

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

_____)	PETITION NO. IV-2019-7
IN THE MATTER OF)	
)	
DRUMMOND CO., INC.)	ORDER RESPONDING TO
ABC COKE PLANT)	PETITION REQUESTING
JEFFERSON COUNTY, AL)	OBJECTION TO THE ISSUANCE OF
PERMIT No. 4-07-0001-04)	TITLE V OPERATING PERMIT
)	
ISSUED BY THE JEFFERSON COUNTY)	
DEPARTMENT OF HEALTH)	
_____)	

ORDER DENYING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated June 13, 2019 (the Petition) from GASP (the Petitioner),¹ 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. 4-07-0001-04 (the Permit) issued by the Jefferson County Department of Health (JCDH) to the Drummond Co., Inc. ABC Coke Plant (ABC Coke or the facility) in Tarrant, Jefferson County, Alabama. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and Chapter 18 of the Jefferson County Board of Health Air Pollution Control Rules and Regulations. *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 further below, the EPA denies the Petition requesting that the EPA Administrator object to the Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA’s implementing regulations at 40 C.F.R. part 70. Along with other submittals from the state

¹ The Petition is nominally from GASP alone. Petition at 1. However, the Petition at times refers to petitioners (plural), and the petition was signed by attorneys from two different organizations (GASP and the Southern Environmental Law Center). *Id.* at 21. For purposes of consistency, this Order treats GASP as the sole petitioner. This treatment has no impact on the substance of the EPA’s response to the Petition.

of Alabama, JCDH submitted a title V program governing the issuance of operating permits within its jurisdiction on December 14, 1993. The EPA granted interim approval of JCDH's title V operating permit program in 1995, 60 Fed. Reg. 57346 (November 15, 1995), and the EPA granted full approval of JCDH's title V program in 2001, 66 Fed. Reg. 54444 (October 29, 2001). This program, which became effective on November 28, 2001, is codified in Chapter 16 ("Operating Permit Fees") and Chapter 18 ("Operating Permit Regulations for Major Sources") of the Jefferson County Board of Health Air Pollution Control Rules and Regulations.

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 the EPA for review. 42 U.S.C. § 7661d(a). Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the 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 the EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of the 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).

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). 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

² *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (NYPIRG).

section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the 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 the 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 below. A more detailed discussion can be found in *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*).

The 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 the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the state's response to comments), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.⁶ Another factor the EPA examines is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the

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.

⁶ *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); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007) (*Georgia Power Plants Order*) (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).

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.”).⁷ Relatedly, the 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).⁸ Also, the failure to address a key element of a particular issue presents further grounds for the 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).⁹

The information that the EPA considers in making a determination 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 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 making a determination whether to grant or deny the petition. *Id.*

III. BACKGROUND

A. The ABC Coke Plant

The ABC Coke Plant, owned by Drummond Co., Inc., is located at 900 Huntsville Avenue in Tarrant, Alabama (Jefferson County). The facility’s title V permit includes a coke by-product plant (which produces coke and is comprised of three coke batteries with related vertical slot coke ovens, coke crushing, and pushing operations with baghouses), a separate coke by-product recovery operation, a utilities production plant (which provides the facility’s essential utility

⁷ *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*).

⁸ *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); *Georgia Power Plants Order* at 9–13; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (March 15, 2005).

⁹ *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.

services), and a wastewater treatment plant (which treats the facility's process wastewater). All of these operations comprise a single source under title V.

B. Permitting History

JCDH issued ABC Coke's initial title V permit (Permit No. 4-07-0001-01) on November 21, 2003, which was renewed in 2008 and 2014. The EPA denied a prior title V petition that challenged the 2014 renewal permit. *See In the Matter of ABC Coke Plant and Walter Coke Plant*, Order on Petition Nos. IV-2014-5 and IV-2014-6 (July 15, 2016). The current action is the facility's third renewal permit, No. 4-07-0001-04. For this permit, JCDH published notice of a draft permit (the Draft Permit), along with a Statement of Basis document, on August 19, 2018, with a public comment period that ran until November 15, 2018. On March 1, 2019, JCDH transmitted a proposed permit (the Proposed Permit), along with its response to public comments (RTC), to the EPA. The EPA's 45-day review period ended on April 15, 2019, during which time the EPA did not object to the Proposed Permit. On April 17, 2019, JCDH issued a final permit (the Final Permit) to ABC Coke. Subsequently, on April 21, 2021, JCDH amended the title V permit (the Amended Permit) to incorporate certain additional requirements related to an enforcement action described below in section III.D.

C. Timeliness of Petition

Pursuant to the CAA, if the 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). The EPA's 45-day review period expired on April 15, 2019. Thus, any petition seeking the EPA's objection to the Proposed Permit was due on or before June 14, 2019. The Petition was dated and received on June 13, 2019, and, therefore, was timely filed.

D. Enforcement Action

The EPA Region 4 and the EPA National Enforcement Investigation Center conducted a joint inspection of the coke by-product recovery plant located at the ABC Coke facility in 2011. JCDH participated in the inspection. Based on that inspection, the EPA initiated an enforcement action against Drummond in 2013, which JCDH soon joined. Settlement discussions between the parties culminated in a proposed consent decree (the Proposed CD) that was lodged by the EPA and JCDH, along with a concurrently filed complaint (the Complaint), in the U.S. District Court for the Northern District of Alabama on February 8, 2019. *See U.S. v. Drummond Company Inc*, Civ. A. No. 2:19-cv-00240 (N.D. Ala. filed Feb. 8, 2019). The Proposed CD was subject to a public comment period that, after multiple extensions, concluded on July 17, 2019. *See* 84 Fed. Reg. 28075 (June 17, 2019); 28 C.F.R. § 50.7. On August 31, 2020, the court granted a motion by the Petitioner (GASP) to intervene in the pending civil enforcement case. GASP subsequently filed a complaint in intervention against Drummond for the purpose of challenging the Proposed CD. On January 14, 2021, the EPA, JCDH, Drummond, and GASP filed a Joint Stipulation of Settlement with the court that resolved GASP's challenge to the Proposed CD, resulting in dismissal of GASP's complaint. The court entered the CD (the Final CD) on January 25, 2021.

