § 7509(a)(4). Such a finding can be made both when the Administrator finds that “any requirement” of an approved SIP required under Title I, Part D

of the Clean Air Act, which relates to nonattainment areas, is not being implemented, as well as when the Administrator finds that “any plan or plan item...required under this Act” is not being implemented. *See* 42 U.S.C. §§ 7509(a)(4) and 7410(m). Thus, the Administrator has the authority to make a finding that a State is failing to implement any requirement of a SIP both within and outside of areas designated as nonattainment.

The Administrator is further authorized by the Clean Air Act to make a determination that a State is failing to adequately administer and enforce its Title V Permitting program, or a portion thereof. *See* 42 U.S.C. § 7661a(i).

In making a finding of failure to implement SIP requirements or a finding of failure to adequately administer and enforce under Title V, the Administrator is obligated to impose sanctions against any State that is the subject of such findings. *See* 42 U.S.C. §§ 7509(a)(4) and 7661a(i). Such sanctions include a prohibition on the approval and funding of highway projects by the Secretary of Transportation, and emission offsets. *See* 42 U.S.C. § 7509(b). The Administrator may also withhold grant funding under Section 105 of the Clean Air Act. *See* 42 U.S.C. § 7509(a)(4).

Upon a finding of failure to implement SIP requirements within a nonattainment area, the Administrator has a nondiscretionary duty to apply sanctions within 18 months. *See* 42 U.S.C. § 7509(a)(4). Upon a finding of failure to implement SIP requirements outside of a nonattainment area, the Administrator has discretion to apply sanctions at any time. *See* 42 U.S.C. § 7410(m).

If a determination is made that a State is not adequately administering and enforcing its Title V permitting program, the Administrator has a nondiscretionary duty to apply sanctions in both attainment and nonattainment areas. *See* 42 U.S.C. § 7661a(i)(2). However, upon a finding of failure to adequately administer and enforce under Title V, the emission offset sanctions can only be applied in nonattainment areas. *See* 42 U.S.C. § 7661a(i)(3). The Administrator may apply sanctions at any time after 90 days and within 18 months of making a finding of failure to adequately administer and enforce. *See* 42 U.S.C. § 7661a(i)(1). At a minimum, however, EPA must apply sanctions after 18 months of such a finding. *See* 42 U.S.C. § 7661a(i)(2).

Additionally, upon making a finding of failure to enforce and implement, the EPA may also withdraw full or partial approval of a State Title V program and/or promulgate, administer, or enforce its own Federal Title V permitting program within any State. *See* 40 C.F.R. §§ 70.11(b)(2)(ii) and (iii). Upon partially or fully withdrawing approval of a State Title V program, the EPA has the authority to withhold grant funding under Section 105 of the Clean Air Act as authorized by Section 179(a)(4). *See* 40 C.F.R. § 70.10(b)(3).

The Administrator therefore has the authority, and indeed is obligated, to undertake the petitioned actions under the Clean Air Act. As will be explained in more detail below, there is ample justification for the Administrator to make the requested findings and apply the requested sanctions.

SUPPORT FOR THE PETITIONED ACTIONS

I. Failure to Implement Stationary Source Permitting Requirements Under the Colorado SIP

The purpose of the Clean Air Act is, among other things, “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.” 42 U.S.C. 7401(b)(1). In furtherance of this purpose, the Clean Air Act requires that modified and newly constructed stationary sources be appropriately regulated and permitted to ensure protection of the NAAQS. *See* 42 U.S.C. § 7410(a)(2)(C).

To this end, Colorado has adopted SIP provisions that require permits for stationary sources of air pollution before such sources can construct and operate within the State. *See* AQCC Regulation No. 3, Part B, Section II.A.1. These provisions include permitting requirements for major sources under PSD (AQCC Regulation No. 3, Part D, Section VI), major sources located in nonattainment areas (AQCC Regulation No. 3, Part D, Section V), and minor sources—including true minor sources and synthetic minor sources (i.e., sources with potential emissions higher than major source thresholds, but with actual emissions below major source levels due to the use of enforceable controls)—in both attainment and nonattainment areas statewide that are not explicitly exempt (AQCC Regulation No. 3, Part B, Section II).

