

**BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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Petition No. IV-2024-1

In the Matter of

DCP Operating Company L.P., Mobile Bay Gas Treating & Processing Facility

Permit No. 503-8085

Issued by the Alabama Department of Environmental Management

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

**I. INTRODUCTION**

The U.S. Environmental Protection Agency (EPA) received a petition dated January 8, 2024 (the Petition) from Mobile Environmental Justice Action Coalition and GASP (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to operating permit No. 503-8085 (the Renewal Permit) issued by the Alabama Department of Environmental Management (ADEM) to the DCP Operating Company L.P., Mobile Bay Gas Treating and Processing Facility (Mobile Bay) in Mobile County, Alabama. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and Chapter 335-3-16 of the Alabama Administrative Code. *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also known as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Renewal Permit, the permit record, and relevant statutory and regulatory authorities, and as explained in Section IV of this Order, the EPA grants in part and denies in part the Petition requesting that the EPA Administrator object to the Renewal Permit. Specifically, the EPA grants Claim 2 and denies Claim 1.

**II. STATUTORY AND REGULATORY FRAMEWORK**

**A. Title V Permits**

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. The EPA granted interim approval of ADEM's title V operating permit program in 1995, 60 Fed. Reg. 57346 (Nov. 15, 1995), and the EPA granted full approval of ADEM's title V program in 2001. 66 Fed. Reg. 54444 (Oct. 29, 2001). This program, which

became effective on November 28, 2001, is codified in Chapter 335-1-7 (“Operating Permit Fees”) and Chapter 335-3-16 (“Operating Permit Regulations for Major Sources”) of the Alabama Administrative Code.

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. 40 C.F.R. § 70.1(b); 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. 32250, 32251 (July 21, 1992). Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the source’s emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements.

## **B. Review of Issues in a Petition**

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

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 the EPA to consider in support of each issue raised must generally be contained within the body of the petition.<sup>1</sup> *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).

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<sup>1</sup> 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.*

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).<sup>2</sup> Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.<sup>3</sup> 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)).<sup>4</sup> When courts have reviewed the EPA’s interpretation of the ambiguous term “demonstrates” and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g., MacClarence*, 596 F.3d at 1130–31.<sup>5</sup> 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 the EPA’s proposed petitions rule. *See* 81 Fed. Reg. 57822, 57829–31 (Aug. 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*).

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether 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, the 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

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

<sup>3</sup> *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.

<sup>4</sup> *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)).

<sup>5</sup> *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

persuasive.”).<sup>6</sup> Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (Jan. 15, 2013).<sup>7</sup> Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g., In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).<sup>8</sup>

Another factor the 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.<sup>9</sup> This includes a requirement that petitioners address the permitting authority’s final decision and final reasoning (including the state’s response to comments) where these documents were available during the timeframe for filing the petition. 40 C.F.R. § 70.12(a)(2)(vi). Specifically, the petition must identify where the permitting authority responded to the public comment and explain how the permitting authority’s response is inadequate to address (or does not address) the issue raised in the public comment. *Id.*

The information that the 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

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<sup>6</sup> *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (Sept. 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*).

<sup>7</sup> *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 (Apr. 20, 2007); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (Jan. 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 (Mar. 15, 2005).

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

<sup>9</sup> *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 (Dec. 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).

during the agency's review of a petition on a proposed permit, those documents may also be considered when determining whether to grant or deny the petition. *Id.*

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

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

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

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

### **III. BACKGROUND**

#### **A. The Mobile Bay Facility**

The Mobile Bay facility, located in Mobile County, Alabama, consists of one natural gas liquids (NGL) processing train that separates NGLs from a high methane residue gas product. The NGLs are treated

and delivered for sale via an interstate pipeline. The facility is a major source of sulfur dioxide , nitrogen oxides, carbon monoxide, volatile organic compounds, and hazardous air pollutants. The facility also has fugitive emissions of particulate matter (PM), also known as fugitive dust, from unpaved roads.

