BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	
	)	
HU HONUA BIOENERGY, LLC	)	
PEPEEKEO, HAWAII	)	PETITION NUMBER VI-2014-10
	)	
PERMIT NO. 0724-01-C	)	ORDER RESPONDING TO THE
	)	PETITIONER'S REQUESTS THAT THE
ISSUED BY THE CLEAN AIR BRANCH	)	ADMINISTRATOR OBJECT TO THE
FOR THE HAWAII DEPARTMENT OF HEALTH	)	ISSUANCE OF A STATE OPERATING
	)	PERMIT
	)	

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

This Order responds to issues raised in a petition to the U.S. Environmental Protection Agency (EPA) by Preserve Pepeekeo Health & Environment (PPHE) (Petitioner), received September 15, 2014 (Petition). The Petition requests that the EPA object to the title V operating permit proposed on March 14, 2014, by the Clean Air Branch (CAB), Environmental Management Division, Hawaii Department of Health (HDOH), for the Hu Honua Bioenergy Facility (Hu Honua) in Pepeekeo, Hawaii (Proposed Permit).[1] This type of Clean Air Act (CAA or Act) operating permit is also referred to as a title V permit or part 70 permit. The operating permit was proposed pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and Hawaii Administrative Rules (HAR), Title 11, Chapter 60.1, Air Pollution Control. *See also* 40 C.F.R. Part 70 (title V implementing regulations). On February 18, 2016, HDOH issued a final permit for Hu Honua, identified as Covered Source Permit (CSP) Number 0724-01-C (Final Permit).[2]

[1] The title V operating permit proposed on March 14, 2014, was titled as a Proposed Permit Amendment, which this order will refer to as the "Proposed Permit."

[2] Hawaii uses the term "covered source" to refer to all title V (part 70) major sources, all sources subject to a requirement under the Prevention of Significant Deterioration (PSD) program, and sources subject to a standard under section 111 or section 112 of the CAA. *See e.g.*, H.A.R. § 60.1-1 (definition of "covered source"). The program is an integrated permitting program in which a source's title V and preconstruction requirements are addressed in a single permitting process. HDOH implements provisions of both its own regulations and federal PSD regulations (40 C.F.R. 52.21) in issuing permits to its covered sources. *See* Hawaii Department of Health – Clean Air Act Title V Operating Permit Program Evaluation, Final Report, conducted by the EPA, Region 9 (September 28, 2010).

Based on review of the Petition and other relevant materials, including the Final Permit, permit record, and relevant statutory and regulatory authorities, and as explained below, the EPA denies the Petition requesting that the EPA object to the Hu Honua title V Proposed Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 766la(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA. The state of Hawaii originally submitted its title V program governing the issuance of operating permits on December 20, 1993. *See* 59 Fed. Reg. 37957 (July 26, 1994). The EPA granted interim approval of Hawaii's title V program on December 1, 1994, and granted full approval on November 30, 2001. *See* 59 Fed. Reg. 61521, 61549 (December 1, 1994); 66 Fed. Reg. 62907, 62945 (December 4, 2001); 40 C.F.R. part 70, Appendix A. The program is now codified in HAR, Title 11, Chapter 60.

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including PSD permits. CAA §§ 502(a), 504(a), 42 U.S.C. §§ 7661a(a), 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 sources' compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to "enable the source, States, the EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and for assuring compliance with such requirements.

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to the EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 766ld(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. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the permit if the EPA determines that the permit is not in compliance with applicable requirements of the CAA. CAA §§ 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c) (providing that the EPA will object if the EPA determines that a permit is not in compliance with applicable requirements or requirements under 40 C.F.R. part 70). If the EPA does not object to a permit on its own initiative, §505(b)(2) of the Act and 40 C.F.R. § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of the EPA's 45-day review period, to object to the permit.

Such a 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 agency (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). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1); *see also New York Public Interest Research Group, Inc. (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2003). Under § 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *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); *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) (discussing the burden of proof in title V petitions); *see also NYPIRG*, 321 F.3d at 333 n.11. In evaluating a petitioner's claims, the EPA considers, as appropriate, the adequacy of the permitting authority's rationale in the permitting record, including the response to comments (RTC).

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," to determine whether a petition demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty to object where such a demonstration is made. *NYPIRG*, 321 F.3d at 333; *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment whether a petition demonstrates a permit does not comply with clean air requirements."). 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 petitioners have demonstrated that the permit is not in compliance with requirements of the Act. *See, e.g., Citizens Against Ruining the Environment*, 535 F.3d at 667 (stating § 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); *NYPIRG*, 321 F.3d at 334 ("§ 505(b)[2] of the CAA provides a step-by-step procedure by which objections to draft permits may be raised and directs the EPA to grant or deny them, *depending on* whether non-compliance has been demonstrated.") (emphasis added); *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). When courts review 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., Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678; *MacClarence*, 596 F.3d at 1130–31. A more detailed discussion of the petitioner demonstration burden can be found in *In the Matter of Consolidated Environmental Management, Inc. – Nucor Steel Louisiana*, Order on Petition Numbers VI-2011-06 and VI-2012-07 (June 19, 2013) (*Nucor II Order*) at 4–7.

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

such criterion is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the RTC), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33; *see also, e.g., In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 (December 14, 2012) (*Noranda Order*) at 20–21 (denying title V petition issue where petitioners did not respond to state's explanation in the RTC or explain why the state erred or the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 (June 22, 2012) (*2012 Kentucky Syngas Order*) at 41 (denying title V petition issue where petitioners did not acknowledge or reply to state's RTC or provide a particularized rationale for why the state erred or the permit was deficient). Another factor the EPA has examined is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for the petitioner's objection, contrary to Congress' express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive."); *In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 (September 21, 2011) (*Murphy Oil Order*) at 12 (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring). Relatedly, the EPA has pointed out in numerous orders that, in particular cases, 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 (January 15, 2013) (*Luminant Sandow Order*) at 9; *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 (April 20, 2007) (*BP Order*) at 8; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004-10 (March 15, 2005) (*Chevron Order*) at 12, 24. Also, if the petitioner did not address a key element of a particular issue, the petition should be denied. *See, e.g., In the Matter of Public Service Company of Colorado, dba Xcel Energy, Pawnee Station*, Order on Petition No. VIII-2010-XX (June 30, 2011) at 7–10; and *In the Matter of Georgia Pacific Consumer Products LP Plant*, Order on Petition No. V-2011-1 (July 23, 2012) at 6–7, 10–11, 13–14.

C. New Source Review

Applicable requirements for a new "major stationary source" or for a "major modification" to a major stationary source include the requirement to obtain a preconstruction permit that complies with applicable new source review (NSR) requirements. For major stationary sources, the NSR program is comprised of two core types of preconstruction permit programs. Part C of the CAA establishes the PSD program, which applies to areas of the country that are designated as attainment or unclassifiable for the national ambient air quality-standards (NAAQS). CAA §§ 160–169, 42 U.S.C. §§ 7470–7479. Part D of the Act establishes the nonattainment NSR program, which applies to areas that are designated as nonattainment with the NAAQS. Where it applies, the PSD program requires a source to obtain a PSD permit before beginning construction of a new major stationary source or undertaking a major modification of a major stationary source and to comply with other PSD requirements. CAA § 165(a), 42 U.S.C. § 7475(a); 40 C.F.R 52.21(a)(2). In issuing a PSD permit, permitting authorities must address several requirements, including: (1) an evaluation of the impact of the proposed new or modified major

stationary source on ambient air quality in the area, and (2) the application of the Best Available Control Technology (BACT) for each pollutant subject to regulation under the Act. CAA §§ 165(a)(3), (4), 42 U.S.C. §§ 7475(a)(3), (4); 40 C.F.R. § 52.21(j), (k).

The EPA has two largely identical sets of regulations implementing the PSD program: one set, found at 40 C.F.R. § 51.166, contains the requirements that state PSD programs must meet to be approved as part of a SIP. The other set of regulations, found at 40 C.F.R. § 52.21, contains the EPA's federal PSD program, which applies in areas without a SIP-approved PSD program. Hawaii's SIP does not contain an approved PSD program. However, the EPA Region 9 has delegated administration of the PSD program to Hawaii. 48 *Fed. Reg.* 51682 (November 10, 1983); 54 *Fed. Reg.* 23978 (June 5, 1989). Thus, HDOH issues PSD permits under 40 C.F.R. § 52.21, and the applicable requirements governing the issuance of PSD permits in Hawaii are the federal PSD regulations at 40 C.F.R. § 52.21. *See* 40 C.F.R. § 52.632. Accordingly, the applicable requirements of the Act for new major sources or major modifications to such sources in Hawaii include the requirement to comply with PSD requirements under 40 C.F.R. § 52.21. *See, e.g.*, 40 C.F.R. § 70.2.

III. BACKGROUND

A. The Hu Honua Facility

A more detailed description of the facility is included in HDOH's Initial Covered Source Permit Review Summary, dated August 2011 (Final Permit Review Summary).[3] In summary, the facility is located in Pepeekeo, Hawaii, on a 2,557-acre site on the Big Island of Hawaii. "The facility was originally constructed in 1971 and operated by Hilo Coast Processing Company (HCPC) starting in 1974." Final Permit Review Summary at 1. "The Hu Honua Bioenergy facility will generate electricity for Hawaii Electric Light Company, Inc. (HELCO) and consists of a 407 MMBtu/hr boiler, a steam turbine generator, and an 836 kW emergency generator." *Id.* at 2. Hu Honua will have a net power output of 21.5 MW to the grid. *Id*. at 1. "Hu Honua is proposing to burn biomass in the form of wood in the boiler and burn 100% biodiesel during startups and as a supplemental fuel during low-load operation of the boiler. An 836 kW electrical generator will be operated only during emergencies and will only combust 100% biodiesel." *Id.* at 1.

[3] Part 70 of the CAA requires permitting authorities to prepare a "statement of basis" for each title V permit. 40 C.F.R. § 70.7(a)(5). The "permit review summary" prepared and issued by HDOH in conjunction with a covered source permit is the functional equivalent of the statement of basis.

B. Permitting History

On August 28, 2009, Hu Honua submitted an application for a new covered source permit to HDOH to re-start operations at the facility, which had previously ceased operation on December 31, 2004. Final Permit Review Summary at 2. On August 13, 2010, HDOH released the Draft Permit Amendment (Draft Permit) for public comment. On December 27, 2010, Hu Honua submitted a revised application to HDOH.[4] On February 17, 2011, HDOH released a Revised Draft Permit for a second round of public comment. After the end of the second public comment period on March 21, 2011, HDOH made significant changes to the Revised Draft Permit before submitting the Proposed Permit to the EPA on May 19, 2011. The EPA's 45-day review period on the Proposed Permit ended on July 5, 2011. During its 45-day review period, the EPA did not object to the Proposed Permit, but did send a letter to HDOH on June 30, 2011, with several comments on the Proposed Permit (EPA Comment Letter). The Petitioner timely filed its petition on August 26, 2011, within the 60-day window following EPA's 45-day review period, which ended on September 6, 2011. *See* CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2). On August 31, 2011, HDOH issued the Final Permit and the Final Permit Review Summary, which included Addendum A (HDOH's summary of and its responses to public comments received during the second public comment period, or "2011 RTC") and Addendum B (HDOH's response to the EPA Letter, or "2011 Response to the EPA Comment"). HDOH announced on its website and Hu Honua announced on its website that the Final Permit had been issued.

On February 7, 2014, the EPA granted in part and denied in part the first Hu Honua title V petition. *In the Matter of Hu Honua Bioenergy Facility* Petition No. IX 2011-1 (February 7, 2014) (*2014 Hu Honua Order*). In response to the *2014 Hu Honua Order*, HDOH made multiple revisions to the Hu Honua operating permit and held a public comment period from March 14, 2014, to May 9, 2014, consistent with the public participation requirements for title V permits of Hawaii's approved Administrative Rules at § 11-60.1-99.[5] During the public comment period, HDOH received several comment letters and extended the original public comment period from April 14, 2014, to May 9, 2014. *See* Proposed RTC (June 4, 2014) at 4. The Petitioner submitted comments during both the original comment period and the extended comment period. *See* PPHE Public Comments (April 14, 2014); PPHE Public Comments (May 9, 2014). On June 4, 2014, HDOH submitted to the EPA the Proposed Permit, an addendum to the permit review summary (otherwise known as the Statement of Basis under part 70), and the Proposed RTC to address the claims that were granted by the Administrator in the *2014 Hu Honua Order*. The EPA did not object to the Proposed Permit but did submit a comment letter to HDOH on July 17, 2014, (EPA's 2014 Letter). The Petitioner timely filed its petition on September 15, 2014, within the 60-day petition period, which ended on September 16, 2014, following the EPA's 45-day review period. *See* CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2). In response to EPA's 2014 comment letter, HDOH made additional changes to the permit and on February 18, 2016, issued

[4] HDOH's permit record references several other submittals of additional information between August 2009 and February 2011. *See, e.g.,* Addendum to the Permit Review Summary for Final Permit.

[5] As explained *supra* note 2, Hawaii's program is an integrated permitting program in which a source's title V and preconstruction requirements are addressed in a single permitting process. The public participation requirements for PSD permits are found at 40 C.F.R. § 52.21(q), which references the public participation procedures of 40 C.F.R. § 124.

the Final Permit, which included the final addendum to the permit review summary, an updated RTC document (Final RTC), and HDOH's response to EPA's 2014 Letter ("2014 Response to the EPA Comment"). HDOH announced on its website that the Final Permit had been issued. *See* Hu Honua Bioenergy LLC – Covered Source Permit, *http://health.hawaii.gov/cab/hu-honua-bioenergy-llc-covered-source-permit/* (last visited July 27, 2016).

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object 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. CAA § 505(b)(2); 42 U.S.C. § 7661d(b)(2). Thus, any petition seeking the EPA's objection to the Hu Honua Permit was due on or before September 16, 2014. The Petition was received on September 15, 2014. The EPA finds the Petition was timely filed.

IV. EPA DETERMINATIONS ON THE ISSUES RAISED BY THE PETITIONER

Claim 1. HDOH Has Failed to Satisfy the Public Participation Requirements of the Act, Title V Regulations and State Law.

Claim 1 is found on pages 5–12 (Section IV) of the Hu Honua Petition and includes four sub-claims. The Petitioner claims generally that the EPA should object to the 2014 Proposed Permit because of alleged violations of public participation requirements. Petition at 6–7. The Petitioner claims that "HDOH has failed to fulfill the public participation requirements of the Act, title V regulations, and state law, reflecting a pattern and practice that materially prejudices public participation in title V actions." *Id*. at 5. The Petitioner cites sections of the Act that broadly assert the importance of public participation, such as 42 U.S.C. § 7470(5),[6] and implementing regulations that describe public participation as one of the purposes of the Title V program (57 *Fed. Reg.* 32250, 32251 (July 21, 1992).[7] *Id*. at 6–7. The Petitioner makes four specific claims that HDOH did not comport with the public participation requirements of the Act and the implementing regulations. *Id*. at 7–12. Accordingly, this claim is divided into four parts, Claim 1.A, 1.B, 1.C and 1.D, as follows.

[6] The purposes of thePSD part of the Act are laid out in 42 U.S.C. § 7470. The purpose cited by the Petitioner, 42 U.S.C. § 7470(5), reads, "to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decision-making process." Even though Hawaii's program is an integrated permitting program in which a source's title V and preconstruction requirements are addressed in a single permitting process, the petition process under 505(b)(2) only concerns whether the title V permit and permit process met the title V applicable requirements, which in this case include the public participation requirements of Hawaii's approved title V regulations in HAR § 11-60.1-99. Procedural opportunities under 42 U.S.C. § 7470(5) are not appropriate for consideration in a petition concerning issues in Hu Honua's title V permit, submitted pursuant to section 505(b)(2) of the CAA.