Significantly, for permitting under its SIP, Colorado defines “stationary source” as:

Any building, structure, facility, or installation, or any combination thereof belonging to the same industrial grouping, that emits or may emit any air pollutant subject to regulation under the Federal Act, that is located on one or more contiguous or adjacent properties and that is owned or operated by the same person or by persons under common control....Building, structures, facilities, equipment, and installations shall be considered to belong to the same industrial grouping if they belong to the same major groups (i.e., have the same two-digit codes) as described in the Standard Industrial Classification Manual, 1987, but not later amendments.

AQCC Regulation No. 3, Part A, Section I.B.41 (*see also*, AQCC Regulation No. 3, Part D, Section I.B.23 and 40 C.F.R. § 52.21(b)(6)). In accordance with Colorado’s SIP, this definition applies with regards to permitting all sources, whether major or minor, statewide in both attainment and nonattainment areas.

Accurately defining the source subject to any permitting action in Colorado is crucial for ensuring compliance with emission limits, standards, controls, and other requirements necessary to both attain and maintain the NAAQS and protect public health and welfare. Because certain emission control requirements apply in relation to certain emission thresholds, an accurate source determination is critical to ensuring compliance with applicable emission controls requirements in the Colorado SIP.

Unfortunately, Colorado is not permitting oil and gas operations in accordance with the definition of stationary source under the SIP, in essence failing to make accurate source

determinations for such operations. The State is failing to ensure that with regards to oil and gas operations, all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control), are aggregated together as single sources, in accordance with the definition of “stationary source” in the Colorado SIP.

The most notable example of Colorado’s failure to accurately make a source determination for oil and gas operations is in relation to the Frederick Compressor Station, located in Weld County. On October 8, 2010, the Administrator objected to CDPHE’s permitting of the Frederick Compressor Station under Title V of the Clean Air Act, holding the State failed to appropriately assess whether oil and gas wells and other pollutant emitting activities connected with the compressor station should be aggregated together as a single stationary source for PSD permitting purposes. *See In the Matter of Kerr-McGee/Anadarko Petroleum Corporation, Frederick Compressor Station*, Petition VIII-2008-02 (Order on Petition) (October 8, 2009). In issuing its objection, the Administrator made clear that Colorado failed to appropriately define the source in accordance with its SIP, and therefore failed to appropriately implement PSD permitting requirements under the SIP. As of the date of this Petition, Colorado has yet to demonstrate to the EPA’s satisfaction that its permitting decision complies with its SIP.

There are many more examples illustrating Colorado’s ongoing failure to implement its SIP, including:

- **CDPHE continues to issue stationary source construction permits for oil and gas operations without making appropriate source determinations:** There are numerous examples of such actions, but the most recent example is a permit currently proposed to be issued to Omimex Petroleum to modify and operate an oil and natural gas compression facility known as the Ferguson Compressor Station in Yuma County, Colorado, which compresses and processes natural gas produced in the region. The public notice for this proposed permit, the permit analysis, and the draft permit are attached to this petition as Exhibit 1. According to data from the Colorado Oil and Gas Conservation Commission (“COGCC”), Omimex Petroleum owns and/or operates 360 wells in Yuma County, all or many of which are likely connected to the Ferguson Compressor Station. *See* attached COGCC database information attached as Exhibit 2. In proposing the permit for Omimex Petroleum, CDPHE entirely fails to assess whether all or a portion of Omimex’s oil and gas wells, or any oil and gas wells under common control by Omimex, should be aggregated with the Ferguson Compressor Station, even though these wells likely supply the Ferguson Compressor Station with natural gas. In fact, CDPHE does not even mention Omimex’s connected oil and gas wells in its permit analysis. The result is that CDPHE is still failing to ensure that pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) are aggregated together as single sources.

