BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF NJDEP Proposed Air Pollution Control Operating Permit BOP160001 For Newark Bay Cogeneration LP Prepared by the New Jersey Department of Environmental Protection	Permit Activity Number: BOP160001

PETITION TO OBJECT TO THE TITLE V OPERATING PERMIT FOR THE NEWARK BAY COGENERATION PARTNERSHIP LP POWER PLANT

Pursuant to section 505(b)(2) of the Clean Air Act, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d), the Ironbound Community Corporation hereby respectfully petitions the Administrator of the U.S. Environmental Protection Agency ("EPA") to object to the above-referenced draft Title V permit ("the Permit") prepared by the New Jersey Department of Environmental Protection ("NJDEP") for the Newark Bay Cogeneration Partnership LP power plant ("Newark Bay") located at 414-462 Avenue P, Newark, New Jersey, 07105.

BACKGROUND

I. FACTUAL BACKGROUND

Newark Bay sits within the densely populated and industrial Ironbound neighborhood of Newark's East Ward. The power plant is one of over 3,300 facilities with environmental permits located within the Ironbound community, and one of more than 200 facilities that store hazardous materials on site.[1] The potential hazards from chemicals stored at Newark Bay are of concern to the surrounding environmental justice community: EPA's EJSCREEN website shows that the census blocks within three miles of Newark Bay have Environmental Justice Indices in the 80th and 90th percentiles for every environmental justice variable, regardless of whether the reference comparison is the U.S., EPA Region 2, or New Jersey average.[2] These hazards are of particular concern to the thousands of people detained and incarcerated at the Delaney Hall

[1] *See* N.J. Dep't of Envtl. Protection, *DEP DataMiner*, https://www13.state.nj.us/DataMiner (follow "search by site" hyperlink; then follow "search by zip code") (last visited Mar. 15, 2019).

[2] *See* EPA, *EJSCREEN Report (Version 2017) 3 Mile Ring Centered at 40.719738,-74.132013, NEW JERSEY, EPA Region 2* (generated June 5, 2018), attached hereto as Ex. 1 to Attach. 1, *infra*.

Detention Facility and Essex County Correctional Facility located directly adjacent to Newark Bay.

II. PETITIONER: IRONBOUND COMMUNITY CORPORATION

Ironbound Community Corporation ("ICC") is a community-based nonprofit organization committed to developing grassroots solutions to community needs. ICC works with community members and stakeholders on a range of issues to improve the quality of air, water, and green space within the Ironbound community.[3] ICC has actively engaged with NJDEP and EPA for years to both inform these agencies of the ongoing adverse and disproportionate impacts suffered by Ironbound residents, and to seek solutions that would mitigate their exposure to toxic air emissions and chemical hazards. ICC raises its concerns in various fora, including the Title V permitting process. ICC submitted multiple written comments to NJDEP as part of the most recent permit renewal process for the Newark Bay Permit.[4]

III. GENERAL TITLE V PERMIT REQUIREMENTS

Title V of the Clean Air Act prohibits major stationary sources of air pollution from operating without or in violation of a valid permit, which must be designed to include – and assure implementation and compliance with – all applicable emission standards and all other applicable requirements. *See* 42 U.S.C. §§ 7661a, 7661c. A Title V permit "consolidate[s] into a single document all of a facility's obligations under the [Clean Air] Act. . . . [and] must include all 'emissions limitations and standards' that apply to the source, as well as associated inspection, monitoring, and reporting requirements." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 309 (2014) (citing 42 U.S.C. § 7661c(a)-(c)). Thus, "[t]he permit is crucial to the implementation of the Act: it contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular polluting source." *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996); *see also id.* (purpose of Title V permits is to provide "a source-specific bible for Clean Air Act compliance").

