BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	)	
	)	
Title V Air Operating Permit	)	
	)	Permit No. AQM-003/00016–Parts 1-3
For the Delaware City Refinery	)	
	)	
Issued by the Delaware Department of Natural Resources and Environmental Control	)	

PETITION TO OBJECT TO THE TITLE V OPERATING PERMIT FOR THE DELAWARE CITY REFINERY

Pursuant to § 505(b)(2) of the Clean Air Act, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d), Delaware Audubon Society, Delaware Concerned Residents for Environmental Justice, Sierra Club, Environmental Justice Health Alliance for Chemical Policy Reform, the Widener Environmental and Natural Resources Law Clinic, Environmental Integrity Project, and Earthjustice ("Petitioners")[1] petition the Administrator of the U.S. Environmental Protection Agency ("EPA") to object to the above-referenced proposed renewal Title V permit issued by the Delaware Department of Natural Resources and Environmental Control ("DNREC") for the Delaware City, Delaware refinery owned and operated by Delaware City Refining Company, LLC ("the Company" or "DCRC").

As discussed below, DNREC failed to provide a proper hearing on the draft Title V permit for the refinery and thus violated core public participation requirements of Clean Air Act Title V and its implementing regulations. In addition, the refinery's proposed Title V permit fails to comply with Title V and other Clean Air Act requirements in multiple ways that also require objection. The permit contains unlawful loopholes for periods of startup, shutdown, and malfunction; fails to ensure compliance with certain standards for hazardous air pollutants and new source performance standards; and omits terms needed to assure compliance with EPA's Risk Management Program.

Acute environmental justice concerns in the communities near the Delaware City refinery provide additional reason why EPA must pay special attention and object here. These communities are densely-populated and contain large percentages of people who are of color and/or low-income, and who are overburdened by air pollution from the refinery and other sources.

[1] The undersigned attorneys submit this petition on behalf of the Petitioners.

BACKGROUND

I. THE PROPOSED PERMIT ON WHICH THIS PETITION IS BASED

This petition asks EPA to object to the proposed Title V permit for the Company's Delaware City, Delaware refinery (Facility ID No. 1000300016). The permit action at issue here is a permit renewal combined with a significant permit modification. DNREC identifies the proposed permit as follows: AQM-003/00016–Part 1 (Renewal 3); AQM-003/00016–Part 2 (Renewal 2); AQM-003/00016–Part 3 (Renewal 3).

DNREC released the draft renewal Title V permit for public comment on April 26, 2020, with a deadline of May 25, 2020 to request a hearing or comment.[2] On May 22, Petitioners timely submitted initial comments and requested a public hearing and opportunity to submit supplemental comments.[3] *See* Ex. 1, Initial Comments. DNREC later provided notice of a July 14, 2020 "public hearing" on the draft Title V permit and extended the comment period.[4] On June 25, 2020, Petitioners filed comments explaining that the "hearing" that DNREC had noticed was not a valid public hearing because DNREC was not going to allow the public to speak. *See* Ex. 2, June 25, 2020 Comments. On July 14, 2020, DNREC nevertheless held a meeting in which all interested parties except the public had an opportunity to speak. On July 31, 2020, Petitioners timely filed supplemental comments on the draft renewal permit.[5] *See* Ex. 3, Supplemental Comments. Together, the May 22, 2020 initial comments, June 25, 2020 comments on the format of the "public hearing," and the July 31, 2020 supplemental comments raised all the objections discussed below in this petition.

DNREC has since responded to some (but not all) of Petitioners' significant comments on the draft permit, revised the permit without resolving all concerns raised in Petitioners' comments, and sent the revised, proposed permit to EPA for its review. Petitioners are timely filing this petition by the September 16, 2022 deadline listed on EPA Region 3's website to

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[2] Notice, https://dnrec.alpha.delaware.gov/2020/04/26/title-v-permit-renewal-application-delaware-city-refining-company/. The notice explains that DNREC considered that version of the permit to be a "draft/proposed" permit and that DNREC was submitting the permit to EPA for concurrent processing. DNREC's response to comments makes clear that, because significant comments were received on the draft permit, DNREC revised the permit and later submitted a new proposed permit to EPA—the proposed permit that is the subject of this petition. DNREC Division of Air Quality's Response Document for the Public Hearing on July 14, 2020 ("Response to Comments" or "RTC") at 5-6.

[3] Petitioners Delaware Concerned Residents for Environmental Justice and Environmental Justice Health Alliance for Chemical Policy Reform were not parties to the initial comments.

[4] Notice of extended comment period, https://dnrec.alpha.delaware.gov/events/virtual-public-hearing-delaware-city-refining-company/

[5] Petitioner Delaware Concerned Residents for Environmental Justice was not a party to the supplemental comments or the June 25, 2020 comments regarding the "public hearing."

petition the agency to object to the proposed permit.[6] This date is within 60 days of the expiration of EPA's 45-day review period, which ended on July 18, 2022. *Id.*

II. PETITIONERS

Delaware Audubon Society ("DAS") is a 1,500 member state-wide non-profit Chapter of the National Audubon Society that advocates for a cleaner Delaware on behalf of birds that utilize our natural resources. DAS has tremendous concern for the natural environment around the Delaware City refinery, especially the northern most heronry located at Pea Patch Island nearby.

Delaware Concerned Residents for Environmental Justice ("DCR4EJ") is a nonprofit organization headquartered in Wilmington, Delaware. DCR4EJ is an environmental justice collective where individuals, health advocates, native indigenous peoples, and organized groups are united around a shared commitment to a bottom-up process rooted in principles to combat toxic chemicals, processes and pollution, the climate crisis, food access, and public health. DCR4EJ's mission is to inform and empower communities to take action to protect the fundamental rights to clean air, water, land, and food in Delaware and beyond.

Environmental Justice Health Alliance for Chemical Policy Reform (EJHA) is a national network of grassroots Environmental and Economic Justice organization located in communities around the country, that works in solidarity with our affiliate Delaware Concerned Residents for Environmental Justice and other groups to address the problem of toxic and other air pollution in Delaware and beyond.

Sierra Club is one of the oldest and largest national nonprofit environmental organizations in the country, with approximately 3.5 million members and supporters dedicated to exploring, enjoying, and protecting the wild places and resources of the earth; practicing and promoting the responsible use of the earth's ecosystems and resources; educating and enlisting humanity to protect and restore the quality of the natural and human environment; and using all lawful means to carry out these objectives. One of Sierra Club's priority national goals is promoting and improving air quality. Sierra Club's Delaware Chapter has been organizing in the spaces of energy, conservation, and climate in Delaware since the 1970's. The Chapter is committed to ensuring Delaware is prepared for the climate impacts to come, doing its part to prevent further harm to Delaware's communities and the planet, and guaranteeing a just and equitable transition to a clean economy.

Environmental Integrity Project ("EIP") is a non-profit, non-partisan watchdog organization that advocates for effective enforcement of environmental laws. EIP has three goals: (1) to illustrate through objective facts and figures how the failure to enforce and implement environmental laws increases pollution and harms public health; (2) to hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and (3) to help communities obtain protections guaranteed by environmental laws.

[6] https://www.epa.gov/caa-permitting/title-v-operating-permit-public-petition-deadlines

III. GENERAL TITLE V PERMIT REQUIREMENTS

To protect public health and the environment, the Clean Air Act prohibits stationary sources of air pollution from operating without or in violation of a valid Title V permit, which must include conditions sufficient to "assure compliance" with all applicable Clean Air Act requirements. 42 U.S.C. §§ 7661c(a), (c); 40 C.F.R. §§ 70.6(a)(1), (c)(1). "Applicable requirements" include all standards, emissions limits, and requirements of the Clean Air Act. 40 C.F.R. § 70.2. Congress intended for Title V to "substantially strengthen enforcement of the Clean Air Act" by "clarify[ing] and mak[ing] more readily enforceable a source's pollution control requirements." S. Rep. No. 101-228 at 347, 348 (1990), *as reprinted in* A Legislative History of the Clean Air Act Amendments of 1990 (1993), at 8687, 8688. As EPA explained when promulgating its Title V regulations, a Title V permit should "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." Operating Permit Program, Final Rule, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992). Among other things, a Title V permit must include compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(c)(1).

If a state proposes a Title V permit that fails to include and assure compliance with all applicable Clean Air Act requirements, EPA must object to the issuance of the permit before the end of its 45-day review period. 42 U.S.C. § 7661d(b)(1); 40 C.F.R. § 70.8(c). If EPA does not object to a Title V permit, "any person may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period … to take such action." 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). The Clean Air Act provides that EPA "shall issue an objection … if the petitioner demonstrates to the Administrator that the 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); *see also N.Y. Pub. Interest Group v. Whitman*, 321 F.3d 316, 333 n.12 (2d Cir. 2003) (explaining that under Title V, "EPA's duty to object to non-compliant permits is nondiscretionary"). EPA must grant or deny a petition to object within 60 days of its filing. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

GROUNDS FOR OBJECTION

For all the reasons discussed below, EPA must object to the proposed Title V permit for the Delaware City refinery because that permit fails to satisfy substantive requirements of the Clean Air Act and EPA's Title V regulations.

I. ENVIRONMENTAL JUSTICE CONCERNS MANDATE INCREASED FOCUS AND ACTION BY EPA TO ENSURE THAT THE PERMIT'S PROVISIONS ARE STRONG AND COMPLY WITH TITLE V AND OTHER CLEAN AIR ACT REQUIREMENTS.

As Petitioners pointed out in their comments to DNREC,[7] the areas surrounding the Delaware City refinery include a significant population of people of color and low-income

[7] Initial Comments at 4-6.

residents, as well as large numbers of community members who face increased vulnerability to health effects from air pollution due to their age (under 18 or over 65).[8] In addition, these communities are overburdened by hazardous air and other pollution. That means this is a permit that involves significant environmental justice concerns and requires particular focus and action by EPA.

EPA found, based on 2015-19 American Community Survey data, that 86,075 people live within a five-mile radius of the refinery—of whom 57% are people of color and 20% have low income.[9] Based on 2010 U.S. Census data, EPA found that, of the people who live within five miles of the refinery, 26% are minors under the age of 18, and 8% are seniors age 65 or older.[10] Based on the 2015-19 American Community Survey data, EPA found that 18,576 people live within a three mile radius of refinery—of whom 52% are people of color and 16% have low income.[11] And based on the 2010 U.S. Census data, EPA found that, of the people who live within three miles of the refinery, 26% are minors under the age of 18, and 9% are seniors age 65 or older.[12]

These community members are exposed to large amounts of toxic air pollution from the refinery. National Emissions Inventory ("NEI") data show that the Delaware City refinery released 46,692 pounds of hazardous air pollutants ("HAPs") in 2014 and 56,863.89 pounds of HAPs in 2017.[13] The toxic air pollution released by the refinery includes chemicals such as benzene, hydrogen cyanide, toluene, hexane, and xylene.[14] NEI data also show that the refinery released 712,735.98 pounds of volatile organic compounds ("VOCs") in 2014 and 682,210.22 pounds of VOCs in 2017—and 370,423.90 pounds of $PM_{2.5}$ in 2014 and 789,395.38 pounds of

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[8] *See* Envt'l Justice Health Alliance for Chemical Policy Reform *et al.*, Life at the Fenceline: Understanding Cumulative Health Hazards in Environmental Justice Communities (2018), https://new.comingcleaninc.org/assets/media/documents/Life%20at%20the%20Fenceline%20-%20English%20-%20Public.pdf.

[9] *See* https://echo.epa.gov/detailed-facility-report?fid=110001148598

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] This data is listed in the Air Pollutant Report (under "Total Aggregate Emissions Data") from EPA's Enforcement and Compliance History Online ("ECHO"). The Air Pollutant Report is available here: https://echo.epa.gov/air-pollutant-report?fid=110001148598

[14] *See id.* at "Emissions Data."

PM2.5 in 2017.[15] That same data show that the refinery released 3,935,315.25 pounds of nitrogen oxides ("NOx") in 2014 and 2,911,201.65 pounds of NOx in 2017.[16]

ECHO shows that the refinery and other nearby sources emit large amounts of pollution that impact the nearby community. For example, ECHO indicates that, calculating the indexes based on the 1-mile maximum (U.S.), the area surrounding the refinery is above the 80th percentile for two different environmental justice indexes—the Risk Management Plan Facility Proximity index (with a percentile ranking of 80.7) and the Superfund Proximity index (with a percentile ranking of 97.6).[17] That same data indicate that, again calculating the indexes based on the 1-mile maximum (U.S.), the area surrounding the refinery is above the 70th percentile for ten different environmental justice indexes—including the Particulate Matter 2.5 index (with a percentile ranking of 70.7), Air Toxics Cancer Risk index (with a percentile ranking of 71.3), and Ozone index (with a percentile ranking of 71.7).[18]

And ECHO lists the refinery as being in a status of "High Priority Violation" in each of the previous 12 quarters.[19]

Further, over recent years, the Delaware City refinery has caused large releases of air pollution—particularly during SSM periods, and often at the refinery's fluid coking unit ("FCU") and fluidized catalytic cracking unit ("FCCU). For example, two separate incidents at the FCU in April 2015 resulted in the release of 310 tons—and then over 260 tons—of sulfur dioxide ("SO2").[20] In late January through early February 2016, a power outage at the refinery[21] caused the unpermitted release of 105 tons of SO2, apparently from the facility's flares.[22] In August 2018, the FCCU's CO boiler tripped offline, causing the release of 82 tons of carbon monoxide ("CO").[23] In September 2018, a boiler trip caused the FCU to release almost 100 tons of CO and 21 tons of SO2, as well as 310 lbs of hydrogen cyanide ("HCN") and over a ton of

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[15] *Id.* at "Total Aggregate Emissions Data."

[16] *Id.* at "Emissions Data."

[17] *See* https://echo.epa.gov/detailed-facility-report?fid=110001148598

[18] *Id.* See also the EJScreen map for the area surrounding the refinery, available at: https://ejscreen.epa.gov/mapper/

[19] *Id.*

[20] *See* Ex. 4, Excerpts from 11/17/17 DNREC Memo: 2017 Partial Compliance Evaluation Report, at 12-13.

[21] https://www.delawareonline.com/story/weather/2016/01/23/power-outage-causes-delaware-city-refinery-shutdown/79232236/

[22] *See* Ex. 5, DNREC Violation List as of June 2019, at 5-7.

[23] *See* Ex. 6, 9/20/18 FCCU CO Exceedance Incident Report, at 2-3.

ammonia.[24] And in January 2019, a trip at the FCU's CO boiler caused the release of 30 tons SO2, 170 tons CO, 6 tons hydrogen sulfide, 2.5 tons of ammonia, 600 lbs HCN, and 90 lbs carbonyl sulfide.[25] On May 16, 2020, a compressor breakdown caused the release of two tons of SO2.[26] And on October 26, 2020, the FCU's CO boiler tripped offline, resulting in the release of 90 tons of CO, 7.5 tons SO2, 930 lbs. ammonia, 140 lbs. hydrogen sulfide, and 110 lbs. HCN.[27] Most recently, on February 14, 2022, an outage of the FCCU's CO boiler resulted in the release of 267 tons of CO.[28]

In these circumstances, as Petitioners' initial comments to DNREC explained (at pages 5-6), there is a compelling need for EPA to devote increased, focused attention to ensure that all Title V requirements have been complied with. EPA has recognized this in responding to prior Title V permit petitions. *See, e.g., In the Matter of United States Steel Corp. – Granite City Works*, Order on Petition No. V-2011-2 (Dec. 3, 2012) ("*Granite City Works* Order") at 4-6 (because of "potential environmental justice concerns" raised by the fact that "immediate area around the [] facility is home to a high density of low-income and minority populations and a concentration of industrial activity," "[f]ocused attention to the adequacy of monitoring and other compliance assurance provisions [was] warranted") (citing in part to Executive Order 12898 (Feb. 11, 1994));[29] *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 (acknowledging that the area surrounding the refinery is home to a high density of low-income and minority populations and a concentration of industrial activity and noting that EPA had given "focused attention to the adequacy of monitoring (as well as other concerns raised by the Petitioners)"); *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. VI-2021-8 ("Valero Houston Order") (June 30, 2022) at 9-11 (same). Here, the environmental justice concerns and the refinery's history of large SSM releases of air pollution—particularly at the FCU and FCCU—warrant increased attention to ensure that the proposed Title V permit does

[24] *See* Ex. 7, 10/2/18 Coker Boiler Trip Event Incident Report, at 3-4.

[25] *See* Ex. 8, 1/15/19 Email with DCRC Coker CO Boiler Preliminary Emissions Estimate.

[26] https://delawarebusinessnow.com/2020/05/compressor-breakdown-leads-to-release-of-4000-pounds-of-sulfur-dioxide-at-delaware-city-refinery/

[27] https://violations.dnrec.delaware.gov/ at Enforcement Number 2021-12574 (Action Served Date of 4/20/2021).

[28] *Id.* at Enforcement Number 2022-12662 (Action Served Date of 7/13/2022).