In addition, CDPHE is continuing to issue numerous permits for the construction and operation of pollutant emitting activities at oil and gas well sites without aggregating

such activities together with the larger sources that they are connected to as single sources in accordance with the Colorado SIP. For instance, CDPHE has issued and continues to issue construction permits for the installation of condensate tank batteries, compressor engines, and other pollutant emitting activities for Kerr-McGee, also known as Anadarko Petroleum, in the Wattenberg Gas Field north of Denver, which is where the Frederick Compressor Station is located. A list of the permits issued and pending permits proposed to be issued to Kerr-McGee is attached to this Petition as Exhibit 3. There is no indication that CDPHE has assessed whether these pollutant emitting activities should be aggregated together with larger facilities operated by Kerr-McGee, such as the Frederick Compressor Station or other compressor stations operated by Kerr-McGee, in accordance with the Colorado SIP. There is no indication that CDPHE has made or is making accurate source determinations in accordance with the Colorado SIP for these and other oil and gas operations.

Finally, even CDPHE's permitting guidance for the oil and gas industry appears to entirely overlook the need to ensure that all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control), are identified together to ensure complete permit applications. CDPHE's "Form APCD-100, Construction Permit Application Completeness Checklist," which details the type of information required to be submitted by oil and gas operators as part of their construction permit applications, nowhere explains that information regarding all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control), must be submitted as part of their applications. This strongly indicates that CDPHE appears to be taking no steps to ensure that oil and gas operations are appropriately permitted in accordance with the Colorado SIP.

- **CDPHE is only addressing the issue of aggregation of oil and gas operations in response to public comments, and even then continues to fail to assess whether pollutant emitting activities should be aggregated in accordance with the Colorado SIP:** CDPHE has responded to the need to appropriately aggregate oil and gas operations under its SIP on only two occasions since the Administrator's October 8, 2009 Objection Frederick Compressor Station Permit—both in response to comments from WildEarth Guardians. However, in both instances, CDPHE failed to make accurate source determinations for the oil and gas operations. For example, in response to comments from WildEarth Guardians on a proposed modification of Gunnison Energy's Ragged Mountain Compressor Station located in Gunnison County, Colorado, CDPHE failed to assess whether oil and gas wells connected to the Ragged Mountain Compressor Station should be aggregated together as a single source. CDPHE's February 11, 2010 response to comments is attached as Exhibit 4 to this Petition. Instead, CDPHE summarily dismissed aggregation, claiming that Gunnison Energy did not fully control the operations of wells feeding the Ragged Mountain Compressor Station, that the wells in questions were not adjacent, and that aggregation was further inappropriate given that the wells in question were "exempt" from permit regulation under the Colorado SIP. This

assessment failed to address whether Gunnison Energy, as the operator of the Ragged Mountain Compressor Station, could, through contractual relationships, control the flow of natural gas from connected wells in order to meaningfully establish common control under the Colorado SIP. Furthermore, CDPHE's lack of adjacency assertion is simply unsupported. There is no indication that the distance between the Ragged Mountain Compressor Station and the wells that supply the facility are too far apart to meaningfully regulate together as a single source under PSD and the Colorado SIP, particularly in light of the interdependent relationship that CDPHE admits exists between the facility and the wells that supply the facility, or that the distance undermines the "common sense notion of plant." See Exhibit 4 at 6. Finally, the fact that CDPHE asserted that well-site activities were "exempt" from the Colorado SIP simply underscores the need for the Administrator to affirm this Petition. The fact that certain oil and gas operations may be exempt from permitting does not make them exempt from permitting under the Colorado SIP if they are a part of a single stationary source, and certainly does not exempt them from any assessment as to whether they should be aggregated. This is a strong indication that Colorado is not appropriately implementing its SIP. Similarly, in response to comments from WildEarth Guardians on a proposed modification of OXY's Conn Creek Gas Treating Facility located in Garfield County, Colorado, CDPHE also failed to appropriately assess whether oil and gas wells connected to the Conn Creek facility should be aggregated together as a single source. CDPHE's January 27, 2010 response to comments is attached as Exhibit 5 to this Petition. In that case, CDPHE actually asserted that the operation of the Conn Creek Gas Treating Facility was not dependent upon the oil and gas wells that supply the facility, even though the facility could not operate without a supply of natural gas.

