

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	PETITION NO. II-2019-4
)	
NEWARK BAY COGENERATION PARTNERSHIP LP)	ORDER RESPONDING TO
)	PETITION REQUESTING
ESSEX COUNTY, NJ)	OBJECTION TO THE ISSUANCE OF
PERMIT No. BOP160001, PI No. 07617)	TITLE V OPERATING PERMIT
)	
ISSUED BY THE NEW JERSEY DEPARTMENT OF)	
ENVIRONMENTAL PROTECTION)	

ORDER DENYING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated March 18, 2019 (the Petition) from the Ironbound Community Corporation (the Petitioner), 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 operating permit No. BOP160001 PI No. 07617 (the Permit) issued by the New Jersey Department of Environmental Protection (NJDEP) to Newark Bay Cogeneration Partnership LP (Newark Bay or the facility) in Essex County, New Jersey. The operating permit was issued pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and New Jersey Administrative Code (N.J.A.C.) 7:27-22. *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 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)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA’s implementing regulations at 40 C.F.R. part 70. The EPA granted interim approval of New Jersey’s title V program on June 17, 1996, with full approval effective November 30, 2001. *See* 61 Fed. Reg. 24715 (May 16, 1996); 66 Fed. Reg. 63168 (December 5, 2001). This program is codified in N.J.A.C. 7:27-22.

All major stationary sources of air pollution and certain other sources are required to apply for and operate in accordance with title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. CAA §§ 502(a), 503, 504(a), 42 U.S.C. §§ 7661a(a), 7661b, 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure compliance with applicable requirements. 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)(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

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.

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] 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

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*, 734 Fed. App’x *11, *15 (2d Cir. 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (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 why the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state’s response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *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).

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

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 Newark Bay Facility

The Newark Bay facility is owned by Talen Energy LLC and operated by Ethos Energy Group. Newark Bay is located in the Ironbound neighborhood in Newark, Essex County, New Jersey—a neighborhood NJDEP has identified as having environmental justice concerns. The facility consists of a 120-megawatt cogeneration plant that provides electricity and steam. Emission-generating equipment at Newark Bay includes two 640 million BTU per hour combustion turbines burning natural gas and ultra-low sulfur diesel, a 38 million BTU per hour auxiliary boiler burning natural gas and ultra-low sulfur diesel, an ultra-low sulfur diesel storage tank, an ammonia storage tank, and two emergency diesel generators.

B. Permitting History

NJDEP issued an initial title V permit to the Newark Bay facility in 2002, which was subsequently renewed and modified. On February 12, 2016, NJDEP received an application for a

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.

title V renewal permit. On March 6, 2018, NJDEP provided public notice of the draft title V renewal permit (the Draft Permit). A public comment period ran from March 6 until June 11, 2018, and NJDEP held a public hearing on May 31, 2018. On November 30, 2018, NJDEP submitted a proposed permit (the Proposed Permit), along with its response to public comments (RTC), to the EPA for its 45-day review of the permit. The EPA did not object to the Proposed Permit. NJDEP issued a final permit No. BOP 160001 (the Final Permit) to Newark Bay on January 29, 2019. The Petitioner submitted the Petition requesting an EPA objection to the Permit on March 18, 2019.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONER

Petitioner's Claim: The Petition is based on a single claim: because the Newark Bay facility has the physical capacity to store enough aqueous ammonia to trigger the requirement to prepare a risk management plan (RMP), the Permit must include “monitoring and reporting requirements sufficient to determine the applicability of the RMP preparation requirement.” Petition at 11.