[29] Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order 12898 (Feb. 11, 1994); *see also* EPA, EJ 2020, https://www.epa.gov/environmentaljustice/ej-2020-action-agenda-epas-environmental-justice-strategy; EPA, Plan EJ 2014, Considering Environmental Justice in Permitting (2014), https://nepis.epa.gov/Exe/ZyPDF.cgi/P100ETRR.PDF?Dockey=P100ETRR.PDF.

not include unlawful loopholes covering SSM periods at these two units and other units at the refinery.

The environmental justice concerns are further heightened here because the area in which the Delaware City refinery is located is currently designated nonattainment for the 1979, 2008, and 2015 ozone National Ambient Air Quality Standard (NAAQS).[30] The Delaware City refinery's emissions of hundreds of tons per year of ozone-precursors, including NOx and VOCs (as discussed above), contribute to the unhealthy levels of ozone in this area.

A. DNREC'S Response Regarding These Environmental Justice Concerns Fails to Demonstrate That EPA Could or Should Ignore These Important Factors.

In its response to Petitioners' comments, DNREC does not dispute that the communities surrounding the Delaware City refinery include a significant population of people of color and low-income residents—or that large numbers of these community members face increased vulnerability to health effects from air pollution due to their age. Nor does DNREC dispute that these community members are exposed to large amounts of toxic air pollution from the refinery, or that the refinery's FCU and FCCU have a history of releasing large amounts of air pollution during SSM periods. Instead, DNREC asserts that: "corrective actions . . . are conducted immediately and units are typically brought back into compliance in a matter of hours"; the Department has initiated certain enforcement actions; and the Department "prioritizes improvement of the ambient air quality through reduction of air emissions of normal operation." RTC at 3-4. None of these assertions change the fact that significant environmental justice concerns here require particular focus and action by EPA to ensure that the refinery's Title V permit complies with all requirements of the Clean Air Act. Nor do DNREC's assertions change the fact that the Title V permit includes unlawful loopholes that could prevent citizens or EPA from bringing a successful enforcement action to remedy violations (and deter future violations) at the FCU and FCCU.

II. DNREC VIOLATED PUBLIC PARTICIPATION REQUIREMENTS BY FAILING TO PROVIDE AN ADEQUATE PUBLIC HEARING AND RESPOND TO SIGNIFICANT COMMENTS.

A. DNREC failed to provide an adequate public hearing.

Petitioners submitted multiple comments and requests for a valid public hearing where DNREC would allow the public to speak. However, DNREC refused Petitioners' repeated requests to allow oral testimony and therefore violated the public participation requirements of the Clean Air Act and its federal and state implementing regulations. While DNREC purported to hold a virtual public hearing on July 14, 2020, the meeting did not allow the public to speak or

[30] *See* https://echo.epa.gov/detailed-facility-report?fid=110001148598 at "Air Quality Nonattainment Areas."

present comments orally.[31] During the meeting, representatives of both DNREC and DCRC spoke and gave presentations, showing that DNREC had the practical and technological capability to allow public participation.[32] However, while the public could join the meeting, DNREC gave the public no opportunity to present their comments.[33] 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."[34] The lack of true public participation rendered DNREC's "hearing" inadequate and in violation of both statutory and regulatory requirements.

DNREC's failure to allow public oral comment violates the Clean Air Act and its implementing regulations. *See* 42 U.S.C § 7661(a)(b)(6); 40 C.F.R. 70.7(h). The statute requires a permitting authority to provide "an opportunity for public comment *and* a hearing." 42 U.S.C § 7661(a)(b)(6) (emphasis added). Importantly, the statute requires both the opportunity for comment *and* the opportunity for a hearing, showing a clear distinction between a hearing and merely the opportunity to submit written comments. The Clean Air Act's implementing regulations further emphasize the importance of providing an avenue for the public to orally present their comments in permitting proceedings by requiring a permitting authority to "provide adequate procedures for public notice including offering an opportunity for public comment *and* a hearing on the draft permit." 40 C.F.R. § 70.7(h).

While the federal regulations do not specifically define public hearing, regulatory and statutory examples demonstrate that a public hearing must include the opportunity for the public to speak. For instance, in discussing the Part 70 regulations, EPA explained its view that public hearings should be implemented as an "open meeting for concerned parties to express their concerns." *See* 56 Fed. Reg. 21,712, 21,743 (1991). Moreover, a 2006 Task Force evaluating the Title V public participation procedures noted hearings as an important aspect of public participation because "a public hearing provides an opportunity to *submit oral comments* into the administrative record."[35] The Task Force also clarified the meaning of "public comment,"

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[31] *See* July 2020 Supplemental Comments at 2–3; Request for a Valid Public Hearing (June 25, 2020); Transcript of July 14, 2020 Meeting at 5, 8, available at: https://documents.dnrec.delaware.gov/Admin/Documents/dnrec-hearings/2020-P-A-0017/hearing-transcript-20200714-dcrc-docket-2020-P-A-0017.pdf.

[32] July 2020 Supplemental Comments at 2; DCRC presentation on July 14, 2020, http://www.dnrec.delaware.gov/Admin/Documents/dnrec-hearings/2020-P-A-0017/DCRC-hearing-presentation.pdf.

[33] July 2020 Supplemental Comments at 2.

[34] Transcript of July 14, 2020 Meeting at 5, 8.

[35] TITLE V TASK FORCE, FINAL REPORT TO THE CLEAN AIR ACT ADVISORY COMMITTEE 186 (Apr. 2006), https://www.epa.gov/sites/default/files/2014-10/documents/title5_taskforce_finalreport20060405.pdf.

defining it as "a comment made during the public comment period either in writing or orally at a public hearing."[36]

Use of the term "public hearing" in other statutory and regulatory contexts further illustrates the clear intent that public hearings include the opportunity to speak. For example, Resource Conservation and Recovery Act requires, if requested, an "informal public hearing (including an opportunity for presentation of written and oral views)" prior to issuing a permit for a hazardous facility.[37] 42 U.S.C. § 6974(b)(2). Similarly, other sections of the Clean Air Act describe a public hearing as an "opportunity for interested persons to appear and submit written or oral presentations on the air quality impact of such source." 42 U.S.C § 7475(a)(2).

By failing to allow the public to speak at its purported hearing, DNREC did not meet the federal public participation requirements of the Clean Air Act. The statute and regulations purposefully distinguish between the requirement to provide a public hearing and the requirement to accept written comments, emphasizing the importance of each public participation opportunity. *See* 42 U.S.C § 7661(a)(b)(6); 40 C.F.R. 70.7(h). If the regulations did not intend for a public hearing to include oral comments made by the public, it would only require permitting authorities to accept written comments. Although DNREC calls its meeting a public hearing, it explicitly refused to allow the public to submit oral or written comments during the proceedings.[38] The meeting thus did not allow the public to "express their concerns," nor did it represent an open forum for discussion. *See* 56 Fed. Reg. at 21,743.

The virtual format of the meeting provided no excuse for DNREC to deny public oral comments, as evidenced by the EPA and other state agencies' consistent use of a virtual format that allows for public speaking.[39] For example, both New Jersey[40] and Texas[41] have held virtual

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[36] *Id.* at 238.

[37] The RCRA public participation manual further provides the general characterization of a public hearing, noting that "[p]ublic hearings provide an opportunity for the public to provide formal comments and oral testimony on proposed agency actions." EPA, RCRA PUBLIC PARTICIPATION MANUAL, EPA-530-F-20-001, at 1 (2020).

[38] *See* July 2020 Supplemental Comments at 2–3; Request for a Valid Public Hearing (June 25, 2020); Transcript of July 14, 2020 Meeting at 5, 8.

[39] S*ee* Request for a Valid Public Hearing at 7–8 (June 25, 2020) (identifying examples of states using a virtual format and allowing oral comments).

[40] *See, e.g.*, *Notice of Opportunity for Public Comment*, NJ DEP'T ENV'TL PROT. (Apr. 8, 2020), https://www.state.nj.us/dep/aqpp/downloads/publicnotpost/drppn.pdf. (stating "If you are interested in joining the virtual public hearing, please email the Department . . . name, telephone number, and email address and whether you intend to provide oral testimony or not.").

[41] *See, e.g.*, *Notice of Public Meeting for Water Quality Land Application Permit for Municipal Wastewater New Proposed Permit No. WQ0015835001*, TEX. COMM'N ON ENV'TL QUALITY (May 4, 2020), https://www.tceq.texas.gov/assets/public/comm_exec/pm-ph/notices/2020/2020-06-09-silesia-properties-lp-wq0015835001-pm.pdf.

hearings where the public can orally participate either by telephone or video. Similarly, EPA regularly conducts virtual public hearings that allow for public oral comment.[42] In a 2020 memorandum permitting virtual public hearings during the COVID-19 pandemic, EPA cited previous guidance on the use of a virtual format for Clean Water Act public hearings.[43] This guidance states that a virtual public hearing should be conducted as similarly to an in-person hearing as possible, and explicitly notes the requirement for oral comment:

> Participants using a web conferencing platform should be able to: submit their own materials remotely for their oral comment; have access to any introductory or additional material (e.g., visual aids) shared during the public hearing, including those shared by others during scheduled and unscheduled testimony; and, communicate live to those conducting the public hearing.[44]

While this guidance document is not directly applicable to Clean Air Act Title V public participation procedures, the applicable Clean Water Act regulatory sections similarly require a "public hearing" with no explicit reference to oral comments. *See* 40 C.F.R § 131.20.

DNREC also violated its state implementing regulations by failing to allow the public to speak at the permitting "hearing." 7 DEL. ADMIN. CODE tit. 1102 § 12.2.4; *see also* § 7.10.2 (requiring an opportunity for *both* the submission of written comments and hearing requests); § 7.10.3 (requiring the opportunity for a public hearing on Title V permits). Under Delaware regulations, public participation includes providing the opportunity for a public hearing that allows "interested persons to appear and submit written or oral comments." 7 DEL. ADMIN. CODE tit. 1102 § 12.24. By purporting to grant the public's request to hold a public hearing, DNREC implicitly recognized its duty under state and federal law to provide a hearing opportunity in the DCRC permitting proceedings. However, DNREC violated Delaware's public participation requirement by failing to provide the opportunity for interested persons to present, in real time, their comments either written or orally while the meeting's proceedings.[45] The so-called hearing provided on July 14, 2020, therefore did not facilitate any public participation, and instead

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[42] *See* MATTHEW LEOPOLD, EPA, MEMORANDUM ON VIRTUAL HEARINGS AND MEETINGS (Apr. 16, 2020); *see also, e.g.*, EPA Virtual Public Hearings on the Risk Management Program Safer Communities by Chemical Accident Prevention Proposed Rule, https://www.epa.gov/rmp/forms/virtual-public-hearings-risk-management-program-safer-communities-chemical-accident; *see also* Proposed Rule, 87 Fed. Reg. 53,556 (Aug. 31, 2022).

[43] *See* EPA OFFICE OF WATER, EPA 823-F-19-005, MODERNIZING PUBLIC HEARINGS FOR WATER QUALITY STANDARD DECISIONS CONSISTENT WITH 40 CFR 25.5 (June 2019).

[44] *Id.* at 16. The importance of allowing live, oral comments during a virtual hearing is emphasized throughout the document: "Where a state . . . has chosen to conduct a hybrid or online public hearing, participants should be able to comment or ask questions during the public hearing using the web conferencing platform." *Id.* at 16.

[45] Transcript of July 14, 2020 Meeting at 5, 8.

merely gave DNREC and DCRC the opportunity to present its views. By refusing to allow the public to speak, DNREC ignored the very meaning of participation.

DNREC's refusal to provide a public hearing strikes at the heart of Title V and must not be tolerated by EPA, if it seeks to fulfill the Act and reaffirm core public participation requirements. Neither COVID-19 nor any other justification should allow a state to silence the public and bar those interested in speaking from providing oral comments on a draft permit, or Title V would be stripped of its core meaning and the people most affected by this and other similar permits in Delaware and beyond could be ignored repeatedly by DNREC and other state permitting agencies.

While DNREC purported to accept the request for a public hearing, the meeting it did hold did not actually constitute a hearing adequate to satisfy the public participation requirements of federal and state law. The Administrator therefore must object to the issuance of the permit because DNREC failed to meet the public participation requirements of the Clean Air Act. 40 C.F.R § 70.8(c)(3).

B. DNREC failed to respond to substantive comments in writing.

Multiple comments raised concern about DNREC's refusal to allow live oral comments by the interested public during a meeting purporting to be a public hearing.[46] During the so-called hearing, DNREC allowed some interested parties to speak, including DCRC and DNREC.[47] However, it explicitly refused to allow the public the opportunity to provide live oral comments.[48] Members of the public submitted multiple comments both before and after the hearing expressing substantive concerns over the legality of the procedures employed during the meeting. DNREC never responded in writing to these comments. In its RTC (referred to as a "Technical Response Memorandum" in the Hearing Officer's Report and Secretary's Order), DNREC rationalized its failure to respond to concerns about the hearing by stating that the document would only respond to "technical" comments.[49] The RTC further stated that the hearing procedures and the exclusion of live oral comments were "administrative concerns" that would be addressed in the Hearing Officer's Report and the Secretary's Order "as appropriate."[50] However, neither the Secretary's Order nor the Hearing Officer's Report mentioned comments regarding the lack of oral participation.[51] Instead, these reports continuously referred to the

[46] *See* July 2020 Supplemental Comments at 2–3; Request for a Valid Public Hearing (June 25, 2020).

[47] Transcript of July 14, 2020 Meeting at 5, 8.

[48] *Id.*; RTC at 2 ("[O]nly written comments were accepted through the duration of the public comment period.").

[49] RTC at 23.

[50] *Id.* at 24.

[51] *See generally* Ex, 9, Hearing Officer's Report (Mar. 10, 2022) ("HOR"); Ex. 10, Secretary's Order No. 2022-A-0008 (May 16, 2022).

hearing without mentioning its lack of adequate participation mechanisms.[52] Given the RTC's mention of comments regarding the adequacy of the hearing process, DNREC was clearly aware of the public's concerns.[53]

Despite Petitioners' significant comment raising the adequate public hearing issue, DNREC, in its response to comments, failed to offer any substantive response to Petitioners' concerns, in violation of Title V requirements (as reflected in 40 C.F.R. § 70.7(h)(6)). Thus, Petitioners cannot "explain how [DNREC's] response to the comment is inadequate to address the issue raised in the public comment." *See* 40 C.F.R. § 70.12(a)(2)(vi).

DNREC's obligation to respond to significant comments is rooted both in the Clean Air Act's regulatory requirements and core principles of administrative law.[54] *See* 40 C.F.R. § 70.7(h)(6); 40 C.F.R § 70.8 (a)(1). The Act's implementing regulations require 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." 40 C.F.R. § 70.7(h)(6). Moreover, a permitting authority's Response to Comment (RTC) document comprises a core element of the information submitted to the EPA for permit approval. *See* 40 C.F.R § 70.8 (a)(1); 85 Fed. Reg. 6431, 6439 (Feb. 5, 2020) ("The EPA has long held the view that RTCs for the proposed permit can play a critical role in the agency's formulation of a response to a title V petition on that proposed permit."); *In the Matter of Scrubgrass Generating Company, L.P.,* Order on Petition No. III-2016-5 (May 12, 2017) at 12 (granting a petition for review because the permitting authority did not respond to significant comments).

By requiring a permitting authority to respond to significant comments, the regulations aim to promote consistency and provide "more complete permit records for the benefit of the permitting authority, the source, the public, and the EPA." 85 Fed. Reg. at 6440. To facilitate these goals, a permitting authority's response to significant comments must also adequately explain the basis of its decision. *See, e.g.*, *In the Matter of Consolidated Edison Company Hudson Avenue Generating Station,* Order on Petition No. II-2002-10 (Sept. 30, 2003) at 8 (stating that a permitting authority "has an obligation to respond to significant public comments and adequately explain the basis of its decision"). An adequate RTC document should therefore describe and clarify the permitting authority's rationale for its response to a significant comment.

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[52] *See, e.g.*, HOR at 4; Secretary's Order at 4.

[53] RTC at 23.

[54] *See also, e.g.,* 85 Fed. Reg. 6431 at 6439 ("Under general principles of administrative law, it is incumbent upon an administrative agency to respond to significant comments raised during the public comment period"); *see also, e.g.*, *In the Matter of Consolidated Edison Company, Hudson Avenue Generating Station*, Petition 11-2002-10 at 8 (Sept. 30, 2003) ("It is a general principle of environmental law that an inherent component of any meaningful notice and opportunity to comment is a response by the regulatory authority to significant comments."); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("[A]n agency must consider and respond to significant comments received during the period for public comment.").

See 85 Fed. Reg. at 6440 ("Without the availability of the written RTC during the petition period, there may be an increased likelihood of granting a particular claim on the basis that the state provided an inadequate rationale or permit record.").

EPA has clarified what types of comments qualify as significant for Title V purposes and thus require a written response. Significant comments include, but are not limited to, comments about "whether the title V permit includes terms and conditions addressing federal applicable requirements and requirements under part 70." *Id.* at 6436. Significant comments also include those raising issues concerning a permitting authority's "adequate monitoring and related recordkeeping and reporting requirements." *Id.* 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. These comments raised procedural concerns directly questioning whether DNREC met the regulatory requirements of adequate public participation. *See* 40 C.F.R. § 70.7(h)(6); 40 C.F.R § 70.8 (a)(1); *see also In the Matter of UOP L.L.C.*, Order on Petition No. IV-2021-6 (Apr. 27, 2008) at 23 (granting a petition for review because the permitting authority failed to respond to comments about its statement of basis).

