BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION NO. IX-2018-4
	)	
PHILLIPS 66 SAN FRANCISCO REFINERY CONTRA COSTA COUNTY, CALIFORNIA	))	ORDER RESPONDING TO PETITION REQUESTING
	)	OBJECTION TO THE ISSUANCE OF
PERMIT FOR FACILITY NO. A0016	)	A TITLE V OPERATING PERMIT
	)	
ISSUED BY THE BAY AREA AIR QUALITY MANAGEMENT DISTRICT	))	
	)	

ORDER DENYING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated March 19, 2018 (the Petition) from Communities for a Better Environment, San Francisco Baykeeper, Center for Biological Diversity, Friends of the Earth, Stand.earth, and Sierra Club (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661d(b)(2). The Petition requests that the EPA Administrator object to the operating permit issued by the Bay Area Air Quality Management District (BAAQMD or the District) on January 25, 2018 (the Permit) to Facility No. A0016, the Phillips 66 San Francisco Refinery (Phillips 66 or the facility) located in Contra Costa County, California. The operating permit was issued pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and BAAQMD Regulation 2, Rule 6. *See also* 40 C.F.R. part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further below, the EPA denies the Petition requesting that the EPA Administrator object to the Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(l) 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 and the EPA's implementing regulations at 40 C.F.R. part 70. The California Air Resources Board submitted a title V program to the EPA on behalf of BAAQMD governing the issuance of operating permits in the District on November 16, 1993. The EPA granted interim approval of the BAAQMD title V operating permit program in 1995. 60 Fed. Reg. 32606 (June 23, 1995); 40

C.F.R part 70, Appendix A. Effective November 30, 2001, the EPA granted full approval of the BAAQMD title V operating permit program. 66 Fed. Reg. 63503 (December 7, 2001). The BAAQMD title V program is codified in District Regulation 2, Rule 6.

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 the requirements of the applicable implementation plan. 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 compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* CAA § 504(c), 42 U.S.C. § 7661c(c). One purpose of the title V program is to "enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." 57 Fed. Reg. at 32251. Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the source's emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements.

B. Review of Issues in a Petition

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

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). 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 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)(l).[1] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[2]

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

[2] *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541

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

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether 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 state's response to comments), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.[5] Another factor the EPA examines 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's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner]

F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *cf. NYPIRG*, 321 F.3d at 333 n.11.

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

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

[5] *See also, e.g.*, *Finger Lakes Zero Waste Coalition v. EPA*, No. 16-3420-ag, U.S. App. LEXIS 12542, at *9–10 (2d Cir. May 15, 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012) (denying a title V petition issue where petitioners did not respond to the state's explanation in response to comments or explain why the state erred or the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007) (*Georgia Power Plants Order*) (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).

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

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

III. BACKGROUND

A. The Phillips 66 Facility

The Phillips 66 San Francisco Refinery is a full-scale oil refinery located in Rodeo, Contra Costa County, California. The facility processes crude oils and other feedstocks received via marine tanker vessels and pipeline into refined petroleum products, primarily fuel products such as gasoline and fuel oils. The facility includes various emissions units involved in refining processes, such as combustion units, storage tanks, sulfur plants, wastewater treatment facilities, and fugitive emissions from pipe fittings, pumps, and compressors, as well as auxiliary operations.

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

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

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

B. Permitting History

Phillips 66 received its initial title V permit for the San Francisco Refinery on December 1, 2003. Following various reopenings, revisions, and a permit renewal, Phillips 66 submitted an application to renew its title V permit on February 26, 2016. On November 16, 2017, BAAQMD issued public notice of a draft renewal title V permit (the Draft/Proposed Permit[9]) along with a Statement of Basis, subject to a public comment period that ended on December 31, 2017. This same permit was subject to an EPA review period that ended on January 17, 2018. No public comments were submitted and the EPA did not object to the issuance of the Permit. On January 25, 2018, BAAQMD issued the final title V permit (Final Permit) to Phillips 66. The Petitioners submitted a Petition dated and received on March 19, 2018.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

The Petitioners raise various claims centered around the allegation that "the District improperly and unlawfully issued a Renewal Title V Permit because it included an approval of permitted capacity increases for [hydrocracking emission units] U240 and U246 without providing adequate notice to the public and without a legal or factual basis for the approval." Petition at 8–9. As these claims are related, the EPA is responding to them together.