By compiling all applicable requirements into a single document, Title V "enable[s] 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." Operating Permit Program, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992). To that end, Title V permits must include such conditions as necessary to assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(1). As defined, "applicable requirements" include all standards, emissions limits, and requirements of the Act. 40 C.F.R. § 70.2. Conditions that are necessary to ensure compliance include sufficient compliance certification, testing, monitoring, reporting, and recordkeeping requirements. 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a); *see also Sierra Club v. EPA*, 536 F.3d 673, 674-75 (D.C. Cir. 2008) ("But Title V did more than require the compilation in a single document of existing applicable emission limits . . . . It also mandated that each

[3] *See* Ironbound Cmty. Corp., *Envtl. Justice*, http://ironboundcc.org/what-we-do/community/environmental-justice/ (last visited Mar. 15, 2019).

[4] *See* Comments from ICC et al., to NJDEP (June 11, 2018), attached hereto as Attach. 1; Sign-On Comments from ICC et al., to NJDEP (June 11, 2018), attached hereto as Attach. 2.

permit . . . shall set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions.") (internal citations and quotation marks omitted). Consistent with this principle, permitting authorities must include in their statement of basis a reasoned explanation for why the selected monitoring, recordkeeping, and reporting requirements are sufficient to assure the facility's compliance with each applicable requirement. *See, e.g.*, Order Denying in Part and Granting in Part Pet. for Objection to Permit at 10-11 & n.16, *In re Los Medanos Energy Center* (May 24, 2004).[5]

The public plays an important role in the enforceability of the Title V permit. *See* 40 C.F.R. §70.6(b)(1) ("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."). To that end, all Title V permit documents, including "[a] copy of each permit application, compliance plan (including the schedule of compliance), emissions or compliance monitoring report, certification, and each permit issued under this subchapter, shall be available to the public." 42 U.S.C. § 7661b(e); *see also id.* § 7661a(b)(8) (state implementing programs must "make available to the public any permit application, compliance plan, permit, and monitoring or compliance report"); 40 C.F.R. § 70.4(b)(3)(viii) (same).

If the state submits a Title V permit to EPA that fails to include and assure compliance with all applicable Clean Air Act requirements, EPA must object to the issuance of the permit before the end of its 45-day review period. *See* 42 U.S.C. § 7661d(b)(1); 40 C.F.R. § 70.8(c). If EPA does not object to a Title V permit, "any person may petition the Administrator within 60 days after the expiration of the [Administrator's] 45-day review period . . . to take such action." 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). The Clean Air Act provides that EPA "shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this [Act]." 42 U.S.C. § 7661d(b)(2); *see* 40 C.F.R. § 70.8(c)(1); *see also N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 333 n.12 (2d Cir. 2003) (explaining that under Title V, "EPA's duty to object to non-compliant permits is nondiscretionary"). EPA must grant or deny a petition to object within 60 days of its filing. *See* 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

For the reasons set forth below, the Newark Bay Cogeneration Partnership LP Permit fails to comport with substantive requirements of the Clean Air Act because it fails to require monitoring and reporting sufficient to determine the applicability of the Act's Risk Management Plan provisions. These objections were raised before NJDEP by the public comment deadline.[6]

[5] *Available at* https://www.epa.gov/sites/production/files/2015-08/documents/los_medanos_decision2001.pdf.

[6] *See* ICC et al., Comments, Attach. 1 at 19-22 & n.41; *see also* Comments of Ana Baptista, Chair, Envtl. Policy & Sustainability Mgmt. Program, Milano Sch. of Int'l Affairs, Mgmt. and Urban Policy, to NJDEP at 3, 4 (June 11, 2018), attached hereto as Attach. 3.

GROUNDS FOR OBJECTION

I. THE PERMIT FAILS TO REQUIRE MONITORING OR REPORTING NECESSARY TO ENSURE NEWARK BAY'S COMPLIANCE WITH THE RISK MANAGEMENT PLAN PROVISIONS OF THE CLEAN AIR ACT.

A. Permits for Facilities That Can Operate in a Way That Triggers Risk Management Plan Requirements Must Include Monitoring and Reporting Sufficient to Ensure Whether Those Requirements Apply.