In section I.A of the Petition’s Grounds for Objection, the Petitioner states that all title V permits shall include “enforceable . . . standards . . . and such other conditions as are necessary to assure compliance with applicable requirements of [the CAA].” Petition at 4 (citing 42 U.S.C. § 7661c(a)). To ensure that these requirements are enforceable, the Petitioner claims that CAA § 504(c) requires that title V permits “shall set forth . . . monitoring . . . and reporting requirements to assure compliance with the permit terms and conditions.” *Id.* (citing 42 U.S.C. § 7661c(c); *In re Shell Offshore, Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit*, 13 E.A.D. 357, 394 n.54 (EAB 2007)). The Petitioner contends that these monitoring and reporting requirements apply to “any requirement concerning accident prevention under section 112(r)(7) of the Act.” *Id.* (quoting 40 C.F.R. § 70.2 (definition of “applicable requirement”). Accordingly, the Petitioner argues that “[t]he requirement to prepare a [RMP] is thus a ‘requirement’ for which permits must include monitoring and reporting in order to ensure compliance.” *Id.* (citing *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1018 n.3 (D.C. Cir. 2000)).

As the Petitioner acknowledges, “no provision of [CAA] 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.” *Id.* The Petitioner notes that when a requirement does not include monitoring sufficient to assure compliance, “permitting authorities *must* include in the permit ‘periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit.’” *Id.* at 4–5 (quoting 40 C.F.R. § 70.6(a)(3)(i)(B); citing § 70.6(c)(1) and *Sierra Club v. EPA*, 536 F.3d 673, 675 (D.C. Cir. 2008)).

The Petitioner further contends that “[n]ot 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.” *Id.* at 5. Put another way, the Petitioner claims that “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.” *Id.* For support, the Petitioner cites multiple EPA title V petition orders.⁹ The Petitioner asserts that this principle holds true for the applicability of RMP requirements, claiming that “[i]f 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.” *Id.* at 6 (citing additional EPA petition orders).¹⁰

The Petitioner advances additional arguments concerning the importance of monitoring to determine whether RMP requirements are triggered. First, because RMP applicability 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,” the Petitioner claims that a facility’s episodic assurance of the non-applicability of RMP requirements at permit renewal or modification does not account for the possibility that threshold will be exceeded in the intervening period between applications. Petition at 6 (quoting *Keyspan Order*). Second, the Petitioner asserts that NJDEP cannot comply with its duty to “[v]erify that the source owner or operator has registered and submitted an RMP or a revised plan when required by [part 68],” or to take enforcement action for the failure to do so, if facilities do not monitor and report the amount of listed substances present on-site over the course of the permit. *Id.* (quoting 40 C.F.R. § 68.215(e)(1); citing 40 C.F.R. § 68.215(e)(4) and Memorandum from Steven J. Hitte, Chief, Operating Permits Group, EPA Office of Air Quality Planning and Standards, and Kathleen M. Jones, Associate Director, Program Implementation and Coordination Division, EPA Office of Solid Waste and Emergency Response, re: Title V Program Responsibilities Concerning the Accidental Release Prevention Program (April 20, 1999)). Third, the Petitioners assert that to be sufficient to ensure compliance, the frequency of monitoring must be consistent with the underlying requirement. *Id.* at 5 and 7 (citing 40 C.F.R. § 70.6(a)(3)(i)(B)). The relevant New Jersey regulation requires that an RMP be submitted the same day as threshold quantity is exceeded. *Id.* (citing N.J.A.C. § 7:31-11.4(c)(1)(3)). Thus, the Petitioner asserts monitoring must occur daily, or, at minimum, whenever new shipments are received or the quantity of a substance increases onsite. *Id.* Fourth, the Petitioner argues that “any exceedance of the threshold quantity must be promptly reported to ensure no deviation from the same-day RMP requirement” and that such reports must be made publicly available. *Id.* (citing 40 C.F.R. § 70.6(a)(3)(iii), (b)(1)).

In section I.B of the Petition’s Grounds for Objection, the Petitioner turns to the Permit. The Petitioner claims that Newark Bay stores aqueous ammonia in a 14,000-gallon tank, which has

⁹ On this point, Petitioner cites *In the Matter of Waste Management of LA, LLC, Woodside Sanitary Landfill & Recycling Center*, Order on Petition No. VI-2009-01 (May 27, 2010) (*Woodside Order*); *In the Matter of Eastman Kodak Company*, Amendment to Order on Petition No. II-2003-02 (April 4, 2006) (*Kodak II Order*); *In the Matter of Motiva Enterprises LLC, Port Arthur Refinery*, Order on Petition No. VI-2016-23 (May 31, 2018) (*Motiva Port Arthur Order*); *In the Matter of Hu Honua Bioenergy Facility*, Order on Petition No. IX-2011-1 (February 7, 2014) (*Hu Honua I Order*).