- **CDPHE has not addressed the fact that it has failed to ensure that numerous existing construction permits for oil and gas operations comply with the Colorado SIP:** Most importantly, CDPHE has not addressed the fact that it has issued numerous construction permits for new and modified oil and gas operations that fail to make accurate source determinations in accordance with the Colorado SIP. Despite the requirements of the SIP, the Assistant Administrator's September 22, 2010 guidance on this issue, the Administrator's October 8, 2010 Objection, and other regulatory requirements, CDPHE has not sought to remedy the shortcomings in its prior permitting decisions and has instead allowed flawed construction permits to continue to regulate oil and gas operations within the State.

CDPHE is failing to implement its SIP both within and outside of designated nonattainment areas. In particular, CDPHE is failing to appropriately permit oil and gas operations within the Denver Metropolitan/North Front Range 8-hour Ozone Nonattainment Area, which was designated in 2007. See 40 C.F.R. § 81.306. This failure is especially of concern given that oil and gas operations contribute significantly to the region's ozone pollution due to the release of large amounts of nitrogen oxides ("NOx") and volatile organic compounds ("VOCs"). Inventories prepared by CDPHE for the nonattainment SIP show that on average, oil and gas operations release 203.3 tons/day of VOCs and 46.2 tons/day of NOx, making these operations the largest source of VOCs and the fourth largest source of NOx in the nonattainment area. See Denver Metro Area & North Front Range Ozone Action Plan at III-6, *available online*

at <http://www.cdphe.state.co.us/ap/ozone/RegDevelop/ozoneplan.pdf> (last visited July 19, 2010). There is legitimate concern that in failing to appropriately permit oil and gas operations, CDPHE is failing to ensure that emissions will be appropriately controlled and/or reduced to ensure attainment and maintenance of the 8-hour ozone NAAQS within the nonattainment area.

II. Failure to Adequately Administer and Enforce Title V Program

Colorado's Title V permitting program requires that any stationary source of air pollution falling under the categories set forth AQCC Regulation No. 3, Part C, Section II.A.1 obtain a Title V operating permit in accordance with the provisions of AQCC Regulation No. 3., Part C. Above all, any major source, which includes any stationary source that emits or has the potential to emit 100 tons/year of any air pollutant (*see* AQCC Regulation No. 3, Part A, Section I.B.23.b), must obtain a Title V operating permit in order to operate within the State of Colorado.

The definition of "stationary source" set forth in the Colorado SIP at AQCC Regulation No. 3, Part A, Section I.B.41 is clearly implicated and applies with regards to the permitting of major sources under Colorado's Title V program. Indeed, the definitions of "major source" and "stationary source" under federal regulations governing state Title V permitting programs are virtually identical to the Colorado SIP. Under these regulations, a "major source" is defined as "any stationary source (or group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping[.]" while stationary source is defined as "any building, structure, facility, or installation that emits or has the potential to emit any regulated air pollutant or any pollutant listed under section 112(b) of the [Clean Air] Act." 40 C.F.R. § 70.2.

Unfortunately, like its permitting of new and modified oil and gas operations, Colorado is failing to appropriately permit oil and gas operations consistent with the definition of stationary source as it applies to permitting under its Title V program. In particular, CDPHE is both failing to make accurate source determinations for purposes of assessing both applicability under its Title V program and to ensure that existing sources currently subject to Title V are appropriately permitted consistent with its Title V program.

Again, the most notable example of Colorado's failure to accurately make a source determination for oil and gas operations is in relation to the Frederick Compressor Station, located in Weld County. On October 8, 2010, the Administrator objected to CDPHE's permitting of the Frederick Compressor Station under Title V of the Clean Air Act, holding the State failed to appropriately assess whether oil and gas wells and other pollutant emitting activities connected with the compressor station should be aggregated together as a single stationary source for Title V permitting purposes. *See In the Matter of Kerr-McGee/Anadarko Petroleum Corporation, Frederick Compressor Station*, Petition VIII-2008-02 (Order on Petition) (October 8, 2009). In issuing its objection, the Administrator stated that, "CDPHE failed to adequately support its determination of the source for PSD and title V purposes." *Id.* at 9. As of the date of this Petition, Colorado has yet to demonstrate to the EPA's satisfaction that its permitting decision complies with Title V with regards to its source determination.

