BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Petition No. III-2022-10

In the Matter of

Delaware City Refining Company, LLC, Delaware City Refinery

Permit No. AQM-003/00016 - Parts 1-3

Issued by the Delaware Department of Natural Resources and Environmental Control

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ORDER GRANTING IN PART AND DENYING IN PART A PETITION FOR OBJECTION TO A TITLE V OPERATING PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated September 16, 2022 (the Petition) from Delaware Audobon Society, Delaware Concerned Residents for Environmental Justice, Environmental Justice Health Alliance for Chemical Policy Reform, the Widener Environmental and Natural Resources Law Clinic, Environmental Integrity Project, and Earthjustice (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to operating permit No. AQM-003/00016–Parts 1-3 (the Permit) issued by the Delaware Department of Natural Resources and Environmental Control (DNREC) to the Delaware City Refinery (the facility) in New Castle County, Delaware. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and 7 Del. Admin. C. § 1130. *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained in Section IV of this Order, EPA grants in part and denies in part the Petition requesting that the EPA Administrator object to the Permit. Specifically, EPA grants Claims II, a portion of III.B.ii, III.D, IV.A, and IV.B and denies the rest of the claims.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 766la(d)(1), requires each state to develop and submit to EPA an operating permit program to meet the requirements of title V of the CAA and EPA's implementing regulations at 40 C.F.R. part 70. The state of Delaware submitted a title V

program governing the issuance of operating permits on November 15, 1992. After several amendments to the program, EPA granted interim approval effective on January 3, 1996. Delaware subsequently submitted two program amendments in 2000. EPA granted full approval of Delaware's title V operating permit program in 2001; 66 Fed. Reg. 50321 (October 3, 2001). This program, which became effective on November 19, 2001, is codified in 7 Del. Admin. C. § 1130.

All major stationary sources of air pollution and certain other sources are required to apply for and operate in accordance with title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. 42 U.S.C. §§ 7661a(a), 7661b, 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* 42 U.S.C. § 7661c(c). One purpose of the title V program is to "enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." 57 Fed. Reg. at 32251. Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the source's emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements.

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(a) and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to EPA for review. 42 U.S.C. § 7661d(a). Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the proposed permit if EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of EPA's 45-day review period, petition the Administrator to object to the permit. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

Each petition must identify the proposed permit on which the petition is based and identify the petition claims. 40 C.F.R. § 70.12(a). Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under part 70. 40 C.F.R. § 70.12(a)(2). Any arguments or claims the petitioner wishes EPA to consider in support of each issue raised must generally be contained within the body of the petition.[1] *Id.*

[1] If reference is made to an attached document, the body of the petition must provide a specific citation to the referenced information, along with a description of how that information supports the claim. In determining whether to object, the Administrator will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. *Id*.

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); *see also* 40 C.F.R. § 70.12(a)(2)(v).

In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).[2] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to EPA.[3] The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).[4] When courts have reviewed EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g.*, *MacClarence*, 596 F.3d at 1130–31.[5] Certain aspects of the petitioner's demonstration burden are discussed in the following paragraph. A more detailed discussion can be found in the preamble to EPA's proposed petitions rule. *See* 81 Fed. Reg. 57822, 57829–31 (August 24, 2016); *see also In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether a petitioner has provided the relevant analyses and citations to support its claims. For each claim, the petitioner must identify (1) the specific grounds for an objection, citing to a specific permit term or condition where applicable; (2) the applicable requirement as defined in 40 C.F.R. § 70.2, or requirement under part 70, that is not met; and (3) an explanation of how the

[2] *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (*NYPIRG*).
[3] *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *cf. NYPIRG*, 321 F.3d at 333 n.11.
[4] *See also Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' . . . plainly mandates an objection *whenever* a petitioner demonstrates noncompliance." (emphasis added)).
[5] *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under part 70. 40 C.F.R. § 70.12(a)(2)(i)–(iii). If a petitioner does not identify these elements, EPA is left to work out the basis for the petitioner's objection, contrary to Congress's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.").[6] Relatedly, EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard. *See, e.g.*, *In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013).[7] Also, the failure to address a key element of a particular issue presents further grounds for EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g.*, *In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).[8]

Another factor EPA examines is whether the petitioner has addressed the state or local permitting authority's decision and reasoning contained in the permit record. 81 Fed. Reg. at 57832; *see Voigt v. EPA*, 46 F.4th 895, 901–02 (8th Cir. 2022); *MacClarence*, 596 F.3d at 1132–33.[9] This includes a requirement that petitioners address the permitting authority's final decision and final reasoning (including the state's response to comments) where these documents were available during the timeframe for filing the petition. 40 C.F.R. § 70.12(a)(2)(vi). Specifically, the petition must identify where the permitting authority responded to the public comment and explain how the permitting authority's response is inadequate to address (or does not address) the issue raised in the public comment. *Id*.

The information that EPA considers in determining whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. 40 C.F.R. § 70.13. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement

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[6] *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (September 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring); *In the Matter of Portland Generating Station*, Order on Petition at 7 (June 20, 2007) (*Portland Generating Station Order*).

[7] *See also Portland Generating Station Order* at 7 ("[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement]."); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (April 20, 2007); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007) (*Georgia Power Plants Order*); *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (March 15, 2005).

[8] *See also In the Matter of Hu Honua Bioenergy*, Order on Petition No. IX-2011-1 at 19–20 (February 7, 2014); *Georgia Power Plants Order* at 10.

[9] *See also, e.g.*, *Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. App'x *11, *15 (2d Cir. 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012) (denying a title V petition issue where petitioners did not respond to the state's explanation in response to comments or explain why the state erred or why the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *Georgia Power Plants Order* at 9–13 (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).

required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis'); any comments the permitting authority received during the public participation process on the draft permit; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; and all materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). *Id.* If a final permit and a statement of basis for the final permit are available during the agency's review of a petition on a proposed permit, those documents may also be considered when determining whether to grant or deny the petition. *Id*.

If EPA grants a title V petition, a permitting authority may address EPA's objection by, among other things, providing EPA with a revised permit. 42 U.S.C. § 7661d(b)(3), (c); 40 C.F.R. § 70.8(d); *see id*. § 70.7(g)(4); 70.8(c)(4); *see generally* 81 Fed. Reg. 57822, 57842 (August 24, 2016) (describing post-petition procedures); *Nucor II Order* at 14–15 (same). In some cases, the permitting authority's response to an EPA objection may not involve a revision to the permit terms and conditions themselves, but may instead involve revisions to the permit record. For example, when EPA has issued a title V objection on the ground that the permit record does not adequately support the permitting decision, it may be acceptable for the permitting authority to respond only by providing an additional rationale to support its permitting decision.

When the permitting authority revises a permit or permit record in order to resolve an EPA objection, it must go through the appropriate procedures for that revision. The permitting authority should determine whether its response is a minor modification or a significant modification to the title V permit, as described in 40 C.F.R. § 70.7(e)(2) and (4) or the corresponding regulations in the state's EPA-approved title V program. If the permitting authority determines that the modification is a significant modification, then the permitting authority must provide for notice and opportunity for public comment for the significant modification consistent with 40 C.F.R. § 70.7(h) or the state's corresponding regulations.

In any case, whether the permitting authority submits revised permit terms, a revised permit record, or other revisions to the permit, and regardless of the procedures used to make such revision, the permitting authority's response is generally treated as a new proposed permit for purposes of CAA § 505(b) and 40 C.F.R. § 70.8(c) and (d). *See Nucor II Order* at 14. As such, it would be subject to EPA's 45-day review per CAA § 505(b)(1) and 40 C.F.R. § 70.8(c), and an opportunity for the public to petition under CAA § 505(b)(2) and 40 C.F.R. § 70.8(d) if EPA does not object during its 45-day review period.

When a permitting authority responds to an EPA objection, it may choose to do so by modifying the permit terms or conditions or the permit record with respect to the specific deficiencies that EPA identified; permitting authorities need not address elements of the permit or the permit record that are unrelated to EPA's objection. As described in various title V petition orders, the scope of EPA's review (and accordingly, the appropriate scope of a petition) on such a response would be limited to the specific permit terms or conditions or elements of the permit record modified in that permit action. *See In The Matter of Hu Honua Bioenergy, LLC*, Order on Petition No. VI-2014-10 at 38–40 (September 14, 2016); *In the Matter of WPSC, Weston*, Order on Petition No. V-2006-4 at 5–6, 10 (December 19, 2007).

C. New Source Review

The major New Source Review (NSR) program is comprised of two core types of preconstruction permit requirements for major stationary sources. Part C of title I of the CAA establishes the Prevention of Significant Deterioration (PSD) program, which applies to new major stationary sources and major modifications of existing major stationary sources for pollutants for which an area is designated as attainment or unclassifiable for the national ambient air quality standards (NAAQS) and for other pollutants regulated under the CAA. 42 U.S.C. §§ 7470–7479. Part D of title I of the Act establishes the major nonattainment NSR (NNSR) program, which applies to new major stationary sources and major modifications of existing major stationary sources for those NAAQS pollutants for which an area is designated as nonattainment. 42 U.S.C. §§ 7501–7515. EPA has two largely identical sets of regulations implementing the PSD program. One set, found at 40 C.F.R. § 51.166, contains the requirements that state PSD programs must meet to be approved as part of a state implementation plan (SIP). The other set of regulations, found at 40 C.F.R. § 52.21, contains EPA's federal PSD program, which applies in areas without a SIP-approved PSD program. EPA's regulations specifying requirements for state NNSR programs are contained in 40 C.F.R. § 51.165.

While parts C and D of title I of the Act address the major NSR program for major sources, section 110(a)(2)(C) addresses the permitting program for new and modified minor sources and for minor modifications to major sources. EPA commonly refers to the latter program as the "minor NSR" program. States must also develop minor NSR programs to, along with the major source programs, attain and maintain the NAAQS. The federal requirements for state minor NSR programs are outlined in 40 C.F.R. §§ 51.160 through 51.164. These federal requirements for minor NSR programs are less prescriptive than those for major sources, and, as a result, there is a larger variation of requirements in EPA-approved state minor NSR programs than in major source programs.

EPA has approved Delaware's PSD, NNSR, and minor NSR programs as part of its SIP. *See* 40 C.F.R. § 52.420(c) (identifying EPA-approved regulations in the Delaware SIP). Delaware's major and minor NSR provisions, as incorporated into Delaware's EPA-approved SIP, are contained in portions of 7 Del. Admin. C. § 1102 and 1125.

III. BACKGROUND

A. The Delaware City Refinery

The Delaware City Refinery, owned by Delaware City Refining Company, LLC, is a petroleum refinery located in New Castle County, Delaware. The facility is a title V major source of nitrogen oxides (NOx), sulfur dioxide (SO_2), carbon monoxide (CO), hazardous air pollutants (HAPs), and volatile organic compounds (VOCs). Emission units within the facility are also subject to various New Source Performance Standards (NSPS), National Emission Standards for Hazardous Air Pollutants (NESHAP), and preconstruction permitting requirements.

EPA conducted an analysis using EPA's EJScreen[10] to assess key demographic and environmental indicators within a 5-kilometer radius of the Delaware City Refinery. This analysis showed a total population of approximately 12,304 residents, of which approximately 43 percent are people of color and 16 percent are low income. In addition, EPA reviewed the EJScreen Environmental Justice Indices, which combine certain demographic indicators with 12 environmental indicators. The table below outlines the Environmental Justice Indices for the one-mile radius surrounding the facility and their associated percentiles when compared to the rest of the State of Delaware.