¹⁰ On this point, Petitioner cites *In the Matter of Keyspan Generation Far Rockaway Station*, Order on Petition No. II-2002-06 (September 24, 2004) (*Keyspan Order*); *In the Matters of Albert Einstein College of Medicine of Yeshiva University, Action Packaging Corp, and Kings Plaza total Energy Plant*, Order on Petition Nos. II-2000-01, -02, and -03 (August 26, 2004) (*Yeshiva, Action Packaging, Kings Plaza Order*).

the capacity to hold aqueous ammonia in quantities greater than the relevant thresholds established in the EPA's and NJDEP's regulations. Petition at 8.¹¹ The Petitioner concludes that "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 [New Jersey] thresholds, to register and prepare an RMP." *Id.*

In section I.C of the Petition's Grounds for Objection, the Petitioner discusses current permit terms related to Newark Bay's aqueous ammonia storage tank. In relevant part, permit terms reproduced in the Petition restrict the content of the tank to aqueous ammonia, limit the facility's annual throughput of aqueous ammonia to 410,000 gallons per year, and limit ammonia emissions to ≤ 0.1 tons per year. In order to assure compliance with the first two requirements, the Permit also requires Newark Bay to monitor tank contents and the amount of aqueous ammonia delivered, and to keep records of the invoices showing the amount of aqueous ammonia delivered each delivery. *See* Petition at 9 (reproducing Proposed & Final Permit p. 63 of 79 (pdf p. 78); Draft Permit p. 62 of 78 (pdf p. 76) (identical terms)). The Petitioner asserts that "[t]he 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." *Id.* The Petitioner contends that the existing permit requirements are not sufficient to indicate whether ammonia is present at any given time above the RMP thresholds, since the requirements do not account for the quantity and concentration of aqueous ammonia already present in the tank at the time of shipment. *Id.* (citing *In the Matter of Piedmont Green Power, LLC*, Order on Petition No. IV-2015-2 at 9–12 (Dec. 13, 2016)). The Petitioner also argues that because the Permit does not require any reporting of the records required to be kept by the source, "the applicability of the RMP preparation requirement is thereby entirely shielded from NJDEP, EPA, and the public." *Id.*

Finally, the Petitioner addresses NJDEP's RTC. The Petitioner briefly acknowledges NJDEP's statement that "[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." Petition at 10 (quoting RTC at 13). The state went on to explain that, "Pursuant to a Discharge Prevention Containment and Countermeasure (DPCC) plan, 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." *Id.* (quoting RTC at 13–14). The Petitioner challenges the state's reliance on this state law-based DPCC plan, claiming that it cannot substitute for monitoring and reporting in the title V permit for three reasons: (1) the DPCC plan is unrelated to CAA requirements such as the RMP preparation requirement; (2) the DPCC plan

¹¹ The Petitioner indicates that the EPA has delegated authority to NJDEP to implement the RMP program and discusses two thresholds related to the quantity of aqueous ammonia stored on-site that could trigger RMP requirements at Newark Bay: one based on the EPA's regulations at 40 C.F.R. § 68.130(b) (incorporated into NJDEP's regulations) and another unique to NJDEP's regulations at N.J. Admin. Code § 7:31-6.3(a). *See id.* at 7–8.

is confidential; and (3) NJDEP has not identified any provision in the DPCC plan that requires reporting of the quantity and concentration of aqueous ammonia. *See id.* at 10–11.

EPA’s Response: For the following reasons, the EPA denies the Petitioner’s request for an objection.

Threshold Requirement: Reasonable Specificity

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).