All Title V permits shall include "enforceable . . . standards . . . and such other conditions as are necessary to assure compliance with applicable requirements of [the Clean Air Act], including the requirements of the applicable [State] implementation plan." 42 U.S.C. § 7661c(a). To ensure that these standards and requirements are truly "enforceable," Congress required that "[e]ach [Title V] permit . . . shall set forth . . . monitoring . . . and reporting requirements to assure compliance with the permit terms and conditions." *Id.* § 7661c(c); *see also In re Shell Offshore, Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit*, 13 E.A.D. 357, 394 n.54 (EAB 2007) ("'[F]ederal enforceability' has been interpreted as requiring practical enforceability as well. That is, the permit must include conditions allowing the applicable enforcement authority to show continual compliance (or non-compliance) such as adequate testing, monitoring, and record keeping requirements").

This monitoring, recordkeeping, and reporting requirement applies to "[*a*]*ny* standard or other requirement under section 112 of the Act, including *any* requirement concerning accident prevention under section 112(r)(7) of the Act." 40 C.F.R. § 70.2 (emphasis added). As relevant here, Section 112(r)(7) requires facilities "at which a regulated substance is present in more than a threshold quantity to prepare . . . a risk management plan to detect and prevent or minimize accidental releases of such substances from the stationary source, and to provide a prompt emergency response to any such releases in order to protect human health and the environment." 42 U.S.C. § 7412(r)(7)(B)(ii). The requirement to prepare a Risk Management Plan ("RMP") is thus a "requirement" for which permits must include monitoring and reporting in order to ensure compliance.[7]

But no provision of Section 112(r)(7) or EPA's Part 68 implementing regulations set forth monitoring or reporting provisions to ensure whether the RMP preparation requirement applies. When a requirement does not set forth "periodic testing or instrumental or noninstrumental monitoring" sufficient to assure compliance – either because a monitoring requirement is insufficient or because no monitoring requirement exists – permitting authorities *must* include in the permit "periodic monitoring sufficient to yield reliable data from the relevant time period that

[7] *See also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1018 n.3 (D.C. Cir. 2000) (quoting John S. Seitz, Director, Office of Air Quality Planning and Standards, Developing Approvable State Enabling Legislation Required to Implement Title V, at p. 4 (Feb. 25, 1993)) ("Permits must incorporate terms and conditions to assure compliance with all applicable requirements under the Act, including . . . sections 111 and 112 . . . monitoring, recordkeeping and reporting requirements, and any other federally-recognized requirements applicable to the source.").

are representative of the source's compliance with the permit." 40 C.F.R. §§ 70.6(a)(3)(i)(B), 70.6(c)(1); *see also Sierra Club v. EPA*, 536 F.3d 673, 675 (D.C. Cir. 2008) ("Where the emission standard lacks a periodic monitoring requirement altogether, the permitting authority must create one that assures compliance and include it in the permit."). For a monitoring provision to be sufficient to ensure compliance, it must use "terms, test methods, units, averaging periods, and other statistical conventions" consistent with the underlying requirement. 40 C.F.R. § 70.6(a)(3)(i)(B); *see also* Order Amending In the Matter of Eastman Kodak Co., Pet. II-2003-02, dated February 18, 2005 at 6-7, *In re Eastman Kodak Co.* (Apr. 4, 2006) ("Kodak Order")[8] (objecting to permit because its monitoring requirement did not specify a frequency and was therefore insufficient).