Because comments regarding the adequacy of the public hearing qualify as significant, Title V and implementing regulations thus required DNREC to create and submit an RTC document that included both "a written response to all significant comments raised during the public participation process on the draft permit" and an "explanation of how those public comments and the permitting authority's responses are available to the public." 40 C.F.R. § 70.7(h)(6); 40 C.F.R § 70.8 (a)(1). DNREC failed to meet these requirements by explicitly refusing to respond to comments about the hearing process.[55] Its RTC document acknowledged DNREC's awareness of these comments but stated that "comments submitted regarding the format of the public hearing and its exclusion of live oral comments . . . will not be addressed in this Technical Response Memorandum."[56] While the RTC suggested that DNREC might choose to respond to hearing process comments in other documents, it ultimately never issued a written response.[57]

DNREC did not provide any rationale for its decision to disallow public oral comments. Instead, DNREC noted that it would only respond to "technical" comments. Stating that the issue of public participation was an "administrative" issue, DNREC argued improperly that did not warrant a response in the RTC. Moreover, while the RTC stated that administrative comments might be addressed in either the Secretary's Order or the Hearing Officer's report, neither document mentioned administrative comments and instead classified the RTC as "exhaustive" and "comprehensive."[58] The distinction between administrative and technical comments used by DNREC to justify its nonresponse to comments on the hearing process has no basis in the law.

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[55] RTC at 23.

[56] *Id.*

[57] *Id.*; *see generally* HOR; Secretary's Order.

[58] *See, e.g.*, HOR at 4; Secretary's Order at 4.

No regulations distinguish a permitting authority's duty to respond to a significant comment based on whether the comment raises technical issues or administrative issues. DNREC thus failed to respond, in any manner, to comments raising concern about the inadequacies of the public hearing.

Finally, DNREC's failure to respond to the significant comments raising concerns about its refusal to allow oral comments during its purported hearing violates its obligations under general principles of administrative law. *See* 85 Fed. Reg. at 6440 ("The agency recognizes that a permitting authority's obligation to respond to public comments is informed by long history of administrative law and practice."). In discussing the need for regulations that require permitting authorities to respond to significant comments, EPA highlighted the concept that an agency's response to comments is fundamentally important in administrative law, stating that it "is incumbent upon an administrative agency to respond to significant comments raised during the public comment period." 85 Fed. Reg. at 6440. Moreover, the public participation requirement of the Clean Air Act is meaningless unless the permitting authority "responds to significant points raised by the public." *See Home Box Office* v. *FCC,* 567 F.2d 9, 35 (D.C. Cir. 1977). Because DNREC failed to meet these obligations, it eroded the purpose of the public participation requirements in the Act. *See, e.g.*, *In the Matter of Murphy Oil USA, Inc., Meraux Refinery*, 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").

In sum, DNREC failed to comply with the procedural requirements of the Clean Air Act because it failed to respond to significant comments about its inadequate hearing process. The Administrator therefore must object to the issuance of permit as required by 40 C.F.R § 70.8(c)(1).

III. THE PROPOSED PERMIT CONTAINS UNLAWFUL LOOPHOLES FOR SSM PERIODS.

As discussed below, the proposed permit contains unlawful loopholes that relax federally enforceable limits during SSM periods. As discussed further below, EPA cannot lawfully refuse to consider these SSM loopholes on the basis that some of them were established through construction permits.

A. 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.

As Petitioners' comments explained (Initial Comments at 9-14, Suppl. Comments at 8-11), the proposed Title V permit contains "director's discretion" provisions[59]—incorporated

[59] In its 2015 "SSM SIP call," requiring states across the country to remove unlawful SSM loopholes from their SIPs, EPA defined a "director's discretion provision" as "in general, a regulatory provision that authorizes a state regulatory official unilaterally to grant exemptions or variances from otherwise applicable emission limitations or control measures, or to excuse noncompliance with otherwise

from underlying minor NSR, "Regulation 1102" construction permits for the FCU and FCCU—that 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 shutdown or bypass of these units' pollution controls. *See* Proposed Title V Permit Condition 3 – Table 1, Parts 2(da)(1)(i)(H), 2(e)(1)(i)(J).[60] The limits that DNREC can excuse noncompliance with include minor NSR, SIP, and consent decree limits and NESHAP. These limits and standards are applicable requirements that the Delaware City refinery's Title V permit must assure compliance with. *See* 40 C.F.R. 70.2 (defining "applicable requirement" to include: [a]ny standard or other requirement provided for in the applicable implementation plan"; "[a]ny term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I"; and "[a]ny standard or other requirement under section 112 of the Act"). Except for one of the minor NSR limits, which contains a limited exemption during startup periods, all the affected limits apply continuously. Because the Title V permit incorporates these provisions that unlawfully give DNREC discretion to excuse compliance with these applicable requirements during unplanned shutdown and bypass periods (the provisions are unlawful for three different reasons, as discussed below), it fails to ensure compliance with the affected federally enforceable limits, in violation of 40 C.F.R. §§ 70.1(b), 70.6(a)(1), and 70.7(a)(1)(iv) and 42 U.S.C. § 7661c(a).

The director's discretion provision for the FCU provides in relevant part:

> 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 [Carbon Monoxide Boiler ("COB")] or the Belco prescrubber or [wet gas scrubber ("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

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applicable emission limitations or control measures, which would be binding on the EPA and the public." 80 Fed. Reg. 33,840, 33,842 (June 12, 2015).

[60] The proposed permit lists the source of the FCU director's discretion provision as "APC-81/0829(A8)," and the source of the FCCU director's discretion provision as "APC-82/0981(A12)." Proposed Title V Permit Condition 3 – Table 1, Parts 2(da)(1)(i), 2(e)(1)(i). Petitioners obtained a more recent revision of APC-82/0981 from a records request to DNREC, and that permit for the FCCU is a minor NSR permit issued under 7 DE Admin. Code 1102 section 2. Petitioners do not have a copy of the underlying FCU permit but assume that it is a minor NSR permit based on statements from DNREC in its response to Petitioners' comments on the draft Title V permit. *See* RTC at 13 (stating that the FCU "does not have an NSR/PSD permit because it has not undergone a modification that would increase 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.

Title V Permit Condition 3 – Table 1, Part 2(da)(1)(i)(H). The director's discretion provision for the FCCU is virtually identical:

> Except as provided in Operational Limitation M,[61] this permit does not authorize emissions exceeding the limits set forth in Condition 3 – Table 1.e.2 through e.9 including emissions during periods of any unplanned shutdown of the FCCU, or any unplanned shutdown or bypass of the FCCU COB and [Selective Non-Catalytic Reduction System ("SNCR"], or the Belco prescrubber or WGS system. Instead, in the event of any unplanned shutdown of the FCCU or any unplanned shutdown or bypass of the FCCU COB and SNCR, 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 FCCU 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 7 DE Admin. Code 1100. 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 FCCU, and the basis for such degree of reduction; 5) the estimated emissions associated with a complete shutdown of the FCCU; 6) whether Premcor had reviewed all prior similar causes of unplanned shutdowns and had taken all reasonable

[61] Operational Limitation M requires operation of the FCCU to be in accordance with Attachment G of the Title V permit in the event of an unplanned shutdown and/or bypass of the FCCU's CO boiler.

and prudent actions necessary to avoid future similar outages; and 7) the actual emissions during the period of the unplanned shutdown.

Id. at Part 2(e)(1)(i)(J).

For the FCU, the limits and requirements that DNREC is allowed to excuse noncompliance with include requirements from:

- The SIP, in particular the facility-wide limit for nitrogen oxides ("NOx")[62] and a visible emissions limit. *See* Part 2(da)(4)(i)(B), (11).[63]
- Minor NSR construction permits, including limits for particulate matter ("PM"), sulfur dioxide ("SO2"), NOx, carbon monoxide ("CO"), volatile organic compounds ("VOCs"), sulfuric acid, lead, and nickel. *See* Part 2(da)(2)-(10).
- NESHAP, in particular limits from 40 C.F.R. § 63.643 for miscellaneous process vents. *See* Part 2(da)(10)(i)(B).
- A 2001 federal-court consent decree between EPA and Motiva, in particular the short-term SO2 limits from Part 2(da)(3). *See* RTC at 45.[64]

For the FCCU, the limits and requirements that DNREC is allowed to excuse noncompliance with include requirements from:

- The SIP, in particular the facility-wide NOx limit[65]and a visible emission limit. *See* Part 2(e)(4)(i)(A), (10).[66]
- Minor NSR construction permits, including limits for PM, SO2, CO, VOCs, sulfuric acid, lead, hydrogen cyanide (HCN), and ammonia. *See* Part 2(e)(2)-(11).

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[62] In its response to comments, DNREC explains that the facility-wide NOx limit is a SIP limit for the FCU. RTC at 40.

[63] The visible emissions limit is in Part 2(da)(11) of Table 1—not in Part 2(da)(2)-(10) (the permit subsections specifically listed in the FCU director's discretion provision). The FCU director's discretion provision, however, does not limit its applicability to Part 2(da)(2)-(10); it allows DNREC to excuse "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*.'" (Emphasis added).

[64] DNREC's response to comments is presumably referring to this 2001 consent decree from the U.S. District Court for the Southern District of Texas: https://www.epa.gov/sites/default/files/documents/condec-motiva-rpt_0.pdf

[65] DNREC also explains that the facility-wide NOx limit is a SIP limit for the FCCU. RTC at 56.

[66] As with the FCU director's discretion provision, the FCCU director's discretion provision is not limited to the permit subsections specifically listed in the provision (Part 2(e)(2)-(9) of Table 1). Instead, it allows DNREC to excuse "noncompliance with emission limitations or operating standards included in this Permit or otherwise applicable to the facility under 7 DE Admin. Code 1100"—including the SIP opacity limit from Part 2(e)(10).

- NESHAP, in particular all applicable limits from 40 C.F.R. Part 63, Subpart UUU, including the limits from Subpart UUU's Tables 1-2 and 8-9 for metallic HAPs and organic HAPs from FCCUs. *See* Part 2(e)(9)(i)(A).
- The 2001 federal-court consent decree between EPA and Motiva, in particular the SO2 concentration limits from Part 2(e)(3). *See* RTC at 43-45.

None of these applicable requirements contain exemptions for periods of unplanned shutdown of the FCU and FCCU or during unplanned shutdown or bypass of these units' pollution controls—except for the FCCU's minor NSR CO limit, which contains a limited 24-hour exemption during unplanned shutdown or bypass of the FCCU's CO boiler (*see* Proposed Permit Attach. G).

The proposed permit's director's discretion provisions are unlawful and render the Title V permit unable to ensure compliance with the affected limits for three reasons:

First, 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. Clean Air Act § 110(a)(2)(A) requires SIPs to include enforceable "emission limitations." 42 U.S.C. § 7410(a)(2)(A). Similarly, § 112(d) requires EPA to promulgate regulations establishing NESHAP "emission standards," 42 U.S.C. § 7412(d)(1)-(2). And 42 U.S.C. § 7661(c)(a) provides that each Title V permit "shall include enforceable emission limitations and standards." The Act unambiguously requires emission limitations and emissions standards to apply continuously. *See* 42 U.S.C. § 7602(k) (defining "emission limitation" and "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") (emphasis added).

Contrary to the Clean Air Act's requirement that SIP emission limits and NESHAP standards apply continuously, the permit's director's discretion provisions give DNREC discretion to allow the affected SIP and NESHAP limits and standards to only apply some of the time. This is plainly unlawful, as the D.C. Circuit has confirmed. *See Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008). In *Sierra Club*, 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 H.R. Rep. No. 95-294, at 92 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1170). Yet that is precisely what the director's discretion provisions allow DNREC to grant on an *ad hoc* basis—temporary, periodic, or limited controls on emissions of air pollution. Congress gave states no authority "to relax emission standards on a temporal basis." *Id.* at 1028. EPA's 2015 SSM SIP call also recognized that, in the context of SIPs, director's discretion provisions are unlawful for this reason—that they result in there not being continuous limits in place. *See* 80 Fed. Reg. at 33,927.

Here, as approved (the SIP limits) and promulgated (the NESHAP) by EPA, the applicable SIP and NESHAP limits for the FCU and FCCU apply continuously, including during periods of unplanned shutdown of these units and during unplanned shutdown or bypass of the units' pollution controls. The director's discretion provisions, however, give DNREC unlawful

discretion to allow these limits to only apply some of the time. Thus, the provisions render the Title V permit unable to ensure compliance with these SIP and NESHAP limits.

Similarly, except for the FCCU's CO minor NSR limit, all the minor NSR and consent decree limits for the FCU and FCCU apply continuously. The director's discretion provisions, however, would give DNREC discretion to allow the minor NSR and consent decree limits to only apply some of the time.[67] Thus, these provisions render the Title V permit unable to ensure compliance with these limits as well.

Second, these director's discretion provisions are also unlawful under the Clean Air Act because they would purport to allow DNREC to alter—on an *ad hoc* basis—the SIP and NESHAP limits in question through a process that is contrary to the Act's process for establishing and revising these limits. None of the SIP and NESHAP limits applicable to the FCU and FCCU contain exemptions for periods of unplanned shutdown of the FCU and FCCU or during unplanned shutdown or bypass of these units' pollution controls. Nor do the SIP and NESHAP contain the director's discretion provisions.

Clean Air Act § 110(i) provides that revisions to SIP provisions may only take place through certain specified routes—including the formal SIP revision process—that do not include director's discretion provisions from minor NSR permits. 42 U.S.C. § 7410(i). 40 C.F.R. § 51.105 is in keeping with that requirement and provides that SIP revisions will not be considered part of SIP until such revisions have been approved by EPA. But the director's discretion provisions here do not require EPA-approved SIP revisions before excusing the refinery's noncompliance with the SIP limits. *See* 80 Fed. Reg. at 88,928 (finding, in the 2015 SSM SIP call, that director's discretion provisions "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]").

As for the applicable NESHAP limits, only EPA—not DNREC—can establish or revise these limits. *See* 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"). Clean Air Act § 112(1)(1) makes doubly clear that states cannot weaken NESHAP limits, such as through excusing noncompliance with NESHAP on an *ad hoc* basis: "Each State may develop and submit to the Administrator for approval a program for the implementation and enforcement … of emission standards … A program submitted by a State under this subsection may provide for partial or complete delegation of the Administrator's authorities and responsibilities to implement and enforce emissions standards and prevention requirements *but shall not include authority to set standards less stringent than those promulgated by the Administrator* …." 42 U.S.C. § 7412(l)(1) (emphasis added).

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[67] As noted above, the minor NSR CO limit for the FCCU contains a limited 24-hour exemption during unplanned shutdown or bypass of the FCCU's CO boiler. The director's discretion provision for the FCCU, however, would allow DNREC to excuse compliance with the CO limit during other, additional periods, including unplanned shutdown of the FCCU itself, unplanned shutdown or bypass of pollution controls beyond the CO boiler, and unplanned shutdown of the CO boiler after 24 hours.

In addition, only the parties or federal court—not DNREC alone—can alter a federal-court consent decree, such as the 2001 consent decree between EPA and Motiva that established certain SO2 limits for the FCU and FCCU. *See* EPA-Motiva Consent at 105 (providing that the "consent decree may be modified only by the written approval of the United States and the appropriate Plaintiff-Intervener and Motiva or by Order of the Court").[68]

Contrary to all these requirements, the director's discretion provisions here, on their face, would allow DNREC to alter the applicability of SIP, NESHAP, and consent decree limits through an *ad hoc* process that does not fall into any of the allowed routes for establishing or revising these limits. The provisions are therefore unlawful and ultra vires, render the Title V permit unable to ensure compliance with the affected SIP, NESHAP, and consent decree limits, and cannot be included in the federally enforceable provisions of the Title V permit.

Third, the proposed permit's director's discretion provisions contravene the Clean Air Act and EPA's Title V regulations by allowing DNREC to remove the ability of the public and EPA to enforce violations of all the affected limits—the SIP, minor NSR, consent decree, and NESHAP emission limits—during periods of unplanned shutdown of the FCU and FCCU or during unplanned shutdown or bypass of these units' pollution controls. The Clean Air Act is clear: Title V permits must include "enforceable" emission limitations and standards. 42 U.S.C. § 7661c(a). Likewise, SIP emission limitations in SIPs must be "enforceable." *Id.* § 7410(a)(2)(A). Consistent with the statute, 40 C.F.R. § 70.6(b)(1) 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." What is more, the Act's citizen suit provision mandates that state and federal emission limitations, permit conditions, and consent decree limits be enforceable by citizens in federal court. 42 U.S.C. § 7604(a), (f). The director's discretion provisions unlawfully undermine and can even eliminate citizens' ability to enforce violations of the affected limits during SSM events at the FCU and FCCU.

