BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION NO. VII-2022-9
	)	
CARGILL, INC.	)	ORDER RESPONDING TO
BLAIR FACILITY	)	PETITION REQUESTING
WASHINGTON COUNTY, NE	)	OBJECTION TO THE ISSUANCE OF
	)	TITLE V OPERATING PERMIT
PERMIT NO. OP96S1-001	)	
	)	
ISSUED BY THE NEBRASKA DEPARTMENT OF	)	
ENVIRONMENT AND ENERGY	)	
	)	

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

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated August 8, 2022 (the Petition) from Cargill, Inc. (Cargill or the Petitioner), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to operating permit No. OP96S1-001 (the Permit) issued by the Nebraska Department of Environment and Energy (NDEE) to Cargill's wet corn mill in Blair, Washington County, Nebraska (the Cargill Blair Facility). The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and title 129 of the Nebraska Administrative Code (NAC).[1] *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

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

[1] All references to the NAC within this Order refer to the NAC rules in effect at the time the Petition was filed, as those rules constituted the official EPA-approved part 70 program at the time the Permit was issued and the Petition was filed, and that version was cited throughout the permit record and the Petition. Note that the relevant regulations in title 129 of the NAC were recently reorganized and renumbered, effective September 28, 2022. Additional information about the reorganization of title 129 can be found on NDEE's website: *http://dee.ne.gov/Publica.nsf/Pages/22-069*.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 766la(d)(1), requires each state to develop and submit to EPA an operating permit program to meet the requirements of title V of the CAA and EPA's implementing regulations at 40 C.F.R. part 70. EPA granted full approval of Nebraska's title V operating permit program in 1995. 60 Fed. Reg. 53872 (October 18, 1995). This program, which became effective on November 17, 1995, is codified in various sections of title 129 of the NAC.

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

B. Review of Issues in a Petition

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

Each petition must identify the proposed permit on which the petition is based and identify the petition claims. 40 C.F.R. § 70.12(a). Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under part 70. 40 C.F.R. § 70.12(a)(2). Any

arguments or claims the petitioner wishes EPA to consider in support of each issue raised must generally be contained within the body of the petition.[2] *Id.*

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

In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).[3] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to EPA.[4] The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).[5] When courts have reviewed EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g.*, *MacClarence*, 596 F.3d at 1130–31.[6] Certain aspects of the petitioner's demonstration burden are discussed in the following paragraph. A more detailed discussion can be found in the preamble to EPA's proposed petitions rule. *See* 81 Fed. Reg. 57822, 57829–31 (August 24, 2016); *see also In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

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

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

[4] *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *cf. NYPIRG*, 321 F.3d at 333 n.11.

[5] *See also Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' . . . plainly mandates an objection *whenever* a petitioner demonstrates noncompliance." (emphasis added)).

[6] *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether a petitioner has provided the relevant analyses and citations to support its claims. For each claim, the petitioner must identify (1) the specific grounds for an objection, citing to a specific permit term or condition where applicable; (2) the applicable requirement as defined in 40 C.F.R. § 70.2, or requirement under part 70, that is not met; and (3) an explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under part 70. 40 C.F.R. § 70.12(a)(2)(i)–(iii). If a petitioner does not identify these elements, EPA is left to work out the basis for the petitioner's objection, contrary to Congress's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.").[7] Relatedly, EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard. *See, e.g.*, *In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013).[8] Also, the failure to address a key element of a particular issue presents further grounds for EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g.*, *In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).[9]

Another factor EPA examines is whether the petitioner has addressed the state or local permitting authority's decision and reasoning contained in the permit record. 81 Fed. Reg. at 57832; *see Voigt v. EPA*, 46 F.4th 895, 901–02 (8th Cir. 2022); *MacClarence*, 596 F.3d at 1132–33.[10] This includes a requirement that petitioners address the permitting authority's final decision and final reasoning (including the state's response to comments) where these documents were available during the timeframe for filing the petition. 40 C.F.R. § 70.12(a)(2)(vi). Specifically, the petition must identify where the permitting authority responded to the public comment and explain how the permitting authority's response is inadequate to address (or does not address) the issue raised in the public comment. *Id*.

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

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

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

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

The information that EPA considers in determining whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. 40 C.F.R. § 70.13. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis'); any comments the permitting authority received during the public participation process on the draft permit; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; and all materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). *Id.* If a final permit and a statement of basis for the final permit are available during the agency's review of a petition on a proposed permit, those documents may also be considered when determining whether to grant or deny the petition. *Id*.

III. BACKGROUND

A. The Cargill Blair Facility

Cargill owns and operates a wet corn mill in Blair, Washington County, Nebraska. The Cargill Blair Facility separates and further processes corn kernels to produce several products, including dextrose, fructose, animal feed, ethanol, corn oil, and polyols. The facility contains various emission units. At issue in the Petition are units controlled by seven wet scrubbers: EP-7, the Center Millhouse Scrubber; EP-7A, the West Millhouse Scrubber; EP-8A, the Gluten Flash Dryer #2 Scrubber; EP-10, the Germ Fluidized Bed Dryer Scrubber; EP-12, the Fiber Flash Dryer #1 Scrubber; EP-66, the Flaker Wet Scrubber; and EP-67, the Expeller Wet Scrubber. The facility is a major source of air pollution under title V based on potential emissions of particulate matter, sulfur dioxide, nitrogen oxides, carbon monoxide, volatile organic compounds (VOC), and hazardous air pollutants (HAPs). The facility is also subject to various other CAA requirements including New Source Review (NSR) preconstruction permits and several New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants.

EPA conducted an analysis using EPA's EJScreen[11] to assess key demographic and environmental indicators within a five-kilometer radius of the Cargill Blair Facility. This analysis showed a total population of approximately 7,954 residents within a five-kilometer radius of the facility, of which approximately six percent are people of color and 26 percent are low income. In addition, EPA reviewed the EJScreen Environmental Justice Indices, which combine certain demographic indicators with 12 environmental indicators. All of the 12 Environmental Justice Indices in this five-kilometer area were below the 40th percentile when compared to the rest of the State of Nebraska.

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

B. Permitting History

Cargill submitted its initial application for a title V permit in 1996. Following multiple amendments to this permit application over the intervening years, NDEE published notice of a draft permit on November 20, 2020, which was subject to a public comment period that ran until January 11, 2021. NDEE subsequently withdrew that draft permit and, after making changes in response to comments, published notice of a new draft permit on December 24, 2021 (the Draft Permit). The Draft Permit was accompanied by a Fact Sheet and was subject to a public comment period that ran until January 31, 2022. On April 25, 2022, NDEE submitted the Proposed Permit, along with its responses to public comments (RTC), to EPA for its 45-day review. EPA's 45-day review period ended on June 9, 2022, during which time EPA did not object to the Proposed Permit. NDEE issued the final title V permit for the Cargill Blair Facility on May 12, 2022.

C. Timeliness of Petition

Pursuant to the CAA, if EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C. § 7661d(b)(2). EPA's 45-day review period expired on June 9, 2022. Thus, any petition seeking EPA's objection to the Proposed Permit was due on or before August 8, 2022. The Petition was dated and received August 8, 2022 and, therefore, EPA finds that the Petitioner timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONER

The 104-page Petition is principally focused on a single overarching issue: NDEE's decision to impose requirements that the Petitioner views as overly stringent. The Petitioner presents 10 separately labeled claims related to this issue, each of which is addressed in the following subsections.

Before presenting its claims, the Petitioner summarizes the basis for its requested objection as follows: "NDEE exceeds it[s] authority in imposing (i) new supplemental monitoring requirements that are not necessary to assure compliance; and (ii) other new substantive requirements that do not appear in the underlying applicable requirements." Petition at 13.

In this introductory section of the Petition, the Petitioner addresses the legal framework governing the monitoring requirements in title V permits. As the Petitioner states, CAA § 504(c) provides that "[e]ach permit issued under this subchapter shall set forth . . . monitoring, . . . and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to any applicable regulation under subsection (b)." Petition at 10 (quoting 42 U.S.C. § 7661c(c)) (alterations in Petition). Section 504(b), in turn, provides that EPA "may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this chapter[.]" *Id*. (quoting 42 U.S.C. § 7661c(b)) (alteration in Petition).

The Petitioner then addresses EPA regulations governing monitoring, which establish a three-step procedure. First, title V permits must incorporate all monitoring provisions imposed by an underlying applicable requirement. *Id*. (citing 40 C.F.R. § 70.6(a)(3)(i)(A), among other authorities). Second, if the underlying applicable requirement does not contain any periodic monitoring, periodic monitoring must be added to the permit. *Id*. (citing 40 C.F.R. § 70.6(a)(3)(i)(B), among other authorities). Third—and most relevant to the issues raised in the Petition—the Petitioner observes that 40 C.F.R. § 70.6(c)(1) requires that "[a]ll part 70 permits shall contain . . . monitoring . . . sufficient to assure compliance with the terms and conditions of the permit." *Id*. at 11 (quoting 40 C.F.R. § 70.6(c)(1)).

The Petitioner acknowledges that this third provision "allows a permitting authority to supplement existing periodic monitoring contained in the underlying applicable requirement." *Id*. (citing *Sierra Club v. EPA*, 536 F.3d 673, 680 (D.C. Cir. 2008), among other authorities). However, the Petitioner contends that "the circumstances in which the permitting authority can include non-pre-existing terms in the permit—including monitoring terms—are carefully circumscribed by Title V and EPA's regulations." *Id*. at 9. Specifically, the Petitioner asserts that this supplemental monitoring provision can only be used "in very limited circumstances where the existing monitoring is inadequate, and where the permitting authority makes an affirmative, case-specific finding that the existing monitoring is not sufficient to assure compliance." *Id*. at 11.[12] The Petitioner elaborates, quoting previous title V orders concerning the use of this supplemental monitoring authority, including one wherein EPA stated that, "in many cases, monitoring from the applicable requirement will be sufficient to assure compliance with permit terms and conditions; consequently, EPA recommends the monitoring analysis should begin by assessing whether the monitoring required in the applicable requirement is sufficient." *Id*. (quoting *In the Matter of Public Service of New Mexico, San Juan Generating Station*, Order on Petition at 19 (February 15, 2012) (*San Juan Order*); citing *In the Matter of CITGO Refining and Chemicals Company L.P.*, Order on Petition No. VI-2007-01 (May 28, 2009) (*CITGO Order*)). Additionally, the Petitioner reiterates EPA's statement that "[t]he determination of whether the monitoring is adequate in a particular circumstance generally will be made on a case-by-case basis considering site-specific factors." *Id*. (quoting *San Juan Order* at 19; citing *Sierra Club*, 536 F.3d at 677). The Petitioner restates various factors identified by EPA "that permitting authorities may consider in determining appropriate monitoring," addressed further later. *Id*. at 11–12 (quoting *San Juan Order* at 19–20; citing *CITGO Order* at 7–8).

The Petitioner also claims that the case-specific "rationale for the monitoring requirements selected by a permitting authority must be clear and documented in the permit record." *Id*. at 12 (quoting *San Juan Order* at 20; citing *CITGO Order* at 7, 40 C.F.R. § 70.7(a)(5)).

[12] Put another way, the Petitioner acknowledges that the part 70 rules can be read to "allow state and local permitting authorities to supplement *inadequate* monitoring requirements in each permit issued." *Id*. at 11 (quoting *Sierra Club*, 536 F.3d at 680) (emphasis in Petition). The Petitioner contends that this supplemental monitoring authority is limited in additional ways. The Petitioner states that monitoring must conform to any applicable regulations promulgated by EPA. *Id*. at 12 (citing 42 U.S.C. § 7661c(b)–(c)); *Sierra Club*, 536 F.3d at 678). Moreover, the Petitioner asserts that "EPA established a presumption that federal requirements and emissions standards promulgated after 1990 meet periodic monitoring and enhanced monitoring requirements," and that EPA encouraged states to adopt a similar policy. *Id*. (citing 57 Fed. Reg. 32250, 32,278 (July 21, 1992), 62 Fed. Reg. 54900, 54904 (October 22, 1997)).

The Petitioner observes that NDEE's title V regulations incorporate or include provisions that mirror EPA's regulations governing monitoring. *Id*. at 12–13 (citing 129 NAC Ch. 8 §§ 004.01A, 004.01B, 012.01).

Claim A: The Petitioner Claims That "The Permit is Not in Compliance with the CAA Because NDEE Exceeds its Authority Under the CAA and with 40 C.F.R. Part 70 in Imposing New Scrubber Liquid Temperature Control and Monitoring Requirements that Are Not Necessary to Assure Compliance."

Petitioner's Claim: Claim A primarily addresses three specific emission units (EP-7, EP-7A, and EP-12) that are subject to additional scrubber liquid temperature monitoring and control requirements beyond those required in underlying preconstruction permits. Petition at 16 (citing Final Permit at 37–38 (Condition III.(EP-7)(4)(b)(iii)(4)), 44 (Condition III.(EP-7A)(4)(b)(iii)(4)), 82 (Condition III.(EP-12)(4)(b)(iii)(4))).[13]

Claim A includes four parts; the first part includes a summary of the more specific arguments presented in the following three parts. The Petitioner alleges:

> [T]he Permit conditions imposing additional temperature control and monitoring requirements on the Facility's scrubbers do not comply with the procedures in Title V of the CAA or Part 70 [specifically, 40 C.F.R. § 70.6(c)(1)], and exceed NDEE's authority thereunder, because the applicable requirements already contain periodic monitoring terms that are sufficient to assure compliance. NDEE has not conducted the requisite case-by-case analysis in imposing supplemental scrubbing liquid temperature monitoring requirements, nor clearly documented its affirmative case-specific finding in the record that such monitoring is necessary to assure compliance. NDEE also does not comply with the requirements of Part 70, because its rationales for imposing the additional monitoring requirements are not clear and documented in the permit record.

Id. at 13 (internal citations and quotations omitted).