Petitioners' Claims: The Petitioners claim that the Permit approves an increase in source capacity limits for Hydrocracking Units U240 and U246 - e*.g.*, Petition at 1. Specifically, the Petitioners claim that the Permit increased the U240 maximum allowable capacity limit in Table II-A of the Permit from 42,000 barrels per day to 65,000 barrels per day. *Id*. at 2–3 (citing Final Permit at 11, Draft/Proposed Permit at 11, and a prior permit dated August 1, 2014 (2014 Final Permit) at 11). The Petitioners also assert that the Permit "increased" the U246 maximum allowable capacity limit in Table II-A from a daily maximum of 23,000 barrels per day to a 12-month average of 23,000 barrels per day. *Id*. at 3 (citing Final Permit at 13, Draft/Proposed Permit at 13, and 2014 Final Permit at 13). The Petitioners additionally claim that prior to the current title V permit action, Units U240 and U246 together were limited to a total of 65,000 barrels per day, consistent with Permit Condition 22965. *Id*. The Petitioners assert that the two units combined now have effectively been approved to process up to 88,000 barrels per day on average, exceeding the 65,000 barrels per day limit in Condition 22965. *Id*.

As an initial matter, the Petitioners acknowledge that neither they, nor any other member of the public, raised concerns regarding these alleged capacity increases during the public comment period. *Id*. at 9 (citing 42 U.S.C. § 7661d(b)(2)). However, the Petitioners contend that their Petition claims should not be barred because "it was impracticable, indeed impossible, to raise [these] concerns during the comment period." *Id*. Specifically, the Petitioners claim that it was impracticable to raise these concerns because the Draft/Proposed Permit that was provided for

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[9] The version of a title V permit presented to the public for public participation is termed a "draft permit," while the version submitted to the EPA for its review is termed a "proposed permit." 40 C.F.R. § 70.2. Because the same version of the Phillips 66 permit was presented to both the public and the EPA, the Petition refers to the November 16, 2017, version of the permit alternately as both a "draft" permit and a "proposed" permit. While both characterizations are accurate, this Order refers to the November 16, 2017, version of the permit as the "Draft/Proposed Permit."

public comment "stated that no increases in the processing capacity of the hydrocracking units would be considered," "[b]ecause the comment period concluded before it was possible for Petitioners to learn of the increases in capacity limits," and because the "Petitioners first received notice that the capacity limit increases were being considered when they reviewed the final Renewal Title V Permit." *Id*. These justifications are closely related to the Petition claims discussed below.

The Petitioners argue that the alleged capacity increases at Units U240 and U246 violated the CAA and require an EPA objection for two primary reasons: first, because the District did not provide adequate notice regarding these alleged increases, and second, because the permit record does not explain the legal or factual basis for the alleged increases. *E.g.*, *id*. at 1, 2.

Regarding the first issue, the Petitioners assert that public notice must include, among other things, information concerning any emission changes associated with a project. *See id*. at 10 (citing 40 C.F.R. § 70.7(h)(2), (4); BAAQMD Regulation 2-6-412.2). The Petitioners also discuss two prior title V petition orders, wherein the EPA objected to permits where the public notice did not provide information concerning emission changes, and where relevant supporting materials were not available to the public during the comment period. *See id*. at 11 (citing *In the Matter of Bioenergy LLC*, Order on Petition No. I-2003-01 at 9 (October 1, 2006); *In the Matter of Alliant Energy WPL Edgewater Generating Station*, Order on Petition No. V-2009-02 at 12 (August 17, 2010)). Here, the Petitioners claim that "the District did not provide substantive notice to the public concerning the increase in capacity limits for the U240 and U246 hydrocracking units." *Id*. at 10 (citing 40 C.F.R. § 70.7(h)(2)).[10] Rather than provide notice of the alleged capacity increases, the Petitioners claim that the District gave notice that it did *not* intend to approve changes to the capacity limits for U240 and U246 in the current title V renewal permit. *Id*. at 10, 12. The Petitioners claim that "[t]he only discussion related to changes in the permitted capacities for Units U240 and U246 stated that a request for a much smaller increase would not be processed in the Renewal Title V permit." *Id*. at 3. Specifically, the Petitioners claim that the Statement of Basis accompanying the Draft/Proposed Permit included a table referencing certain permit applications that would *not* be processed with the title V permit renewal—including one that requested to increase capacity limits for the U240 and U246 hydrocracking units by 4,000 barrels per day above the existing 65,000 barrels per day limit. *Id*. at 3, 12. The Petitioners also claim that the permit record available during the comment period did not include any factual or legal background, analysis, engineering evaluations, or emissions estimates regarding the increased capacity limits for Units U240 and U246. *Id*. at 3, 12. For these reasons, the Petitioners conclude that they were deprived of adequate notice and were not able to raise objections on the alleged capacity limit increases during the public comment period. *Id*. at 12–13. Thus, the Petitioners present this public notice claim as an independent basis for EPA to object, as well as a justification for their inability to raise issues with the alleged capacity increases during the public comment period. *Id*. at 12–13.

