October 30, 2017

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Re: Kennecott Utah Copper Smelter and Refinery Title V Permit

Dear Bryce and Brandy,

Thank you for the opportunity to comment on the proposed Title V Permit issued for the Kennecott Utah Copper Smelter and Refinery. I make these comments on behalf of Utah Physicians for a Healthy Environment and WESTERN RESOURCE ADVOCATES. Please consider the following as you review the basis for the proposed Title V permit:

Title V

All major stationary sources of air pollution are required to apply for operating permits under Title V of the Clean Air Act. 42 U.S.C. § 7661a(a). Title V permits must include all federally enforceable emission limits and operating requirements that apply to a source as well as monitoring requirements sufficient to assure compliance with these limits and requirements in one legally enforceable document. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a)(1).

Noncompliance by a source with any provision in a Title V permit constitutes a violation of the Clean Air Act and provides ground for an enforcement action against the source. Title V permits are the primary method for enforcing and assuring compliance with State Implementation Plan requirements for major sources. Operating Permit Program, 57 Fed. Reg. 32,250, 32,258 (July 21, 1992).

State-permitting agencies and EPA must take care to ensure that Title V permits accurately and clearly list what each major source must do to comply with the law. See, e.g., *Sierra Club v. Otter Tail*, 615 F.3d 1008 (8th Cir. 2008 (holding that enforcement of New Source Performance Standard omitted from a source's Title V permit was barred by 42 U.S.C. § 7607(b)(2)).

$PM_{2.5}$ Emission Limitations

The proposed permit violates the law because it fails to place emission limitations on $PM_{2.5}$. According to 40 CFR 70.5(c)(3)(i), standard application forms for Title V operating permits shall include information about "all emissions of regulated air pollutants." PM_{10} and $PM_{2.5}$ are separately-regulated NSR pollutants and operators must determine major NSR applicability for each. *See, e.g.,* 77 Fed. Reg. 65,107, 65,111, Implementation of the New Source Review Program for Particulate Matter Less than 2.5 Micrometers (October 25, 2012) ("PM, PM_{10} and $PM_{2.5}$ are considered separately as regulated NSR pollutants subject to review under the PSD program, which means that proposed new and modified sources must treat each indicator of PM as a separate regulated pollutant for applicability determinations, and must then apply the PSD requirements, as appropriate, independently for each indicator of PM"). This is also true to NNSR.

In 2006 EPA issued a new NAAQS for $PM_{2.}$ In 2009, EPA classified Salt Lake County as non-attainment for $PM_{2.}$ and issued an implementation rule to instruct permitting authorities on how to update their NSR, Prevention of Significant Deterioration (PSD), and Title V rules to implement $PM_{2.5}$ requirements. EPA has promulgated a rule to include $PM_{2.5}$ as a criteria pollutant and has designated several areas as being nonattainment. 40 CFR 70.5(c)(3)(i) requires Title V applications to include all NAAQS and HAP pollutants for which the source is major and "additional information related to the emissions of air pollutants sufficient to verify which requirements are applicable to the source." DAQ is required to address $PM_{2.5}$ emissions in its permitting, including in its Title V permits.

Further, failing to include $PM_{2.5}$ emission limitations (filterable and condensable) in the proposed permit violates the Utah $PM_{2.5}$ and fails to protect the NAAQS. R307-401-8.

The following provisions in the proposed permit acknowledge emissions of $PM_{2.5}$ but fail to regulate $PM_{2.5}$ and improperly limit only filterable PM_{10}, thus further neglecting to regulate condensable PM:

- II.B.2 (PM_{10} limit (filterable only) on SME001– stack test frequency once every five years)
- II.B.3 (PM_{10} limit (filterable only) on SME002– stack test frequency once every five years)
- II.B.4 (PM_{10} limit (filterable only) on SME003– stack test frequency once every five years)
- II.B.5 (PM_{10} limit (filterable only) on SME004– stack test frequency once every five years)
- II.B.6 (PM_{10} limit (filterable only) on SME005– stack test frequency once every five years)
- II.B.7 (PM limit (filterable only) on SME011e– stack test frequency once every five years)