More specifically, the Petitioner asserts that the Permit does not comply with CAA § 504(c) and 40 C.F.R. § 70.6(c)(1) because NDEE failed to follow EPA's purportedly established procedure for determining whether existing monitoring is sufficient to assure compliance. *Id*. at 17; *see id*. at 46. Specifically, again, the Petitioner claims that this inquiry requires a case-by-case decision by NDEE to consider various site-specific factors. *Id*. at 17 (citing *San Juan Order* at 19; *CITGO Order* at 7). The Petitioner asserts that NDEE did not conduct a case-by-case evaluation before imposing additional monitoring on the Cargill facility's wet scrubbers, but instead imposed generic requirements on these scrubbers. *Id*. at 18. For example, the Petitioner repeats NDEE's

[13] Claim A specifically focuses on the scrubber liquid temperature monitoring—not the scrubber liquid temperature control limits—applicable to these three units. The Petitioner also references the temperature control limits because NDEE's rationales for imposing both sets of conditions are overlapping. Petition at 16 n.11; *see* Petition Claim B. Additionally, the Petitioner asserts that the same arguments would also apply to the remaining four emission units at issue in the Petition (EP-8A, EP-10, EP-66, and EP-67), which are not currently subject to the same scrubber liquid temperature requirements, but are instead subject to "alternative" requirements to test for VOC and HAP emissions at the scrubber inlet. Petition at 16 n.12.

statements that it seeks to impose "standardized" VOC monitoring requirements on wet scrubbers. *Id*. at 18–19 (citing Fact Sheet at 77, 80, 93; RTC at 9, 17). The Petitioner contests NDEE's assertions that the state conducted a case-by-case analysis. The Petitioner characterizes NDEE's RTC as explaining: (i) why the state did not consider certain site-specific features or factors, (ii) why those features or factors were irrelevant, or (iii) providing only generic, unsupported rationales. *Id*. at 19. Overall, the Petitioner asserts that NDEE's analysis does not amount to a source- or emission point-specific determination that supplemental monitoring is necessary to assure compliance. *Id*.

Additionally, the Petitioner asserts that NDEE did not satisfy 40 C.F.R. § 70.7(a)(5) "because NDEE has not clearly documented in the record why the additional scrubber liquid temperature control and monitoring requirements being imposed in the Permit are necessary to assure compliance." *Id*. at 17.

In the second part of Claim A, the Petitioner focuses on certain factors that EPA has recommended permitting authorities consider when determining whether underlying monitoring requirements are sufficient. *See id*. at 21–46. The Petitioner identifies the following five factors:

> (1) the variability of emissions from the unit in question;
> (2) the likelihood of a violation of the requirements;
> (3) whether add-on controls are being used for the unit to meet the emission limit;
> (4) the type of monitoring, process, maintenance, or control equipment data already available for the emissions unit; and
> (5) the type and frequency of the monitoring requirements for similar emission units at other facilities.

Id. at 21 (quoting *San Juan Order* at 19–20; citing *CITGO Order* at 7–8). The Petitioner acknowledges that this list of factors is not prescriptive or exhaustive, but nonetheless asserts that NDEE cannot ignore relevant information in the record regarding these factors. *Id*. at 22; *see id*. at 20, 46–47. The Petitioner asserts that NDEE did not meaningfully evaluate those factors nor base its determination on other relevant source- or emission point-specific factors. *Id*. at 22. The Petitioner takes each of these factors in turn in support of its contentions. *See id*. at 22–46.

The Petitioner concludes the second part of Claim A with the following summary, asserting that NDEE failed to satisfy CAA § 504(c), 40 C.F.R. § 70.6(c)(1), and 40 C.F.R. § 70.7(a)(5):

> [S]ignificant record evidence relevant to the factors identified by EPA supports the opposite conclusion—that scrubber liquid temperature control and monitoring are not necessary to assure compliance. Given that available information indicates that VOC emissions from these emission points do not experience significant variability and are below the relevant limits with sufficient compliance margins, the fact that the scrubbers are not primarily designed or optimized for VOC control or to effect VOC reductions, and that the only other similar corn wet milling emission units are not required to control and monitor scrubber liquid temperature, NDEE's imposition of additional supplemental monitoring is arbitrary and capricious and is not supported in the record.

Id. at 46.

In the third part of Claim A, the Petitioner claims that "NDEE does not identify additional source- and emission point-specific factors" (*i.e.*, factors beyond those previously identified by EPA) that justify the additional monitoring. *Id*. at 46. More specifically, the Petitioner acknowledges the information on which NDEE based its decision—including permit applications, information provided by Cargill during draft permit negotiations, source specific considerations (*e.g.*, source of water supply), past performance testing results, past emission inventories, emission profiles, and wet scrubber design considerations—while asserting that this information does not support the imposition of additional monitoring. *Id*. at 47. The Petitioner discusses each of these in turn. *See id*. at 48–52.

In the fourth part of Claim A, the Petitioner claims that "NDEE's generalized arguments regarding its hypothesized correlation between scrubber liquid temperature and VOC emissions do not support the need for supplemental monitoring and are arbitrary and capricious and unsupported by scientific literature, data, or record information." *Id*. at 52. The Petitioner asserts that NDEE's justification for supplemental monitoring relies on the flawed and oversimplified hypothesis that there is a strong positive correlation between higher scrubber liquid temperature and higher VOC emissions. *Id*. at 52–53. The Petitioner then addresses the lack of support for NDEE's position in scientific literature, criticizes NDEE's reliance on a NDEE White Paper, and argues that stack test data relied upon by NDEE do not support its decision to impose supplemental monitoring. *See id*. at 54–66.

The Petitioner concludes Claim A by reiterating its allegations:

> [T]he scrubber liquid temperature control and monitoring requirements included in the Permit do not comply with Section 504(c) of the CAA, 42 U.S.C. § 7661c(c), 40 C.F.R. § 70.6(c)(1), or 40 C.F.R. § 70.7(a)(5), because NDEE has not clearly documented in the record why the additional scrubber liquid temperature control and monitoring requirements are necessary to assure compliance.

Id. at 66; *see id*. at 13.

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

Section 505(b)(2) of the CAA requires an EPA objection "if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the CAA]." 42 U.S.C. § 7661d(b)(2); *see* 40 C.F.R. §§ 70.8(c)(1), 70.12(a)(2) (similar language). Here, the substantive statutory provision at issue is CAA § 504(c), which mandates that "[e]ach permit issued under [title V] shall set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions." 42 U.S.C. § 7661c(c); *see* 40 C.F.R. § 70.6(c)(1) (similar

language); 129 NAC Ch. 8 § 012.01 (similar language).[14] Notably, the Petitioner does not allege that the title V permit does not contain monitoring requirements sufficient to assure compliance with all permit terms. Instead, the Petitioner suggests that the Permit does not comply with CAA § 504(c) and 40 C.F.R. § 70.6(c)(1) because the Permit imposes *more* monitoring requirements than necessary to assure compliance with its terms.[15]

State Authority to Establish More Stringent Permitting Requirements

In imposing more monitoring than allegedly necessary, the Petitioner argues that NDEE "exceeded its authority" under the CAA.[16] As a general matter, the Petitioner's "exceeded authority" argument neglects to acknowledge the fact that the statutory and regulatory provisions in title V, including CAA § 504(c) and 40 C.F.R. § 70.6(c)(1), establish minimum—not maximum—program elements. 42 U.S.C. § 7661a(b) (directing EPA to promulgate "regulations establishing the *minimum* elements of a permit program to be administered by" states (emphasis added)); 40 C.F.R. § 70.1(a) ("These regulations define the *minimum* elements required by the Act for State operating permit programs . . . ." (emphasis added)). More to the point, ***the CAA and EPA's regulations expressly provide that states may establish more stringent permit requirements***. 42 U.S.C. § 7661e(a) ("Nothing in this subchapter [title V] shall prevent a State . . . from establishing *additional* permitting requirements not inconsistent with this chapter." (emphasis added)); 40 C.F.R. § 70.1(c) ("Nothing in this part shall prevent a State . . . from establishing *additional or more stringent* requirements not inconsistent with this Act." (emphasis added)).[17] Notably, the 104-page Petition does not acknowledge any of these authorities, much less explain why they are inapplicable or distinguishable from the facts at hand.

The potential for states to establish requirements more stringent than federally prescribed minimums is not unique to title V; this basic element of cooperative federalism is enshrined

[14] CAA § 504(a) similarly requires that "Each permit issued under [title V] shall include . . . such other conditions as are necessary to assure compliance with applicable requirements of [the CAA], including the requirements of the applicable implementation plan."

[15] The Petitioner also argues that NDEE did not follow the correct procedures under CAA § 504(c) and 40 C.F.R. § 70.6(c)(1). EPA's response later addresses this argument.

[16] The discussion that follows assumes *arguendo* that NDEE did, in fact, establish monitoring requirements beyond those necessary to assure compliance with all applicable requirements and permit terms. To be clear, EPA's response does not (and need not) reach a conclusion on the merits of that issue.

[17] *See also id*. § 71.1(e); *Appalachian Power Co. v. EPA*, 208 F. 3d 1015, 1019 n.6 (D.C. Cir. 2000) ("In some instances, States may adopt emission standards or limitations that are more stringent than federal standards. 42 U.S.C. § 7416. States may also adopt more stringent permit requirements. 40 C.F.R. § 70.1(c)."). Note that 40 C.F.R. § 70.1(c) addresses both the content of state part 70 program rules as well as the content of individual permits. The full text reads: "Nothing in this part shall prevent a State, or interstate permitting authority, from establishing additional or more stringent requirements not inconsistent with this Act. EPA will approve *State program submittals* to the extent that they are not inconsistent with the Act and these regulations. No *permit*, however, can be less stringent than necessary to meet all applicable requirements." 40 C.F.R. § 70.1(c) (emphasis added). Here, NDEE's RTC relies in part on 129 NAC Ch. 8 § 013—a regulation that EPA approved as part of Nebraska's part 70 program (and SIP)—which provides that "[t]he Director may place such conditions and restrictions upon a permit issued or renewed under this Title as he or she deems necessary to protect public health or the environment."

throughout the CAA. *See*, *e.g.*, 42 U.S.C. § 7416.[18] For example, the authority for states to establish more stringent requirements is recognized under the Compliance Assurance Monitoring (CAM) rule,[19] NSR permitting requirements in State Implementation Plans (SIPs),[20] other SIP requirements (as acknowledged by the United States Supreme Court),[21] and in various other CAA programs. This framework is also common throughout other environmental statutes that EPA and states administer, including permitting programs for water and solid waste.[22] Across all

[18] CAA § 116, which applies across the entire Act, states: "[N]othing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except . . . such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under [an applicable SIP or under section 7411 or section 7412]." 42 U.S.C. § 7416. *See also Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3d Cir. 2013) ("The Clean Air Act states that air pollution prevention and control is the primary responsibility of individual states and local governments but that federal financial assistance and leadership is essential to accomplish these goals. 42 U.S.C. § 7401(a)(3)–(4). Thus, it employs a 'cooperative federalism' structure under which the federal government develops baseline standards that the states individually implement and enforce. In so doing, states are expressly allowed to employ standards more stringent than those specified by the federal requirements.").

[19] *See* 40 C.F.R. § 64.10(a)(2) ("Nothing in this part shall . . . (2) Restrict or abrogate the authority of the Administrator or the permitting authority to impose additional or more stringent monitoring, recordkeeping, testing, or reporting requirements on any owner or operator of a source under any provision of the Act, including but not limited to sections 114(a)(1) and 504(b), or state law, as applicable.").

[20] *See* 40 C.F.R. §§ 51.165(a)(1), (a)(2)(ii), (a)(6), 166(a)(7)(iv), (b), (r)(6); *Duquesne Light Co. v. EPA*, 166 F.3d 609, 613 (3d Cir. 1999) ("EPA . . . only has power to disallow state plans that fail to be stringent enough—that is, plans that fall below the level of stringency provided by federal law. EPA thus has no power to require Pennsylvania to make its plan the same as the federal requirement, provided Pennsylvania's is more stringent than required by the Clean Air Act; rather, EPA by statutory directive must approve a plan when it conforms to the federal minimum." (internal citations to and quotations from CAA §§ 116 and 110(k)(3) omitted)).

[21] *See Union Elec. Co. v. EPA*, 427 U.S. 246, 262–64 (1976) ("*Amici* . . . claim that the States are precluded from submitting implementation plans more stringent than federal law demands by § 110(a)(2)'s second criterion that the plan contain such control devices 'as may be necessary' to achieve the primary and secondary air quality standards. § 110(a)(2)(B). The contention is that an overly restrictive plan is not 'necessary' for attainment of the national standards and so must be rejected by the Administrator. . . . *[T]he most natural reading of the 'as may be necessary' phrase in context is simply that the Administrator must assure that the minimal, or 'necessary,' requirements are met, not that he detect and reject any state plan more demanding than federal law requires. This reading is further supported by practical considerations. Section 116 of the Clean Air Act . . . provides that the States may adopt emission standards stricter than the national standards*." (emphasis added)).

[22] Most notable is the National Pollutant Discharge Elimination System (NPDES) permitting program under the Clean Water Act, which served as the model for Congress's enactment of the title V permitting program in 1990. *See, e.g.*, House Debate on S.1630 (May 21, 1990), *reprinted in* 2 Environment and Natural Resources Policy Division of the Congressional Research Service of the Library of Congress, Legislative History of the Clean Air Act Amendments of 1990, at 2565 (1998). The NPDES program has similar provisions for more stringent state requirements. *See, e.g.*, 33 U.S.C. §§ 1311(b)(1)(C), 1313(f), 1370; 40 C.F.R. §§ 122.1(a)(5), 123.1(i), 123.25(a), 131.4(a); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489–90 (1987) ("Even if the Federal Government administers the permit program, the source State may require discharge limitations more stringent than those required by the Federal Government."); *PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 723 (1994) (Stevens, J., concurring) ("Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards."); *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 695 (6th Cir. 2015) (quoting the Supreme Court's discussion in *Ouelette* and stating: "What was true for the Clean Water Act holds true for the Clean Air Act"); *United States Steel Corp. v. Train*, 556 F.2d 822, 838–39 (7th Cir. 1977) ("If this is intended as an argument that the allocations are more stringent than would be necessary to achieve the water quality standards . . . this necessity argument is not available

these programs, the common thread is that Congress repeatedly established cooperative federalism systems under which states have the ability to impose more stringent (*i.e.*, more environmentally protective) measures, and courts have repeatedly held that it is not EPA's role to object to such additional measures.