EJ Indices	Percentile in State
Particulate Matter 2.5	56
Ozone	68
Diesel Particulate Matter	67
Air Toxics Cancer Risk	70
Air Toxics Respiratory HI	56
Traffic Proximity	57
Lead Paint	50
Superfund Proximity	70
RMP Facility Proximity	74
Hazardous Waste Proximity	61
Underground Storage Tanks	56
Wastewater Discharge	58

B. Permitting History

Delaware City Refining Company first obtained a title V permit for the Delaware City Refinery in 1996, which was subsequently renewed. On May 10, 2019, Delaware City Refinery Company submitted an application for a renewal title V permit. Delaware published notice of a draft permit on April 26. 2020, subject to a public comment period that initially ran until May 25, 2020 and was extended until July 31, 2020. On June 3, 2022, Delaware submitted the Proposed Permit, along with its responses to public comments (RTC), to EPA for its 45-day review. EPA's 45-day review period ended on July 18, 2022, during which time EPA did not object to the Proposed Permit. Delaware issued the final title V renewal permit for the Delaware City Refinery on August 18, 2022.

C. Timeliness of Petition

Pursuant to the CAA, if EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). EPA's 45-day review period expired on July 18, 2022. Thus, any petition seeking EPA's objection to the Proposed Permit was due on or

[10] EJScreen is an environmental justice mapping and screening tool that provides EPA with a nationally consistent dataset and approach for combining environmental and demographic indicators. *See https://www.epa.gov/ejscreen/what-ejscreen*.

before September 16, 2022. The Petition was dated September 16, 2022, and, therefore, EPA finds that the Petitioners timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Environmental Justice

Within Section I of the Grounds for Objection section of the Petition, the Petitioners discuss characteristics of the communities surrounding the Delaware City Refinery, describing them as including a "significant population of people of color and low-income residents, as well as a large number of community members who face increased vulnerability to health effects from air pollution due to their age (under 18 or over 65)." Petition at 4–5. The Petitioners describe the demographics of nearby residents living within a 5-mile and 3-mile radius of the facility as well as the magnitude of toxic air pollution, including hazardous air pollutants (HAPs) and volatile organic compounds (VOCs). *Id.* at 5–6. The Petitioners also note that EPA's Enforcement and Compliance Online (ECHO) website lists the facility as being in a status of "High Priority Violation" in each of the previous 12 quarters. *Id.* at 6. The Petitioners then cite to several cases where the Delaware City Refinery has caused large releases of air pollution, focusing on periods of startup, shutdown, and malfunction (SSM) as well as releases from the fluid coking unit (FCU) and fluidized catalytic cracking unit (FCCU). *Id.* at 6–7.

The Petitioners claim that "there is a compelling need for EPA to devote increased, focused attention to ensure that all title V requirements have been complied with." *Id.* at 7. The Petitioners note that EPA has recognized this need in responding to prior title V permit petitions, citing to several orders in which EPA gave "focused attention to the adequacy of monitoring…" *Id.* (quoting *In the Matter of United States Steel Corp. – Granite City Works*, Order on Petition No. V-2011-2 (Dec. 3, 2012) ("*US Steel II Order*") at 4–6; *Order Granting Petitions for Objection to Permits, In the Matter of ExxonMobil Fuels & Lubricant Company, Baton Rouge Refinery, Reforming Complex and Utilities Unit*, Petition Nos. VI-2020-4, VI-2020-6, VI-2021-1, VI-2021-2 (March 18, 2022) at 11–12; and *Order Granting in Part and Denying in Part a Petition for Objection to Permit, In the Matter of Valero Refining-Texas, L.P., Valero Houston Refinery*, Petition No. VI2021-8 ("*Valero Houston Order*") (June 30, 2022) at 9–11). The Petitioners further assert that the environmental justice concerns are also heightened as the Delaware City Refinery emits hundreds of tons per year of ozone-precursors, in an area currently designated nonattainment for the 1979, 2008, and 2015 ozone National Ambient Air Quality Standard (NAAQS). *Id.* at 8.

As stated in previous orders on title V permit petitions, EPA appreciates and takes seriously the Petitioners' concerns regarding the potential impacts of emissions from the Delaware City Refinery on communities living near the facility, and the Petitioners' desire that the facility's title V permits contain sufficient provisions to assure compliance with all applicable requirements. EPA is committed to advancing environmental justice and incorporating equity considerations into all aspects of our work. As EPA has previously explained:

> Executive Order 12898, signed by President Clinton on February 11, 1994, focuses federal attention on the environmental and human health conditions of minority

> populations and low-income populations with the goal of achieving environmental protection for all communities. Executive Order (EO) 12898 also is intended to promote non-discrimination in federal programs substantially affecting human health and the environment, and to provide minority and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment. It generally directs federal agencies to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations. Attention to environmental justice in the implementation of federal environmental programs is a priority for EPA. *See generally*, Office of Environmental Justice Plan EJ 2014 (September 2011) (outlining EPA's efforts to promote environmental justice and identifying environmental justice and permitting as a focus area). Environmental justice issues can be raised and considered in the context of a variety of actions carried out under the Act. Title V generally does not impose new, substantive emission control requirements, but provides for a public and governmental review process and requires title V permits to assure compliance with all underlying applicable requirements. *See, e.g., In the Matter of Marcal Paper Mills,* Petition No. II-2006-01 (Order on Petition) (November 30, 2006), at 12. Title V can help promote environmental justice through its underlying public participation requirements and through the requirements for monitoring, compliance certification, reporting and other measures intended to assure compliance with applicable requirements.

US Steel II Order at 5.[11]

EPA has thoroughly reviewed and evaluated the Petition, giving focused attention to the adequacy of monitoring (as well as other concerns raised by the Petitioners). As explained in the following sections, EPA is granting the Petition where the Petitioners have demonstrated that the Permit fails to assure compliance with applicable requirements.

Claim II: The Petitioners Claim That "DNREC Violated Public Participation Requirements by Failing to Provide an Adequate Public Hearing and Respond to Significant Comments."

Petitioners' Claim: The Petitioners claim that despite submitting multiple comments and requests for a public hearing, DNREC did not allow the public to speak or present comments orally at a virtual public hearing on July 14, 2020. Petition at 8–9. The Petitioners claim that representatives of both DNREC and the facility gave presentations during the public hearing and the Hearing Officer repeatedly informed the public that "there will be no Q and A or live chat sessions permitted during the hearing tonight, nor will there be any real-time comments accepted on this virtual platform during the course of tonight's proceedings." Petition at 9 (citing Transcript of July 14, 2020 Meeting at 5, 8). The Petitioners assert that the lack of true public participation violates the CAA and its implementing regulations, specifically citing 42 U.S.C. §

[11] More recently, Executive Orders 13990 and 14008, signed by President Biden on January 20, 2021, and January 27, 2011, respectively, affirm the federal government's commitment to environmental justice.

7661(a)(b)(6) and 40 C.F.R. 70.7(h), which the Petitioners claim require a permitting authority provide the opportunity for public comment *and* a hearing. *Id.* The Petitioners add that the virtual format of the meeting provided no excuse for DNREC to not accept public oral comments, referencing to New Jersey, Texas, and EPA conducting virtual public hearings where the public can orally participate. Petition at 10–11. The Petitioners also claim that DNREC violated its own implementing regulations at 7 Del. Admin. C. § 1102-12.2.4, which require providing the opportunity for a public hearing that allows "interested persons to appear and submit written or oral comment."[12] Petition at 11.

The Petitioners claim that they submitted multiple comments raising their concerns with DNREC's refusal to allow live oral comments during the public hearing, asserting that DNREC never responded to these comments. *Id.* at 12. The Petitioners contend that in the Technical Response Memorandum (referred to from here as the Response to Comment or RTC), DNREC explained that the document would only respond to "technical" comment and that because the comments were "administrative concerns," they would be addressed in the Hearing Officer's Report and Secretary's Order. *Id* (citing RTC at 23). The Petitioners claim that neither the Hearing Officer's Report nor the Secretary's Order mention or respond to the comments raising concerns over the public hearing. *Id.* The Petitioners contend that the lack of response to comment violates 40 C.F.R. § 70.7(h)(6), which requires a permitting authority to "respond in writing to all significant comments raised during the public participation process, including any such written comments submitted during the public comment period and any such comments raised during any public hearing on the permit." *Id.* at 13.

The Petitioners assert that the permitting authority's response to significant comments must also adequately explain the basis of its decision and that an adequate RTC document should describe and clarify the rationale for its response to a significant comment.[13] *Id.* The Petitioners also claim that EPA has clarified what types of comments qualify as significant and the comments requesting an adequate hearing and "expressing concern over the refusal of DNREC to allow oral comments by the public clearly qualify as significant." *Id.* at 14. The Petitioners cite *In the Matter of UOP, L.L.C.,* Order on Petition No. IV-2021-6 (Apr. 27, 2008) at 23, claiming that EPA granted the petition because the permitting authority failed to respond to comments about its statement of basis. *Id.* The Petitioners conclude that because the comments regarding the adequacy of the public hearing are significant, and because DNREC did not respond to these comments or provide rationale for its decision to disallow public oral comments, DNREC failed to comply with the procedural requirements of the Clean Air Act. *Id.* at 14–15.

EPA's Response: For the following reasons, grants the Petitioners' request for an objection on this claim.

The Petitioners have demonstrated that the record is inadequate to explain DNREC's rationale for not allowing public presentation of written or oral public comments during the virtual public hearing held on July 14, 2020. Additionally, DNREC did not adequately respond to public comments raising these concerns. In its response to comment, DNREC stated:

[12] The Petitioners also cite 7 Del. Admin. C. § 1102-12.2.4, § 7.10.2, and § 7.10.3.
[13] The Petitioners cite *In the Matter of Consolidated Edison Company Hudson Avenue Generating Station,* Order on Petition No. II-2002-10 (Sept. 30, 2003) at 8.

> Comments submitted regarding the format of the public hearing and its exclusion of live oral comments during the hearing are administrative concerns and are not technical in nature and will not be addressed in this Technical Response Memorandum prepared by AQ. Instead, this and other administrative concerns, as appropriate, will be addressed in the Hearing Officer's Report and Secretary's Order.

RTC at 23–24.

However, as the Petitioners note, the Hearing Officer's Report and Secretary's Order do not mention or respond to the comments regarding the format of the public hearing and the exclusion of live oral comments. DNREC has failed to adequately respond to significant public comments as required by 40 C.F.R. 70.8(a)(1). Well-established principles of administrative law provide that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments.[14] EPA has long required permitting authorities to respond to significant comments[15] and in 2020 the Agency codified this principle in 40 C.F.R. 70.8(a)(1), requiring states to provide a response to all significant comments to EPA with the proposed permit.[16] Here, DNREC acknowledged the comment made by the Petitioners in the RTC and asserted that the comments would be addressed in a separate part of the permit record. However, DNREC ultimately did not respond to the Petitioners' comments, therefore not satisfying the requirements of 40 C.F.R. 70.8(a)(1).