Congress enacted the Act's citizen suit provision, 42 U.S.C. § 7604, "to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced." *Train v. NRDC*, 510 F.2d 692, 700 (D.C. Cir. 1974). Congress expressly authorized citizen suits over violations of "an emission standard or limitation under this chapter," 42 U.S.C. § 7604(a)(1), which Congress defined to include: SIP and NESHAP limits ("a … emission limitation, standard of performance or emission standard" "which is in effect under this chapter … or under an applicable implementation plan," as well as "any requirement under section . . . 7412 of this title");[69] minor NSR limits ("any permit term or condition"); and consent decree limits ("a schedule or timetable of compliance [or] emission limitation" "which is in effect under this chapter"). *Id.* § 7604(f)(1), (3)-(4). Thus, these provisions mean that citizens have the right to bring suits in federal court over violations of

[68] Again, this consent decree is available here: https://www.epa.gov/sites/default/files/documents/condec-motiva-rpt_0.pdf

[69] Congress also defined "the term 'applicable implementation plan'" to "mean[] the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410… and which implements the relevant requirements of this chapter." *Id.* § 7602(q).

emission limitations and standards, including those established in SIPs, NESHAP, minor NSR permits, and consent decrees.

Further, Congress enacted Title V to strengthen enforcement and promote compliance. In enacting it, Congress expected Title V to "substantially strengthen enforcement of the Clean Air Act" by "clarify[ing] and mak[ing] more readily enforceable a source's pollution control requirements." S. Rep. No. 101-228, at 347-48 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3731. Similarly, the Senate Report explained: "The first benefit of the title V permit program is that … it will clarify and make more readily enforceable a source's pollution control requirements." *Id.* at 347, 1990 U.S.C.C.A.N. 3731. *See also id.* at 346, 1990 U.S.C.C.A.N. 3729 ("Operating permits are needed to … better enforce the requirements of the law by applying them more clearly to individual sources and allowing better tracking of compliance."). To effectuate this purpose of strengthening enforcement and promoting compliance, Congress designed Title V permits to enable EPA, states, and the public to identify violations and correct them—requiring Title V permits to list all applicable requirements and include monitoring, recordkeeping, reporting, and annual compliance certification requirements and schedules of compliance. 42 U.S.C. § 7661(c)(a), (c). To this end, Congress also provided that any Title V permit condition can be enforced administratively or in court by EPA or by the public through a citizen suit. *Id.* §§ 7413(a)(3), 7604(a)(1), (f).

Emission limitations and standards subject to director's discretion provisions such as the ones here violate both Congress's instruction that citizens may enforce emissions limitations and standards and the requirement (from the Act and EPA's Title V regulations) that Title V permits contain "enforceable" emission limitations and standards (as well as the Act's requirement that SIP limits be "enforceable.") These provisions block enforcement unless citizens can somehow prove DNREC's decision to excuse a violation was unlawful. As EPA acknowledged in the SSM SIP call, 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." 80 Fed. Reg. at 33,929.

In sum, the director's discretion provisions give DNREC the unlawful discretion to leave the surrounding communities unable to obtain relief from a federal court for violations of the affected SIP, minor NSR,[70] consent decree, and NESHAP limits during periods of unplanned shutdown of the FCU and FCCU or during unplanned shutdown or bypass of these units' pollution controls—even when these units repeatedly release massive amounts of pollution that exceed the normal emission limits and standards. The provisions also allow DNREC to unlawfully undermine EPA's ability to, under 42 U.S.C. § 7413, enforce these applicable limitations and standards. To satisfy the Act and provide necessary protection for clean air and public health, it is essential that these applicable requirements be enforceable.

[70] As noted above, the minor NSR CO limit for the FCCU contains a limited 24-hour exemption during unplanned shutdown or bypass of the FCCU's CO boiler. The director's discretion provision for the FCCU, however, would allow DNREC to excuse compliance with the CO limit during other, additional periods, including unplanned shutdown of the FCCU itself, unplanned shutdown or bypass of pollution controls beyond the CO boiler, and unplanned shutdown of the CO boiler after 24 hours.

Further, where a facility commits a violation of applicable Clean Air Act standards or requirements, it is up to a federal court, not DNREC, to determine whether a violation has occurred and issue a penalty, pursuant to § 7604 or 7413. DNREC may not lawfully limit a federal court's future ability to determine proper remedies for violations of SIP, minor NSR, consent decree, or NESHAP emission limits. Even where EPA has attempted to waive penalties for certain violations in advance, the U.S. Court of Appeals for the D.C. Circuit has held this was unlawful. *NRDC v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014).

In short, these director's discretion provisions are unlawful and render the Title V permit unable to ensure compliance with the affected limits, and EPA must require DNREC to remove the provisions or otherwise make clear that they cannot be invoked by the refinery or DNREC in a lawsuit brought by citizens or EPA to enforce the emission standards and limitations applicable to the FCU and FCCU.

1. DNREC's response to comments offers no valid reason for retaining the unlawful director's discretion provisions.

In its response to comments, DNREC maintains 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 applicable SSM policy. *E.g.*, RTC at 7-8. On their face, however, these two provisions give DNREC the ability to shield Delaware City Refining Company from enforcement by EPA and the public. EPA's controlling guidance on SSM provisions, issued with the agency's 2015 "SSM SIP call," shows that these provisions are unlawful. There, EPA explained that, while states may adopt provisions that impose reasonable limits upon the exercise of enforcement discretion by state air agency personnel, "SIP provisions cannot contain enforcement discretion provisions that would bar enforcement by the EPA or citizens for any violations … if the state elects not to enforce."[71] 80 Fed. Reg. at 33,917. EPA added:

> [I]f on the face of an approved SIP provision the state appears to have the unilateral authority to decide that a specific event is not a ''violation'' or if it otherwise appears that if the state elects not to pursue enforcement for such violation then no other party may do so, then that SIP provision fails to meet fundamental legal requirements for enforcement under the CAA. *If the SIP provision appears to provide that the decision of the state not to enforce for an exceedance of the SIP emission limit bars the EPA or others from bringing an enforcement action, then that is an impermissible imposition of the state's enforcement discretion decisions on other parties.* The EPA has previously issued a SIP call to resolve just such an ambiguity, and its authority to do so has been upheld.

[71] EPA's SSM policy from the SIP call is specifically applicable to SSM provisions in SIPs, but EPA's reasoning in that policy regarding director's discretion provisions (as well as affirmative defenses and other SSM loopholes) is equally applicable here.

80 Fed. Reg. at 33,923-24 (citing 76 Fed. Reg. 21,639 (April 18, 2011)) (emphasis added).[72] Here too, the proposed permit's director's discretion provisions appear to unlawfully provide that a decision by DNREC not to enforce for violations of the affected limits can bar EPA or the public from bringing a successful enforcement action. DNREC, of course, always has discretion regarding whether it wants to bring its own enforcement action, but there is no reason that this discretion needs to be addressed in the permit—especially in a way that a federal court could read to bar successful enforcement by citizens or EPA.

DNREC also argues that the "conditions explicitly identify failure to meet the limits as noncompliance." *E.g.*, RTC at 8. And DNREC invokes language elsewhere from the proposed permit that 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.'" *Id.* at 10. DNREC continues: "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.'" It does not matter that the provisions state that the "permit does not authorize emissions exceeding the limits" or that the Title V permit or DNREC's regulations elsewhere provide that all terms and conditions are enforceable. The director's provisions also specifically provide: "*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*."

At the very best, the director's discretion provisions are ambiguous as to whether DNREC could shield the refinery from a successful enforcement action by citizens or EPA, and EPA has correctly recognized that such ambiguity renders a director's discretion provision unlawful, as noted in the quoted language above from EPA's 2015 SSM SIP call. *See* 80 Fed. Reg. at 33,923-24 ("The EPA has previously issued a SIP call to resolve just such an ambiguity, and its authority to do so has been upheld."). In that separate SIP call, EPA required Utah to remove an ambiguous director discretion provision from its SIP, correctly concluding: "At best, the UBR [Utah's unavoidable breakdown rule] language is ambiguous . . . Ambiguous language can undermine the purpose of the SIP and compliance with CAA requirements." 76 Fed. Reg. at 21,648. Here too, at the very best, the permit's director discretion provisions (when taking into account language elsewhere in the permit and DNREC's regulations) are ambiguous, and this ambiguity could undermine compliance with the applicable requirements for the FCU and FCCU, as well as undermine the ability of citizens and EPA to bring a successful enforcement action to ensure that compliance. In addition, that the permit and DNREC's regulations elsewhere provide that terms and conditions are "enforceable" does not mean that the refinery is precluded from invoking the director's discretion provisions to prevent citizens or EPA from obtaining injunctive relief or penalties.

[72] In a September 2021 memorandum, EPA reaffirmed the policy announced in the 2015 SSM SIP call. *See* https://www.epa.gov/system/files/documents/2021-09/oar-21-000-6324.pdf.

DNREC further 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." RTC at 10. This just proves the point that the provisions allow DNREC to determine whether the refinery "has responded appropriately," thus possibly precluding citizens or EPA from proving liability for violations or securing injunctive relief or penalties.

Additionally, DNREC argues that the conditions do not "constitute an exemption." RTC at 9. The point is that these provisions allow DNREC to determine that the affected limits should not apply at all times, in which case there would be no continuous emission limits and standards in place. EPA's 2015 SSM policy properly recognized that director's discretion provisions are unlawful for this same reason—that they can result in there not being continuous limits in place. 80 Fed. Reg. at 33,927.

Finally, DNREC maintains that the "purpose of this provision is . . . to encourage the [refinery] to prioritize emissions reductions when responding to an upset event." RTC at 36. Regardless whether the provisions might possibly encourage the refinery to reduce emissions once the FCU or FCCU is already violating its limits during an "upset," the provisions are unlawful for all the reasons noted above. Further, as discussed above, the provisions could frustrate enforcement by citizens and EPA. The possibility of a successful enforcement action brought by citizens or EPA would better incentivize the refinery to prevent "upsets" in the first place.

DNREC has failed to justify—nor (as discussed above) could it justify—these provisions. Therefore, Petitioners call for EPA to object to these provisions and ensure they are removed from the Title V permit.

B. 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 proposed Title V permit unlawfully relaxes NESHAP from 40 C.F.R. Part 63, Subpart UUU that are applicable to the refinery's FCCU in two different ways, as discussed below.

1. 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.

As Petitioners' comments explained with reasonable specificity (Initial Comments at 14-16, Suppl. Comments at 11-13), the proposed Title V permit, as written, provides the FCCU with either an unlawful exemption from, or unlawful alternative to, applicable NESHAP for metallic HAPS for up to 80 hours (more than three full days) during each planned startup and shutdown. *See* Proposed Title V Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H). The affected, applicable standards for metallic HAPs from Subpart UUU do not contain this exemption or alternative limit. These Subpart UUU standards are applicable requirements that the refinery's Title V permit must assure compliance with. *See* 40 C.F.R. 70.2 (defining "applicable requirement" to include"[a]ny standard or other requirement under section 112 of the Act"). The unlawful

language providing the exemption or alternative limit is incorporated from an underlying minor NSR, "Regulation 1102" construction permit for the FCCU.[73] Because the Title V permit incorporates this unlawful provision providing an exemption or alternative limit not contained in Subpart UUU (the provision is unlawful for three different reasons, as discussed below), the proposed permit fails to ensure compliance with the applicable metallic HAP standards from Subpart UUU, in violation of 40 C.F.R. §§ 70.1(b), 70.6(a)(1), and 70.7(a)(1)(iv) and 42 U.S.C. § 7661c(a).

The provision in question from the proposed Title V permit 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 . . . .

Title V Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H).

The applicable metallic HAP standards from Subpart UUU are "short-term Emission Standards" in "Condition 3 – Table 1.. . . e.9": the proposed permit's Condition 3 – Table 1, Part 2(e)(9) lists applicable requirements for HAPs and provides that the FCCU "shall comply with all the applicable requirements of 40 CFR Part 63, subpart UUU." Although the proposed Title V permit fails to specify what metallic HAP limit(s) from Subpart UUU apply to the FCCU, Subpart UUU lists certain limits that apply to FCCUs during non-startup and non-shutdown periods, including 1.0 lb PM/1,000 lb of coke burn-off along with an opacity limit of 30 percent. *See* 40 C.F.R. § 63.1564(a)(1); 40 C.F.R. Part 63, Subpart UUU, Table 1.[74] Although these additional startup and shutdown standards are also not reflected in the proposed permit, Subpart UUU also provides that, during startup and shutdown periods (as well as during hot standby),

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[73] As with the director's discretion provision, the proposed permit lists the source of this provision as "APC-82/0981(A12)." Proposed Title V Permit Condition 3 – Table 1, Part 2(e)(1)(i).

[74] Subpart UUU provides that these non-startup and non-shutdown limits do not apply during certain periods of planned maintenance preapproved by the applicable permitting authority, but this limited exception to the non-startup and non-shutdown limits is only available when a refinery has multiple FCCUs served by a single wet scrubber. *Id.* §§ 63.1564(a)(4), 63.1575(j). That provision is not applicable here, since the Delaware City refinery only has one FCCU.

FCCUs can elect to comply with the standards that apply at all other times (such as the 1.0 lb PM/1,000 lb of coke burn-off plus the opacity limit of 30 percent)—or 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.* § 63.1564(a)(5).

As written, the quoted Title V permit language above provides an exemption to these Subpart UUU metallic HAP standards that apply during startup and shutdown: the quoted language—when read together with the proposed permit's Condition 3 – Table 1, Part 2(e)(9)—provides that the "short-term Emission Standards" from Subpart UUU "shall not apply . . . 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."[75] Or the quoted language could be read to provide an alternative to the Subpart UUU metallic HAP standards that apply during startup and shutdown, since Subpart UUU generally uses PM as a surrogate for metallic HAPs from FCCUs (*see* 40 C.F.R. Part 63, Subpart UUU, Table 1),[76] and the permit provision in question 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 Emission Standards" listed in the permit for non-startup and non-shutdown periods, including the Subpart UUU standards. If the FCCU emitted PM at this same rate every hour of the year, its annual emissions would be 2,190 tons/year.

In its recent order on the Title V permit for the Valero Houston refinery, EPA concluded that, "[g]iven that neither the title V permit nor NSR Permit 2501A indicate that the [maintenance, startup, and shutdown ("MSS")] limits in Permit 2501A supersede the otherwise applicable . . . NESHAP standards, the Permit must be read such that the . . . NESHAP limits are not affected by the MSS limits in NSR Permit 2501A." Valero Houston Order at 67. Here, in contrast to the Valero permits, the proposed Title V permit indicates that the metallic HAP NESHAP limits otherwise applicable to the FCCU either do not apply during planned startups and shutdowns or are superseded by the 500 lb/hr PM limit. Even if DNREC did not intentionally include this exemption or alternative to the Subpart UUU metallic HAP standards in the proposed permit, it is important to remedy this problem because the refinery, in an attempt to avoid liability, could invoke this permit language in an enforcement action brought by citizens or EPA for violations of the applicable Subpart UUU standards.

Here, the provision in question is unlawful and renders the Title V permit unable to ensure compliance with the affected Subpart UUU standards for three different reasons:

First, to the extent it provides an exemption to the otherwise applicable NESHAP, the provision violates the unambiguous Clean Air Act requirement that emission standards apply continuously, not only during some periods of time. *See* 42 U.S.C. § 7602(k) (defining "emission

[75] In contrast to its treatment of the metallic HAP standards from Subpart UUU, the proposed Title V permit specifies that the Subpart UUU standards for organic HAPs from FCCUs during startup, shutdown, and hot standby do apply here. *See* Title V Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H)(4). There, the proposed Title V permit cites to what DNREC calls the "inorganic HAP work practice standards specified in 40 CFR Parts 63.1565(a)(5)," but DNREC presumably means the standards for "organic" HAPs, since that is what § 63.1565 details.

[76] Subpart UUU also allows certain FCCUs to comply with standards for nickel in lieu of complying with PM standards. *Id.*

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") (emphasis added); *Sierra Club*, 551 F.3d at 1027. As promulgated by EPA, the applicable NESHAP for metallic HAPs apply continuously, including during periods of planned startup and shutdown at FCCUs. The provision in question, however, as written provides an exemption from these continuously appliable standards. Thus, the provision renders the proposed Title V permit unable to ensure compliance with the Subpart UUU standards for metallic HAPs from FCCUs.

Second, regardless whether the provision in question provides an exemption or an alternative to the Subpart UUU standards for metallic HAPs, it alters the applicable NESHAP through a process that is contrary to the Act's process for establishing and revising these standards. As discussed above, only EPA—not DNREC—can establish or revise NESHAP. *See* 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"). *See also id.* § 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"). Thus, the permit provision in question is unlawful and ultra vires and renders the Title V permit unable to ensure compliance with the affected NESHAP limits.

Third, the provision—regardless whether it provides an exemption or alternative to the Subpart UUU standards— contravenes the Clean Air Act and EPA's 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. As discussed above with the director's discretion provisions, the Clean Air Act is clear that Title V permits must include "enforceable" emission limitations and standards. 42 U.S.C. § 7661c(a). Likewise, 40 C.F.R. § 70.6(b)(1) 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." And the Act's citizen suit provision mandates that NESHAP be enforceable by citizens in federal court. 42 U.S.C. § 7604(a)(1), (f)(1), (f)(3). Also as discussed above, *supra* at 21-22, Congress enacted the Act's citizen suit provision to widen access to the courts to ensure that the Act would be enforced—and enacted Title V to strengthen enforcement and promote compliance.

