

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	PETITION No. VIII-2018-5
)	
SUNCOR ENERGY)	ORDER RESPONDING TO
COMMERCE CITY, CO)	PETITION REQUESTING
)	OBJECTION TO THE ISSUANCE OF
PERMIT No. 96OPAD120)	A TITLE V OPERATING PERMIT
)	
ISSUED BY THE COLORADO DEPARTMENT OF PUBLIC)	
HEALTH AND ENVIRONMENT)	

ORDER DENYING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated April 17, 2018, (the Petition), from the Colorado Latino Forum, Colorado People’s Alliance, Cross Community Coalition, Elyria and Swansea Neighborhood Association, the Sierra Club, and Western Resource Advocates (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to the proposed operating permit No. 96OPAD120 (the Permit) issued by the Colorado Air Pollution Control Division (APCD or Division) of the Colorado Department of Public Health & Environment to Suncor Energy (U.S.A.) Inc. (Suncor) for the Commerce City Refinery, Plants 1 & 3 (Refinery or the facility) in Adams County, Colorado. The operating permit was proposed pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and the Colorado Air Quality Control Commission Regulation No. 3, Part C. *See also* 40 Code of Federal Regulations (C.F.R.) Part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Proposed 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 Proposed Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA’s implementing regulations at 40 C.F.R. Part 70. The state of Colorado submitted a title V

program governing the issuance of operating permits on November 5, 1993. The EPA granted interim approval to the title V operating permit program in January 1995 and full approval in August 2000. *See* 60 *Fed. Reg.* 4563 (January 24, 1995) (interim approval); 61 *Fed. Reg.* 56368 (October 31, 1996) (revising interim approval); 65 *Fed. Reg.* 49919 (August 16, 2000) (full approval). This program is codified in 5 Code of Colorado Regulations (CCR) 1001-5, Regulation No. 3, Part C.

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 source's 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, the 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)(1).¹ Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.²

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

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 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., 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,

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] 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).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, those documents may also be considered as part of making a determination whether to grant or deny the petition.

III. BACKGROUND

A. The Suncor Facility

Suncor owns the Commerce City Refinery, Plants 1 and 3 located in Adams County, Colorado. The facility is a refinery involved in the production of finished petroleum products including gasoline, jet fuel, diesel fuel, and fuel oil. Processes used at the facility include catalytic cracking

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).

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.

which takes place in a fluid catalytic cracking unit (FCCU). Hydrogen cyanide (HCN) is generated and emitted as part of this process.

B. Permitting History

An initial title V permit was issued to Suncor for the facility on August 1, 2004. The permit was renewed on October 1, 2012, and last revised on February 1, 2016. Between November 2015 and February 2017, Suncor submitted requests to the Division for a number of modifications to the permit, including a request to limit HCN emissions. The Division included an HCN emissions limit of 12.8 tons per year within a draft revised permit.

Public notice for a draft revised permit was posted on the Division's webpage on May 11, 2017. Public comments were initially accepted through June 12, 2017. A public hearing was held on August 2, 2017, and the comment period was extended until August 9, 2017.

The proposed permit was submitted to the EPA for review on January 2, 2018, and the EPA did not object. A final permit was issued on February 22, 2018.

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The EPA's 45-day review period expired on February 16, 2018. Thus, any petition seeking the EPA's objection to the proposed permit was due on or before April 17, 2018. The Petition was received April 17, 2018, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Claim A: The Petitioners claim that “The Division cannot lawfully establish a federally enforceable HCN emissions limit solely to abet Suncor in avoiding its EPCRA and CERCLA obligations.”