The EPA summarized the case in a Federal Register notice as follows:

This case relates to alleged releases of benzene from Drummond's coke by-product recovery plant in Tarrant, Alabama (Facility). The case involves claims for civil penalties and injunctive relief under the Clean Air Act, 42 U.S.C. 7401 et seq., and its implementing regulations known as National Emission Standards for Hazardous Air Pollutants (NESHAPs), including 40 CFR part 61, subpart L (Benzene Emissions from Coke By-product Recovery Plants), Subpart V (Equipment Leaks and Fugitive Emissions), and Subpart FF (Benzene Waste Operations), as well as related claims under laws promulgated by the Jefferson County Board of Health.

84 Fed. Reg. 4104 (February 14, 2019).

As discussed further below, Petition Claims I, II.A, and II.B relate to issues addressed in this enforcement action. The EPA believes the enforcement action—not the title V petition process—is the most appropriate venue for resolving any compliance-related claims raised in that action. *See, e.g., In the Matter of W.E. Energies Oak Creek Power Plant*, Order on Petition, Permit No. 241007690-P10 at 8 (June 12, 2009) (*Oak Creek Order*) (“EPA adopts the approach that, once EPA has resolved a matter through enforcement resulting in a CD approved by a court, the Administrator will not determine that a demonstration of noncompliance with the Act has been made in the title V context.”); *In the Matter of Bullseye Glass Co.*, Order on Petition No. X-2020-7 at 6 (August 18, 2020) (*Bullseye Glass Order*) (distinguishing concerns related to a facility’s compliance with applicable requirements from concerns related to the adequacy of title V permit terms).

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONER

Claim I: The Petitioner claims that “The permit improperly omits requirements applicable to Total Annual Benzene from the coke by-product recovery plant and the public did not have a meaningful opportunity to comment on that omission.”

Petitioner’s Claim: The Petitioner claims that the ABC Coke Permit does not include requirements that would apply if the total annual quantity of benzene (TAB) in the waste streams at the facility’s coke by-product recovery plant exceeds 10 megagrams (Mg) per year. Instead, the Permit includes requirements that apply when the TAB is ≤ 1 Mg/year or ≤ 10 Mg/year. Petition at 4–5 (citing Permit¹⁰ Conditions 34 and 35 and 40 C.F.R. § 61.357).

The Petitioner asserts that TAB exceeded 10 Mg/year (potentially up to 38 Mg/year). *Id.* at 5, 7 (citing Complaint and Proposed CD filed by EPA and JCDH). The Petitioner claims that TAB at these levels must be regulated differently than the current Permit requires. *Id.* at 7.

¹⁰ The citations to the Permit throughout the Petition refer to the “Final” Permit, to which the Petitioner ascribes an August 16, 2018 date. However, as noted above, the Draft Permit was released on August 19, 2018; the Final Permit (attached as Exhibit A of the Petition) was issued on April 17, 2019. For all claims discussed in this Order, the Draft and Final Permit terms do not appear to materially differ. Thus, this discrepancy does not impact the EPA’s response to the Petition.

The Petitioner acknowledges the following EPA statements:

After Drummond completed actions to address some of the more significant concerns such as permanently enclosing an open-ended overflow pipe, several of the additional waste streams identified by EPA and JCBH were no longer relevant to the TAB calculation, thereby reducing the TAB. EPA and JCBH anticipate that Drummond's actions taken to date, along with additional actions required under the Consent Decree to seal and enclose any remaining leaking equipment and to install additional controls will result in the TAB being reduced below 1 Mg.

Id. at 5–6 (quoting EPA, Drummond Company Clean Air Act Settlement Information Sheet, available at <https://www.epa.gov/al/drummond-company-clean-air-act-settlement-information-sheet> (Settlement Information Sheet)). The Petitioner challenges the EPA's reliance on these anticipated reductions in TAB, claiming that they are speculative and conjectural. *Id.* at 6. The Petitioner asserts that neither the EPA nor JCDH have presented any evidence that TAB is or will be under 1 Mg/year and have not provided the TAB calculations to the Petitioner upon request. *Id.* Similarly, the Petitioner contends that the permit record lacks a justification for JCDH's conclusion that actual TAB is less than 1 Mg/year and, thus, that the requirements applicable if TAB exceeded 10 Mg/year do not apply. *Id.* at 6. The Petitioner claims that the representation in the Statement of Basis that "actual TAB does not exceed 1 megagram per year, demonstrated by monthly sampling consistent with §61.352(a)(1) and annual recalculation and reporting of the TAB" was misleading and was contradicted by the Complaint filed months after the Statement of Basis was released. *Id.* (quoting Statement of Basis at 5). The Petitioner claims that the representation in the RTC that ABC Coke was "in compliance" intentionally concealed information about the past noncompliance referenced in the Complaint. *Id.* (quoting RTC at 22).