Considering the foregoing, as a general matter, it is not clear how the premise underlying the Petitioner's arguments—that NDEE exceeded its authority under the CAA and EPA's regulations by imposing more monitoring than is allegedly necessary—could present a basis for EPA's objection to the Permit.[23] Again, the standard for petitions requesting EPA's objection requires a demonstration that "the permit is not in compliance with the requirements of [the CAA]." 42 U.S.C. § 7661d(b)(2). Given that the relevant "requirements of [the CAA]" are "minimum elements" of state programs, the most natural reading of "not in compliance with" is, essentially: *not meeting the minimum requirements of the CAA*. 42 U.S.C. §§ 7661a(b), 7661d(b)(2). The Petitioner makes no such allegation here. Thus, EPA's response to Claim A does not (and need not) reach any conclusions regarding whether NDEE did, in fact, establish monitoring requirements beyond those necessary to assure compliance with all applicable requirements and permit terms.

Limitations on State Authority to Establish New Federally Enforceable Requirements through Title V Permits

The Petitioner attempts to identify a more targeted basis for its "exceeds authority" claim, asserting that "the circumstances in which the permitting authority can include non-pre-existing terms in the permit—including monitoring terms—are *carefully circumscribed by Title V and EPA's regulations*." Petition at 9 (emphasis added).

Notwithstanding the fact that neither the CAA nor EPA's regulations limit states' authority to establish more stringent permitting requirements (as explained earlier), EPA agrees with the Petitioner that there are some limitations on the extent to which title V permits can or should be used to establish new requirements. The title V permitting program was designed primarily as a tool to aid implementation and enforcement of—and compliance with—existing CAA requirements, not as a program to establish new substantive requirements on a source. *See* 40 C.F.R. § 70.1(b).[24]

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in this proceeding. Section 301(b)(1)(C), the ultimate source of the Administrator's obligation to put the state limitations in the permit, is not limited to restrictions based on water quality standards but extends to 'any more stringent limitation' the state adopts pursuant to the authority preserved by § 510. As we read the Act, the Administrator had no more authority to inquire into whether the limitations adopted by the state were necessary to achieve the water quality standards than he did to inquire into the validity of those standards."), *abandoned on other grounds by City of W. Chicago, Ill. v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632 (7th Cir. 1983). Similar concepts also exist for solid waste permitting programs under the Resource Conservation and Recovery Act. *See, e.g.*, 42 U.S.C. §§ 6929, 6991; 40 C.F.R. § 239.2(a)(1), 256.21(a).

[23] The Petitioner's concerns regarding the NDEE's alleged exceedance of its authority would perhaps have been better suited to a challenge in state court. *See* 42 U.S.C. § 7661a(b)(6); 40 C.F.R. § 70.4(b)(3)(x)–(xii). EPA is not aware that the Petitioner pursued that relief in this case.

[24] *See also, e.g.*, *Envtl. Integrity Project v. EPA*, 969 F.3d 529, 536 (5th Cir. 2020) (citing numerous other cases that embody this principle); 56 Fed. Reg. 21712, 21713–14, 21729–30 (May 10, 1991); 57 Fed. Reg. 32250, 32251 (July 21, 1992).

One such limitation set forth in EPA's regulations—which the Petitioner does not address—is a restriction on *using title V permits to make more stringent state requirements federally enforceable*.[25] As EPA explained in its response to public comments on the initial part 70 rules (the Part 70 RTC): "Sections 116 and 506(a) of the Act stand for the proposition that States retain authority to adopt more stringent requirements, not that these requirements must be federally enforceable."[26] Thus, although EPA's regulations provide that "[a]ll terms and conditions in a part 70 permit . . . are enforceable by the Administrator and citizens under the Act," the regulations contain an exception to this principle: "the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements." 40 C.F.R. § 70.6(b)(1)–(2).[27]

Applying this regulatory framework to permit terms reflecting additional or more stringent state requirements depends on the nature of the requirement.[28] As relevant here, any provisions that are "required under the Act" must be federally enforceable. *Id*. EPA has interpreted this phrase to include permit terms that "bear [a] reasonable relation to the purposes or provisions of the Act" or that are "derived from" the CAA and its implementing regulations. *See* 56 Fed. Reg. at 21729; Part 70 RTC at 6-11, 6-12. Requirements designed to assure compliance with a federally enforceable CAA requirement—*e.g.*, monitoring requirements imposed pursuant to CAA § 504(c) and 40 C.F.R. § 70.6(c)(1)—naturally fit within this category. As the Petitioner acknowledges, when an underlying requirement does not contain any periodic monitoring or does not contain sufficient monitoring, states are *required* to create such requirements through the title V permitting process. *See Sierra Club*, 536 F.3d at 678–680. CAA-based monitoring requirements are thus the most notable exception to the general principle that title V permits do not create new requirements.[29]

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[25] This principle involves various regulations, including 40 C.F.R. §§ 70.1(b)–(c), 70.6(a)(1)(i), and 70.6(b)(1)–(2).
[26] Response to Comments on the 40 C.F.R. Part 70 Rulemaking, EPA Docket No. A-90-33, V-C-1 at 6-11 (June 1992).
[27] In finalizing the part 70 rules in 1992, EPA declined to adopt the regulatory text proposed in 1991, which would have stated: "The State permitting authority shall specifically designate as not federally enforceable any State provisions in the permit which are more stringent than the applicable requirements under the Act." 56 Fed. Reg. at 21775. Several other EPA-administered regulatory programs feature limitations or qualifications similar to those that EPA proposed (but did not adopt) for title V permits. *See, e.g.*, 40 C.F.R. § 233.1(c) (dredge-or-fill requirements under the CWA § 404); 40 C.F.R. § 271.1(i)(2) (state hazardous waste programs under RCRA); 40 C.F.R. § 281.12(a)(3)(ii) (underground storage tank programs under RCRA). However, the majority of EPA programs do not contain such limitations on federal enforceability. *See supra* note 22.
[28] In addition to more stringent permit terms, EPA has also addressed—and allowed—more stringent state requirements related to the procedures for title V permit issuance, enforcement, and fees. *See* 57 Fed. Reg. at 32284; 56 Fed. Reg. at 21730; Part 70 RTC at 6-13 to 6-14, 9-4, 11-12.
[29] *See, e.g.*, 58 Fed. Reg. 54648, 54651 (October 22, 1993) ("The title V process was not intended to establish more stringent or new requirements. However, the one exception is for compliance provisions required in all permits by title V and 40 CFR 70.6. The part 70 rule allows in some circumstances for the addition or clarification of compliance requirements—as opposed to new emission limits or standards."). EPA has identified other exceptions to the general rules that title V permits do not create substantive new requirements and that any such requirements should be labeled not federally enforceable. For example, EPA's title V regulations allow the creation of federally enforceable limitations designed to restrict a facility's emissions for purposes of avoiding otherwise applicable CAA requirements. *See* 40 C.F.R § 70.6(b)(1); 57 Fed. Reg. at 32284, 32279; Part 70 RTC at 2-8; *see also* 40 C.F.R. §§ 70.2 (definition of "emissions allowable under the permit"), 70.7(e)(2)(i)(A)(*4*); 57 Fed. Reg. at 32267–68, 32279; Part 70 RTC at 6-12, 6-20, 6-21, 6-24.

In sum, as relevant to Claim A, a state permitting authority's authority to establish additional, more stringent requirements through title V permits is primarily constrained by EPA rules requiring that certain state-derived permit terms be designated "not federally enforceable." 40 C.F.R. § 70.6(b)(2).[30] The Petitioner does not make any claims regarding this requirement.[31] However, even if it had, provisions designed to assure compliance with a federally enforceable, CAA-based requirement—like the VOC monitoring requirements at issue in Claim A—are not the type of provision that should be designated "not federally enforceable." The following paragraphs further explore other alleged limitations on a state's authority to establish such provisions under CAA § 504(c) and 40 C.F.R. § 70.6(c)(1).

Alleged Limitations on State Authority to Impose Monitoring under CAA § 504(c) and 40 C.F.R. § 70.6(c)(1)

The Petitioner argues that the authority to supplement monitoring under CAA § 504(c) and 40 C.F.R. § 70.6(c)(1) exists only "where the permitting authority makes an affirmative, case-specific finding that the existing monitoring is not sufficient to assure compliance." Petition at 11 (citing *Sierra Club v. EPA*, 536 F.3d at 680).

However, neither CAA § 504(c) nor 40 C.F.R. § 70.6(c)(1) contain this limitation on a state's authority to establish monitoring provisions through title V.[32] Rather—consistent with the general principles discussed earlier—these statutory and regulatory provisions establish a floor on the monitoring that *must* be included in a title V permit, not a ceiling on the monitoring that *may* be included.[33] The position articulated by the Petitioner comes not from CAA § 504(c) or 40 C.F.R. § 70.6(c)(1), but rather from prior EPA petition orders and court cases interpreting these statutory and regulatory provisions. *E.g.*, *CITGO Order*; *Sierra Club*, 536 F.3d at 678–680.

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[30] Other constraints on a state's authority to *revise* underlying applicable requirements in a title V permit are addressed with respect to Claim C.

[31] The requirements of 40 C.F.R. § 70.6(b)(2) can also be implicated by claims related to § 70.6(a)(1)(i), which states: "The permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based." Although the Petitioner does not raise any claim under § 70.6(b)(2), it does raise a claim under § 70.6(a)(1)(i) (Claim E), addressed later in EPA's response.

[32] Other monitoring-focused regulations cited by the Petitioner are more specific and, accordingly, more limited in their reach. However, any restrictions in those regulations do not carry forward to 40 C.F.R. § 70.6(c)(1). *See* 40 C.F.R. § 70.6(a)(3)(i)(A)–(B); *Appalachian Power*, 208 F.3d at 1026–28 (rejecting arguments that § 70.6(a)(3)(i)(B) provides authority to establish additional monitoring in situations where an underlying requirement already included some periodic monitoring); *Sierra Club*, 536 F.3d at 680 ("Neither § 70.6(a)(3)(i)(A) nor § 70.6(a)(3)(i)(B) allows state and local authorities to supplement inadequate monitoring requirements, so the question is whether § 70.6(c)(1) does. . . . The most reasonable reading [of § 70.6(c)(1)] is that it serves as a gap-filler to these provisions.").

[33] As far as monitoring is concerned, EPA recognizes that CAA § 504(b) indicates that "continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance." Even this provision does not establish a ceiling. Rather, this passage simply indicates that the floor does not necessarily entail continuous emissions monitoring in all instances. Contrast these monitoring-focused provisions of CAA § 504 with the operational flexibility provisions of CAA § 502(b)(10). Regarding the latter, EPA has stated that states cannot establish more stringent requirements that would contradict the Act's operational flexibility provisions because Congress made them mandatory program elements. 56 Fed. Reg. at 21730; Part 70 RTC at 6-13 to 6-14; *see* 57 Fed. Reg. at 32266. Notably, the operational flexibility requirements are the only provisions in title V for which EPA ascribed this limitation.

Importantly, those orders and cases considered whether supplemental monitoring *must* be added to a permit in situations where a permit's existing monitoring was allegedly inadequate. Those orders and cases did not speak to whether there are additional situations when more stringent monitoring *may* be added to a permit. In other words, these orders and court decisions—like the statutory and regulatory provisions on which they were based—addressed the floor, not the ceiling, of monitoring requirements.

In sum, considered in light of the statutory and regulatory provisions discussed earlier,[34] EPA interprets CAA § 504(c) and 40 C.F.R. § 70.6(c)(1) to require that all permits contain sufficient monitoring, testing, recordkeeping, and reporting requirements to assure compliance with all applicable requirements, but not to prohibit requirements that exceed this minimum requirement.

To interpret the statute and regulations otherwise (as the Petitioner urges) would effectively redefine these provisions to require that all title V permits contain monitoring "no more stringent than necessary" to assure compliance with all applicable requirements and permit terms. Such an interpretation would be difficult, if not impossible, to implement. For any given standard or limitation, numerous potentially viable (*i.e.*, sufficient) systems of testing, monitoring, and/or recordkeeping may exist. Some of these monitoring regimes would arguably be more stringent than others—whether by a small or wide margin. By the Petitioner's logic, for each standard or limitation, a state would be restricted to *only one* appropriate system of monitoring, recordkeeping, and reporting for each requirement: the least stringent of the numerous potentially viable monitoring options. This outcome is not compelled by the statute or regulations, and EPA does not consider it to reflect good public policy. Rather, states should (and do) have the flexibility to determine the appropriate monitoring at a source on a case-by-case basis, so long as the monitoring satisfies minimum federal requirements. Provided such monitoring is designed to assure compliance with a federally enforceable applicable requirement or permit term, it may be federally enforceable.

Application to the Cargill Blair Permit

Considering the Petitioner's claim in light of the aforementioned legal framework, EPA notes that the Petitioner does not contest the overall monitoring methodology at issue in Claim A, which consists of periodic performance testing followed by ongoing parametric monitoring (*i.e.*, monitoring and maintaining various operating parameters related to the performance of control devices and, by extension, VOC emissions). Moreover, the Petitioner does not object to monitoring (and maintaining) three of the relevant operating parameters: scrubber liquid flow rate, scrubber liquid pH, and scrubber differential pressure. However, the Petitioner *does* object to monitoring a fourth, related parameter: scrubber liquid temperature. That is, the Petitioner claims that NDEE exceeded its authority by adding Permit terms requiring monitoring of a fourth operating parameter (whose precise impact on emissions is the subject of debate between Petitioner and NDEE). Even accepting for the sake of argument the Petitioner's contention that a state could exceed its authority by establishing more stringent monitoring requirements—a point EPA does *not* concede—the specific additions to the Permit's monitoring requirements do not constitute an abuse of the state's discretion to determine the necessary monitoring to include in a title V permit. In other words, even if there *were* an upper bound to NDEE's authority to

[34] *See* 42 U.S.C. §§ 7416, 7661a(b), 7661e(a); 40 C.F.R. § 70.1(a), (c).

establish monitoring requirements, it is hard to credit the Petitioner's assertion that this boundary exists between monitoring three operating parameters and monitoring a fourth, closely related operating parameter.