Not only must a Title V permit include monitoring and reporting provisions to ensure compliance with an applicable requirement, the permit must also set forth sufficient monitoring to ensure whether a requirement applies in the first instance when that requirement is likely to be triggered over the life of the permit. *See* Order Granting in Part and Denying in Part Pet. for Objection to Permit at 9, *In re: Waste Mgmt. of LA. L.L.C. Woodside Sanitary Landfill & Recycling Ctr.* (May 27, 2010)[9] ("Some factors that permitting authorities may consider in determining appropriate monitoring [include] . . . the likelihood of a violation of the requirements . . ."). Thus, for example, when a requirement applies only upon the exceedance of a certain operational threshold, and the facility has the capacity to exceed that threshold during the permit term, the permit must include monitoring and reporting sufficient to determine whether the threshold has been exceeded. *See, e.g.*, Kodak Order at 3 (objecting to permit whose monitoring requirement was not sufficient to determine whether total annual benzene quantity from facility waste exceeded 10 Mg/yr, and thereby triggered NESHAP requirements); *cf.* Order Granting in Part and Denying in Part Pet. for Objection to Permit at 24, *In re Motiva Enterprises LLC* (May 31, 2018)[10] (requiring permitting agency to specify the monitoring, recordkeeping, and reporting requirements necessary to assure no exceedance of thresholds below which facility can take advantage of less stringent permit-by-rule provisions); Order Granting in Part and Denying in Part Pet. for Objection to Permit at 9-12, *In re Hu Honua Bioenergy Facility* (Feb. 7, 2014)[11] (objecting to permit for insufficient monitoring and reporting to assure that emissions did not exceed PSD-triggering threshold). Without such monitoring and reporting, the permitting agency cannot "assure that the facility will at no time exceed th[e] limit" that triggers the requirement. Kodak Order at 3; *see also* Clean Air Act Proposed Approval of Revision to Operating Permits Program in Washington, 67 Fed. Reg. 43,575, 43,576 (June 28, 2002) ("Nothing in part 70, however, authorizes a State to exempt [insignificant emission units] from the testing, monitoring, recordkeeping, reporting, or compliance certification requirements of 40

[8] *Available at* https://www.epa.gov/sites/production/files/2015-08/documents/kodak_amendedresponse_2003.pdf.

[9] *Available at* https://www.epa.gov/sites/production/files/2015-08/documents/woodside_decision2009.pdf.

[10] *Available at* https://www.epa.gov/sites/production/files/2018-06/documents/motiva_port_arthur_response2018.pdf

[11] *Available at* https://www.epa.gov/sites/production/files/2015-08/documents/hu_honua_decision2011.pdf.

CFR 70.6," even if these units may typically be exempt from most requirements because they are below size or production rate thresholds).

The same holds true for the applicability of the RMP requirement. If a facility operates such that a listed substance may be present above the threshold quantity, its permit must include not only a general provision setting forth that Part 68 applies if the listed substance exceeds the threshold quantity, but also monitoring and reporting sufficient to assure whether that threshold has been exceeded. *Cf.* Order Granting in Part and Denying in Part Pet. For Objection to Permit at 18, *In re The Keyspan Generation Far Rockaway Station et al.* (Sept. 24, 2004) ("Keyspan Order")[12] (if "evidence [exists] to suggest that [a facility] is subject to section 112(r) requirements," then "its permit must include certain conditions necessary to implement and assure compliance with such requirements."). Sufficient monitoring and reporting is all the more necessary for the RMP requirement since the applicability of this requirement is based on the quantity of the listed substance present at the facility at *any* given time, and therefore "applicability may fluctuate over the life of the permit." Keyspan Order at 17; *see also* Order Granting in Part and Denying in Part Pets. for Objection to Permits in Resp. to Remand at 11, *In re The Albert Einstein College of Medicine for Yeshiva University* (Aug. 26, 2004)[13] (same). Thus, a facility's episodic assurance in a permit renewal or modification application that – at the time of the application – it is not subject to Section 112(r)(7) is not sufficient to determine whether the quantity of the substance may exceed the RMP threshold over the intervening months or years between applications. Without sufficient monitoring and reporting, the requirement to prepare the RMP is therefore practically enforceable only at the time of the permit application – which, for facilities that seek no permit modifications, would come once every five years. *Cf. Sierra Club v. EPA*, 551 F.3d 1019, 1026-27 (D.C. Cir. 2008) (Clean Air Act emission standards must apply "on a continuous basis").