The Petitioner also asserts that the public lacked a meaningful opportunity to comment on the Draft Permit because accurate TAB reports (and the Complaint filed by the EPA and JCDH) were not publicly available during the public comment period. *Id.* at 7. The Petitioner claims that this information was "necessary to determine the applicability of, or to impose, any applicable requirement" and suggests that the lack of this information "resulted in, or may have resulted in, a deficiency in the permit's content." *Id.* (quoting 40 C.F.R. § 70.5(c) and *In the Matter of Cash Creek Generation, LLC*, Order on Petition No. IV-2010-4 at 11–12 (June 22, 2012) (*Cash Creek II Order*)). The Petitioner states that, "Had Petitioner known that Drummond's TAB was actually over 10 Mg/year, the Petitioner would have commented that Drummond should be required to fulfil [sic] the requirements of 40 C.F.R. § 61.357(d) and that this regulation should be required in the permit." *Id.*

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

As an initial matter, the Petitioner has not considered the existing permit terms germane to this issue.¹¹ Among the relevant terms, one is particularly pertinent: Final Permit Condition 1 for the Coke By-Product Recovery Plant requires ABC Coke to "maintain the [TAB] quantity, determined per 40 CFR 61, Subpart FF, below 10 megagrams per year." Final Permit at 40. This

¹¹ See *supra* note 9 and accompanying text.

provision explicitly states: “The purpose of this restriction is to limit the applicable requirements of Subpart FF” to those that apply when TAB is below 10 Mg. *Id.* Thus, although the Petitioner may be correct that “[t]he permit has no requirements to regulate when the [TAB] from the plant is greater than 10 Mg/[year],” Petition at 4, the Permit explicitly prohibits this situation from occurring, thus obviating the need for the terms requested by the Petitioner. Moreover, not only does the Permit require the source to maintain its TAB below 10 Mg/year, but the Permit also contains provisions dictating how TAB is to be monitored and calculated (to determine whether TAB remains below 10 Mg/year).¹² The Petitioner neither acknowledges these provisions nor challenges their effectiveness (e.g., by arguing that the limit restricting TAB to below 10 Mg/year is not enforceable as a legal and practical matter).¹³ Accordingly, the Petitioner has failed to demonstrate that the Permit does not contain the applicable requirements of subpart FF for the facility.

The allegations raised by the Petitioner concerning the facility’s TAB levels are more properly characterized as compliance issues, not permit content issues. *See Bullseye Glass Order* at 6. If the facility’s TAB exceeds 10 Mg/year, this could present grounds for pursuing enforcement action for violations of both the Permit and the underlying NESHAP, which could eventually result in changes to the source’s Permit. As discussed above, the EPA believes that the enforcement process—and not the title V petition process—is the most appropriate venue for resolving these compliance-based concerns. *See, e.g., Oak Creek Order* at 8–9.

In fact, the EPA, JCDH, and the Petitioner engaged in such an enforcement action, as discussed in Section III.D of this Order. The resolution of this enforcement action has effectively rendered the Petitioner’s claim moot. Since the initial inspection of the facility in 2011, ABC Coke has undertaken—and the Final CD requires the facility to complete—various measures related to the subpart FF NESHAP. Specifically, ABC Coke is required to permanently enclose and seal waste streams that accounted for the vast majority of the TAB values calculated by the EPA. *See* Final CD ¶¶ 17–20; *see also, e.g.,* Declaration of Jay Cornelius, Jan. 16, 2020, Case No. 2:19-cv-00240-AKK (N.D. Ala. filed Jan. 17, 2020). By taking such actions, those waste streams no

¹² These provisions are contained in Conditions 1.C (monitoring), 30 (monitoring), 31 (sampling and testing procedures), 32 (calculation of TAB), and 35 (recordkeeping). *See id.* at 40, 54–55, 57. As the Petitioner acknowledges, the Permit also includes the relevant subpart FF requirements that apply when TAB remains below 10 Mg/year. *See* Final Permit at 56–57 (Conditions 33 and 34).

¹³ In Petition Claim II.B, the Petitioner argues that one of these monitoring provisions—Condition 1.C—is inadequate to assure compliance. However, Claim II.B is entirely without reference to the TAB limit with which this monitoring term is designed to assure compliance, and nowhere does the Petitioner claim that this defect renders the TAB limit in Condition I unenforceable as a practical matter. Moreover, as discussed in the EPA’s response to Claim II.B, *infra*, the Petitioner has failed to demonstrate that this monitoring provision is inadequate.

longer need to be included in TAB calculations. Given these changes, EPA believes it is reasonable to determine that TAB is currently under 1 Mg/year and will remain that way.¹⁴

Additionally, the Final CD requires ABC Coke to apply for a title V permit to incorporate these requirements. *See* Final CD ¶¶ 22.b (as modified), 22.c; *see also In the Matter of CITGO Refining and Chemicals Co.*, Order on Petition No. VI-2007-01 at 12–13 (May 28, 2009) (*CITGO Order*) (certain consent decree terms establish “applicable requirements” that must be included in title V permits). On April 21, 2021, JCDH issued Permit No. 4-07-0001-005-02, a non-title V permit, which contains the required elements from the Final CD. On the same day, JCDH issued an amendment to ABC Coke’s title V permit to incorporate the terms of Permit No. 4-07-0001-005-02, and, accordingly, the Final CD. *See* Amended Permit at 101. In conjunction with the existing permit terms described above, these actions and requirements ensure that the title V permit need not include any additional subpart FF requirements that would be applicable if the facility’s TAB were to exceed 10 Mg/year.

Claim II: The Petitioner claims that “The permit fails to provide periodic monitoring sufficient to assure compliance.”

Claim II includes two subclaims asserting that the Permit does not contain adequate monitoring to assure compliance with applicable requirements. Before presenting these claims, the Petition includes background on title V monitoring requirements. *See* Petition at 8 (citing CAA § 504(c); 40 C.F.R. §§ 70.6(a)(3)(i)(A), 70.6(a)(3)(i)(B), 70.6(c)(1), 70.6(a)(3)(C);¹⁵ *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008)¹⁶).

Claim II.A: The Petitioner claims that “All components of the [Leak Detection and Repair (LDAR)] program must undergo a full audit in order to enforce the requirement that they must be tagged.”

