BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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Petition No. IV-2024-5

In the Matter of

Epic Alabama Maritime Assets, LLC, Alabama Shipyard, LLC

Permit No. 503-6001

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 March 28, 2024 (the Petition) from Mobile Environmental Justice Action Coalition and Greater-Birmingham Alliance to Stop Pollution (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. 503-6001 (the Permit) issued by the Alabama Department of Environmental Management (ADEM) to Epic Alabama Maritime Assets, LLC, Alabama Shipyard, LLC (the Alabama Shipyard) in Mobile County, Alabama. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and Chapter 355-3-16 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 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 and objects to the issuance of the Permit. Specifically, the EPA grants Claims 2 and 3, and denies Claims 1 and 4.

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 and Chapter 335-3-16 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.[1] *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).

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

In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).[2] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[3] The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).[4] When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g.*, *MacClarence*, 596 F.3d at 1130–31.[5] Certain aspects of the petitioner's demonstration burden are discussed 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

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

persuasive.").[6] 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).[7] 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).[8]

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

The information that 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

[6] *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*).

[7] *See also Portland Generating Station Order* at 7 ("[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement]."); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (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).

[8] *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.

[9] *See also, e.g.*, *Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. App'x *11, *15 (2d Cir. 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (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 and objects to the issuance of a permit, 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 Alabama Shipyard Facility

The Alabama Shipyard, owned by Epic Alabama Maritime Assets, LLC, is located at 660 Dunlap Drive, Mobile, Alabama. The facility is a shipyard that maintains, overhauls, repairs, converts, and disposes of

ships. The facility is a major source under title V for particulate matter, volatile organic compounds, and hazardous air pollutants.

B. Permitting History

The Alabama Shipyard first obtained a title V permit in 2002. On November 9, 2022, ADEM issued the facility's fourth renewal permit. That permit, along with permits issued to four other facilities, were the subject of two petitions to the EPA filed on January 4, 2023, and January 9, 2023. In response to those two petitions, the EPA issued an Order on September 18, 2023. *In the Matter of Plains Marketing et al.*, Order on Petition Nos. IV-2023-1 & IV-2023-3 (Sept. 18, 2023) (*Plains Marketing et al. Order*). As relevant to the Alabama Shipyard, the EPA's order granted the petitions in part and objected to certain aspects of the renewal permit issued to the Alabama Shipyard. The EPA's order directed ADEM to: (i) address public comments related to, and revise the permit to include necessary elements of, a NESHAP implementation plan; (ii) revise the permit to address conflicting statements in monitoring requirements associated with the Indoor Blasting Unit, Indoor Blasting Machine, and Shape Blasting Line; and (iii) revise the permit record or permit to address issues related to work practice provisos associated with a baghouse connected to the aforementioned emissions units. *Id*. at 52–55.

ADEM revised the permit and permit record in response to the EPA's order, and ADEM's action to modify the Permit is the subject of the present Petition. Specifically, ADEM addressed comments regarding the NESHAP implementation plan and attached this plan to the Permit, and ADEM removed all permit terms related to the Indoor Blasting Unit, Indoor Blasting Machine, Shape Blasting Line, and associated baghouse. ADEM characterized these revisions as a minor modification, which did not include public notice or a public comment period. On December 15, 2023, ADEM submitted a Proposed Permit reflecting these revisions, along with a letter containing ADEM's responses to the EPA's objections (ADEM Response to Objection, Petition Att. 2) and a Statement of Basis (SOB, Petition Att. 5), to the EPA for its 45-day review. The EPA's 45-day review period ended on January 29, 2024, during which time the EPA did not object to the Proposed Permit. ADEM issued the final title V permit modification for the Alabama Shipyard on January 31, 2024.

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 January 29, 2024. Thus, any petition seeking the EPA's objection to the Proposed Permit was due on or before March 29, 2024. The Petition was dated and received on March 28, 2024, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

D. Environmental Justice

The EPA used EJScreen[10] to review key demographic and environmental indicators within a five-kilometer radius of the Alabama Shipyard. This review showed a total population of approximately

[10] 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*.

23,129 residents within a five-kilometer radius of the facility, of which approximately 72 percent are people of color and 51 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.

EJ Index	Percentile in State
Particulate Matter 2.5	82
Ozone	70
Diesel Particulate Matter	91
Air Toxics Cancer Risk	54
Air Toxics Respiratory Hazard	86
Toxic Releases to Air	83
Traffic Proximity	89
Lead Paint	87
Superfund Proximity	80
RMP Facility Proximity	90
Hazardous Waste Proximity	91
Underground Storage Tanks	85
Wastewater Discharge	85

IV. EPA DETERMINATIONS ON PETITION CLAIMS

The Petition includes four claims requesting the EPA's objection; these are found in sections IV.A through IV.D of the Petition. The EPA's Order addresses these claims as Claims 1, 2, 3, and 4.

A. Claim 1: The Petitioners Claim That "ADEM Failed to Follow the Public Participation Procedures and Did Not Provide Public Notice and Opportunity for Comment on the Significant Modifications to the Renewal Permit that Responded to the Administrator's Order."

Petition Claim: The Petitioners claim that ADEM "failed to provide for public notice and an opportunity for comment on the revisions it made to the Renewal Permit and accompanying record in response to the" EPA's *Plains Marketing et al. Order*. Petition at 8; *see id*. at 8–13.