[10] In addition to claiming that BAAQMD did not provide "substantive notice" of the changes at issue, the Petitioners also briefly state that, although they are "interested parties" regarding the Phillips 66 facility, the Petitioners "did not receive the BAAQMD's 'Notice Inviting Written Public Comment,' dated November 16, 2017" and that they "have no record of receiving actual notice" of the Draft/Proposed Permit. *Id*. at 7 (citing 40 C.F.R. § 70.7(h)(1)); *id*. at 10 n.25.

Regarding the second issue, the Petitioners claim that the EPA must object to the Permit because the Statement of Basis was deficient. The Petitioners discuss the content that they allege must be included in a statement of basis, most notably that it shall "set[] forth the legal and factual basis for the draft permit conditions." *Id*. at 13 (quoting 40 C.F.R. § 70.7(a)(5); BAAQMD Regulation 2-6-427) (additional citations omitted). Here, the Petitioners assert that "the Statement of Basis provides no information or analysis to support the significant change in the limits" associated with Units U240 and U246. *Id*. at 13. The Petitioners characterize the Statement of Basis as "misleading" because, as discussed above, it indicated that certain changes associated with these hydrocracking units would not be processed in the title V permit renewal. *Id*. at 13–14 (citing a portion of the Statement of Basis related to the 4,000 barrels per day increase discussed above). The Petitioners also claim that the Statement of Basis is deficient because it does not include any emissions estimates or engineering evaluations associated with the alleged increased capacity limits. *Id*. at 14. Therefore, the Petitioners conclude that the Statement of Basis "is noncompliant with the CAA," and, thus, that the EPA Administrator must object to the issuance of the Permit. *Id*. at 15.

EPA's Response: For the following reasons, the EPA denies the Petitioners' request for an objection on these claims.

As the Petitioners acknowledge, a threshold requirement of the CAA is that all petition claims "shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period." 42 U.S.C. § 7661d(b)(2). As the EPA has explained:

> The EPA believes that 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. Accordingly, the Agency believes that the requirement to raise issues "with reasonable specificity" places a burden on the petitioner, absent unusual circumstances, to adduce before the State the evidence that would support a finding of noncompliance with the Act.

56 Fed. Reg. 21712, 21750 (May 10, 1991); *see, e.g.*, *Luminant Sandow Order* at 5–6. The CAA provides that this requirement will not bar petition claims where "the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period." 42 U.S.C. § 7661d(b)(2). However, the EPA has previously rejected arguments alleging impracticality or after-arising grounds where relevant information is "readily ascertainable" during the comment period—e.g., where information is contained in the permit record associated with a draft permit. *See, e.g.*, *In the Matter of Appleton Coated, LLC*, Order on Petition Nos. V-2013-12 & V-2013-15 at 17–18 (October 14, 2016) ("Whether or not the . . . Petitioners were . . . aware of the grounds does not change the fact that the grounds were reasonably ascertainable.").

Here, the Petitioners argue that it was impracticable (and "indeed impossible") for the public to raise objections concerning the alleged increases in capacity limits during the public comment period, and that "the grounds for objecting to the substantive change in the Renewal Title V Permit arose after [the public comment] period." Petition at 9. However, for the reasons presented below, the EPA finds that it was not impracticable for the public to raise any such

concerns during the public comment period, and that the grounds for objection did not arise after the conclusion of the public comment period. Rather, the Petitioners could have—and should have—raised any concerns regarding the changed Table II-A capacity limits for Units U240 and U246 during the public comment period, and their failure to do so precludes them from raising such issues in the current Petition. For the same reasons, as discussed further below, the Petitioners' claims regarding the substantive adequacy of public notice and the Statement of Basis are without merit.