Petitioner’s Claim: In Claim II.A, the Petitioner asserts that the Permit does not contain monitoring to ensure compliance with a permit term, based on the LDAR program, that requires ABC Coke to identify certain equipment with a weatherproof tag. Petition at 8–9 (citing Draft Permit at 37; Final Permit at 41). The Petitioner claims that the Permit contains no provisions to

¹⁴ The Petitioner characterizes similar conclusions provided by the EPA at the outset of the enforcement action as “speculative” and “conjectural,” Petition at 5–6, but does not engage with the basis for these conclusions. Multiple filings and documents that were available during the petition period contained information detailing the basis for the EPA’s position, including the source’s alleged failure to include all relevant waste streams in its TAB calculations, the specific waste streams at issue, and the actions taken (or expected to be taken) to enclose these waste streams such that they would no longer need to be included in TAB calculations. *See* Complaint (e.g., ¶ 63), Proposed CD (e.g., ¶¶ 17–18 and B-1), and Settlement Information Sheet. The EPA also provided the Petitioner with updated TAB calculations based on the EPA’s prior investigations of the facility. These calculations detailed the technical basis for the EPA’s conclusions, including the unenclosed emission sources. For example, the calculations show that two waste streams in particular were responsible for 37.76 of the 38.36 Mg/year of TAB referenced by the Petitioner. These TAB calculations were provided on May 20, 2019—well before the Petition was filed—and are publicly available through <https://foiaonline.gov> under Tracking No. EPA-R4-2019-005759. Thus, the Petitioner’s assertion that it had not received the most recent TAB calculations is simply not true. *See* Petition at 6 and 6 n.23.

¹⁵ 40 C.F.R. § 70.6(a)(3)(C) does not exist. Based on the context of the Petition, the EPA believes the Petitioner intended this citation to refer to 40 C.F.R. § 70.6(c)(1).

¹⁶ The Petitioner’s citation to this case references a 2011 date, but the correct date of this case is 2008.

ensure that equipment will be tagged and identified as required. In suggesting that additional monitoring is necessary, the Petitioner asserts that the likelihood of violation of requirements is a factor the EPA must consider when reviewing monitoring in a permit. *Id.* (citing *In the Matter of TVA Bull Run*, Order on Petition No. IV-2015-14 (November 10, 2016)). To this point, the Petitioner claims that the Proposed CD “shows that 700 or more of these components were not tagged or properly in the database.” *Id.* (citing Proposed CD at B-1). The Petitioner acknowledges that the facility began tagging these components in 2017, but asserts that this work was not finished as of February 2019. *Id.* (citing Proposed CD at B-1). Thus, in order to ensure that the relevant LDAR requirements are met, the Petitioner suggests that “the permit should require one thorough baseline audit or review of all refinery components as well as a requirement to identify any additional new components that are added as part of any physical change at the facility.” *Id.*

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

The Petition asserts that the following is necessary to assure compliance with relevant LDAR requirements: “[1] the permit should require one thorough baseline audit or review of all refinery components [to ensure they are properly identified and/or tagged] as well as [2] a requirement to identify any additional new components that are added as part of any physical change at the facility.” Petition at 9.

Regarding the Petitioner’s request for a baseline audit to determine the facility’s compliance with the tagging requirements, this issue has already been addressed through the enforcement process. Notably, as a result of the EPA’s and JCDH’s enforcement action, the facility has recently completed an audit and has added 700 components to its tagging database, which are now being monitored pursuant to its LDAR program. *See* Declaration of Jay Cornelius at page 6.¹⁷ A third party—someone other than ABC Coke—audited the program to ensure the program meets applicable LDAR requirements. *Id.* Moreover, the Final CD requires ongoing audits to ensure, among other things, that all covered equipment in benzene service is clearly identified and that tagging is properly maintained. *See* Final CD, Appx. A ¶ 19–23. As explained with respect to Claim A, on April 21, 2021, JCDH incorporated these requirements into the facility’s title V permit, rendering this portion of the Petitioner’s claim moot. Amended Permit at 105–106.

Regarding the Petitioner’s request for a permit requirement to identify new components, this is not necessary in light of existing permit terms. The existing requirements of Condition 7—including the requirement to identify certain components with weatherproof tags—explicitly apply to “[e]ach component in [volatile organic compound (VOC)] service”; that is, “each affected source described in Condition 2 above.” Final Permit at 41 (Condition 7). Condition 2, in turn, lists various types of pumps, valves, and connections in VOC service; it is not confined to specific existing pieces of equipment at ABC Coke, nor does it contain any restriction that would bar its applicability to new components. *See id.* at 40. The Petitioner has not evaluated

¹⁷ Although the Petitioner bases its claim on the allegation that the Proposed CD “shows that 700 or more of these components were not tagged or properly in the database,” Petition at 9, the Proposed CD actually stated, consistent with the explanation above, that “700 components *have been added* to the tagging database and are now being monitored,” Proposed CD at B-1 (emphasis added).

these terms or demonstrated that they are insufficient.¹⁸ Moreover, the Final CD—and, by extension, the amended title V permit incorporating its conditions—assures that any new components will be properly evaluated and identified. Final CD Appx. A ¶¶ 2.b, 16; Amended Permit at 104. Thus, Claim II.A is moot.¹⁹

Claim II.B: The Petitioner claims that “The Benzene waste stream in the by-product recovery plant must be monitored weekly or daily.”

Petitioner’s Claim: The Petitioner claims that the Permit does not include adequate monitoring of benzene concentrations in the facility’s waste streams. Petition at 9. More specifically, the Petitioner asserts that an existing permit term requiring monitoring of flow rate and benzene concentration at least once per month is insufficient. *Id.* (citing Permit Condition 1.C). The Petitioner claims that more frequent monitoring is warranted. For support, the Petitioner asserts that the source was previously noncompliant, in that it “failed to accurately determine the annual waste quantity at the point of generation of each waste stream” *Id.* (quoting Compliant ¶85). The Petitioner also asserts that, “Over the years, there has been great variability of the TAB at the plant,” citing the differences between alleged TAB values at 38 Mg/year and 1 Mg/year. *Id.* at 9–10. The Petitioner suggests that daily or weekly sampling of flow rates and benzene concentrations for each waste stream is necessary to capture this purported underlying variability in the benzene waste streams. *Id.* at 8.