Part and parcel to the obligation that the RMP preparation requirement must be enforceable is the obligation that state permitting agencies like NJDEP "[v]erify that the source owner or operator has registered and submitted an RMP or a revised plan when required by [Part 68]." 40 C.F.R. § 68.215(e)(1). State agencies have the authority to take enforcement action against facilities for their failure to register and submit a required RMP. *Id.* § 68.215(e)(4); *see also* Memorandum from Steven J. Hitte, Chief, Operating Permits Group, to Air Program Manager, Regions I-X at 1-2 (Apr. 20, 1999) (state permitting agencies must verify and enforce the requirement for facilities to register and submit an RMP). New Jersey's Part 68 implementing regulations, *see infra*, similarly set forth that a facility violates those regulations if it "[f]ail[s] to comply with the requirements of 40 CFR 68 as incorporated at N.J.A.C. 7:31 *no later than the date* on which a regulated substance is first present at a threshold quantity in a process" at the facility. N.J. Admin. Code § 7:31-11.4(c)(1)(3) (emphasis added). New Jersey thus cannot comply with its duty to enforce the Clean Air Act's RMP requirement if facilities perform no monitoring or reporting of the quantity of listed substances that are present on site over the course of the permit.

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[12] *Available at* https://www.epa.gov/sites/production/files/2015-08/documents/keyspan_decision2002.pdf.

[13] *Available at* https://www.epa.gov/sites/production/files/2015-08/documents/yeshiva_remand_decision2004.pdf.

As to the question of the required monitoring frequency, given that the applicability of the RMP requirement "fluctuates over the life of the permit," *see* Keyspan Order at 17, monitoring and reporting of the quantity of listed substances present on site must occur at intervals that correspond with the variable nature of the RMP requirement. Here, monitoring of the quantity and concentration of the listed substance must occur daily in order to satisfy the New Jersey regulation's requirement that an RMP be submitted the same day that the threshold quantity is exceeded. *See* N.J. Admin. Code § 7:31-11.4(c)(1)(3); *see also* 40 C.F.R. § 70.6(a)(3)(i)(B) ("[M]onitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement."). At the very least, monitoring of the quantity and concentration of the listed substance should occur no less frequently than upon each new shipment or increase of the substance onsite.

Similarly, any exceedance of the threshold quantity must be promptly reported to ensure no deviation from the same-day RMP requirement, preferably within 2 to 10 days of the occurrence. *See* 40 C.F.R. § 70.6(a)(3)(iii) ("[T]he permit shall . . . require . . . [p]rompt reporting of deviations from permit requirements. . ."); Clean Air Act Proposed Interim Approval of Operating Permits Program: State of New York, 61 Fed. Reg. 39,617, 39,619 (July 30, 1996) ("EPA believes that 'prompt' should be defined as requiring reporting within two to ten days . . ."); *see also N.Y. Pub. Interest Research Grp., Inc. v. Johnson*, 427 F.3d 172, 184 (2d Cir. 2005) ("[T]he purpose of prompt reporting is . . . to alert the EPA and the public to . . . violations."). Any such deviation should be included in the facility's six-month monitoring report and annual compliance certification. And all such reports must be made publicly available, since every Title V permit condition, including the RMP requirement, must be enforceable by EPA and members of the public via citizen suits. 40 C.F.R. § 70.6(b)(1) ("All terms and conditions in a part 70 permit. . . are enforceable by the Administrator and citizens under the Act.").

B. The Newark Bay Permit Must Require Monitoring and Reporting Because Aqueous Ammonia May Be Present at Newark Bay Above Thresholds that Trigger the Risk Management Plan Requirement.