For planned startups and shutdowns, the proposed permit provision in question violates both Congress's instruction that citizens may enforce NESHAP and the requirement (from the Act and EPA's Title V regulations) that Title V permits contain "enforceable" emission standards. The provision also unlawfully undermines EPA's ability to, under 42 U.S.C. § 7413, enforce the otherwise applicable standards for metallic HAPs during planned startups and shutdowns. Finally, the provision also unlawfully removes a federal court's future ability to order penalties for violations of the otherwise applicable Subpart UUU standards during planned startups and shutdowns. *See NRDC*, 749 F.3d at 1063.

For all these reasons, this permit provision is unlawful and renders the Title V permit unable to ensure compliance with the applicable Subpart UUU standards for metallic HAPs, and

EPA must require DNREC to remove the provision or otherwise make clear that it does not affect Subpart UUU's standards for metallic HAPs from FCCUs.

2. The proposed permit unlawfully excuses the FCCU from complying with Subpart UUU standards when the CO boiler is burning only refinery fuel gas.

As Petitioners' comments explained with reasonable specificity (Initial Comments at 14-16, Suppl. Comments at 11-13), the same provision of the proposed Title V permit, as written, also provides the FCCU with an unlawful exemption from all applicable NESHAP whenever the FCCU's CO boiler is combusting only refinery fuel gas. *See* Proposed Title V Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H). The affected, applicable Subpart UUU standards for metallic and organic HAPs from FCCUs do not contain this exemption. These Subpart UUU standards are applicable requirements that the refinery's Title V permit must assure compliance with. *See* 40 C.F.R. 70.2 (defining "applicable requirement" to include "[a]ny standard or other requirement under section 112 of the Act"). As noted above, the unlawful language providing the exemption is incorporated from an underlying minor NSR, "Regulation 1102" construction permit for the FCCU. Because the Title V permit incorporates this unlawful provision providing an exemption not contained in Subpart UUU (the provision is unlawful for three different reasons, as discussed below), the proposed permit fails to ensure compliance with the applicable metallic and organic HAP standards from Subpart UUU, in violation of 40 C.F.R. §§ 70.1(b), 70.6(a)(1), and 70.7(a)(1)(iv) and 42 U.S.C. § 7661c(a).

The relevant proposed permit language states: "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 . . . ." Title V Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H). The applicable Subpart UUU metallic and organic HAP standards for FCCUs are "short-term Emission Standards" in "Condition 3 – Table 1.. . . e.9": the proposed permit's Condition 3 – Table 1, Part 2(e)(9) lists applicable requirements for HAPs and provides that the FCCU "shall comply with all the applicable requirements of 40 CFR Part 63, subpart UUU." Although the proposed Title V permit mostly fails to specify what metallic or organic HAP limit(s) from Subpart UUU apply to the FCCU,[77] Subpart UUU—as noted above—lists certain possible 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 along with an opacity limit of 30 percent. *See* 40 C.F.R. § 63.1564(a)(1); 40 C.F.R. Part 63, Subpart UUU, Table 1. Subpart UUU also lists certain organic HAP limits that apply to FCCUs during non-startup and non-shutdown periods, including 500 ppmv CO. *Id.* § 63.1565(a)(1); 40 C.F.R. Part 63, Subpart UUU, Table 8.[78] As discussed above, Subpart UUU also provides that, during startup and shutdown periods (as well

[77] As noted above, the proposed Title V permit does list the Subpart UUU standards for organic HAPs that apply during startup, shutdown, and hot standby. *See* Title V Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H)(4).

[78] As with the metallic HAP standards, Subpart UUU provides that these non-startup and non-shutdown CO limits do not apply during certain periods of planned maintenance preapproved by the applicable permitting authority, but this limited exception to the non-startup and non-shutdown CO limits is likewise only available when a refinery has multiple FCCUs served by a single wet scrubber, *id.* §§ 63.1565(a)(4), 63.1575(j)—which is not the case here.

as during hot standby), FCCUs can elect to comply with the metallic HAP standards that apply at all other times—or 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.* § 63.1564(a)(5). Similarly, Subpart UUU provides that, during these periods, FCCUs can elect to comply with the organic HAP standards that apply at all other times—or FCCUs can elect to maintain oxygen concentration in the exhaust gas from the catalyst regenerator at or above 1 volume percent. *Id.* § 63.1565(a)(5).

As written, the proposed permit provision in question provides an exemption to these Subpart UUU metallic and organic HAP standards: the provision—when read together with the proposed permit's Condition 3 – Table 1, Part 2(e)(9)—provides that the "short-term Emission Standards" from Subpart UUU "shall not apply during periods when the FCCU COB is combusting refinery fuel gas only." The Subpart UUU standards contain no exemptions or other exceptions for when FCCU CO boilers are combusting only refinery fuel gas.

This permit provision is unlawful and renders the Title V permit unable to ensure compliance with the applicable Subpart UUU standards for the same three reasons that the language relaxing the metallic HAP standards during planned startups and shutdowns is unlawful: it violates the unambiguous Clean Air Act requirement that emission standards apply continuously; it alters the applicable NESHAP through a process that is contrary to the Act's process for establishing and revising these standards; and it contravenes the Clean Air Act and EPA's Title V regulations by removing the ability of the public and EPA to enforce—and a court to order penalties for—violations of the otherwise applicable NESHAP for metallic and organic HAPs during periods when the FCCU's CO boiler is combusting only refinery fuel gas. *See supra* at 27-28.

Thus, this permit provision is unlawful and renders the Title V permit unable to ensure compliance with the affected standards, and EPA must require DNREC to remove the provision or otherwise make clear that it does not affect Subpart UUU's standards for FCCUs.

3. DNREC's response to comments offers no valid reason to retain the permit language relaxing 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.

DNREC's response to comments does not substantively address the arguments from Petitioners' comments regarding why the permit language relaxing the 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 is unlawful. Instead, DNREC asserts that "Commenters have not identified any applicable . . . NESHAP limit that is affected by the startup/shutdown conditions and has [sic] not shown that the ability for EPA or the public to enforce any . . . Federal requirement has been affected." RTC at 20. To the contrary, Petitioners' comments explained with reasonable specificity that the draft Title V permit: provided that, during planned startups and shutdowns and when the CO boiler is combusting only refinery fuel gas, the FCCU does not have to comply with any limit for HAPs; provided that the FCCU, during planned startups and shutdowns, is only required to meet a 500 lb/hr limit for PM instead of its normal

PM limit of 1 lb/1,000 lb of coke burned;[79] and unlawfully provided for an exemption or inflated limits that unlawfully affect NESHAP applicable to the FCCU. Initial Comments at 14-16; Suppl. Comments at 11. Petitioners raised this issue with reasonable specificity—which is all that is required under 42 U.S.C. §§ 7661d(b)(2) and 40 C.F.R. § 70.8(d)—to put DNREC on notice regarding these permit problems. *See Appalachian Power Co. v. EPA*, 135 F.3d 791, 817 (D.C. Cir. 1998) ("the word 'reasonable' cannot be read out of the statute).

C. That the Director's Discretion Provisions and Provision Relaxing the FCCU's Subpart UUU Requirements Were Incorporated from Construction Permits Provides No Reason for EPA to Refuse to Address these Loopholes.

As discussed above, the director's discretion provisions and provision relaxing the FCCU's Subpart UUU requirements cannot lawfully be included in the refinery's Title V permit. As also noted above, these provisions were incorporated into the proposed Title V permit from minor NSR, "Regulation 1102" construction permits. EPA has recently taken the position that unlawfully inflated NSR limits for SSM periods cannot be addressed through Title V permitting because previously-issued NSR permits establish (says EPA) a source's NSR-related "applicable requirements" for Title V purposes— at least for sources located within the jurisdiction of the U.S. Court of Appeals for the Fifth Circuit. As discussed below, EPA cannot possibly employ this policy to refuse to address the effect of the SSM loopholes here on EPA-established NESHAP or the effect of the director's discretion provisions on EPA-approved SIP limits or consent decree limits. Further, the regulatory interpretation and rationale from EPA's policy is irrelevant to the question of whether EPA can consider the director's discretion provisions' effect on minor NSR limits. And as also discussed below, there is no lawful interpretation that would allow EPA to avoid considering these provisions' effect on minor NSR limits.[80]

1. The Valero Houston Order and Its Basis

In its recent order on the Title V permit for the Valero Houston refinery, EPA—for the first time—refused to address SSM limits that unlawfully inflate otherwise applicable NSR limits

[79] As noted above, 1 lb PM/1,000 lb of coke burned is one of the limits for metallic HAPs that can apply to FCCUs under Subpart UUU.

[80] In comments on the draft Title V permit, Petitioners could not have reasonably addressed EPA's position that SSM loopholes established through underlying permits cannot be dealt with through Title V permitting: EPA took that position for the first time in its 2022 order on the Title V permit for the Valero Houston refinery, after the close of the comment periods on the draft Title V permit here. And DNREC never took that position in the draft permit materials (and also has not taken that position in its response to Petitioners' comments on the draft permit). Thus, it was impracticable for Petitioners to, in their comments on the draft Title V permit, address EPA's position, and the grounds for Petitioners arguments in this particular subsection of the petition arose after the close of the comment period. *See* 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). Importantly though, this issue (whether SSM loopholes first established in a construction permit can be addressed through Title V) is not an "objection[] to the permit" that was required to be raised with reasonable specificity during the comment period under §§ § 7661d(b)(2) and 70.8(d).

solely because those SSM limits were originally established in a NSR permit.[81] Valero Houston Order at 64-67. EPA claimed, "where 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." *Id.* at 65. EPA further claimed that "any challenges to the validity of [the state permitting authority's] decisions regarding the terms and conditions of [the] NSR Permit [] should have been raised through the state's title I permitting processes, or through an enforcement action." *Id.* at 66.

In reaching this conclusion, 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). EPA first announced the general policy later applied in the Big River Steel and Exxon Baytown Olefins Orders through a Title V order covering the Hunter power plant in Utah. *See In the Matter of PacifiCorp Energy Hunter Power Plant*, Order on Petition No. VIII-2016-4 ("Hunter Order") (Oct. 16, 2017) (vacated by *Sierra Club v. EPA*, 964 F.3d 882 (10th Cir. 2020)). In the Hunter Order, EPA specifically concluded that Title V permitting should not address the applicability of major NSR when a minor NSR permit has already issued for the project in question. Although neither the Big River Steel Order nor the Exxon Baytown Olefins Order specifically involved the applicability of major NSR after the issuance of a minor NSR permit, both orders relied heavily on the Hunter Order's reasoning.[82] Likewise, in reviewing the Exxon Baytown Olefins Order in *Environmental Integrity Project*, the Fifth Circuit directly evaluated the lawfulness of the Hunter Order.[83]

These three Title V orders (the Hunter, Big River Steel, and Exxon Baytown Olefins Orders) and the Fifth Circuit's decision all turned on EPA's interpretation of the term "applicable requirement," which is found in EPA's Title V regulations and the Clean Air Act's Title V.[84]

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[81] At issue in the Valero Houston permit were provisions that unlawfully inflate NSR limits during periods of startup, shutdown, and maintenance (rather than malfunction).

[82] *See, e.g.*, Big River Steel Order at 9 ("[F]or the legal and policy reasons discussed below and in the *PacifiCorp-Hunter Order*, the EPA believes this position better aligns with the structure of the Act and the EPA's original understanding of the relationship between the operating and construction permitting programs under the CAA after the enactment of title V."); Exxon Baytown Olefins Order at 9 ("… these preconstruction permits define the 'applicable requirements' for purposes of title V permitting.") (citing Hunter Order at 8–11, Big River Steel Order at 9-11).

[83] *See, e.g.*, 969 F.3d at 540 ("We need not decide whether the *Hunter* Order is entitled to *Chevron* deference because, independent of *Chevron*, we find its reasoning persuasive as a construction of the relevant provisions of Title V.").

[84] *See, e.g.*, Hunter Order at 10 ("The EPA is now interpreting the regulations to mean that the issuance of a minor NSR permit defines the applicability of preconstruction requirements under section (1) of the definition of 'applicable requirement' for the approved construction activities for the purposes of

EPA's interpretation and reasoning in all three orders focused on two sections from 40 C.F.R. § 70.2's definition of "applicable requirement"—the first section ("Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA . . . .") and the second section ("Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act"). As summarized in the Big River Steel Order, EPA reasoned in all three orders:

> [P]rior to the *PacifiCorp-Hunter Order*, the EPA had construed section (1) of the definition of "applicable requirement" to include both the requirement to obtain a preconstruction permit and a requirement that such a permit comply with the applicable preconstruction permitting requirements in the plan. Specifically, the EPA has read the phrase "[a]ny standard or other requirement provided for in the applicable implementation plan" to include the requirement to obtain a preconstruction permit that in turn complies with the applicable PSD requirements under the Act. But when a source has obtained a preconstruction permit, for purposes of writing a title V permit, this presents an ambiguity in the definition of "applicable requirement" because section (2) includes the terms and conditions of that permit. The EPA has previously interpreted its regulations to apply both sections (1) and section (2) to title I preconstruction permitting requirements after a preconstruction permit has been obtained. But this reading can lead to a requirement that a title V permitting authority or the EPA consider or reconsider, in issuing a title V permit or permit renewal or in responding to a petition, whether a validly issued preconstruction permit complies with all of the requirements of the applicable implementation plan. While such an expansive reading of section (1) may have been applied by the EPA in past title V petition responses, this leads to an incongruous result that is inefficient and can upset settled expectations—on the part of a state, an owner/operator, and the public at large—in circumstances where a source has obtained a legally enforceable preconstruction permit in accordance with the requirements of title I.

Big River Steel Order at 10 (citation and internal punctuation omitted). *See also* Hunter Order at 9-10 (articulating the same reasoning and interpretation); Exxon Baytown Olefins Order at 9 (relying on interpretation and rationale from the Hunter and Big River Steel Orders).

Likewise, although EPA did not articulate the rationale behind its interpretation in the Valero Houston Order (beyond citing to previous Title V orders and Fifth Circuit's decision),

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permitting under title V of the Act."); Big River Steel Order at 10 ("The EPA is now interpreting the part 70 regulations to mean that the issuance of a PSD permit defines the preconstruction requirements under section (1) of the definition of 'applicable requirement' for the approved construction activities for the purposes of permitting under title V of the Act."); Exxon Baytown Olefins Order at 9 ("… these preconstruction permits define the 'applicable requirements' for purposes of title V permitting."); *Environmental Integrity Project v. EPA,* 969 F.3d at 540 ("EPA argues that the term 'applicable requirements' in § 7661c(a) is ambiguous . . . .").

that order also necessarily relied on the agency's reasoning regarding the interplay between the first and second sections of § 70.2's definition of "applicable requirement": in arguing that the Title V permit there incorporated limits—from a previously issued NSR permit—for periods of maintenance, startup, and shutdown that unlawfully inflated otherwise applicable major NSR limits, the petitioners asserted that the Texas Commission on Environmental Quality ("TCEQ") had failed to comply with major NSR permitting requirements from the SIP—including ensuring that the startup and shutdown limits reflected the Best Available Control Technology, analyzing air quality impacts, ensuring that the public participation requirements for establishing major NSR limits were complied with, and offsetting any emissions increases resulting from relaxing major NSR limits.[85]

2. EPA cannot possibly refuse to address SSM loopholes from underlying construction permits that affect NESHAP, SIP, or consent decree limits.

In the Valero Houston Order, EPA correctly proceeded to address the petitioners' additional argument that the SSM loopholes there (incorporated from a NSR permit) also affected applicable NESHAP and NSPS. *See* Valero Houston Order at 67. The reasoning from the Hunter Order and the Title V orders that relied upon it (including the Big River Steel and Exxon Baytown Olefins Orders)—that previously issued preconstruction permits establish NSR-related applicable requirements—would in no way support the agency deferring to NSR permit language that pertains to requirements beyond NSR requirements.

Here too, EPA cannot possibly refuse to address the director's discretion provisions incorporated from minor NSR permits to the extent those provisions alter or affect EPA-established NESHAP or EPA-approved SIP limits—which the director's discretion provisions do. Nor can EPA possibly refuse to address the language (again incorporated from a minor NSR permit) relaxing Subpart UUU requirements applicable to the FCCU. As discussed above in more detail (*see supra* at 20), only EPA can promulgate or revise NESHAP, and only EPA can approve revisions to SIPs. To give DNREC and other state agencies carte blanche to, through NSR permitting, provide SSM loopholes that affect applicable NESHAP or SIP requirements would be contrary to the Act's unambiguous process for establishing and revising these requirements. If EPA were to take the position that SSM loopholes affecting NESHAP or SIP requirements cannot be addressed through Title V petitions just because those loopholes were originally established in a NSR permit, that would give states free rein to unlawfully revise these requirements on an ad hoc basis through NSR permitting.