Petitioners' Claim: The Petitioners claim that the “EPA must object to the HCN emissions limit modification because it is premised not on implementing a CAA requirement, but rather on allowing Suncor to evade its obligations under other EPA-administered environmental laws” and therefore the modification is not in compliance with applicable requirements of the CAA. Petition at 10. The Petitioners cite to both Suncor's request for a modification and the Division's statement in its Technical Review Document (TRD) which state that “the purpose for the HCN emission limit is to avoid Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Emergency Planning and Community Right-to-Know Act (EPCRA) reporting requirements.” *Id.* at 11 (citing to the Final TRD at 18). The Petitioners contend that generally, EPCRA and CERCLA require reporting releases of hazardous substances above certain threshold quantities, including 10 lbs for HCN, and further state that Suncor routinely releases more than 10 lbs of HCN emissions. The Petitioners agree that a release subject to notice as defined by 42 U.S.C. § 11004(a)(2)(A) excludes a federally permitted release. The

Petitioners surmise from the relevant part of the definition of federally permitted at 42 U.S.C. § 9601(10)(H) that a release is federally permitted if it is both regulated under the CAA and incorporated into a facility's permit. *See* 42 U.S.C. § 9601(10)(H). The Petitioners argue that the act of placing the HCN limit in the title V permit intended to avoid reporting under CERCLA cannot by itself render HCN releases "federally permitted" under the CERCLA/EPCRA regime, because the limit as incorporated in the title V permit is not implementing any federal air pollution control requirement since there is no federal requirement specifically limiting Suncor's HCN emissions. Instead, the Petitioners argue, the only purpose of the limit is to avoid reporting under CERCLA and EPCRA. Petition at 12.

The Petitioners state that "[t]he Division's only response is that EPA has approved Colorado's minor source permitting program and state regulations, that authorize [the Division] to limit a source's potential to emit HAPs [Hazardous Air Pollutants]." Petition at 12. However, the Petitioners disagree and argue that "[a]ccording to the Division's logic, EPA's approval of the program makes any permit term or condition federally enforceable..." *Id.* at 12. Specifically, the Petitioners argue that the existence of a federally enforceable limit does not automatically mean that any release that complies with that limit is a federally permitted release under CERCLA. "Rather, any such limit must be established 'under section 111, section 112, title I part C, title I part D, or State implementation plans.'" *Id.* at 12 (citing to 42 U.S.C. § 9601(10)(H), providing the definition of federally permitted release). The Petitioners assert that the EPA did not approve Colorado's potential to emit regulations for hazardous pollutants into Colorado's SIP, but instead approved them pursuant to CAA section 112(I), which governs State programs for implementation and enforcement of hazardous air pollutant emission standards. *Id.* at 13 (citing to 65 *Fed. Reg.* 79,750, 79,751). Further, the Petitioners argue that although the regulations were approved under CAA section 112, that does not make the HCN limit federally enforceable. According to the Petitioners, the limit does not conform with the permit program requirements of the EPA's underlying regulations since there is no specific federal section 112 National Emission Standards for Hazardous Air Pollutants (NESHAP) for HCN.⁹ *Id.* at 13 (citing to 65 *Fed. Reg.* 79751). The Petitioners then argue that since the HCN limit is not federally enforceable, it must be identified as a state-only limit in the title V Permit. The Petitioners argue that the "HCN limit is not appropriately promulgated under the Division's EPA-approved regulations designed to limit a source's 'potential to emit' HAPs." *Id.* at 13. They argue that the purpose of a potential to emit (PTE) limit is to allow a source of HAP emissions that would otherwise be regulated under § 112 to avoid classification as a major source by voluntarily agreeing to an enforceable restriction on HAP emissions. *Id.* at 14.

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

⁹ NESHAPs are established as stationary source standards to regulate HAPs from source categories. In this case, the facility is subject to the NESHAP for Petroleum Refineries (40 C.F.R. Subpart UUU). The Refinery NESHAP controls HCN emissions using carbon monoxide (CO) as a surrogate. *See* 80 *Fed. Reg.* 75178, 75204 (stating ". . . the control strategy used by the best performing facilities to reduce organic HAP emissions was the use of complete combustion, which occurs when the CO concentration is reduced to 500 ppmv," and that "once CO emissions are reduced to below 500 ppmv (i.e., complete combustion is achieved), we no longer see a direct correlation between CO concentrations and HCN emissions. . . . Therefore, [based on the data available] we maintain that complete combustion is the primary control needed to achieve controlled levels of HCN emissions.").