- II.B.10 (PM_{10} limit (filterable only) on SME006– stack test frequency once every five years)
- II.B.11 (PM_{10} limit (filterable only) on SME013– stack test frequency once every five years)
- II.B.13 (PM_{10} limit (filterable only) on SME010a– stack test frequency once every five years)
- II.B.14 (PM_{10} limit (filterable only) on SME010b– stack test frequency once every five years)
- II.B.25 (PM_{10} limit (filterable only) on SME011– stack test frequency once every five years)
- II.B.30 (PM_{10} limit (filterable only) on SME017a– stack test frequency once every five years)
- II.B.44 (PM_{10} limit (filterable only) on REF010– stack test frequency once every three years)

The relevant application for does not require information concerning emissions of $PM_{2.5}$ (filterable and condensable) and the state does not address these emissions in the proposed permit. By failing to regulate $PM_{2.5}$, the proposed permit does not comply with EPA-approved SIP permitting programs or the underlying permits themselves. By failing to mandate monitoring, recordkeeping and reporting of $PM_{2.5}$, the proposed permit does not meet Title V's monitoring, recordkeeping and reporting requirements.

Statement of Basis

According to EPA, a permitting authority must 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). The permitting authority shall send this statement to the EPA and to any other person who requests it." 40 CFR section 70.7(a)(5). The statement of basis is intended to support the requirements of CAA section 502(b)(6) by providing information to allow for "expeditious" evaluation of the permit terms and conditions, and by providing information that supports public participation in the permitting process, considering other information in the record.

EPA provided an overview of the elements of an adequate statement of basis in a 2006 Title V petition order. *In the Matter of Onyx Environmental Services*, Order on Petition No. V-2005-1 (February 1, 2006) (Onyx Order) at 13-14. In the Onyx Order, in the context of a general overview statement on the statement of basis, the EPA explained,

> A statement of basis must describe the origin or basis of each permit condition or exemption. However, it is more than just a short form of the permit. It should highlight elements that U.S. EPA and the public would find important to review. Rather than restating the permit, it should list anything that deviates from simply a straight recitation of applicable requirements. The statement of basis should highlight items such as the

> permit shield, streamlined conditions, or any monitoring that is required under 40 C.F.R. § 70.6(a)(3)(i)(B). Thus, it should include a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and U.S. EPA a record of the applicability and technical issues surrounding the issuance of the permit.

Onyx Order at 13-14 (citations omitted).

In a 2001 letter from EPA to the Ohio Environmental Protection Agency, which is also cited to in the Onyx Order, EPA explained:

> The [statement of basis] should also include factual information that is important for the public to be aware of. Examples include:
>
> 1. A listing of any Title V permits issued to the same applicant at the plant site, if any. In some cases it may be important to include the rationale for determining that sources are support facilities.
>
> 2. Attainment status.
>
> 3. Construction and permitting history of the source.
>
> 4. Compliance history including inspections, any violations noticed, a listing of consent decrees into which the permittee has entered and corrective action(s) taken to address noncompliance.

Letter from Stephen Rothblatt, EPA Region 5 to Robert Hodanbosi, Ohio EPA, December 20, 2001.

The proposed permit does not include a "Statement of Basis" or any reference to or incorporation of a statement of basis and so is unlawful.[1] To the extent that the "Reviewers Comments" constitute a statement of basis, this should be made clear.

The "Reviewers Comments" are not adequate to serve as a statement of basis. For example, the comments do not discuss the "decision-making that went into the development of the title V permit and provide the permitting authority, the public, and U.S. EPA a record of the applicability and technical issues surrounding the issuance of the permit." The comments do discuss some elements of the permit, but do not, for example, for every relevant permit term and condition:

- discuss emission limits and monitoring of $PM_{2.5}$ or condensable $PM_{2.5}$

[1] See the discussion concerning incorporation by reference.

- justify emission testing/stack testing that occurs once every three to five years
- discuss control of fugitive dust or the adequacy of any controls
- address "compliance history including inspections, any violations noticed, a listing of consent decrees into which the permittee has entered and corrective action(s) taken to address noncompliance"
- explain the failure to require monitoring and reporting relative to fugitive emissions and dust limitations and practices
- discuss the permit's lack of reporting requirements

Finally, comment 7 references a provision that allows the source to petition the Director for authority to monitor less frequently that is unlawful. Monitoring must be sufficient to show continuous compliance with the relevant permit terms and conditions. This blanket provision fails to allow the public to participate in decision making that would reduce monitoring frequency and fails to require a showing of adequate monitoring or recordkeeping contrary to Title V.