According to the Petitioners, the CAA "requires that the permitting authority provide 'for public notice, including offering an opportunity for public comment and a hearing . . . including applications, renewals, or revisions.'" *Id*. at 11 (quoting 42 U.S.C. § 7661a(b)(6)) (alterations in Petition).[11] The Petitioners offer several reasons for why they believe notice-and-comment was required for the revisions processed in the current permit action.

Throughout this claim, the Petitioners reference the procedures that apply when a permit is reopened for cause. *See* Petition at 2, 5, 8, 9, 10, 11, 12 (citing 40 C.F.R. § 70.7(f)(1)(iii), (f)(2), (f)(3); Ala. Admin.

[11] The Petition attributes the quoted language to 72 U.S.C. § 7661a(b)(6); this appears to be a typographical error.

Code r. 335-3-16-.13(5); Permit General Proviso 13). Specifically, the Petitioners observe that if the EPA determines that a "permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of this permit[,]" then the permit is reopened and "[p]roceedings to reopen and issue a permit shall follow the same procedures as apply to initial permit issuance." *Id*. at 10, 11 (quoting 40 C.F.R. § 70.7(f)(1)(iii), (f)(2); Ala. Admin. Code r. 335-3-16-.13(5)(a)(3), (b)).[12] The Petitioners observe that these procedures include the requirement for public notice and comment. *Id*. at 10, 11–12. The Petitioners allege that the EPA's *Plains Marketing et al. Order* "found that in establishing the terms of the Renewal Permit a mistake was made in excluding the NESHAP implementation plan from the Title V Permit and that there were inaccurate statements regarding permit provisos for the Indoor Blasting Unit and the Shape Blasting Line." *Id*. at 10 (citing *Plains Marketing et al. Order* at 52, 53). The Petitioners therefore conclude that, in responding to the EPA's order, ADEM "was required to reopen the permit" and follow procedures that included public notice and comment. *Id*. at 10, 12.

The Petitioners also repeatedly characterize the changes at issue as "significant modifications" (or similar terminology), which would require public participation. *Id*. at 2, 5, 8, 9, 10, 12, 13. More specifically, the Petitioners allege that the modifications at issue "were 'significant' because they were modifications under the NESHAP regulations and added an updated compliance plan, which had not been included as part of the title V permit in the past." *Id*. at 13 (citing 40 C.F.R. § 70.7(e)(4)(i), Ala. Admin. Code r. 335-3-16-.13(4)). For support, the Petitioners note that ADEM's regulations define significant modifications to include "modifications under the NSPS or NESHAPS regulations." *Id*. (quoting Ala. Admin. Code r. 335-3-16-.13(4)).[13]

The Petitioners acknowledge ADEM's statement that the permit revisions were processed as a minor modification. *Id*. at 9 (citing ADEM Response to Objection). The Petitioners claim that ADEM did not provide a basis for processing these changes as a minor modification, or, alternatively as an administrative permit amendment—the only two procedures that are exempt from public participation requirements. *Id*. (citing 40 C.F.R. § 70.7(e)(2), (d)). In a footnote, the Petitioners briefly address the criteria relevant to minor modifications and administrative permit amendments, stating:

> The modifications ADEM made to the Renewal Permit in response to the Administrator's Order do not meet the requirements in either of these regulations. For example, the modifications make significant changes – i.e., wholesale deletions – to existing monitoring, reporting, and recordkeeping requirements for Emission Units 002, 004, and 006 and thus are not minor permit modifications under 40 C.F.R. § 70.7(e)(2)(i)(A)(2). Nor are ADEM's modifications the correction of typographical errors, incorporation of more frequent monitoring, or other types of minor changes allowed as administrative permit amendments under 40 C.F.R. § 70.7(d)(1).

Id. at 9 n.2.

[12] The first of the two quoted passages comes from 40 C.F.R. § 70.7(f)(1)(iii) and Ala. Admin. Code r. 335-3-16-.13(5)(a)(3), but the Petitioners do not specifically attribute it to that authority.

[13] Relatedly, the Petitioners contest ADEM's decision not to provide public notice because the revisions at issue were "not considered significant." Petition at 8 (quoting SOB at 2). The Petitioners claim that "there is not a category of permitting processing procedures called 'not significant'"; the Petitioners accuse ADEM of "crafting a category to exempt the permit modifications from public participation *out of thin air*." *Id*. at 9 (emphasis in Petition).

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

The majority of the Petitioners' discussion in Claim 1 focuses on requirements related to reopening a permit for cause. Those requirements are not relevant here. In fact, the EPA rejected nearly identical arguments from the same petitioners in the order that gave rise to the current permit action. *Plains Marketing et al. Order* at 57–58.[14]

Here, the Petitioners mischaracterize the effect of *Plains Marketing et al. Order* on the Alabama Shipyard permit. That order did *not* require ADEM to *reopen* the Alabama Shipyard permit for cause pursuant to CAA § 505(e) and 40 C.F.R. § 70.7(f) and (g). Rather, the EPA's order *objected* to the issuance of the Alabama Shipyard permit under CAA § 505(b)(2) and 40 C.F.R. § 70.8. The EPA's order required ADEM to revise the permit in order to resolve EPA's objection and suggested that ADEM follow the appropriate permit modification procedures when making those revisions. Specifically, the EPA explained in the *Plains Marketing et al. Order* (and dozens of other orders that have granted petition claims):

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

Plains Marketing et al. Order at 5–6.