There are many more examples illustrating Colorado's ongoing failure to adequately administer and enforce its Title V permitting program, including:

- **CDPHE continues to issue construction permits for oil and gas operations without making appropriate source determinations under Title V:** As discussed, Colorado continues to issue construction permits for oil and gas operations under the Colorado SIP without assuring that such permits accurately encompass all the pollutant emitting activities that belong to the single source. In doing so, Colorado is failing to ensure that all stationary sources of air pollution subject to Title V permitting requirements are required to obtain Title V permits in accordance with AQCC Regulation No. 3, Part C, a clear sign that Colorado is failing to adequately administer and enforce its Title V permitting program. It is likely that in doing so, Colorado is allowing numerous major sources within the State to operate without first obtaining Title V Permits in accordance with AQCC Regulation No. 3., Part C.
- **CDPHE continues to issue Title V Permits for oil and gas operations without assessing whether connected pollutant emitting activities should be aggregated:** Colorado continues to issue Title V Permits for the operation of oil and gas facilities without assuring valid source determinations prior to issuing the Title V Permits. Colorado is failing to assure that all the pollutant emitting activities that belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) are aggregated together with the existing major source to ensure appropriate permitting under Title V. For example, on October 1, 2009, CDPHE issued a renewed Title V Permit to Pioneer Natural Resources (USA) to operate the Burro Canyon natural gas gathering and compression facility in Las Animas County, Colorado. This Title V Permit and the revised Technical Review Document are attached to this Petition as Exhibits 6 and 7, respectively. According to data from the COGCC, Pioneer Natural Resources (USA) owns and/or operates 2,634 wells in Las Animas County, some or many of which are likely connected to the Burro Canyon facility. *See* attached COGCC database information attached as Exhibit 8. In issuing the Title V permit for Pioneer Natural Resources, CDPHE did not assess whether all or a portion of Pioneer's oil and gas wells, or any oil and gas wells under common control by Pioneer, should be aggregated with the Burro Canyon facility, even though some or many of these wells likely supply the facility with natural gas. In fact, CDPHE does not even mention Pioneer's connected oil and gas wells in its revised Technical Review Document for the Title V Permit. The result is that CDPHE is still failing to ensure that pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) are aggregated together as single sources for Title V Permitting purposes.
- **CDPHE has not addressed the fact that it has failed to ensure that numerous existing Title V permits for oil and gas operations comply with its Title V permitting program:** Most importantly, CDPHE has not addressed the fact that it has issued numerous Title V permits for oil and gas operations that fail to make accurate source

determinations. Despite the requirements of its Title V permitting program, the Assistant Administrator's September 22, 2010 guidance on this issue, the Administrator's October 8, 2010 Objection, and other regulatory requirements, CDPHE has not sought to remedy the shortcomings in its prior Title V permitting decisions and has instead allowed flawed Title V permits to continue to govern the operation of oil and gas facilities that are major sources.

CDPHE is failing to implement its Title V permitting program both within and outside of designated nonattainment areas. In particular, CDPHE is failing to appropriately permit oil and gas operations under Title V within the Denver Metropolitan/North Front Range 8-hour Ozone Nonattainment Area. The Administrator's October 8, 2009 objection to the issuance of the Frederick Compressor Station, which is located in the Denver Metropolitan/North Front Range 8-hour Ozone Nonattainment Area, is clear evidence of this. There is thus well-founded concern that in failing to appropriately permit oil and gas operations under Title V, CDPHE is failing to ensure that emissions will be appropriately controlled and/or reduced from major sources to ensure attainment and maintenance of the 8-hour ozone NAAQS within the nonattainment area.

III. Sanctions

Upon making a finding that a State is failing to implement its SIP, the Administrator has a nondiscretionary duty to apply the sanctions set forth under Section 179(b) of the Clean Air Act, unless such deficiency is corrected by a State within 18 months of the finding, if such finding relates to a SIP or SIP revision required under Title I, Part D of the Clean Air Act, which relates to nonattainment areas. In this case, it is clear that Colorado is failing to implement its SIP with regards to the permitting of stationary sources in the Denver Metropolitan/North Front Range 8-hour Ozone Nonattainment Area. These permitting requirements are required to be in the SIP in accordance with 42 U.S.C. §§ 7502(c)(7) and 7503 under Title I, Part D of the Clean Air Act. Thus, in making a finding that Colorado is failing to implement its SIP, the Administrator must also apply the sanctions in 42 U.S.C. § 7509(b) against the State.