EPA disagrees with the Petitioners in their assertion that DNREC violated its implementing regulations at 7 Del. Admin. C. § 1102-12.2.4. While the Petitioners correctly claim that the regulation provides the opportunity for a public hearing that allows "interested persons to appear and submit written or oral comment," 7 Del. Admin. C. § 1102 applies to construction permits, not title V operating permits.[17] The Petitioners also cite § 7.10.2 and 7.10.3, which are found in 7 Del. Admin. C. § 1130, the implementing regulations for title V operating permits. 7 Del. Admin. C § 1130-7.10.5 states that "[t]he Department may limit participation at the public hearing to issues raised in written comments submitted during the public comment period. The

[14] *See, e.g., Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) ("[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.").
[15] *See generally In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC,* Petition No. 11-2000-07, Order on Petition No. II-2000-07 (May 2, 2001) (applying the concepts of meaningful public participation and logical outgrowth to title V); *In the Matter of Murphy Oil USA, Inc., Meraux Refinery*, Petition No. 2500-00001-V5, Order on Petition No. VI-2011-02 (Sept. 21, 2011) (discussing a response to significant comments as "an inherent component of any meaningful notice and opportunity for comment."); *see also In the Matter of Blanchard Refining Company, Galveston Bay Refinery*, Order on Petition No. VI-2017-7 at 35 (August 9, 2021).
[16] *See* 85 Fed. Reg. at 6439–40 (discussing EPA's historical implementation of this principle, its new regulations codifying this requirement, and providing guidance on what constitutes a "significant comment").
[17] "This regulation establishes the procedures that satisfy the requirement of 7 Del.C. Ch. 60 to report and obtain approval of equipment which has the potential to discharge air contaminants into the atmosphere, and, for construction or modification activities not subject to 7 DE Admin. Code 1125, the procedures that satisfy the requirement of 40 CFR Part 51 Subpart I (July 7, 1994 edition) and Section 110(a)(2)(C) of the federal clean air act (CAA) as amended November 15, 1990." 7 Del. Admin. C. § 1102-1.1.

officer conducting the hearing may, as appropriate, *impose additional limitations*, including time restrictions."

Direction to DNREC: DNREC must adequately respond to the significant comments regarding its reasoning for not allowing public presentation of written or oral public comments during the virtual public hearing held on July 14, 2020. In some circumstances, it could be reasonable for DNREC to justify imposing limitations on a public hearing for a title V operating permit; however, in this case, DNREC should, at a minimum, revise the response to comments or amend the Hearing Officer Report or Secretary's Order to provide that justification.

Claim III: The Proposed Permit Contains Unlawful Loopholes for SSM Periods

In Claim III, the Petitioners raise several distinct subclaims regarding their assertion that the Permit contains unlawful loopholes that relax federally enforceable limits during SSM periods. Petition at 15. However, EPA notes that Section III.C of the Petition does not contain a separate claim, but instead provides background and justification for the assertion that EPA cannot refuse to address these alleged SSM loopholes because they were incorporated from underlying NSR permits. The Petitioners contend that despite EPA taking the position that unlawfully inflated NSR limits for SSM periods cannot be addressed through title V permitting, EPA cannot possibly employ this policy to refuse to address the effect of the SSM loopholes on EPA-established NESHAP, SIP limits, minor NSR limits, or consent decree limits.[18] Petition at 31. The Petitioners also cite to the *Valero Houston Order*, claiming that EPA correctly addressed the petitioners' argument that SSM loopholes there (incorporated from an underlying NSR permit) also affected applicable NESHAP and NSPS. *Id* at 34 (citing *Valero Houston Order* at 67).

Claim III.A: The Petitioners Claim That "The Proposed Permit Unlawfully Gives DNREC Discretion to Excuse Noncompliance During Periods of Unplanned Shutdowns of the FCU and FCCU and Unplanned Shutdown or Bypass of Their Controls."

Petitioners' Claim: The Petitioners claim that the proposed title V permit contains "director's discretion" provisions that were incorporated from an underlying NSR construction permit for the FCU and FCCU. Petition at 15–16. The Petitioner asserts that these provisions "unlawfully allow DNREC to excuse noncompliance with multiple federally enforceable limits during periods of unplanned shutdown of the refinery's FCU and FCCU and during unplanned

[18] The Petitioners assert that in reaching the conclusion that challenges to the validity of decisions regarding an NSR permit should have been raised through that NSR permitting process or through an enforcement action, EPA relied primarily on two previous title V orders—*In the Matter of Big River Steel, LLC,* Order on Petition No. VI-2013-10 ("*Big River Steel Order*") (October 31, 2017) and *In the Matter of Exxon Mobil Corporation, Baytown Olefins Plant*, Order on Petition No. VI-2016-12 ("*Exxon Baytown Olefins Order*") (March 1, 2018)—and the Fifth Circuit's decision upholding the second of those orders, *Environmental Integrity Project v. EPA*, 969 F.3d 529 (5th Cir. 2020). Petition at 32. The Petitioners also reference the title V order *In the Matter of PacifiCorp Energy Hunter Power Plant*, Order on Petition No. VIII-2016-4 ("*Hunter Order*") (Oct. 16, 2017). *Id.* The Petitioners contend that the decisions all turned on EPA's interpretation of the term "applicable requirement," found in 40 C.F.R. § 70.2. *Id.* at 33.

shutdown and bypass of these units' pollution controls." *Id.* at 16. The Petitioners cite two permit conditions that state:

> This Permit does not authorize emissions exceeding the limits set forth in Condition 3 - Table 1.da.2 through da.10 including emissions during periods of any unplanned shutdown of the FCU, or any unplanned shutdown or bypass of the FCU COB or the Belco prescrubber or WGS. Instead, in the event of any unplanned shutdown of the FCU or any unplanned shutdown or bypass of the FCU COB or Belco prescrubber or the WGS, the Owner/Operator shall bear the burden of demonstrating to the Department's satisfaction that the Owner/Operator's continued operation of the FCU should not subject the Owner/Operator to an enforcement action for noncompliance with emission limitations or operating standards included in this Permit or otherwise applicable to the facility under the State of Delaware "Regulations Governing the Control of Air Pollution." Such demonstration must at a minimum be supported by sufficient documentation and emissions data including all relevant emissions calculations, formulas, and any assumptions made thereof. The Department's evaluation shall consider, the specific circumstances of the event, including without limitation 1) the cause of, and the Owner/Operator's response to, the unplanned shutdown; 2) whether the Owner/Operator has taken all reasonable and prudent steps to abide by the emissions limit conditions; 3) whether the Owner/Operator has taken all reasonable and prudent steps to minimize the emissions associated with the plant; 4) the degree to which the Owner/Operator has reduced throughput to the FCU, and the basis for such degree of reduction; 5) the estimated emissions associated with a complete shutdown of the FCU; 6) whether the Owner/Operator has reviewed all prior similar causes of unplanned shutdowns and had taken all reasonable and prudent actions necessary to avoid future similar outages; and 7) the actual emissions during the period of the unplanned shutdown.

Permit Condition 3 – Table 1, Part 2(da)(1)(i)(H).

The Permit contains a similar provision for the FCCU in Permit Condition 3 – Table 1, Part 2(e)(1)(i)(J).

The Petitioner claims that with these provisions DNREC can excuse noncompliance with minor NSR limits, SIP limits, NESHAP limits, and limits from a 2001 consent decree.[19] Petition at 16. The Petitioners assert that these limits and standards are applicable requirements with which the title V permit must assure compliance with, citing 40 C.F.R. § 70.2 (defining an applicable requirement). *Id.* The Petitioners claim that with the exception of one of the minor NSR limits (which contains a limited exemption for startup periods) all of the affected limits apply

[19] As explained at the beginning of Claim III, Section III.C of the Petition provides background and justification for the Petitioners' assertion that EPA cannot refuse to address these SSM loopholes because they were incorporated from underlying NSR permits. The Petitioners contend that despite EPA taking the position that unlawfully inflated NSR limits for SSM periods cannot be addressed through title V permitting, EPA cannot possibly employ this policy to refuse to address the effect of the SSM loopholes on EPA-established NESHAP, SIP limits, minor NSR limits, or consent decree limits.

continuously. Therefore, because the permit incorporates these provisions that excuse noncompliance with applicable requirements, the title V permit fails to ensure compliance with the affected federally enforceable limits and violates 40 C.F.R. §§ 70.1(b), 70.6(a)(1), and 70.7(a)(1)(iv) and 42 U.S.C. § 7661c(a). *Id.*

The Petitioners identify three reasons that the director's discretion provisions are unlawful and render the title V permit unable to ensure compliance with the affected limits.

First, the Petitioners claim that with respect to the affected SIP and NESHAP limits, the director's discretion provisions "violate the clear Clean Air Act requirement that these emission limits and standards apply continuously, not only during some periods of time." *Id.* at 19 (citing 42 U.S.C. § 7602(k)).[20] The Petitioners contend that despite the Clean Air Act requiring that SIP emission limits and NESHAP standards apply continuously, the director's discretion provisions allow the affected SIP and NESHAP limits and standards to apply only periodically. *Id.* The Petitioners claim that this position was confirmed in the 2008 *Sierra Club v. EPA* D.C. Circuit decision,[21] contending that the court held that "the requirement for "continuous" emission limits and standards means that "temporary, periodic, or limited systems of control" do not comply with the Act. *Id* (quoting *Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008)). The Petitioners also point to EPA's 2015 SSM SIP Call,[22] claiming it recognized that, in the context of SIPs, director's discretion provisions are unlawful because they result in there not being continuous limits in place. *Id.* In addition to the SIP and NESHAP limits, the Petitioners note that except for the FCCU's CO minor NSR limit, all the minor NSR and consent decree limits for the FCU and FCCU also apply continuously, and the director's discretion provisions would give DNREC the discretion to allow the NSR and consent decree limits to apply only some of the time. *Id.* at 20.

Second, the Petitioners assert that the director's discretion provisions are unlawful as they would purport to allow DNREC to alter—on an *ad hoc* basis—the SIP and NESHAP limits through a process contrary to the Clean Air Act's process for establishing and revising these limits. *Id.* For the SIP limits, the Petitioners reference 42 U.S.C. § 7410(i) to argue that revision to SIP provisions may only take place through specified routes such as the formal SIP revision process, not through director's discretion provisions from minor NSR permits. *Id.* The Petitioners also claim that the 2015 SSM SIP Call addressed director's discretion provisions, in that they "functionally could allow *de facto* revisions of the approved emission limitations required by the SIP without complying with the process for SIP revisions required by the [Clean Air Act]." *Id* (citing 80 Fed. Reg. 33840, 33928 (June 12, 2015)). Regarding the NESHAP limits, the Petitioner claim that only EPA—not DNREC—can establish or revise these limits, citing 42 U.S.C. §§ 7412(d)(1), (d)(6), (l)(1), and 7602(a). Lastly, the Petitioners contend that only the parties or federal court—not DNREC alone—can alter a federal consent decree, such as the 2001

[20] The Petitioners also cite 42 U.S.C. § 7410(a)(2)(A) (requiring SIPs to include enforceable "emission limitations"), 42 U.S.C. § 7412(d)(1)-(2) (requiring EPA to promulgate regulations establishing NESHAP "emission standards"), and 42 U.S.C. § 7661(c)(a) (providing that each title V permit "shall include enforceable emission limitations and standards"). Petition at 19.
[21] *Sierra Club v. EPA,* 551 F.3d 1019, 1027 (D.C. Cir. 2008).
[22] Petitioners cite 80 Fed. Reg. at 33927.

consent decree between EPA and Motiva, which established certain SO_2 limits for the FCU and FCCU. *Id.* at 21.