In response to the EPA's order, ADEM did not reopen the permit for cause, and therefore ADEM was not required to follow the procedures associated with reopening. Instead, as the EPA recommended, ADEM processed the changes to the previously finalized renewal permit using a permit modification, and therefore was only required to follow the procedures associated with permit modifications.

As the Petitioners seem to implicitly recognize, the EPA's and ADEM's rules require notice for significant permit modifications, but not minor permit modifications. 40 C.F.R. § 70.7(a)(1)(ii), (h); Ala.

[14] The discussion in the *Plains Marketing et al. Order* dealt with a different facility's permit, but it involved an essentially identical fact pattern. There, the same Petitioners erroneously argued that revisions made by ADEM in response to a prior EPA objection should have been processed with public notice and comment, based on regulatory requirements associated with reopening a title V permit for cause. The EPA explained that "[t]hose regulations are not relevant to the current permitting action. Neither ADEM nor EPA reopened the 2021 UOP Permit for cause. Rather, EPA objected to the 2021 UOP Permit under its authority in CAA § 505(b)(2); 40 C.F.R. § 70.8(d)." *Plains Marketing et al. Order* at 57–58.

Admin. Code r. 335-3-16-.15(4); *see* 40 C.F.R. § 70.4(d)(3)(iv); Ala. Admin. Code r. 335-3-16-.13(4).[15] The present permit action did not follow significant modification procedures, and it was characterized by ADEM as a minor modification. *See* ADEM Response to Objection at 2. Thus, the key question is whether the changes at issue qualified for processing as a minor permit modification (without public notice), or whether they should have been processed as a significant permit modification (with public notice). In a claim like this, a petitioner must demonstrate that the specific changes at issue were required to be processed as a significant modification. This necessarily requires a petitioner to address the criteria governing minor modifications and significant modifications. *See* 40 C.F.R. § 70.7(e)(2), (4); Ala. Admin. Code r. 335-3-16-.13. The Petition contains very little discussion of these criteria.

Regarding the addition of the NESHAP implementation plan to the Permit, the Petition includes a single sentence (along with a citation sentence) explaining why the Petitioners think this change should have been processed as a significant modification. *See* Petition at 13. This Petition argument is based on a criterion in the ADEM rules that requires the use of significant modification procedures for "[m]odifications that are significant modifications under Rules 335-3-14-.04 or 335-3-14-.05 or are modifications under the NSPS or NESHAPS regulations." Ala. Admin. Code r. 335-3-16-.13(4).[16] The Petitioners suggest that adding the NESHAP implementation plan to the Permit constitutes a modification under the NESHAP regulations, but the Petitioners offer no support for this suggestion. In any case, the Petitioners are incorrect. The various types of modifications identified in the cited regulation refer to *physical or operational changes at a facility* that would qualify as a "modification" and trigger additional substantive requirements under the specific CAA programs referenced in this regulation.[17] The addition of the NESHAP implementation plan to the facility's title V permit simply reflects the incorporation of an already existing applicable requirement into the title V permit; this permit revision is not associated with any type of physical or operational change to the facility that would constitute a modification under any of these programs. Thus, the regulatory criterion in Ala. Admin. Code r. 335-3-16-.13(4) is not relevant to whether the present permit action should have been processed as a significant modification.

[15] The Petitioners selectively quote from CAA § 502(b)(6), distorting the meaning of this statutory provision. This statutory provision does not resolve the matter or specifically discuss which types of permit actions require public notice and the opportunity for public comment. *See* 42 U.S.C. § 7661a(b)(6). The EPA's regulations describe the specific types of permit actions that do and do not require public notice. The EPA explained its interpretation of this statutory provision and the basis for these regulations when promulgating the initial title V rules. *See* 57 Fed. Reg. 32250, 32280–32287 (July 21, 1992).

[16] The Petitioners also cite 40 C.F.R. § 70.7(e)(4)(i), an EPA regulation identifying criteria for significant permit modification procedures. This particular EPA regulation does not contain an analogous criterion to the one cited in ADEM's regulations, and the Petitioners do not explain why they believe this EPA regulation is relevant. Nonetheless, other portions of the EPA's regulations contain a similar criterion to the one in ADEM's regulations: minor modification procedures can only be used for changes that "[a]re not modifications under any provision of Title I of the Act." 40 C.F.R. §70.7(e)(2)(i)(A)(*5)*; *see also* Ala. Admin. Code r. 335-3-16-.13(3)(a)(1)(v). The types of modifications listed in ADEM's significant modification criterion are equivalent to the title I modifications referenced in the EPA's (and ADEM's) minor modification criterion.

[17] The reference in Ala. Admin. Code r. 335-3-16-.13(4) to section 335-3-14-.04 refers to physical or operational changes at a facility that constitute a major modification and trigger Prevention of Significant Deterioration requirements; the reference to section 335-3-14-.05 refers to the same types of changes under the Nonattainment New Source Review program. Similarly, the regulation's references to "modifications under the NSPS regulations" refers to certain physical and operational changes, as defined in 40 C.F.R. § 60.2; these changes may give rise to additional obligations described in specific subparts of 40 C.F.R. part 60 that relate to specific types of equipment. There is no regulatory definition of modification with respect to NESHAPs, since NESHAP obligations under 40 C.F.R. part 63 are not triggered by modifications, but rather by construction of new sources or reconstruction.