**B. Permitting History**

DCP Operating Company L.P. first obtained a title V permit for the Mobile Bay facility in 2002, which was subsequently renewed. On February 24, 2022, DCP Operating Company L.P. applied for a title V permit renewal. ADEM published notice of a draft permit on July 20, 2023, subject to a public comment period that ran until August 21, 2023. On September 25, 2023, ADEM submitted the Proposed Permit, along with its responses to public comments (RTC), to the EPA for its 45-day review. The EPA’s 45-day review period ended on November 9, 2023, during which time the EPA did not object to the Proposed Permit. ADEM issued the final title V renewal permit for the Mobile Bay facility on December 6, 2023.

**C. Timeliness of Petition**

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The EPA’s 45-day review period expired on November 8, 2023. Thus, any petition seeking the EPA’s objection to the Renewal Permit was due on or before January 8, 2024. The Petition was received January 8, 2024, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

**D. Environmental Justice**

The EPA used EJScreen<sup>10</sup> to review key demographic and environmental indicators within a five-kilometer radius of the DCP Mobile Bay facility. This review showed a total population of approximately 1,631 residents within a five-kilometer radius of the facility, of which approximately 9 percent are people of color and 46 percent are low income. In addition, the EPA reviewed the EJScreen Environmental Justice Indices, which combine certain demographic indicators with 13 environmental indicators. The following table identifies the Environmental Justice Indices for the five-kilometer radius surrounding the facility and their associated percentiles when compared to the rest of the State of Alabama.

<b>EJ Index</b>	<b>Percentile in State</b>
Particulate Matter 2.5	20
Ozone	67
Diesel Particulate Matter	40
Air Toxics Cancer Risk	0
Air Toxics Respiratory Hazard	6
Toxic Releases to Air	36

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

Traffic Proximity	36
Lead Paint	56
Superfund Proximity	58
RMP Facility Proximity	66
Hazardous Waste Proximity	35
Underground Storage Tanks	36
Wastewater Discharge	58

#### IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

##### **Claim 1: The Petitioners Claim That “The Renewal Permit Does Not Include the Specific and Detailed Measures for Control of Fugitive Emissions from the Unpaved Roads.”**

**Petition Claim:** The Petitioners claim that the Renewal Permit is deficient because it does not include specific and detailed requirements to control fugitive dust from unpaved roads at the facility, which must be included to assure compliance with the SIP requirements at Ala. Admin. Code r. 335-3-4-.02. Petition at 8. The Petitioners assert that the SIP requires that the facility prevent fugitive PM and specifically prohibits the facility from “(1) operating without taking reasonable precautions to prevent fugitive dust emissions, including from the use of the roads within it, and (2) allowing visible fugitive dust emissions beyond the lot line of the source.” *Id.* at 8–9 (citing Ala. Admin. Code r. 335-3-4-.02).

The Petitioners contend that despite the SIP limitation on fugitive dust being an applicable requirement, the Renewal Permit as a whole only contains requirements that reiterate the requirements in the SIP by requiring roads at the facility be “maintained in the following manner so that dust will not become airborne” using one or a combination of several methods. *Id.* at 9 (quoting General Permit Proviso 18). The Petitioners then cite those methods, which includes the application of water to road surfaces, reducing traffic speed, paving, application of binders, and other unspecified “alternative methods.” *Id.* (citing General Permit Proviso 18). The Petitioners claim that these provisions are general and vague and lack specific and detailed operational requirements to control fugitive dust. *Id.* at 9–10.

The Petitioners then provide a number of examples of purported deficiencies in the Renewal Permit, including: leaving it to the facility to determine when the road is “sufficiently dry” and necessary to apply water, failure to include and define triggers for water suppression activities, failure to specify the frequency at which water must be applied, failure to specify the speed at which vehicular traffic must be reduced to, and lack of specification as to how the facility determines the road surface is found to allow the creation of dust. *Id.* at 10. The Petitioners then cite to the Statement of Basis (SOB), claiming that it merely explains that “[a]ll plant roads are paved or graveled. There are no raw materials, storage piles, products, etc. capable of generating fugitive dust at this facility for this facility” and that “additional specific requirement are not necessary for this facility.” *Id.* (citing SOB at 4).