Third, the Petitioners claim that the director's discretion provisions contravene the Clean Air Act and title V regulations by "allowing DNREC to remove the ability of the public and EPA to enforce violations of the affected limits" during periods of unplanned shutdown or bypass of pollution controls for the FCU and FCCU. *Id.* The Petitioners assert that title V permits must include "enforceable" emission limitations and standards and, similarly, SIP emission limitations in SIPs must be "enforceable." *Id* (citing 42 U.S.C. §§ 7661c(a) and 7410(a)(2)(A)). Additionally, the Petitioners point to 40 C.F.R. § 70.6(b)(1) which they claim provides that, except for those terms specifically marked as state-only, "[a]ll terms and conditions in a part 70 permit … are enforceable by [EPA] and citizens under the Act." *Id.* The Petitioners claim that the emission limitations and standards subject to director's discretion provisions violate both Congress's instruction that citizens may enforce emissions limitations and standards and the requirement that title V permits contain "enforceable" emission limitations and standards. *Id.* at 22. The Petitioners contend that these provisions "block enforcement unless citizens can somehow prove DNREC's decision to excuse a violation was unlawful." *Id.* Lastly, the Petitioners cite to the 2015 SSM SIP call, asserting that EPA acknowledged that director's discretion provisions "are inconsistent with and undermine the enforcement structure of the [Act] . . . which provide[s] independent authority to the EPA and citizens to enforce SIP provisions, including emission limitations." *Id* (citing 80 Fed. Reg. at 33929).

The Petitioners claim that in its response to comments, DNREC states that the director's discretion provisions do not "administratively determine that an occurrence of excess emissions is not a violation," that DNREC is allowed to use enforcement discretion, and that the provisions follow EPA's SSM policy. *Id.* at 23. The Petitioners contend that these provisions, on their face, give DNREC the ability to shield the facility from enforcement by EPA and the public, and while DNREC always has enforcement discretion, there is no reason that discretion needs to be addressed in the Permit. *Id.* at 23–24. The Petitioners acknowledge DNREC's RTC that stated the "conditions explicitly identify failure to meet the limits as noncompliance" and that the Permit states that the terms and conditions of the permit are enforceable by DNREC and EPA unless designated as "state enforceable only." *Id.* at 24. However, the Petitioners argue that the director's discretion provisions specifically provide that "*Instead,* in the event of any unplanned shutdown of the [units] or any unplanned shutdown or bypass of the [units' controls], the Owner/Operator shall bear the burden of demonstrating to the Department's satisfaction that the Owner/Operator's continued operation of the [units] *should not subject the Owner/Operator to an enforcement action for noncompliance*." *Id.*

The Petitioners argue that, at best, the director's discretion provisions are ambiguous as to whether DNREC could shield the refinery from enforcement action by EPA or citizens, and that EPA has recognized such ambiguity renders one of these provisions unlawful, again pointing to EPA's 2015 SSM SIP call. *Id.* The Petitioners reference a SIP call in Utah, where EPA required Utah to remove an ambiguous director's discretion provision from its SIP, claiming that the director's discretion provision in this case is similarly ambiguous. *Id.* The Petitioners claim that while DNREC argues that the "conditions remain enforceable because they place the burden on the facility to demonstrate to the Department's satisfaction…that it has responded appropriately,"

this proves that the provisions allow DNREC to make a determination and possibly preclude citizens or EPA from enforcing. *Id.* (quoting RTC at 10 and 36).

EPA's Response: For the following reasons, EPA denies the Petitioners' request for an objection on this claim.

2015 SSM SIP Call

On June 12, 2015, EPA took final action on a petition for rulemaking where it clarified, restated, and revised its guidance concerning the interpretation of CAA requirements with respect to treatment of excess emissions during periods of SSM in SIPs.[23] In that action EPA expressed that exemptions for excess emissions during periods of SSM were inconsistent with the CAA. EPA also expressed that "[w]hile automatic exemptions and director's discretion exemptions from otherwise applicable emission limitations are not consistent with the CAA, SIPs may include criteria and procedures for the use of enforcement discretion by air agency personnel."[24] EPA applied these interpretations to issue a SIP call for specific provisions in the SIPs of a number of states, in some cases closely reading provisions and their context to discern whether the provision was in fact "an exemption, a statement regarding exercise of enforcement discretion by the air agency or an affirmative defense."[25] EPA found that many SIP provisions were not permissible under the CAA; however, in some cases EPA found that was not the case.

EPA's Analysis

In addressing the Petitioners' claim that EPA cannot possibly employ the policy of refusing to address the effect of the SSM loopholes on various EPA-established NESHAP, SIP limits, minor NSR limits, or consent decree limits, EPA recognizes that permit conditions could affect these limits. To the extent that this SSM provision (established in an underlying NSR permit) affects the NSR-based limits (also established in that NSR permit), EPA will not review those issues. *See Valero Houston Order* at 65–66.[26] However, to the extent that these provisions affect other

[23] 80 Fed. Reg. 33840
[24] *Id.* at 33844.
[25] *Id.*
[26] "[W]here the EPA has approved a state's title I permitting program (whether PSD, NNSR, or minor NSR), duly issued preconstruction permits will establish the NSR-related 'applicable requirements' for the purposes of title V, and the terms and conditions of such permits should be incorporated into the Title V permit without further review by EPA. *See generally Exxon Baytown Olefins Order; Big River Steel Order."* Here, the provisions that Petitioners challenge are terms of NSR Permits APC-81/0829(A8) and APC-82/0981(A12). These permits were issued pursuant to procedures approved by the EPA under title I of the CAA, specifically, the NSR permitting regulations in 7 Del. Admin. C. § 1102. The Petitioners do not contest that Permits APC-81/0829(A8) and APC-82/0981(A12) were title I (NSR) permits duly issued under DNREC's EPA-approved regulations. This permitting action would also have been subject to judicial review through the state court system. See 7 Del. C. c. 60 § 6008- 6009; 29 Del. C. c. 101 § 10141–10145. Those title I-based procedures were the appropriate venue for raising the Petitioners' concerns with the provisions established in NSR Permits APC-81/0829(A8) and APC-82/0981(A12). The Petitioners have not presented any evidence to suggest that they were somehow precluded from participating in the title I permitting procedures, nor do they offer any argument as to why, given their concerns about the terms of NSR Permits APC-81/0829(A8) and APC-82/0981(A12), they did not attempt to challenge them when they were issued. The Petitioners may not now use this title V petition to raise legal concerns over NSR Permits APC-81/0829(A8) and APC-82/0981(A12) that should have been raised at the time the permits were issued in the NSR permitting process.

non-NSR limits, such as the NSPS, NESHAP, SIP and consent decree limits, EPA will review the issues.

The Petitioners have not demonstrated that the cited permit conditions allow DNREC to excuse noncompliance with federally enforceable limits during periods of unplanned shutdown of the refinery's FCU and FCCU and during unplanned shutdown and bypass of these units' pollution controls. EPA understands the permit conditions to provide DNREC with enforcement discretion (discretion it has at all times) during periods of startup and shutdown, without limiting its ability to enforce in any way.

First, with regard to the Petitioners' claim that the Clean Air Act requires that these emission limits and standards apply continuously, since the permit conditions in question do not excuse noncompliance with standards, EPA finds that the Petitioners have not demonstrated that the referenced emission limits and standards do not apply continuously.

Second, the Petitioners have not demonstrated that the permit conditions allow DNREC to alter—on an *ad hoc* basis—SIP and NESHAP limits. EPA understands the permit conditions to not alter the applicability of any emission limits; nor do they allow for the alteration or *de facto* revision of emission limits, contrary to the language the Petitioners cited from the 2015 SSM SIP Call. The permit conditions in question recognize excess emissions as violations and do not automatically excuse noncompliance with emission limits.

Third, the Petitioners have not demonstrated that language within Permit Condition 3 – Table 1, Part 2(da)(1)(i)(H) and Permit Condition 3 – Table 1, Part 2(e)(1)(i)(J)—including the statement that "continued operation of the [units] should not subject the Owner/Operator to an enforcement action for noncompliance"—would prevent EPA or citizens from enforcing noncompliance with the relevant limits. On its face, this permit term references a determination by DNREC regarding its own enforcement activities and does not expressly preclude or interfere with enforcement by other parties. The Petitioners have not demonstrated that this provision could shield the refinery from enforcement actions by EPA or citizens. Notably, DNREC's RTC also explained:

> The permit states this explicitly in Condition 2.b.10 which states "All terms and conditions of this permit are enforceable by the Department and by the U.S. Environmental Protection Agency ("EPA") unless specifically designated as "State Enforceable Only". This permit condition references Regulation 1130 Section 6.2.1 which further states that "…all terms and conditions in a permit issued under 6.0 of this regulation…are enforceable by the Department, by EPA, and by citizens under section 304 of the Act."

RTC at 10–11.

This refutes the Petitioners' assertion that DNREC could shield the refinery from enforcement action by EPA or citizens, as the permit conditions in question do not administratively determine that an occurrence of excess emissions is not a violation, and the permit explicitly states that the conditions are enforceable by DNREC, EPA, and citizens. This is in contrast to statements made in the 2015 SSM SIP Call, in which EPA explained that SIP provisions that allowed state

personnel to decide "unilaterally and without meaningful limitations that what would otherwise be a violation of the applicable emission limitation is instead exempt" would be problematic[27] Here, again, the provisions in question do not excuse excess emissions, but rather give DNREC the discretion to enforce in instances of violations of the applicable emission limits during periods of SSM.

Claim III.B: The Petitioners Claim That "The Proposed Permit Unlawfully Relaxes 40 C.F.R. Part 63, Subpart UUU Standards Applicable to the FCCU During Planned Startups and Shutdowns and When the FCCU's CO Boiler is Combusting Only Refinery Fuel Gas."

The Petitioners claim that the Permit provides the FCCU with either an unlawful exemption from, or unlawful alternative to, the applicable NESHAP requirements from subpart UUU during planned startup and shutdown and when the FCCU's CO boiler is combusting only refinery fuel gas. Petition at 25 and 29.

Claim III.B.i: The Petitioners Claim That "During planned startups and shutdowns, the permit provides the FCCU with either an unlawful exemption from—or an unlawful alternative to—the Subpart UUU standards for metallic HAPs."

Petitioners' Claim: The Petitioners claim that while Permit Condition 3 – Table 1, Part 2(e)(9) lists the applicable requirements for HAPs and provides that the FCCU "shall comply with all the applicable requirements" of subpart UUU, the Permit fails to specify what metallic HAP limit(s) from subpart UUU apply to the FCCU. *Id.* at 26. The Petitioners specify that subpart UUU lists certain metallic HAP limits that apply to FCCUs during non-startup and non-shutdown periods, including 1.0 lb PM/1,000 lb of coke burn-off and an opacity limit of 30 percent. *Id* at 26 (citing 40 C.F.R. § 63.1564(a)(1); 40 C.F.R. Part 63, Subpart UUU, Table 1). The Petitioners contend that while these limits are not reflected in the Permit, subpart UUU also provides that during periods of startup, shutdown, and hot standby, FCCUs can comply with the standards that apply at all other times or elect to alternative operating parameters. *Id.* at 26–27. In this case, the Petitioners claim that FCCUs can elect to maintain inlet velocity to the primary internal cyclones of the FCCU catalyst regenerator at or above 20 feet per second. *Id.* at 27 (citing 40 C.F.R. §63.1564(a)(5)).

[27] In the 2015 SSM SIP Call, EPA stated: "Another category of problematic SIP provision identified by the Petitioner is exemptions for excess emissions that, while not automatic, are exemptions for such emissions granted at the discretion of state regulatory personnel. In some cases, the SIP provision in question may provide some minimal degree of process and some parameters for the granting of such discretionary exemptions, but the typical provision at issue allows state personnel to decide unilaterally and without meaningful limitations that what would otherwise be a violation of the applicable emission limitation is instead exempt. Because the state personnel have the authority to decide that the excess emissions at issue are not a violation of the applicable emission limitation, such a decision would transform the violation into a nonviolation, thereby barring enforcement by the EPA or others." 80 Fed. Reg. 33957.