EPA has delegated to New Jersey implementation of Part 68 and has approved NJDEP to implement and enforce its regulations under the State's Toxic Catastrophe Prevention Act ("TCPA") in place of Part 68. 40 C.F.R. § 63.99(a)(31)(i). NJDEP's TCPA program is thus federally enforceable. *See* EPA, General RMP Guidance ch. 10: Implementation, at 10-1.[14]

NJDEP's TCPA regulations both incorporate the entirety of EPA's Part 68 list of hazardous substances and threshold quantities, and also set forth a TCPA-specific list of hazardous substances and threshold quantities that also trigger RMP requirements in New Jersey. *See* N.J. Admin. Code § 7:31-6.3(a). EPA's Part 68 list includes "Ammonia [conc 20% or greater]" as a toxic substance with a threshold quantity of 20,000 pounds. 40 C.F.R. § 68.130(b). New Jersey's TCPA list, meanwhile, sets forth a 19,000-pound threshold for "Ammonia (aqueous) 28 percent by weight or more NH_3." N.J. Admin. Code § 7:31-6.3(a). Under NJDEP's program, "the total weight of the solution shall be used to determine whether a threshold quantity is

[14] *Available at* https://www.epa.gov/rmp/guidance-facilities-risk-management-programs-rmp.

present at a facility" for extremely hazardous substances "listed with a concentration in weight percent" like aqueous ammonia.[15] *Id.* § 7:31-6.2(d)(1).

In sum, New Jersey facilities must prepare an RMP if either of the following is present at the facility at any given time:

1) 20,000-pounds or more of ammonia in a solution with a concentration of 20% ammonia or greater; or
2) 19,000-pounds or more of aqueous ammonia, whose ammonia concentration is 28% or greater.

Newark Bay stores aqueous ammonia for its selective catalytic reduction ("SCR") device in a 14,000-gallon tank, *see* Newark Bay Permit § D at 63 of 79, which converts to approximately 96,000 pounds of aqueous ammonia.[16] The facility thus has the capacity to store well above either the Part 68 20,000-pound threshold or the TCPA 19,000-pound threshold. In addition, Newark Bay represented in its permit application that the aqueous ammonia used by its SCR device has a *minimum* concentration of by volume of 20%, *id.* at 111, 113, in line with the Part 68 minimum concentration of 20% and the TCPA minimum concentration of 28%.

Thus, aqueous ammonia may be present at the facility above thresholds that require the preparation of an RMP. Accordingly, the permit must include conditions requiring the monitoring and reporting of aqueous ammonia quantities and concentrations so that NJDEP, EPA, and the public can ensure over the course of the permit term that Newark Bay complies with any requirement, based on both the EPA and TCPA thresholds, to register and prepare an RMP. *Cf.* Order Granting in Part and Denying in Part Pet. for Objection to Permit at 9-10, *Louisiana Pacific Corp.* (Nov. 5, 2007)[17] (objecting to permit that improperly streamlined EPA and State requirements such that compliance with both requirements could not be assured).

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[15] NJDEP's response to ICC's comments note that, for the purposes of the 20,000-pound aqueous ammonia threshold of Part 68, "only the weight of the ammonia solute in the solution is considered, not the weight of the water." NJDEP, *Hearing Officer's Report – Resp. to Pub. Comments* at 13-14 (Nov. 30, 2018) ("Newark Bay RTC"), attached hereto as Attach. 4. Even if the weight of the ammonia solute is the relevant weight for the purposes of Part 68, however, Newark Bay has the capacity to store aqueous ammonia at levels that exceed a 20,000-pound ammonia solute threshold, *e.g.*, 96,000 pounds of 21% aqueous ammonia, or 75,000 pounds of 27% aqueous ammonia. Regardless of the applicable weight for Part 68, the TCPA regulations, in contrast, expressly set forth that the 19,000-pound TCPA threshold applies to the "total weight of the solution" and not just the weight of the ammonia. N.J. Admin. Code § 7:31-6.2(d)(1).