Monitoring

The purposes of stationary source emissions monitoring are to provide: 1) data and information from a regulated stationary source (facility) to demonstrate compliance with certain regulatory requirements, and; 2) performance information to the facility operator so that corrective action can be taken, if necessary. Applicable requirements can necessitate periodic or continuous monitoring related to permit terms or conditions (*e.g.*, emission limits, work practice requirements, equipment design and operating requirements) that result from regulations.

Each Title V permit must include applicable emission limits and operating requirements and conditions necessary to assure compliance with applicable limits and operating requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a) and (c). In 2008, the D.C. Circuit Court of Appeals struck down an EPA rule that would have prohibited MDE and other state and local authorities from adding monitoring provisions to Title V permits if needed to "assure compliance." *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008). The Court emphasized the statutory duty to include adequate monitoring in Title V permit, stating: "[b]y its terms, this mandate means that a monitoring requirement insufficient 'to assure compliance' with emission limits has no place in a permit unless and until it is supplemented by more rigorous standards." *Id.* at 677. The Court specifically noted that annual testing is unlikely to assure compliance with a short term emission limit, and found that state permitting authorities have a statutory duty to include monitoring requirements that ensure compliance with emission limits in Title V operating permits. *Id.* at 675.

EPA has interpreted 40 CFR section 70.7(a)(5) to require that the rationale for selected monitoring methods be clear and documented in the permit record. *In the Matter of CITGO Refining and Chemicals Company LP (CITGO)*, Order on Petition No. VI-2007-01 (May 28,

2009) at 7; *see also In the Matter of Fort James Camas Mill (Fort James)*, Order on Petition No. X-1999-1 (December 22, 2000) at 8.

The provisions of the proposed permit listed below fail to require lawfully adequate monitoring and do not ensure compliance with the NAAQS because they fail to require monitoring of $PM_{2.5}$ emissions and/or $PM_{2.5}$ condensable emissions. Moreover, by requiring stack testing only once every three to five years, particularly without evidence or analysis to suggest that infrequent monitoring is adequate to show compliance, the proposed permit terms do not meet Title V requirements.

- II.B.2 (PM_{10} limit (filterable only) on SME001– stack test frequency once every five years)
- II.B.3 (PM_{10} limit (filterable only) on SME002– stack test frequency once every five years)
- II.B.4 (PM_{10} limit (filterable only) on SME003– stack test frequency once every five years)
- II.B.5 (PM_{10} limit (filterable only) on SME004– stack test frequency once every five years)
- II.B.6 (PM_{10} limit (filterable only) on SME005– stack test frequency once every five years)
- II.B.7 (PM limit (filterable only) on SME011e– stack test frequency once every five years)
- II.B.10 (PM_{10} limit (filterable only) on SME006– stack test frequency once every five years)
- II.B.11 (PM_{10} limit (filterable only) on SME013– stack test frequency once every five years)
- II.B.13 (PM_{10} limit (filterable only) on SME010a– stack test frequency once every five years)
- II.B.14 (PM_{10} limit (filterable only) on SME010b– stack test frequency once every five years)
- II.B.25 (PM_{10} limit (filterable only) on SME011– stack test frequency once every five years)
- II.B.30 (PM_{10} limit (filterable only) on SME017a– stack test frequency once every five years)
- II.B.44 (PM_{10} limit (filterable only) on REF010– stack test frequency once every three years)

The provisions of the proposed permit listed below fail to require lawfully adequate monitoring and do not ensure compliance with the NAAQS because they fail to require monitoring of NOx emissions sufficient to address and protect an hourly standard. Moreover, by requiring stack testing only once every three (where indicated), particularly without evidence or analysis to

suggest that infrequent monitoring is adequate to show compliance, the proposed permit terms do not meet Title V requirements.[2]

- II.B.24b (NO_X limit on SME026 – hourly, averaged over 30 days)
- II.B.24c (NO_X limit on SME026 – stack test every three years)
- II.B.24e.i (NO_X limit on SME026 – hourly, annual average)
- II.B.36.d (NO_X limit on REF 001 and 002 – stack test every three years)

Monitoring, Recordkeeping and Reporting

The Clean Air Act and EPA's implementing regulations require all Title V permits to contain monitoring requirements that assure compliance with applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(c)(1) and 70.6(a)(3). Emission limits imposed in the proposed permit are "applicable requirements." 40 C.F.R. § 70.