The Petitioners cite Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H), which states in relevant part:

> The short-term Emission Standards in Condition 3 - Table 1.e.4.i.B, e.5, e.6, e.8, and e.9 below, shall not apply during periods when the FCCU COB is combusting refinery fuel gas only and during periods of planned shut downs and planned start ups of the FCCU for a period of time not to exceed 80 hours for each planned shut down and each planned start up event. The planned shut down period shall begin 8 hours prior to the time when there is no feed entering the FCCU reaction section. The planned start up period shall begin when dry-out of the FCCU is commenced. The Emission Standards in Condition 3 – Table 1.e.2 through e.9 shall apply to each planned start up event after the expiration of the 80 hour period following commencement of FCCU dry-out. In lieu of the Emission Standards, the following emission limitations shall apply during planned start ups and shut downs of the FCCU:
>
> . . . 2. PM – 500 lbs/hr . . . .

The Petitioners claim that the quoted permit language provides an exemption, or an alternative to the subpart UUU metallic HAP standards that apply during startup and shutdown. *Id.* at 27. The Petitioners assert that the affected, applicable standards for metallic HAPs from subpart UUU do not contain an exemption or an alternative limit and that the subpart UUU standards are applicable requirements that the refinery's title V permit must assure compliance with. *Id.* at 25–26. The Petitioners note that subpart UUU generally uses PM as a surrogate for metallic HAPs from FCCUs and the provision cited also lists a PM limit of 500 lbs/hr that applies "during planned start ups and shut downs of the FCCU" "[i]n lieu of the Emissions Standards" for non-startup and non-shutdown periods. *Id.* at 27. The Petitioners contend that because of this exemption, the permit fails to ensure compliance with the applicable metallic HAP standards from subpart UUU, violating 40 C.F.R. §§ 70.1(b), 70.6(a)(1), and 70(a)(1)(iv) and 42 U.S.C. § 7661c(a). *Id*.

The Petitioners expand on their argument that the provision is unlawful and renders the title V permit unable to ensure compliance with subpart UUU, providing three reasons:

First, the Petitioners claim that to the extent the provision provides an exemption to the otherwise applicable NESHAP, it violates the Clean Air Act requirement that emission standards apply continuously, not only during some periods of time.[28] *Id.* at 27–28. Second, the Petitioner argues that the provision alters the applicable NESHAP through a process contrary to the Clean Air

[28] The Petitioners cite 42 U.S.C. § 7602(k) (defining "emission standard" as a "requirement…which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis*, including any requirement relating to the operation or maintenance of a source to assure *continuous emission reduction*, and any design, equipment, work practice or operational standard promulgated under this chapter").

Act's process for establishing and revising said standards.[29] *Id.* at 28. Third, the Petitioners claim that the provision contravenes the Clean Air Act and title V regulations by "removing the ability of the public and EPA to enforce violations of the otherwise applicable NESHAP for metallic HAPs during periods of planned startup and shutdown." *Id.* The Petitioners contend that DNREC's response to comment was not sufficient, as the Petitioners claim DNREC states "Commenters have not identified any applicable…NESHAP limit that is affected by the startup/shutdown conditions and has [sic] not shown the ability for EPA or the public to enforce any…federal requirement has been affected." *Id.* (citing RTC at 20).

EPA's Response: For the following reasons, EPA denies the Petitioners' request for an objection on this claim. The Petitioners have failed to demonstrate the allegedly missing limits are, in fact, missing and are subject to the exemptions provided in Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H).

The first limit that the Petitioners assert is not reflected in the Permit is 1.0 lb PM/1,000 lb of coke burn-off. This limit does appear, however, in Permit Condition 3, Table 1, Part 2(e)(2a)(i)(B), as this condition states "Particulate Matter (TSP/PM_{10}) emissions from the WGS + system shall not exceed 1lb/1000 lb of coke burned and 203 TPY." Permit at 214. Not only is the limit reflected in the Permit, but it also does not appear that this limit is subject to the exemption (or alternative) during periods of planned shutdowns and planned startups of the FCCU. Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H) notes that the short-term emission standards in Condition 3 – Table 1, Part 2(e)(4)(i)(B), (e)(5), (e)(6), (e)(8), and (e)(9) do not apply during periods of planned shutdowns and planned startups. Notably, (e)(2a) is not included in that list of exempted limits.

Similarly, the Petitioners assert that the opacity limit of 30 percent is not reflected in the Permit. This limit also appears to be covered in Permit Condition 3, Table 1, this time in Part 2(e)(10)(i)(A) as this condition states:

> The Owner/Operator shall not cause or allow the emission of visible air contaminants and/or smoke from any emission unit, the shade or appearance of which is greater than 20 percent opacity for an aggregate of more than 3 minutes in any 1 hour or more than 15 minutes in any 24 hour period.

Permit at 225.

Again, in addition to this limit being covered in the Permit, it does not appear that this limit is subject to the exemption (or alternative) during periods of planned shutdowns and planned startups of the FCCU. Permit Condition 3, Table 1, Part 2(e)(10)(i)(A) is not included in the several conditions listed that are exempt during periods of planned shutdowns and planned startups.

[29] The Petitioners cite 42 U.S.C. §§ 7412(d)(1) (requiring the Administrator to promulgate NESHAP), 7412(d)(6) (requiring the Administrator to revise as necessary NESHAP at least every 8 years), 7602(a) (defining "Administrator" as "the Administrator of the Environmental Protection Agency"), and § 7412(1)(1) (providing that a state program for implementation and enforcement of NESHAP "shall not include authority to set standards less stringent than those promulgated by the Administrator").

Additionally, the Petitioners have failed to address or contend with DNREC's RTC, which states:

> The permit has startup/shutdown provisions for emission limits located in conditions Part 2 – e.4 through e.9 (except e.7). The PM limits are found in conditions e.2.a and e.2.b and so still apply. However, the PM emissions for normal operation are based on the coke burn rate; for periods without coke burn, this type of rate based limit is meaningless, this includes startup and shutdown periods, and any other periods where only RFG is being combusted. The startup/shutdown limits were established to cover this scenario.

RTC at 11–12.

EPA acknowledges the potential confusion created in these permit conditions, particularly due to the lack of citations to the appropriate subpart UUU provisions as the basis for these limits. To the extent there are merits to these concerns, EPA addresses these in Claim IV.B below. However; because of the reasons outlined above, the Petitioners are incorrect in their assertion that the cited limits are missing and/or are subject to the exemptions provided in Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H). Therefore, the Petitioners have failed to demonstrate that the permit does not include or assure compliance with the cited applicable requirements from the subpart UUU NESHAP.

Claim III.B.ii: The Petitioners Claim That "The proposed permit unlawfully excuses the FCCU from complying with Subpart UUU standards when the CO boiler is burning only refinery fuel gas."

Petitioners' Claim: Similar to claim III.B.i regarding alleged exemptions from NESHAP requirements, the Petitioners claim that while Permit Condition 3 – Table 1, Part 2(e)(9) lists the applicable requirements for HAPs and provides that the FCCU "shall comply with all the applicable requirements" of subpart UUU, the proposed title V permit "mostly fails to specify what metallic or organic HAP limit(s) from Subpart UUU apply to the FCCU." Petition at 29.

The Petitioners identify several metallic and organic HAP limits that are allegedly applicable. The Petitioners reiterate that subpart UUU lists certain metallic HAP limits that apply to FCCUs during non-startup and non-shutdown periods, including 1.0 lb PM/1,000 lb of coke burn-off and an opacity limit of 30 percent. *Id* (citing 40 C.F.R. § 63.1564(a)(1); 40 C.F.R. Part 63, Subpart UUU, Table 1). The Petitioners reiterate that subpart UUU provides that during periods of startup, shutdown, and hot standby, FCCUs can elect to comply with alternative operating parameters. *Id*. at 29–30. In this case, the Petitioners claim that FCCUs can elect to maintain inlet velocity to the primary internal cyclones of the FCCU catalyst regenerator at or above 20 feet per second. *Id.* at 30 (citing 40 C.F.R. §63.1564(a)(5)).

The Petitioners also specify that subpart UUU lists certain organic HAP limits that apply to FCCUs during non-startup and non-shutdown periods, including 500 ppmv CO. *Id* (citing 40 C.F.R. § 63.1565(a)(1); 40 C.F.R. Part 63, Subpart UUU, Table 8). Similarly, the Petitioners

state that during these periods, FCCUs can elect to comply with alternate operating parameters. *Id.* at 29–30. In this case, the Petitioners claim that FCCUs can elect to maintain oxygen concentration in the exhaust gas from the catalyst regenerator at or above 1 volume percent. *Id.* at 30 (citing 40 C.F.R. § 63.1565(a)(5)).

The Petitioners claim that Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H) creates an exemption to these applicable requirements when FCCU CO boilers are combusting only refinery fuel gas; the Petitioners again state that subpart UUU does not contain such an exemption. *Id.* The Petitioners then outline the same three reasons as in claim III.B.i that the provision is unlawful and renders the title V permit unable to ensure compliance with subpart UUU. *Id.*

EPA's Response: For the following reasons, EPA grants in part and denies in part the Petitioners' request for an objection on this claim. The Petitioners have demonstrated that Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H) appears to create an impermissible exemption from the CO limit of 500 ppmv during periods when the FCCU CO boiler is combusting refinery fuel gas and that DNREC's RTC is deficient.

Permit Condition 3, Table 1, Part 2(e)(5)(i)(A) states that "CO emissions from the FCCU WGS+ shall not exceed 500 ppmv dry as 1-hour average, and 3,085 TPY." Permit at 220–221. However, Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H) notes that the short-term emission standards in Condition 3 – Table 1, Part 2 (e)(5), (among other provisions not relevant here) do not apply during periods when the CO boiler is combusting refinery fuel gas, creating an apparent exemption for the CO limit of 500 ppmv.

In its response to the Petitioners' comments regarding the CO limit that applies during these periods when the FCCU CO boiler is combusting refinery fuel gas, DNREC states:

> CO: This has a startup/shutdown limit identical to the normal operation limit. It was previously 860 lbs/hr, however, the last Significant Permit Modification updated it to 500 ppm to meet the startup/shutdown provisions of Part 63 Subpart UUU as identified in Condition e.4.i.H. While the permit may appear to contain an exemption for this limit, the startup/shutdown condition (Condition e.1.i.H) supplements 500 ppm as the "new" startup/shutdown limit and includes the NESHAP provision of 63.1565(a)(5) that allows oxygen concentration in the exhaust to determine compliance during startup, shutdown, and hot standby events.

RTC at 17.

Importantly, this response neglects to address the significant issue raised in comments regarding the applicability of this exemption during times when the FCCU is combusting refinery fuel gas. 40 C.F.R. § 70.7(h)(6). While Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H) supplements 500 ppm as the "new" startup/shutdown limit for CO, this only is applicable for startup and shutdown conditions and does not appear to explicitly cover scenarios where the CO boiler is combusting

refinery fuel gas. Based on other portions of the RTC,[30] burning refinery fuel gas may occur during periods of startup and shutdown, but there might be other instances where refinery fuel gas is burned and those are not accounted for in the existing permit conditions. Because of these reasons, the Petitioners have demonstrated that DNREC's RTC does not provide justification for the exemption created for the 500 ppmv CO limit during periods when the CO boiler is combusting refinery fuel gas.

To the extent this claim addresses the subpart UUU limits on metallic HAPs (via PM as a surrogate), the Petitioners have failed to demonstrate the Permit does not require the FCCU to comply with these limits when combusting refinery fuel gas, for the reasons discussed in EPA's response to Claim III.B.i. Thus, EPA denies that part of Claim III.B.ii.