[7] As described in 40 C.F.R. § 70.1(b); 57 *Fed. Reg.* 32250, 32251 (July 21, 1992), one purpose of the title V program is to "enable the source, States, EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements."

Claim 1.A. Documents Have Not Been Made Available, Are Not Identifiable or Formatted, or Are Very Difficult to Access and Understand.

Petitioner's Claim: The Petitioner generally claims that many documents relating to the permit record have not been made available, are not identifiable or formatted, or are very difficult to access and understand. *Id*. at 7–8. The Petitioner claims that multiple Proposed Permit revisions have been posted but each lacked identification and dating information, making it difficult to ascertain what the currently proposed modifications to the permit actually are. *Id*. at 7. The Petitioner claims that the absence of a table of contents or organizational document makes it impossible to effectively and efficiently locate parts of the Proposed Permit one is interested in. *Id*. The Petitioner claims that public notices during the permit process failed to include identification and location information for key related documents. *Id*. In sum, the Petitioner requests that the EPA object to the permit on these grounds related to the availability and clarity of the documents produced to the public, and that the EPA order HDOH to "produce a single document, available on-line in PDF format that includes the statement of basis, and an understandable explanation of how the permit evolved and preceded, including the dates and reason for various revisions." *Id*. at 8.

EPA's Response. For the reasons described below, the EPA denies the Petitioner's claim that the EPA must object to the permit on the bases described above.

HAR § 11-60.1-99 contains the public participation requirements of Hawaii's approved title V regulations. HAR § 11-60.1-99(b)(1) requires that the director make available for public inspection in at least one location in the county affected by the proposed action, or in which the source is or would be located: information on the subject matter; information submitted by the applicant, the department's analysis and proposed action, and other information and documents determined to be appropriate by the department. HAR § 11-60.1-99(b)(5)(F) requires that notice of public comment and public hearing identify the name, address, and telephone number of a person from whom interested persons may obtain additional information, including copies of the draft permit, the application, all relevant supporting materials including any compliance plan, and monitoring and compliance certification reports, and all other materials available to the department that are relevant to the permit decision, except for information that is determined to be confidential, including information determined to be confidential pursuant to HAR § 11-60.1-14. *See also* 40 C.F.R 70.7 (h)(2).

When a title V petition seeks an objection based on the unavailability of information or documents in purported violation of title V's public participation requirements, the petitioner must demonstrate that the unavailability deprived the public of the opportunity to meaningfully participate during the permitting process. *2012 Kentucky Syngas Order* at 8; *see also In the Matter of Cash Creek Generation, LLC*, Order on Petition IV-2010-4 (June 22, 2012) (*2012 Cash Creek Order*) at 6; *In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada , LLC*, Order on Petition No. II-2000-07 (May 2, 2001) (*2001 Pencor-Masada Order*) (applying the concepts of meaningful public participation and logical outgrowth to title V). When reviewing such a claim under title V, the EPA generally looks to whether the petitioner has demonstrated "that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content." *In the Matter of Sirmos Division of Bromante Corp.*, Petition

No. II-2002-03, Order on Petition No. II-2002-03 (May 24, 2004) at 6–7, 9–10, 15. Absent such a showing, the EPA generally cannot conclude that the availability of, or improved access to, the information would have led to meaningful public comment. In implementing the requirements for public participation under title V, the EPA acknowledges that the part 70 regulations were promulgated in light of CAA section 502(b)(6)'s pursuit of "[a]dequate, streamlined, and reasonable procedures … for public notice, including offering an opportunity for public comment and a hearing." 42 U.S.C. § 7661a(b)(6). However, petitioners must also provide the EPA with a basis upon which to conclude that the permit itself was deficient as a result of the alleged confusion in the public participation process.

The EPA finds that the Petitioner has not demonstrated that documents related to the permit record were unavailable, that public notices did not contain information concerning the location of the information, or that the permit documents did not contain the required information. As HDOH explained, during the public comment period, it did maintain a publicly available Administrative Record, consisting of, among other things, the draft permit amendment, the addendum to the permit review summary, and non-confidential supporting materials from the applicant. Proposed RTC at 5. As HDOH further explained, the Administrative Record was available for viewing at two of its offices, as well as on its website. *Id*. As an initial matter, the EPA finds that the Petitioner has not demonstrated that HDOH did not make available to the public any information required pursuant to HAR § 11-60.1-99(b)(5)(F) in the manner prescribed by HAR § 11-60.1-99(b)(1). The Petitioner has not identified any specific piece of required information that was unavailable. The Petitioner also has not identified any specific matter in which the availability of the information was not consistent with the requirements of HAR § 11-60.1-99(b)(1). In particular, the Petitioner has not demonstrated that Hawaii's approved title V regulations codified in HAR § 11-60.1-99 require the Administrative Record to contain a single document in an online PDF format. The regulations at HAR § 11-60.1-99 contain no such requirement.

Further, the Petitioner did not identify what information in any document was missing or show how that unavailability has resulted in, or may have resulted in, a deficiency in the permit. *See In the Matter of U.S. Department of Energy – Hanford*, Order on Petition Nos. X-2014-01 and X-2013-01 (May 29, 2015) (*Hanford Order)* at 19–20. The Petitioner has not demonstrated that the record provided by HDOH was not in compliance with the Act or resulted in a flaw in the permit. In particular, the Petitioner did not demonstrate how any potential confusion resulting from the construction of the record affected their ability to comment on specific Proposed Permit conditions. The EPA notes that while the Petitioner claims that some documents were not available, the Petitioner was able to make very specific references to the Proposed Permit in its petition.[8]

For the foregoing reasons, the EPA denies the Petition as to this claim.

[8] The EPA also notes that the Final Permit published by HDOH on February 18, 2016, contains all the terms and conditions that apply to Hu Honua in one document. *See* Final Permit.

Claim 1.B. No Statement of Basis Was Furnished and Its Surrogate Was Inadequate.

Petitioner's Claim: The Petitioner claims that HDOH failed to provide a "Statement of Basis" as required by 40 C.F.R. § 70.7(a)(5). Petition at 9. The Petitioner claims that although the "Permit Review Summary and Analysis" document presented with the permit revisions fulfills some of the role of a Statement of Basis, it does not substitute for the requisite document because it fails to satisfy all of the requirements under 40 C.F.R. § 70.7(a)(5). *Id*. at 9–10. In particular, the Petitioner claims that the permit does not provide "references for those sections of the lengthy Subpart JJJJJ that apply to the Hu Honua facility, nor the legal and factual basis on which HDOH has determined which requirements are applicable." *Id*. at 10 (citing 40 C.F.R. § 70.7(a)(5)). The Petitioner also specifically claims that the Permit is not clear as to whether the facility is new or existing. The Petitioner claims that because of HDOH's piecemeal approach to the permit and the lack of a complete statement of basis, the public cannot discern basic facts about the permit, such as which of the specific requirements ("emissions limits, work practice standards, emission reduction measures, or management practices") apply to the facility. *Id*. The Petitioner also asserts that they cannot be held to their demonstration burden on the issues in the petition when HDOH has "failed to adequately detail is own 'decisions and reasoning,' including accurate citations." *Id*. (citing *Nucor II Order* at 6–7).

EPA's Response: For the reasons described below, the EPA denies the Petitioner's claim that the EPA must object to the permit on the bases described above.

Hawaii's approved title V regulation at HAR § 11-60.1-104(j) states, "The director shall provide a statement that sets forth the legal and factual bases for the draft permit conditions (including references to the applicable statutory or regulatory provisions) to EPA and any other person requesting it." HAR § 11-60.1-104(j). The relevant portion of part 70 states, "The permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions), [and] … shall send this statement to … any other person who requests it." 40 C.F.R. § 70.7(a)(5). In reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet a procedural requirement, such as accompanying a permit by a statement of basis meeting the requirements of 40 C.F.R. § 70.7(a)(5), the EPA considers whether the petitioner has demonstrated that the permitting authority's failure resulted in, or may have resulted in, a deficiency in the content of the permit. *See Hanford Order* at 25 (citing *In the Matter of Onyx Environmental Services*, Order on Petition No. V-2005-1 (February 1, 2006) at 14.)

The EPA finds that the Petitioner has not demonstrated that the documents provided by HDOH, including the amended "Permit Review Summary and Analysis," did not satisfy the requirements of HAR § 11-60.1-104(j) and 40 C.F.R. § 70.7(a)(5). The Petitioner wrote to HDOH to request such a statement with respect to the Proposed Permit. Proposed RTC at 4. HDOH responded by directing the Petitioner to its website, as well as the District Health offices in Kona and Hilo, where the administrative record, including the addendum to the permit review summary, could be found. Proposed RTC at 5. HDOH proposed, and ultimately finalized, an "Addendum to the Permit Review Summary" that, according to HDOH, served the purpose of a statement of basis.

See Id. at 4. The Addendum to the Permit Review Summary provided with the Proposed Permit explained all of the changes to the permit and tied them to the *2014 Hu Honua Order* where appropriate. *See* Addendum to the Permit Review Summary for Proposed Permit. The Petition includes three specific claims alleging the inadequacy of the Permit Review Summary. With regard to Subpart JJJJJ, the significant modification permit action that is the subject of this Petition does not concern the requirements of 40 C.F.R. § 63 Subpart JJJJJ, which includes the requirements for industrial, commercial, and institutional borders. With regard to whether the Permit includes the applicable regulatory provisions consistent with HAR § 11-60.1-104(j), both the Proposed Permit and the Permit Review Summary for the Proposed Permit appear to contain regulatory citations for each permit term. With regard to whether the Hu Honua facility is new or existing, the Petitioner has not given any detail on why such information pertains to the requirements of the Proposed Permit or resulted in a deficiency in the content of the Proposed Permit. The Petitioner provides no other arguments concerning why the Permit is deficient. Thus, the Petitioner has not demonstrated that the Permit Review Summary resulted in a deficiency in the content of the permit

For the foregoing reasons, the EPA denies the Petition as to this claim.

Claim 1.C. Mandatory Public Notification Procedures Were Ignored.

Petitioner's Claim: The Petitioner states that Hawaii's title V program, HAR § 60.1-99(b)(4)(B), and part 70, 40 C.F.R. § 70.7(h), require notice of opportunity for comment on permit actions. Petition at 10–11. The Petitioner claims that "[i]n written comments, PPHE expressed concern and objection based on HDOH's failure to notify any member of the public of its notice of permit action and public comment period. PPHE Letter, 4/14/14, page 2". *Id*. at 11. Referring to HDOH's response to this comment in HDOH's Proposed RTC at page 5, the Petitioner further claims that "[t]he Department's response states further that they cannot generate a mailing list and notify only those commenters that object to the Hu Honua facility or questioned the adequacy of a permit condition." *Id*. The Petitioner states that "PPHE's comment made not [sic] such request, only that HDOH should have a mailing list and PPHE should be on it. … [I]t turns out that HDOH simply does not maintain a mailing list as contemplated by state and federal requirements." *Id*. The Petitioner further claims that "[a]s a consequence of not timely notifying both Petitioner and other commenters …, PPHE and the public at large has been prejudiced in this proceeding."[9] *Id*.

EPA's Response: For the reasons described below, the EPA denies the Petitioner's claim that the EPA must object to the permit on the bases described above.

During the public comment period, there were two comments regarding a mailing list. The first comment regarding a mailing list stated:

> HAR §11-60.1-99 establishes the Department's regulations and procedures for public participation in CSP proceedings under the Clean Air Act. HAR §11-60.1-99(b)(4)(B) requires that the Department shall give notice of a public comment period to "persons on a mailing list developed by the director". Federal Title V

[9] The relevant federal regulation states, "[n]otice shall be given: … to persons on a mailing list developed by the permitting authority, including those who request in writing to be on the list." 40 C.F.R. § 70.7(h)(1).

> operating permit requirements contain a similar requirement, (40 Code of Federal Regulations §70.7(h)(1) ("to persons on a mailing list developed by the permitting authority"). Based on prior mailings by CAB to PPHE and its council concerning this source and PPHE's singular role in triggering the EPA Objection and the instant permit revisions, PPHE's belief it would receive notice of the public comment period was reasonable.
>
> … PPHE had no notice or opportunity to engage technical review or analyze the legal adequacy of the response.

PPHE Public Comments (April 14, 2014) at 2–3. In response to the comment above, HDOH stated:

> The procedures implemented to process the initial covered source permit and the draft permit amendment including the public participation proceedings were in accordance with the applicable state and federal regulations including Hawaii Administrative Rules, Chapter 11- 60.1 and 40 CFR Part 70. The Department made available to the public the Administrative Record, consisting of the draft permit amendment, the addendum to the permit review summary, and non-confidential supporting materials from the applicant. The Administrative Record was available for viewing at the District Health offices in Kona and Hilo, and on the Department's website. The 30-day public comment period was extended from 4/14/14 to 5/9/14 upon discovery that the Department did not notify all persons on a public notice mailing list of the public notice.

Proposed RTC at 4. The second comment regarding a mailing list stated:

> By this letter, PPHE formally requests that all persons that have submitted written comments to the State of Hawaii objecting to the Hu Honua facility or questioning the adequacy of permit condition be placed on a mailing list and be notified by mail or email regarding proposed and final actions affecting this facility. This request specifically requests inclusion of this office on such list.

PPHE Public Comments (May 9, 2014) at 3. In response to this second comment, HDOH stated:

> The Department needs to remain impartial in its processing of permit applications and therefore cannot generate a mailing list and notify only those commenters who had objected to the Hu Honua facility or questioned the adequacy of a permit condition. In accordance with Hawaii Administrative Rules, Sections 11-60.1-99 and 11-60.1-100, commenters on the draft permit amendment will be notified of the final permit decision.

Proposed RTC at 5.

The relevant provision in Hawaii's approved title V regulation states, "Notification of a public comment period or a public hearing shall be made: … (B) To persons on a mailing list developed by the director, including those who request in writing to be on the list." HAR 60.1-99(b)(4)(B).

40 CFR 70.7(h)(1) provides that Notice shall be given: … To persons on a mailing list developed by the permitting authority, including those who request in writing to be on the list." Consistent with the public participation requirements for title V permits of Hawaii's approved administrative rules at § 11-60.1-99, HDOH held a public comment period on the Draft Permit from March 14, 2014, to May 9, 2014.

The EPA finds that the Petitioner has not demonstrated that HDOH did not comply with the procedural requirements for notice and public participation. Specifically, the Petitioner claims that HDOH did not maintain a mailing list as required by part 70 and Hawaii's regulations; however, the record indicates that HDOH does in fact maintain a mailing list. As outlined above, HDOH did state in the Proposed RTC that "[t]he Department needs to remain impartial in its processing of permit applications and therefore cannot generate a mailing list and notify *only those commenters that objected to the Hu Honua facility or questioned the adequacy of a permit condition*." *Id*. at 5 (emphasis added). With this response, however, HDOH was not refusing to maintain a mailing list in general for notice purposes but rather indicating that it would notify all individuals on the mailing list. Indeed, HDOH's response to the first comment highlighted above evidences HDOH's intention to maintain and use a mailing list. In response to the Petitioner's first comment, HDOH explained that "The 30-day public comment period was extended from 4/14/14 to 5/9/14 upon discovery that the Department did not notify all persons on a public notice mailing list of the public notice." *Id*. at 4. Hence, the Petitioner has not demonstrated that HDOH did not maintain a mailing list as required by HAR 60.1-99(b)(4)(B) and 40 C.F.R. § 70.7(h).