The Petitioner attempts to connect its arguments concerning the limitations on a state's authority to establish monitoring requirements that are allegedly more stringent than necessary with "procedural requirements" of the Act and part 70. Specifically, the Petitioner claims that NDEE did not comply with CAA § 504(c) and 40 C.F.R. § 70.6(c)(1) because "NDEE fails to follow EPA's established procedure for determining whether existing monitoring is sufficient to assure compliance." Petition at 17. In the Petitioner's words, "EPA requires the permitting authority to utilize a fact-specific, case-by-case process to determine whether it is necessary to supplement existing periodic monitoring requirements." *Id*. (citing *CITGO Order*, among others). EPA generally agrees that such a case-by-case evaluation is the most appropriate approach in most situations, particularly when determining whether monitoring requirements are inadequate and *must* be supplemented. However, it would be an overstatement to suggest that any particular procedure is required by CAA § 504(c) or 40 C.F.R. § 70.6(c)(1) when determining whether a state *may* supplement existing monitoring—*i.e.*, when determining the upper bounds of a state's discretion to set appropriate monitoring requirements.[35] In any case, NDEE did follow the general "procedure" that the Petitioner references. The state determined that the additional monitoring requirements were necessary after evaluating various site-specific factors, including some of those identified in the *CITGO Order*. *See* RTC at 8. Regardless of the fact that NDEE applied some general principles in reaching its conclusion, NDEE nonetheless made a case-by-case determination. (Among other things, this is evidenced by the fact that NDEE applied different requirements to different units within the Cargill facility.)

The Petitioner also argues that NDEE failed to adequately document its rationale in the permit record, contrary to 40 C.F.R. § 70.7(a)(5). *E.g.*, Petition at 17. As the Petitioner correctly states, it is important that permitting authorities explain the basis for their permitting decisions, including the selected monitoring. *E.g.*, *CITGO Order* at 7. More specifically, 40 C.F.R. § 70.7(a)(5) requires that states "provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." NDEE did just that in its Fact Sheet accompanying the Draft Permit, explaining the basis for its decision to impose additional monitoring across seven pages dedicated to this issue. *See* Fact Sheet at 84–90. Moreover, NDEE supplemented this rationale throughout its RTC. *See, e.g.*, RTC at 7–8, 15–16. The Petitioner does not allege that NDEE failed entirely to provide a rationale,[36] but rather challenges the content of NDEE's rationale. The fact that the Petitioner disagrees with individual elements of NDEE's rationale is not enough to demonstrate that NDEE failed to satisfy § 70.7(a)(5), however. Moreover, as explained in the next paragraph, the Petitioner's challenges to the content of NDEE's rationale present no basis for EPA's objection.

[35] Neither CAA § 504(c) nor 40 C.F.R. § 70.6(c)(1) prescribe a specific "procedure" for determining whether existing monitoring is sufficient or determining whether additional monitoring is necessary or appropriate. Moreover, EPA's recommendations and policies concerning this topic—such as those outlined in the *CITGO Order* cited by the Petitioner—are not binding on states. Thus, failure to follow specific elements of EPA's recommended "procedure" would not necessarily mean that a state failed to comply with CAA § 504(c) or 40 C.F.R. § 70.6(c)(1).
[36] Had NDEE failed to provide any basis for its decision to impose additional monitoring, EPA's response might have been different insofar as 40 C.F.R. § 70.7(a)(5) is concerned.

In addition to its allegations under 40 C.F.R. § 70.7(a)(5), the remainder of Claim A presents numerous technical arguments challenging the substance of NDEE's decision. Specifically, the Petitioner addresses specific facts or factors that NDEE either did or did not consider relevant to its determination that additional scrubber liquid temperature monitoring was necessary to assure compliance with the relevant VOC emission limits. In light of the statutory and regulatory authorities and principles discussed earlier, EPA generally will not substitute its judgment for that of a state where the state exercises its discretion and documents its decision that additional monitoring is necessary to assure compliance, and a petitioner challenges the selected monitoring as being more stringent than necessary.[37] By their nature, such challenges cannot demonstrate "that the permit is not in compliance with the requirements of [the CAA]," including the requirement that "[e]ach permit issued under [title V] shall set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions." 42 U.S.C. §§ 7661d(b)(2), 7661c(c); *see also* 40 C.F.R. §§ 70.12(a)(2), 70.6(c)(1).[38] Accordingly, the Petitioner's technical arguments present no basis for EPA's objection to the Permit, and EPA denies Claim A.

Claim B: The Petitioner Claims That "The Permit is Not in Compliance with Title V Because NDEE Exceeds its Authority Under the CAA and Part 70 in Imposing New Substantive Requirements in the Form of Scrubber Liquid Temperature Control Requirements, and NDEE's Decision to Do So is Arbitrary and Capricious and Unsupported in the Record."

Petitioner's Claim: Claim B addresses permit terms that apply to the same three emission units discussed in Claim A (EP-7, EP-7A, and EP-12). These permit terms provide, for example: "The scrubbing liquid temperature shall not exceed above 10 percent of the level determined during performance testing, a[s] required in Condition III.(EP-7)(3)(b)(i) above." *Id*. at 67 (quoting Final Permit at 38 (Condition III.(EP-7)(4)(b)(iv)(3)); citing Final Permit at 44, 82–83).

First, the Petitioner claims that because these scrubber liquid temperature "control requirements" are predicated on NDEE's rationale for imposing additional scrubber liquid temperature monitoring, they suffer the same flaws as described in Claim A. *Id*. at 67.

Moreover, the Petitioner claims that these limits are deficient for an additional reason. As background, the Petitioner explains that "[a] Title V permit pulls a source's existing underlying applicable requirements into one place; however, it 'does not impose substantive new requirements[.]'" *Id*. at 9 (quoting 40 C.F.R. § 70.1(b); citing 57 Fed. Reg. at 32251; *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1026–27 (D.C. Cir. 2000); *Envtl. Integrity Project v. EPA*, 969 F.3d 529, 543 (5th Cir. 2020); White Paper for Streamlined Development of Part 70 Permit Applications, 1 (July 10, 1995)). The Petitioner thus concludes that "the circumstances in which the permitting authority can include non-pre-existing terms in the permit . . . are carefully circumscribed by Title V and EPA's regulations." *Id*.

[37] By contrast, EPA will continue to evaluate whether a state's monitoring decisions meet the *minimum* requirements of CAA § 504(c) and 40 C.F.R. § 70.6(c)(1).

[38] Again, the Petitioner's concerns regarding the NDEE's alleged exceedance of its authority would perhaps have been better suited to a challenge in state court. *See* 42 U.S.C. § 7661a(b)(6); 40 C.F.R. § 70.4(b)(3)(x)–(xii).

The Petitioner claims that these scrubber liquid temperature "control requirements . . . exceed NDEE's legal authority under Title V because they impose new substantive requirements." *Id*. at 67; *see also id*. at 13–14, 67–68 (citing the authorities in the preceding paragraph). The Petitioner argues that the requirements are new because they were not established by an underlying applicable requirement (*e.g.*, preconstruction permit). *Id*. at 68. The Petitioner also argues that the new requirement to control scrubber liquid temperature is "substantive" because it "impose[s] duties and obligations on those who are regulated." *Id*. at 68 (quoting *Appalachian Power*, 208 F.3d at 1027; citing *General Electric v. Koncelik*, 10th Dist. Franklin No. 05AP-310, 206-Ohio-1655, ¶ 23 (Ohio Ct. App. March 31, 2006)).

In addition, the Petitioner asserts that NDEE did not consider the technical feasibility or cost of installing the equipment that would be necessary to alter the scrubber liquid temperature (specifically, a chiller). *Id*. at 69. The Petitioner observes that this technology was not required as a result of prior actions that established the underlying VOC emission limits. *Id*.

With respect to emission unit EP-7A, the Petitioner claims that adding a scrubber liquid temperature control requirement effectively constituted reopening of a VOC limit contained in a 2006 preconstruction permit (CP06-0008)[39]—which the Petitioner asserts is not permitted through title V. *Id*. at 68–69 (citing *Envtl. Integrity Project v. EPA*, 969 F.3d at 543, 546).

With respect to emission units EP-7 and EP-12, the Petitioner asserts that the scrubber liquid temperature control requirements upset the emission control and monitoring terms established in a 2006 Consent Decree (2006 CD) and the 2012 preconstruction permit implementing the 2006 CD (CP08-065). *Id*. at 70. Specifically, the Petitioner observes that NDEE considered but decided against imposing a liquid temperature control and monitoring requirement through the CD process. *Id*. at 70–71. Moreover, the Petitioner asserts that it would "be inappropriate to impose additional temperature control and monitoring requirements on these emission points, where the underlying applicable requirement was not intended to achieve any VOC emission reductions." *Id*. at 71. The Petitioner claims that NDEE's failure to consider these arguments renders NDEE's decision arbitrary and capricious and not in compliance with title V. *Id*. at 71–72 (citing 40 C.F.R. § 70.7(h)(6)).

The Petitioner also challenges NDEE's justification for the scrubber liquid temperature control requirements, characterizing NDEE's rationale as "generic" and lacking a case-specific evaluation or demonstration. *Id*. at 72. The Petitioner concludes Claim B by reiterating its contention that NDEE lacks the authority to require Cargill to control and monitor scrubber liquid temperature because such requirements do not exist in the underlying applicable requirements and are not necessary to assure compliance. *Id*.

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

As explained in EPA's response to Claim A, as a general matter, neither the CAA nor EPA's regulations prohibit states from establishing requirements more stringent than the minimum

[39] The Petitioner explains that in the CP06-0008 preconstruction permitting action, NDEE determined that no additional controls qualified as Best Available Control Technology (BACT) for VOCs. *Id*. at 70.

program elements contained in title V of the Act and EPA's part 70 regulations. EPA's regulations do, however, require that permit requirements not based on the CAA be designated as "not federally enforceable." This limitation does not apply to permit terms designed to assure compliance with an applicable requirement or permit term pursuant to CAA § 504(c) and 40 C.F.R. § 70.6(c)(1). EPA interprets CAA § 504(c) and 40 C.F.R. § 70.6(c)(1) to require permits to contain sufficient monitoring, testing, recordkeeping, and reporting requirements to assure compliance with all applicable requirements, but not to prohibit requirements that exceed this minimum requirement. *See supra* p. 16.

Thus, here, the key question is whether the permit terms at issue in Claim B fit within the framework described in Claim A with respect to CAA § 504(c) and 40 C.F.R. § 70.6(c)(1). As explained in the following paragraphs, EPA finds that they do.

At the outset, EPA acknowledges the factual differences between Claim B and Claim A. Claim B involves the Permit's requirement to not only *monitor* scrubber liquid temperature, but also a limiting condition embodied in multiple permit terms: "The scrubbing liquid temperature *shall not exceed* above 10 percent of the level determined during performance testing . . . ." Final Permit at 38 (Permit Condition III.(EP-7)(4)(b)(iv)(3)) (emphasis added); *see also id*. at 44, 82–83. The Petitioner characterizes these permit terms as requiring the facility to "control" scrubber liquid temperature; NDEE describes them as requiring the facility to "maintain" scrubber liquid temperature. Petition at 67; RTC at 21. More specifically, NDEE explains:

> Performance testing is prescribed to be conducted under normal conditions that the facility expects to operate and are likely to most challenge the emissions controls (but without creating an unsafe condition). When conducting periodic emissions testing to demonstrate compliance with permit limitations, operational parameters are required to be measured during the test. By doing so, the source can then continuously operate the control device in accordance with those parameters observed during the testing event, provided they demonstrated compliance with permit limitations. If the source operates the control device in the same manner as it did during the test, it can then demonstrate continuous compliance with the limitations. Lastly, it is important to note that the permit ***does not*** prescribe that the operating parameters ***need to be controlled*** but rather ***maintained*** to ensure demonstration of compliance with permit limitations. The concept of operating under conditions that most challenge the control device while conducting performance testing is to establish baseline values for the operating parameters on the control device (wet scrubber). Once the values are established, the source has the flexibility to operate the control device 'at or below' or 'at or above' the baseline value depending on the parameter.

RTC at 21 (emphasis in original).

In Claim B, the Petitioner alleges that the required "controls" on scrubber liquid temperature are distinguishable from the monitoring provisions implicated by Claim A because they are "substantive" changes that "impose duties and obligations on those who are regulated." Petition at 68 (quoting *Appalachian Power*). The Petitioner's focus on "substantive" requirements relates

to 40 C.F.R. § 70.1(b), which states that "title V does not impose substantive new requirements . . . ." *See* Petition at 68.

EPA need not resolve the question whether, as Petitioner urges, these requirements are "substantive."[40] Notably, in the *Appalachian Power* case cited by the Petitioner, the D.C. Circuit stated that even additional *monitoring* provisions are "substantive." *Appalachian Power*, 208 F.3d at 1026–27. In finding that both emission limitations *and monitoring requirements* should be considered "substantive," this case actually undermines the Petitioner's attempted distinction between allegedly substantive requirements (in Claim B) and non-substantive requirements (in Claim A).[41] Accordingly, any distinction between "substantive" and non-substantive requirements—as expressed in § 70.1(b) or elsewhere—does not resolve the issue.

Importantly, even after determining that monitoring requirements may be "substantive," this same court subsequently held that title V permits can and must be used to create additional monitoring in certain circumstances pursuant to CAA § 504(c) and 40 C.F.R. § 70.6(c)(1). *Sierra Club*, 536 F.3d at 678–680. Thus, whether "substantive" or not, conditions like monitoring designed to assure compliance with existing permit terms are the most notable exception to the general rule that "title V does not impose substantive new requirements." 40 C.F.R. § 70.1(b).[42] Therefore, the more pertinent distinction is whether the permit terms at issue in Claim B are (i) compliance assurance provisions (which title V permits *were* designed to establish) or (ii) emissions limitations, standards, or work practices (which title V permits were generally *not* designed to establish).

The Petitioner appears to argue that the requirement to maintain scrubber liquid temperature is fundamentally different from the type of compliance assurance provisions that could be authorized by CAA § 504(c) and 40 C.F.R. § 70.6(c)(1). The Petitioner's argument is not persuasive. Limitations on operating parameters closely tied to a testing and monitoring regime can be part of a compliance assurance approach under CAA § 504(c) and 40 C.F.R. § 70.6(c)(1).