[16] *See* EPA, *Conversion from Gallons to Pounds of Common Solvents*, https://www.epa.gov/sites/production/files/2014-01/gallonspoundsconversion.xls (last visited June 11, 2018); *see also* 40 C.F.R. § 68.115(a) ("A threshold quantity of a regulated [Part 68] substance . . . is present at a stationary source if the total quantity of the regulated substance contained in a process exceeds the threshold.").

[17] *Available at* https://www.epa.gov/sites/production/files/2015-08/documents/lp_tomahawk_decision2006.pdf.

C. The Proposed Newark Bay Permit Fails to Include Monitoring and Reporting Sufficient to Determine the Applicability of Clean Air Act Risk Management Plan Requirements.

The Newark Bay Permit fails to include monitoring and reporting sufficient to determine the applicability of the RMP preparation requirement. The Permit lists only the following conditions with regard to the aqueous ammonia storage tank:

Ref.#	Applicable Requirement	Monitoring Requirement	Recordkeeping Requirement	Submittal/Action Requirement
1	Tank content limited to aqueous ammonia. [N.J.A.C. 7:27-22.16(e)]	Other: Tank contents. Per Delivery. [N.J.A.C. 7:27-22.16(e)].	Other: Keep records of Invoices/Bills of Lading showing material delivered. Per Delivery. [N.J.A.C. 7:27-22.16(e)].	None.
2	Permittee's annual throughput limit from preconstruction permit. Aqueous Ammonia <= 410,000 gal/yr. [N.J.A.C. 7:27-22.16(e)]	Other: Amount of ammonia delivered by date. Per Delivery. [N.J.A.C. 7:27-22.16(e)].	Other: Keep records of Invoices/Bills of Lading showing materials delivered. Per Delivery. [N.J.A.C. 7:27-22.16(e)].	None.
3	Ammonia <= 0.1 tons/yr. [N.J.A.C. 7:27-22.16(e)]	None.	None.	None.

The Permit thus contains no condition to ensure that the facility monitors, keeps records, and reports the quantity and concentration of ammonia it stores at any given time. And while the permit does require Newark Bay to "Keep records of Invoices/Bills of Lading showing material delivered. Per Delivery," Newark Bay Permit § D at 63 of 79, those records, by themselves, do not indicate whether ammonia is present at any given time above the Part 68 and TCPA thresholds, since they do not take into account the quantity and concentration of the aqueous ammonia already present at the time of the shipment. *See* Order Granting Pet. for Objection to Permit at 9-12, *Re: Piedmont Green Power, LLC* (Dec. 13, 2016)[18] (objecting to permit because requirement to keep biomass fuel shipment records, by itself, was insufficient to assure biomass fuel composition and whether facility was exceeding major source emission threshold). Nor does Newark Bay have any obligation to report these shipment records, so the applicability of the RMP preparation requirement is thereby entirely shielded from NJDEP, EPA, and the public.

[18] *Available at* https://www.epa.gov/sites/production/files/2016-12/documents/piedmont_response2015.pdf.

This deficiency is fatal to the permit as it undermines NJDEP's RMP obligation and EPA and the public's ability to enforce the Clean Air Act. *See* N.J. Admin. Code § 7:31–6.3(a); 40 C.F.R. § 70.6(b)(1); *see also Sierra Club*, 536 F.3d at 677 ("[Title V's] mandate means that a monitoring requirement insufficient 'to assure compliance' with emission limits has no place in a permit unless and until it is supplemented by more rigorous standards.").

NJDEP responded to ICC's comments on this point by asserting that "[p]ursuant to its Discharge Prevention Containment and Countermeasure (DPCC) plan [under the New Jersey Spill Compensation and Control Act ("Spill Act"), N.J. Stat. Ann. § 58:10-23.11d2 *et seq*.], Newark Bay Cogeneration manages its ammonia inventory such that it has less than the 20,000-pound threshold quantity of aqueous ammonia . . . so that it is not required to prepare a risk management plan pursuant to 40 CFR 68." Newark Bay RTC at 13-14, Attach. 4.