The Petitioners then assert that the Renewal Permit, Final SOB, and RTC do not provide a reasoned explanation as to how General Permit Proviso 18 contains specific and detailed operational requirements to control fugitive dust on unpaved roads. Additionally, the Petitioners contend that ADEM does not provide a rationale for how General Permit Proviso 18 contains conditions to assure compliance with the SIP requirements at Ala. Admin. Code r. 335-3-4-.02(1), (2) for the facility to take

reasonable precautions to prevent fugitive dust emissions or assure that the facility does not cause or allow fugitive dust beyond the lot line, as required by U.S.C. § 7661c(a), 40 C.F.R. § 70.6(a)(1), and 40 C.F.R. § 70.6(c)(1).<sup>11</sup> *Id.* at 10–11.

The Petitioners claim that EPA has expressly found that “[t]he ‘reasonable precautions’ requirement at Ala. Admin. Code r. 335-3-4-.02(1) is an ‘applicable requirement’ for title V purposes.” *Id.* at 12 (citing *In the Matter of Alabama Power Company, Barry Generating Plant, Mobile County, AL*, Order on Petition No. IV-2021-5 at 15–16 (June 14, 2022) (“*Barry Order*”). The Petitioners contend that the Renewal Permit leaves discretion completely up to the facility to determine the details of what, if any, reasonable precautions to take to control fugitive dust as well as approve any “alternative methods” without the opportunity for public comment. *Id.* The Petitioners assert that the lack of specific operational requirements means that communities, the EPA, and ADEM have no means of tracking these control activities and associated SIP requirements and will be hindered in taking enforcement action. *Id.*

The Petitioners note that they raised these issues in Comment 3 of their public comments, which stated the same points and arguments as in the Petition. *Id.* at 13 (citing Public Comments at 8–10). The Petitioners claim that their comments also included an explanation refuting ADEM’s assertion that gravel roads do not produce dust, citing a US DOT manual that states “all gravel roads will give off dust under traffic because they are ‘unpaved roads’ for which dust is an ‘inherent problem.’” *Id.* (citing U.S. Dept. of Transportation, Federal Highway Administration, *Gravel Roads: Maintenance and Design Manual* at 51 (Nov. 2000)). The Petitioners note that ADEM’s response is almost the same as the language used in the SOB, with the addition of several words that explains that the roads are paved or graveled, “thereby significantly limiting the potential for fugitive dust.” The Petitioners claim that this response is neither consistent with the CAA and regulatory requirements nor responsive to the Petitioner’s significant comments, which ADEM has the obligation to respond to. *Id.* at 15 and 17 (citing 42 U.S.C. § 7661c(a);<sup>12</sup> 40 C.F.R. § 70.6 (a)(1); 40 C.F.R. § 70.6(c)(1); 40 C.F.R. § 70.7(h)(6)). The Petitioners assert that the inadequacy of ADEM’s response presents additional grounds for objection.

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

The EPA has addressed a similar claim in previous orders: *In the Matter of ABC Coke & Walter Coke*, Order on Petition Nos. IV-2014-5 and IV-2014-6 at 5–6 (July 15, 2016) (“*ABC Coke & Walter Coke Order*”) and *In the Matter of Owens-Brockway Glass Container Inc.*, Order on Petition No. X-2020-2 at 17 (May 10, 2021). The *ABC Coke & Walter Coke Order* implicated the same SIP requirement and was denied for similar reasons as discussed here. The Petitioners have not demonstrated that the Renewal Permit lacks specificity regarding the facility’s obligations under the SIP requirements to control fugitive dust to assure compliance with the

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<sup>11</sup> The Petitioners assert that the CAA and EPA regulations requires that “[e]ach permit issued under this subchapter shall include enforceable emission limitations and standards ... and such other conditions as are necessary to assure compliance with the applicable requirements of this chapter, including the requirements of the applicable implementation plan” and that “[e]missions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.” Petition at 11 (citing U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a)(1), (c)(1)).