Relevant Legal Background

On December 20, 2000, the EPA published approval of Colorado’s revisions to its hazardous air pollutant requirements set forth in Regulations Nos. 3 and 8 of the State Air Quality Control Commission regulations. These regulations address permits being used to limit the PTE of criteria and hazardous air pollutants (HAPs). The revisions addressing criteria pollutants were approved into Colorado’s SIP under section 110 of the CAA. Those regulations addressing the PTE of HAPs were approved pursuant to section 112(l) of the CAA. These regulations provide Colorado with authority to issue PTE limits on hazardous air pollutants that are both practicably and federally enforceable. *See 65 Fed. Reg. 79752*. Indeed, the EPA “reserve[s] the right to deem permit conditions that limit PTE not federally enforceable,” noting that “[s]uch a determination will be based upon the permit, permit approval procedures, or permit requirements which do not conform with the permit program requirements or the requirements of our underlying regulations.” *Id.* at 79751.

Under Colorado Regulation No. 8, Part E, IV.A.1, sources may voluntarily apply for permit conditions to limit the source’s potential to emit HAPs in accordance with section IV and the procedural provisions of the Construction or Operating Permit programs in Regulation No. 3.

EPA Analysis

The Petitioners assert that the HCN limit is not federally enforceable under the CAA because, as they further assert, it is included solely to avoid CERCLA and EPCRA reporting requirements. “Applicable requirements” of the CAA for title V purposes is defined in 40 C.F.R. § 70.2. While 40 C.F.R. § 70.2 does not refer to any requirements under other environmental statutes, including CERCLA or EPCRA, the Petitioners have not identified any *CAA applicable requirements* with which the permit does not comply. *See In the Matter of Gateway Generating Station*, Petition No. IX-2013-1 (October 15, 2014) (“*Gateway Order*”) (finding that it is not possible for the Petitioner to demonstrate that the permit is not in compliance with the CAA on the basis of a claim alleging noncompliance with a separate environmental statute). Here, the Petitioners’ claim appears to be based—at least in part—on an allegation that the HCN limit does not meet the *CERCLA* definition of federally permitted release. Thus, the Petitioners’ claim is not based on any alleged substantive deficiency in the proposed permit, or any alleged procedural deficiency in the permitting authority’s processing of the permit, as required by CAA § 505(b)(2). *See Gateway Order* at 13. Therefore, even assuming *arguendo* that Petitioners are correct that the HCN limit does not meet the *CERCLA* definition of a “federally permitted release”—which is not a question that this Order addresses and which this Order does not need to answer in order to resolve the CAA title V matter at issue here—that would not change the analysis of whether there is a flaw in a permit issued pursuant to the CAA.

To the extent that the Petitioners have argued that the modification is not in compliance with the CAA due to the inclusion of a limit for purposes of avoiding reporting in a separate environmental statute, the EPA finds that this claim is unsupported. The Petitioners imply that the HCN limit is flawed because the permittee requested the limit to avoid the obligation to report under CERCLA and EPCRA, rather than to implement a specific CAA provision. However, the Petitioners have provided no analysis or citations that would support their assertion

that it contravenes the CAA to include a limit for this purpose. Thus, the Petitioners have not demonstrated that the title V permit is flawed because of the inclusion of the HCN limit.