Additionally, upon on making a finding that a State is failing to implement its SIP, the Administrator has the discretion to apply the sanctions set forth at 42 U.S.C. § 7509(b) with regards to any other SIP requirement not otherwise required under Title I, Part D of the Clean Air Act or applicable specifically to nonattainment areas. In this case, Petitioner submits that there is ample justification for the Administrator to apply sanctions against Colorado over its ongoing failure to implement its SIP statewide. Despite being put on notice by the EPA that its permitting practices are inconsistent with its SIP, including a formal objection to the issuance of the Frederick Compressor Station by the Administrator, Colorado continues to issue flawed permits for oil and gas operations. CDPHE does not appear to be making a good faith effort to ensure its permitting of oil and gas operations is consistent with the Clean Air Act. Sanctions are needed to rein in Colorado's obvious flouting of the law.

EPA further has discretion to withhold grant funding under Section 105 of the Clean Air Act in response to a finding of failure to implement a SIP. *See* 42 U.S.C. § 7509(a)(4). We further request that the EPA withhold Section 105 grant funding from Colorado unless and until

CDPHE assures full and consistent implementation of its SIP permitting requirements with regards to oil and gas operations. In fact, it would be wholly inappropriate for EPA to continue to provide grants to CDPHE under Section 105 that would fund illegal permitting practices.

Similar to a finding of failure to implement, upon making a determination that a State is failing to adequately administer and enforce its Title V permitting program, the Administrator has a nondiscretionary duty to apply the sanctions set forth under Section 179(b) of the Clean Air Act. *See* 42 U.S.C. § 7661a(i)(2). However, the sanctions set forth under Section 179(b)(2) apply only if the failure to adequately administer and enforce relates to a pollutant for which an area has been designated nonattainment. *See* 42 U.S.C. § 7661a(i)(3). In this case, it is clear that Colorado is failing to adequately administer and enforce its Title V permitting program, both within and outside of nonattainment areas. Thus, in determining that Colorado is failing to adequately administer and enforce its Title V permitting program, the Administrator must also apply the sanctions in 42 U.S.C. § 7509(b) against the State.

In making a determination that a State is failing to adequately administer and enforce its Title V permitting program, the Administrator may also fully or partially withdraw approval of a State's program and "promulgate, administer, or enforce a Federal program under title V of the Act." 40 C.F.R. §§ 70.10(b)(2)(ii) and (iii). In this case, there is a need for the Administrator to partially withdraw approval of Colorado's Title V permitting program and promulgate, administer, and enforce its own Federal Title V permitting program. Specifically, there is a need for the Administrator to withdraw approval of the State of Colorado to permit oil and gas operations under its Title V permitting program and for the EPA to instead permit oil and gas operations under Title V. The sanctions under 40 C.F.R. §§ 70.10(b)(2)(ii) and (iii) should therefore be applied in accordance with 40 C.F.R. § 70.10(b) to ensure adequate permitting of oil and gas operations in Colorado under Title V upon making a determination that the State is failing to adequately administer and enforce its Title V permitting program.

Finally, upon partially withdrawing approval of Colorado's Title V permitting program, EPA further has discretion to withhold grant funding under Section 105 of the Clean Air Act as provided for under Section 179(a)(4). *See* 40 C.F.R. § 70.10(b)(3). We further request that the EPA withhold Section 105 grant funding from Colorado unless and until CDPHE assures full and consistent implementation of its Title V permitting requirements with regards to oil and gas operations. As already stated, it would be wholly inappropriate for EPA to continue to provide grants to CDPHE under Section 105 that would fund illegal Title V permitting.

CONCLUSION

Colorado continues to flout the Clean Air Act, EPA guidance, orders from the Administrator, its SIP, and its Title V permitting program with regards to the permitting of stationary sources within the oil and gas sector. The Administrator cannot allow this to continue.