<sup>12</sup> The Petition cites 72 U.S.C. § 7661c(a); this appears to be a typographical error.

applicable requirement. In fact, General Permit Proviso 18 arguably contains more specific requirements than the SIP, as Ala. Admin. Code r. 335-3-4-.02(1) and (2) provides that:

- (1) No person shall cause, suffer, allow, or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired, or demolished without taking reasonable precautions to prevent particulate matter from becoming airborne. Such reasonable precautions shall include, but not be limited to, the following:
  - (a) Use, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading of roads, or the clearing of land;
  - (b) Application of asphalt, oil, water, or suitable chemicals on dirt roads, materials stock piles, and other surfaces which create airborne dust problems;
  - (c) Installation and use of hoods, fans, and fabric filters (or other suitable control devices) to enclose and vent the handling of dusty materials. Adequate containment methods shall be employed during sandblasting or other similar operations.
- (2) Visible Emissions Restrictions Beyond Lot Line. No person shall cause or permit the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate.

In comparison, General Permit Proviso 18 provides that:

- (a) Precautions shall be taken to prevent fugitive dust emanating from plant roads, grounds, stockpiles, screens, dryers, hoppers, ductwork, etc.
- (b) Plant or haul roads and grounds will be maintained in the following manner so that dust will not become airborne. A minimum of one, or a combination, of the following methods shall be utilized to minimize airborne dust from plant or haul roads and grounds:
  - (1) By the application of water any time the surface of the road is sufficiently dry to allow the creation of dust emissions by the act of wind or vehicular traffic;
  - (2) By reducing the speed of vehicular traffic to a point below that at which dust emissions are created;
  - (3) By paving;
  - (4) By the application of binders to the road surface at any time the road surface is found to allow the creation of dust emissions;
- (c) Should one, or a combination of the above methods fail to adequately reduce airborne dust from plant or haul roads and grounds, alternative methods shall be employed, either exclusively or in combination with one or all of the above control techniques, so that dust will not become airborne. Alternative methods shall be approved by the Department prior to utilization.

Renewal Permit at 8.

While the Petitioners have provided a number of examples of more prescriptive and specific measures to control fugitive dust, the Petitioners have not demonstrated that the ADEM's

inclusion in the Renewal Permit of the general SIP requirement that the facility take reasonable precautions to control fugitive dust—in addition to the specifically identified precautions and corrective action in General Permit Proviso 18—somehow renders the Renewal Permit not in compliance with applicable requirements of the SIP or the requirements of 40 C.F.R. part 70. Also, while the Petitioners claim that the Renewal Permit does not include specific or detailed operational requirements and limitations to assure compliance with Ala. Admin. Code r. 335-3-4-.02(1) and (2), the Petitioners have not demonstrated that the preventative maintenance and corrective actions in General Permit Proviso 18 do not assure compliance with Ala. Admin. Code r. 335-3-4-.02(1) and (2). In this case, it appears ADEM has interpreted the general SIP condition to take “reasonable precautions” to control fugitive dust to be satisfied by the preventative maintenance and corrective action specified in General Permit Proviso 18. In addition to the reasonable precautions prescribed in the Renewal Permit, ADEM also indicated that the roads are either paved or graveled to significantly limit the potential for fugitive dust, and because there are no other possible emission points for fugitive dust, no additional specific requirements are necessary. RTC at 4. The Petitioners have not alleged or demonstrated that these conditions are insufficient at controlling fugitive dust. Therefore, the EPA concludes that the Petitioners have not demonstrated that more specific requirements in the Renewal Permit are necessary for compliance with the applicable fugitive dust control requirements in Alabama’s SIP.

Regarding ADEM’s response to Petitioners’ comments, the Petitioners have not demonstrated that ADEM’s response failed to satisfy 40 C.F.R. § 70.7(h)(6). The Petitioners are correct that it is the responsibility of a permitting authority to respond to all significant comments and that in this instance, the Petitioners’ comments are significant. *See* 40 C.F.R. § 70.7(h)(6). However, ADEM did provide a response to the Petitioners’ comment in its RTC.<sup>13</sup> The Petitioners criticize the brevity of the state’s response. Although ADEM’s RTC was not particularly detailed, it responded to the central issue raised in public comments, and explained why ADEM did not consider it necessary to impose detailed requirements for fugitive dust for this particular facility. ADEM’s response was straightforward because the overall issue is straightforward: the plant roads are paved or graveled and so have a limited potential for generating fugitive dust, and there are no other significant sources of fugitive emissions at this particular facility.