Regarding the Petitioners' claim that the permitting authority lacked the authority to establish this limit, the Petitioners have not provided sufficient support for this claim. They provide only a general assertion that the limit does not conform with permit program requirements or underlying regulations because there is no specific emission limit for HCN under the applicable CAA section 112 NESHAP for petroleum refineries. As noted above, the EPA has authority under its regulations implementing CAA section 112(l) to deem permit conditions that limit PTE for HAPs as not federally enforceable and may require such permit conditions to be labeled as state-only enforceable if the limits do not conform with the permit program requirements or underlying regulations. However, the Petitioners do not explain how the HCN limit fails to meet these requirements. Specifically, the Petitioners have provided no reasoning to support their assertion that the permitted HCN limit can only conform with permit program requirements if there is a specific federal section 112 NESHAP for HCN.¹⁰ Colorado's regulations have been approved by the EPA pursuant to CAA section 112(l) of the CAA and 40 C.F.R. Part 63, Subpart E. *See 65 Fed. Reg. 79750*. Pursuant to 40 C.F.R. 63.91(a)(5), the EPA is authorized to "approve a State program designed to establish limits on the potential to emit hazardous air pollutants listed pursuant to section 112 of the Act." Since HCN is a listed hazardous air pollutant under CAA section 112,¹¹ Colorado has approved authority to establish a limit on the potential to emit HCN that are both practicably and federally enforceable. *See 40 C.F.R. 63.90(e), 63.91(c)*. In its response to comments, the Division clarified that it relied upon this authority in setting the HCN limit. *See Response to Initial (August 1, 2017) Comments on Draft Permit at 30*. The Petitioners have not addressed this aspect of the Division's rationale supporting its permit, and the Petitioners have failed to support an argument that the Division lacked authority to include this limit.

Similarly, to the extent that the Petitioners argue that the limit is not federally enforceable, the Petitioners fail to point to a provision that would preclude the Division from including this limit within the federally enforceable section of the permit. Terms and conditions included in a title V permit that are designed to limit a source's potential to emit are specifically identified as federally enforceable in EPA's title V regulations. *See In re Peabody Western Coal Co.*, 12 E.A.D. 22, 31–32, 2005 EPA App. LEXIS 2, *23–25 (EPA February 18, 2005) ("Title V permits (and other permits as well) may function as vehicles for establishing such PTE limits, potentially allowing a source to avoid more burdensome permitting requirements for 'major sources' by instead qualifying as a 'synthetic minor' source *for purposes of some other regulatory program.*") (emphasis added); *see also* 40 C.F.R. §70.6(b) ("All terms and conditions in a part 70 permit, including any provisions designed to limit a source's potential to emit, are enforceable by the Administrator and citizens under the Act"). While the Petitioners have included supporting

¹⁰ As noted previously, and contrary to the Petitioners' assertion that there is no federal section 112 NESHAP for HCN, the Refinery NESHAP does control HCN through the use of complete combustion as defined by a CO level of 500ppmv or less. *See* n.9.

¹¹ *See* section 112(b)(1) n.1 (listing "Cyanide Compounds," which include HCN); *see also* CAA Amendments of 1990, Pub. L. 101-549, § 301, 104 Stat. 2399, 2535 (Nov. 15, 1990) ("X'CN where X = H' or any other group where a formal dissociation may occur. For example, KCN or Ca(CN)₂").

citations, which demonstrate that potential to emit limits *may* be used to limit a source's emissions below major source thresholds to avoid major source requirements, the definition of potential to emit in Part 63¹² does not restrict the use of PTE limits to *only* this purpose. Thus, the Petitioners have failed to demonstrate that the permit is flawed by the inclusion of the HCN limit in the federally enforceable section of the permit.

In summary, the CAA places the burden on the petitioners to demonstrate to the EPA that the title V permit does not comply with the CAA. 42 U.S.C. § 7661d(b)(2). Here, the Petitioners' claims are based on assertions that the permit fails to meet certain criteria under environmental statutes other than the CAA. The Petitioners have not identified any applicable requirements of the CAA with which the Permit does not comply.

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

Claim B: The Petitioners claim that “The Division set an unlawful & arbitrarily high HCN emissions limit.”

The Petitioners argue generally that the HCN limit is not being used to reduce emissions nor is it protective of public health. The Petitioners have divided this argument into three sub-claims as follows:

Sub-Claim B.1: The HCN limit is based on an arbitrary estimate, rather than actual emission data.