As explained in EPA's response to Claim A, title V permits often employ a combination of different enforceable measures to demonstrate compliance with all applicable requirements and permit terms. EPA often uses the term "monitoring" as a shorthand for the wide variety of requirements designed to assure compliance. In fact, CAA § 504(c) refers not only to "monitoring," but also to "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." Similarly, 40 C.F.R. § 70.6(c)(1) refers to "compliance certification, testing, monitoring, reporting, and recordkeeping

[40] EPA acknowledges that 40 C.F.R. § 70.1(b) states that "title V does not impose substantive new requirements." However, in the same sentence, this regulation also states that title V "does require that . . . certain procedural measures be adopted especially with respect to compliance." Section 70.1(b) might, therefore, be read to establish a dichotomy between "substantive" requirements and "procedural" requirements. This would beg the question whether additional monitoring provisions (or parametric limits associated with monitoring) are "procedural measures . . . with respect to compliance." The Petitioner does not acknowledge or raise any arguments concerning the second part of this definition. In any case, this issue is not one EPA need presently resolve, as the question here does not end with 40 C.F.R. § 70.1(b) (as discussed in the text).

[41] The Petitioner also cites an unreported decision from an Ohio state appellate court, which carries little weight and sheds little light on the issue, despite some factual similarities.

[42] *See supra* note 24.

requirements sufficient to assure compliance with the terms and conditions of the permit." Related compliance-focused provisions throughout title V and the part 70 regulations use similarly varied language to refer to the suite of requirements often described (perhaps imprecisely) by the shorthand term "monitoring."[43] Thus, to determine whether a provision fits within the authority of CAA § 504(c), one should look not only at its form (or label), but also—and more importantly—at its function: "*to assure compliance with the permit terms and conditions*." 42 U.S.C. § 7661c(c) (emphasis added).[44]

Here, the permit terms at issue require Cargill to maintain scrubber liquid temperature at or below the level observed during the latest performance test (plus 10 percent). Final Permit at 38, 44, 82–83. It does not appear that these requirements themselves constitute a "standard" designed to achieve some sort of emissions reduction at the source.[45] Nor do these additional requirements alter the nature of any underlying standards.[46] Instead, these requirements are designed to assure compliance with another, existing standard: VOC emission limits. More specifically, these requirements are designed to ensure that compliance with the VOC limits can be readily determined based on a combination of periodic stack tests (which establish a correlation between VOC emissions and various operating parameters observed during the test) and ongoing measurements of the same operating parameters. In other words, the requirements to maintain scrubber liquid temperature at or below the levels observed during the last stack test are designed to ensure that those stack test results remain a representative and reliable indicator of ongoing VOC emissions. *See* RTC at 21.

To be clear, it may not be necessary in all cases to make these types of operating parameter ranges independently enforceable permit requirements. For example, a different approach might be to require that stack testing be conducted under operating conditions observed over some time period preceding the stack test. But regardless of whether a source is required to: (i) maintain *future* operating conditions within a range observed during a stack test (as is the case in Cargill's Permit), or (ii) conduct a stack test under operating conditions observed *prior* to the stack test, the outcome is essentially the same: the permit is designed to ensure that the stack test data could be used to reliably and accurately quantify emissions. More to the point, either approach could

[43] *See* 42 U.S.C. § 7661c(b) (referring to "procedures and methods for determining compliance and for monitoring and analysis of pollutants"); 40 C.F.R. § 70.6(a)(3)(i)(A) (referring to "monitoring and analysis procedures or test methods"), (a)(3)(i)(B) (referring to "periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring" as well as "terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement").

[44] *See also* 42 U.S.C. § 7661c(a) ("Each permit issued under this subchapter shall include enforceable emission limitations and standards . . . *and such other conditions as are necessary to assure compliance with applicable requirements* of [the CAA] . . . ." (emphasis added)).

[45] Additionally, unlike most emission limitations or standards established under other CAA programs, these scrubber liquid temperature "control" requirements are by no means static or permanent. If Cargill has difficulties in maintaining scrubber liquid temperature within the prescribed ranges, it may simply conduct a new stack test and establish new ranges. *See* Final Permit at 38, 44, 82–83.

[46] By contrast, see EPA's response to Claim C.

reasonably be considered an approach to "monitoring" or "testing" authorized by CAA § 504(c) and 40 C.F.R. § 70.6(c)(1).[47]

Overall, EPA considers it reasonable to view the requirements to maintain scrubber liquid temperature at or near levels observed during the stack test to be part of the Permit's testing, monitoring, and compliance demonstration methodology, established to satisfy CAA § 504(c) and 40 C.F.R. § 70.6(c)(1). Thus, EPA disagrees with the Petitioner's claim that NDEE exceeded its authority in establishing such conditions on the grounds that these requirements are "substantive." For the same reason, the fact that these requirements may be "new"—that is, they impose conditions beyond the requirements established in the 2006 CD and 2006 and 2012 preconstruction permits—is immaterial. Title V permits may be used to supplement compliance assurance provisions from any type of underlying applicable requirement, including consent decrees and preconstruction permits. *See* 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(c)(1); *Sierra Club v. EPA*, 536 F.3d at 678–680.[48]

Additionally, EPA finds no basis for objection in the Petitioner's argument that neither the monitoring nor "control" requirements are necessary or justified to assure compliance with the Permit, because: (i) the Permit's scrubber liquid temperature requirements can reasonably fit under CAA § 504(c) and 40 C.F.R. § 70.6(c)(1), (ii) those statutory and regulatory authorities establish minimum (not maximum) requirements, and (iii) NDEE explained the basis for its decision to impose both the monitoring and "control" requirements. See EPA's response to Claim A, *supra* pp. 10–18.

Claim C: The Petitioner Claims That "The Permit is Not in Compliance with the Title V Because NDEE Exceeds its Authority Under the CAA in Imposing New Substantive Requirements in the Form of 'Alternative' VOC/HAPs Inlet Testing and Compliance Demonstration Requirements, and NDEE's Decision to Do So is Arbitrary and Capricious and Unsupported in the Record."

Petitioner's Claim: In Claim C, the Petitioner addresses four emission units (EP-8, EP-10, EP-66, and EP-77) that are *not* subject to the scrubber liquid temperature monitoring and control requirements implicated by Claims A and B. *See* Petition at 73–74, 86. The Petitioner notes that these units are subject to an "alternative" requirement that "[t]he VOC and HAPs performance tests shall be performed before the emissions stream enter the scrubber[.]" *Id*. at 74 (quoting Final Permit at 49 (Condition III.(EP-8)(3)(b)(iv)); citing Final Permit at 71, 214, 219).

[47] In the related context of the Compliance Assurance Monitoring (CAM) rule under 40 C.F.R. part 64, EPA outlined various scenarios under which a permitting authority could make "indicator ranges" (*i.e.*, ranges of operating parameters associated with a control device) independently enforceable, as opposed to simply requiring monitoring of these operating parameters and corrective actions. Notably, EPA acknowledged that "if a State agency has independent authority to make indicator ranges enforceable, that can be done irrespective of the authority provided in part 64." 62 Fed. Reg. 54900, 54931 (October 22, 1997). In light of the D.C. Circuit's 2008 *Sierra Club* holding and the Agency's subsequent interpretation of CAA § 504(c), and as explained herein, EPA believes state laws and regulations based on CAA § 504(c) can provide states with authority to make indicator ranges enforceable permit terms. Moreover, CAA § 504(c) provides states with the authority and discretion to make indicator ranges *federally* enforceable.

[48] *See also, e.g.*, *In the Matter of South Louisiana Methanol, LP*, Order on Petition Nos. VI-2016-24 and VI-2017-14 at 10–11, 17 (May 29, 2018).

In the first part of Claim C, the Petitioner asserts that requiring testing at the scrubber inlet, rather than the scrubber outlet, effectively changed the point of compliance. *Id*. at 14, 74. Moreover, the Petitioner claims that moving the point of compliance from the scrubber outlet (after emissions controls) to the scrubber inlet (before emissions controls) effectively increased the stringency of the relevant VOC and HAP emission limits. *Id*. In changing the stringency of the underlying limits, the Petitioner contends that NDEE exceeded its authority by imposing a new substantive requirement. *Id*. at 14, 74–75 (citing the authorities discussed in Claim B).

As with Claim B, the Petitioner states that no underlying applicable requirement requires the Cargill Blair facility to meet the VOC or HAP[49] emission limits at the scrubber inlet and, therefore, this is a new requirement. *Id*. at 75. The Petitioner further characterizes this requirement as "substantive" because, again, it "impose[s] duties and obligations on those who are regulated." *Id*. (quoting *Appalachian Power*, 208 F.3d at 1027; citing *General Electric v. Koncelik*, 10th Dist. Franklin No. 05AP-310, 206-Ohio-1655, ¶ 23 (Ohio Ct. App. March 31, 2006)). Moreover, the Petitioner asserts that "the requirement is 'substantive' because it defines how the performance test must be performed and compliance demonstrated, creates a liability for failure to adhere to these restrictions, and would be enforceable by EPA, NDEE, or a citizen if Cargill were to fail to comply." *Id*. at 75; *see id*. at 85.

According to the Petitioner, "Courts have long recognized that regulatory agencies cannot alter the way compliance is demonstrated in a manner that affects the stringency of the requirement." *Id*. at 79 (citing *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 396 (D.C. Cir. 1973); *Appalachian Power Co. v. EPA*, 208 F.3d at 1027; *PPG Indus., Inc. v. Costle*, 659 F.2d 1239 (D.C. Cir. 1981). The Petitioner claims this requirement to meet VOC or HAP emission limits at the scrubber inlet also runs afoul of 40 C.F.R. § 70.6(a)(3)(i)(B), which requires test methods to be consistent with the underlying applicable requirement. *Id*. at 79 n.50. The Petitioner additionally asserts that this alleged change in the stringency of the relevant limits would effectively result in a reopening of the preconstruction permits that established those limits; the Petitioner argues this is not allowable as part of the title V process. *Id*. at 79.

The Petitioner elaborates on these ideas for each emission unit. With respect to VOC emissions for all four affected units, the Petitioner states that the relevant limits apply "from each emission point." *Id*. at 76 (citing Final Permit at 48, 70, 213, 218 (Condition III.(EP-X)(3)(a))). The Petitioner contends that these emission limits therefore apply at the emission point's discharge location (*i.e.*, after the scrubber). *Id*. at 76, 83 (citing 42 U.S.C. § 7602 (definitions of "emission limitation and "air pollutant"); 129 NAC Ch. 1 §§ 012 (definition of "air pollutant), 051 (definition of "emission limitation"), 054 (definition of "emissions"); Neb. Rev. Stat. § 81-1502(9)). According to the Petitioner, "measuring the rate of emissions 'before' the emission point rather than 'from each emission point' strays from the plain language meaning of both the Permit and the regulations and bears no reasonable, technical, or legal relationship to assuring

[49] Although some statements within Claim C refer to both VOC and HAP emission limits, most of Claim C focuses on VOC emission limits. A subsequent, separate portion of Claim C relates more directly to HAP emissions, as explained later in this claim summary.

compliance with an applicable requirement that applies at the emission discharge point." *Id*. at 76.[50]

With respect to emission units EP-10, EP-66, and EP-67, the Petitioner claims that the inlet testing requirements are contrary to the VOC emission limits established in the 2006 CD and accompanying 2012 preconstruction permit (CP08-065). *Id*. According to the Petitioner, those underlying actions identify the emission points as "attaching to the scrubbers." *Id*. at 76–77. The Petitioner asserts that the underlying emission limits were determined based on engineering tests at the scrubber outlet (not inlet). *Id*. at 77. The Petitioner also asserts that the compliance stack test plans and reports submitted to—and approved by—NDEE expressly identified the testing point as the scrubber outlet (not inlet). *Id*. at 77, 83.

With respect to emission unit EP-8A, the Petitioner similarly asserts that the relevant VOC emission limit was established in the underlying 2006 preconstruction permit (CP06-0008) assuming a baseline level of VOC control provided by the scrubber, and based on stack test data collected after the scrubber. *Id*. at 78. Additionally, the Petitioner states that its initial performance test was based on sampling after the scrubber. *Id*.

The Petitioner disputes NDEE's justification for the pre-scrubber testing requirement, first challenging NDEE's statement that the scrubbers at issue do not control VOC/HAP emissions for the relevant emission points. *Id*. at 80 (citing Fact Sheet at 54–58, 66–67, 74–75; RTC at 7, 14, 21, 25, 30, 36, 47). The Petitioner claims that this notion is a mischaracterization of Cargill's statements to NDEE, and that the company explained that the scrubbers do achieve some ancillary level of VOC control. *Id*. The Petitioner contends that NDEE does not respond to Cargill's comments raising this issue. *Id*. at 82. The Petitioner addresses a related portion of NDEE's RTC, wherein NDEE asserts that it did not impose any new testing requirements, but merely clarified the testing location; the Petitioner characterizes this explanation as "not credible." *Id*. (citing RTC at 22, 26, 37). In light of the previously discussed information regarding the origin of the limits and prior testing, the Petitioner contends that "it is not plausible that NDEE somehow just now discovered that Cargill had been testing after the scrubber rather than before, and that that [*sic*] the underlying applicable requirement was intended to apply at the inlet, rather than the outlet." *Id*. at 84. The Petitioner additionally contests NDEE's suggestion that inlet testing is necessary when the efficiency of a control device is unknown, claiming that NDEE provides no support or authority for this position. *Id*. at 84–85.

In summary, the Petitioner contends: "Given that the emission limits at EP-8A, EP-10, EP-66, and EP-67 were set assuming an emission point located at the scrubber outlet, and have been historically tested at that point, NDEE would be unequivocally and impermissibly increasing the stringency of the emission limit[s]" by requiring testing at the scrubber inlet. *Id*. at 78.

In the second part of Claim C, the Petitioner claims that NDEE does not justify the necessity of testing at the scrubber inlet, characterizing this decision as arbitrary and capricious and unsupported in the record. *Id*. at 85. The Petitioner addresses the dichotomy in permit conditions; that is, the Permit's differentiation between scrubbers that provide VOC reduction (subject to

[50] The Petitioner also asserts that it cannot find any reference to inlet testing in NDEE's regulations. *Id*. at 78 n.49, 83.

scrubber liquid temperature control and monitoring, as discussed in Claims A and B) and scrubbers that are considered "uncontrolled" for VOCs (subject to scrubber inlet testing, as discussed in Claim C). *Id*. at 86. The Petitioner claims that inlet testing—which is presented as an alternative to scrubber liquid temperature control and monitoring—is unsupported because it is predicated on the unsupported claim that the scrubber temperature provisions are necessary, which the Petitioner contests in Claims A and B. *Id*. Moreover, the Petitioner claims that the inlet testing requirement is flawed because it would not yield representative, accurate, or reliable data "from the emission points," because it would not account for pollutants removed by the scrubber. *Id*. at 86–87. The Petitioner also contends that the test data would not qualify as "credible evidence" of noncompliance with the relevant VOC limits. *Id*. at 87. In summary, the Petitioner concludes that NDEE lacks authority to impose the scrubber inlet VOC testing and compliance demonstration requirement. *Id*. at 88.