The entirety of the Petition is focused around a single claim: that the Permit must include monitoring and reporting requirements sufficient to determine whether the facility may become subject to the requirement to prepare an RMP. However, contrary to the Petitioner’s bare assertion that “[t]hese objections were raised before NJDEP by the public comment deadline,” Petition at 3, neither this central claim, nor the lengthy supporting arguments that accompany it, were raised to NJDEP during the public comment period. None of the public comments cited by the Petitioner (nor any other public comments) raised the specific claim that additional monitoring is necessary to determine the applicability of RMP, nor any variation of this claim.¹² Instead, the

¹² In support of one commenter’s allegations that RMP requirements were applicable to Newark Bay, one footnote noted permit terms related to recordkeeping obligations for the aqueous ammonia storage tanks. *See* Petition Att. 1, Comment from Ironbound Community Corporation et al. at 21 & n.41 (June 11, 2018) (ICC Comments). This comment solely concerned the commenter’s assumption that ammonia would be stored in at least a 20% concentration, the commenter’s calculations of ammonia storage capacity, and the resulting assertion that RMP was an applicable requirement. Although these same permit terms were implicated in the Petition, they were implicated as support for a different argument. *See* Petition at 9 (discussing recordkeeping obligations and claiming that they do not provide sufficient information to determine the applicability of the RMP preparation requirement). The connection between the claim articulated in the Petition and a single footnote in a public comment (which was raised in an assertion making a different argument) is not sufficient to determine that the Petition claim itself was raised *with reasonable specificity* during the public comment period. A different public comment claimed generally that the Permit must “include other provisions to ensure compliance with Newark Bay’s duty under the [CAA] to operate in a way that prevents, or minimizes the consequences of, accidental releases of extremely hazardous substances.”

most relevant public comments simply alleged that RMP requirements are “applicable requirements” to Newark Bay due to its capacity to store aqueous ammonia in quantities over the threshold amounts, and requested that the Permit should require the facility to prepare an RMP.¹³ These comments raised a fundamentally different issue (*i.e.*, “the facility *is* subject to requirement X”) than that now raised in the core Petition claim (*i.e.*, “the permit should contain monitoring to determine *whether* the facility may become subject to requirement X”).

With one minor exception, the Petitioner has not attempted to argue—much less demonstrate—that it was impracticable to raise the core Petition claim during the public comment period.¹⁴ To the contrary, as noted above, the Petition instead relies on a brief, bare assertion that its claim *was* raised in public comments. Petition at 3.

Moreover, the grounds for objection presented in the Petition did not arise after the public comment period. Public commenters concerned that the Draft Permit did not contain sufficient monitoring, recordkeeping, or reporting requirements to determine whether the facility would trigger the requirement to prepare an RMP could have raised these concerns during the public comment period. Because the claim was not raised with reasonable specificity, because the Petitioner has not demonstrated that it was impracticable to do so, and because the basis for the claim did not arise after the public comment period, the claim is denied. 42 U.S.C. § 7661d(b)(2).

Although the reasonable-specificity defect discussed above is an independent and adequate grounds for denial, even if the Petitioner’s claim had been raised with reasonable specificity during the public comment period, as discussed further below, this claim would be without merit and would fail to demonstrate a flaw in the Permit. Before addressing the Petitioner’s substantive arguments, the EPA provides the following background on the RMP program and how RMP requirements interact with title V permitting requirements.

Background on RMP and Title V

Section 112(r)(7) of the CAA authorizes the EPA Administrator to promulgate regulations that, among other things, “require the owner or operator of stationary sources at which a regulated substance is present in more than a threshold quantity to prepare and implement a risk management plan to detect and prevent or minimize accidental releases of such substances from

ICC Comments at 19. This type of vague, general comment falls short of the statutory requirement that petition claims be raised *with reasonable specificity* during the public comment period. 42 U.S.C. § 7661d(b)(2).

¹³ See ICC Comments at 19–22 (date).

¹⁴ The only exception is presented in section I.C of the Petitioner’s Grounds for Objection, where the Petitioner asserts that its challenges to NJDEP’s reliance on the DPCC plan (with regard to the applicability of the RMP requirement) arose after the comment period and were impracticable to raise during the public comment period. Petition at 11 n.19. Even accepting these assertions *arguendo*, the fact that a such a single, tangential fact could not have been cited during the public comment period does not remedy the Petitioner’s failure to raise the central claim itself during the public comment period. The Petitioner’s assertion that that the Permit must include monitoring and reporting sufficient to determine whether the facility may become subject to the requirement to prepare an RMP could—and should—have been raised by the Petitioner during the public comment period regardless of the state’s response, which introduced the DPCC plan.