The Petitioners assert that Suncor conducted a one-time performance test for HCN and initially estimated the emissions to be 8.56 tons per year (tpy). Suncor later revised the estimate upwards using a new method of calculating the refinery's PTE not based on actual emissions but rather on using the coke burn-off rate as a proxy. The Petitioners assert that the Division failed to acknowledge that this new estimate was a theoretically calculated value and that it was significantly higher than actual HCN emissions measured during the stack test. Petition at 17. The Petitioners argue that “[t]he division's decision to rely on an upper-bound estimate derived from the lb/1000 lb coke burning limit, rather than the actual stack test data (or indeed, representative data from multiple stack tests), is arbitrary, unsupported, and contradicts its own reasoning.” *Id.* at 18.

The Petitioners argue that the Division failed to show that using the coke burn-off rate as a proxy is the best or even a correct measure of HCN emissions. The Petitioners argue that there is insufficient information in the record to determine that the coke burn-off rate is a reasonable proxy. *Id.* at 19. Lastly, the Petitioners assert that the language in the final permit allows Suncor to choose a HCN emission limit based on either coke burn-off rate or its actual emissions, depending on which is higher. *Id.* at 17.

¹² See, e.g., 40 C.F.R. 63.1, which states “*Potential to emit* means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any 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, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.”

Sub-claim B.2: The Division has not demonstrated that the HCN limit is at least as stringent as federal requirements.

Citing to 42 U.S.C. § 7416,¹³ the Petitioners argue that the Division has not demonstrated that the HCN limit is at least as strict as, or more strict than, the 500 ppm CO limit established by the EPA's Refinery Rule.¹⁴

Sub-claim B.3: Suncor's HCN emissions limit does not protect public health

The Petitioners argue that the Division did not attempt to determine whether the HCN emissions limit it set would protect human health from HCN exposure. The Petitioners assert that the Division's claim that it lacks legal authority to set emission limits stricter than federal requirements is "inconsistent with federal law, represents a misinterpretation of state statutes and regulations, and is inconsistent with [the Division's] ordinary practice." Petition at 20. Regarding the modeling conducted by the Division, the Petitioners argue that the Division used flawed metrics and that it provided no support for its claim that the modeled levels are safe for human health in fence-line communities. The Petitioners argue that the Division failed to provide sufficient information for the EPA or the public to evaluate the basis for the modeling assumptions. *Id.* at 23.

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

As an initial matter, sub-claims B.1 and B.2 were not raised with reasonable specificity during the public comment period. Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. 70.8(d) state that a petition to the EPA Administrator to object to a title V permit shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period unless the petitioner demonstrates that it was impracticable to raise such objections during the public comment period or unless the grounds for such objection arose after the public comment period. A title V petition should not be used to raise issues to the EPA that the state has had no opportunity to address, and 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. *See, e.g., 56 Fed. Reg.* 21712, 21750 (1991); *Luminant Order* at 5; *In the Matter of Phillips 66 San Francisco Refinery*, Order on Petition No. IX-2018-4 at 5-10 (August 8, 2018). Here, the Petitioners' raised general concerns in their public comments with setting the HCN limit at a level of Suncor's current emissions.¹⁵ However, the Petitioners' comments do not make specific arguments regarding the Division's reliance on a theoretically calculated value. Similarly, the Petitioners

¹³ The relevant portions of 42 U.S.C. § 7416 state: ". . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section."

¹⁴ The EPA refinery rule referenced by the Petitioners is found at 40 C.F.R. Part 63, Subpart UUU. This rule controls HCN by limiting CO emissions to 500 ppmv. *See 80 Fed. Reg.* at 75204.