The Petition contains no further discussion of why the addition of the NESHAP implementation plan to the Permit should not have been processed as a minor modification under any other relevant regulatory criteria. Therefore, the Petitioners fail to demonstrate that this change required a significant permit modification with public notice, and the EPA denies the Petition on this issue.

Regarding the removal of requirements related to the Indoor Blasting Unit, Indoor Blasting Machine, and Shape Blasting Line, the Petition includes two sentences (in a footnote) arguing that this change did not qualify for processing as a minor permit modification. *See* Petition at 9 n.2.[18] Again, the Petitioners claim that "the modifications make significant changes – i.e., wholesale deletions – to existing monitoring, reporting, and recordkeeping requirements for Emission Units 002, 004, and 006 and thus are not minor permit modifications under 40 C.F.R. § 70.7(e)(2)(i)(A)(*2*)." The Petitioners' argument paints an incomplete picture of both the specific changes at issue and the relevant regulatory text, and ultimately fails to demonstrate that ADEM erred in processing these changes as a minor modification.

The Petitioners fail to consider the broader context of the changes at issue here: the permit modification at issue did not simply remove monitoring requirements; rather, it removed *all* requirements associated with certain ostensibly inoperable emissions units.[19] Thus, the real issue here is whether significant modification procedures are required to remove all requirements associated with inoperable emissions units. The Petitioners do not identify any legal authority that would require a significant permit modification in order to remove obsolete requirements associated with inoperable units. In fact, no such requirement exists in the EPA's or ADEM's rules, nor can such a requirement be inferred from the regulatory criterion addressing significant changes to existing monitoring in the permit.

The Petitioners do not attempt to explain how their interpretation is consistent with the text and context of the regulatory criterion they invoke. The regulations provide that minor permit modification procedures may be used only for permit changes that "[d]o not involve significant changes to *existing* monitoring, reporting, or recordkeeping requirements *in the permit*." 40 C.F.R. § 70.7(e)(2)(i)(A)(2) (emphasis added); Ala. Admin. Code r. 335-3-16-.13(3)(a)(1)(ii) (substantively identical text); *see* 40 C.F.R. § 70.7(e)(4)(2) (similar criterion in the regulations concerning significant permit modifications). By its plain language, this criterion is relevant in situations where "existing" monitoring requirements "in the permit," used to demonstrate compliance with an existing applicable requirement, undergo significant changes. *See, e.g.*, 57 Fed. Reg. 32250, 32288 (July 21, 1992) ("Significant changes to existing monitoring permit terms or conditions . . . would be significant modifications, *since these types of changes are likely to affect how the permitting authority determines whether the source is in compliance with emission limitations and other permit terms and conditions*." (emphasis added)). The purpose behind this criterion is to ensure that the public has an opportunity to review the sufficiency of monitoring requirements that the source will be required to follow in order to assure compliance

[18] In the same footnote, the Petitioners also briefly mention administrative permit amendments. Because ADEM did not process the changes at issue using administrative permit amendment procedures, the EPA need not address whether these changes would qualify for treatment as such.

[19] The EPA's response to Claims 2 and 3 addresses whether these units are physically or legally inoperable and whether it was appropriate for ADEM to remove from the Permit the requirements associated with these units. The EPA's response to Claim 1 addresses only the procedure used to make this type of change (to remove requirements associated with ostensibly inoperable units), and the EPA's response to Claim 1 assumes, without deciding, that the units are in fact inoperable.

with existing applicable requirements. This is important, because ensuring that title V permits contain sufficient monitoring (and other compliance assurance provisions) is a key function of title V. *See* 42 U.S.C. § 504(c); 40 C.F.R. § 70.6(c)(1); *Sierra Club* v. *EPA,* 536 F.3d 673 (D.C. Cir. 2008). However, in situations where all underlying applicable requirements (including the relevant limits and standards) become inapplicable and are removed from a title V permit, there is no longer anything for the title V permit to assure compliance with.[20] Accordingly, this criterion is not relevant in this situation.

Even if one focuses on the monitoring requirements themselves, removing obsolete monitoring requirements from a permit does not amount to a "significant change" to the monitoring the facility is required to follow. *See In the Matter of Premcor Refining Group, Inc., Premcor Alsip Distribution Center, and ExxonMobil Pipeline Co., Des Plaines Terminal*, Order on Petition Nos. V-2022-8 & V-2022-15 at 17–20 (May 1, 2023) (finding that the state reasonably concluded that removing an obsolete initial stack testing requirement qualified as a minor modification, because the modification did not change the requirements that actually applied to the ongoing operations of the source). This is especially true when the requirements at issue are obsolete because the equipment to which they applied is no longer operable.[21] Removing the monitoring requirements from the Permit has not changed the source's actual obligations.

The Petitioners have not demonstrated that the changes associated with the removal of requirements for the Indoor Blasting Unit, Indoor Blasting Machine, and Shape Blasting Line were required to be processed as a significant permit modification. The EPA considers ADEM's decision to make this change using minor modification procedures to be reasonable and consistent with the regulations. Therefore, the EPA denies Claim 1 on this issue.

B. Claims 2 and 3: The Petitioners Claim That "The Revised Renewal Permit Action Failed to Satisfy the EPA Administrator's Objection Regarding Three Emitting Units, Instead Erroneously Removed the Emitting Units from the Renewal Permit" and "ADEM Failed to Respond to the Administrator's Objection Regarding Work Practice Provisos for Baghouse Maintenance and Repair."