Within Claim C, the Petitioner also raises a distinct issue regarding testing for HAPs. The Petitioner states that there are no HAP limits associated with units EP-10, EP-66, or EP-67, and that the only HAP limit associated with EP-8A is not federally enforceable. *Id*. at 75. The Petitioner claims that "NDEE lacks authority to impose performance test requirements in the Title V operating permit when there is no underlying federal applicable requirement with which Cargill is required to demonstrate compliance." *Id*. at 76.

EPA's Response: For the following reasons, EPA grants in part and denies in part the Petitioner's request for an objection on this claim. EPA's response addresses the VOC testing and HAP testing requirements separately.

VOC Testing

Claim C involves a different set of emission units—accompanied by a different testing and monitoring regime—than those addressed in Claims A and B. Specifically, Claim C addresses Units EP-8A, EP-10, EP-66, and EP-67, and the Permit's requirement that, for these units, "The VOC and HAPs performance tests shall be performed before the emissions stream enter[s] the scrubber." Final Permit at 49 (Condition III.(EP-8A)(3)(b)(iv)); *see also id*. at 71, 214, 219. The Petitioner contends that the requirement to conduct testing *before* the scrubber is a change in the point of compliance that made the underlying VOC emission limits more stringent, and accordingly exceeded NDEE's authority. *E.g.*, Petition at 14, 74.

EPA's resolution of Claim C depends on one key distinction: whether the title V permit either: (i) establishes requirements designed to assure compliance with an existing requirement, pursuant to CAA § 504(c) (as discussed in Claims A and B), or (ii) purports to modify an applicable requirement established elsewhere.[51] Again, the principles discussed in Claims A and B with respect to monitoring under CAA § 504(c) are the primary *exception* to the general rule, identified by the Petitioner, that title V permits should not be used to create new requirements or

[51] Permit terms that purport to modify an existing applicable requirement can be further distinguished from permit terms that establish new, additional, and/or more stringent limitations or standards (a concept introduced in, but ultimately not relevant to, Claim B). Establishing the latter type of provision could be consistent with CAA § 506(a) and 40 C.F.R. § 70.1(c), although such provisions should be designated as not federally enforceable per 40 C.F.R. § 70.6(b)(2).

modify underlying applicable requirements established in other CAA programs. In other words, although title V permits may be used to add compliance assurance provisions, all underlying "applicable requirements" (including those contained in preconstruction permits) must be faithfully incorporated into a title V permit. *See* 42 U.S.C. § 7661c(a); 40 C.F.R. §§ 70.1(b), 70.2 (definition of "applicable requirement), 70.6(a)(1); *Envtl. Integrity Project v. EPA*, 969 F.3d 529 (5th Cir. 2020); *see also, e.g., In the Matter of Big River Steel, LLC*, Order on Petition No. VI-2013-10 (October 31, 2017).

Here, the permit terms regarding VOC and HAPs performance tests address a specific detail related to stack testing—something that would normally fit well within the compliance-focused provisions of CAA § 504(c). However, as the Petitioner asserts and courts have recognized, certain types of changes to a testing or monitoring methodology *can* be significant enough to constitute a revision of the underlying limitation or standard itself.[52] Determining whether a change to testing or monitoring would effectively change the underlying standard depends on whether the change would amend the nature of the compliance obligation. Viewed in the abstract, the situation here is relatively straightforward: an alleged change of the testing location (*i.e.*, compliance point) from *after* a control device to *before* a control device. Changing the point of compliance without accounting for the emission reductions associated with the control device could effectively alter the stringency of the underlying limit by a significant amount.[53]

Accordingly, Claim C ultimately depends on two disputed factual issues: (i) whether VOC emissions from Units EP-8A, EP-10, EP-66, and EP-67 are actually controlled by the scrubbers; and, if so, (ii) whether NDEE's identification of the testing location for Units EP-8A, EP-10, EP-66, and EP-67 reflected a *change* in the point of compliance (as the Petitioner argues) or simply a *clarification* of the existing compliance point (as NDEE argues). On both of these issues, the permit record is unclear.

First, in Cargill's public comments (and various communications prior to that stage), the company indicated that the scrubbers *do* control at least some proportion of VOC emissions. *See* Petition Ex. 2, Comments at 58–60; Petition at 80–82. NDEE's RTC did not substantively engage with or dispute this point. *See* RTC at 25–27; 40 C.F.R. § 70.7(h)(6). Thus, based on the

[52] *See Appalachian Power*, 208 F.3d at 1027 ("We have recognized before that changing the method of measuring compliance with an emission limitation can affect the stringency of the limitation itself."); *see also Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375, 396 (D.C. Cir. 1973) ("[A] significant difference between techniques used by the agency in arriving at standards, and requirements presently prescribed for determining compliance with standards, raises serious questions about the validity of the standard."); *Clean Air Implementation Project v. EPA*, 150 F. 3d 1200, (D.C. Cir. 1998) ("An enforcement action brought on the basis of credible evidence would, we believe, provide the factual development necessary to determine whether the new rule has affected whatever existing standard is involved."); 62 Fed. Reg. 8314, 8314–15 (February 24, 1997) ("The credible evidence revisions are not intended to and will not serve to affect the stringency of underlying emission standards by amending the nature of the compliance obligation."); *id*. (explaining that so long as an alternative test method retains the quantification and time period elements of a reference test method, it would not affect the stringency of the standard).

[53] This type of change would not *literally* change the numerical value of the underlying limit with which the source must comply. However, changing a testing location could *effectively* change the stringency of the limit by making it more likely that the source would be found to violate the limit even if operations (and actual emissions to the atmosphere) remained unchanged. In other words, if the source would have to reduce its actual emissions in order to avoid violating the limit according to the new testing location, such a change in testing location would effectively make the limit more stringent.

permit record before EPA, it appears that that the scrubbers at issue control at least some amount of VOC emissions. The permit record is unclear regarding the extent to which the scrubbers control VOC emissions, but from the record before EPA, there *may* be a non-trivial difference between VOC emissions measured before the scrubbers compared to after the scrubbers.

Second, Cargill's public comments detailed its assertions that the relevant VOC emission limits were originally established based on emission levels observed *after* the scrubber had reduced VOC emissions to some degree. *See* Petition Ex. 2, Comments at 54–60; Petition at 76–78. Similarly, Cargill explained that the prior test protocols—which NDEE approved—identified the scrubber outlet as the test point. *See* Petition Ex. 2, Comments at 55–56; Petition at 77–87, 82–83. NDEE's RTC suggests that it only now "discovered" that Cargill had performed prior stack tests at the scrubber outlet and asserts that the Permit merely "clarifie[s]" the testing location (which was not specified in the underlying permits). RTC at 26. However, NDEE does not respond to or address various comments alleging that this "clarification" was, in fact, a substantive change in the testing location. 40 C.F.R. § 70.7(h)(6).

NDEE also does not offer a meaningful response to the allegation that, if: (i) the scrubbers do control VOC emissions, and (ii) the testing location was in fact changed, then such change would effectively change the stringency of the underlying limit (notwithstanding that the numerical limit itself did not change). *See* RTC at 26. In sum, because the permit record is unclear as to whether NDEE, in fact, altered the stringency of the underlying limits, EPA cannot determine whether the Permit faithfully incorporates all applicable requirements. 40 C.F.R. § 70.8(c)(3)(ii). Accordingly, EPA grants this part of Claim C.

HAP Testing

With respect to the HAP testing requirements at issue in Claim C, the Permit terms vary slightly—but materially—among the four affected emission units. For unit EP-8A, the Permit states:

> Performance tests shall be conducted on EP-8A for . . . VOC, acetaldehyde, and combined HAPs . . . ; acetaldehyde and HAPs testing are state enforceable only[.]
> ***
> (iv) The VOC and HAPs performance tests shall be performed before the emissions stream enter the scrubber (S-04504). The combined HAPs performance tests shall include speciation and quantification of the HAP composition of the emissions.

Final Permit at 49 (Condition III.(EP-8A)(3)(b)).

Relevant here is the Permit's express indication that "acetaldehyde and HAPs testing are state enforceable only." *Id*. Permit terms like this that are designated as "state-only" or "not federally enforceable" are not subject to review in a petition requesting EPA's objection. 40 C.F.R. § 70.6(b)(2); *see, e.g.*, *In the Matter of Harquahala Generating Station Project*, Order on Petition, Permit No. V99-015 at 5 (July 2, 2003) ("State-only terms are not subject to the requirements of Title V and hence are not . . . evaluated by EPA unless those terms are drafted in a way that might impair the effectiveness of the permit or hinder a permitting authority's ability

to implement or enforce the permit.").[54] Thus, to the extent Claim C addresses HAP testing for unit EP-8A, it is denied.

The permit terms associated with emission units EP-10, EP-66, and EP-67 differ in meaningful ways. Most importantly, the permit terms do not contain any "state enforceable only" qualifier for the HAP testing requirements on EP-10, EP-66, and EP-67. *See* Final Permit at 71 (Condition III.(EP-10)(3)(b)), 214 (Condition III.(EP-66)(3)(b)), 219 (Condition III.(EP-67)(3)(b)).[55] Therefore, as written, the Permit establishes some federally enforceable HAP testing requirements.

NDEE explained the basis for these HAP monitoring provisions as follows:

> All units with a VOC emission limitation are required to conduct a speciation/quantification to determine the HAP content of the VOC. . . . For EP-8A, EP-10, EP-66, and EP-67, Cargill claimed that these scrubbers do not control VOC or HAPs. NDEE is requiring the testing of VOC and HAPs to be conducted prior to the scrubber (inlet). For the emission points with no emission limits for any HAP (individual or combined) but require HAP testing, the speciation/quantification testing requirements for HAPs will determine the individual HAPs and controlled emission rates. These emission points had estimated no HAPs or insignificant amounts of HAPs in their construction permit application(s), and therefore, no HAP limitations were established at the issuance of the construction permit(s). These tests will be evaluated to determine if case-by-case HAP BACT/MACT (Title 129, Chapter 27) is applicable, and if the estimated HAPs in the construction permits were accurate.

Fact Sheet at 91–92. Notably, this explanation accompanied the Fact Sheet associated with the Draft Permit. NDEE's RTC did not address Cargill's comments (presented in response to the Fact Sheet) questioning the state's authority for establishing HAP testing. *See* Petition Ex. 2, Comments at 54; 40 C.F.R. § 70.7(h)(6).

Overall, the permit record fails to explain NDEE's authority for establishing federally enforceable HAP testing requirements designed exclusively for information-gathering purposes. Importantly, unlike the monitoring provisions addressed in Claims A and B, the HAP testing requirements on units EP-10, EP-66, and EP-77 bear no relationship to—that is, are not designed to assure compliance with—any underlying applicable requirements or permit terms. As such, they cannot be based on CAA § 504(c) and, accordingly, do not fall within the exceptions discussed in Claims A and B that allow states to establish more stringent federally enforceable

[54] See also EPA's response to Claims F and G, addressing a similar issue: whether the violation of a state-only enforceable law can present a basis for EPA's objection to a title V permit.

[55] The permit terms associated with EP-10, EP-66, and EP-77, similar to EP-8A, state "(iv) The VOC and HAPs performance tests shall be performed before the emissions stream enter the scrubber (S-04007). The VOC performance tests shall include speciation and quantification of the HAP composition of the emissions for the first performance test." Final Permit at 71; *see id*. at 214, 219. However, the terms applicable to EP-10, EP-66, and EP-77 do not contain the requirement (applicable to EP-8A) that "Performance tests shall be conducted for . . . acetaldehyde, and combined HAPs," nor the indication that HAP testing is state enforceable only. Final Permit at 49; *see id*. at 71, 214, 219.

conditions in order to assure compliance with existing permit terms. Because NDEE's authority for establishing federally enforceable HAP testing requirements is unclear at best, EPA grants this portion of Claim C.

Direction to NDEE: Regarding the Permit's VOC testing methodology, NDEE must revise the permit record to further respond to Cargill's public comments involving: (i) whether and to what extent the scrubbers associated with EP-8A, EP-10, EP-66, and EP-67 control VOC emissions, (ii) whether identifying the scrubber inlet as the test location resulted in a change in the point of compliance, and, accordingly, (iii) whether the Permit effectively altered the stringency of the underlying VOC emission limits established in preconstruction permits CP06-0008 and CP08-065. Depending on what NDEE determines after addressing these issues, NDEE may consider whether revisions to the Permit are necessary. For example, if NDEE determines that the EP-8A, EP-10, EP-66, and EP-67 scrubbers *do* control VOC emissions, the state may decide that there is no meaningful distinction between these four emission units and the three units addressed in Claims A and B (EP-7, EP-7A, EP-12). NDEE might then decide to impose the post-scrubber stack testing and scrubber liquid temperature provisions addressed in Claims A and B to all seven units. *See* RTC at 27. Or, if NDEE determines that the EP-8A, EP-10, EP-66, and EP-67 scrubbers do not control any VOC emissions—or that they control only a negligible amount of VOC emissions—the state may be able to reasonably conclude that testing at the scrubber inlet does not alter the stringency of the underlying VOC emission limit, and that no revisions to the Permit are necessary.

Regarding the Permit's HAP testing requirements for units EP-10, EP-66, and EP-67, NDEE must revise the permit record to respond to Cargill's comments regarding the state's authority for establishing federally enforceable HAP testing conditions in the absence of any federally enforceable HAP standards or limitations. As discussed with respect to Claim A, nothing in the CAA prohibits NDEE from imposing additional or more stringent requirements—or requirements unrelated to the CAA—under state law. However, if such requirements are included in a title V permit, EPA's regulations require that they be designated "not federally enforceable." 40 C.F.R. § 70.6(b)(2). Thus, if NDEE determines that it lacks the authority to establish federally enforceable HAP testing conditions, it may be able to retain (and properly label) those permit terms as state-only requirements.

Claim D: The Petitioner Claims That "NDEE's Rationales for Imposing Additional Requirements Despite the Terms Agreed-Upon in the Consent Decree Are Arbitrary and Capricious and Lack Support in the Record."