¹⁵ Earthjustice comments regarding Suncor Energy Title V Operating Permit Modification 960PAD120, at page 49 (August 1, 2017).

did not make any arguments in their comments that the HCN limit must be as strict as the CO limit established in the refinery rule. The Petitioners have not demonstrated that it was impracticable to raise these concerns during the public comment period. Therefore, to the extent that the Petitioners assert that the HCN limit was arbitrarily determined or that it should be at least as strict as federal requirements, these claims are denied because they were not raised with reasonable specificity during the public comment period. 42 U.S.C. § 7661d(b)(2).

Notwithstanding the fact that these claims were not raised with reasonable specificity during the comment period, the EPA also finds that the Petitioners have not met their burden of demonstrating that the Permit is not in compliance with the CAA.

The Petitioners imply that the HCN limit is flawed because the permitted limit is higher than actual HCN emissions measured during a stack test. Additionally, the Petitioners assert that using the coke burn-off rate is not an appropriate proxy. The Division provided an explanation for the methodology used to calculate the emission factor used in creating the HCN limit. The emission factor was calculated to account for operational variability around coke burn. *See* Final TRD at 19. The Petitioners did not contradict this methodology to explain how the Division's rationale is inconsistent with the Act or otherwise arbitrary.¹⁶ Likewise, the Petitioners have not addressed why it would be inadequate to use coke burn-off to monitor HCN emissions. Instead, the Petitioners have attempted to shift the burden to the Division to demonstrate the adequacy of the chosen emission factor and monitoring method. However, in the context of a petition for an objection, the CAA places the burden on the Petitioners to demonstrate to the EPA that the title V permit does not comply with the Act. 42 U.S.C. § 7661d(b)(2). *See In the Matter of Motiva Enterprises, LLC, Port Arthur Refinery*, Order on Petition No. IV-2016-23 at 23-25 (May 31, 2008); *In the Matter of Pasadena Refining System, Pasadena Refinery*, Order on Petition No. VI-2016-20 at 18-20 (May 1, 2018). The Petitioners have not contradicted the reasoning provided by the Division for calculating the emission factor. While the Petitioners assert that the HCN limit should reflect actual emissions determined through stack testing, they have not provided any citation which would support that assertion.

The EPA does not agree that the Division needs to show the HCN limit is as strict as the EPA's Refinery Rule. The HCN limit is not being used to supplant the requirements of the rule. The Refinery Rule remains an applicable requirement and has been incorporated into the title V permit elsewhere. *See* Suncor Energy Inc., title V Permit No. 96OPAD120, Condition No. 54. The permittee is required to comply with both the HCN PTE limit *and* the Refinery Rule.

Regarding sub-claim B.3, the Petitioners have argued that the Division failed to set a limit that is protective of public health and that the Division's reasoning that it lacks authority to set a limit beyond the one that Suncor requests or one that is stricter than federal requirements is flawed. Further, the Petitioners argue that the authority cited by the Division to set the limit does not constrain the agency's authority to set a standard at a level that protects public health. However, while the Petitioners have argued that the authority does not constrain the agency to set a more restrictive limit, the Petitioners have not cited to any specific requirement that would give rise to a requirement for the Division to include a more stringent limit. As noted above, the title V permitting program does not generally require the permitting authority to impose substantive

¹⁶ *See* n.5 *supra*.

new requirements on a permittee, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure source's compliance with applicable requirements. *See* 40 C.F.R. § 70.1(b). The source is authorized pursuant to Colorado Regulation No. 8 to voluntarily apply for a permit condition to limit the PTE of HAPs, as the source here has done,¹⁷ and Petitioners have not identified any authority to the contrary.