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 EPA’s regulations in 40 C.F.R. part 68 implement this provision. Notably, these regulations provide that the requirement to prepare an RMP applies to the “owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process”; *i.e.*, where the “total quantity of the regulated substance contained in a process exceeds the threshold.” 40 C.F.R. §§ 68.10(a), .115(a). For aqueous ammonia, the threshold is 20,000 pounds of ammonia. *Id.* § 68.130 Table 1.¹⁵ These RMP applicability regulations, by their terms, only consider the amount of a substance *actually present* in a process on-site at any given point in time. *Id.* §§ 68.10(a), 115(a). Thus, under the RMP rules, the *potential* for a source to store a regulated substance in amounts exceeding a threshold (based on, for example, the capacity of a storage tank) is not relevant to determining RMP applicability. *See General Guidance on Risk Management Programs for Chemical Accident Prevention (40 CFR Part 68)*, EPA 555-B-04-001 at 1-9 (March 2009) (RMP Guidance) (“To determine if you have the threshold quantity of a regulated substance in a vessel . . . [y]ou do not need to consider the vessel’s maximum capacity if you never fill it to that level.”). In this way, determining the applicability of RMP requirements is different from many other CAA programs, where applicability *can* depend on a source’s *potential* to emit a certain pollutant at levels exceeding a threshold.

The EPA was cognizant of the unique relationship between RMP and title V permitting requirements when it developed its regulations for both programs in the 1990s. The definition of “applicable requirement” in the EPA’s title V regulations includes, among others, “Any 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. However, when the EPA promulgated these title V regulations in 1992, and when the EPA established the final part 68 RMP rules in 1996, the agency acknowledged that the RMP program was different from other “applicable requirements” and “was not intended to be primarily implemented or enforced through title V.” 57 Fed. Reg. 32250, 32275 (July 21, 1992); *see* 61 Fed. Reg. 31668, 31688 (June 20, 1996); *see also, e.g., In the Matter of NYCDEP North River Water Pollution Control Plant*, Order on Petition No. II-2002-11 at 24–25 (September 24, 2004) (*North River Order*) (“[S]ection 112(r) requirements . . . are different from other applicable permit requirements.”). Accordingly, in promulgating the part 68 rules, EPA determined that “generic terms in [title V] permits and certain minimal oversight activities” would assure compliance with RMP requirements. 61 Fed. Reg. 31668, 31689 (June 20, 1996). For sources subject to both RMP and title V, these permit content and state oversight requirements are codified at 40 C.F.R. § 68.215.

Regarding whether and how RMP applicability questions should be handled through the title V permitting process, the EPA has explained that:

[T]he minimum with respect to section 112(r) is a “check box” for the source to note whether it is subject to section 112(r), and either certification that the source

¹⁵ As NJDEP correctly stated in its RTC, under federal rules and guidance relevant to toxic substances like aqueous ammonia, only the weight of the solvent (ammonia) is considered, not the weight of the entire solution (*i.e.*, the ammonia-water mixture). The opposite is true for flammable substances. *See* 40 C.F.R. § 68.115(b)(1) and (2); RMP Guidance at 1-11.

is in compliance with part 68 or has a plan for achieving compliance. Any other requirements are up to the air permitting authority.