Direction to DNREC: DNREC must ensure that the Permit includes, and does not establish an impermissible exemption from, the 500 ppmv CO limit during periods when the CO boiler is combusting refinery fuel gas. DNREC may need to revise the Permit to make it clear that the 500 ppmv CO limit is still applicable during periods when the CO boiler is combusting refinery fuel gas, unless it can otherwise explain why the exemption in Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H) does not apply to this CO limit from subpart UUU. At minimum, DNREC must respond to the public comments raising this issue.

Claim III.D: The Petitioners Claim That "The Permit Includes an Unlawful Affirmative Defense to Liability for Exceedances of "Technology-Based" Limits During Malfunctions and Emergencies."

Petitioners' Claim: The Petitioners claim that the Permit contains an unlawful affirmative defense to liability for exceedances of "technology-based" limits caused by malfunctions and emergencies, citing Permit Conditions 2(b)(5)-(6).[31] Petition at 39. The Petitioners assume that the "technology-based" limits include major NSR, PSD, NESHAP, and NSPS limits and conclude that the affirmative defense renders the Permit unable to assure compliance with the affected limits. *Id.* The Petitioners also claim that the affirmative defense violates the requirement that title V permits include "enforceable" emission limitations and standards, citing 42 U.S.C. § 7661c(a), 40 C.F.R. § 70.6(b)(1), because "the defense can be used by the refinery to render the affected limits unenforceable." *Id.*

The Petitioners refer to the 2014 D.C. Circuit decision *Natural Resources Defense Council v. EPA*,[32] in which the court confirmed that affirmative defenses violate the requirements of 42 U.S.C. §§ 7604 and 7413 of the Clean Air Act. *Id.* The Petitioners claim that EPA recognized this in the SSM SIP Call[33] and in 2016, and again in 2022, in proposing to require states to

[30] "However, the PM emissions for normal operation are based on the coke burn rate; for periods without coke burn, this type of rate based limit is meaningless, *this includes startup and shutdown periods, and any other periods where only RFG is being combusted.* The startup/shutdown limits were established to cover this scenario." RTC at 11–12.

[31] The Petitioners also cite Permit Conditions 2(e)(4)-(5) (defining "emergency" and "malfunction"), 3(b)(2)(iii), 3(c)(2)(ii)(A) (recordkeeping and reporting requirements for the affirmative defense).
[32] 749 F.3d 1055, 1063 (D.C. Cir. 2014).
[33] 80 Fed. Reg. at 33929.

remove affirmative defenses from their title V rules.[34] *Id.* at 39–40. The Petitioners contend that the affirmative defense from the Permit is especially problematic because—unlike the affirmative defense for emergencies from EPA's title V regulations, 40 C.F.R. § 70.6(g)—it is a defense to liability not only for emergencies, but also for malfunctions. *Id.* at 40. The Petitioners state that despite the affirmative defense existing in Delaware's title V regulations, the affirmative defense is plainly unlawful, and EPA should require DNREC to remove the provision from the Permit. *Id.*

The Petitioners assert that in their response to comments, DNREC concedes that the affirmative defense here is based on EPA's prior, 1999 policy regarding excess emissions during SSM periods, and that EPA has "since concluded in 2015 that the enforcement structure of the CAA precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action." *Id* at 41 (citing RTC at 21–22). The Petitioners also contend that DNREC asserts that the affirmative defense "does not seek to limit EPA's or citizens' ability to seek enforcement," because 7 Del. Admin. Code 1130 § 6.2 states that "all terms and conditions in a permit … are enforceable by the Department, by EPA, and by citizens under section 304 of the Act." *Id* (citing RTC). The Petitioners refute this, stating that even though an affected person can bring a citizen suit, this does not, by itself, make an affected limit "enforceable"— especially when the affirmative defense is built into the permit that would be enforced. *Id.*

EPA's Response: For the following reasons, EPA grants the Petitioners' request for an objection on this claim.

Relevant Permit Conditions

Permit Conditions 2(b)(5) and (6) state:

> 5. The Owner and/or Operator may seek to establish that noncompliance with a technology-based emission limitation under this permit was due to an emergency or malfunction if both the recordkeeping requirements in Condition 3(b)(2)(iii) and the reporting requirements in Condition 3(c)(2)(ii)(A) are satisfied. *[Reference: 7 DE Admin. Code 1130 Section 6.7.2 dated 12/11/00]*
>
> 6.i. In any enforcement proceeding, the Owner and/or Operator seeking to establish the occurrence of an emergency or malfunction has the burden of proof. *[Reference: 7 DE Admin. Code 1130 Section 6.7.4 dated 12/11/00]*
>
> ii. The provisions of 7 DE Admin. Code 1130 pertaining to Emergency/Malfunctions as defined in Conditions Nos. 2(b)(5); 2(b)(6); 3(b)(2)(iii); and 3(c)(2)(ii)(A) of this permit are in addition to any emergency or malfunction provision contained in any applicable requirement. *[Reference: 7 DE Admin. Code 1130 Section 6.7.5 dated 12/11/00]*

Permit at 13.

[34] 81 Fed. Reg. 38645 (June 14, 2016); 87 Fed. Reg. 19042 (April 1, 2022).

EPA's Analysis

The Petitioners have demonstrated that the Permit's affirmative defense permit condition is inconsistent with Delaware's title V regulations because it extends beyond emergencies and also includes malfunctions. Delaware's EPA-approved title V affirmative defense regulations, like EPA's regulations upon which the state rules are based, only reference "emergencies" and do not mention "malfunctions." *See* 7 Del. Admin. C. § 1130-6.7. While the definitions of "emergency" and "malfunction" are similar in Delaware's regulations,[35] Delaware's regulations and 40 C.F.R. 70.6(g),[36] only apply to "emergencies" and do not mention malfunctions.

While EPA has indicated in proposed rulemakings[37] that it intends to remove affirmative defense provisions from title V regulations (prompting the removal of affirmative defense provisions from state, local, and tribal title V programs), this rule has not been finalized and permitting authorities have not been required to remove affirmative defense provisions from their programs and title V permits. However, the Agency has indicated in the preambles accompanying these proposals that, if EPA finalizes a rule removing the affirmative defense provisions from the title V regulations, permitting authorities will likely be required to remove affirmative defense provisions consistent with the existing regulations concerning program and permit revisions.

Direction to DNREC: DNREC should revise the Permit to remove any reference to "malfunctions" in the affirmative defense permit conditions. In addition to removing those references, EPA encourages DNREC to consider removing the affirmative defense provisions altogether, while recognizing that EPA's 2022 rulemaking has not been finalized.[38] Additionally, as noted in the proposed rulemakings, these provisions have never been required elements of state permitting programs.

Claim IV.A: The Petitioners Claim That "The Permit Fails to Ensure Compliance with NSPS and NESHAP Requirements for a Flare Management Plan."

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[35] 7 Del. Admin. C. § 1130-6.7 defines an emergency as: "[A]ny situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency." The general provisions and definitions found in 7 Del. Admin C. § 1101 define a malfunction as: "[A]ny sudden and unavoidable failure of air pollution control equipment or of a process to operate in a normal or usual manner. Failures that are caused entirely or in part by poor maintenance, careless operation, or any other preventable upset condition or preventable equipment breakdown shall not be considered malfunctions."

[36] 40 C.F.R. 70.6(g) defines an emergency as "any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error."

[37] 81 Fed. Reg. 38645 (June 14, 2016); 87 Fed. Reg. 19042 (April 1, 2022).

[38] "Moreover, because states have never been required by federal law to include these provisions in state-issued title V permits, the EPA also encourages states to exercise their discretion to cease including emergency affirmative defense provisions as early as practicable. In many cases, there will be no reason for states to wait for the EPA to take final action on this proposal to begin implementing this suggestion." 81 Fed. Reg. 38653 (June 14, 2016).

Petitioners' Claim: The Petitioners claim that the Permit fails to ensure compliance with NSPS and NESHAP requirements for a flare management plan, which are applicable requirements with which the Permit must assure compliance. Petition at 42. The Petitioners cite to 40 C.F.R. § 60.103a(a)-(b), which they contend requires the development, implementation, and submission of, and compliance with a flare management plan that includes a variety of information. *Id.* The Petitioners claim that in order to ensure compliance with these requirements, "the Title V permit must attach and incorporate a non-redacted version of the most current version of the refinery's flare management plan(s) into the Title V permit or incorporate the plans' terms, to allow the public and regulators to access the specifics of these applicable requirements as they apply to the Delaware City refinery." *Id.* The Petitioners claim that the Permit does not attach or incorporate the flare management plan(s). *Id.*

The Petitioners cite to the *Valero Houston Order*, claiming EPA made clear that the terms of the flare management plan must be included in a title V permit, either directly or by incorporating by reference. *Id* (citing *Valero Houston Order* at 25–26). The Petitioners refute DNREC's response to comment, claiming DNREC stated that the NSPS and NESHAP flare management plan requirements "do not require" that the plan "be housed in the permit" and that "[i]f the [plan] were incorporated into the permit by attachment, updates to the [plan] including those which would not otherwise have to be submitted to the Administrator would require modification through the permitting process which is clearly not the intent of the FMP provisions, nor that operational plans of this complexity should be subject to public participation." Petition at 42–43 (citing RTC at 83–84). Lastly, the Petitioners note that DNREC states: "Failure to comply with the [plan] submitted to the Department and the Administrator would violate several permit conditions, and as such, is enforceable." *Id* at 43 (citing RTC at 84). The Petitioners assert that DNREC is still obligated to incorporate the flare management plan as they are applicable requirements, and the terms should be included in the permit to be enforceable. *Id.*

EPA's Response: For the following reasons, EPA grants the Petitioners' request for an objection on this claim.

Title V permits must include conditions reflecting all "applicable requirements" as well as monitoring, recordkeeping, and reporting conditions necessary to assure compliance with all applicable requirements and permit terms. CAA § 504(a), (c); 40 C.F.R. § 70.6(a)(1), (c)(1). These required elements of a title V permit can either be included on the face of the title V permit, or, in certain circumstances, may be incorporated by reference into the title V permit. The Petitioners have asserted that the flare management plan is an applicable requirement requiring its inclusion in the title V permit.

EPA has addressed the inclusion of plans in title V permits in multiple previous orders. To summarize EPA's position, only plans (or portions of plans) that are necessary to impose an applicable requirement or assure compliance with an applicable requirement need be included (or incorporated) in a title V permit or included with a permit application and made available for public review. See CAA § 504(a), (c); 40 C.F.R. §§ 70.5(c), 70.6(a)(1), 70.6(c)(1); *In the Matter of Drummond Co., Inc. ABC Coke Plant*, Order on Petition No. IV-2017-7 at 13–15 (June 30, 2021); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 11–14 (June 22, 2012) ("*Kentucky Syngas Order*"); *Cash Creek II Order* at 11–12; *In the Matter of EVRAZ*

Rocky Mountain Steel, Order on Petition No. VIII-2011-01 at 7–8 (May 31, 2012) ("*Rocky Mountain Steel Order*"); *In the Matter of Alliant Energy, WPL Edgewater Generating Station*, Order on Petition No. V-2009-02 at 12–14 (August 17, 2010) ("*Edgewater Order*"); *In the Matter of WE Energies Oak Creek Power Plant*, Order on Petition, Permit No. 241007690-P10 at 24–25 (June 12, 2009) ("*Oak Creek Order*"); *Valero Houston Order* at 25–26.