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

In Claim II.B, the Petitioner asserts that the monthly benzene monitoring in Condition 1.C is insufficient but fails to identify or consider the substantive permit term supported by this monitoring provision.²⁰ Notably, Condition 1.C for the By-product Recovery Plant supports Condition 1, which establishes an *annual* limit on TAB, not to exceed 10 Mg/year. Final Permit at 40 (Item 1). The Petitioner, in not acknowledging the underlying permit term, fails to demonstrate that the *monthly* monitoring of benzene concentrations is insufficient to assure compliance with this *annual* permit limit.

Additionally, the Petitioner has failed to demonstrate any connection between the facility’s “past non-compliance” or alleged “great variability of the TAB at the plant” and the need for more frequent monitoring. While a facility’s history of noncompliance and the variability of the TAB could be factors supporting the need for additional monitoring, the importance of these factors is context-dependent. Here, the facility’s alleged noncompliance and the variability in the TAB measurements is not related to the *frequency* of benzene measurements at the facility that the Petitioner now challenges. Rather, as discussed above with respect to Claim I, past noncompliance concerns and variability of the TAB stemmed from the *method* by which ABC Coke had previously calculated its TAB; specifically, *which* waste streams were included and

¹⁸ See *supra* note 9 and accompanying text.

¹⁹ See, e.g., *In the Matter of Shell Deer Park Chemical Plant and Refinery*, Order on Petition Nos. VI-2014-04 and VI-2014-05 at 37 (September 24, 2015) (denying a claim as moot when the issue was resolved by a subsequent permit modification).

²⁰ See *supra* note 9 and accompanying text.

where the benzene content was measured in calculating the facility's TAB.²¹ Accordingly, none of the arguments supplied by the Petitioner demonstrate that more frequent monitoring of benzene concentrations is necessary to assure compliance with the TAB limit contained in Condition 1.

Further, as explained in Claim I, that the facility has made and is required to make physical changes to permanently seal up and enclose certain waste streams that were responsible for the alleged noncompliance and "variability" cited by the Petitioner. Final CD ¶¶ 17–20; Amended Permit at 101. Moreover, the Final CD—and, by extension, the amended title V permit incorporating its conditions—requires additional monitoring and TAB calculation procedures for specific equipment, as necessary. Final CD ¶¶ 14, 21; Amended Permit at 101–102. Collectively, these developments have effectively rendered the Petitioner's claim moot.

Claim III: The Petitioner claims that "Drummond's permit application was incomplete."

Claim III includes multiple subclaims asserting that the ABC Coke permit application was incomplete. Before presenting its specific bases for objection, the Petition briefly introduces statutory and regulatory requirements related to permit applications and permit content. *See* Petition at 10 (citing CAA §§ 304, 502(a), 504(a); 40 C.F.R. §§ 70.5(c), 70.7(a); 57 Fed. Reg. 32250, 32251 (July 21, 1992)).

Claim III.A: The Petitioner claims that "Multiple plans in the draft permit are not attached either to the draft permit nor permit application nor are they referenced correctly and thus are not publicly available."

Petitioner's Claim: In Claim III.A, the Petitioner claims that the EPA should object to the permit because various plans referenced throughout the Permit are not appropriately incorporated by reference into the Permit. Petition at 10.

The Petitioner discusses various EPA statements concerning incorporation by reference in title V permits: The Petitioner notes that the EPA has emphasized that incorporation by reference is "appropriate where the cited requirement is part of the public docket or is otherwise readily available, clear and unambiguous, and currently applicable." *Id.* at 10 (citing *In the Matter of United States Steel Corp., Granite City Works*, Order on Petition No. V-2009-03 (January 31, 2011) (*U.S. Steel I Order*)). Quoting the EPA, the Petitioner further claims it is important that "(1) referenced documents be specifically identified; (2) descriptive information such as the title or number of the document and the date of the document be included so that there is no ambiguity as to which version of a document is being referenced; and (3) citations, cross references, and incorporations by reference are detailed enough that the manner in which any referenced material applies to a facility is clear and is not reasonably subject to misinterpretation." *Id.* at 10 (quoting *U.S. Steel I Order*); *see id.* at 12 (citing White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program (March 5, 1996) (*White Paper 2*)). The Petitioner states that the EPA has granted a petition to object to a

²¹ *See supra* note 14 and accompanying text.

permit where the permit did not specify the version of or include a description of plans that the permit incorporated by reference. *Id.* at 11 (citing *U.S. Steel I Order*).

Turning to ABC Coke, the Petitioner provides a table listing multiple plans and the location in the Permit where the plans are referenced. *Id.* at 11. The Petitioner claims that none of the plans were attached to the permit application, Draft Permit, or Final Permit. *Id.*

The Petitioner acknowledges that, in response to public comments, JCDH provided a description of each plan in its RTC. *Id.* at 11. However, the Petitioner asserts that these descriptions are inadequate, given that the descriptions do not address the version or date of each relevant plan, nor do the descriptions identify what general requirements are included in each plan. *Id.* at 11, 12. Moreover, the Petitioner asserts that each description, along with the version of each plan incorporated by reference, must be included on the face of the permit (as opposed to the RTC). *Id.* at 11. The Petitioner also acknowledges that JCDH provided the plans to the Petitioner. However, the Petitioner claims that this production of records does not resolve the alleged flaws with how the plans are incorporated into the permit. *Id.* at 12.