The Petitioners claim that "the comment period concluded before it was possible for Petitioners to learn of the increases in capacity limits" and that they "first received notice that the capacity limit increases were being considered when they reviewed the final Renewal Title V Permit." Petition at 9. However, both of these assertions are incorrect. The Petitioners' claims arise from one specific set of changes to the Phillips 66 Permit: the revision of capacity limits contained in Table II-A for Units U240 and U246. *See* Draft/Proposed Permit at 11, 13; Final Permit at 11, 13; Petition at 2–3. Notably, these revisions were readily ascertainable on the face of the Draft/Proposed Permit that was available during the public comment period; the Draft/Proposed Permit showed, *in redline*, the changes to the Units U240 and U246 capacity limits in Table II-A. Draft/Proposed Permit at 11, 13. Thus, as the Petitioners recognize, the version of the Permit released for public comment "reflect[ed] the change in capacity limits." Petition at 15; *see also* Petition at 3 n.2 (citing the specific portions of the Draft/Proposed Permit containing the changes to the Table II-A limits for Units U240 and U246). Moreover, the Statement of Basis, in a portion not acknowledged by Petitioners, explained the following changes to permitted sources (i.e., emission units that have previously been issued District permits):

> [Unit U240] S307 capacity was revised in Table II-A from 4[2],000[11] barrels per day to 65,000 barrels per day. This increase was approved of under application 13424 in 2007.
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> . . .
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> [Unit U246] S434 capacity was updated in Table II-A to reflect how the daily capacity was derived from Condition 22969 which limits the source to 8,395,000 [barrels] per 12-month period.

Statement of Basis at 11. Thus, not only did the Draft/Proposed Permit itself clearly indicate *that* the maximum capacity values in Table II-A were being modified, but the Statement of Basis accompanying the Draft/Proposed Permit explained *why* the values were being modified. Although the Petitioners may not have noticed these changes until they reviewed the Final Permit, these changes were readily ascertainable from the Draft/Proposed Permit as well as from the Statement of Basis that accompanied it.[12] Therefore, the public could have raised any concerns with these changes during the public comment period.

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[11] The Statement of Basis referenced a Table II-A value of 45,000 barrels per day for Unit U240. This appears to be a typographical error, given that the value actually listed in Table II-A was 42,000 barrels per day.

[12] The terms of the Draft/Proposed Permit at issue in the Petition are essentially identical to those contained in the Final Permit. Thus, there is no basis to conclude that the public did not have "substantive notice" of these changes until after the Final Permit was issued, or that the grounds for the Petitioners' objections arose after the end of the comment period (e.g., after the Final Permit was issued). Petition at 9.

The Petitioners argue that the "Petitioners had no reason to make public comments to the draft," and characterize the Statement of Basis as "misleading," because "[t]he only discussion related to changes in the permitted capacities for U240 and U246 stated that a request for a much smaller [4,000 barrels per day] increase would not be processed in the Renewal Title V permit." Petition at 9, 13, 3. Not only are the Petitioners incorrect (this was *not* the only discussion of changed capacities[13]), but the Petitioners have also conflated two distinct elements of the permit record.

The portion of the Statement of Basis cited by the Petitioners concerns a different issue than the changes to the capacity limits in Table II-A discussed above. Specifically, the portion cited by the Petitioners explained that various changes related to pending preconstruction permitting actions would not be reflected in the current title V renewal permit because the underlying preconstruction permits have not yet been issued and construction has not commenced. Statement of Basis at 5. Among these non-finalized revisions was a request to increase throughput for Units U240 and U246 "by 4,000 barrels per day above the existing 65,000 barrels per day permit limit." *Id*. at 6. Although both the applied-for increase of 4,000 barrels per day as well as the changes to Table II-A implicate the throughput of Units U240 and U246, the permit record clearly indicates that these two issues are distinct. First, as the Petitioners acknowledge, the requested 4,000 barrels per day increase is significantly smaller than the change reflected in Table II-A (a change from 42,000 to 65,000 barrels per day for U240). Second, the language discussing the requested 4,000 barrels per day increase acknowledged the "*existing* 65,000 barrels per day permit limit." *Id*. (emphasis added). Given that the 65,000 barrels per day value, characterized as "existing," is reflected in the updated Table II-A as well as the existing Condition 22965,[14] it is clear that the requested 4,000 barrels per day increase was not the cause for the change to Table II-A, but instead that it would be in addition to the values in Table II-A and Condition 22965. Third and most importantly, as discussed above, other portions of the Statement of Basis clearly explained that the changes to Table II-A reflect revisions "approved of under application 13424 in 2007," and *not* the potential future changes associated with the requested 4,000 barrels per day increase (which was associated with New Source Review (NSR) application 27954 and title V application 27955). Statement of Basis at 11; *compare id*. at 5. Therefore, the EPA does not agree that the discussion in the Statement of Basis regarding the requested 4,000 barrels per day throughput increase was "misleading" as the Petitioners claim, nor that this distinct reference rendered it impracticable for the Petitioners to raise concerns regarding the changed capacity values in Table II-A during the public comment period.