Petition Claims 2 and 3 raise substantially overlapping issues and are addressed together.

[20] Notably, the regulations do not require a significant modification to remove obsolete standards and limitations that are no longer "applicable requirements." Given that the underlying standards and limitations could be removed from a title V permit via minor modification, it would make little sense to require additional procedures to remove the monitoring requirements that are simply designed to support such no-longer-applicable standards and limitations. The Petitioners' logic—that removing monitoring from a permit equates to a significant change to existing monitoring—would be more persuasive in a different situation, where the relevant emissions units (and underlying standards and limitations) still exist. Removing monitoring that is actually relevant to assuring compliance with an existing standard or limitations would indeed reflect a significant change to existing monitoring in the permit, and one deserving of public scrutiny through the significant modification process. However, that fact pattern is not present here.

[21] The facts here bear out this logic: for example, a monitoring requirement previously associated with the Indoor Blasting Unit indicated that "Visible emissions shall be monitored on a weekly basis *when this source is operating* by someone familiar with Method 9 of 40CFR60 Appendix A. . . ." Petition Att. 7 at 2-2 (November 2022 Renewal Permit). So, even under the prior permit, no monitoring was required if the unit was not operating.

Petition Claims: In Claims 2 and 3, the Petitioners claim that it was improper for ADEM to remove requirements associated with three emissions units from the Permit, and that this revision to the Permit failed to resolve the EPA's prior objections. *See* Petition at 13–21.

In Claim 2, the Petitioners observe that in the *Plains Marketing et al. Order*, the EPA directed ADEM to revise the Alabama Shipyard permit to resolve a conflict between various permit terms associated with monitoring of the Indoor Blasting Unit and Shape Blasting Line. *Id*. at 13–14 (citing *Plains Marketing et al. Order* at 53). Similarly, in Claim 3, the Petitioners observe that the EPA's *Plains Marketing et al. Order* EPA directed ADEM to revise the Alabama Shipyard permit or permit record to address prior public comments relating to work practice provisos for a baghouse associated with the same emissions units implicated by Claim 2. *Id*. at 18 (citing *Plains Marketing et al. Order* at 55).

The Petitioners state that, in response, ADEM removed from the Permit all permit terms associated with the emissions units at issue, including the associated baghouse. *Id*. at 14, 19. The Petitioners repeat ADEM's explanation that the "Alabama Shipyard has not recently used the Indoor Blasting and Shape Blasting Line Units (Emission Units 002, 004, and 006) and has no plans to do so in the future." *Id*. (quoting SOB at 2). The Petitioners further repeat the Alabama Shipyard's statements that the facility "authorize[d] ADEM to remove the indoor blasting units with the associated baghouses (emission unit[s] 2[,] 4[,] and 6) from the Title V permit," that "[t]he baghouses will be disconnected, so the units are inoperable," and that if the facility needs to start up similar operations, it "will apply for a Title V modification." *Id*. at 14–15 (quoting Petition Att. 4).

The Petitioners contest the removal of these units from the Permit. *Id*. at 14, 20. The Petitioners assert: "The Part 70 regulatory test is whether the three units are emission units [that] have the potential to emit regulated pollutants, and if so, they must be included in the Renewal Permit," because title V permits "must contain *all* emission units at the Facility." *Id*. at 15, 16 (citing 40 C.F.R. §§ 70.2 (definitions of "potential to emit," "emissions unit," "regulated air pollutant," and "stationary source"), 70.3(c)(1)); *see id*. at 17.

The Petitioners provide several factual reasons for why these units should not have been removed from the Permit. The Petitioners claim that "the Indoor Blasting and Shape Blasting Line units (Emission Units 002, 004, and 006) remain onsite, have not been permanently rendered inoperable, and continue to have the potential to operate and emit regulated pollutants . . .." *Id*. at 20. More specifically, the Petitioners assert that the emissions units at issue have not been removed, but remain physically onsite, and have the potential to operate and emit PM. *Id*. at 15. The Petitioners assert that disconnecting the baghouse control devices from these units does not render the units inoperable, and that the applicant took no other action to render the units permanently inoperable. *Id*. at 15, 17. The Petitioners challenge ADEM's conclusion that the facility "has no plans to" use these emissions units "in the future," asserting that there are no statements from the facility that support ADEM's assertion. *Id*. (quoting SOB at 2). In any case, the Petitioners assert that the facility's future plans are not relevant insofar as title V legal requirements are concerned. *Id*. at 15, 17. Additionally, the Petitioners claim that ADEM provides no information about whether the underlying title I preconstruction permits associated with these emissions units were revoked. *Id*. at 17.

Throughout Claims 2 and 3, the Petitioners not only challenge the basis for removing these units from the Permit, but also allege that, in removing the units instead of specifically addressing the EPA's

direction from the *Plains Marketing et al. Order*, ADEM failed to satisfy the EPA's objections and respond to the EPA's Order. *Id*. at 3, 4, 11, 13, 16, 17, 18, 19, 20, 21.

EPA Response: For the following reasons, the EPA grants these Petition claims and objects to the issuance of the Permit.