Petitioner's Claim: In Claim D, the Petitioner addresses five of the seven emission units implicated by Claims A, B, and C—specifically, units that were subject to emission limits based on the 2006 CD and associated 2012 preconstruction permit (CP08-065): EP-7, EP-10, EP-12, EP-66, and EP-67. Within this claim, the Petitioner reiterates arguments made in Claims A, B, and C regarding decisions made through the CD and resulting preconstruction permitting process, as well as arguments regarding NDEE's alleged failure to explain why it changed its position in the current permit action. *See id*. at 89–91; *see also id*. at 34–36, 70–72.

The Petitioner presents various other arguments related to the 2006 CD within this claim. For example, the Petitioner asserts that the emission limits, test methodology, and parametric monitoring established through the CD process were inextricably linked. *Id*. at 88–89. Accordingly, the Petitioner argues that changing the monitoring associated with these units (both the scrubber liquid temperature and the scrubber inlet testing requirements) would also necessitate changes to the associated limits. *Id*. at 89. The Petitioner introduces this argument not to suggest that the underlying limits *should* be adjusted, but rather to support its argument that the monitoring changes should *not* be imposed in the current title V permit. *See id*. at 90.

The Petitioner acknowledges NDEE's position that the CD did not discuss any monitoring or control requirements, but claims that NDEE's response fails to account for the history and purpose of the relevant limits. *Id*. at 91 (citing RTC at 31). The Petitioner also contests any suggestion by NDEE that the state could alter the requirements of the CD because the CD has been terminated. *Id*. at 91–92. Moreover, the Petitioner asserts that NDEE did not consider whether it has authority to alter the monitoring established in the construction permit that implemented the CD, and further claims that "[i]f any party to the Consent Decree, including the State of Nebraska, thought the established requirements were not enough to demonstrate compliance, the time to raise those concerns was before Consent Decree termination." *Id*. at 92.

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

The issues raised in Claim D either restate or elaborate on arguments presented as support for Claims A, B, and C. The Petitioner does not present any separately identifiable basis for objection within Claim D that was not already presented in—and addressed by EPA's response to—Claims A, B or C. Accordingly, Claim D is denied.

Nonetheless, in order to provide clarity, EPA will address several of the Petitioner's CD-focused remarks. Overall, the fact that certain VOC limitations and monitoring requirements were initially established in the 2006 CD has little bearing on the issues addressed in Claims A and B. As an initial matter, the CD itself has since been terminated, so it is the 2012 preconstruction permit that includes the relevant terms from the CD—and *not* the CD itself—that establishes the "applicable requirements" that must be included in the title V permit. *See* 40 C.F.R. § 70.2 (definition of "applicable requirement"). Perhaps more importantly, NDEE's authority to establish monitoring in a title V permit beyond that which is contained in an underlying applicable requirement (whether a consent decree or a preconstruction permit) is well-established, as discussed in EPA's response to Claims A and B.[56] In general, requiring a facility to monitor an additional parameter, or to maintain operating conditions similar to those during a stack test, does not amount to changing the underlying requirements of the 2006 CD or preconstruction permit. See EPA's response to Claims A and B.

[56] *See supra* note 48 and accompanying text. Additionally, to the extent the Petitioner's argument is based on the premise that negotiated CDs inherently reflect a full and complete embodiment of all relevant applicable requirements or necessary monitoring provisions—*i.e.*, a ceiling to the requirements to which a source may be subject—EPA disagrees. The scope of requirements addressed by a CD is defined on a case-by-case basis within each CD. Moreover, regardless of any requirements established in a CD, the title V permitting process may always be used to establish additional compliance assurance provisions (like monitoring) where necessary.

To the extent changing a testing location could be viewed as changing the stringency of the underlying limits established in the 2006 CD or 2012 preconstruction permit (CP08-065), see EPA's response to Claim C.

Claim E: The Petitioner Claims That "NDEE Fails to Identify Sources of Authority that Would Justify the Imposition of New Substantive Requirements and NDEE Does Not Satisfy the Threshold Requirement for Imposing Supplemental Monitoring Requirements."

Petitioner's Claim: The Petitioner begins Claim E by reiterating its overarching claims, presented in Claims A, B, and C, that NDEE lacks authority to establish the permit terms related to scrubber liquid temperature monitoring, scrubber liquid temperature "controls," and scrubber inlet testing. *Id*. at 93. More specifically, within Claim E, the Petitioner claims that the Permit does not satisfy 40 C.F.R. § 70.6(a)(1)(i), which requires that each permit "specify and reference the origin of and authority for each term or condition." *Id*. For similar reasons, the Petitioner also claims that NDEE did not satisfy 40 C.F.R. § 70.7(a)(5), which requires that "the permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." *Id*.

The Petitioner first addresses the authorities cited for the scrubber liquid temperature monitoring and "control" requirements. *See id*. at 93–95; *see also id*. at 68 (within Claim B). Regarding the Permit's reference to "Construction Permit #CP19-125," the Petitioner states that this underlying permit contains no requirement to control or monitor scrubber inlet temperature. *Id*. at 94. Regarding the Permit's reference to "Title 129, Chapter 8, Section 004.01," the Petitioner observes that this regulation mirrors EPA's regulation at 40 C.F.R. § 70.6(a)(3)(i)(B) (which NDEE cited in its Fact Sheet). *Id*. at 94. The Petitioner states these requirements are applicable only where there is no periodic monitoring in an underlying requirement, and asserts this is not the case here, where NDEE has supplemented existing periodic monitoring. *Id*. at 94–95. Regarding the Permit's reference to "Title 129, Chapter 8, Section 012.01," the Petitioner observes that this regulation mirrors EPA's regulation at 40 C.F.R. § 70.6(c)(1) (which NDEE cited in its Fact Sheet and RTC). *Id*. at 95. The Petitioner asserts that NDEE did not follow the appropriate requirements and procedures to impose additional requirements under this authority, for the reasons detailed in Claims A and B. *Id*. Regarding the Fact Sheet's additional reference to 40 C.F.R. § 63.8(a), the Petitioner asserts (among other things) that this regulation applies to specific HAP regulations and is not relevant to the emission units at issue here. *Id*. Regarding NDEE's reference to 129 NAC Ch. 8 § 013 within the state's RTC, the Petitioner claims that NDEE provides no support for its assertion that the scrubber liquid temperature control and monitoring requirements are necessary to protect public health or the environment. *Id*. at 94 n.62. Moreover, the Petitioner asserts that this authority was not cited in the Permit or the Fact Sheet, as is required. *Id*. (citing 40 C.F.R. § 70.6(a)(1)(i)).

The Petitioner next addresses the authorities cited for the VOC and HAP scrubber inlet testing requirements. *See id*. at 95–97; *see also id*. at 75 (within Claim C). Regarding the Permit's reference to "Title 129, Chapter 8, Section 004.01," the Petitioner reiterates its argument earlier that this regulation, as well as 40 C.F.R. § 70.6(a)(3)(i)(B), are not relevant here because the

applicable requirements associated with the seven emission points in question already included periodic monitoring and testing requirements. *Id*. at 96–97. Regarding the Permit's reference to "Title 129, Chapter 8, Section 012.01,"[57] the Petitioner reiterates that that this regulation (and 40 C.F.R. § 70.6(c)(1), on which it is based) do not provide the authority to impose new substantive requirements, for the reasons detailed in Claim C. *Id*. at 97. Regarding the Permit and RTC's reference to "Title 129, Chapter 34, Section 001" and the RTC's reference to Section 004, the Petitioner claims that NDEE does not explain how these provisions authorize the scrubber inlet testing conditions. Specifically, the Petitioner asserts that NDEE does not assert that "it has reason to believe . . . that existing emissions exceed the limitations required in these control regulations" and does not include in the record any "estimates of potential contaminant emissions rates from the source and due consideration of probable efficiency of any existing control device, or visible emission determinations made by an official observer" giving rise to a belief that these emission points exceed their existing permitted limits." *Id*. (quoting 129 NAC Ch. 34 § 001). Moreover, the Petitioner argues that even if this authority could authorize testing requirements, it still would not authorize shifting the compliance demonstration point to the scrubber inlet. *Id*.

The Petitioner concludes that "NDEE has failed to fulfill its requirement to specify the legal basis for the scrubber liquid temperature control and monitoring conditions and inlet testing and compliance demonstration requirements in the Permit." *Id*. (citing 40 C.F.R. § 70.6(a)(1)(i); 40 C.F.R. § 70.7(a)(5)).

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

EPA denies Claim E to the extent it challenges the legal authority underlying the scrubber liquid temperature monitoring and "control" requirements applicable to units EP-7, EP-7A, and EP-12. Among other provisions, the Permit identifies 129 NAC Ch. 8 § 012 as the source of authority for those permit terms. Final Permit at 37–38, 44, 82. This state regulation is EPA-approved state law equivalent of 40 C.F.R. § 70.6(c)(1); both are based on CAA § 504(c). See EPA's response to Claims A and B. The Permit's reference to this regulation is sufficient to satisfy the requirement to "specify and reference the origin of and authority for each term or condition," per 40 C.F.R. § 70.6(a)(1)(i).[58] Similarly, the discussion of legal authorities contained in the Permit, the Fact Sheet, and the RTC are sufficient to satisfy the requirement to include "a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)," per § 70.7(a)(5). Accordingly, Claim E is denied

[57] The Petition contains a bullet-item reference to "Title 129, Chapter 8, Sections 004.012." Petition at 96. This appears to be a typographical error, as the permit term refers to "Section[] 012" and the text of the Petition focuses on Section 012.01. Final Permit at 49; Petition at 97.

[58] Two additional points regarding 40 C.F.R. § 70.6(a)(1)(i) bear mention: First, even if the Permit also identified other legal authorities that are less directly relevant to the permit terms at issue, that would not mean that NDEE failed to satisfy § 70.6(a)(1)(i). Second, EPA observes that NDEE cites at least one additional authority in its RTC to support the scrubber liquid temperature requirements: 129 NAC Ch. 8 § 013. *See, e.g.*, RTC at 15. However, as the Petitioner acknowledges, because the Permit itself does not cite that authority, EPA need not address that authority for purposes of determining whether the Permit satisfies 40 C.F.R. § 70.6(a)(1)(i), as this regulation imposes requirements regarding the content of the Permit itself.

with respect to the scrubber liquid temperature requirements applicable to units EP-7, EP-7A, and EP-12.

EPA grants Claim E to the extent it challenges the legal authority underlying the scrubber inlet testing requirements applicable to units EP-8A, EP-10, EP-66, and EP-67. The Permit identifies 129 NAC Ch. 8 §§ 004.01B and 012 and Ch. 34 § 001 as the authorities for the relevant testing requirements. Final Permit at 49, 71, 214, 219.[59]

As an initial matter, EPA agrees with the Petitioner that 129 NAC Ch. 8 § 004.01B—and its federal equivalent, 40 C.F.R. § 70.6(a)(3)(i)(B), as referenced in NDEE's RTC—are not relevant here, as those regulations only apply when an underlying requirement contains no periodic monitoring requirements.

Additionally, as explained with respect to Claim C, to the extent the Permit effectively changes the point of compliance from after a control device to before a control device, such a change could constitute a revision to the underlying VOC emission limits. That type of change would not be authorized by CAA § 504(c), 40 C.F.R. § 70.6(c)(1), or 129 NAC Ch. 8 § 012.01.

Finally, although 129 NAC Ch. 34 § 001 appears to provide NDEE with relatively broad authority with respect to stack testing, nothing in that regulation appears to provide the state with authority to change the testing location in a manner that fundamentally changes the point of compliance and the stringency of the underlying emission limits.

Given the lack of clarity in the permit record regarding whether and to what extent the scrubber inlet testing requirements actually constituted a change to the underlying emission limits (as discussed in Claim C), EPA cannot determine whether the Permit's references to 129 NAC Ch. 8 § 012 and Ch. 34 § 001 satisfy 40 C.F.R. § 70.6(a)(1)(i). *See* 40 C.F.R. § 70.8(c)(3)(ii).[60] Accordingly, EPA grants Claim E on this issue.

Direction to NDEE: NDEE must ensure that each permit term identified by the Petitioner is supported by—and that the Permit cites to— appropriate legal authority. EPA expects that NDEE's revisions to the Permit and/or permit record required by EPA's objection in Claim C will also resolve the legal authority citation issues discussed in Claim E.

Claim F: The Petitioner Claims That "NDEE Improperly Seeks to Use the Title V Permitting Process to Circumvent Rulemaking Requirements."

Petitioner's Claim: In Claim F, the Petitioner reiterates its allegation from Claim A that NDEE failed to conduct a source-specific analysis of the necessary monitoring and instead imposed permit conditions based on statewide policies. Petition at 98; *see id*. at 18–19 (within Claim A).

[59] EPA observes that NDEE cites at least one additional authority in its RTC to support the scrubber inlet testing requirements: 129 NAC Ch. 34 § 004. *See* RTC at 25. Again, EPA need not address that authority for purposes of determining whether the Permit satisfies 40 C.F.R. § 70.6(a)(1)(i), as this regulation imposes requirements regarding the content of the Permit itself. *See supra* note 58.

[60] Given that EPA is granting this claim with respect to 40 C.F.R. § 70.6(a)(1)(i), EPA need not resolve whether the authority issues implicated by Claim C and this part of Claim E resulted in NDEE not satisfying 40 C.F.R. § 70.7(a)(5).

In attempting to apply statewide policies through the title V permitting process, the Petitioner argues that NDEE circumvented the rulemaking requirements of the Nebraska Administrative Procedures Act (APA). *Id*. at 98. The Petitioner also asserts that NDEE's decision to impose additional monitoring is contrary to the Nebraska Governor's Executive Order No 17-04, which states: "Any regulation deemed to be more restrictive than required under state or federal law or creates an undue burden on Nebraskans, shall be revised or repealed pursuant to the Nebraska Administrative Procedure Act." *Id*. at 98–99 (citing Petition Ex. 42).