Overall, the Petitioners' concerns regarding the alleged increase in capacity for the U240 and U246 hydrocracking units could have been, but were not, raised with reasonable specificity during the public comment period, as required by the CAA. Accordingly, the Petitioners' claims predicated on this alleged capacity increase—including their claim that the Statement of Basis did not contain enough substantive information about these alleged increases—also could have

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[13] Rather, as noted above, the Statement of Basis contains additional discussion related to the permitted capacities of Units U240 and U246 reflected in Table II-A. *See* Statement of Basis at 11.
[14] *See infra* note 19 and accompanying text.

been, but were not, raised with reasonable specificity during the public comment period.[15] Because the Petitioners have not demonstrated that it was impracticable to do so, and because the basis for these claims did not arise after the public comment period, these claims are denied. 42 U.S.C. § 7661d(b)(2).

Moreover, whether the Petitioners' procedural claims are viewed as justifications for why the Petitioners did not raise any concerns regarding the changed capacity limits during the public comment period, or as independent claims challenging the sufficiency of the public notice and Statement of Basis, these claims are without merit.[16] Although the Petitioners claim that they were not provided substantive notice of the alleged capacity increases to Units U240 and U246, and that the Statement of Basis does not contain an explanation for the alleged increases, these assertions are incorrect. As discussed above, the Draft/Proposed Permit and Statement of Basis *did* provide notice of the changes proposed by BAAQMD.[17] The Petitioners simply did not identify the portion of the Statement of Basis that explains the permit changes at issue, and apparently overlooked the corresponding changes to the Draft/Proposed Permit itself. *See* Statement of Basis at 11; Draft/Proposed Permit at 11, 13. Therefore, the claims in the Petition concerning the adequacy of public notice and the Statement of Basis present no grounds for an EPA objection.[18]

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[15] Given that the Final Permit is essentially identical to the Draft/Proposed Permit with respect to the permit terms at issue here, the permit record upon which the Petition is based is essentially identical to the record that was available during the public comment period. Therefore, the same claims now raised in the Petition could have been raised just as easily during the comment period. If the public believed that more substantive information was necessary to evaluate the changes to the Permit—e.g., through a more detailed Statement of Basis—those concerns should have been raised to BAAQMD during the public comment period.

[16] In essence, the Petitioners' arguments concerning the allegedly inadequate public notice (and, to some extent, the allegedly inadequate Statement of Basis) are presented both as justifications for their failure to raise their concerns during the public comment period as well as independent grounds for objection. Thus, although the EPA's discussion above more directly rebuts the Petitioners' arguments that it was impractical to raise their concerns during the public comment period, the EPA's discussion also effectively rebuts the Petitioners' arguments challenging the substantive adequacy of the public notice (and, to some extent, the Statement of Basis).

[17] The Petitioners specifically claim "[a]lthough the Statement of Basis indicated that it had attached 'engineering evaluations for all the NSR applications to be included with the Title V permit renewal,' it did not include any engineering evaluations related to the increased capacity limits for the hydrocracking units." Petition at 14. However, the Statement of Basis includes engineering evaluations related to the preconstruction permitting actions *implicated in the current title V action for the first time*—i.e., those specified on page 4 of the Statement of Basis. Engineering Evaluations associated with preconstruction permits that were previously incorporated into the title V permit are attached to prior versions of the title V permit. As discussed further below, information relevant to the Petitioners' claims was included in a 2009 title V permit revision. *See infra* note 20 and accompanying text.