The Petitioner concludes by asserting that the “EPA must object to the permit, as the plans referenced throughout the draft permit are not attached, nor do they specify each version, the date of the plan, or a general description of each plan.” *Id.*

EPA’s Response: For the following reasons, the EPA denies the Petitioner’s 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. As the Petitioner observes, EPA guidance describes certain criteria for incorporation by reference. *See, e.g., U.S. Steel I Order* at 42–44; *White Paper 2* at 36–41. Here, the Petitioner claims that the manner by which the Permit references certain operational plans is insufficient to properly incorporate those plans by reference.

However, before addressing whether a permit properly incorporates by reference certain provisions (such as an operational plan)—one must first determine whether the provisions at issue are actually required permit elements. If the contents of a plan need not be included (or incorporated) into a title V permit in the first instance, then the manner in which a permit references such a plan is not particularly relevant.

The EPA has spoken to these issues on multiple occasions. 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 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*); *Oak Creek Order* at 24–25.

Central to the EPA’s evaluation of this type of claim is the petitioner’s demonstration burden. Accordingly, the 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, the 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, the 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 that plan that it must be included in the permit.

In these prior petition orders, the EPA considered whether many different types of plans should be included in a permit or permit application, with the results often depending on the nature of the specific plans at issue. *See, e.g., Cash Creek II Order* at 11 (“EPA’s decision on this issue is based on the role of the operation plan requirement in this particular permit.”); *Edgewater Order* at 12 (basing EPA’s decision on the regulations governing permit applications, permit content, and public participation, along with “the specific facts relevant to each of the plans required in the . . . permit”). The EPA has denied claims, for example, where a startup, shutdown, and malfunction plan was developed “to support other existing (required) terms and conditions,” *Kentucky Syngas Order* at 12; where a flare monitoring plan established elements “analogous to a performance test protocol” that supplemented other permit limits, *id.*; where a vent sampling plan was “essentially a performance test protocol,” *id.* at 13; where a flare operation plan was not directly related to specific BACT requirements or other applicable requirements, *Cash Creek II Order* at 12; and where a specific NESHAP required a source to merely “develop and maintain” a plan related to the removal of mercury switches, *Rocky Mountain Steel Order* at 8.

On the other hand, the EPA has granted claims, for example, where a specific NESHAP required the source to “prepare *and implement*” a plan related to electric arc furnaces, *Rocky Mountain Steel Order* at 7 (emphasis added); where an underlying requirement explicitly required the source to “submit *and comply with* an approved” plan, *Edgewater Order* at 13, *Oak Creek Order* at 26 (emphasis added); where a startup and shutdown plan “contain[ed] information needed to determine the applicability of, or the exemption from, specific permit limits,” *Edgewater Order* at 13, *see Oak Creek Order* at 24; where an inspection plan was explicitly listed as a “Compliance Demonstration Method” for a particulate matter (PM) limit, *Edgewater Order* at 14; and where a malfunction prevention plan provided the “means of demonstrating and monitoring compliance with the PM limit,” *Oak Creek Order* at 26.

Here, the entirety of Claim III.A is predicated on the Petitioner’s assumption that each of the various plans referenced in the Permit must either be included on the face of the Permit or properly incorporated by reference into the Permit (and made publicly available as part of the permit application). As illustrated by the complexity and variability of the plans addressed in prior petition orders, the issue is not so simple. Some plans must be included in (or properly incorporated into) a permit and must be made available for public review alongside a permit application; others do not. Determining whether the provisions of a specific plan must be included in (or incorporated into) a permit is necessarily a fact-specific inquiry depending on the nature of the plan and the relationship between the plan and the underlying legal authority and permit terms giving rise to the plan. *See, e.g., Cash Creek II Order* at 11; *Edgewater Order* at 12.

The Petition includes a table referencing seven different types of plans associated with at least twenty-four permit terms. However, the Petition does not describe any of these plans, the permit terms that reference them, the legal authorities from which the plans are derived (as identified in the Permit), or provide any other relevant analysis. Accordingly, the Petitioner has not demonstrated that the referenced plans are necessary to impose an applicable requirement or assure compliance with an applicable requirement such that these plans must be included in (or properly incorporated into) the Permit.

Moreover, the Petitioner has failed to substantively engage with JCDH’s RTC, which discussed each plan’s relationship to specific permit terms and applicable requirements, including whether ABC Coke is required to merely develop the plans or actually implement the plans, and the extent to which certain plans may be related to assuring compliance with permit terms.²² The Petitioner’s failure to engage with JCDH’s discussion concerning whether these plans needed to be included in the permit presents an additional basis for denying this claim.²³

Claim III.B: The Petitioner claims that “In violation of 40 CFR Part 70.5, the proposed permit’s application lacked sufficient Potential to Emit data to be able to determine whether certain applicable requirements are triggered.”

Petitioner’s Claim: Claim III.B includes multiple subclaims alleging that the title V permit application did not include sufficient information on the facility’s potential to emit (PTE) to determine which requirements are applicable to the facility. For support, the Petitioner quotes various EPA regulations governing the required content of permit applications. Specifically, the Petitioner notes that 40 C.F.R. § 70.5(c)(3) requires the following emissions-related information in permit applications:

- (i) All emissions of pollutants for which the source is major, and all emissions of regulated air pollutants. A permit application shall describe all emissions of regulated air pollutants emitted from any emissions . . . (iii) Emissions rate in tpy and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method . . . [and] (v) Identification and

²² *See, e.g.,* RTC at 112 (“[T]he elements of the startup, shutdown, and malfunction plan shall not be considered an applicable requirement as defined in §70.2 and §71.2 of this chapter.”); *id.* at 113 (“ABC has not been required to ‘implement’ this [work practice] plan.”)

²³ *See supra* note 6 and accompanying text.

description of air pollution control equipment and compliance monitoring devices or activities (vi) Limitations on source operation affecting emissions or any work practice standards, where applicable, for all regulated pollutants at the part 70 source . . . (viii) Calculations on which the information in paragraphs (c)(3)(i) through (vii) of this section is based.