The Petitioners have demonstrated that the record is unclear as to whether it was appropriate for ADEM to remove from the Permit all requirements associated with the Indoor Blasting Unit, Indoor Blasting Machine, and Shape Blasting Line (Emission Units 002, 004, and 006) and the associated baghouse.[22]

A title V permit issued to a major source must include "all applicable requirements for all relevant emissions units in the major source." 40 C.F.R. § 70.3(c)(1); *see* 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a)(1). The regulatory definition of "applicable requirement" similarly refers to various types of requirements "as they apply to emissions units in a part 70 source." 40 C.F.R. § 70.2. It appears uncontested that the various requirements removed from the Permit (and which were implicated by the EPA's *Plains Marketing et al. Order*) were applicable requirements. Thus, the issue here turns on whether the Indoor Blasting Unit, Indoor Blasting Machine, and Shape Blasting Line associated with those requirements remain "emissions units." If so, the applicable requirements associated with those units must be included in the Permit; if not, the requirements associated with those units may be removed from the Permit.

The term "emissions unit" is defined in the EPA's regulations as "any part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant." 40 C.F.R. § 70.2. Here, PM is the relevant regulated air pollutant, and it appears undisputed that the units do not currently emit PM, so the question turns on whether these units continue to have the potential to emit PM. The EPA's regulations provide that "potential to emit means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design," taking into account "[a]ny physical or operational limitation on the capacity of a source to emit an air pollutant" that is enforceable. *Id*. Accordingly, the units at issue here could be properly removed from the permit if they lack the capacity to emit PM either (i) as a legal matter, based on enforceable restrictions on their operation, or (ii) as a practical matter, under their physical and operational design. On both these potential approaches, the permit record is unclear.

First, as a legal matter, it is unclear whether the Alabama Shipyard is prohibited from operating the units in question. It is not immediately apparent from the Permit or permit record whether the removal of these units from the Permit effectively prohibits their operation. The Permit does not itself contain any enforceable limitations prohibiting the operation of the specific units at issue, nor does it contain any general limitations prohibiting the operation of equipment that is not specifically identified

[22] Although the EPA agrees with the Petitioners that it is not clear whether these permit terms should have been removed from the Permit, the EPA does not agree that this action failed to resolve the EPA's objections identified in the *Plains Marketing et al. Order*. By removing all permit terms implicated by the EPA's prior objection, ADEM's revisions effectively rendered the monitoring and work practice issues identified in the EPA's objections moot, thus resolving those objections.

in the Permit.[23] The Permit record also does not identify any legal authorities specific to Alabama's permitting program that would prohibit the operation of units not included in, or removed from, a title V permit.

Second, to the extent these units are not legally prohibited from operating, it is unclear whether, as a practical matter, these units are shut down to such a degree that they lack the capacity to emit under their physical and operational design. The permit record on this issue consists of a few sentences repeated across several documents, some of which are of limited relevance. For example, ADEM indicates that the "Alabama Shipyard has not recently used the Indoor Blasting and Shape Blasting Line Units (Emission Units 002, 004, and 006) and has no plans to do so in the future." SOB at 3; *see* ADEM Response to Objection at 2 (similar); *see also* SOB at 3 ("plans to") Petition Att. 4 ("will be"). However, recent usage patterns and future usage plans have little direct relevance to whether the units at issue are *currently capable* of emitting and thus need to be included in the Permit.

Perhaps more relevant is ADEM's indication that "the facility . . . plans to disconnect the units and the associated baghouses so that they cannot be used." SOB at 3; *see* ADEM Response to Objection at 2 (similar). The Alabama Shipyard's letter to ADEM further indicates that "The baghouses will be disconnected, so that the units are inoperable." Petition Att. 4. In addition to the aforementioned problems with the future-looking nature of these statements, even if these statements could be interpreted to reflect the current status of the units in question, they do not conclusively establish that the units at issue lack the capacity to emit. For example, it is unclear from these statements whether the units would themselves be physically decommissioned, or whether they would simply be disconnected from the baghouse (their control device). If the latter, it is unclear whether the units would still be capable of operating despite the disconnected control device. The record does not provide any information regarding why disconnecting a control device from the units would render the units inoperable or incapable of emitting.

The Alabama Shipyard also indicates that, "If we need to start up similar operations, we will apply for a Title V modification." Petition Att. 4. This statement brings into question whether the Alabama Shipyard presently has the physical capacity to re-start these units (*e.g.*, by reconnecting the baghouse to the units, or some other action). At the very least, it implies that this is a possibility.[24]

Overall, from the record, the EPA cannot tell whether the Indoor Blasting Unit, Indoor Blasting Machine, and Shape Blasting Line have the capacity to emit PM under their current physical and operational design, taking into account any enforceable limitations on their operation. Thus, the EPA

[23] The EPA observes that many permitting authorities routinely include language in title V permits indicating that the source is only legally permitted to operate the equipment specifically listed in the permit. Although this is not compelled by the CAA or the EPA's part 70 regulations, there may be various reasons why states may wish to use title V permits in this manner. In any case, here, the Permit contains no such language. Instead, the cover sheet to the Permit indicates: "[T]he Permittee is hereby authorized to construct, install and use the equipment, device or other article described above." The equipment, device, or article referenced "above" this statement refers to the entire Alabama Shipyard facility, as opposed to any specific equipment identified within the Permit. *See* Permit, cover page.

[24] It is also unclear whether it would be appropriate, as the Alabama Shipyard suggests, to use a title V permit modification to authorize a re-start of these units. Generally, if an emissions unit has been permanently shut down and wishes to restart, the source must evaluate whether the restart triggers preconstruction permitting requirements such as NSR. The Alabama Shipyard's discussion of title V suggests that it wanted to keep the ability to operate these three units in the future without undergoing such additional NSR permitting.

cannot tell whether these units should continue to be considered "emissions units," or accordingly whether it was appropriate to remove from the Permit all applicable requirements associated with these units. Therefore, the EPA grants Claims 2 and 3. 40 C.F.R. § 70.8(c)(3)(ii).