Because the Petitioners have not demonstrated that the fugitive dust requirements in the Renewal Permit are insufficient to assure compliance with the applicable fugitive dust control requirements in Alabama’s SIP, and because the Petitioners have not demonstrated that ADEM’s RTC failed to satisfy 40 C.F.R. § 70.7(h)(6), the EPA denies the Petition with respect to this claim.

**Claim 2: The Petitioners Claim That “The Renewal Permit Does Not Include Monitoring, Recordkeeping, and Reporting Requirements that Assure Compliance with Applicable Requirements for the Unpaved Roads and Assure Federal Enforceability of the Permit.”**

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<sup>13</sup> “All plant roads are paved or graveled, thereby significantly limiting the potential for fugitive dust. There are no raw materials, storage piles, products, etc. capable of generating fugitive dust at this facility. Therefore, no additional specific requirements for fugitive dust are not necessary for this facility.” RTC at 4. The EPA notes a potential typo and understands the last sentence of the cited response to read “Therefore, no additional specific requirements for fugitive dust are necessary for this facility.”

**Petition Claim:** The Petitioners claim that the Renewal Permit is deficient because General Permit Proviso 18 fails to establish monitoring, recordkeeping, or reporting requirements to assure compliance with the SIP requirements at Ala. Admin. Code r. 335-3-4-.02. Petition at 19. The Petitioners assert that the permit record does not provide a reasoned explanation as to how the lack of these requirements assures compliance with the SIP. *Id.* The Petitioners contend that each title V permit must contain monitoring, recordkeeping, and reporting that assure compliance with all applicable requirements. *Id.* (citing 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(3), (c)(1); *In the Matter of Wheelabrator Baltimore, L.P.*, Permit No. 24-510-01886 at 10 (Apr. 14, 2010)). Additionally, the Petitioners claim that under title V, testing, monitoring, and reporting requirements must be included in the title V permit itself. *Id.* at 23 (citing *In the Matter of Valero Refining-Texas, L.P. Valero Houston Refinery*, Order on Petition No. VI-2021-8 at 23 (June 30, 2022)).

The Petitioners also claim that the requirements of a SIP incorporated into a title V permit are applicable requirements, and that the rationale for the selected monitoring requirement must be clear and documented in the permit record. *Id.* at 19–20 (citing 40 C.F.R. § 70.2, C.F.R. § 70.7(a)(5); *In the Matter of United States Steel, Granite City Works*, Order on Petition No. V-2009-03 at 7-8 (Jan. 31, 2011)). Additionally, the Petitioners claim that, “[I]f the applicable requirement contains no periodic monitoring, permitting authorities must add ‘periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit.’” *Id.* at 20 (quoting *In the Matter of CITGO Refining and Chemicals Co., L.P., West Plant, Corpus Christi, TX*, Order on Petition No. VI-2007-01 at 7 (May 28, 2009); 40 C.F.R. § 70.6(a)(3)(i)(B)).

The Petitioners assert that EPA found in the *Barry Order* that when fugitive dust provisions of Alabama’s SIP apply, the title V permit must “include monitoring, recordkeeping, and reporting requirements that assure compliance with the applicable requirement Ala. Admin. Code r. 335-3-4-.02. . . .” *Id.* (quoting *Barry Order* at 16; citing 42 U.S.C § 7661c(a), (c); 40 C.F.R. § 70.6(a)(3), (c)(1)).

The Petitioners note that they raised these issues in Comment 3 of their public comments, which stated the same points and arguments as in the Petition. Petition at 21 (citing Public Comments at 8–10). As in Claim 1, the Petitioners note that ADEM’s response is almost the same as the language used in the SOB, with the addition of several words that explains that the roads are paved or graveled, “thereby significantly limiting the potential for fugitive dust,” which the Petitioners assert is neither consistent with the CAA and regulatory requirements nor responsive to the Petitioner’s comments. *Id.* at 21–22 (quoting RTC at 4).