Furthermore, to the extent that notice was not initially provided to a mailing list, or to all parties on the mailing list, HDOH subsequently provided such notice and extended the public comment period to allow for those who had previously not received notice via the mailing list to comment on the Proposed Permit. In fact, the EPA notes that the Petitioner took advantage of every opportunity for public participation and submitted numerous comments during both the initial and extended comment periods. Specifically, regardless of the Petitioner's assertions concerning HDOH's failure to provide for opportunity for public comment, the Petitioner did in fact comment during the first public comment period ending on April 14, 2014, and again during the extended comment period ending on May 9, 2014. Therefore, the issue of whether HDOH provided the Petitioner and other parties on the mailing list an opportunity to comment on the Proposed Permit is now moot. *See Hanford Order* at 19.

For the foregoing reasons, the EPA denies the Petition as to this claim.

Claim 1.D. A Public Hearing Was Improperly Denied.

Petitioner's Claim: The Petitioner states that "PPHE requested that the HDOH conduct a public hearing so the public comment process would be robust and provide opportunity for both PPHE and other interested members of the public to have actual, real time interaction with HDOH personnel and describe their technical concerns over the revisions to the Project." Petition at 11–12. The Petitioner claims that HDOH improperly denied its request for a public hearing on the Proposed Permit. *Id*. at 12. The Petitioner asserts that HDOH denied the public hearing because it "determined after reviewing the comments submitted … that a public hearing … would not

have aided the Department … and therefore a public hearing was not held." *Id*. at 12 (citing Proposed RTC at 5) (ellipses in original). The Petitioner contends that "[w]hile it is certainly the case that public involvement in permitting processes is, in part, intended to aid the Department, such a narrow view is contrary to both the letter and spirit of the Act." *Id*.

EPA's Response: For the reasons described below, the EPA denies the Petitioner's claim that the EPA must object to the permit on the bases described above.

The Petitioner commented that "[s]ince DOH has been unable to articulate its rationale in materials available to the public, it should do so in public, and allow questions and respond to those questions from the public at a public hearing." *See* PPHE Public Comments (May 9, 2014) at 2. In responding to this public comment requesting a public hearing, HDOH stated:

> The Department determined after reviewing the comments submitted during the public comment period that a public hearing on the draft permit amendment would not have aided the Department in making a final decision on the draft permit amendment and therefore a public hearing was not held.

Proposed RTC at 4–5. With the Final Permit, HDOH provided an updated RTC that further explained why a public hearing was not held:

> The Department determined after reviewing the comments submitted during the public comment period that a public hearing was not warranted for the following reasons: 1) the Department has sole discretion on whether to have a public hearing, 2) there was not a significant number of requests for a public hearing (there was only one), and 3) based on the comments received, the Department determined that a public hearing on the draft permit amendment would not have aided the Department in making a final decision on the draft permit amendment.

Final RTC at 5.

The CAA and part 70 require a permitting authority to "offer [] an opportunity for . . . a hearing on the draft permit." 40 C.F.R. § 70.7(h); *see* 42 U.S.C. § 7661a(b)(6); CAA § 502(b)(6). The EPA has previously interpreted federal requirements to require "a hearing *where appropriate*." 57 *Fed. Reg.* 32290 (July 21, 1992) ("For this purpose, public participation includes: notice, an opportunity for public comment, and a hearing *where appropriate*.") (emphasis added). Hawaii's approved title V program similarly requires that "the director shall provide for public notice, including the method by which a public hearing can be *requested*."[10] HAR § 11-60.1-99(a). The EPA has explained that "[n]either the Act nor EPA's implementing regulations require a permitting authority to hold a hearing when one is requested. Rather, the Act and applicable regulations require only that States offer an opportunity for a public hearing." *In the Matter of*

[10] Hawaii's regulations also state:

> Any person requesting a public hearing shall do so during the public comment period. Any request from a person for a public hearing shall indicate the interest of the person filing the request and the reasons why a public hearing is warranted.

HAR § 11-60.1-99(a).

ExxonMobil Operating Permits, Order on Petition No. Vl-2004-01 (June 29, 2005) (*ExxonMobil Order*) at 12 (denying petition issue where petitioners failed to demonstrate that this discretion was not reasonably exercised); *see also Noranda Order* at 8–9 (citing *ExxonMobil Order*).

In this matter, the EPA finds that HDOH's decision not to hold a public hearing was not inconsistent with the public participation requirements of CAA § 502(b) (6), 40 C.F.R. § 70.7(h), or HAR § 11-60.1-99. [11] Both part 70 and Hawaii's title V regulations require that the permitting authority offer the *opportunity* for a public hearing on a draft permit and provide a hearing if appropriate.[12] In this case, as it explained in its RTCs, HDOH exercised its discretion and determined that there was only one request for a hearing and that a public hearing would not have aided HDOH in its final decision. Given the fact that the Petitioner was the only requestor, HDOH could have reasonably concluded that there was not sufficient public interest to hold a hearing on these permits. *ExxonMobil Order* at 12. It is not the EPA's position that a single request cannot be sufficient public interest. *Id*. Rather, the permitting authority must independently analyze each request and make a reasonable judgment as to whether the facts before it warrant granting a particular request. *Id*. In making that judgment, it is not unreasonable for the permitting authority to take account of written comments, including those from the Petitioner, that were received with the request for the public hearing. *Id*. HDOH has the discretion to deny a public hearing and the EPA finds that HDOH reasonably exercised its discretion in this instance.

Furthermore, the Petitioner's stated rationale in its Petition does not demonstrate that HDOH improperly denied its request for a public hearing. The Petitioner claims that "actual, real time interaction with HDOH personnel and describ[ing] their technical concerns over the revisions to the Project" would have aided HDOH in making a final decision on the Proposed Permit. However, the Petitioner has not explained why this statement demonstrates that HDOH improperly denied its request for a hearing. Moreover, as in the matter of the *Noranda Order*, HDOH provided an opportunity for the Petitioner to submit written comments on the Draft Permit, and the Petitioner availed itself of that opportunity. In fact, as explained in Section III.b of this Order, the Petitioner submitted two sets of public comments. Presumably, the Petitioner included all of its technical concerns in these written comments. Thus, it bears noting that the Petitioner has not provided any explanation of how the denial of their hearing request deprived them of meaningful opportunity for participation in the permit proceedings or resulted in a flaw in the permit. *Noranda Order* at 9.

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[11] Further, even where a permitting authority does hold a public hearing, neither CAA § 502(b)(6), 40 C.F.R. § 70.7(h), or HAR § 11-60.1-99 require that the public hearing provide for "questions and response to questions" at the public hearing. The EPA observes that responding to comments received at public hearings generally requires considered examination of the issues presented in light of the requirements of the CAA. Permitting authorities normally respond to comments received at a public hearing in the RTC and not during the public hearing.

[12] Part 70, 40 C.F.R. § 70.7(h), requires that a permitting authority "offer [] an opportunity for . . . a hearing on the draft permit." In accordance with those regulations, Hawaii's regulations provide for the opportunity to request a public hearing as follows:

> Any person requesting a public hearing shall do so during the public comment period. Any request from a person for a public hearing shall indicate the interest of the person filing the request and the reasons why a public hearing is warranted.

HAR § 11-60.1-99(a).

For the foregoing reasons, the EPA denies the Petition as to this claim.

Claim 2. Permit Limitations for Criteria Pollutants Are Not Practically Enforceable.

Claim 2 is found on pages 12–21 (Section V) of the Hu Honua Petition and includes several sub-claims. Because these claims include substantially overlapping issues, the summary of the Petitioner's Claim 2 and the EPA's response addresses all the Claim 2 issues together.

Petitioner's Claim: For the reasons described in detail below, the Petitioner claims that Hu Honua is a major source of carbon monoxide (CO) and nitrogen oxide (NOx) that should be subject to PSD. *See* Petition at 12–21. The Petitioner claims that "HDOH relied on unsubstantiated and highly questionable emissions factors in calculating the Hu Honua facility's PTE and allowing use of a synthetic minor permit assuming the permit emissions cap would be reached at the 12 month mark …." *Id*. at 12. The Petitioner also generally claims that "HDOH has failed to ensure the Permit is sufficiently clear to be enforceable." *Id.* The Petitioner further identifies several concerns regarding the permit's reliance on a "synthetic minor emissions cap."[13] *Id*. First, the Petitioner contends that Hu Honua will reach or exceed its emission limit for CO and NOx in "much less than twelve months, which will in turn subject the community of Pepe'ekeo to variable pulses of higher concentrations of air pollution that will impair human health and well being."[14] *Id*. Second, the Petitioner claims that Hu Honua will have to shut down and start up frequently to stay below the permitted emission limits, which the Petitioner claims would lead to higher emissions. *Id*. Relatedly, the Petitioner specifically contends that Hu Honua's power supply agreement might constrain the facility's ability to shut down due to specific timing expectations, contractual incentives, or requirements to provide a certain amount of electricity. *Id*. at 13.

In addition, the Petitioner claims that the "EPA must reject the permit as lacking a technical foundation that ensures compliance with the 250 [tons per year (tpy)] limitations for criteria pollutants" and that the "EPA elected to withhold action on these claims as articulated in the prior PPHE petition (and incorporated herein by reference as if restated herein)." *Id*. at 21.

Hu Honua is a Major Source of Criteria Pollutants

With regard to whether Hu Honua is a major source of CO emissions, the Petitioner claims that the *2014 Hu Honua Order* "offered HDOH (and/or the operate [sic]) an opportunity to avoid such justification *if* it established federally and practically enforceable emission limits in the final Permit." *Id*. at 13. Referring to the EPA Region 9's June 30, 2011, letter to HDOH on the 2011 proposed permit, the Petitioner also states that the EPA suggested that "HDOH's other option was to provide documentation that would justify treating Hu Honua as a synthetic minor source

[13] Emission limits intended to restrict a facility's potential to emit (PTE) to below the applicable PSD major stationary source threshold amount are sometimes referred to as synthetic minor emission limits.

[14] The EPA observes that permit condition C.6 of the Proposed and Final Permits states:

> The CO and NOx emissions from the facility, including during periods of boiler startups, shutdowns, and malfunction or upset conditions, shall not equal or exceed 250 tons per year, on any rolling twelve-month (12-month) period. CO and NOx emissions from the 836 kW emergency biodiesel engine generator shall also be included in the CO and NOx emissions from the facility.

Proposed Permit at 1 (C.6).

'using source test data from other stoker biomass boilers that are complying with the emission limits … proposed for Hu Honua.'" *Id.* (quoting Letter to Clean Air Branch Manager Wilfred Nagamine from Permits Office Chief Gerardo Rios, EPA Region IX, (June 30, 2011) at point I (*2011 EPA Letter to HDOH*)). The Petitioner contends that "HDOH has failed in both regards, and therefore, Hu Honua must be treated as a major source of criteria pollutants and undergo PSD/BACT analysis." *Id.*

Further, the Petitioner generally claims that Hu Honua is a major source of criteria pollutants because HDOH did not provide a sufficient justification for the CO emissions factors used to calculate the CO PTE for the boiler. *Id*. at 15–16. The Petitioner makes various claims about the reliability of the 0.17 lb/MMBtu CO emission factor for the boiler. *Id*. at 16–17 (citing *2011 EPA Letter to HDOH*; Mary Booth, PhD, Partnership for Policy Integrity, *Trash, Trees and Toxics: How Biomass Energy has Become the New Coal* (April 2, 2014) at 29 (*PFPI Report*)). Specifically, the Petitioner contends that HDOH's entire justification for the CO emission factor of 0.17 lb/MMBtu for the boiler is based on two facilities that are not yet constructed or operating and have similar engineering and equipment to those chosen at Hu Honua. *Id*. at 15 (citing *2011 EPA Letter to HDOH*; Addendum B, Response to EPA's Comments on Proposed Air Permit for Hu Honua Bioenergy at 2). The Petitioner asserts that while these two facilities have similar engineering and equipment to Hu Honua, "both fuel source and industrial context must be specifically analyzed to determine the analytical utility of the two plants." *Id*. at 16. The Petitioner also claims that the EPA suggested that the CO emissions "would be 'among the lowest [the agency] has ever seen nation-wide for biomass fired boilers…'" *Id*. (citing *2011 EPA Letter to HDOH*). The Petitioner claims that the current permit uses an emission factor based on data with a "C" rating even though HDOH rejected the use of AP-42 emission factors for acrolein in an earlier draft permit because the data were rated "C." *Id*. at 17. The Petitioner has not identified which emission factor they are claiming has a "C" rating, other than to state that it is an emissions factor for Priority Biofuels in Minnesota for 100 percent biodiesel. The Petitioner further asserts that HDOH should provide an analysis of the fuel type, furnace type, firing configuration, and boiler operating conditions for the use of this emission factor. *Id*.

The Petitioner also contends that the initial PTE calculations for CO and NOx excluded emissions associated with startup, shutdown, malfunction, and upset conditions and that the addition of these emissions would result in Hu Honua being classified as a major source subject to PSD. *Id*. The Petitioner further claims that, despite EPA's direction in the *2014 Hu Honua Order*, the permit and accompanying analysis do not include startup, shutdown, and malfunction emissions in the initial PTE calculations or in the emission limits, monitoring, and recordkeeping. *Id*. at 17–18. Referring to HDOH's Proposed RTC, the Petitioner asserts that the "totality of the analysis is that 'nothing significant will happen.' [Proposed] RTC at 7 of 9." *Id*. at 18. The Petitioner contends that, contrary to the applicant's projected emissions, emissions during startup, shutdown, and malfunction will increase substantially for CO, NOx, and HAPs. *Id*. For support, the Petitioner also provides a table of emissions during normal operation and startup, shutdown, and maintenance conditions at a bioenergy facility in Texas, asserting that the table shows that emissions increase substantially during such conditions, contrary to the administrative record on Hu Honua's emissions during startup and shutdown. *Id*. at 19.

Emission Limits are Not Practically Enforceable

The Petitioner asserts that "a permit is enforceable as a practical matter … if permit conditions establishes [sic] a clear legal obligation for the source and/or allows compliance to be verified and enforced." *Id*. at 13 (citing CAA § 113(a); providing a link to the EPA Region 9, *Draft Title V Permit Review Guidelines*, Guidelines: Practical Enforceability, III-53 – III-64 (Sept. 9, 1999)). The Petitioner also claims that "an emission limit for criteria pollutants can be relied upon to restrict a source's PTE only if is legally and practically enforceable." *Id*. at 14 (citing 40 C.F.R. § 52.21(b)(4), 40 C.F.R. 52.632, *2012 Cash Creek Order* at 14–15).

The Petitioner generally claims that the permit's emission limits for CO and NOx are not practically enforceable because the monitoring protocol for wood sampling under permit condition F.4[15] is "entirely unknown." *Id*. at 14–15. Therefore, the Petitioner contends that Hu Honua's PTE cannot be restricted by the permit's emission limits. *Id*. at 14. Specifically, the Petitioner claims that permit condition E.14.a.iii[16] depends on wood sampling and analysis per permit condition E.2.c.iii[17] in order to calculate CO emissions. *Id*. The Petitioner asserts that the monitoring method is important for the permit to be practically enforceable because the fuel source is highly variable, the initial PTE calculations demonstrated a small margin of error to remain below major source thresholds, and "the emission limits are based on the 2,800,000 MMBtu/yr fuel consumption limit." *Id*. at 15.