Similarly, EPA cannot possibly refuse to address the director's discretion provisions' effect on consent decree limits. As discussed above (*supra* at 21), only the parties or the court—not DNREC through NSR permitting—can alter obligations from the relevant consent decree here.

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[85] Petition for Objection to Permit, In the Matter of Valero Refining-Texas, L.P., Valero Houston Refinery, Petition No. VI-2021-8, at 98-105 (June 29, 2021), available at: https://www.epa.gov/system/files/documents/2021-07/valero-houston-petition_6-29-21.pdf

3. EPA's interpretation and rationale from previous Title V orders is irrelevant to the question of whether EPA can consider the director's discretion provisions' effect on minor NSR limits.

As discussed above, in addition to affecting NESHAP, SIP, and consent decree limits, the director's discretion provisions here can also be used to excuse violations of minor NSR limits for the FCU and FCCU. EPA's regulatory interpretation and rationale behind the Hunter, Big River Steel, Exxon Baytown Olefins, and Valero Houston Orders is irrelevant to the question of whether EPA can consider the director's discretion provisions' effect on minor NSR limits. As discussed above, in all of those orders, EPA took the position that, once a state has issued a preconstruction permit, that creates ambiguity regarding whether the first section of 40 C.F.R. § 70.2's definition of "applicable requirement" can be applied to mandate compliance with major NSR permitting requirements from a SIP, since the second section of § 70.2's definition of "applicable requirement" includes the terms and conditions of the previously issued permit. Here, on the other hand, Petitioners are not asserting that DNREC somehow failed to comply with any major NSR permitting requirements from the SIP. Thus, the first section of § 70.2's definition of "applicable requirement" is irrelevant, and there can be no alleged ambiguity concerning the application of the first and second sections of that definition. EPA has not articulated an interpretation or rationale that would allow it to avoid considering the director's discretion provisions' effect here on minor NSR limits. And, as discussed below, EPA cannot possibly articulate a lawful or nonarbitrary interpretation that would allow it to avoid such consideration.[86]

EPA's position from the Valero Houston Order (and the other Title V orders that the Valero Order relied upon)—that previously issued preconstruction permits establish NSR-related "applicable requirements"—is also irrelevant to the question of whether EPA can consider the director's discretion provisions' effect on minor NSR limits for the additional reason that the director's discretion provisions are not themselves "applicable requirements" that must be included in a Title V permit.

As noted above, the second section of § 70.2's definition of "applicable requirement" includes "[a]ny term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I." 40 C.F.R. § 70.2. This definition would clearly include the minor NSR limits for the FCU and FCCU. It would not, however,

[86] EPA cannot possibly attempt to avoid its Title V obligations here by pointing to the Fifth Circuit's decision in *Environmental Integrity Project*. The Fifth Circuit wrongly decided that case, contrary to the unambiguous regulatory and statutory language and Title V's clear statutory purpose. Regardless, that case is inapposite here because the rationale and interpretation from the Exxon Baytown Olefins and Hunter Orders that the court considered there are irrelevant here. That case is also not binding here because the Delaware City refinery is not located in the Fifth Circuit. *Environmental Integrity Project* is not binding on EPA even in the Fifth Circuit. In *Environmental Integrity Project*, the Fifth Circuit afforded the Hunter Order *Skidmore* deference, finding EPA's reasoning "persuasive." 969 F.3d at 540-41. To be sure, the Fifth Circuit should not have deferred to EPA, for the agency's position was (and is) unambiguously unlawful. But EPA can revise its interpretation of a statute found ambiguous by a federal court, so long as it explains the reasons for doing so. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005); *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 789 (D.C. Cir. 2012).

include the director's discretion provisions, as EPA made clear in its White Paper for Streamlined Development of Part 70 Permit Applications (July 10, 1995) ("White Paper"). In the White Paper, EPA explained that only "environmentally significant terms" from minor NSR permits need be included in Title V permits. White Paper at 12. Other terms from minor NSR permits—including terms that are extraneous, environmentally insignificant, or otherwise not required as part of the SIP or a federally-enforceable NSR program—"need not be incorporated into the part 70 permit to fulfill the purposes of the NSR and title V programs required under the Act." *Id.*

Here, the director's discretion provisions are not "environmentally significant terms" as that phrase is used in the White Paper (the provisions are significant in that they can be used to unlawfully excuse noncompliance). Nor do they need to be incorporated into the Title V permit here to fulfill the purposes of the NSR and Title V programs. Instead, as discussed above, they are provisions that unlawfully frustrate enforcement for violations of applicable requirements, including the minor NSR limits for the FCU and FCCU. The director's discretion provisions are extraneous, otherwise not required as part of Delaware's NSR program, and need not be included in the Title V permit. Thus, the director's discretion provisions are not applicable requirements for purposes of Title V.

This is also made clear by the relevant statutory and regulatory language. For example, the Clean Air Act requires all Title V permits to "include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions *as are necessary to assure compliance with applicable requirements of this chapter*." 42 U.S.C. § 7661c(a) (emphasis added). Similarly, EPA's Title V regulations require that each Title V permit include "[e]missions limitations and standards, including those operational requirements and limitations *that assure compliance with all applicable requirements* at the time of permit issuance."40 C.F.R. § 70.6(a)(1). Thus, the statute and EPA's regulations make clear that Title V permits must ensure compliance with all applicable requirements. It would be illogical to consider the director's discretion provisions—which frustrate, rather than ensure, compliance with applicable requirements—to themselves also be applicable requirements that Title V permits must ensure compliance with.

4. The Clean Air Act and EPA's Title V regulations mandate that the agency consider the director's discretion provisions' unlawful effect on minor NSR limits.

EPA must evaluate the director's discretion provisions' unlawful effect on minor NSR limits here to comply with the unambiguous statutory mandate that Title V permits include "enforceable" emission limitations. 42 U.S.C. § 7661c(a). Consistent with the statute, 40 C.F.R. § 70.6(b)(1) plainly 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." (Emphasis added). Contrary to this unambiguous statutory and regulatory directive, the director's discretion provisions (as discussed above, *supra* at 21-22) unlawfully allow DNREC to remove the ability of the public and EPA to enforce violations of minor NSR limits during certain SSM periods, thus rendering those limits unenforceable.

Title V of the Act also separately makes clear that EPA must remedy the unlawful director's discretion provisions through the Title V objection process. For example, 42 U.S.C. § 7661d(b)(1) provides: "If any [Title V] permit contains provisions that are determined by the Administrator as *not in compliance with the applicable requirements of this chapter* …, the Administrator shall … object to its issuance." (Emphasis added). Similarly, § 7661d(b)(2) provides that, in responding to a Title V petition, EPA "shall issue an objection … if the petitioner demonstrates … that the permit is *not in compliance with the requirements of this chapter* …." (Emphasis added). As discussed above (*supra* at 21-22), with respect to the affected minor NSR limits, the director's discretion provisions are not "in compliance with" the requirements of the Clean Air Act because they violate both Congress's instruction that citizens may enforce emissions limitations and the Act's requirement that Title V permits contain "enforceable" emission limitations.

EPA must also evaluate the director's discretion provisions' unlawful effect on minor NSR limits here to comply with the unambiguous statutory command that Title V permits ensure compliance with all applicable requirements. For example, the Act requires Title V permits to include "enforceable emission limitations and standards … and such other conditions as are necessary to *assure compliance with applicable requirements of this chapter* …." 42 U.S.C. § 7661c(a) (emphasis added). In addition, 42 U.S.C. § 7661a(f) declares that a state's Title V program cannot be approved by EPA, even partially, unless it "applies, and ensures compliance with … [a]ll requirements of [Title I] . . . applicable to sources required to have a permit under [Title V]." Minor NSR limits are requirements of "this chapter" and Title I: the statutory provision that provides the basis for minor NSR permit programs, 42 U.S.C. § 7410(a)(2)(C), is found in Title I. Contrary to this unambiguous language from the Act, the director's discretion provisions render the Title V permit unable to ensure compliance with the minor NSR limits: the provisions unlawfully permit DNREC to undermine enforcement of the limits, and also permit DNREC to decide that the continuously applicable minor NSR limit only apply some of the time.

Title V's core purpose of promoting compliance and strengthening enforcement (s*ee supra* at 22) also makes clear that EPA must consider the effect of the director's discretion provisions on minor NSR limits here.

EPA's Title V regulations also make clear that EPA must consider the unlawful effect of the director's discretion provisions on minor NSR limits because those limits are unambiguously applicable requirements that the proposed Title V permit must ensure compliance with. As noted above, the Valero Houston Order and the earlier Title V orders that it relied upon all were based on the policy that EPA initially announced through the Hunter Order (a policy that is, as discussed above, inapplicable here). The U.S. Court of Appeals for the Tenth Circuit flatly and correctly rejected the Hunter Order as contrary to the plain language of EPA's Title V regulations—something that the Valero Houston Order fails to even mention. In reviewing the Hunter Order, the Tenth Circuit concluded that EPA's Title V regulations "unmistakably require[] that each Title V permit include all requirements in the state implementation plan, including Utah's requirement for major NSR." *Sierra Club v. EPA*, 964 F.3d at 891. The Tenth Circuit also concluded that, when EPA promulgated its Title V regulations, the agency "intended to broadly use the term 'applicable requirement'"—citing EPA guidance instructing state regulators that "each permit" must contain provisions for "applicable requirements," defined as "limits and conditions to assure compliance with *all applicable requirements under the Act,*

including requirements of the applicable implementation plan." *Id.* at 893-93 (citing William G. Rosenberg, EPA, Guidance to States on Authority Necessary to Implement the Operating Permits Program in Title V of the Clean Air Act Amendments of 1990 (May 21, 1991)) (emphasis added). The court further correctly concluded that EPA's preamble to its final rule establishing its Title V regulations "shows a regulatory aim of enhancing compliance with the statutory requirements in Title I," citing to excerpts "suggest[ing] that the phrase 'applicable requirements' encompasses all requirements under the Clean Air Act." *Id.* at 894-95.

Here, just as major NSR requirements were in *Sierra Club*, the minor NSR limits for the FCU and FCCU are unambiguously applicable requirements under EPA's Title V regulations that the proposed Title V permit must ensure compliance with. These limits are plainly applicable requirements, since they are "condition[s] of . . . preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I." *See* 40 C.F.R. § 70.2 (second section of "applicable requirement" definition). And EPA's Title V regulations unambiguously mandate that Title V permits must ensure compliance with all applicable requirements. For example, 40 C.F.R. § 70.1(b) declares that "[a]ll sources subject to these regulations shall have a permit to operate that assures compliance by the source with *all* applicable requirements." (Emphasis added). *See also* 40 C.F.R. §§ 70.4(b)(3)(i), (v) (a state must have authority to "[i]ssue permits and assure compliance with each applicable requirement" and "[i]ncorporate into permits all applicable requirements"), 70.6(a)(1) (permit must "assure compliance with all applicable requirements at the time of permit issuance"), 70.7(a)(1)(iv) (a permit can be issued only if it "provide[s] for compliance with all applicable requirements"). Thus, EPA cannot lawfully refuse to address provisions—such as the director's discretion provisions—that render the Title V permit unable to ensure compliance with these applicable minor NSR limits.

That the director's discretion provisions are part of the same minor NSR permits containing the affected minor NSR limits does not created ambiguity in the second section of the regulatory definition of "applicable requirement." As discussed above (*supra* at 35-36), the unlawful director's discretion provisions are not themselves "applicable requirements" that a Title V permit must ensure compliance with. Even if there were some ambiguity here in the regulatory definition (there is not), the unambiguous statutory mandates discussed above control. Further, there is no reasonable interpretation—for all the reasons discussed above and below—that would allow EPA to avoid evaluating the director's discretion provisions' unlawful effect on the minor NSR limits for the FCU and FCCU.

Finally, EPA should address the director's discretion provisions' effect on minor NSR limits here because SSM loopholes, such as these provisions, are an environmental justice issue that EPA should remedy whenever given the opportunity. SSM events can severely and disproportionately harm communities near or downwind of polluting facilities—communities that are often of color, low income, and overburdened by pollution from multiple sources. For example, in issuing and defending its 2015 SSM SIP call, EPA emphasized that pollution during SSM events has "real-world consequences that adversely affect public health." 80 Fed. Reg. at 33,850. EPA recognized that "[s]ources may emit large amounts of pollutants during SSM events." EPA Final Br. at 18, D.C. Cir. Case No. 15-1166, ECF No. 1643446 ("EPA Br.") (citing *US Magnesium v. EPA*, 690 F.3d 1157, 1163 (10th Cir. 2012) (where "one plant releas[ed] three times its daily limit of sulphur dioxide over a nine-hour period"). Further, in the SIP call

rulemaking, the agency expressly tied the requirement that emissions limitations apply continuously—instead of only during non-SSM periods—to the Clean Air Act's public health goal: "[c]ompliance with the applicable requirements is intended to achieve the air quality protection and improvement purposes and objectives of the [Act]." 80 Fed. Reg. at 33,850. EPA noted that one facility emitted 11,000 pounds of sulfur dioxide in just nine hours—dramatically exceeding its 3,200-pound daily limit. EPA, EPA-HQ-OAR-2012-0322, Memorandum to Docket: Statutory, Regulatory, and Policy Context for this Rulemaking 23 (Feb. 4, 2013). And the agency acknowledged that excess SSM emissions "often occur near communities in which *any* additional emissions could interfere with protecting the public health and environment." *Id.*

If EPA were to take the position that Title V cannot be used to address the effect of NSR-permit SSM loopholes on all NSR limits, that would require environmental justice communities to constantly monitor, comment on, and successfully challenge through state processes most, if not every, NSR permit development related to SSM provisions. Although EPA claimed in the Valero Houston Order that SSM loopholes can be addressed through enforcement, Petitioners are aware of no citizen suit that could be brought to address unlawful SSM loopholes—and EPA did not explain how such an enforcement suit could possibly be brought. If EPA is truly serious about protecting environmental justice communities, as it claims to be, it should not refuse to address unlawful NSR-permit SSM loopholes in the Title V context.

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

As Petitioners' comments explained (Initial Comments at 16-17, Suppl. Comments at 4-8), the proposed Title V permit includes an unlawful affirmative defense to liability for exceedances of "technology-based" limits caused by malfunctions and emergencies. *See* Proposed Title V Permit Condition 2(b)(5)-(6). *See also* Proposed Title V 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). "Technology-based" limits presumably include major NSR, PSD, NESHAP, and NSPS limits. The unlawful affirmative defense renders the proposed Title V permit unable to assure compliance with the affected limits (contained in underlying permits and EPA regulations that do not contain such an affirmative defense to liability), in violation of 40 C.F.R. §§ 70.1(b), 70.6(a)(1), and 70.7(a)(1)(iv) and 42 U.S.C. § 7661c(a). In addition, the affirmative defense also violates the requirement that Title V permits include "enforceable" emission limitations and standards, 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.

Affirmative defenses violate the unambiguous requirements of 42 U.S.C. §§ 7604 and 7413 of the Clean Air Act, as the U.S. Court of Appeals for the D.C. Circuit confirmed in *Natural Resources Defense Council v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014). The D.C. Circuit explained that the Act's "citizen suit" provision, 42 U.S.C. § 7604(a), "creates a private right of action" and, "as the Supreme Court has explained, 'the Judiciary, not any executive agency, determines 'the scope'—*including the available remedies*—'of judicial power vested by' statutes establishing private rights of action.'" *Id.* at 1063 (emphasis in original; quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013)). EPA recognized the same in the SSM

SIP Call. 80 Fed. Reg. at 33,929. EPA also recognized the same in 2016—and again this year—in proposing to require states to remove affirmative defenses from their Title V rules. 81 Fed. Reg. 38,645 (June 14, 2016); 87 Fed. Reg. 19,042 (April 1, 2022). There, EPA also properly found that, to the extent the affirmative defense from EPA's Part 70 regulations qualifies as an exemption, it would be contrary to the requirement that emission limits apply continuously. 81 Fed. Reg. at 38,650-51. The same reasoning applies to the affirmative defense at issue here. Environmental groups filed comments on EPA's 2016 and 2022 proposals, explaining in more detail why Title V affirmative defenses are unlawful. *See, e.g.*, Ex. 11, Enviro. Groups' Suppl. Comments on Title V Affirmative Defense.

The affirmative defense from the proposed permit here 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 for violations occurring during both emergencies and malfunctions. Not only can the affirmative defense be used to absolve DCRC of liability for violations of NSR and PSD limits occurring during these periods, it can also be used as a complete defense for violations of EPA-created NESHAP and NSPS.

Because the affirmative defense is plainly unlawful, EPA should require DNREC to remove the defense from the refinery's Title V permit now. It does not matter that the affirmative defense is contained in Delaware's Title V rules, even if those rules were approved by EPA (which is completely unclear, as discussed below): those state rules cannot supersede the clear intent of Congress in enacting the Clean Air Act. Further, affected community members should not have to wait years for EPA to (hopefully) finalize its proposed rule to require states to remove affirmative defenses from their Title V programs and for Delaware to remove the rule from its state regulations and this refinery' Title V permit. Any delay in removing the affirmative defense from the proposed permit here is especially problematic because of the environmental justice concerns presented by this refinery and SSM loopholes, as well as the refinery's history of massive releases of air pollution during malfunctions. *See supra* at 4-8, 38-39.