The Petitioners contend that ADEM’s response fails to explain how the lack of monitoring, recordkeeping, and reporting assures compliance with SIP requirements; specifically, ADEM “does not explain how the lack of monitoring, recordkeeping and reporting will provide the necessary compliance information regarding no fugitive dust emissions and prohibiting fugitive dust emissions from crossing the property line.” *Id.* at 22. Additionally, the Petitioners claim that ADEM’s belief that the potential for fugitive dust is significantly limited because all roads are paved or graveled, is irrelevant to monitoring, recordkeeping, and reporting requirements, and the SIP fugitive dust provisions do not allow ADEM to ignore the monitoring, recordkeeping, and reporting requirements if fugitive dust is significantly limited. *Id.* at 22–23.

The Petitioners then argue that even if the SIP fugitive dust regulations could be interpreted to allow ADEM to ignore the monitoring, recordkeeping, and reporting requirements, ADEM failed to provide a basis for its assertion that the potential for fugitive dust is significantly limited, particularly given the Petitioners' comments and citation to the information regarding gravel roads in the DOT manual cited in Claim 1. *Id.* at 23. The Petitioners claim that the Renewal Permit specifically fails to require the facility to monitor the amount of gravel applied, ensure it is continuously used and effective, keep records of such activity, and report the information to ADEM, and ultimately does not contain any requirements that the facility use gravel on the unpaved roads. *Id.*

The Petitioners assert that ADEM's RTC failed to address significant comments on monitoring, recordkeeping, and reporting. *Id.* at 24. The Petitioners conclude that ADEM has an obligation to supplement the Renewal Permit with specific and detailed monitoring, recordkeeping, and reporting requirements so that the facility can demonstrate continuous compliance with the EPA-approved SIP regulations for fugitive dust, which are title V applicable requirements. *Id.* at 24.

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

The Petitioners have demonstrated that ADEM has failed to respond to significant public comments as required by 40 C.F.R. § 70.7(h)(6). ADEM appears to have not addressed the Petitioner's public comments regarding the need for supplemental monitoring, recordkeeping, and reporting for fugitive dust provisions, and did not provide any response to these concerns in the RTC, simply restating language provided in the SOB. Because ADEM simply has not responded to the voluminous comments submitted on this issue, the record is inadequate for the EPA to determine whether ADEM has an "obligation to supplement the Renewal Permit with specific and detailed monitoring, recordkeeping, and reporting requirements so that the facility can demonstrate continuous compliance with the EPA-approved SIP regulations for fugitive dust," as claimed by the Petitioners. *See* Petition at 24. ADEM's RTC did not address the Petitioners' comments on monitoring, recordkeeping, and reporting related to fugitive dust requirements; thus, the EPA has no basis on which to determine that the Renewal Permit need not include supplemental monitoring, recordkeeping, and reporting. 40 C.F.R. § 70.8(c)(3)(ii). Accordingly, the EPA grants on this claim.

**Direction to ADEM:** ADEM must respond to the significant comments regarding the need for additional monitoring, recordkeeping, and reporting requirements that would assure compliance with the fugitive dust provisions in the Renewal Permit. In some circumstances, it could be reasonable that general permit provisions, such as the fugitive dust provisions here (which are arguably more specific than the requirements laid out in the SIP), could be sufficient to assure compliance with SIP requirements, without the addition of supplemental monitoring, recordkeeping, and reporting.<sup>14</sup> Even if that is the case, ADEM has the obligation to revise the permit record and respond to the Petitioners' comments as required by 40 C.F.R. § 70.7(h)(6).

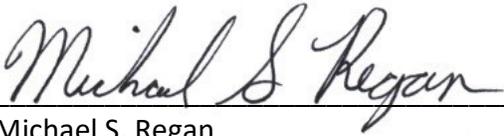
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<sup>14</sup> The EPA has taken the position that permitting authorities generally have broad discretion in determining the nature of any periodic monitoring for generally applicable requirements, which can cover insignificant emission units. *See* White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program at 32–33 (Mar. 5, 1996).

**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: May 10, 2024



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Michael S. Regan  
Administrator