The Petitioner also claims that the permit's reliance on a fuel consumption limit of 2,800,000 MMBtu/yr to demonstrate compliance with the synthetic minor emission limitations is a fundamental flaw in the permit. *Id*. at 19. The Petitioner provides a table of CO emission limits at other biomass-fueled power plants, which the Petitioner claims demonstrates that many biomass-fueled facilities use an emission factor that calculates PTE emissions just below the major source cutoff. *Id*. at 20. The Petitioner states, "[E]missions limitations predicated on a limitation of fuel consumed in light of projected emissions factors are plainly not in accordance with the Act's enforceable emissions limitations." *Id*. at 21.

The Petitioner makes several other specific allegations in support of its assertion that the synthetic minor emission limits are unenforceable. The Petitioner asserts that the permit and accompanying analysis do not include startup, shutdown, and malfunction emissions in monitoring and recordkeeping requirements. *Id*. at 18. The Petitioner asserts that the emission limits are not practically enforceable because the permit's reporting requirements would allow 8 months to pass before the state or the public became aware of exceedances of the permitted

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[15] *See infra* note 37 for information on permit condition F.4.

[16] The EPA notes that permit condition E.14.a.iii in the Proposed Permit states:

> The F factor (Fd) required in Section 4.1 and 4.3 for burning wood shall be derived using Equation 2.4-3 of the EIIP document. The high heating value (HHV), hydrogen, carbon, sulfur, nitrogen, and oxygen content for the wood needed for this equation shall be derived from the wood sampling and analysis conducted per Attachment II, Special Condition No. E.2.c.iii.

Proposed Permit at 2 (E.14.a.iii). The EPA notes that the Final Permit removed permit condition E.14.a.iii and the Final Permit no longer uses wood sampling to calculate CO and NOx emissions from the boiler. *See infra* pp. 23–24; Final Permit, Attachment II at 14–15 (E.14).

[17] *See infra* note 37 for information on permit conditions E.2.c.iii.

emission limits for CO and NOx. *Id*. at 13–14. Finally, the Petitioner claims that the permit does not "connect permit condition F.6.a.vii to determining compliance with the emission limits in permit conditions C.6 (criteria pollutants))," as required by the *2014 Hu Honua Order*.[18] *Id*. at 18 (citing *2014 Hu Honua Order* at 17).

EPA's Response: For the reasons described below, the EPA denies the Petitioner's claim that the EPA must object to the permit on the bases described in Claim 2 above.

Relevant Legal Background

HDOH implements the PSD program under a delegation agreement with the EPA and issues PSD permits under 40 C.F.R. § 52.21. Under the relevant provision in 40 C.F.R. § 52.21(b)(4), the calculation of a facility's PTE for purposes of determining whether the facility triggers PSD requirements for a particular pollutant includes consideration of "[a] physical or operational limitation on the capacity of the source to emit [the] pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, … if the limitation or the effect it would have on emissions … [i]s federally enforceable."[19] *2014 Hu Honua Order* at 9; *2012 Cash Creek Order* at 15; *2012 Kentucky Syngas Order* at 28; *In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC*, Order on Petition No. II-2001-05 (April 8, 2002) (*2002 Pencor-Masada Order*) at 21.[20] In other words, if a permit applicant agrees to an enforceable limit that is sufficient to restrict PTE, the facility's PTE is calculated based on that limit. In this case, therefore, an EPA objection is warranted if the permit does not impose enforceable limits on the source's CO and NOx emissions such that source-wide emissions remain below 250 tpy, the applicable threshold for determining whether Hu Honua is a major stationary source for PSD purposes. 42 U.S.C. § 7479(1) (defining "major emitting facility"); 40 C.F.R. 52.21(b)(1)(i)(b) (defining "major stationary source"); *see 2014 Hu Honua Order* at 9–10.

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[18] The EPA notes that permit condition F.6.a.vii in the Proposed Permit states:

> The total of all HAPs emissions and the largest individual HAP emissions from the facility on a monthly and rolling twelve-month (12-month) basis. Facility emissions shall include emissions during periods of boiler startups, shutdowns, and malfunction or upset conditions; and emissions from the 836 kW emergency biodiesel engine generator.

Proposed Permit at 5 (F.6.a.vii).

[19] Following two court decisions, *National Mining Ass'n v. EPA*, 59 F.3d 1351 (D.C. Cir.1995) and *Chemical Manufacturers Ass'n v. EPA*, No. 89-1514 (D.C. Cir. 1995), the EPA clarified that the term "federally enforceable" as used in relation to the definition of PTE for the federal PSD program should be read to mean "federally enforceable or legally and practicably enforceable by a state or local air pollution control agency." John Seitz and Robert Van Heuvelen, "Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit" (Jan. 22, 1996), at 3. The term "federal enforceability" has also been interpreted to encompass a requirement for practical enforceability. See, e.g., *In re Shell Offshore, Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit*, 13 E.A.D. 357, 394 n.54 (EAB 2007).

[20] There is substantial body of EPA guidance and administrative decisions relating to PTE and PTE limits. *E.g.*, *see generally*, Terrell E. Hunt, and John S. Seitz, "Limiting Potential to Emit in New Source Permitting" (June 13, 1989); John Seitz, "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act" (Jan. 25, 1995); Kathie Stein, "Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and § 112 Rules and General Permits" (January 25, 1995); John Seitz and Robert Van Heuvelen, "Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit" (January 22, 1996); *In re Shell Offshore, Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit*, 13 E.A.D. 357 (EAB 2007); *2002 Pencor-Masada Order* at 4–7.

Importantly, only limits that meet certain enforceability criteria may be used to restrict a facility's PTE, and the permit must include sufficient terms and conditions such that the source cannot lawfully exceed the limit. *See, e.g.*, *2012 Cash Creek Order* at 15 (explaining that an "emission limit can be relied upon to restrict a source's PTE only if it is legally and practicably enforceable" (emphasis added)); *2002 Pencor-Masada Order* at 4–7. One of the key concepts in evaluating the enforceability of PTE limits is whether the limit is enforceable as a practical matter. *See, e.g.*, *2002 Pencor-Masada Order* at 4–7 (emphasizing the importance of practical enforceability in the permit terms and conditions that limit PTE). In order for an emission limit to be enforceable as a practical matter, the permit must clearly specify how emissions will be measured or determined for purposes of demonstrating compliance with the limit. *See, e.g.*, *2014 Hu Honua Order* at 10. Thus, such limitations must be supported by monitoring, recordkeeping, and reporting requirements "sufficient to enable regulators and citizens to determine whether the limit has been exceeded and, if so, to take appropriate enforcement action." 2002 *Pencor-Masada Order* at 7. Further, in general terms, to effectively restrict a facility's PTE under the relevant major stationary source threshold, a permit's emission limits must apply at all times to all actual emissions, and all actual emissions must be considered in determining compliance with the respective limits. *2014 Hu Honua Order* at 10–11; *2012 Cash Creek Order* at 15; *2012 Kentucky Syngas Order* at 29–30. Additionally, as the EPA has previously explained: "Although it is generally preferred that PTE limitations be as short-term as possible (e.g., not to exceed one month), EPA guidance allows permits to be written with longer term limits if they are rolled (meaning recalculated periodically with updated data) on a frequent basis (e.g., daily or monthly). [EPA guidance] also recognizes that such longer rolling limits may be appropriate for sources with 'substantial and unpredictable variation in production.'" 2002 *Pencor-Masada Order* at 6. This type of rolling cumulative limit may be appropriate where the permitting authority determines that the limit, in combination with applicable monitoring, reporting, and recordkeeping, provides an assurance that compliance can be readily determined and verified. *See id*. at 6–7.

Overview of Permit Terms

Permit condition C.6 of the Proposed Permit states, "The CO and NOx emissions from the facility, including during periods of boiler startups, shutdowns, and malfunction or upset conditions, shall not equal or exceed 250 tpy, on any rolling twelve-month (12-month) period. CO and NOx emissions from the 836 KW emergency biodiesel engine generator shall also be included in the CO and NOx emissions from the facility."[21] Proposed Permit at 1 (C.6). The Proposed Permit requires a selective non-catalytic reduction (SNCR) system to be "installed, operated, and maintained as necessary to achieve the NOx emission limits during operation of the boiler installed." *Id*. at D.2.c. The boiler emission calculations rely on data from continuous emission monitors (CEMS) (or data from the boiler's source performance tests for CO or NOx when CEMS data are missing) to demonstrate compliance with the CO and NOx emission limits

[21] The EPA observes that, except where otherwise note in this Order, the terms and conditions of the Final Permit are the same as those of the Proposed Permit.

under permit condition C.6. *Id*. at 2–3 (E.14).[22] The CEMS for CO and NOx must be installed, operated, calibrated, and maintained according to permit conditions E.8 and E.9. *Id*. at E.8, E.9. The CO and NOx emissions must be calculated on a monthly basis, and added to the total emissions from the previous 11 months to determine an annual emissions total each month (i.e., a rolling 12-month total is calculated every month). *Id*. at 2–3 (E.14). These emissions calculations are then reported biannually in accordance with permit condition F.6.[23] *Id*. at 5. If, in any month, this total exceeds the major source threshold, the source must report the deviation within 5 working days according to permit condition F.3. *Id*. at F.3.

EPA's Analysis

The EPA finds that the Petitioner has not demonstrated that the Proposed Permit's CO and NOx terms and conditions are inadequate to restrict Hu Honua's PTE to below the 250 tpy PSD major stationary source threshold. [24] *See 2014 Hu Honua Order*; *2012 Cash Creek Order* at 15; *2012 Kentucky Syngas Order*; *In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol*, LLC, Petition No. II-2000-07, Order on Petition (May 2, 2001), at 21. As explained below, the Petitioner has not demonstrated the Proposed Permit's annual limits in permit condition C.6 are not enforceable as a practical matter. Therefore, the Petitioner has not demonstrated that Hu Honua and HDOH cannot rely on the CO and NOx emission limitations in determining the source's PTE and determining whether the source exceeds the major source threshold of 250 tpy. Thus, the Petitioner has not demonstrated that Hu Honua is a major source that must undergo PSD permitting.

As explained previously, annual emission limits expressed as a cumulative rolling total basis (12-month rolling total) may be appropriate where the permitting authority determines that the limit, in combination with applicable monitoring, reporting, and recordkeeping, provides an assurance that compliance can be readily determined and verified, and the limit can be enforced as a legal

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[22] The EPA notes that the Final Permit now relies on CEMS data substitution procedures under 40 C.F.R. Part 75 rather than source performance tests to estimate CO and NOx emissions when CEMS data are missing. In the Final Permit, permit condition E.14.a states:

> The permittee shall use data from the boiler's CO and NOx CEMS required by Attachment II, Special Conditions Nos. E.8 and E.9, using the following procedures:
> i. The permittee shall use the data conversion procedures for SO2 in 40 CFR Part 75, Appendix F, modified to account for the difference in molecular weight between CO and SO2, and the missing data substitution procedures for SO2 in 40 CFR Part 75, Subpart D, modified to account for the difference in molecular weight between CO and SO2, to determine the hourly mass emission rate of CO from the boiler during all boiler operating hours.
> ii. The permittee shall use the data conversion procedures in 40 CFR Part 75, Appendix F and the missing data substitution procedures for NOx in 40 CFR Part 75, Subpart D, to determine the hourly mass emission rate of NOx from the boiler during all boiler operating hours; ….

Final Permit, Attachment II at 14 (E.14.a).

[23] The EPA notes that the Final Permit connects the reporting requirements of F.6.a.vi to demonstrate compliance with the CO and NOx emission limits in C.6. Final Permit, Attachment II at 19 (F.6.a.vi).

[24] With regard to all of the statements in the Petition concerning the EPA's statements in the June 30, 2011, letter commenting on the May 19, 2011, proposed permit (the permit that was the subject of the EPA's February 7, 2014, Order), the EPA notes that those comments were on a prior version of the Hu Honua title V permit that was proposed to the EPA on May 19, 2011, not on the 2014 Proposed Permit that is the subject of the Petition. *See* Petition at 13–16; *2011 EPA Letter to HDOH*.

and practical matter. *See 2002 Pencor-Masada Order* at 6. The Hu Honua permit contains rolling 12-month cumulative total, source-wide CO and NOx emission limits of less than 250 tpy that apply at all times and rely on CEMS to determine emissions from the boiler. *See* Proposed Permit at 1 (C.6). The EPA notes that the use of CEMS, such as that in the Hu Honua permit for CO and NOx emissions from the boiler, "is a more rigorous type of monitoring than for some other kinds of PTE limits." *2001 Pencor-Masada Order* at 23. Therefore, any of the Petitioner's concerns about the uncertainty of the boiler emission factors used in the initial PTE calculations are adequately addressed by the permit's use of real-time monitoring of the boiler emissions with CEMS.[25] *See 2002 Pencor-Masada* at 6; *2001 Pencor-Masada Order* at 23 ("EPA believes that this CEM-based approach adequately addresses this uncertainty by requiring thorough real-time monitoring of the emissions.").

EPA's Analysis Concerning Practical Enforceability of Emission Limits

As an initial matter, although the Petitioner stated that the permit lacks a "technical foundation that ensures compliance with the less than 250 TPY limitations for criteria pollutants," Petition at 21, the EPA finds that the Petitioner did not identify any specific emission limit that they claim was unenforceable as a practical matter. As identified above, the Proposed Permit includes permit condition C.6., which requires that the rolling 12-month cumulative total CO and NOx emissions be less than 250 tpy. Proposed Permit at 1 (C.6). As directed by the *2014 Hu Honua Order*, Proposed Permit condition C.6 now covers source-wide emissions, including emissions from the emergency generator, and applies at all times, including during periods of startup, shutdown, and malfunction or upset conditions. *See 2014 Hu Honua Order* at 12 (directing HDOH to clarify that the CO and NOx emission limits apply at all times and include emissions from the emergency generator). For the reasons explained in detail below, the Petitioner has not demonstrated that the permit's emission limits on CO and NOx in permit condition C.6., included in the permit to restrict the facility's PTE below the 250 tpy PSD major stationary source threshold, are unenforceable as a practical matter.

As described above, the Petitioner provides five specific assertions to support its claim that the CO and NOx emission limits of permit condition C.6. are not enforceable as a practical matter: (1) the boiler emissions are calculated using unsubstantiated and questionable emission factors and a fuel consumption limit; (2) the monitoring protocol for wood sampling is unknown; (3) the permit does not include startup, shutdown, and malfunction emissions in the monitoring and recordkeeping requirements; (4) 8 months would pass before the state or the public would know of any exceedances of the CO and NOx emission limits; and (5) the permit does not connect the reporting requirements of permit condition F.6. to emission limits for CO and NOx in permit condition C.6. The EPA addresses each of these five specific assertions below.

[25] This is consistent with prior EPA practice in appropriate circumstances. *See e.g.*, Memorandum titled "3M Tape Manufacturing Division Plant, St. Paul, Minnesota," from John Rasnic to David Kee, dated July 14, 1992 ("a federally enforceable emissions limit may be used . . . to limit the potential to emit as long as a continuous emissions monitor (CEM) or an acceptable alternative is used."); and Memorandum titled "Policy Determination on Limiting Potential to Emit for Koch Refining Company Clean Fuels Project," from John Rasnic to David Kee, dated March 13, 1992 ("Use of an emission limit to restrict potential to emit . . . is acceptable provided that emissions can be and are required to be readily and periodically determined or calculated.").