R397-415-6a requires a Title V permit to include adequate monitoring, recordkeeping and reporting requirements. Relative to monitoring, Utah regulation states that a Title V permit shall contain "[a]ll monitoring and analysis procedures or test methods required under applicable monitoring and testing requirements[.]" R397-415-6a(3)(a)(i). "Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring," the permit must require "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit[.]" R397-415-6a(3)(a)(ii).

Relative to reporting, Utah rule requires:

> Submittal of reports of any required monitoring every six months, or more frequently if specified by the underlying applicable requirement or by the director. All instances of deviations from permit requirements must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with R307-415-5d.

R397-415-6a(3)(c)(i). The proposed permit does not meet these requirements.

First, the permit often references Section I (apparently I.L.1.b) as the sole source of applicable monitoring, recordkeeping and reporting requirements. *E.g.* II.B.1.a.3, II.B.1.b.1, II.B.1.b.2, II.B.1.b.3, II.B.1.c.1-3, II.B.1.d.3, II.B.1.e.3, II.B.1.f.2-3, II.B.1.g.2-3, II.B.1.h.2-3, II.B.1.i.3, II.B.1.l.3, II.B.1.m.3, II.B.1.n.3, II.B.1.o.3, II.B.1.p.3, II.B.1.q.3, II.B.2.b.3, II.B.3.b.3, II.B.4.b.3, II.B.5.b.3, II.B.6.b.3, II.B.8.a.3, II.B.8.b.3, II.B.8.c.3, II.B.8.d.3, II.B.9.b.3, II.B.9.c.3, II.B.9.d.3, II.B.10.b.3, II.B.11.b.3, II.B.12.a.3, II.B.13.c.3, II.B.13.d.3, II.B.14.c.3, II.B.14.d.3, II.B.15.a.3,

[2] Anytime a permit fails to require adequate monitoring, it necessarily fails to mandate adequate recordkeeping and reporting. Recordkeeping and reporting are necessary to implement legally sufficient monitoring.

II.B.16.a.3, II.B.17.a.3, II.B.18.a.3, II.B.18.b.3, II.B.20.a.3, II.B.21.a.3, II.B.22.a.3, II.B.23.a.3, II.B.24.a.3, II.B.26.a.3, II.B.27.a.3, II.B.28.a.3, II.B.29.a.3, II.B.30.b.3, II.B.31.a.3, II.B.31.b.3, II.B.32.a.3, II.B.33.a.3, II.B.33.c.3, II.B.34.a.3, II.B.34.c.3, II.B.34.d.3, II.B.34.e.3, II.B.34.f.3, II.B.34.g.3, II.B.34.j.3, II.B.34.k.3, II.B.34.l.3, II.B.34.m.3, II.B.34.n.3, II.B.35.b.3, II.B.36.a.3, II.B.36.c.3, II.B.36.f.3, II.B.37.b.3, II.B.38.b.3, II.B.39.d.3, II.B.40.a.3, II.B.41.a.3, II.B.42.a.3, II.B.43.a.3, II.B.43.b.3, II.B.44.b.3, II.B.45.a.3, II.B.45.c.3, II.B.46.a.3, II.B.46.a.3, II.B.46.b.3, II.B.47.a.3 and so on. However, Section I contains no specific monitoring, recordkeeping or reporting requirements and merely restates the law regarding compliance certification. Therefore, any reliance on this provision to meet the mandate of R397-415-6a is necessarily circular and unlawful.

Second, reference to Section I to establish monitoring requirements does not meet the mandate that the permit includes "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit[.]" R397-415-6a(3)(a)(ii). Section I imposes no such requirement.

Third, reference to Section I to satisfy reporting requirement is not adequate under R397-415-6a(3)(c)(i). Section I does not mandate reporting on **all required monitoring every six months**, and does not mandate that "instances of deviations from permit requirements…be clearly identified in such reports."

Fugitive Emissions

The proposed permit fails to require adequate monitoring, recordkeeping and reporting requirements relative to limitations and controls on fugitive emissions and fugitive dust.

The Clean Air Act and EPA's implementing regulations require all Title V permits to contain monitoring requirements that assure compliance with applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(c)(1) and 70.6(a)(3). Emission limits imposed by R307-309 are "applicable requirements." 40 C.F.R. § 70.

R307-415-4(4) states:

> Fugitive emissions and fugitive dust from a Part 70 source shall be included in the permit application and the operating permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of source categories contained in the definition of major source.

The proposed permit also fails to meet these requirements.