Central to EPA's evaluation of this type of claim is the petitioner's demonstration burden. Accordingly, EPA has denied claims where "the Petitioners have not demonstrated that the … plan's content is needed to impose an applicable requirement or as a compliance assurance measure." *Kentucky Syngas Order* at 11. More specifically, EPA has denied claims: where petitioners did not include any specific discussion of the nature and purpose of the plan; where petitioners did not identify any legal requirement directing a source to prepare and implement a plan; and where petitioners did not identify how a state's explanation of a plan was unreasonable. See *Kentucky Syngas Order* at 11–14; *Cash Creek II Order* at 11–12. On the other hand, EPA has granted other claims where petitioners claimed and demonstrated that certain plans "define[d] permit terms" and that the permit relied on other plans "to assure compliance with applicable requirements." *Oak Creek Order* at 24, 25. In either case, the underlying question—whether the provisions of a plan must be included in a facility's title V permit—is a fact-specific inquiry, and the petitioner has the burden to demonstrate under the facts specific to the plan that it must be included in the permit.

The current claim is similar to those addressed in the *Oak Creek Order* and the *Valero Houston Order.* It is clear that NSPS subpart Ja and NESHAP subpart CC are applicable requirements. These regulations require Delaware City Refinery to develop and implement a flare management plan.[39] As noted by the Petitioners, in order to determine compliance with the requirements of the NSPS subpart Ja and NESHAP subpart CC, one must be able to ascertain if Delaware City Refinery is in compliance with the flare management plan. It is not enough to cite to the requirements of the NSPS subpart Ja and NESHAP subpart CC to develop a flare management plan because these standards also require the facility to include operational requirements in the flare management plan. For instance, one of the elements of the plan required by NSPS subpart Ja are procedures to minimize or eliminate discharge to the flare during the planned startup and shutdown of the refinery process units. 40 C.F.R. § 60.103a(a)(5); cf. *Oak Creek Order* at 25 (finding that the startup/shutdown plan contained operational requirements and limitations applicable during startup and shutdown operations that exceed the opacity limit, therefore the plan must be included in the permit). For these reasons, EPA has determined that the requirement to develop and implement the flare management plan is an applicable requirement and therefore the plan needs to be included as part of the title V permit.

Direction to DNREC: In responding to this Order, DNREC must amend the Permit to include the terms of the flare management plan required by NSPS subpart Ja and NESHAP subpart CC. This plan may be included directly in the Permit or incorporated by reference as appropriate. DNREC must also ensure that the plan does not redact emission limitations or standards, including operational requirements and limitations that assure compliance with applicable requirements.

[39] 40 C.F.R. § 60.103a(a) and 40 C.F.R. § 63.670(o)(2).

Claim IV.B: The Petitioners Claim That "EPA Should Require DNREC to Revise the Permit to Identify Other Specific Applicable Requirements from NESHAP Subpart UUU and NSPS Subpart J."

Petitioners' Claim: The Petitioners claim that the Permit fails to assure compliance with applicable Clean Air Act requirements because the Permit does not identify specific applicable limits and requirements from NESHAP subpart UUU and NSPS subpart J. Petition at 43. For the FCCU, the Petitioners claim that the only specific subpart UUU-related obligations listed in the permit are obligations to submit semiannual compliance reports and to operate in keeping with an operating, maintenance, and monitoring plan. *Id.* at 44 (citing Permit Condition 3 – Table 1, Part 2(e)(9)). The Petitioners then list a number of subpart UUU and subpart J requirements they claim are missing from the permit.[40] *Id.* For the FCU, the Petitioners assert that the Permit fails to identify a limit and monitoring requirements from NSPS subpart J. *Id.* at 45. Lastly, the Petitioners point to three boilers, claiming that the Permit fails to sufficiently cite to the NSPS subpart J requirements that apply to those boilers. *Id.* at 46.

The Petitioners claim that EPA has taken the position that NESHAP requirements may be incorporated into title V permits by reference, but that incorporation must be done in a way that clearly identifies a source's NESHAP obligations.[41] *Id.* The Petitioners claim that EPA has more recently spoken to this in the title V order *In the Matter of ExxonMobil Corp., Baytown Chemical Plant*, Petition No. VI-2020-9 at 16–19 (March 18, 2022), in which EPA indicated that the permitting authority "must ensure that the Permit is unambiguous as to which requirements of this subpart (including the emission limitations and standards, as well as the applicable testing, monitoring, recordkeeping, and reporting requirements) are applicable to emission units" at the facility. *Id.* at 47. The Petitioners assert that here too, the Permit fails to explicitly and unambiguously identify the NESHAP and NSPS limits and requirements applicable to the units referenced. *Id.*

The Petitioners then reiterate their claims regarding SSM provisions and their effect on applicable NESHAP and NSPS limits, which is addressed in Claim III.B. *Id.* The Petitioners claim that DNREC, in its response to comments, asserts that the Petitioners "have not identified" the NESHAP and NSPS provisions applicable to the FCCU that were omitted from the permit. *Id* (citing RTC at 75–76). The Petitioners contend that they did point out that the permit listed no specific NSPS requirements for the FCCU, even though subparts J and Ja are applicable. *Id.*

[40] Separately, the Petitioners claim that EPA should also require DNREC to correct the standards for organic HAPs that apply during startup, shutdown, and hot standby, as the Permit implies that those standards only apply during planned startups and shutdowns—and also states that the standards are for "inorganic" (rather than organic) HAP emissions. Petition at 45.

[41] The Petitioners cite *In the Matter of Tesoro Refining and Marketing Co.,* Order on Petition No. IX-2004-6, at 8-9 (March 15, 2005) (*Tesoro Order*), where EPA explained: "At a minimum, a permit must explicitly state all emission limitations and operational requirements for all applicable emission units at the facility . . . In all cases, references should be detailed enough that the manner in which the referenced material applies to the facility is clear and is not reasonably subject to misinterpretation." The Petitioners also cite *In the Matter of Citgo Refining and Chemicals, West Plant, Corpus Christi*, Order on Petition No. VI-2007-01, at 11 (May 28, 2009), (objecting to title V permit that failed to explicitly identify applicable emission limits).

EPA's Response: For the following reasons, EPA grants the Petitioners' request for an objection on this claim.

Under title V of the CAA and EPA's part 70 regulations every title V permit must include all applicable requirements that apply to a source, as well as any permit terms necessary to assure compliance with these requirements. *E.g.*, 42 U.S.C. § 7661c(a).[42] The CAA § 504 requirement to include all applicable requirements in a title V permit can be satisfied using incorporation by reference (IBR) in certain circumstances. *See, e.g., White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program,* 40 (March 5, 1996) (*White Paper 2*) (explaining how IBR can satisfy the requirements of CAA § 504). In all cases where IBR is employed, the title V permit must contain references that are "detailed enough that the manner in which the referenced material applies to the facility is clear and is not reasonably subject to misinterpretation." *White Paper 2* at 37. Moreover, "Where only a portion of the referenced document applies, . . . permits must specify the relevant section of the document." *Id.*

Requirements of a NESHAP that apply to emission units at a facility are "applicable requirements." 40 C.F.R. § 70.2. EPA has previously addressed the manner by which NESHAP (or NSPS) requirements may be incorporated by reference into title V permits. In 1999, EPA rejected suggestions that states have the discretion to include high-level citations to an entire NESHAP subpart, stating: "The permit needs to cite to whatever level is necessary to identify the applicable requirements that apply to each emissions unit or group of emission units (if generic grouping is used), and to identify how those units will comply with the requirements."[43] EPA has also objected to title V permits that have attempted to incorporate by reference NESHAP (or NSPS) requirements without providing sufficient detail to determine the specific requirements that apply to emission units at the source. Specifically, in the *Tesoro Order*, EPA found that references to sections of a NESHAP that were not associated with specific emission units created ambiguity and applicability questions that "render[ed] the Permit unenforceable as a practical matter and incapable of meeting the Part 70 standard that it assure compliance with all applicable requirements." *Tesoro Order* at 8. Additionally, in the *ETC Waha Order*, EPA found that high-level references to an entire NSPS subpart, which did not identify the specific requirements within the subpart that applied to each emissions unit, similarly failed to comply with the CAA. *In the Matter of ETC Texas Pipeline, Ltd. Waha Gas Plant*, Order on Petition No. VI-2020-3 at 17–19 (January 28, 2022).[44] *See also Exxon Baytown Olefins Order* at 16–17.

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[42] CAA section 504(a) requires the following: "Each permit issued under this subchapter shall include enforceable emission limitations and standards, . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan." 42 U.S.C. § 7661c(a); see also 40 C.F.R. § 70.6(a)(1) ("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."); § 70.3(c)(1) ("For major sources, the permitting authority shall include in the permit all applicable requirements for all relevant emissions units in the major source.").

[43] Letter from John S. Seitz, EPA, to Robert Hodanbosi and Charles Lagges, STAPPA/ALAPCO, Enclosure B at 6 (May 20, 1999).

[44] Notably, both the *Tesoro* and *ETC Waha Orders* involved relatively complex NESHAP and NSPS regulations containing multiple requirements, only some of which were applicable to individual emission units at the respective sources. There may be other situations where it is possible for a title V permit to clearly and unambiguously incorporate the requirements of a more straightforward NESHAP or NSPS regulation with less detailed references.

Here, the Petitioners have demonstrated that the Permit is deficient because it fails to identify, with specific regulatory citations, the applicable emission limitations and other requirements of the subpart UUU NESHAP and subpart J NSPS to which the emission units at the Delaware City Refinery are subject. As noted by the Petitioners, with a few exceptions, the Permit only indicates that "The permit holder shall comply with all of the applicable requirements of 40 CFR Part 63, Subpart UUU" or generally lists subpart UUU as an applicable requirement for several units. Permit at 387, 388, and 223. Similarly, with a few exceptions, the Permit only generally lists subpart J as an applicable requirement for a number of units. Permit at 383–389.

EPA acknowledges that the Permit appears to include various limits (including the limits discussed in Claim III.B.i) that appear equivalent to—and would therefore assure compliance with—at least some of the applicable requirements from these NESHAP and NSPS subparts. However, because most of those limits do not identify the applicable NESHAP or NSPS as the origin of or authority for those limits, it is not readily apparent that the Permit in fact includes all applicable requirements from these subparts. *See* 40 C.F.R. § 70.6(a)(1)(i) ("The permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based."). Instead, it appears that DNREC is relying at least in part on the high-level citations to the entire NESHAP or NSPS subparts (discussed in the preceding paragraph) to incorporate and assure compliance with all relevant applicable requirements from those subparts. The Permit's vague, high-level references render it difficult to determine which of the requirements of the subpart UUU NESHAP and subpart J NSPS are applicable to specific emission units at the Delaware City Refinery. Thus, the Permit cannot be said to include or assure compliance with the applicable requirements of the subpart UUU NESHAP or subpart J NSPS. 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(1), (c).

EPA appreciates the complexity of some of EPA's regulations and is willing to assist permitting authorities seeking to understand how these regulations apply to individual facilities. However, it is ultimately the permitting authority's responsibility to issue title V permits that include (that is, identify with sufficient detail and clarity) all applicable requirements, including citations to specific NESHAP or NSPS requirements. Because the Permit does not satisfy these requirements, EPA objects. 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(1), (c).