First, in regard to the Petitioner's claim that the CO and NOx emission limits are not enforceable because the boiler emissions are calculated using unsubstantiated and questionable emission factors and a fuel consumption limit, the Petitioner has not met its demonstration burden for these claims for the following reasons. The Proposed Permit does not rely on emission factors or on a fuel consumption limit to calculate boiler emissions and demonstrate compliance with the boiler CO and NOx emission limits of permit condition C.6. With respect to boiler emissions, the Proposed Permit relies on data from the CO and NOx CEMS (or data from the boiler's source performance tests for CO or NOx when CEMS data are missing) to demonstrate compliance with the CO and NOx emission limits under permit condition C.6. Proposed Permit at 2–3 (E.14).[26] Specifically, the EPA finds that the CO and NOx emission limits do not rely on a CO emission factor of 0.17 lb/MMBtu or a heat input limit of 2,800,000 MMBtu to calculate boiler emissions as claimed by the Petitioner. Further, the EPA finds that Final Permit condition E.14.a requires the use of CEMS to determine CO and NOx emissions from the boiler for purposes of demonstrating compliance with the CO and NOx emission limits of Final Permit condition C.6. Final Permit, Attachment II at 14 (E.14). The EPA finds that the use of CEMS is a rigorous type of monitoring appropriate for determining boiler CO and NOx emissions.[27] For these reasons, the EPA finds that the annual CO and NOx emission limits of Proposed and Final Permit Conditions C.6 do not rely on emission factors or a fuel consumption limit to determine boiler emissions.[28]

Second, with regard to the Petitioner's assertions concerning the wood sampling protocol referred to in permit condition E.14.a.iii for calculating CO and NOx emissions, the Final Permit removed permit condition E.14.a.iii and the Final Permit no longer uses wood sampling to calculate CO and NOx emissions from the boiler. *See* Final Permit, Attachment II at 22–23 (E.14). This issue is now moot. *See In the Matter of EME Homer City Generation and First Energy Generation – Mansfield*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 (July 30, 2014) at 33, 43, 46, 54 (explaining that a significant modification to the final permit that was issued after the petition resulted in multiple claims being moot); *In the Matter of Chevron Products Company*, Order on Petition No. IX-2004-10 (March 15, 2005) at 5, 6, 9, 11 (explaining that changes to the final permit issued by the state after the petition resulted in multiple claims being moot). For these reasons, the EPA finds that the Final Permit does not rely

[26] The EPA notes that the Final Permit relies on CEMS data substitution procedures under 40 C.F.R. Part 75 rather than source performance tests to estimate CO and NOx emissions when CEMS data are missing. Final Permit, Attachment II at 14 (E.14.a). This revision further supports the enforceability of these limits and does not change the EPA's conclusion on the Petitioner's claim regarding their enforceability.

[27] EPA, AP 42, Fifth Edition, Compilation of Air Pollutant Emission Factors, Introduction at 4–5 (showing CEMS as having the highest reliability for estimating emissions); *see also 2002 Pencor-Masada* at 6; *2001 Pencor-Masada Order* at 23.

[28] The EPA also notes that the Petitioner states, "In an earlier draft of the permit, CAB rejected the use the [sic] AP-42 acrolein emission factors because the data were rated 'C.' However, the current permit uses an emissions factor for Priority Biofuels in Minnesota for 100% biodiesel that has a 'C' rating." Petition at 17. The Petitioner has not identified what emission factor has a "C" rating. Moreover, the Petitioner has not demonstrated how use of such an emission factor would render the emission limits for CO and NOx in permit condition C.6 unenforceable, and it is not clear to the EPA how use of such an emission factor could affect the enforceability of the emission limits for CO and NOx in permit condition C.6, since, as described above, boiler emissions factors are not used to determine compliance with those limits. Proposed Permit at 2–3 (E.14).

on wood sampling to determine CO and NOx emissions for purposes of determining compliance with the CO and NOx emission limits of less than 250 tpy and the issue is now moot.
Third, as summarized in detail above, the Petitioner claims that the Proposed Permit does not assure compliance with the CO and NOx emission limits during periods of startup, shutdown, and malfunction. The EPA finds that the Petitioner's specific assertion that the permit's CO and NOx emission limits do not apply during startup, shutdown, and malfunction conditions is incorrect. Proposed and Final Permit conditions C.6 do in fact apply during periods of startup, shutdown, malfunction, and upset. Proposed Permit at 1 (C.6); Final Permit, Attachment II at 3 (C.6). Thus, the Petitioner has not demonstrated that the permit's CO and NOx emission limits do not apply during startup, shutdown, and malfunction conditions.

Relatedly, the EPA also finds that the Proposed and Final Permits do require monitoring of these emissions during startup, shutdown, and malfunction, as the Proposed and Final Permits' provisions for monitoring CO and NOx emissions under permit condition E.14 state, "The permittee shall calculate and record the CO and NOx emissions from the facility, including during periods of boiler startup, shutdown, and malfunction or upset conditions…." Proposed Permit at 2 (E.14); Final Permit, Attachment II at 14 (E.14). These emissions are calculated using "CEMS, or data from the boiler's source performance tests for CO or NOx when missing CEMS data" and must then be reported bi-annually in accordance with permit condition F.6.a.vi. Proposed Permit at 2 (E.14.a), 5 (F.6.a.vi); Final Permit, Attachment II at 14 (E.14.a), 19 (F.6.a.vi). With regard to the Petitioner's assertion that Hu Honua will have to startup and shutdown frequently to stay below the permitted emission limits for CO and NOx and that frequent startups and shutdowns will increase emissions, the Petitioner includes a table of lb/hr CO and NOx emissions during startup and shutdown from a bioenergy facility in Texas. However, the Petitioner has not demonstrated that the claimed frequent startup and shutdowns or increased emissions during startup and shutdown would render the annual limits unenforceable.[29] As previously discussed, the boiler emissions will be monitored with CEMS at all times to determine compliance with the C.6 limits; therefore, if the boiler does startup and shutdown more frequently and have higher emissions during those periods, those higher emissions will be calculated using CEMS data and counted towards the C.6 limits in accordance with permit condition E.14. *Id*. at 2 (E.14). As explained above, if Hu Honua were to exceed their annual limits on any rolling 12-month basis, the source must report the deviation within 5 working days according to permit condition F.3. *Id*. at F.3. Accordingly, Hu Honua must manage its operations and constrain its emissions so that it complies with its emission limitations at all times, and, if it does not do so and has actual CO or NOx emissions above its emission limits, it must face the consequences for any violation, as appropriate.[30] *See id*. at C.8. The EPA also notes that the Final Permit includes changes to monitoring and reporting provisions under permit conditions E.14 and F.6.a.vi to assure compliance with the CO and NOx emission limits during startup, shutdown, and malfunction or upset conditions. Final Permit, Attachment II at 14 (E.14), 19

[29] The EPA notes that the Petitioner claims HDOH stated that "nothing significant will happen" to emissions during startup, shutdown, and malfunction conditions. Petition at 18 (citing Responses to Comments at 7 of 9). However, the EPA has been unable to locate where HDOH made a statement to this effect at the cited page of the Proposed RTC or anywhere else in the record.

[30] The Petitioner similarly has not demonstrated that the power supply agreement would render the CO and NOx emission limits unenforceable for the reasons discussed here.

(F.6.a.vi). In addition, permit condition D.1.d of the Final Permit now includes "work practice standards for startup that will minimize emissions during startup by using a cleaner burning fuel (biodiesel) until the air pollution control equipment is operating per manufacturer's specifications." Addendum to the Permit Review Summary for Final Permit at 3; Final Permit, Attachment II at 5 (D.1.d).[31] For these reasons, the Petitioner has not demonstrated that the Proposed and Final Permits do not assure compliance with the emission limits for CO and NOx at all times, including during boiler startup, shutdown, and malfunction.

Fourth, with regard to the Petitioner's claim that 8 months would pass before the state or the public would know of any exceedances of the emission limits for CO and NOx, the Petitioner has not demonstrated that the Proposed Permit's and Final Permit's reporting requirements render the annual emission limits unenforceable. The Proposed and Final Permits require any deviation from the permit requirements to be reported within 5 working days and therefore the Petitioner has not demonstrated that HDOH or the public will not learn of potential or actual emission violations for 8 months. Proposed Permit at 2–3 (E.14). In addition, the Petitioner has not identified any requirement that would require more frequent reporting than biannually for an emission limit to be enforceable. *See MacClarence*, 596 F.3d 1123 at 1131 (9th Cir. 2010); *Murphy Oil Order* at 12 ("The Petitioner has made general claims, but has not cited any specific applicable requirement…"). The EPA has pointed out in numerous orders that, in particular cases, general assertions or allegations do not meet the demonstration standard. *See, e.g.*, *Luminant Sandow Order* at 9; *BP Order* at 8; *Chevron Order* at 12, 24. Similar to those orders, the Petitioner's general assertion here that the permit must require more rapid determination of likely or actual emission threshold exceedances than every 8 months does not demonstrate a flaw in the permit or meet its demonstration burden. For these reasons, the EPA finds that the Petitioner has not demonstrated that the Proposed Permit's and Final Permit's reporting requirements render the annual emission limits unenforceable.

Fifth, with regard to the Petitioner's claim that the permit does not connect the reporting requirements of permit condition F.6.a.vii to emission limits for CO and NOx in permit condition C.6, the Petitioner has not demonstrated that permit condition F.6.a.vii must be connected to permit condition C.6. While the *2014 Hu Honua Order* did mention that the 2011 permit did not specifically connect the calculations in permit condition F.6.a.vi to permit condition C.6, this was not "a direct requirement in the Order" contrary to the Petitioner's claim. *See 2014 Hu Honua Order* at 11, 17. The Petitioner has not demonstrated why permit condition F.6.a.vii (concerning reporting of HAP emissions) must be connected to permit condition C.6 (emission limits for CO

[31] Permit condition D.1.d states:

> i. The definition of startup shall be as defined in 40 CFR Part 63. Subpart JJJJJJ. [Each startup shall not exceed three (3) hours.]
> ii. During startup, only biodiesel (S15) shall be used prior to the operating temperature of the superheater reaching 750 °F. When the superheater reaches 750 °F, operation of the air pollution control equipment shall commence. Wood can only be burned during startup after all the air pollution control equipment is operating according to the manufacturer's specifications. [Minimize startup and shutdown periods per manufacturer's recommendation.]
> iii. The period when only wood is burned during startup shall not exceed three (3) hours.
> iv. The permittee shall minimize startup and shutdown periods per the manufacturer's recommended procedures.

Final Permit, Attachment II at 5 (D.1.d).

and NOx) in order for those limits to be enforceable as a practical matter. The Petitioner provides no support or explanation for why HAP reporting requirements should be tied to emission limits for CO and NOx. To the extent that the Petitioner intends to claim that permit condition F.6.a.vi (rather than the cited condition F.6.a.vii concerning reporting of HAP emissions) should be connected to CO and NOx emission limits in permit condition C.6, that claim would now be moot. Permit condition F.6.a.vi in the Final Permit draws that connection by requiring biannual reporting of "[t]he CO and NOx emissions from the facility on a monthly and rolling twelvemonth (12-month) basis to demonstrate compliance with Attachment II, Special Condition No. C.6." Final Permit, Attachment II at 19 (F.6.a.vi).

For the reasons stated above, the EPA finds that the Petitioner has not demonstrated that the CO and NOx emission limits of Proposed Permit condition C.6 are not enforceable as a practical matter. In addition, for the reasons articulated above, the EPA finds that the Petitioner has not provided a basis for determining that CO and NOx emission limits of Final Permit condition C.6 are not enforceable as a practical matter.

EPA's Analysis Concerning the Petitioner's Statement Regarding Prior PPHE Action

The Petitioner stated that the "EPA must reject this permit as lacking a technical foundation that ensures compliance with the 250 TPY limitations for criteria pollutants and 10/25 TPY hazardous air pollutants" and that the "EPA elected to withhold action on these claims that have been similarly articulated in the prior PPHE petition (and are incorporated herein by reference as is restated herein)." Petition at 21. With regard to these statements, the EPA observes that the permit condition C.6 of the Proposed Permit requires that CO and NOx emissions shall not equal or exceed 250 tpy on a rolling 12-month basis. Proposed Permit at 1 (C.6). Further, the EPA has already addressed the 2011 Hu Honua Petition in the *2014 Hu Honua Order*, which granted in part and denied in part the 2011 Petition. *See generally 2014 Hu Honua Order*.

Where the EPA has granted a petition on an issue and the state has responded with a new proposed permit, it makes little sense for the EPA to return to the issue as raised in an earlier petition because that issue has been superseded by later events. *In the Matter of Meraux Refinery*, Order on Petition No. VI-2012-04 (May 29, 2015) (*Meraux Order*) at 10; *Nucor II Order* at 13 and n. 8. Under such circumstances, "as a procedural matter, the new proposed permit moots out the petition as to any issue granted from the earlier petition that it seeks to address." *Nucor II Order* at 13 and n.8. In addition, to the extent that the Petitioner simply incorporates by reference claims from the 2011 Petition that the EPA has already granted and to which the state has already responded, the Petitioner has not met its demonstration burden because they have not acknowledged or addressed the 2014 HDOH response and the rationale therein, or provided any explanation suggesting why the state's reasoning was flawed or why that Proposed Permit was deficient. *See, e.g., MacClarence*, 596 F.3d at 1132–33; *Meraux Order* at 10; *Noranda Order* at 20. Similarly, to the extent that the EPA denied claims from the 2011 Petition in the *2014 Hu Honua Order*, the EPA is not required to address those claims again in this Order. If the Petitioner wished to further pursue the claims from the 2011 Petition that the EPA denied, CAA section 505(b)(2) provides for judicial review of any denial of a title V petition. The Petitioner did not seek judicial review in this instance.

The Petitioner states that it is incorporating claims that the EPA did not act on in the 2011 Petition. The EPA's approach to the claims concerning CO, NOx, and HAP emissions raised in that petition are explained in the *2014 Hu Honua Order*, as are its reasons for granting that petition in part and denying it in part. *See 2014 Hu Honua Order* at 7–14, 15–19. The Petitioner's mere incorporation by reference of these claims from the 2011 Petition has not satisfied its demonstration burden. *See generally supra* pp. 2–4 (discussing petition demonstration burden). First, the Petitioner has not clearly identified which claims it intends to incorporate. Further, the Petitioner has not addressed the rationale provided in the *2014 Hu Honua Order* for how the EPA was approaching the claims in the 2011 Petition. For example, in the *2014 Hu Honua Order*, the EPA explained that it was not resolving certain issues raised in Claim 2 of the 2011 Petition, such as issues related to the CO PTE calculation and the CO emissions factors, because "[d]epending on HDOH's response to this objection, several issues raised in Claim 2 could be moot or substantively different." *2014 Hu Honua Order* at 13. Yet, in incorporating these claims by reference, the Petitioner does not address whether these claims have been mooted or are substantively different after HDOH's response to the *2014 Hu Honua Order* and revisions to the permit. Moreover, the Petitioner has not explained how these claims relate to the claims raised in the 2014 Petition that appear to address the same subject or how they relate to the current Proposed Permit that is the subject of the present petition and which has been substantially revised since the 2011 proposed permit. The EPA has explained how it is addressing the claims in the 2014 Petition related to the limitations for CO and NOx, see *supra* pp. 19–26, and the limitations for HAPs, and see *infra* pp. 28–34. For the reasons explained here, the EPA does not believe that additional consideration of the claims incorporated from the 2011 Hu Honua Petition is needed.