There is ample justification for the Administrator to make the requested findings, to apply the required sanctions, and to exercise discretion to apply additional sanctions. Furthermore, there is ample imperative. As explained, air pollution from oil and gas operations is increasingly

threatening air quality, putting public health and welfare at risk throughout Colorado. Proper permitting under the Colorado SIP and Title V of the Clean Air Act is absolutely critical to ensuring consistent, lasting, and legally adequate protection for Colorado citizens and communities.

Again, we request the Administrator exercise her authority under the Clean Air Act and undertake the following actions:

1. Pursuant to 42 U.S.C. §§ 7410(m) and 7509(a)(4) of the Clean Air Act, find that requirements of Colorado's SIP are not being implemented by CDPHE with regards to the permitting of stationary sources within the oil and gas sector, both inside and outside of designated nonattainment areas, within the State of Colorado;
2. Pursuant to 42 U.S.C. § 7661a(i) of the Clean Air Act, determine that CDPHE is not adequately administering and enforcing its Title V permitting program with regards to the permitting of stationary sources within the oil and gas sector, both inside and outside of designated nonattainment areas, within the State of Colorado; and
3. Apply the sanctions set forth at 42 U.S.C. § 7509(b) against the State of Colorado in accordance with the requirements of 42 U.S.C. §§ 7410(m), 7509(a)(4), and 7661a(i). We request the Administrator exercise its discretion to apply sanctions, where allowed, and where the application of sanctions are nondiscretionary, to apply them as expeditiously as possible. We further request the Administrator withhold Clean Air Act Section 105 grant funding from Colorado, as authorized by 42 U.S.C. § 7509(a)(4), unless and until Colorado rectifies both the finding of failure to implement its SIP and the determination of failure to adequately administer and enforce its Title V permitting program. We further request that the Administrator partially withdraw Title V permitting program approval from Colorado with regards to the permitting of oil and gas operations subject to Title V, and promulgate, administer, and enforce a Federal Title V Permitting program in place, as authorized by 40 C.F.R. § 70.10(b)(2)(ii) and (iii).

As stated, this issue needs urgent action from the Administrator. WildEarth Guardians therefore requests EPA expedite resolution of this matter and respond within sixty days. Since EPA has made perfectly clear that Colorado has failed and continues to fail to implement its SIP and Title V Permitting program, this request is more than reasonable. Furthermore, given that Colorado continues to propose new permits for stationary sources within the oil and gas sector that are plainly inconsistent with its SIP and its Title V permitting program, there is an urgent need for the Administrator to intervene.

Thank you for your consideration of this Petition. If you have any questions, need clarification, or would like to discuss this matter further, please contact WildEarth Guardians at the contact information below.

Submitted this 22nd day of July, 2010.

Jeremy Nichols
Climate and Energy Program Director
WildEarth Guardians
1536 Wynkoop, Suite 301
Denver, CO 80202
(303) 573-4898 x 1303
jnichols@wildearthguardians.org

cc: Gina McCarthy, Assistant Administrator, EPA Office of Air and
Radiation;
James Martin, Regional Administrator, EPA Region 8;
Martha Rudolph, Executive Director, Colorado Department of
Public Health and the Environment.

TABLE OF EXHIBITS

1. Public Notice, Permit Analysis, and Proposed Permit for Omimex Petroleum, Inc., Yuma County, CO.
2. List of oil and gas wells owned and/or operated by Omimex Petroleum, Inc. in Yuma County, CO.
3. List of permits issued and pending permits proposed to be issued to Kerr-McGee.
4. CDPHE Response to WildEarth Guardians' Comments on Proposed Permit for Modifications of Gunnison Energy's Ragged Mountain Compressor Station, Gunnison County, CO (February 11, 2010).
5. CDPHE Response to WildEarth Guardians' Comments on Proposed Permit for Modifications of OXY's Conn Creek Gas Treating Facility, Garfield County, CO (January 27, 2010).
6. Title V Permit for Pioneer Natural Resources USA, Inc. to operate the Burro Canyon Compressor Station, Las Animas County, CO, Permit No. 99OPLA208 (October 1, 2009).
7. Technical Review Document for Renewal of Operating Permit 99OPLA208 (June 2009).
8. List of oil and gas wells owned and/or operated by Pioneer Natural Resources USA, Inc. in Las Animas County, CO.