Direction to ADEM: ADEM must, at minimum, revise the permit record to justify its decision to remove all requirements associated with the Indoor Blasting Unit, Indoor Blasting Machine, and Shape Blasting Line. ADEM's response should address whether these units have the capacity to emit PM under their *current* (not past or future) physical and operational design, taking into account any enforceable restrictions on the operation of these units.

For example, ADEM's response could address enforceable legal restrictions that would render these units inoperable. To the extent such requirements already exist elsewhere (*e.g.*, in the Alabama regulations), ADEM could identify and explain its interpretation of those requirements in the permit record. Or, if necessary, ADEM could revise the Permit to include an enforceable prohibition on the operation of these units (or any units not specifically listed in the Permit). Alternatively, ADEM's response could provide more information in the permit record—which would presumably need to be supplied by the Alabama Shipyard—about the physical status of these units. Any of these potential approaches could be used to ensure that the units in question lack the potential to emit, such that they are not "emissions units" with applicable requirements that need to be addressed by the Permit.

Alternatively, if these units continue to have the potential to emit PM, ADEM could revise the Permit to reinstate all applicable requirements that apply to these emissions units. If ADEM chooses this option, then ADEM would also need to more directly address the EPA's objections from the *Plains Marketing et al. Order*. *See Plains Marketing et al. Order* at 53, 55.

C. Claim 4: The Petitioners Claim That "The Revised Renewal Permit is Based on an Incomplete Permit Application."

Petition Claim: The Petitioners claim that the source did not submit a complete permit application that included a required certification of truth, accuracy, and completeness. *See* Petition at 21–22.

The Petitioners state that 40 C.F.R. § 70.5(d) requires that any application form, report, or compliance certification submitted pursuant to part 70 "shall contain certification by a responsible official of truth, accuracy, and completeness," and more specifically, that "[t]his certification and any other certification required under this part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete." *Id*. at 21 (quoting 40 C.F.R. § 70.5(d)); *see id*. at 22 (citing Ala. Admin. Code r. 335-3-16-.04(9)).

The Petitioners claim: "The AL Shipyard Letter [*i.e.*, the letter from the Alabama Shipyard requesting that ADEM remove emissions units from the Permit] and the NESHAP Compliance Plan are both part of the Facility's permit application, and as such they were required to be submitted under the truth, accuracy, and completeness requirements. They were not." *Id*. at 21–22.

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

As discussed with respect to Claim 1, the EPA's *Plains Marketing et al. Order* directed ADEM to make various changes to the Alabama Shipyard permit, and the EPA recommended that ADEM make these changes either by minor modification or significant modification, as appropriate. *Plains Marketing et al. Order* at 5–6. In response, ADEM revised the permit and characterized the revision as a minor permit modification.

Permit applications are an inherent feature not only of initial and renewal permits, but also of minor and significant permit modifications. *See* 40 C.F.R. § 70.7(a)(1); *see also* 40 C.F.R. §§ 70.5(a)(2), 70.7(e)(2)(ii), 70.7(e)(4)(ii); 70.8(a)(1). As part of a complete application, "a responsible official [must] certify the submitted information consistent with [40 C.F.R. § 70.5(d)]." 40 C.F.R. § 70.7(a)(2). As the Petitioners acknowledge, the regulations elaborate on this certification requirement as follows:

> Any application form, report, or compliance certification submitted pursuant to these regulations shall contain certification by a responsible official of truth, accuracy, and completeness. This certification and any other certification required under this part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

40 C.F.R. § 70.5(d); Ala. Admin. Code r. 335-3-16-.04(9) (substantively identical regulation); *see also* 42 U.S.C. § 7661b(c). This certification requirement expressly attaches to applications associated with minor permit modifications. 40 C.F.R. §§ 70.5(a)(2); 70.7(e)(2)(ii); Ala. Admin. Code r. 335-3-16-.13(3)(b).

However, not all correspondence exchanged between a permittee and a permitting authority in the course of addressing an EPA objection must necessarily be considered a formal permit application. Neither the EPA's nor ADEM's regulations specifically require a formal permit application before a state may revise a permit in response to an EPA objection. The requirements governing permit revisions could be satisfied without a certified permit application in limited cases where the permittee does not itself request the changes (*e.g.*, where the necessary changes are required by an EPA objection) and where the permitting authority requires no additional information from the permittee in order to make a specific change to a permit. Thus, determining whether a permit application has been submitted—or is required to be submitted—for revisions made to resolve an EPA objection is a fact-specific question that depends on the nature of the changes at issue.

Here, the present minor modification involves two changes to the Permit, made in response to the EPA's *Plains Marketing et al. Order*: (i) adding the source's NESHAP implementation plan to the Permit, and (ii) removing requirements associated with several emissions units from the Permit.