In addition, the Petitioner's mere incorporation by reference of their public comments into this Petition without any attempt to explain how these comments relate to the argument in the Petition and without confronting HDOH's reasoning supporting the Proposed Permit is not sufficient to satisfy the Petitioner's demonstration burden. *See* Petition at 8; s*ee Nucor II Order* at 16; *MacClarence*, 596 F.3d at 1130–31. In particular, HDOH provided a response to these comments. *See* Proposed RTC. The Petition does not acknowledge or address HDOH's response to these comments, or point to any flaw in HDOH's explanation. *See, e.g.*, *MacClarence,* 596 F.3d at 1132–33; *Noranda Order* at 20.

For the foregoing reasons, the EPA denies the Petition as to this claim.

Claim 3: Emission Limitations for HAPs Not Federally or Practically Enforceable.

Claim 3 is found on pages 21–22 (Section VI) of the Hu Honua Petition and includes two sub-claims. Because these claims include substantially overlapping issues, the summary of the Petitioner's Claim 3 and the EPA's response addresses all the Claim 3 issues together.

Petitioner's Claim. The Petitioner claims that the "EPA must reject the permit as lacking a technical foundation that ensures compliance with the 10/25 TPY [sic] for hazardous air pollutants" and that the "EPA elected to withhold action on these claims as articulated in the prior PPHE petition (an incorporated herein by reference as if restated herein)." Petition at 21.

The Petitioner also claims that the "Hu Honua is a major source of HAPs and must undergo a MACT Analysis." *Id*. at 21. In support of these allegations, the Petitioner claims that the Proposed Permit does not contain the wood sampling and analysis protocol for determining HAP emissions and therefore is not practically enforceable. *Id*. at 21. Specifically, the Petitioner states, "HAP emissions calculations under E.15.b.iii suggests wood sampling and analysis per E.2.c.iii, which in turn depends on the monthly sampling for High Heating Value (HHV) of the fuel and quarterly sampling for chlorine content of fuel according to the 'protocol' in F.4." *Id*. at 14, 21–22 (citing 40 C.F.R. § 63.2). The Petitioner asserts that the permit is not practically enforceable without details about the protocol "quality and frequency." *Id*. at 22.

In addition, the Petitioner states, "Relatedly, and contrary to a direct requirement of the Order, the Permit fails to specifically connect the calculations in Section F.6.a.vii to determining compliance with the emission limits in C.7 (HAPs)." *Id*. at 22 (citing *2014 Hu Honua Order* at 17; Letter from Region IX Permits Office Chief Gerardo Rios to HDOH Clean Air Branch staff Nolan Haria (July 17, 2014)). The Petitioner provides no other explanation or support for this statement.

EPA's Response: For the reasons described below, the EPA denies the Petitioner's claim that the EPA must object to the permit on the bases described above.

Relevant Legal Background

Under the governing provisions of CAA § 112(a) and 40 C.F.R. § 63.2, the calculation of a source's PTE for purposes of determining whether the source triggers requirements for major stationary sources of HAP includes consideration of "[a] physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, … if the limitation or the effect it would have on emissions is federally enforceable."[32] *See also* HAR §11-60.1-1; *2014 Hu Honua Order* at 16–17; *2012 Cash Creek Order* at 14–15; *2001 Pencor-Masada Order* at 21.[33] In other words, if a permit applicant agrees to an enforceable limit that is sufficient to restrict PTE, the facility's PTE is calculated based on that limit. Therefore, an EPA objection regarding whether Hu Honua's Final Permit assures compliance with requirements for major stationary sources of individual HAP and total HAP is warranted if the permit does not impose enforceable limits on the source's individual and total HAP emissions such that source-wide emissions remain below 10 tpy for individual HAP and 25 tpy total HAP, the applicable thresholds for determining whether Hu Honua is a major stationary source of HAP. 42 U.S.C. § 7412(a)(1); 40 C.F.R. § 63.2; H.A.R. § 11-60.1-1.[34]

Overview of Permit Terms

Permit condition C.7 of the Proposed and Final Permits limits the rolling 12-month cumulative total individual HAP emissions to less than 10 tpy and total HAP emissions to less than 25 tpy. Proposed Permit at 2 (C.7); Final Permit, Attachment II at 4 (C.7). The Proposed Permit requires

[32] *See supra* note 19.
[33] *See supra* note 20.
[34] *See supra* pp. 19–20 for further discussion on PTE limits.

that determination of boiler HCl emissions relies on CEMS (or data from the boiler's source performance data for HCl when CEMS data are missing) to demonstrate compliance with the individual HCl and total HAP emission limits under permit condition C.7. Proposed Permit at 3 (E.15).[35] In addition, the Proposed Permit requires that determination of boiler chlorine, acetaldehyde, acrolein, benzene, dichloromethane, formaldehyde, manganese, naphthalene, styrene, and toluene emissions relies on the boiler's source performance tests and the methodology described in Section 4.3 of the U.S. EPA's *Emission Inventory Improvement Program (EIIP)*, Volume 2, Chapter 2, "Preferred and Alternative Methods for Estimating Air Emissions From Boilers" (Jan. 2001), to demonstrate compliance with the individual and total HAP emission limits under permit condition C.7. *Id*. at 3–4 (E.15). For all other HAPs, emissions must be calculated using emission factors in the following equation:

> Emission factor (lb/MMBtu) x Higher Heating Value (MMBtu/lbs of wood or MMBtu/gallons of biodiesel) x Fuel Consumption (lbs of wood/rolling 12-month period or gallons of biodiesel/rolling 12-month period)

Id. at 4 (E.15).[36] For all HAPs besides HCl, the Proposed Permit specifies that the higher heating value shall be derived from the wood sampling conducted per permit condition E.2.c.iii and F.4.[37] All HAP emissions must be calculated on a monthly basis, and added to the total

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[35] The EPA notes that the Final Permit now relies on CEMS data substitution procedures under 40 C.F.R. Part 75 rather than source performance tests to estimate HCl emissions when CEMS data are missing. In the Final Permit, permit condition E.15.a states:

> The permittee shall use data from the boiler's HCl CEMS required by Attachment II, Special Conditions No. E.7. The permittee shall use the data conversion procedures for SO2 in 40 CFR Part 75, Appendix F, modified to account for the difference in molecular weight between HCl and SO2, and the missing data substitution procedures for SO2 in 40 CFR Part 75, Subpart D, modified to account for the difference in molecular weight between HCl and SO2, to determine the hourly mass emission rate of HCl from the boiler during all boiler operating hours.

[36] Note that the Final Permit included more detail in permit condition E.15 and relies on emission factors and Section 5 of U.S. EPA's EIIP for all other HAPs. Final Permit, Attachment II at 15–16 (E.15).

[37] Permit condition E.2.c.iii states:

> (1) On a monthly basis, the wood shall be sampled and analyzed in accordance with the wood sampling protocol of Attachment II, Special Condition No. F.4, to determine the higher heating value of the fuel. Samples shall be collected for analysis at least once per calendar month. Samples shall be collected at least twenty (20) days from the last sample collected or less as approved by the Department of Health.
>
> (2) On a quarterly basis, the wood shall be sampled and analyzed in accordance with the wood sampling protocol of Attachment II, Special Condition No. F.4, to determine the proximate and ultimate analysis, and the chlorine content of the fuel. Samples shall be collected for analysis at least once per calendar quarter. Samples shall be collected at least sixty (60) days from the last sample collected or less as approved by the Department of Health. Upon written request and justification, the Department of Health may approve a less frequent sampling and analysis schedule if it can be demonstrated that there are minimum variations in the wood fuel characteristics. The sampling and analysis schedule shall be no less frequent than on a quarterly basis for the first year of operations.

Permit condition F.4 states:

> At least sixty (60) days prior to first fire of the boiler, the permittee shall submit to the Department of Health for approval, in writing, a fuel analysis plan that identifies the fuels to be burned in the boiler, a detailed description of the sample location and the analytical methods, with expected minimum detection levels, to be used for the measurement of chlorine. A minimum of three (3)

emissions from the previous 11 months to determine an annual emissions total each month (i.e., any rolling 12-month total). *Id*. at 3–4 (E.15). These emissions calculations are then reported biannually in accordance with permit condition F.6.[38] *Id*. at 5 (F.6.a.vii). If, in any month, this total exceeds the major source threshold, the source must report the deviation within 5 working days according to permit condition F.3. The Proposed and Final Permits contain a condition that requires a MACT evaluation if the Permit's annual HAP emission limits are increased such that they are higher than the HAP major source threshold amounts. *See* Proposed Permit at C.8; Final Permit, Attachment II at 4 (C.8) ("Any relaxation in these limits that increases the potential to emit above the applicable PSD and/or MACT thresholds will require a PSD and/or MACT evaluation of the source as though construction had not yet commenced on the source.").

EPA's Analysis

The EPA finds that the Petitioner has not demonstrated that the Proposed Permit's terms and conditions concerning individual and total HAP emissions are inadequate to restrict Hu Honua's PTE to below the individual and total HAP major source thresholds of 10 and 25 tpy, respectively. *See 2014 Hu Honua Order* at 9; *2012 Cash Creek Order* at 15; *2012 Kentucky Syngas Order* at 28; *2001 Pencor-Masada Order* at 21. In addition, the EPA finds that the Petitioner has not demonstrated that Hu Honua is a major source of HAP that must undergo a MACT analysis. As a preliminary matter, the Petitioner states, "Hu Honua Is A Major Source for HAPs and Must Undergo MACT Analysis." Petition at 21. However, the Petitioner has not explained why it considers Hu Honua a major source of HAPs or what the Petitioner means by asserting that Hu Honua must undergo a MACT analysis, other than the claim that the permit lacks a wood sampling and analysis protocol and that the reporting requirements of permit condition F.6.a.vii should be tied to determining compliance with the HAP emission limits in permit condition C.7. As explained below, the Petitioner has not demonstrated the Proposed Permit's annual limits in permit condition C.7 are not practically enforceable. Therefore, the Petitioner has not demonstrated that Hu Honua's individual and total HAP emissions would exceed the major source thresholds of 10 and 25 tpy, respectively. Thus, the Petitioner has not demonstrated that Hu Honua is a major source that must undergo a MACT analysis.

With regard to the Petitioner's claim that the permit is not practically enforceable because it does not contain the wood sampling and analysis protocol under permit condition F.4, the Petitioner has not demonstrated that the annual limits for total and individual HAP emissions are

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> composite fuel samples for each fuel type must be obtained. Also, a wood sampling and analysis protocol for determining the wood's proximate and ultimate analysis, the chlorine content, and higher heating value of the fuel shall be submitted. The protocol shall address in detail the sampling and testing methodology to ensure the samples collected are representative of the wood fired in the boiler during the sampling period. The protocol shall also identify the requirement that the collection of each sample include a recorded description of the wood samples collected (such as the tree species and tree section such as bark, leaves, branches, trunk, etc.). The permittee shall obtain approval for the sampling protocol prior to the first fire of the boiler. Manufacturer's literature on the weigh scale required by Attachment II, Special Condition No. E.2.c.i. shall be submitted to the Department of Health along with the wood sampling and analysis protocol. The literature should include information on the accuracy, manufacturer's recommended calibration methods and frequency, and operating details of the weigh scale.

[38] The EPA notes that the Final Permit connects the reporting requirements of F.6.a.vii to demonstrate compliance with the individual and total HAPs emission limits in C.7. Final Permit, Attachment II at 19 (F.6.a.vii).

unenforceable. First, the EPA finds that the Proposed Permit does not rely on wood sampling to calculate HCl emissions because these emissions are determined using CEMS data. *See* Proposed Permit at 3–4 (E.15). Specifically, in determining whether Hu Honua would exceed the rolling 12-month individual and total HAP emission limits of Proposed Permit condition C.7, Proposed Permit condition E.15a. requires the use of CEMS. For the remaining HAPs in the Proposed Permit, the Petitioner has not identified which individual or total HAP emission limits they claim are unenforceable. The Petitioner's general assertions do not explain why the detailed information provided in E.2.c.iii and F.4 (*see supra* note 37) is insufficient to determine compliance with the HAP emission limits in permit condition C.7. The Petitioner has not raised any specific concerns about the quality of the sampling method or explained how the variability in the sampling method might affect the enforceability of any particular HAP emission limit. Specifically, the Petitioner has not explained how the variability in the sampling method could affect the higher heating value or the calculation of HAP emissions to determine compliance with the HAP emission limits. In addition, the Petitioner claims the permit lacks details on the frequency of the wood sampling, but permit condition E.2.c.iii specifies that wood sampling and analysis will be conducted on a monthly and quarterly basis. Proposed Permit at E.2.c.iii. The EPA has pointed out in numerous orders that, in particular cases, general assertions or allegations do not meet the demonstration standard. *See, e.g.*, *Luminant Sandow Order* at 9; *BP Order* at 8; *Chevron Order* at 12, 24.

With regard to the Petitioner's claim that the reporting requirements of permit condition F.6.a.vii should be tied to determining compliance with the HAP emission limits in permit condition C.7, this issue is now moot.[39] The Final Permit requires biannual reporting of "[t]he total of all HAPs emissions and the largest individual HAP emissions from the facility on a monthly and rolling twelve-month (12-month) basis to demonstrate compliance with Attachment II, Special Condition No. C.7." Final Permit, Attachment II at 19 (F.6.a.vii).

As explained above, the Petitioner states that the "EPA elected to withhold action on these claims as articulated in the prior PPHE petition (as incorporated herein by reference as if restated herein)" as it relates to "10/25 TPY for hazardous pollutants," Petition at 21. With regard to these statements, the EPA observes that the permit condition C.7 of the Proposed Permit requires that the total of all HAPs emissions and any individual HAP emissions shall not equal or exceed 25 tpy and 10 tpy, respectively, on a rolling 12-month basis. Proposed Permit at 2 (C.7). For the same reasons articulated in response to Claim 2 concerning the "250 TPY limitations for criteria pollutants," at pages 28–29 above, the Petitioner has not met its demonstration burden for the claims incorporated by reference from the 2011 Hu Honua Petition as those relate to "10/25 TPY for hazardous pollutants." Petition at 21. Further, for the same reasons explained at *supra* pp. 26–27 above, the EPA does not believe that additional consideration of the claims incorporated from the 2011 Hu Honua Petition is needed.

For the foregoing reasons, the EPA denies the Petition as to this claim.

[39] The EPA notes that this issue was also raised on page 18 of the Petition.

Claim 4. Buffet Style Emissions Factors for HAPs Are Unacceptable.

Claim 4 is found on pages 22–23 (Section VII) of the Hu Honua Petition.

Petitioner's Claim: The Petitioner generally claims that the permit and permit record do not provide an adequate rationale for the use of "buffet style emissions factors." Petition at 22. The Petitioner contends that "EPA Region 9 has stated that it is not acceptable to use non-AP-42 emission factors without justifying why those factors are better than the EPA factors." *Id*. at 22 (citing Mary Booth, PhD, Partnership for Policy Integrity, *Trash, Trees and Toxics: How Biomass Energy has Become the New Coal* (April 2, 2014) at 47). The Petitioner claims that HDOH did not "provide an 'adequate rationale for allowing the operator to select from such a wide variety of data sources." *Id*. The Petition states, "The Petitioners urge EPA to categorically reject any justification of alternatives to [AP-42] based on how recently the data source was developed. HDOH seems to imply that more current data is necessarily more reliable or adequate." *Id*.

Next, the Petitioner claims, "There are only ten instances out of 33 HAPs shown in the table [on PFPI report on page 46] where NCASI factors are the same or greater than the EPA factors, and for the HAPs with the higher AP-42 factors (acrolein, benzene, formaldehyde, hydrochloric acid, manganese, and styrene) the NCASI factors are consistently and significantly lower—for instance, NCASI's emissions factor for acrolein is just under 2% of the EPA emission factor." *Id*. at 23. The Petitioner concludes, "It is simply not reasonable or appropriate to rely on unsubstantiated emissions factors based on the evidence and support cited by HDOH and the applicant with regard to the Hu Honua facility. *Id*.