The Petitioners have also alleged that the modeling conducted by the Division was flawed and does not show that the limit is protective of human health. However, the Petitioners have not demonstrated how the modeling is relevant to any federal requirement. Neither CAA section 112(b) nor 40 C.F.R. Part 63, Subpart UUU establish applicable requirements for the source to model concentrations or health impacts of HCN emissions. In its TRD, the Division stated that, “[t]here are no federal or Colorado ambient air quality standards for HCN, therefore modeling is not required. Nevertheless, based on comments received during the public comment period, the Division modeled HCN emissions to determine the levels of HCN that would be present at the fenceline.” TRD at 18. Since the modeling is not an applicable requirement of the CAA and is not used to establish an applicable requirement of the CAA, it is not appropriate for EPA to evaluate it in the title V petition process. *See In the Matter of Waupaca Foundry*, Petition No. V-2015-02 at 9 (July 14, 2016) (finding that it was not appropriate for EPA to evaluate modeling conducted pursuant to state regulations in the title V petition).

Claim C: The Petitioners claim that “The HCN emissions limit lacks adequate Provisions to assure compliance.”

Petitioners’ Claim: The Petitioners assert that the HCN emissions limit does not have sufficiently strong provisions to assure compliance with the emissions limit as required by 42 U.S.C. § 7661c(a) and (c). The Petitioners assert that to be enforceable, the HCN limit must include adequate monitoring, testing, and enforcement. Petition at 25. The assertion that the HCN limit does not meet these requirements stems from the Petitioners’ belief that “the Division has imposed only minimal reporting requirements on Suncor.” *Id* at 25. The Petitioners acknowledge the requirement for Suncor to submit semi-annual monitoring and permit deviation reports and annual compliance certifications but argue that these reports may not include information on actual HCN emissions and may only include information on the coke burn-off rate. Additionally, the Petitioners argue that “by exempting Suncor from its EPCRA and CERCLA reporting, the Division has cut off the public’s only easily accessible source of information about Suncor’s HCN emissions.” *Id. at 25.*

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

The Petitioners appear to take issue not with the monitoring itself but with the reporting requirements of the permit. The Petitioners imply that the reporting is inadequate as there is no provision to make reports available to the public, unlike the release reporting requirements under EPCRA and CERCLA. As noted previously, reporting requirements of EPCRA and CERCLA are not applicable requirements of the CAA. The burden is on the petitioner to cite to applicable

¹⁷ It is worth noting that but for the permittee requesting this limit, the permit would have *no* specific limits directly applicable to HCN, as the EPA refinery rule controls HCN by limiting CO emissions. *See supra* nn. 9, 10, and 14.

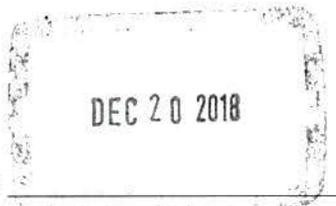
requirements which have been omitted, and to demonstrate that this omission results in the permit not complying with the CAA. While the Division has cited to multiple reports and certifications that Suncor is required to submit, the Petitioners have challenged the adequacy of these based on the reports potentially listing the coke burn-off rate as a proxy for actual HCN emissions. However, as determined previously, the Petitioners have not provided any analysis explaining why it might be inappropriate to use the coke burn-off rate as a proxy for HCN emissions. Additionally, the Petitioners have failed to demonstrate that this reporting would be inadequate when viewed in context of all the required reporting for assuring compliance with the limit in the permit. Specifically, the Petitioners have not assessed the annual stack test reporting which will report actual emissions data. *See In the Matter of Public Service New Hampshire, Shiller Station*, Order on Petition No. VI-2014-04 at 14–16 (July 28, 2015) (finding that because the Petitioner did not address the overall monitoring scheme, the Petitioner did not demonstrate that the monitoring requirements in the permit were insufficient to assure compliance). While the Petitioners have argued that none of this reporting is sufficient since it is not “easily accessible,” the EPA sees no reason why these reports would not be available under Colorado’s Open Records Act requirements. Furthermore, the Petitioners have not demonstrated how, even if these reports are not “easily accessible,” this leads to a flaw in the permit.

In summary, the Petitioners make general allegations concerning the reporting they assert is necessary, but do not demonstrate, with citation or analysis, why the existing permit terms and conditions are inadequate.

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: _____



Andrew R. Wheeler
Acting Administrator