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

The CAA provides EPA with authority to object to permits that contain provisions "not in compliance with the applicable requirements of [the CAA], including the requirements of an applicable implementation plan." 42 U.S.C. § 7661d(b)(1), (2). EPA's regulations define "applicable requirement" to include specific types of federal and EPA-approved state authorities (*e.g.*, EPA-approved SIP requirements). *See* 40 C.F.R. § 70.2. In addition to "applicable requirements" established in other CAA programs, EPA's regulations clarify that EPA's objection authority also extends to the title V permitting requirements contained in 40 C.F.R. part 70 (often described as "part 70 requirements"). 40 C.F.R. §§ 70.8(c)(1), 70.12(a)(2), 70.12(a)(2)(ii). In sum, EPA's objection authority is confined to CAA-based requirements and does not apply to other federal, state, or local programs.

Here, the Petitioner claims that EPA must object based on alleged violations of the Nebraska APA[61] and a Nebraska Executive Order. Neither of those state authorities reflect federally enforceable "applicable requirements" or part 70 requirements. Thus, whether NDEE satisfied (or violated) these state authorities in issuing the Permit is strictly a matter of state law, and not an issue that EPA can or will address through the title V petition process. *See, e.g.*, *In the Matter of Salt River Project Agricultural Improvement and Power District, Agua Fria Generating Station*, Order on Petition No. IX-2022-4 at 14 (July 28, 2022) (*SRP Agua Fria Order*). Because the Petitioner has not cited any applicable requirement with which the Permit allegedly does not comply or assure compliance, EPA denies Claim F. 40 C.F.R. § 70.12(a)(2)(ii).

Claim G: The Petitioner Claims That "NDEE Improperly Relies on 'Guidance' that is Procedurally and Substantively Flawed."

Petitioner's Claim: In Claim G, the Petitioner asserts that NDEE's process for issuing the Permit was procedurally flawed due to NDEE's improper reliance on guidance documents in establishing what the Petitioner characterizes as "substantive monitoring requirements." Petition at 99. For support, the Petitioner cites the Nebraska APA, which states that guidance documents may not "impose additional requirements or penalties on regulated entities" and that "[a] guidance document shall not give rise to any legal right or duty or be treated as authority for any standard, requirement, or policy." *Id*. (quoting Neb. Rev. Stat. 84-901.03(2), 84-901(5)). The Petitioner also addresses NDEE's response to comments regarding this claim.

[61] Within Claim F, the Petitioner provides no specific citations to any particular provision in the Nebraska APA, but instead refers to this statute generally. *See* Petition at 98–99. Elsewhere in the Petition, the Petitioner cites Neb. Rev. Stat. 84-901.03(2), 84-901(5), and 84-907.4(3) (specific Nebraska APA provisions). *See* Petition at 59, 99, 100.

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

Here, similar to Claim F, the only authority cited by the Petitioner to support its request for an EPA objection is the Nebraska APA. This state statute is not a federally enforceable "applicable requirement" under the CAA. Thus, whether NDEE satisfied (or violated) this state requirement in issuing the Permit is strictly a matter of state law, and not an issue that EPA can or will address through the title V petition process. *See, e.g.*, *SRP Agua Fria Order* at 14. Because the Petitioner has not cited any applicable requirement with which the Permit allegedly does not comply or assure compliance, EPA denies Claim G. 40 C.F.R. § 70.12(a)(2)(ii).

Claim H: The Petitioner Claims That "NDEE's Procedure for Issuing the Permit was Flawed Because NDEE Fails to Respond to All Significant Comments and Thus Did Not Comply with Title V or its Regulations."

Petitioner's Claim: In Claim H, the Petitioner asserts that NDEE did not consider or respond to numerous significant comments raised by Cargill. Petition at 100 (citing 40 C.F.R. § 70.7(h)(6)); *see id*. at 15.[62] The Petitioner does not, within Claim H, identify the specific comments to which NDEE failed to respond. Instead, the Petitioner alludes to instances of this alleged failure to respond presented elsewhere in the Petition, as well as arguments contained in an Addendum to the Petition (an 11-page document dedicated to this issue). *Id*. These alleged failures relate to the issues raised in Claims A–D.

With respect to the issues raised in Claim A, the Petitioner claims that NDEE failed to respond to Cargill's comments regarding NDEE's generic rationales and the lack of a source-specific analysis, alleging various deficiencies in NDEE's responses. Addendum at 1. The Petitioner claims that NDEE did not substantively respond to specific comments related to the monitoring factors addressed in Claim A (*e.g.*, variability of emissions, likelihood of violation, purpose of existing emission controls, requirements for similar units at other facilities). *See* Petition at 34, 38, 40, 45; Addendum at 1–5. The Petitioner claims that NDEE did not respond to specific comments related to other factors or information upon which NDEE relied (*e.g.*, source of water supply). *See* Petition at 50–51; Addendum at 5–6. The Petitioner claims that NDEE did not respond to specific comments related to the scientific literature and other data used to support NDEE's decision. *See* Petition at 57–58, 63, 66; Addendum at 6–7.

With respect to the issues raised in Claim B, the Petitioner claims that NDEE did not respond to comments arguing that imposing scrubber liquid temperature controls would reflect a new substantive requirement—in excess of NDEE's authority—that would fundamentally change and reopen the BACT determinations underlying the relevant VOC emission limits as well as conditions established in the 2006 CD. *See* Petition at 70, 71–72; Addendum at 7–9.

[62] The Petitioner also cites *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) and a specific provision of the Nebraska APA: Neb. Rev. Stat. § 84-907.4(3).

With respect to the issues raised in Claim C, the Petitioner claims that NDEE did not respond to comments arguing that the VOC/HAP scrubber inlet testing requirement is a new substantive requirement—in excess of NDEE's authority—that changed the stringency of the relevant emission limits. Petition at 76; Addendum at 9. More specifically, the Petitioner argues that NDEE did not respond to comments that the compliance demonstration point historically had been the scrubber outlet, as reflected in test plans approved by NDEE. Petition at 82; Addendum at 9. The Petitioner also asserts that NDEE did not respond to comments that there are no federally enforceable HAP emission limits applicable to the scrubbers. Addendum at 10.

With respect to the issues raised in Claim D, the Petitioner claims that NDEE did not respond to comments regarding the emission points included in the CD (and accompanying construction permit). *See* Petition at 90–92; Addendum at 10–11.

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

As an initial matter, EPA's regulations, as revised in 2020, require:

> Any arguments or claims the petitioner wishes the EPA to consider in support of each issue raised must be contained within the body of the petition, or if reference is made to an attached document, the body of the petition must provide a specific citation to the referenced information, along with a description of how that information supports the claim. In determining whether to object, the Administrator will not consider arguments, assertions, claims, or other information incorporated into the petition by reference.

40 C.F.R. § 70.12(a)(2). Some of the specific "arguments or claims" related to NDEE's alleged failure to respond to comments are presented exclusively within the Addendum to the Petition and are not identified within the Petition itself. EPA is not obligated to consider such arguments. *Id*. The remainder of the Petitioner's specific arguments or claims are scattered throughout Petition Claims A through D and are not specifically identified within Claim G. EPA's overall responses to Claims A through D effectively address the RTC-focused aspects of those claims. Nonetheless, in the interests of clarity, EPA will address the Petitioner's RTC-focused allegations as they relate to Claims A through D.

EPA's regulations require: "The permitting authority must respond in writing to all significant comments raised during the public participation process . . . ." 40 C.F.R. § 70.7(h)(6).[63] Resolving allegations that a state failed to respond to comments involves determining whether a comment is a "significant comment." This term is not defined in EPA's regulations and must be evaluated on a case-by-case basis. However, in promulgating this regulatory requirement, EPA discussed various considerations that guide this inquiry, based on a long history of agency practice and administrative law from federal courts. *See* 85 Fed. Reg. 6431, 6440 (February 5, 2020) (discussing various court decisions). For example, the D.C. Circuit has explained that

[63] EPA's response addresses the federal requirements related to this topic and does not address whether NDEE complied with a similar provision in the Nebraska APA, which is not federally enforceable. See EPA's response to Claims F and G.

significant comments are those "which, if true, raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule." *Home Box Office* v. *FCC*, 567 F. 2d 9, 35 n.58 (D.C. Cir. 1977). Put another way, comments that "may not be relevant or material to the permitting proceeding" are not significant and do not require a response. 85 Fed. Reg. at 6440.

With respect to the scrubber liquid temperature requirements related to Claims A and B and the CD-focused discussion in Claim D, EPA denies Claim H. To start, EPA acknowledges that Cargill's public comments addressing the scrubber liquid temperature monitoring and "control" requirements represented "significant comments" that warranted a response from NDEE. However, NDEE provided responses addressing the commenter's overarching concerns, underlying legal authorities, and many of the fact-specific issues raised in public comments (as well as other fact-specific issues not raised in public comments). The Petitioner now faults NDEE for its alleged failure to fully respond to a number of specific facts or sub-arguments raised in those comments, as well as other specific sub-arguments related to the 2006 CD. Even if true, the Petitioner has not demonstrated that any such alleged failure ran afoul of 40 C.F.R. § 70.7(h)(6). More specifically, given NDEE's broad authority to establish additional monitoring requirements pursuant to its regulations implementing CAA § 504(c), the Petitioner has not demonstrated that any of the specific technical considerations at issue would have provided a basis for determining that the Draft Permit needed to be revised. Thus, the Petitioner has not demonstrated that any specific technical sub-arguments to which NDEE did not specifically respond were in and of themselves "significant comments" requiring further, more specific responses from NDEE. 40 C.F.R. § 70.7(h)(6).[64]

With respect to the VOC and HAP scrubber inlet testing requirements related to Claim C, EPA grants Claim H. As explained more fully in EPA's response to Claim C, NDEE did not address several of Cargill's comments implicating key factual and legal issues that are central to assessing the validity of the relevant permit terms. These included comments regarding: (i) whether the scrubbers at issue actually control some VOC emissions, (ii) whether the requirement to test at the scrubber inlet was a change in testing location from prior permit actions or test plan approvals, and (iii) the authority for establishing federally enforceable HAP testing requirements in the absence of any federally enforceable HAP limits. EPA finds that such comments were "significant" and warranted a response from NDEE. 40 C.F.R. § 70.7(h)(6).

Direction to NDEE: NDEE must supplement the permit record to more fully address the comments relevant to Claim C regarding the VOC and HAP scrubber inlet testing requirements. EPA expects that NDEE's revisions to the permit record required by EPA's objection in Claim C will also resolve the inadequate RTC issues discussed in Claim H.

[64] *See also SRP Agua Fria Order* at 13 n.27 ("The Petitioner also claims that MCAQD did not reply to comments raising this issue. However, MCAQD did respond to the overarching public comments asserting that production or operating limits were necessary. Given that it is not clear how or why this particular factual argument is relevant to the overarching Petition claim or the sufficiency of the Permit, it is not clear that this was a "significant comment" warranting a specific response from MCAQD." (internal citations omitted)); *In the Matter of Salt River Project Agricultural Improvement and Power District, Desert Basin Generating Station*, Order on Petition No. IX-2022-3 at 23 n.42 (July 28, 2022) (same).

Claim I: The Petitioner Claims "Errata: NDEE's Inconsistent Language Regarding Compliance Assurance Monitoring ('CAM') Plans Creates Regulatory Uncertainty."

Petitioner's Claim: In Claim I, the Petitioner asserts that NDEE's Fact Sheet contains language erroneously suggesting that certain CAM plans are insufficient, creating regulatory uncertainty for the Cargill Blair facility. Petition at 101. More specifically, the Petitioner observes that NDEE stated the following:

> The CAM plans submitted by Cargill for these emission-units meet the minimum requirements for CAM plans as shown in guidance documents from EPA (only 2 indicators shown in example). NDEE has determined additional parameter monitoring (more than 2 indicators) is necessary to demonstrate continuous compliance with VOC/HAP limitations. Pursuant to 40 CFR 64.6(b), the CAM plans are being included in the operating permit on condition that Cargill collect additional data to confirm the ability of the monitoring to provide data that are sufficient and to confirm the appropriateness of an indicator range(s) or designated condition(s).

Id. (quoting Fact Sheet at 38).

The Petitioner raises various points relating to NDEE's statement. The Petitioner asserts that monitoring established in CAM plans is, by default, deemed sufficient to assure compliance under title V regulations. *Id*. The Petitioner also asserts that NDEE previously found the CAM plans to meet the requirements of the CAM rule and questions NDEE's suggestion that it did not previously approve the CAM plans. *Id*. at 101–102. The Petitioner expresses concerns that it is unclear whether complying with the CAM plans will demonstrate compliance with the permit terms. *Id*. at 102. The Petitioner states that it does not know whether NDEE will seek to reopen the CAM plans or the Permit to add new requirements. *Id*. Based on these alleged inconsistencies and uncertainties, the Petitioner requests that EPA object to the Permit "so NDEE can clarify the status of the CAM Plans." *Id*.

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

This "claim" raises various questions and issues for which the Petitioner desires more information and/or clarity from NDEE. However, the Petitioner's general concerns are not presented alongside any allegation that the Permit, permit record, or permit process is not in compliance with the requirements of the Act or part 70. 40 C.F.R. § 70.12(a)(2). Thus, this claim presents no basis for EPA's objection and is denied.

Claim J: The Petitioner Claims That "EPA's Review of the Permit in Response to the Petition is . . . Distinct From its Prior Review During the Comment Period."

Petitioner's Claim: In Section J of the Petitioner's "Grounds for Objection," the Petitioner observes that EPA Region 7 previously provided comments to NDEE regarding the Permit, and

requests that EPA reconsider certain statements made in those comments. Petition at 102–103. The Petitioner specifically identifies certain parts of EPA's comment letter with which the Petitioner takes issue, and observes that these issues are related to specific portions of Claims A and G. *See id.* at 103. The Petitioner "requests that EPA conduct an independent and distinct review of these issues in evaluation of this petition." *Id.*

EPA's Response: As an initial matter, it is not clear why the Petitioner included this discussion as a separate section within its "Grounds for Objection" to the Permit. Section IV.J of the Petition does not contain any allegation that the Permit, permit record, or permit process is not in compliance with the requirements of the Act or part 70. 40 C.F.R. § 70.12(a)(2). Thus, to the extent this could be considered a separate claim requesting EPA's objection, it is denied.

Nonetheless, EPA observes that its review of and response to the Petitioner's other claims in this order, including Claims A and G, were conducted independently following the framework provided by CAA § 505(b)(2). This review was distinct from EPA's submission of comments during the public comment period on the Draft Permit.

V. CONCLUSION

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

Dated: FEB 16 2023

Michael S. Regan
Administrator