EPA's Response: For the reasons described below, the EPA denies the Petitioner's claim that the EPA must object to the permit on the bases described above.

In support of its argument, the Petitioner cites to HDOH's response in its Summary of Comments for the period ending May 9, 2014.

> The permit allows the permittee to use other applicable data sources besides EPA's AP-42 for emissions calculations, since AP-42 may not provide emission factor data for some pollutants or other emission factors were deemed more current and/or more representative.

Proposed RTC at 2.

As summarized above, in its Petition, the Petitioner's arguments are limited to the adequacy of HDOH's rationale on the use of emission factors other than AP-42. As a preliminary matter, the EPA observes that the Petitioner has not identified how the alleged inadequacy of HDOH's rationale is related to an applicable requirement or permit condition. Although the Petitioner makes various assertions relating to the adequacy of the HAP emission factors, the Petitioner did not explain how the chosen HAP emission factors fail to assure compliance with one or more applicable requirements of the Act. In this matter, the Petitioner has not identified or analyzed any permit term or applicable requirement for which the emission factor may be inadequate. *See*

MacClarence, 596 F.3d 1123 at 1131 (9th Cir. 2010); *Murphy Oil Order* at 12 ("The Petitioner has made general claims, but has not cited any specific applicable requirement…").

Further, the Petitioner's basic assertion—that "buffet style emission factors are unacceptable"—is not comprehensible or supported. In the first instance, the EPA has explained that a permitting authority should select the appropriate emission factors, whether AP-42 or industry emission factors (such as NCASI), on a case-by-case basis. *See* EPA, White Paper for Streamlined Development of Part 70 Permit Applications (White Paper No. 1) (July 10, 1995) at 18–19 ("Emissions factors provided by permitting authorities are also allowed where EPA emission factors are missing or State or industry values provide greater accuracy."); EPA Technical Guidance Document: Compliance Assurance Monitoring, 1-8 (August 17, 1998) (providing a list of methods for estimating emissions, including AP-42 and industry or state emission factors); EPA, *AP 42, Fifth Edition, Compilation of Air Pollutant Emission Factors*, Introduction at 4–5 (explaining when emission factors should be used to calculate emissions and providing a hierarchy of monitoring methods, including AP-42 and industry emission factors). The Petitioner has not demonstrated that HDOH's rationale for the selected emission factors is inadequate. Further, the Petitioner has not explained why the Partnership for Policy Integrity (PFPI) report it cites demonstrates that the emission factors used in the Hu Honua permit are inappropriate.[40]

Citing the PFPI report, the Petitioner states that the NCASI emission factors for HCl, acrolein, benzene, formaldehyde, manganese, and styrene are significantly lower than those in AP-42. However, the Petitioner provides no other statement explaining why HDOH's rationale for selecting these emission factors is inadequate or otherwise describing why use of these factors is in error. Further, the Petitioner has not identified why the PFPI report provides information related to selecting the appropriate emission factors for the particular wood fuel that Hu Honua will use. Concerning the remaining HAPs on page 46 of the PFPI report referenced in the Petition, the Petitioner has not made any specific allegation, other than the general assertion that the use of emission factors other than AP-42 is inappropriate. The Petitioner claims that 10 of the cited emission factors in the PFPI report are the same or greater than AP-42, appearing to imply that certain emission factors are acceptable, but the Petitioner has not identified which those might be. The Petitioner only makes general assertions that the HAP emission factors in the permit are unsubstantiated and inadequate, but the Petitioner has not explained how the HAP emission factors in the PFPI report relate to any emission factors selected by HDOH for the Hu Honua permit. In addition, the Petitioner has not demonstrated HDOH's rationale in the permit record, that emission factors other than AP-42 were accepted on a case-by-case basis as being more current or more representative is inconsistent with the Act. For these reasons, the Petitioner has not demonstrated that the emission factors themselves were inadequate or that HDOH's rationale for the selected emission factors was inadequate.

As explained previously, a Petitioner must provide the relevant citations and analyses to support its claims in order to satisfy the demonstration burden. *See MacClarence*, 596 F.3d 1123 at 1131 (9th Cir. 2010). The Petitioner has only made general assertions or allegations and has failed to

[40] The EPA observes that neither the PFPI report nor the Petition provide a citation or the context in which EPA Region 9 stated that "it is not acceptable to use non-AP-42 emission factors without justifying why those factors are better than the EPA factors." *See* Petition at 22. Moreover, as noted above, the EPA has articulated the appropriate use of non-AP-42 emission factors in White Paper No. 1 as cited above.

relate them to the permit. Therefore, the Petitioner has not demonstrated that the emission factors selected by HDOH for various unspecified HAPs do not assure compliance with any applicable requirement under the Act.

For the foregoing reasons, the EPA denies the Petition as to this claim.

Claim 5. Permit Must Preclude Affirmative Defenses.

Claim 5 is found on pages 23 (Section VIII) of the Hu Honua Petition.

Petitioner's Claim: The Petitioner claims that "the permit should explicitly preclude the use of any affirmative defenses related to malfunction or upset condition that result in exceedances." Petition at 23. In particular**,** the Petitioner claims that affirmative defenses should be explicitly precluded in Hu Honua's permit because the source is accepting a permit threshold to remain a synthetic minor source. *Id*.

EPA's Response: For the reasons described below, the EPA denies the Petitioner's claim that the EPA must object to the permit on the bases described above.

This claim was not raised with reasonable specificity during the public comment period, as required by CAA section 505(b)(2) and 40 C.F.R. § 70.8(d). In addition, the Petitioner has not demonstrated that it was impracticable to raise such objections at that time, and there is no basis for finding that grounds for such objection arose later. Nowhere did the public comments raise the claim that HDOH should expressly preclude use of affirmative defenses for emission exceedances caused by malfunction or upset conditions. Indeed, the public comments did not mention affirmative defenses. *See Luminant Sandow Order* at 11. Thus, HDOH did not have an opportunity to consider and respond to this claim raised in the petition. *See, e.g., Luminant Sandow Order* at 5 ("A title V petition should not be used to raise issues to the EPA that the State has had no opportunity to address."); Operating Permit Program, 56 *Fed. Reg.* 21712, 21750 (May 10, 1991) ("Congress did not intend for petitioners to be allowed to create an entirely new record before the Administrator that the State has had no opportunity to address."). Thus, the Petitioner cannot raise this claim now.

For the foregoing reasons, the EPA denies the Petition as to this claim.

Claim 6. F6 Monitoring Report Requirements Are Not Practically Enforceable.

Claim 6 is found on pages 24 (Section IX) of the Hu Honua Petition.

Petitioner's Claim: The Petitioner claims that Proposed Permit condition F.6 "establishes a semi-annual monitoring report requirement" and "further permits reports to be submitted up to sixty days following the end of each period." Petition at 24. The Petitioner therefore asserts that under Proposed Permit condition F.6, "8 months is likely to pass before Hu Honua has to submit monitoring reports." *Id*. The Petitioner further states that the "EPA suggests that in order for a permit or limits in a permit to be practically enforceable, they must 'readily allow' for compliance determinations." *Id*. Therefore, the Petitioner claims that the "8 month submittal

window is not sufficiently short to assure compliance with the Act and is not practically enforceable." *Id*. The Petitioner concludes that the permit should require more regular reporting for the initial 2 years of operation. *Id*.

EPA's Response: For the reasons described below, the EPA denies the Petitioner's claim that the EPA must object to the permit on the bases described above.

As a preliminary matter, this claim was not raised with reasonable specificity during the public comment period, as required by CAA section 505(b)(2) and 40 C.F.R. § 70.8(d). In addition, the Petitioner has not demonstrated that it was impracticable to raise such objections during the comment period, and there is no basis for finding that grounds for such objection arose after that period. First, nowhere did the public comment letters raise any issues with semi-annual monitoring reports or claim that the semi-annual reporting rendered the annual limits unenforceable. This claim, which is very detailed and very specific about semi-annual monitoring requirements, was not raised during the public comment period. *See Luminant Sandow Order* at 11. The public comments presented no argument, evidence, or analysis to HDOH during the public comment period raising these very specific claims about the reporting period that they are now presenting. Thus, HDOH did not have an opportunity to consider and respond to this claim raised in the petition. *See, e.g., Luminant Sandow Order* at 5 ("A title V petition should not be used to raise issues to the EPA that the State has had no opportunity to address."); Operating Permit Program, 56 *Fed. Reg.* 21712, 21750 (May 10, 1991) ("Congress did not intend for petitioners to be allowed to create an entirely new record before the Administrator that the State has had no opportunity to address.").

Even if the comments had raised the Petitioner's claim regarding the monitoring reports, the Petitioner has not demonstrated that the Permit's emission limits are unenforceable or that the reporting requirements are inadequate. The Petitioner has not explained why the reporting is inadequate to assure enforceability of any emission limit. The Petitioner has not explained why the permit does not readily allow for compliance demonstrations in light of the Permit Condition F.6. The EPA observes that the Permit's requirements for semi-annual reporting appears to be consistent with the requirements of the federal title V regulations at 40 C.F.R. 70.6(a)(3)(iii)(A) and the approved Hawaii title V regulations at HAR §11-60.1-90(I). Further, the EPA observes that the permit requires the reporting of any deviations from permit requirements, consistent with the requirements of the federal title V regulations at 40 C.F.R. 70.6(a)(3)(iii)(B) and the approved Hawaii title V regulations at HAR §11-60.1-90(J). *See* Proposed Permit at 2–3 (E.14). The Petitioner has not identified any requirement that would require more frequent reporting of emissions than biannually for an emission limit to be enforceable. *See MacClarence*, 596 F.3d 1123 at 1131 (9th Cir. 2010); *Murphy Oil Order* at 12 ("The Petitioner has made general claims, but has not cited any specific applicable requirement…"). The Petitioner's general assertion that the permit must require determination of likely or actual emission threshold exceedances more rapidly than every 8 months does not demonstrate flaws in the permits. In addition, the Proposed Permit requires any deviation from the permit requirements to be reported within 5 working days and therefore the Petitioner has not demonstrated that HDOH or the public will not learn of potential or actual emission violations for 8 months. Proposed Permit at 2–3 (E.14).

For the foregoing reasons, the EPA denies the Petition as to this claim.

Claim 7. No Requirement for Monitoring, Recording and Reporting Flow Meter Data.

Claim 7 is found on pages 24 (Section X) of the Hu Honua Petition.

Petitioner's Claim: The Petitioner asserts that "[t]here is no requirement that data from the flow meter be included in any reporting" and contends that "[t]he permit must include a…requirement to record and report any data from the flow meter." Petition at 24. In support of its arguments, the Petitioner states that the "EPA insiste[d] on the installation, operation and maintenance of the flow meter, which was intended to permit the conversion of [parts per million (ppm)] emission data measured by the CO and NOx CEMS to lb/hour data to verify compliance." *Id*. The Petitioner further contends that failure to include requirements to record and report flow meter data "would not only render the public's review authority useless, but the permit cannot *assure* compliance with the Act." *Id*. (emphasis in original).

EPA's Response: For the reasons provided below, the EPA denies the Petitioner's claim.

As a preliminary matter, this claim was not raised with reasonable specificity during the public comment period, as required by CAA section 505(b)(2) and 40 C.F.R. § 70.8(d). In addition, the Petitioner has not demonstrated that it was impracticable to raise this objection within such period, and there is no basis for finding that grounds for such objection arose after such period. *See Luminant Sandow Order* at 6. The public comments on this permit make no mention of a flow meter, let alone the necessity for recording and reporting any flow meter data. The Petitioner does claim that the EPA previously insisted on "installation, operation and maintenance of the flow meter." Petition at 24. The EPA did raise a flow meter issue in a June 30, 2011, comment letter to HDOH on the May 19, 2011, proposed permit (the permit that was the subject of the EPA's February 7, 2014, Order); however, the EPA's comment letter on a previous permit does not satisfy the reasonable specificity requirement as it was not raised during the public comment period (beginning March 14, 2014) for this significant modification. *See 2011 EPA Letter to HDOH*. Therefore, the Petitioner cannot raise this claim for the first time now.

Even if the comments had raised the Petitioner's claim regarding the monitoring reports, the Petitioner has not demonstrated that the permit is not in compliance with one or more applicable requirements of the Act. The Petitioner states that the EPA insisted on installation of a flow meter to allow conversion of CEMS ppm emission data to lb/hour data to verify compliance; however, the Petitioner has not acknowledged that the permit requires the permittee to "install, operate, calibrate and maintain a flow meter to calculate hourly emission rates from the CEMS." Final Permit, Attachment II at 14 (E.13). The Petitioner asserts that requirements to record and report flow meter data are necessary for the public's review and to allow the permit to assure compliance with the Act; however, the Petitioner has not acknowledged that the permit requires the permittee to calculate and record CO and NOx emissions from the facility on a monthly and rolling twelve-month basis using the CEMS, which necessarily requires using the flow meter data to convert the ppm readings from the CEMS to mass emission rates. *See Id*. at 22–23 (E.14). The Final Permit also requires semi-annual reporting of these calculated and recorded CO and NOx emissions, along with supporting documents and calculations showing the basis of the emissions. *See Id*. at 19 (F.6.a.vi, F.6.a.viii). The EPA notes that it is possible that flow meter

data will be reported as part of the supporting documents and calculations; however, the Petitioner has not identified an applicable requirement of the Act that requires flow meter data to be explicitly called out in the permit for reporting separately from the CEMS data reporting requirements in the permit. General assertions regarding the need for flow meter data to be recorded and reported are not adequate to demonstrate that the permit is not in compliance with an applicable requirement of the Act, especially where Petitioner fails to acknowledge or discuss recordkeeping and reporting requirements that will, of necessity, include flow meter data in some fashion. *See MacClarence*, 596 F.3d 1123, 1131 (9th Cir. 2010); *Murphy Oil Order* at 12.

For the foregoing reasons, the EPA denies the Petition as to this claim.

Claim 8. E6 Continues to be Ambiguous.

Claim 8 is found on page 24 (Section XI) of the Hu Honua Petition.

Petitioner's Claim: The Petitioner claims that the "EPA specifically directed HDOH to 'connect' the Monitoring Report Forms to compliance determinations with the CO and NOx emission limits in Section C.6. EPA Order at [sic]." Petition at 24. The Petitioner states that there is no "connection" or cross-reference of these provisions as directed by the EPA. *Id*. The Petitioner also claims that permit condition E.6 should explicitly state the purpose of the semi-annual reports, and that the format of the reports should readily allow a determination of violations of any emission limit. *Id*.

EPA's Response: For the reasons described below, the EPA denies the Petitioner's claim that the EPA must object to the permit on the bases described above.

As a preliminary matter, this claim was not raised with reasonable specificity during the public comment period, as required by CAA section 505(b)(2) and 40 C.F.R. § 70.8(d). In addition, the Petitioner has not demonstrated that it was impracticable to raise such objections during the comment period, and there is no basis for finding that grounds for such objection arose after that period. Nowhere did the public comment letters raise any issues with permit condition E.6 or the monitoring report forms. This claim, which is very specific about the monitoring report forms, was not raised during the public comment period. *See Luminant Sandow Order* at 11. The public comments presented no argument, evidence, or analysis to HDOH during the public comment period raising these very specific claims about the monitoring report forms that they are now presenting. Thus, HDOH did not have an opportunity to consider and respond to this claim raised in the petition. *See, e.g., Luminant Sandow Order* at 5 ("A title V petition should not be used to raise issues to the EPA that the State has had no opportunity to address."); Operating Permit Program, 56 *Fed. Reg.* 21712, 21750 (May 10, 1991) ("Congress did not intend for petitioners to be allowed to create an entirely new record before the Administrator that the State has had no opportunity to address.").