[18] Regarding the Petitioners' brief statement that they have no record of receiving a direct notice from BAAQMD, as an initial matter, the Petitioners do not present this as a basis for requesting an EPA objection. Rather, the Petitioners include this brief statement in their "Procedural Background" section, as well as in a footnote alongside their "Failure to Provide Substantive Notice" claim. *See* Petition at 7, 10 n.25. To the extent that this brief statement could be construed as a claim warranting an EPA response, the Petitioners have not demonstrated that BAAQMD's provision of notice was procedurally flawed with respect to 40 C.F.R. § 70.7(h)(1). First, although the Petitioners describe themselves as "interested parties," they do not directly allege (much less demonstrate) that any specific Petitioners had requested in writing to be placed on a mailing list developed by BAAQMD, such that BAAQMD was required to transmit direct notice to them. 40 C.F.R. § 70.7(h)(1). Second, the Petitioners do not directly allege (much less demonstrate) that BAAQMD did not actually transmit such notice to all interested parties as required by 40 C.F.R. § 70.7(h)(1). Instead, the Petitioners simply indicate that the Petitioners "did not receive" or "have no record of receiving" a direct notice. However, this suggestion is inconsistent with arguments the Petitioners advance

Beyond the two procedural issues discussed above, the Petitioners do not advance any substantive claims suggesting how the alleged capacity increases might run afoul of applicable CAA requirements. However, the EPA notes that, contrary to the premise underlying the Petitioners' claims, it does not appear that the Permit actually authorizes an increase in the capacity of the U240 and U246 hydrocracking units in a manner inconsistent with the CAA, existing permit terms, or preconstruction permit authorizations. First, the revised Table II-A values now appear to align with existing permit conditions governing the capacity of the units at issue, which were unchanged during the current permit renewal action.[19] Second, the updated Table II-A values appear to accurately reflect the conditions of underlying preconstruction permits.[20] The Petitioners have presented no evidence to demonstrate that updating Table II-A to

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in their claims, including their argument that "[b]ecause the draft permit stated that no increases in the processing capacity of the hydrocracking units would be considered in the Renewal Title V Permit, Petitioners had no reason to make public comments to the draft" permit. Petition at 9. The EPA also observes that BAAQMD subsequently indicated that the Draft/Proposed Permit "was noticed via the Air District website, the West County Times *and Air District interested parties' lists* . . . ." *See* Letter from Jack P. Broadbent, Executive Officer/Air Pollution Control Officer, BAAQMD (March 15, 2018) (Broadbent Letter) (emphasis added), available at *http://www.baaqmd.gov/permits/major-facility-review-title-v/title-v-permits/page-resources/table-data/contra-costa/a0016/phillips-66-san-francisco-refinery*. The EPA understands that BAAQMD's interested parties list for this action includes at least two of the Petitioners (San Francisco Baykeeper and Communities for a Better Environment), including one matching the mailing address listed in the Petition (San Francisco Baykeeper). Actions by government agents—such as the provision of notice by permitting authorities—are subject to a presumption of regularity absent clear evidence to the contrary. *See, e.g.*, *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15 (1926); *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001). Additionally, the long-recognized "mailbox rule" establishes a presumption that the addressee properly received a properly and timely mailed document, *e.g.*, *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884), and an addressee's "bare assertion of non-receipt is insufficient to rebut" this presumption, *United States v. Ekong*, 518 F.3d 285, 287 (5th Cir. 2007). Given BAAQMD's representations, and, more importantly, the Petitioners' failure to present allegations or evidence demonstrating that BAAQMD's provision of notice was deficient with respect to 40 C.F.R. § 70.7(h)(1), the EPA finds no basis for objection on this issue. The EPA encourages all parties seeking direct notice of future permitting actions to request in writing to be placed on the appropriate mailing list, and/or to confirm that their mailing address is up-to-date.