Direction to DNREC: DNREC must revise the title V permit to include the applicable requirements of the subpart UUU NESHAP and subpart J NSPS. If DNREC wishes to accomplish this by incorporating certain applicable requirements of subpart UUU and subpart J by reference, it must ensure that the Permit is unambiguous as to which requirements of these subparts (including the emission limitations and standards, as well as the applicable testing, monitoring, recordkeeping, and reporting requirements) are applicable to emission units at the Delaware City Refinery. To the extent that the Petitioners identified individual citation issues throughout the Permit, EPA recommends that DNREC revise those permit conditions to explicitly identify which specific NESHAP or NSPS requirement each permit condition satisfies. DNREC should also correct the permit terms that reference "inorganic" HAP in instances where the term applies to organic HAPs, in particular Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H).

Claim V: The Petitioners Claim That "The Proposed Permit Fails to Include Necessary Terms and Conditions to Assure Compliance With the Accidental Release Prevention, Risk Management Plan Regulation, 40 C.F.R. Part 68."

Petitioners' Claim: The Petitioners claim that the Permit is incomplete and unlawful because it "omits terms needed to assure compliance with the Accidental Release Prevention Requirements, also known as the EPA Risk Management Program, 40 C.F.R. Part 68," asserting that it is an applicable requirement with which the permit must assure compliance. Petition at 48. The Petitioners contend that the Permit is deficient because it does not include specific terms and conditions needed to assure compliance with 40 C.F.R. Part 68. *Id.* The Petitioners cite to Permit Condition p.1, which states:

> In the event this stationary source, as defined in the State of Delaware 7 DE Admin. Code 1201 "Accidental Release Prevention Regulation" Section 4.0, is subject to or becomes subject to Section 5.0 of 7 DE Admin. Code 1201 (as amended March 11, 2006), the owner or operator shall submit a risk management plan (RMP) to the Environmental Protection Agency's RMP Reporting Center by the date specified in Section 5.10 and required revisions as specified in Section 5.190. A certification statement shall also be submitted as mandated by Section 5.185.

Permit at 18.

The Petitioners assert that this is the only permit condition that speaks to the Risk Management Plan (RMP), and it is deficient because it does not plainly state that the federal and state RMP regulations apply to the process at the refinery, rather it conditions compliance as a hypothetical — stating "in the event" that the refinery might become subject to the regulation. Petition at 49. The Petitioners contend that without a clear statement that the regulations apply and are enforceable through the permit, the proposed permit does not meet the requirement to include a statement listing part 68 as an applicable requirement.[45] *Id.*

The Petitioners further assert that the Permit fails to include the following components as required by these provisions and 40 C.F.R. § 68.215(a)(2): "Conditions that require the source owner or operator to submit: (i) A compliance schedule for meeting the requirements of this part by the dates provided in §§ 68.10(a) through (f) and 68.96(a) and (b)(2)(i), or; (ii) As part of the compliance certification submitted under 40 CFR 70.6(c)(5), a certification statement that the source is in compliance with all requirements of this part, including the registration and submission of the RMP." *Id.* The Petitioners claim that the compliance certification refers to Condition 3- Table 1 of the proposed permit, which does not reference 40 C.F.R. part 68 or the specifically required regulations listed above and directed for inclusion in title V permits pursuant to 40 C.F.R. § 68.215(a)(2). *Id.* The Petitioner then lists a number of other requirements listed in the part 68 regulations regarding verification and compliance with the RMP, noting there is no evidence that DNREC satisfied these requirements. *Id.* at 49–50.

[45] The Petitioners claim that the statement is required pursuant to 40 C.F.R. § 68.215(a)(1) as required by 40 C.F.R. § 70.6, 7 Del. Admin. Code 1130, § 122.142(b)(2)(B), and 42 U.S.C. § 7661c(a).

The Petitioners claim that the RTC is deficient as DNREC stated: "Part 68 describes the 'requirements for owners or operators of stationary sources concerning the prevention of accidental releases. . .' The Division of Air Quality does not provide permits for accidental releases…." *Id* at 51 (citing RTC at 84). The Petitioners assert that it is irrelevant that the Division of Air Quality ("DAQ") does not provide permits for this and that "DNREC, through DAQ, does provide Title V permits to major sources, including DCRC, that are covered by both Title V and the Risk Management Program, Part 68." *Id.* The Petitioners then cite to 7 Del. Admin. C. § 1201-5.215, which explains the requirements for the RMP, specifying what a "Regulation No. 30" permit for stationary sources shall contain as part of the RMP. *Id.* at 52–53. The Petitioners claim that, in sum, the Delaware code itself requires the title V permit to include the same information that 40 C.F.R. § 68.215 requires. *Id.* at 53. The Petitioners contend that while Delaware operates its own Accidental Release Prevention program, this does not provide reason for not responding to significant comments as the response to Petitioners' comments did not acknowledge the requirement that DNREC ensures RMP compliance. *Id.* The Petitioners assert that while the RTC suggested that air permits need not incorporate the RMP requirements, federal regulations incorporate by reference the Delaware state program under part 68. 40 C.F.R. § 63.99(a)(8). *Id.* The Petitioners also contend that because of this, "air permits are indeed required to incorporate and fulfill 40 C.F.R. 68.215 directly and as implemented through the DNREC state air permit and RMP requirements. *Id.*

EPA's Response: For the following reasons, EPA denies the Petitioners' request for an objection on this claim.

Background on RMP and Title V

Section 112(r)(7) of the CAA authorizes the EPA Administrator to promulgate regulations that, among other things, "require the owner or operator of stationary sources at which a regulated substance is present in more than a threshold quantity to prepare and implement a risk management plan to detect and prevent or minimize accidental releases of such substances from the stationary source, and to provide a prompt emergency response to any such releases in order to protect human health and the environment." 42 U.S.C. § 7412(r)(7)(B)(ii). EPA's regulations in 40 C.F.R. part 68 implement this provision.

EPA was cognizant of the unique relationship between RMP and title V permitting requirements when it developed its regulations for both programs in the 1990s. The definition of "applicable requirement" in EPA's title V regulations includes, among others, "Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act." 40 C.F.R. § 70.2. However, when EPA promulgated these title V regulations in 1992, and when EPA established the final part 68 RMP rules in 1996, the agency acknowledged that the RMP program was different from other "applicable requirements" and "was not intended to be primarily implemented or enforced through title V." 57 Fed. Reg. 32250, 32275 (July 21, 1992); see 61 Fed. Reg. 31668, 31688 (June 20, 1996); *see also, e.g., In the Matter of Newark Bay Cogeneration Partnership LP*, Order on Petition No. II-2019-4 at 9–16 (August 16, 2019) ("*Newark Bay Order*") ("[S]ection 112(r) requirements . . . are different from other applicable permit requirements.") and *In the Matter of Bristol-Myers Squibb Co., Inc.,* Order on Petition No. II-2002-09 at 22 (February 18, 2005)

("*Bristol-Myers Squibb Order*"). Accordingly, in promulgating the part 68 rules, EPA determined that "generic terms in [title V] permits and certain minimal oversight activities" would assure compliance with RMP requirements. 61 Fed. Reg. 31668, 31689 (June 20, 1996). For sources subject to both RMP and title V, these permit content and state oversight requirements are codified at 40 C.F.R. § 68.215.

Relevant Legal Background

As the Petitioners cite in their claim, 7 Del. Admin. C. § 1201-5.215 reflects the requirements found in 40 C.F.R. 68.215, as it states in part:

> 5.215.1 Requirements of this regulation apply to any stationary source subject to Section 5.130 and State of Delaware "Regulations Governing the Control of Air Pollution", Regulation No. 30. The Regulation No. 30 permit for the stationary source shall contain:
>
> 5.215.1.1 A statement listing this part as an applicable requirement;
>
> 5.215.1.2 Conditions that require the source owner or operator to submit:
>
> 5.215.1.2.1 A compliance schedule for meeting the requirements of this regulation by the date provided in Section 5.10.1 or;
>
> 5.215.1.2.2 As part of the compliance certification submitted under Regulation 30 Section 6(c)(5), a certification statement that the source is in compliance with all requirements of this regulation, including the registration and submission of the RMP.

EPA's Analysis

Title V permits must contain "conditions as are necessary to assure compliance with applicable requirements" of the CAA. 42 U.S.C. § 7661c(a). As discussed above, when EPA promulgated its rules governing the RMP and title V programs, EPA placed the burden on sources to determine whether RMP requirements are applicable to each source (based on the actual, on-site presence of a substance in excess of threshold quantities). Based on information submitted by the company to EPA, it appears that the facility is subject to 112(r) and submitted a RMP in April of 2019.

The Petitioners' argument that the Permit is deficient because "it does not plainly state that the federal and state RMP regulations apply to the process at the refinery, rather it conditions compliance as a hypothetical — stating 'in the event' that DNREC might become subject to the regulation" is flawed. As EPA stated in the *Bristol-Myers Squibb Order*:

> Although general section 112(r) permit conditions do not definitively state whether an individual source is subject to the risk management plan requirements, the permit is written generally to ensure that it covers any newly subject source, or any source

> whose applicability fluctuates to ensure that the section 112(r) permit obligations remain up to date. A source that is subject to section 112(r) must also certify its compliance status with respect to these requirements in the same manner it would certify with respect to other applicable requirements pursuant to 40 CFR § 70.6(c)(5). As such, the permit must require annual certifications from the source that it is fulfilling its obligations to assure compliance with section 112(r). See 40 CFR § 68.215. The risk management plans under section 112(r), however, are not required to be incorporated into title V permits.

Bristol-Myers Squibb Order at 22.

The referenced permit condition is similar to a permit term EPA endorsed in the *Bristol-Myers Squibb Order*, in which EPA determined that this type of flexible, generic permit term is sufficient to ensure that CAA§ 112(r) permit obligations remain up to date, even where the applicability of RMP could fluctuate over the life of the permit. As 40 C.F.R. § 68.215(a)(2) makes clear, a title V permit for a source subject to part 68 shall contain "*[c]onditions that require* the source owner or operator to submit" (i) a compliance schedule *or* (ii) as part of the annual compliance certification submitted in accordance with EPA's part 70 regulations, a certification statement that the source is in compliance with the requirements of part 68. And, as explained above, 7 Del. Admin. C. § 1201-5.215 echoes the requirements found in 40 C.F.R. 68.215. Permit Condition p.1 is sufficient to meet these requirements; this permit term is clear that if the facility is subject to 7 Del. Admin. C. § 1201-5.130 (the state's analog to 40 C.F.R. § 68.130), then the appropriate RMP requirements must be satisfied. Permit Condition p.1 also identifies the applicable 40 C.F.R. part 68 requirements related to certifications that the source is required to comply with, specifically referencing 7 Del. Admin. C. § 1130-6.1.4 and 7 Del. Admin. C. § 1201 as the basis for that permit condition. As EPA explained in the *Bristol-Myers Squibb Order* and above, since the facility is subject to 112(r) and part 68, the requirements of Permit Condition p.1 are applicable to the source. EPA denies the petition with respect to this issue.

Additionally, the Petitioners' argument that there is no evidence that DNREC has satisfied requirements to verify compliance with the RMP rules or otherwise satisfied the requirements for a compliance certification does not allege any flaw with the Permit itself. Under CAA § 505(b)(2), a petitioner must demonstrate that "the permit is not in compliance with the requirements" of the CAA before EPA will object to the permit. 42 U.S.C. § 7661d(b)(2) (emphasis added). Under § 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to EPA.

In summary, for the reasons listed above, the Petitioner has failed to demonstrate that the Permit does not satisfy 40 C.F.R. part 68.

V. CONCLUSION

For the reasons set forth in this Order and pursuant to CAA § 505(b)(2) and 40 C.F.R. § 70.8(d), I hereby grant in part and deny in part the Petition as described in this Order.

Dated: JUL - 5 2023

Michael S. Regan
Administrator