Even if the comments had raised the Petitioner's claim regarding permit condition E.6, the Petitioner has not demonstrated that E.6 must be connected to the emission limits in permit condition C.6 to assure compliance with the Act. The EPA notes that permit condition E.6 requires the installation, operation, calibration, and maintenance of a Continuous Parameter

Monitoring System (CPMS) to measure the sorbent injection rate.[41] Proposed Permit at E.6. Permit condition E.6 does not contain any references to monitoring report forms as the Petitioner claims. Therefore, the Petitioner has not demonstrated that permit condition E.6 should be connected to determining compliance with the emission limits in permit condition C.6. Further, the Petitioner has not identified any requirement that would require permit condition E.6 to be connected to permit condition C.6 to assure that the emission limits are enforceable. *See MacClarence*, 596 F.3d 1123 at 1131 (9th Cir. 2010); *Murphy Oil Order* at 12 ("The Petitioner has made general claims, but has not cited any specific applicable requirement…"). The Petitioner's general assertions about E.6 and monitoring report forms do not demonstrate flaws in the permit. The EPA has pointed out in numerous orders that, in particular cases, general assertions or allegations do not meet the demonstration standard. *See, e.g., Luminant Sandow Order* at 9; *BP Order* at 8; *Chevron Order* at 12, 24.

Furthermore, the *2014 Hu Honua Order* did not address permit condition E.6 as the Petitioner claims.[42] To the extent that the Petitioner intended to claim that the reporting requirements in permit condition F.6 are not tied to the emission limits in permit condition C.6, the *2014 Hu Honua Order* did state that the final permit did not "connect the calculations in Section F.6.a.vi to determining compliance with the CO and NOx emission limits in Section C.6." *2014 Hu Honua Order* at 10. As explained in the response to Claim 2, the Final Permit requires biannual reporting of "[t]he CO and NOx emissions from the facility on a monthly and rolling twelvemonth (12-month) basis to demonstrate compliance with Attachment II, Special Condition No. C.6." Final Permit, Attachment II at 19 (F.6.a.vi). Indeed, the Final Permit now ties the reporting requirements of permit condition F.6.a.vi to assuring compliance with the CO and NOx emission limits in permit condition C.6. Therefore, this claim is now moot.

For the foregoing reasons, the EPA denies the Petition as to this claim.

Claim 9. Permit Fails to Address GHG Emissions.

Claim 9 is found on page 25 (Section XII) of the Hu Honua Petition.

Petitioner's Claim: The Petitioner claims that "[t]he *UARG* decision leaves open the questions of whether facilities subject to Title V, but who avoid PSD by means of meeting synthetic minor source requirements may be subject to GHG regulation." Petition at 25. The Petitioner "requests that a BACT analysis should be conducted for GHGs unless the facility can demonstrate that it will restrict GHGs to below applicable thresholds." *Id.* at 25.

EPA's Response: For the reasons described below, the EPA denies the Petitioner's claim that the EPA must object to the permit on the bases described above.

The EPA interprets its Title V regulations at 40 C.F.R. part 70 to require different opportunities for citizens to petition on initial permit issuance, permit modifications, and permit renewals. The

[41] The CPMS and sorbent injection rate relates to HCl emissions and does not relate to any emission limits contained C.6 for CO and NOx. *See* Proposed Permit at D.5.

[42] The EPA notes that the citation in the Petition only states "EPA Order at" and does not specify a page or location in the *Hu Honua Order*.

regulations state that a permit, permit modification, or renewal may be issued if specified conditions are met, 40 C.F.R. § 70.7(a)(l), including a requirement that "[t] he permitting authority shall provide a statement that sets forth the legal and factual basis for the *draft permit conditions*." 40 C.F.R. § 70.7(a)(1)(ii) and 70.7(a)(5) (emphasis added). Further, 40 C.F.R. § 70.7(h) requires the permitting authority to provide adequate procedures for public notice and comment for permit proceedings that qualify as significant modifications and provides that the notice shall identify "*the activity or activities involved in the permit action; the emissions change involved in any permit modification; … and all other materials available to the permitting authority that are relevant to the permit decision …*" 40 C.F.R. § 70.7(h)(2) (emphasis added). The EPA interprets these provisions to limit petitions on significant modifications to issues directly related to those modifications. *See In the Matter of WPSC – Weston*, Order on Petition No. V-2006-4 (December 19, 2007) (*Weston Order*) at 5–6, 10; *In the Matter of TVA – Shawnee*, Order on Petition No. IV-2011-1 (August 31, 2012) (*Shawnee Order*) at 4–7.

In addition, in the preamble to the part 70 rules, in the broader context of permit modifications, the EPA explained that:

> Public objections to a draft permit, permit revision, or permit renewal must be germane to the applicable requirements implicated by the permit action in question. For example, objections addressed to portions of an existing permit that would not in any way be affected by a proposed permit revision would not be germane. Public comments will only be germane if they address whether the draft permit is consistent with the applicable requirements or requirements of part 70.

57 *Fed. Reg.* 32250, 32290 (July 21, 1992). In the *Weston Order*, in the context of a significant permit modification, the EPA stated:

> [T]his interpretation is not only consistent with the regulations but it also furthers the statutory requirement that the Title V regulations contain "[a]dequate, streamlined, and reasonable procedures" for evaluating permit applications and issuing permits. Sources required to have a Title V permit to operate must apply for such a permit. At the time the permitting authority issues the source its Title V permit, the public is provided an opportunity to review, comment on, and object to any aspect of that permit. Sources are also required to renew the permit at least every five years, and that process also provides the public with an opportunity to review, comment on, and object to all aspects of the permit. See 40 C.F.R § 70.7(c). EPA's interpretation that the opportunity to object during significant modification permit actions should be limited to the issues directly related to the permit modifications is a considered one that accounts for the review opportunities available to the public. EPA directed permitting authorities to complete the review of the majority of significant modification actions within nine months, half the time authorized for completion of initial permit issuance and renewal, knowing that the limited scope of the action would allow for expedited processing in most circumstances. 40 C.F.R. § 70.7(e)(4)(ii).

Weston Order at 6 (citing CAA § 502(b)(6); 40 U.S.C. § 7661a(b)(6)).

As was noted earlier, a title V operating permit for the Hu Honua facility was issued on August 31, 2011, and a final significant modification to the title V permit was issued on February 18, 2016. During both the initial permit issuance and the significant modification process, opportunities were provided for public notice and comment, consistent with the requirements found at HAR § 11-60.1-99 (which track the relevant requirements found in federal regulations at 40 C.F.R. part 70). The permit revision at issue in the Petition was a significant modification action to respond to the Administrator's direction in the *2014 Hu Honua Order*. The Petitioner's claim related to the regulation of GHG emissions for synthetic minor sources does not derive from the changes in the Proposed Permit related to the enforceability of the CO, NOx, and HAP emission limits. According to the Addendum to the Permit Review Summary, the significant modification only addresses the three objections by the EPA in the *2014 Hu Honua Order*:

> a. The permit fails to ensure compliance with the criteria air pollutant emission limits.
> b. The permit fails to ensure compliance with the hazardous air pollutant emission limits.
> c. The permit record does not adequately explain an emission limit exemption that applies during startup and shutdown.

Addendum to the Permit Review Summary for Final Permit at 1. In the Proposed RTC, HDOH classified the comments on GHG's as "out of scope of the draft permit amendment and the addendum to the permit review summary and the Department's responses." Proposed RTC at 1, 3.

In this case, the record shows that the Final Permit modification issued by HDOH did not include any changes or modifications related to GHG emissions. Further, none of the permit terms and conditions of the Proposed Permit concern GHGs. Indeed, nowhere in the Proposed Permit title V permit are GHGs even mentioned. This claim could have and should have been raised during the previous permit action for which the scope of the public comments was not limited. Accordingly, the Petitioner's claim is not within the scope of the significant modification to the Proposed Permit.

Even if the Petitioner's claim had been within the scope of the significant modification to the permit, the Petitioner has not demonstrated that Hu Honua should evaluate GHG emissions or undergo a BACT analysis for GHGs. The Petitioner's demonstration on this point is limited to two sentences, as summarized above. The EPA has repeatedly stated that, in particular cases, general assertions or allegations may not meet the demonstration standard. *See, e.g., Luminant Sandow Order* at 9; *BP Order* at 8; *Chevron Order* at 12, 24. Here, the Petitioner makes only general assertions and fails to provide any relevant citations or analyze their assertions in the context of any applicable requirement of the Act. The Petitioner has not identified the *UARG* decision or explained its relevance to its assertion that a BACT analysis is required. To the extent that the Petitioner intended to refer to *Utility Air Regulatory Group (UARG) v. EPA*, 134 S. Ct. 2427 (2014), the Petitioner has not explained why the *UARG v. EPA* decision should be read to require a BACT analysis for GHGs to be included in the Proposed Permit. That decision made clear that sources would only be subject to BACT review for GHGs if they were major for

another regulated pollutant and going through PSD review anyways. *See UARG v. EPA*, 134 S. Ct. 2427. As we have discussed in this order, Hu Honua is not a major source for PSD.The Petitioner has not explained why an applicable requirement of the Act requires Hu Honua, as a minor source, to conduct a BACT analysis for GHGs. *See MacClarence*, 596 F.3d 1123 at 1131 (9th Cir. 2010); *Murphy Oil Order* at 12.

For the foregoing reasons, the EPA denies the Petition as to this claim.

Claim 10. HDOH Failed to Estimate Emissions from Malfunction or Upset Conditions.

Claim 10 is found on page 25 (Section XIII) of the Hu Honua Petition.

Petitioner's Claim: The Petitioner generally claims that "HDOH must either estimate [emissions from malfunction or upset conditions] or provide a legal or technical justification for failure to undertake the analysis." Petition at 25. The Petitioner states that "there is an extremely slim margin of error available for allowable emissions at Hu Honua- 3.6 TPY for CO." *Id*. The Petitioner asserts that HDOH stated that "'there is no default value for estimating emissions under these conditions.'" *Id*. at 25 (quoting Proposed RTC at 2). In addition, the Petitioner states, "Given that it is commonly known that emissions are far higher during periods of malfunction and upset, it is likely that even a small number of foreseeable malfunction or upset events will cause Hu Honua to exceed the synthetic minor source thresholds." *Id*. at 25.

EPA's Response: For the reasons provided below, the EPA denies the Petitioner's claim.

The Petitioner has not demonstrated that the Proposed Permit does not assure compliance with any applicable requirement under the CAA. *See* 42 U.S.C. § 7661d(b)(2); *MacClarence*, 596 F.3d at 1130–33. As an initial matter, the EPA finds that the Petitioner has not identified an applicable requirement with which the Proposed Permit is not in compliance. Nor has the Petitioner identified a permit term or condition that is deficient. The Petitioner's claim is focused generally on the estimate of emissions from malfunction or upset conditions, but the Petitioner does not explain how such estimates are related to an applicable requirement or a Proposed Permit term and condition. The Petitioner points to allowable emissions of 3.6 tpy for CO, but it does not explain the relevance of this assertion to the Proposed Permit. Further, the Petitioner provides no support for its assertion that "virtually any emissions increase (not included in the initial calculations) will mean that the facility is in fact a major source." Petition at 25. Thus, the Petitioner's claim consists of general assertions and allegations, and the Petitioner has not related these allegations to an error in the Proposed Permit. *See, e.g., Luminant Sandow Order* at 9; *BP Order* at 8; *Chevron Order* at 12, 24.

The EPA observes that the Proposed and Final Permits at permit condition C.6 require that CO and NOx emissions from the facility, including during periods of boiler startups, shutdowns, and malfunction or upset conditions shall not exceed 250 tons per year on any rolling twelve-month basis. *See* Proposed Permit at 1 (C.6); Final Permit, Attachment II at 3 (C.6). Further the Proposed and Final Permit's monitoring provision for CO and NOx under E.14 states, "The permittee shall calculate and record the CO and NOx emissions from the facility, including during periods of boiler startup, shutdown, and malfunction or upset conditions…" Proposed

Permit at 2 (E.14); Final Permit, Attachment II, at 14 (E.14). The emission calculations must then be reported bi-annually in accordance with permit condition F.6.a.vi. Proposed Permit at 1 (C.6), 5 (F.6.a.vi). The EPA also notes that the Final Permit includes changes to monitoring and reporting provisions under permit conditions E.14 and F.6.a.vi to assure compliance with the CO and NOx emission limits during startup, shutdown, and malfunction or upset conditions. Final Permit, Attachment II at 14 (E.14), 19 (F.6.a.vi).

The EPA also observes that the Proposed and Final Permits contain permit condition C.7, which limits the rolling 12-month cumulative total individual HAP emissions to less than 10 tpy and total HAP emissions to less than 25 tpy and applies at all times, including during startup, shutdown, and malfunction or upset conditions. Proposed Permit at 2 (C.7); Final Permit, Attachment II at 4 (C.7). Further, the Proposed and Final Permit's monitoring provision for HAPs under E.15 states, "The permittee shall calculate and record the total of all HAP emissions and all individual HAP emissions as identified in AP-42 from the facility, including during periods of boiler startups, shutdowns, and malfunction or upset conditions…" Proposed Permit at 3 (E.15); Final Permit, Attachment II at 15 (E.15). These emissions are calculated using CEMS, data from the boiler's source performance tests, or emission factors as explained in Claim 3 of this order. Proposed Permit at 3 (E.15); Final Permit, Attachment II at 15 (E.15). The emission calculations must then be reported bi-annually in accordance with Permit Condition F.6.a.vii. Proposed Permit at 2 (C.7), 5 (F.6.a.vii). The EPA also notes that the Final Permit includes changes to monitoring and reporting provisions under permit conditions E.15 and F.6.a.vii to assure compliance with the HAP emission limits during startup, shutdown, and malfunction or upset conditions. Final Permit, Attachment II at 15 (E.15), 19 (F.6.a.vii).

To the extent that the Petitioner is concerned with increased emissions during startup, shutdown, and malfunction or upset conditions leading to an exceedance of the emission limits, those emissions must be included in the monitoring calculations under permit conditions E.14 and E.15 and thus must be accounted for in determining compliance with those emission limits. Proposed Permit at 2 (E.14), 3 (E.15). As explained above, if Hu Honua were to exceed their annual limits on any rolling 12-month basis, the source must report the deviation within 5 working days according to permit condition F.3. *Id*. at F.3.

Thus, to the extent that the Petitioner intended to assert that CO, NO_x, and HAP emissions generated during malfunction and upset conditions needed to be included in the Proposed Permit's compliance demonstration requirements, the Petitioner has not demonstrated that the Proposed Permit does not assure compliance with the emission limits for CO, NOx, and HAP at all times, including during startup, shutdown, and malfunction or upset conditions. Thus, the Petitioner's general assertions regarding the need to include emission from malfunction and upset conditions, to the extent they were even raised in reference to the permit's compliance demonstration requirements, do not meet the demonstration requirement of the Act. *See MacClarence*, 596 F.3d 1123, 1131 (9th Cir. 2010).

For the foregoing reasons, the EPA denies the Petition as to this claim.

V. CONCLUSION

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

Dated: SEP 14 2016

Gina McCarthy
Administrator