Petition at 12–13. The Petitioner, citing 40 C.F.R. § 70.5(a)(2), asserts that this information must be “sufficient to evaluate the subject source and its application and to determine all applicable requirements.” *Id.* at 13. Similarly, quoting 40 C.F.R. § 70.5(c), the Petitioner asserts that permit applications cannot omit “information needed to determine the applicability of, or to impose, any applicable requirement.” *Id.* The Petitioner later quotes 40 C.F.R. § 70.5(c)(5), which requires that applications include “information that may be necessary to implement and enforce other applicable requirements of the Act or of [Title V] or to determine the applicability of such requirements.” *Id.* at 19.

Additionally, the Petitioner asserts generally that permit applications must contain “detailed emissions information” for each source of emissions. *Id.* at 3, 19, 20. The Petitioner addresses a portion of JCDH’s RTC relevant to this idea, specifically noting that “JCDH repeatedly cites to the ‘White Paper for Streamlined Development of Part 70 Permit Applications’ [White Paper 1] to explain its more ‘qualitative’ analysis” and to support JCDH’s conclusion that “precise emissions estimates are not needed.” *Id.* at 13 (quoting RTC at 102 and citing RTC at 111, 118–19, and 121). The Petitioner asserts that White Paper 1 only applied to initial permits and that its guidance was not intended to apply long-term to permit renewals like the current Final Permit. *Id.* Petitioner also asserts that White Paper 1 was developed to address confusion before title V regulations had been developed and before adequate monitoring had been conducted. *Id.*

The Petitioner highlights the potential importance of accurate emissions data, as forecast in the heading to this claim. For example, the Petitioner claims generally: “Without complete information in the permit application, a permitting authority cannot determine whether certain requirements such as the New Source Review [(NSR)] program are triggered.” *Id.* at 12. Later, the Petitioner asserts that “[c]orrect emissions data are important for modeling for NAAQS compliance, evaluation of risk impacts, and for determining a proper baseline for [NSR]. . . . Unless JCDH has reasonable, accurate emissions [estimates], it is impossible to determine if NSR would be triggered by physical changes or the changes in operations.” *Id.* at 13–14. The Petitioner also indicates that ABC Coke previously accepted limitations to ensure that prior changes did not trigger major NSR, and insists that if emission estimates are inaccurate, then these limits are also inaccurate. *Id.* at 13.

Turning to the ABC Coke permit application, in Subclaim III.B.i, the Petitioner first contests various general aspects of the facility’s PTE calculations included in its permit application. For example, the Petitioner criticizes ABC Coke’s reliance on AP-42 emission factors to establish PTE—including both general challenges as well as specific challenges to the use of “E-rated” emission factors and factors based on decades-old data—and suggests that site-specific data based on continuous testing should have been used to estimate emissions. *See id.* at 14–15.

After presenting these general arguments, the Petition includes six separate subclaims (subclaims III.B.i.1 through III.B.i.6) challenging PTE calculations for specific pollutants and emission units. In Subclaim III.B.i.1, the Petitioner presents technical arguments challenging the PTE calculations for benzene-soluble organics, sulfur dioxide (SO₂), and nitrogen oxides (NO_x) from door leaks. *See id.* at 15. In Subclaim III.B.i.2, the Petitioner presents technical arguments challenging the PTE calculations for SO₂, NO_x, carbon monoxide, and VOC from soaking operations. *See id.* at 16. In Subclaim III.B.i.3, the Petitioner challenges the PTE calculations for VOC from flares. *See id.* at 16–17. In Subclaim III.B.i.4, the Petitioner presents technical arguments challenging the PTE calculations for SO₂ from underfire stacks and certain flares. *See id.* at 17–18. In Subclaim III.B.i.5, the Petitioner presents technical arguments challenging the PTE calculations for PM emissions from pushing, quenching, and solid materials handling and storage operations. *See id.* at 18. In Subclaim III.B.i.6, the Petitioner presents technical arguments challenging the PTE calculations for NO_x from the boilers. *See id.* at 18–19.

Finally, in Subclaim III.B.ii, the Petitioner addresses a set of four emergency flares. The Petitioner argues that the permit application did not properly account for emissions from the emergency flares. *See id.* at 19–20. The Petitioner also argues that a “source-wide VOC limit in the permit is not enforceable,” *id.* at 21, referring also to requirements that flare systems be capable of controlling 120 percent of normal gas flow, controlling VOC with 95 percent destruction efficiency, and operating without visible emissions. *Id.* at 20. The Petitioner suggests that the four emergency flares are not accounted for in determining compliance with the “source-wide VOC limit,” and claims that, “Without accounting for these flares, the VOC efficiency destruction rate used to establish the VOC [PTE] limit is not enforceable because it simply assumes a combustion efficiency that does not take into account all emissions sources.” *Id.* The Petitioner implies that the destruction efficiency might be different for the four emergency flares than for other flares. *Id.*

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

The relevant regulatory provisions governing permit application content share a common thread: the information in a permit application must be detailed enough to determine and impose all applicable requirements that must be included in a source’s title V permit. 40 C.F.R. §§ 70.5(a)(2), 70.5(c), 70.5(c)(3)(i)-(viii).²⁴ In Claim III.B, the Petitioner attempts to draw a connection between an alleged flaw in the permit and the cited regulatory provisions. *See* Petition at 12–13 (“In violation of 40 CFR Part 70.5, the proposed permit’s application lacked sufficient [PTE] data to be able to determine whether certain applicable requirements are triggered”). However, although the Petition claims that the numerous alleged deficiencies presented under Claim III.B show that the application lacked sufficient data “to determine whether certain applicable requirements are triggered,” Petition at 12, the Petitioner does not

²⁴ The Petitioner characterizes these requirements as requiring that permit applications contain “detailed emissions information” for each source of emissions. Petition at 19, 20. The EPA does not agree with this characterization, which is not based in the cited regulatory text. In fact, the EPA has explained that detailed emissions information is not always necessary for all sources of emissions. For further discussion, see *In the Matter of Superior Silica Sands and Wisconsin Proppants, LLC*, Order on Petition Nos. V-2016-18 & V-2017-2 at 7–12 (February 26, 2018) (*SSS/WP Order*); White Paper 1 at 6–9; White Paper 2 at 30–36. The EPA also disagrees with the Petitioner’s suggestion that the guidance contained in White Paper 1 is no longer relevant.

identify any specific applicable requirements or demonstrate how they might be affected by the alleged defects in the permit application.