For example, Utah's R307-309 includes limits on fugitive emissions and fugitive dust, including opacity limitations. R307-309-4(1); R307-309-5(1). These limitations are applicable to the source. *E.g.* II.B.1.g, II.B.1.o, II.B.1.p, II.B.34.j, II.B.34.k, II.B.34.l. However, the proposed

permit does not include any monitoring requirements to ensure compliance with these emission limitations, much less monitoring requirements sufficient to show continuous compliance or "to yield reliable data from the relevant time period that are representative of the source's compliance with the permit[.]" R397-415-6a(3)(a)(ii). Similarly, as Rule 309 does not include any monitoring requirements to establish compliance with the opacity limitations, reference to the rule will not address the failings of the proposed permit to mandate sufficient monitoring.[3]

Nor does the proposed permit include reporting requirements sufficient to meet the requirements of Title V. Relative to reporting, the permit itself references only "Section I." This is not adequate for the reasons stated above. Section I includes no reporting requirements specific to the opacity limitations. Section I does not mandate reporting on **all required monitoring every six months**, and does not mandate that reporting of "instances of deviations from permit requirements must be clearly identified in such reports." R397-415-6a(3)(c)(i). Similarly, Rule 309 does not include any reporting requirements to establish compliance with the opacity limitations or any other rule conditions. Therefore, reference to the rule will not address the failings of the proposed permit to mandate sufficient reporting.

Incorporating by Reference

The Clean Air Act does not allow emission limits and operating requirements to be incorporated by reference into Title V permits. *In the Matter of the Premcor Refining Group* ("Premcor Order"), Order on Petition No. VI-2007-002 at 5-6 (May 28, 2009). Instead, such information must be listed on the Title V permit's face.

Some other kinds of information may be incorporated by reference into a Title V permit, so long as the following conditions are met:

> In order for incorporation by reference to be used in a way that fosters public participation and results in a title V permit that assures compliance with the Act, it is important that: (1) referenced documents be specifically identified; (2) descriptive information such as the title or number of the document and the date of the document be included so that there is no ambiguity as to which version of a document is being referenced; and (3) citations, cross references, and incorporations by reference are detailed enough that the manner in which any referenced material applies to a facility is clear and is not reasonably subject to misinterpretation

In the Matter of United States Steel Corp.—Granite City Works, Order on Petition No. V-2009-03 ("Granite City I Order") at 43-44 (January 31, 2011).

Under conditions II.B.1.g, II.B.34.l, II.B.34.n.1 and II.B.34.k, the proposed permit purports to incorporate a fugitive dust plan by reference. Similarly, as indicated above, the proposed permit

[3] Monitoring must be recorded and reported.

references Rule 309. However, the proposed permit does not meet the requirements for such references. First, the Clean Air Act does not allow emission limits and operating requirements to be incorporated by reference into Title V permits. Rule 309 and fugitive dust plans include emission limitations and operating requirements. R307-309.

Second, Rule 309 and fugitive dust plans are not specifically identified and the references are not detailed enough to allow public comment on or enforce the conditions and terms in the rule or that plan. The references do not allow the public to understand what conditions the permit imposes or what monitoring or recordkeeping requirements it provides. Therefore, the references are not sufficiently clear and are subject to misinterpretation and so improperly made.

Condition II.B.25

Condition II.B.25 requires continuous monitoring of PM_{10} emissions from SME 011. However, the permit also refers to annual stack testing to monitor this permit limit. We would appreciate clarification of this monitoring requirement.

Comment 8 references 40 CFR 63 Subpart EEEEEE. However, as indicated elsewhere, it appears that the permit's monitoring and reporting requirements are inadequate to meet Title V or 40 CFR 63 Subpart EEEEEE. Again, we would appreciate clarification of this point.

State-Only Requirements

Reference in the proposed permit to state only requirements is inappropriate. All provisions contained in an EPA-approved SIP and all terms and conditions in a permit issued under any SIP-approved permit program are already federally enforceable. *See* 40 CFR, section 52.23. The purported "state only" requirements are terms and conditions in permits issued under a SIP-approved permit program and/or an EPA-approved SIP. Moreover, all such terms and conditions are also federally enforceable "applicable requirements" that must be incorporated into the Federal side of a Title V permit. *See* Clean Air Act, section 504(a); 40 CFR, section 70.20.

Thank you for considering these comments. I welcome the opportunity to discuss these comments with you.

JORO WALKER, Esq.