[19] Condition 22965 (which the Petitioners briefly reference) restricts the daily throughput of Unit U240 to 65,000 barrels per day, consistent with the revised value in Table II-A. *See* Draft/Proposed Permit at 11, 544; Final Permit at 11, 503. Likewise, Condition 22969 (which the Petitioners do not acknowledge) restricts throughput of Unit U246 "to 8,395,000 barrels over any rolling 12-month period," similar to the "8,395,000 [barrels] per 12 months annual daily average" clarified in Table II-A. Draft/Proposed Permit at 13, 544–45; Final Permit at 13, 504; *see also* Statement of Basis at 11. Although the Petitioners allege that the revisions to Table II-A would effectively authorize up to 88,000 barrels per day from both units, and that this would be inconsistent with the 65,000 barrels per day limit in Condition 22965, the Statement of Basis explains that this is not the case because "[t]he amount of gas oil processed at S-307 [U240] [i.e., the 65,000 barrels per day limit] *includes* the amount of gas oil that can be processed at S-434 U246." Statement of Basis at 85 (emphasis added).

[20] For example, as explained in the Statement of Basis, the 65,000 barrels per day value in Table II-A "was approved of under [preconstruction permit] application 13424 in 2007." Statement of Basis at 11. The preconstruction permit associated with application 13424 was issued on October 5, 2007. *See* Final Authority to Construct and Evaluation Report, Application 13424, ConocoPhillips Refinery, Facility A0016, Rodeo CA (October 5, 2007). This preconstruction permit established Conditions 22965 and 22969, which authorized the capacity increases implicated by the Petition. *See id.* at 82, 83; *see also supra* note 19. These preconstruction permit terms were then incorporated into the facility's title V permit in April 2009: Conditions 22965 and 22969 appear to have been copied verbatim, and Table II-A was updated to reflect these conditions. *See* Phillips 66 Title V Permit at 12, 14, 480, 481 (June 18, 2009). The permit records associated with these two permit actions discussed the basis for these changes. S*ee* Engineering Evaluation and Statement of Basis associated with the June 18, 2009, title V permit (April 2009) ("The purpose of this revision is to incorporate the sources and modification that went through preconstruction review

accurately reflect the underlying applicable requirement (the limits from a preconstruction permit) was inappropriate in this instance.[21] Third, the EPA notes that BAAQMD subsequently explained that "[t]he Title V Permit issued on January 25, 2018, does not approve increases in heavy oil feed capacity for Unit 240 at Phillips 66."[22] Thus, many of the Petitioners' apparent concerns, based on the premise that the current permit action authorizes the Phillips 66 refinery to increase its capacity, are unwarranted.

In sum, the documents presented for public notice, including the Draft/Proposed Permit and Statement of Basis, plainly indicated the District's intent to revise the Table II-A capacity values for Units U240 and U246. Thus, the Petitioners' procedural claims—that the public did not have notice of such changes, and that that the Statement of Basis did not provide information about these changes—are without merit. Similarly, the Petitioners' arguments that it was impracticable during the comment period to raise any issues with the alleged capacity increases—including any concerns regarding the changed capacity values themselves, or the level of detail contained in the Statement of Basis—are without merit, and, therefore, these issues cannot be raised in the current title V petition. Moreover, the Petitioners have failed to allege (much less demonstrate) that the changes at issue resulted in the Permit not complying with substantive requirements of the Act, and their apparent concerns regarding capacity increases at the facility are unwarranted.

For the foregoing reasons, the EPA denies the Petitioners' request for an objection on these claims.

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 described above.

Dated: AUG 08 2018

Andrew R. Wheeler
Acting Administrator

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under Application 13424 (the Clean Fuels Expansion Project). The detail of the changes is in the engineering evaluation for Application 13424, which is in Appendix B and which hereby is incorporated into this statement of basis."); *id.* at 340–42 (containing the Engineering Evaluation for preconstruction application 13424, dated October 5, 2007, further explaining the basis for these changes). Although the updated 65,000 barrels per day value in Table II-A was not included in later versions of the title V permit starting with the last title V permit renewal in 2011, this oversight appears to have been corrected, such that the title V permit now correctly reflects this requirement established in the underlying preconstruction permit.

[21] *See generally In the Matter of PacifiCorp Energy, Hunter Power Plant*, Order on Petition No. VIII-2016-4 at 8–21 (October 16, 2017) (explaining, among other things, that duly-issued title I preconstruction permitting actions establish the "applicable requirements" that should generally be incorporated in the title V permit without further review, except to add monitoring, recordkeeping, and reporting requirements where necessary).

[22] Broadbent Letter, *supra* note 18.