To the extent the affirmative defense from Delaware's Title V regulations (7 Del. Admin. Code 1130 § 6.7) has not been approved by EPA, that makes the case even clearer for requiring DNREC to remove it from the refinery's Title V permit now. It is unclear how EPA could approve the affirmative defense for malfunctions in Delaware's Title V rules, since EPA, in promulgating its Title V rules, took the position that state permitting agencies "may not adopt an emergency [affirmative] defense less stringent than that set forth at section 70.6(g)." *See* Operating Permits Program and Federal Operating Permits Program, Proposed Rule, 60 Fed. Reg. 45,530, 45,558 (Aug. 31, 1995). There is no indication, that Petitioners have seen, that EPA approved the affirmative defense provisions from Delaware's Title V regulations at all when approving those regulations. EPA's Federal Register notices regarding approval of the state's Title V program do not even mention the affirmative defense. 60 Fed. Reg. 48,944 (Sept. 21, 1995) (proposed interim approval); 60 Fed. Reg. 62,032 (Dec. 4, 1995) (final interim approval); 66 Fed. Reg. 50,378 (Oct. 3, 2001) (proposed full approval); 66 Fed. Reg. 50,321 (Oct. 3, 2001) (direct final full approval).

1. DNREC's response to comments offers no valid reason to retain the unlawful affirmative defense.

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." RTC at 21-22. Yet DNREC asserts that the affirmative defense "does not seek to limit EPA's or citizens' ability to seek enforcement," apparently 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.* at 22.[87] That an affected person can bring a citizen suit under 42 U.S.C. § 7604 (or that EPA can bring an enforcement action under § 7413) does not, by itself, make an affected limit "enforceable"—especially when the affirmative defense here is built right into the permit that would be enforced. Under the plain language of the proposed permit, DCRC can assert a defense that—if a court in an enforcement proceeding found that all the affirmative defense factors were met—would tie the court's hands to find that DCRC had not violated "technology-based" limits, even when emissions clearly exceeded those limits, during malfunctions and emergencies. In other words, the affirmative defense could be employed to render the affected limits unenforceable.

DNREC next points to EPA guidance, issued in 2020 under the previous Administration, stating that affirmative defenses may be lawful in certain circumstances. RTC at 22. Under the current Administration, however, EPA has since withdrawn the 2020 guidance and returned to the (correct) policy announced in the SSM SIP call—that affirmative defenses are unlawful.[88]

Finally, DNREC argues that concerns about the affirmative defense "must be addressed at the regulatory level rather than as a permit action." RTC at 22. As discussed above, however, EPA should require DNREC to remove the affirmative defense from the refinery's Title V permit now because it is plainly unlawful—and especially to the extent EPA has not approved the defense from Delaware's Title V regulations. As also discussed above, community members impacted by the toxic and other air pollution from this refinery should not have to wait years for this environmental justice problem to be remedied "at the regulatory level."

IV. THE PROPOSED PERMIT FAILS TO ASSURE COMPLIANCE WITH NESHAP AND NSPS REQUIREMENTS.

The proposed permit fails to assure compliance with EPA-established NESHAP and New Source Performance Standards ("NSPS") in two separate ways:

[87] Similarly, DNREC asserts that "[a]pplicable provisions remain enforceable because affirmative defenses do not provide relief from the initial enforcement action of a Notice of Violation." RTC at 27.

[88] *See* https://www.epa.gov/system/files/documents/2021-09/oar-21-000-6324.pdf

A. The Permit Fails to Ensure Compliance with NSPS and NESHAP Requirements for a Flare Management Plan.

As Petitioners' comments pointed out (Suppl. Comments at 32-33), the proposed Title V permit fails to ensure compliance with certain NSPS and NESHAP requirements for a flare management plan. The NSPS and NESHAP requirements for a flare management plan are applicable requirements that the Title V permit for the Delaware City refinery must assure compliance with. *See* 40 C.F.R. 70.2 (defining "applicable requirement" to include "[a]ny standard or other requirement under section 111 of the Act" and "[a]ny standard or other requirement under section 112 of the Act"). The permit's failure to ensure compliance with these applicable requirements 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).

The Delaware City refinery has two flares—the north and south flares. *See, e.g.*, Proposed Title V Permit Condition 3 – Table 1, Part 2(n). 40 C.F.R. § 60.103a, at subsections (a)-(b), requires owners and operators of flares to develop, implement, submit, and comply with a flare management plan that includes several detailed categories of information, including: a listing of units and systems connected to the flares; descriptions of the flares; an assessment of whether discharges to the flares can be minimized; and procedures to minimize or eliminate discharges to the flares during planned startup and shutdown of the units and systems connected to the flares. The compliance deadline for this requirement was November 11, 2015—though, after that, the plans are to be updated to account for changes in operation of the flare. 40 C.F.R. § 60.103a(b)(1)-(2).

Similarly, 40 C.F.R. § 63.670(o) also requires owners and operators of any flares that have the potential to operate above their smokeless capacity under any circumstance to develop, implement, submit, and comply with a flare management plan to minimize flaring during periods of startup, shutdown or emergency releases. The compliance deadline for this requirement was January 30, 2019. *Id.* § 63.670(o)(2).

To ensure compliance with these clearly applicable NESHAP and NSPS requirements regarding flare management plans, *see id.* § 70.2, 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. *See, e.g.*, 42 U.S.C. § 7661c(a) (requiring Title V permits to include enforceable emission limitations and standards and "such other conditions as are necessary to assure compliance with applicable requirements of this chapter"). The proposed Title V permit, however, does not attach or incorporate the flare management plan(s).

In the Valero Houston Order, EPA made clear that the terms of NSPS and NESHAP flare management plans must be included in a refinery's Title V permit—either by directly including the plans in the permit or incorporating their terms by reference. Valero Houston Order at 25-26.

DNREC's response to comments offers no valid reason that the flare management plans should not be incorporated into the Title V permit. DNREC first asserts that the NSPS and

NESHAP flare management plan requirements "do not require" that the plan "be housed in the permit." RTC at 83. The Valero Houston Order shows that this argument fails:

> [T]o determine compliance with the requirements of the NSPS subpart Ja and NESHAP subpart CC, one must be able to ascertain if Valero 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.

Valero Houston Order at 26.

DNREC also asserts: "If 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." RTC at 83-84. That DNREC might find it inconvenient to update the Title V permit to incorporate any revisions to the flare management plans does not change the fact that the terms of the plans are applicable requirements that the Title V permit must ensure compliance with.

Finally, 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." RTC at 84. This just proves the point that the terms of the flare management plans should be listed as part of the Title V permit. If the terms are not listed in the permit, members of the public cannot know the terms of the plans, cannot know whether the refinery is complying with the terms, and could not bring a citizen enforcement suit for any violations of those terms.

B. EPA should require DNREC to revise the permit to identify other specific applicable requirements from NESHAP Subpart UUU and NSPS Subpart J.

As Petitioners' comments explained (Suppl. Comments at 27-30), the proposed Title V permit—in violation of 42 U.S.C. §§ 7661c(a) and 7661c(c), as well as 40 C.F.R. §§ 70.1(b), 70.6(a)(1), 70.6(c)(1), and 70.7(a)(1)(iv)—fails to assure compliance with applicable Clean Air Act requirements for certain units at the refinery because the permit does not identify specific applicable limits and requirements from NESHAP Subpart UUU and NSPS Subpart J.

The refinery's FCCU. For the refinery's FCCU's NESHAP obligations, the proposed permit—other than incorporating certain standards for organic HAPs that apply during startup, shutdown, and hot standby—generally only states that DCRC "shall comply with all the applicable requirements of 40 CFR Part 63, subpart UUU." Proposed Title V Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H)(4), 2(e)(9)(i)(A). Other than the organic HAP standards that apply

during startup, shutdown, and hot standby,[89] the only specific Subpart UUU-related obligations listed in the permit are obligations to submit semi-annual compliance reports and to operate in keeping with an operation, maintenance, and monitoring plan. *Id.* at Part 2(e)(9). Yet Subpart UUU contains many additional requirements applicable to FCCUs (including this one), including emission standards, operating limits, and monitoring, testing, and reporting requirements. *See* 40 C.F.R. §§ 63.1564-65; 40 C.F.R. Part 63, Subpart UUU, Tables 1-14. For example, the permit fails to list the following NESHAP requirements applicable to the FCCU here:

- The metallic HAP standards from 40 C.F.R. § 63.1564(a)(1) and Table 1 to Subpart UUU. Here, because the refinery's FCCU is subject to NSPS Subpart J (as discussed below), it would seem to be subject to a PM limit (as a surrogate for metallic HAPs) of 1.0 lb/1,000 lb of coke burn-off, along with an opacity limit of 30 percent except for one 6-minute average opacity reading in any 1-hour period. *See* 40 C.F.R. Part 63, Subpart UUU, Table 1. Although the proposed permit lists a PM limit of 1 lb/1000 lb of coke burned and a 20 percent opacity limit (Proposed Title V Permit Condition 3 – Table 1, Part 2(e)(2a)(i)(B), 2(e)(10)(i)(A)), the permit cites the source of these limits as the FCCU's minor NSR permit and (for the opacity limit) also the SIP and NSPS Subpart J.
- The metallic HAP operating limits from 40 C.F.R. § 63.1564(a)(2) and Table 2 to Subpart UUU. As an FCCU subject to NSPS Subpart J, the refinery's FCCU here would appear to be subject to Table 2's 20 percent opacity operating limit, with a 3-hour rolling average. But this requirement is listed nowhere in the permit.
- The metallic HAP standards that apply during startup, shutdown, and hot standby at FCCUs—which allow FCCUs to either comply with the numeric limits and operating limits (discussed immediately above) applicable during all other periods, or to maintain the inlet velocity to the primary internal cyclones of the catalytic cracking unit catalyst regenerator at or above 20 feet per second. *See* 40 C.F.R. § 63.1564(a)(5). These requirements are not listed in the permit.
- The requirements from 40 C.F.R. § 1571(a)(5) and Subpart UUU's Table 6 to conduct a performance test for metallic HAPs once every five years—or (for FCCU's subject to NSPS Subpart J) annually if the PM emissions measured during the most recent performance source test are greater than 0.80 g/kg coke burn-off.
- The organic HAP standard from 40 C.F.R. § 63.1565(a)(1) and Table 8 to Subpart UUU—maintaining CO emissions (as a surrogate for organic HAPs) at or below 500 ppm. Although the proposed permit lists a CO limit of 500 ppm (Proposed Title V Permit Condition 3 – Table 1, Part 2(e)(5)(i)(A)), the permit cites the source of this limit as the FCCU's minor NSR permit.
- The Subpart UUU monitoring requirements for organic and metallic HAPs. *See* 40 C.F.R. §§ 63.1572-73; 40 C.F.R. Part 63, Subpart UUU, Tables 3, 6-7, 10, 13.

[89] As discussed below, there are problems with DNREC's identification of those standards that apply during startup, shutdown, and hot standby.

EPA should also require DNREC to correct the standards for organic HAPs that apply during startup, shutdown, and hot standby. *See* 40 C.F.R. § 63.1565(a)(5). The proposed permit at least 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. *See* Proposed Title V Permit Condition 3 – Table 1, Part 2(e)(1)(i)(H) (". . . the following emission limitations shall apply during planned start ups and shut downs of the FCCU: . . . For CO and inorganic HAP emissions during startup, shutdown, and hot standby . . . .").

Similarly, the proposed permit lists no specific NSPS requirements for the FCCU, other than an opacity limit (Proposed Title V Permit Condition 3 – Table 1, Part 2(e)(10)(i)(A)). DNREC specifically admits that NSPS Subpart J is applicable to the FCCU. RTC at 75. The proposed permit fails to identify the following NSPS Subpart J requirements applicable to the FCCU:

- The PM limit of 1.0 kg/Mg (2.0 lb/ton) of coke burn-off in the catalyst regenerator from 40 C.F.R. § 60.102(a)(1). Again, although the proposed permit lists a PM limit of 1 lb/1000 lb of coke burned (Proposed Title V Permit Condition 3 – Table 1, Part 2(e)(2a)(i)(B)), the permit cites the source of this limit as the FCCU's minor NSR permit.
- The CO limit of 500 ppm, as a one-hour average, from 40 C.F.R. §§ 60.103(a), 60.105(e)(2). While the proposed permit lists a CO limit of 500 ppm (Proposed Title V Permit Condition 3 – Table 1, Part 2(e)(5)(i)(A)), the permit cites the source of this limit as the FCCU's minor NSR permit.
- The SO2 limit of 50 ppm, with a 7-day averaging period, from 40 C.F.R. § 60.104(b)(1), (c). While the proposed permit lists this same SO2 limit (Proposed Title V Permit Condition 3 – Table 1, Part 2(e)(3)(i)(A)), the permit cites the source of this limit as the FCCU's minor NSR permit
- The monitoring, testing, recordkeeping, and reporting requirements from 40 C.F.R. §§ 60.105-108.

The refinery's FCU. The proposed permit also fails to specifically identify a limit and monitoring requirements from NSPS Subpart J applicable to the FCU. *See* 40 C.F.R. §§ 60.104(a)(1), 60.105(a)(4). DNREC admits that Subpart J is applicable to the FCU and (apparently mistakenly) states that "SO_2 standards of the NSPS require this unit to combust fuel gas containing less than 10 ppm H_2S." RTC at 13, 45, 77. Subpart J actually provides that refineries are not allowed to burn in any fuel gas combustion device fuel gases containing H2S exceeding 230 mg/dscm (0.10 gr/dscf). 40 C.F.R. § 60.104(a)(1). DNREC claims that the applicable NSPS "condition is included in the permit." RTC at 45. DNREC is presumably referring to a portion of the proposed permit that provides: "With the exception of the FCU burner offgas, the Owner/Operator shall not burn any fuel gas in any fuel gas combustion device that contains [H2S] in excess of 0.10 gr/dscf (162 ppm)." Proposed Title V Permit Condition 3 – Table 1, Part 2(da)(1)(i)(B).[90] But the proposed Title V permit cites the FCU's minor NSR permit—not NSPS Subpart J—as the source of this limit. And while the proposed permit

[90] Separately, the proposed permit lists a H2SO4/SO3 limit of 10 ppm for the FCU. *Id.* at Part 2(da)(7)(i)(A)(2).

requires the refinery to continuously monitor the H2S concentration of refinery fuel gas, it cites the SIP—not Subpart J—as the source of this requirement. *Id.* at Part 2(da)(1)(iii)(A).

Boilers 80-2, 80-3, and 80-4. DNREC admits that NSPS Subpart J "is applicable to the boilers because they are fuel gas combustion devices." RTC at 77. DNREC states that the "only applicable requirement for fuel gas combustion devices is that the fuel have an H_2S content less than 0.1 gr/scf" and that this requirement "found in § 60.104(a)(1) is included the permit at Part 3- Condition a.2.i.A." *Id.* at 77-78. While that permit condition indeed lists a 0.1 gr/dscf limit as being applicable to boilers 80-2, 80-3, and 80-4, it is not readily apparent from the proposed permit that NSPS Subpart J is applicable to the boilers: that permit condition only references three construction or preconstruction permits as the possible source(s) of that limit—not Subpart J. *See* Proposed Title V Permit Condition 3 – Table 1, Part 3(a)(i)(A). Similarly, although the proposed permit provides that compliance with the H2S limit "shall be based on the H2S CEMS," the permit cites the same permits as the possible source(s) of this requirement. *Id.* at Part 3(a)(ii)(G). The only reference to NSPS requirements in the section of the proposed permit devoted to these boilers is the requirement from 40 C.F.R. § 60.7 to submit quarterly CEMS reports. *See id.* at Part 3(a)(v)(I). This reference to a reporting requirement from the NSPS general provisions is not specific enough to identify Subpart J as an applicable requirement for these boilers. EPA should require DNREC to revise the permit to identify NSPS Subpart J as the source of the boilers' 0.1 gr/dscf H2S limit, as well as the source of the H2S CEMS monitoring obligations from Subpart J.

The NESHAP and NSPS requirements applicable to the refinery's FCCU, FCU, and boilers are unquestionably applicable requirements with which the Title V permit must ensure compliance. *See* 40 C.F.R. § 70.2 (defining "applicable requirement" to include "[a]ny standard or other requirement under" §§ 111 and 112 "of the Act"). 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 clearly identifies a source's NESHAP obligations. *In the Matter of Tesoro Refining and Marketing Co.,* Order on Petition No. IX-2004-6, at 8-9 (March 15, 2005) ("Tesoro Order"). In the Tesoro Order, 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.

Id. at 8 (emphasis added, citations omitted). *See also 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). More recently, EPA objected to a Title V permit that—like the proposed permit here—failed to include applicable NESHAP requirements with sufficient detail and instructed the permitting authority that, if it wished to remedy the permit problems by incorporating certain applicable requirements by reference, it "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. *Order Granting in Part and Denying in Part a Petition for Objection to Permit, In the*

Matter of ExxonMobil Corp., Baytown Chemical Plan, Petition No. VI-2020-9 at 16-19 (March 18, 2022). There, EPA specifically rejected—and noted that it had previously rejected—the same approach of high-level citation that DNREC has taken with respect to the FCCU's NESHAP obligations here, stating:

> In 1999, the 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." The EPA has also objected to title V permits that have attempted to [incorporate] NESHAP (or NSPS) requirements without providing sufficient detail to determine the specific requirements that apply to emission units at the source.