But Newark Bay's confidential DPCC plan cannot substitute for the monitoring and reporting necessary in the Title V permit for at least three reasons. *First*, DPCC plans are unrelated to Clean Air Act requirements such as the RMP preparation requirement. *See In re Newark Energy Ctr. Proposed Air Pollution Control Operating Permit Modification*, No. A-5794-14T1, 2017 WL 5983119, at *5 (N.J. Super. Ct. App. Div. Dec. 1, 2017) ("[T]he Spill Act's controlling provisions fail to mention permitting, and do not link the Spill Act's emergency planning and reporting obligations to a facility's eligibility for a [Title V air] permit to operate."). While DPCC plans must include a "description of all aboveground storage tanks" and their size, N.J. Admin. Code § 7:1E-4.2(c)(1), NJDEP's Spill Act regulations contain no requirement to monitor, keep records, and report the quantity and concentration of tank contents. *Cf. id.* §§ 7:1E–2.10; 7:1E-2.15(d) (requiring recordkeeping of tank inspection, testing, and repair, but not tank contents). And since, as NJDEP recognizes, "[t]he requirements of 40 CFR 68 to prepare a risk management plan are triggered by the actual inventory and concentration of ammonia at the facility, not by the capacity of the storage tank," Newark Bay RTC at 13, Attach. 4, Newark Bay's DPCC plan – which contains information about storage capacity but not the actual inventory and concentration of ammonia at the facility – does not shed light on the applicability of RMP requirements.

Second, DPCC plans cannot substitute for Title V permit requirements because NJDEP keeps the DPCC plans of Newark Bay and various other facilities confidential. *See* Response to Comments at 17 (noting Newark Bay's DPCC plan is "not [a] public document[]"); *see also In re Newark Energy Ctr.*, 2017 WL 5983119, at *2 (DPCC plans "are not generally available to the public"). In contrast, any requirement in a Title V permit or related document "shall be available to the public." 42 U.S.C. § 7661b(e); *see also id.* § 7661a(b)(8) (state implementing programs must "make available to the public any permit application, compliance plan, permit, and monitoring or compliance report"); 40 C.F.R. § 70.4(b)(3)(viii) (same). Thus, provisions in a confidential DPCC plan cannot "enable . . . the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements," as required by Title V. 57 Fed. Reg. at 32,251; *see also* 40 C.F.R. §70.6(b)(1) ("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.").

Finally, even if DPCC plan provisions could substitute for Title V requirements – which they cannot – NJDEP has pointed to no provision of the confidential DPCC plan that requires reporting to NJDEP of the quantity and concentration of aqueous ammonia at the facility over the courts of the Title V permit term. The DPCC plan thus does not even enable NJDEP itself to ascertain "whether the source is meeting th[e] requirements" of Title V. 57 Fed. Reg. at 32,251.

Newark Bay's DPCC plan thus does not resolve any of the Permit's deficiencies because that plan cannot substitute for Title V monitoring and reporting requirements sufficient to determine the applicability of the RMP preparation requirement.[19]

CONCLUSION

For the reasons set forth herein, EPA must object to the Title V permit prepared by NJDEP for the Newark Bay Cogeneration LP plant in Newark, New Jersey because of the Permit's failure to ensure the applicability of requirements of Section 112(r)(7) of the Act.

Respectfully submitted on March 18, 2019, on behalf of the Ironbound Community Corporation,

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[19] Because NJDEP raised the issue of the DPCC plan's relationship with the Title V permit for the first time in its response to comments, the grounds for ICC or other commenters to address the DPCC plan "arose after [the comment] period" and could not be included in their original comments to NJDEP. *See* 42 U.S.C. § 7661d(b)(2). Regardless of the timing of NJDEP's raising of the issue, because the agency keeps the contents of these DPCC plans confidential, it is "impracticable" for commenters to address the applicability of a DPCC plan to the Newark Bay Permit – or to any facility's Clean Air Act permit, for that matter. *See id.*