Regarding the addition of the NESHAP implementation plan to the Permit, the Petitioners have not demonstrated that the Alabama Shipyard submitted an application regarding this change, nor have they demonstrated that this change required the Alabama Shipyard to submit a permit application (and, thus, a certification). As an initial matter, the Petitioners appear to suggest—incorrectly—that the NESHAP implementation plan was "part of the Facility's permit application." Petition at 21. The Petitioners present no evidence that the Alabama Shipyard submitted a permit application in association with this change, and the EPA's review of the record reveals nothing resembling an application. Moreover, the Petitioners do not identify any legal authority that would require the

Alabama Shipyard to submit a permit application (and, thus, a certification) before the NESHAP plan could be added to the Permit.[25] As explained earlier in this response, not all changes to a permit necessarily require a permit application. Here, the change at issue arose from EPA's *Plains Marketing et. al. Order*, which directed ADEM to "either explain that the necessary elements of the plan have been included in the permit, referencing the permit conditions that do so, or revise the permit to include or incorporate the necessary elements of the plan by reference . . . ." *Plains Marketing et al. Order* at 52. Consistent with the EPA's direction, ADEM incorporated the plan into the current revised Permit. ADEM already possessed a copy of the facility's NESHAP implementation plan; a 2020 version of this plan was included in the certified application for the Alabama Shipyard's last title V permit renewal. *See id*. at 51–52. The Permit now includes a November 10, 2023, version of this plan. To the extent that the Petitioners believed any changes to this plan necessitated a new permit application, certified by a responsible official, they could have raised this argument, but they did not.[26] Thus, the EPA need not determine in this Order whether the Alabama Shipyard was required to submit the updated plan via certified permit application. Overall, because the Petitioners have not demonstrated that a certified application was required for this change, the EPA denies Claim 4 as it relates to the NESHAP implementation plan.

Regarding the removal of permit terms involving the Indoor Blasting Unit, Indoor Blasting Machine, and Shape Blasting Line, the permit record suggests that this decision was based, in part, on factual information provided by the permittee. The Alabama Shipyard submitted a letter to ADEM discussing facts relevant to the removal of these units from the Permit, and this letter indicates that it was provided in response to an email request from ADEM. *See* Petition Att. 4. However, the EPA need not resolve at this time whether this letter from the Alabama Shipyard was subject to, or complied with, the permit application certification requirement implicated by Claim 4 of the Petition. As explained in the EPA's response to Claims 2 and 3, the EPA is objecting to the Permit because the record does not currently support ADEM's decision to remove from the Permit the requirements associated with the Indoor Blasting Unit, Indoor Blasting Machine, and Shape Blasting Line. In response to that objection, ADEM has various options, all of which have the potential to render the issues in Claim 4 moot or substantively change the EPA's analysis of this issue.

Specifically, if ADEM responds to the EPA's objection on Claims 2 and 3 by clarifying in the permit record that the units are legally prohibited from operating by virtue of their removal from the Permit (for example, by operation of Alabama law), or if ADEM revises the Permit to include such a prohibition, then ADEM would need no further information from the Alabama Shipyard to justify the removal of these units from the Permit. Thus, there would be no need for the facility to submit a permit application that complies with the certification requirement at issue in Claim 4.

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[25] The only legal authorities cited by the Petitioners are 40 C.F.R. § 70.5(d), Ala. Admin. Code r. 335-3-16-.04(9), and 42 U.S.C. § 7414(a)(3)(C). As previously explained, the first two regulatory citations provide that, *if* an application is submitted, any such application must include a certification by a responsible official. Those regulatory authorities do not speak to *when* an application must be submitted. The statutory provision cited by the Petitioners is not directly relevant to certifications associated with permit applications, nor does it speak to the situations when a permit application must be submitted.

[26] The Petitioners do not provide any information or arguments to demonstrate that incorporating the more recent plan into the permit required a new permit application from the Alabama Shipyard. For example, the Petitioners could have addressed any differences between the previously submitted and current plan and argued that specific changes to the plan effectively involved the submission of information from the permittee to the state, necessitating a new permit application. Both versions of the NESHAP implementation plan were and are publicly available on ADEM's eFile system, available at *https://app.adem.alabama.gov/eFile*.

Alternatively, ADEM may respond to the EPA's objection on Claims 2 and 3 by supplementing the permit record to more fully explain the factual basis for its decision to remove the requirements for these units (*i.e.*, by explaining why these units no longer have the physical or operational capacity to emit). This would presumably require ADEM to acquire more information from the Alabama Shipyard upon which ADEM will base its permitting decision. This would be the precise type of situation in which the CAA, the EPA's regulations, and ADEM's regulations require a responsible official to certify the truth, accuracy, and completeness of the submitted information.

In sum, ADEM's response to the EPA's objection on Claims 2 and 3 regarding the removal of the Indoor Blasting Unit, Indoor Blasting Machine, and Shape Blasting Line has the potential to resolve the related issues raised in Claim 4 involving these same units. Thus, the issues in Claim 4 are not yet ripe. It is an appropriate exercise of the EPA's discretion and a reasonable use of agency resources to not resolve Claim 4 at this time. *See, e.g.*, *In the Matter of Salt River Project Agricultural Improvement & Power District, Agua Fria Generating Station,* Order on Petition No. IX-2022-4 at 23–24 (July 28, 2022); *In the Matter of Salt River Project Agricultural Improvement & Power District, Desert Basin Generating Station,* Order on Petition No. IX–2022–3 at 24 (July 28, 2022). Therefore, the EPA denies Claim 4 to the extent it concerns the removal of requirements associated with those units.

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 and object to the issuance of the Permit as described in this Order.

Dated: August 16, 2024

Michael S. Regan
Administrator