Id. at 16-17 (citations omitted).

Here too, the proposed Title V permit fails to explicitly and unambiguously identify the NESHAP and NSPS limits and monitoring, testing, recordkeeping, and reporting requirements applicable to the units discussed above. Thus, the proposed permit fails to ensure compliance with these applicable requirements.

In objecting to the proposed permit's failure to identify these applicable NESHAP and NSPS requirements, EPA should instruct DNREC to make clear, in revising the permit, that any SSM provisions currently contained in the permit (except for the provision that lists organic HAP requirements for the FCCU during startup, shutdown, and hot standby) do not affect the applicable NESHAP and NSPS limits. For example, the proposed permit provides that, during an unplanned shutdown or bypass of the FCCU's CO boiler, the FCCU shall comply with certain operational requirements from Attachment G to the permit. Proposed Title V Permit Condition 3 – Table 1, Part 2(e)(1)(i)(M). And Attachment G provides: "During this period (24 hours maximum), the short-term emission limit in Part 2 – Condition 3 – Table 1.e.5.i.A . . . shall not apply." The "short-term emission limit in Part 2 – Condition 3 – Table 1.e.5.i.A" is the FCCU's 500 ppm CO limit from a minor NSR permit—which is the same as the CO limit from NESHAP Subpart UUU and NSPS Subpart J.

Similarly, the proposed permit could be read to provide that—instead of complying with the 500 ppm CO limit during startup, shutdown, malfunction, and hot standby—the FCCU can comply with an alternative limit of maintaining the O_2 concentration in the exhaust gas from the regenerator overhead at or above 1 volume percent. *See* Proposed Title V Permit Condition 3 – Table 1, Part 2(e)(9)(iii)(B)-(C). Under NESHAP Subpart UUU, this alternative to the 500 ppm CO limit only applies during startup, shutdown, and hot standby—not malfunctions. 40 C.F.R. 63.1565(a)(5).

In its response to comments, DNREC asserts that Petitioners "have not identified" NESHAP Subpart UUU and NSPS Subpart J provisions applicable to the FCCU that were omitted from the permit. RTC at 75-76. To the contrary, Petitioners pointed out that the draft permit failed to list "many additional requirements [from Subpart UUU] applicable to FCCUs,

including emission standards, operating limits, and monitoring, testing, and reporting requirements. *See, e.g.*, 40 C.F.R. §§ 63.1564-65; 40 C.F.R. Part 63, Subpart UUU, Tables 1-14." Suppl. Comments at 27-28. And Petitioners pointed out that the permit listed no specific NSPS requirements for the FCCU, even though NSPS Subparts J and Ja are applicable to FCCUs constructed or modified after certain dates. *Id.* at 28. These comments were more than sufficient to put DNREC on notice regarding the missing NESHAP and NSPS requirements for the FCCU.[91]

DNREC also argues: "The quoted text of the Tesoro Order . . . questioned whether Tesoro's permits had sufficiently low level citations to facilitate an incorporation by reference. This does not address citations of conditions wholly contained within the permit." RTC at 79. But the Tesoro Order is apt here. As noted above, that order stated that "a permit *must explicitly state all emission limitations and operational requirements* for all applicable emission units at the facility." Tesoro Order at 8 (emphasis added). As discussed above, the proposed permit here flunks that test.

V. THE PROPOSED PERMIT FAILS TO INCLUDE NECESSARY TERMS AND CONDITIONS TO ASSURE COMPLIANCE WITH THE ACCIDENTAL RELEASE PREVENTION, RISK MANAGEMENT PLAN REGULATIONS, 40 C.F.R. PART 68.

A. EPA Must Object to Assure Compliance with RMP Rules in Part 68.

As Petitioners plainly raised in their comments to DNREC,[92] the proposed permit is incomplete and unlawful because it omits terms needed to determine and assure compliance with the Accidental Release Prevention Requirements, also known as the EPA Risk Management Program, 40 C.F.R. Part 68— as evidenced by the proposed permit itself. 40 C.F.R. Part 68 is an "applicable requirement" for DCRC, with which the permit must assure compliance. 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a), (c); 40 C.F.R. § 68.215. However, the proposed permit does not include specific terms and conditions needed to assure compliance with 40 C.F.R. Part 68.

The proposed permit includes only the following:

> **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

[91] To the extent EPA believes that Petitioners did not raise their NSPS Subpart J objection with reasonable specificity during the comment period (they did), it was impracticable in comments to raise this objection because DNREC did not identify the FCCU as being subject to Subpart J until issuing its response to comments. *See* 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). Further, the grounds for that objection arose after the comment period, when DNREC first identified the FCCU as being subject to Subpart J. *See id.*

[92] *See, e.g.*, Supplemental Comments Part VII, at 33-35.

> 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.

Proposed permit at 18 ¶ p. (emphasis added).

That provision is deficient because it does not plainly state that the federal and state RMP regulations indeed apply to processes at the refinery. Comments highlighted this, citing a Risk Management Plan by DCRC. *See* Suppl. Comments at 33 n.39. Additional EPA data confirms this – including recently released data providing information about six reportable incidents at the DCRC refinery, which is a Program 3 petroleum refinery, under the Risk Management Program rules since 2012.[93]

Yet the proposed permit leaves open whether the RMP rules are an applicable requirement or not, by conditioning compliance, as a hypothetical—stating "in the event" that DCRC is or might become subject to the regulations, and without confirming that indeed DCRC is subject to—and therefore must meet—the regulatory requirements. Without a clear statement that these regulations apply and are enforceable through this permit, the proposed permit does not meet the requirement to include "[a] statement listing [Part 68] as an applicable requirement," 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).

Further, the proposed permit also 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." The proposed permit does not satisfy this requirement either. 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). *See* Proposed Permit at 25 (Condition 3 – Table 1 (Specific Requirements)). The general language in the proposed permit on compliance certification also does not address this. *Id.* at 21-24 (not referencing Part 68 or RMP requirements at all).

In addition, the federal Clean Air Act Risk Management Program Part 68 regulations require the following:

> (e) The air permitting authority or the agency designated by delegation or agreement under paragraph (d) of this section shall, at a minimum:
>
> (1) Verify that the source owner or operator has registered and submitted an RMP or a revised plan when required by this part;

[93] *See* EPA Proposed Rule Docket, EPA-HQ-OLEM-2022-0174-0065 RMP Accidents 2004-2020 App. A to Technical Background Document (showing DCRC incidents only) (attached as Exhibit 12).

(2) Verify that the source owner or operator has submitted a source certification or in its absence has submitted a compliance schedule consistent with paragraph (a)(2) of this section;

(3) For some or all of the sources subject to this section, use one or more mechanisms such as, but not limited to, a completeness check, source audits, record reviews, or facility inspections to ensure that permitted sources are in compliance with the requirements of this part; and

(4) Initiate enforcement action based on paragraphs (e)(1) and (e)(2) of this section as appropriate.

40 C.F.R. § 68.215(e). As discussed below, Delaware state law also incorporates and applies these requirements. 7 DEL. ADMIN. CODE § 1201-5.215 (emphasis added). However, as the proposed permit shows, there is no evidence that DNREC has indeed verified DCRC's compliance, included the necessary recognition that DCRC must comply with RMP rules, or the required RMP compliance certification, or otherwise satisfied this section.

Notably these requirements do not allow a hypothetical statement, which is vague and does not ensure DCRC actually complies. They require a clear statement listing the accidental release prevention requirements as applicable requirements. The proposed permit fails to satisfy this mandate.

Further, since the last Title V permit was issued to DCRC, EPA updated the RMP regulations in Part 68. These first took effect on September 21, 2018 – and then were weakened, but some improvements were retained in a final rule issued on December 19, 2019, and EPA has now proposed to further strengthen the Part 68 rules.[94] The 2019 regulations added new requirements, going beyond the RMP, such as coordination with emergency responders, for which the compliance date has now passed, additional emergency response planning requirements, and public meeting requirements – and additional new requirements are under consideration and should be finalized by August 2023. Because these are new, it is particularly important to ensure that the Title V Permit includes sufficient specificity to assure compliance with them.

Fully applying the Part 68 requirements is especially important because DCRC has had recent safety incidents and release problems as discussed in the attached supplemental comments and in the recently released incident list from EPA.[95] DNREC's own "Violation List" includes a large number of these incidents. *See* Ex. 5, DNREC Violation List as of June 2019. A review of DNREC's compliance reports demonstrates hundreds of deviations of air requirements that threaten health and safety. In addition, news reports have highlighted other serious incidents. For example, on April 18, 2018, a leak resulted in the release of more than 100 pounds of hydrogen

[94] EPA, Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Safer Communities by Chemical Accident Prevention, Proposed Rule, 87 Fed. Reg. 53,556 (Aug. 31, 2022); *see also* Final Rule, 84 Fed. Reg. 69.834 (Dec. 19, 2019).

[95] *See* List of DCRC RMP Accidents, *supra* note 93; Ex. 12.

sulfide and sulfur dioxide.[96] And, on March 11, 2020 a fire at the refinery critically injured two workers and created a "huge column of thick, black smoke . . . visible for miles."[97] The record accompanying the proposed permit does not assure compliance with Part 68, including 40 C.F.R. § 68.215, nor does it protect the public from this type of incident at this facility, and thus does not meet Clean Air Act Title V requirements.

EPA must object to the proposed permit on the ground that it does not assure compliance with the RMP Part 68 rules, nor does it specifically satisfy 40 C.F.R. § 68.215. If these important applicable requirements are not clearly and fully included in the permit, this not only violates Title V but undermines the importance of ensuring compliance with essential health and safety requirements put in place to protect fenceline communities, workers, first-responders, and other members of the public from the use, storage, and management of hazardous substances at DCRC. EPA must require DNREC to revise the permit to recognize the RMP rules, Part 68, apply to DCRC and to assure compliance with these rules, including the compliance certification required by 40 C.F.R. § 68.215. EPA should also exercise oversight to ensure DNREC is satisfying this provision, as discussed above.

B. EPA Must Object Due to DNREC's Failure to Respond to Petitioners' Significant Comment Raising the Problem of the Draft Permit's Omission of Important RMP Rule, Part 68, Requirements.

EPA should also object because DNREC failed to provide any valid justification for refusing to follow 40 C.F.R. Part 68 and incorporate these applicable requirements into the draft permit.

In particular, in response to the comment on the draft permit, DNREC simply 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….

RTC at 84 (pointing to state emergency and prevention response regulations "handled by the Accidental Release Prevention Program of the Division of Waste and Hazardous Substances"). But this response completely misses the mark and fails to satisfy Title V or the applicable requirements.

It is irrelevant that the Division of Air Quality ("DAQ") does not provide permits for this. 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. As Petitioners' comments explained, and the prior section again summarizes, 40 C.F.R. Part 68 is an "applicable

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[96] Delaware Business Now, Hydrogen sulfide, sulfur dioxide leak reported at refinery (Apr. 19, 2018), https://delawarebusinessnow.com/2018/04/hydrogen-sulfide-sulfur-dioxide-leak-reported-at-refinery/.

[97] Mike Phillips, Update | 2 critically injured in fire at the Delaware City Refinery, WDEL Radio (Mar. 11, 2020), https://www.wdel.com/news/update-2-critically-injured-in-fire-at-the-delaware-city-refinery/article_5d076dea-63c1-11ea-a60c-0fdaa04bc550.html.

requirement" of the Clean Air Act with which Clean Air Act Title V requires DNREC, as a permitting authority, to assure compliance in Title V permits. *See* 40 C.F.R. 68.215. The fact that facilities regulated by this program must register with the state under a separate state program does not abrogate the requirement that Title V permits comply with Part 68, as evidenced by the state requirement that an RMP still be submitted to the EPA. 7 DEL. ADMIN. CODE § 1201-5.150.1. Importantly, the Delaware program could only be approved by assuring it is at least as strong as the federal program. *See* 66 Fed. Reg. 30818, 30819 (noting that multiple provisions are "clearly" more stringent than the Federal regulation). Therefore, the Delaware program incorporates section 68.215 and specifically refers to the state air permits. The Delaware Code thus states as follows:

> 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.*
>
> *5.215.2 The owner or operator shall submit any additional relevant information requested by the Department.*
>
> 5.215.3 The Department shall, at a minimum:
>
> 5.215.3.1 Verify that the source owner or operator has registered and submitted an RMP or a revised plan when required by this part;
>
> 5.215.3.2 Verify that the source owner or operator has submitted a source certification or in its absence has submitted a compliance schedule consistent with 5.215.1.2 of this section;
>
> 5.215.3.3 For all of the sources subject to this section, use one or more mechanisms such as, but not limited to, a completeness check, source audits, record reviews, or stationary source inspections to ensure that permitted sources are in compliance with the requirements of this part; and
>
> 5.215.3.4 Initiate enforcement action based on 5.215.3.1 and 5.215.3.2 of this section as appropriate.

7 DEL. ADMIN. CODE § 1201-5.215 (emphasis added). In sum, the Delaware code itself requires the air permit – i.e., the Title V permit at issue here – to include the very same information that 40 C.F.R. § 68.215 requires, and that Commenters called for. Thus, DNREC cannot evade this core requirement by suggesting its state program exempts it from this requirement.

Further, DNREC must "at a minimum" "[v]erify that the source owner or operator has registered and submitted an RMP or a revised plan when required by this part." 7 DEL. ADMIN. CODE § 1201-5.215.3. Yet, it has failed to do so by incorporating language to this effect in the permit – nor has it done so by confirming this or making clear the regulatory requirements are met in the response to comments.

The language in the proposed permit and the record here fail to satisfy these requirements or the Delaware program implementing it, and instead makes it sound questionable as to whether DCRC must meet any Risk Management Program requirements.

Finally, although Delaware operates its own Accidental Release Prevention program, federal regulations still require DNREC to adequately respond to significant comments. *See* 40 C.F.R. § 70.7(h)(6); 40 C.F.R § 70.8 (a)(1). Petitioners' comments clearly qualify as significant because they address "whether the title V permit includes terms and conditions addressing *federal* applicable requirements." 85 Fed. Reg. 6431, 6440 (emphasis added). Compliance with Part 68 is a federal requirement, regardless of whether a state operates its own program. *See* 40 C.F.R. 68.215. A state-operated program therefore also does not abrogate the agency's duty to adequately respond to Petitioner's comments about RMP compliance.

The DAQ's response to Petitioners' comments did not adequately address the issue nor justify DNREC's failure to satisfy Title V by assuring compliance with the Risk Management Program regulations.[98] Instead of discussing how the DCRC permit does or would meet the applicable RMP requirements, the DAQ merely placed blame on other divisions within the DNREC for its own failure.[99] However, in discussing its approval of Delaware's Accidental Release Prevention Program, EPA noted that DNREC was "not delegating [program operation] authority to any other state, local or Federal agency." 66 Fed. Reg. 30818, 30819. DNREC thus retains oversight and authority over both the DAQ and the Division of Waste and Hazardous Substances, yet the response to Petitioners' comments did not acknowledge the requirement that DNREC ensures RMP compliance.[100] While the response to Petitioners' comments 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). All the evidence Petitioners could find here shows that 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. The response therefore attempted to ignore the issue improperly. DNREC thus has failed to justify DNREC's position or the proposed permit's failure to include the missing

[98] *See* RTC at 84.

[99] See *id.*

[100] *Id.* ("Instead, these regulations are handled by the Accidental Release Prevention Program of the Division of Waste and Hazardous Substances.").

components described above, and the proposed permit's failure to assure compliance with the Risk Management Program regulations. [101]

[101] *See, e.g.*, *In the Matter of Consolidated Edison Company Hudson Avenue Generating Station,* Order on Petition No. II-2002-10 (Sept. 30, 2003) at 8 (stating that a permitting authority "has an obligation to respond to significant public comments and adequately explain the basis of its decision").

Respectfully submitted this 16th day of September 2022, on behalf of Delaware Audubon Society, Delaware Concerned Residents for Environmental Justice, Sierra Club, Environmental Justice Health Alliance for Chemical Policy Reform, the Widener Environmental and Natural Resources Law Clinic, Environmental Integrity Project, and Earthjustice,

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LIST OF EXHIBITS

Exhibit No.	Title
1	May 22, 2020 Initial Comments
2	June 25, 2020 Comments
3	July 31, 2020 Supplemental Comments
4	Excerpts from 11/17/17 DNREC Memo: 2017 Partial Compliance Evaluation Report
5	DNREC Violation List as of June 2019
6	9/20/18 FCCU CO Exceedance Incident Report
7	10/2/18 Coker Boiler Trip Event Incident Report
8	1/15/19 Email with DCRC Coker CO Boiler Preliminary Emissions Estimate
9	Hearing Officer's Report
10	Secretary's Order No. 2022-A-0008
11	Enviro. Groups' Suppl. Comments on Title V Affirmative Defense
12	RMP Accidents 2004-2020 (showing DCRC incidents only)