The only potential connection between the alleged permit application deficiencies and the applicability of permit requirements are a few generalized references to the applicability of the NSR program within the introductory section of Claim III.B. *See* Petition at 12–14 (quoted and summarized above). However, the Petitioner does not explain how those concerns are related to the current title V renewal application or permit. If anything, these hypothetical concerns are either forward-looking NSR permitting or compliance issues.²⁵

The specific challenges within Subclaims III.B.i and III.B.ii to the ABC Coke permit application emission estimates are presented without any discussion of how they may be relevant to determining what requirements apply to the facility, or to any other requirements of 40 C.F.R. § 70.5. Similarly, the Petition does not address how these issues might have resulted in a flaw in the Permit or affected the Permit in any material way.²⁶ *See, e.g., SSS/WP Order* at 10–12. Accordingly, even if the Petitioner’s allegations concerning these emission calculations were correct, the Petitioner has failed to demonstrate that the ABC Coke permit application did not comply with the relevant requirements of 40 C.F.R. § 70.5 or otherwise resulted in the Permit not complying with the Act.

Regarding the Petitioner’s conceptually distinct allegation within Subclaim III.B.ii that the Permit’s “source-wide VOC limit . . . is not enforceable” because it does not account for emissions from all flares, Petition at 21, this claim is also denied. As an initial matter, the Petitioner has not identified—and the Permit does not appear to contain—a “source-wide VOC

²⁵ The Petitioner’s hypothetical concerns could potentially manifest if and when ABC Coke undertakes a modification in the future. If that happens, certain emissions estimates could indeed be relevant to determining the applicability of major NSR to the specific project at issue, or the results of any required air quality impacts modeling. However, this would likely take place through the NSR (CAA title I) permitting process, not the title V permitting process. *Cf. In the Matter of Big River Steel, LLC*, Order on Petition No. VI-2013-10 at 8–20 (October 31, 2017). And, if the Petitioner has concerns (whether due to emissions estimates or other reasons) with respect to future, hypothetical projects that the facility may not have received the proper NSR permit, or that the facility may not have properly modeled its emissions, the Petitioner could challenge such a future NSR permit through title I mechanisms or potentially pursue enforcement action. *See, e.g., id.* at 14–16, 20–21. The EPA further notes that the Petitioner’s concerns address the calculation of the facility’s PTE; NSR applicability for future modifications is generally based on actual, not potential, emissions. *See* 40 C.F.R. § 51.166(a)(7)(iv)(c)-(f). Regarding the Petitioner’s brief two-sentence discussion of emission limits that were apparently previously established through the NSR permitting process, the Petitioner provides no information about these limits to support its concerns in a manner relevant to title V permitting (e.g., the Petition contains no claim that these limits were not supported by adequate monitoring, recordkeeping, or reporting, and were therefore unenforceable as a practical matter). *See* Petition at 13–14.

²⁶ On this point, JCDH summarized in its RTC how it used (or declined to use) the information from the permit application in developing ABC Coke’s title V permit. JCDH concluded by explaining: “The Department appreciates the commenter’s critical review of the application but it does not find any information or comments provided by the commenter to have any substantial impact on the draft permit the Department has prepared. The Department does not find any reason to change the permit based on these comments.” RTC at 108. The Petitioner did not engage with this explanation, much less demonstrate that JCDH should have changed any portions of the Permit based on any issues with the permit application. *See supra* note 6 and accompanying text.

emissions limit” or a “VOC [PTE] limit.” *Id.* at 20.²⁷ The Permit does contain other limits on flare operations, to which the Petitioner alludes but does not specifically identify. For example, the Permit includes a requirement that “bypass/bleeder stack flares” (which appear to be the “emergency flares” referenced in the Petition)²⁸ remove at least 95 percent of VOC. *See* Final Permit at 74 (Condition 4); *see also id.* at 78 (Condition 17, requiring that such flare systems be capable of controlling 120 percent of the normal gas flow generated by the battery, and to operate with no visible emissions). Any relationship between these terms and the Petitioner’s challenges to the supposed “source-wide VOC emissions limit” is not clear, but it may involve the Petitioner’s allegation that a “VOC efficiency destruction rate” does not take into account the “emergency flares” at issue. Given that Condition 4 cited above explicitly applies a 95 percent destruction efficiency requirement to the specific flares that the Petitioner characterizes as “omitted” (as does Condition 17), the Petitioner’s apparent concern that the 95 percent destruction rate does not account for the emergency flares is not supported by the record. In any case, the Petitioner has failed to evaluate the relevant permit terms or demonstrate that they present a basis for an EPA objection to the Permit.²⁹

V. CONCLUSION

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

Dated: _____

June 30, 2021



Michael S. Regan
Administrator

²⁷ Given that the Petitioner did not cite to or discuss any actual permit terms, it is unclear whether this portion of Subclaim III.B.ii may again involve challenges to ABC Coke’s permit application, potentially conflating permit application emissions estimates with actual permitted emissions limits.

²⁸ *See* Final Permit at 6 (defining “Bypass/bleeder stack” as “a stack, duct, or offtake system that is opened to the atmosphere and used to relieve excess pressure by venting raw coke oven gas from the collecting main to the atmosphere from a by-product coke oven battery, usually during emergency conditions.”).

²⁹ *See supra* note 9 and accompanying text.