61 Fed. Reg. at 31690. When the EPA proposed the RMP rules in 1995, the agency “solicit[ed] comment on whether EPA should make more specific demands of permitting authorities in determining applicability with respect to section 112(r) requirements.” 60 Fed. Reg. 13526, 13537 (March 13, 1995). Upon finalizing these rules, the EPA decided not to impose additional requirements on permitting authorities to determine whether a source was subject to RMP, nor on permit applications to submit detailed information related to applicability. *See, e.g.*, Risk Management Program Rule: Summary and Response to Comments, Docket No. A-91-73 (1996 RMP Rule RTC) at 28-72 (“[D]etailed information is not needed to determine 112(r) applicability; sources need only determine that they have more than a threshold quantity of a regulated substance in at least one process.”), 28-97 (“Under the final rule, EPA does not require the submission of information necessary to determine section 112(r) applicability. Sources, not the permitting authority, are responsible for making this determination and listing 112(r) as an applicable requirement.”); *see also id.* at 28-84, 28-92, 28-95, 28-115. Nonetheless, the EPA provided states with the discretion to determine, on a case-by-case basis, whether further information might be necessary to fulfill the state’s oversight responsibilities under part 68. *See* 40 C.F.R. § 68.215(b), (e); 1996 RMP Rule RTC at 28-115.

The EPA has further clarified the appropriate means to implement these RMP provisions in various title V petition orders. For example, in the *North River Order*, the EPA explained:

The reference to Risk Management Plans (“RMP”) appears at Condition 25 of the permit. This condition states, in part: “If a chemical . . . listed in Tables 1, 2, 3 or 4 of 40 CFR § 68.130 is present in a process in quantities greater than the threshold quantity listed in Table 1, 2, 3 or 4, the following requirements will apply.” The condition goes on to list these requirements. This condition is written generally because of the nature of the section 112(r) requirements, which are different from other applicable permit requirements. Since applicability is based on having a listed 40 CFR § 68.130 substance over the threshold quantity located at the facility, applicability may fluctuate over the life of the permit. Therefore, although general section 112(r) permit conditions do not definitively state whether an individual source is subject to the risk management plan requirements, the permit structure ensures that the permit covers any newly subject source, or any source whose applicability fluctuates, thereby ensuring that the section 112(r) permit obligations remain up to date.

The North River title V permit currently states that [the source] must comply with part 68 and certify appropriately *if* a listed chemical is present above threshold quantities. This language is appropriate and need not be amended. As explained above, if North River were to trigger the section 112(r) and Part 68 requirements, the requirements of Condition 25 would become applicable to the source.

North River Order at 24–25 (emphasis in original).

EPA Evaluation of Petition Claims

As described above, public comments on the Draft Permit raised concerns that the requirement to prepare an RMP was an “applicable requirement” and should be included in the facility’s title V permit. In response, NJDEP stated unequivocally that Newark Bay was not subject to the RMP preparation requirement because Newark Bay manages its on-site aqueous ammonia inventory below the relevant 20,000-pound threshold quantity, pursuant to its DPCC plan. The EPA has reviewed the relevant sections of the Newark Bay DPCC plan and agrees with NJDEP that this plan will ensure that Newark Bay’s actual on-site inventory of aqueous ammonia is, and will remain, below the relevant threshold.¹⁶ Accordingly, the requirement to prepare an RMP is not currently an “applicable requirement” for the Newark Bay facility.

The Petitioner now contends that even if Newark Bay is not currently subject to the requirement to prepare an RMP, this requirement may become applicable in the future. Accordingly, the Petitioner requests that the Permit include monitoring and reporting of the amount of aqueous ammonia stored on-site, in order to determine if, and when, the facility might trigger RMP requirements.

As discussed above, when the EPA promulgated its rules governing the RMP and title V programs, the EPA placed the burden on sources to determine whether RMP requirements are applicable to each source (based on the actual, on-site presence of a substance in excess of threshold quantities). Described as a “check box” requirement in a permit application, these rules do not require, and the EPA clearly did not intend, for a source’s title V permit to require a source that is not subject to RMP to periodically monitor and report its on-site storage in order to determine whether RMP requirements might be triggered at some point in the future.

The Petitioner, acknowledging the absence of any such requirements in the RMP rules, nevertheless asserts that the authority and obligation to require this monitoring and reporting is derived from title V. Specifically, the Petitioner argues: “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.” Petition at 5. However, this novel argument, which essentially forms the basis of the entire Petition, is fundamentally flawed.

As an initial matter, none of the statutory or regulatory authorities provided by the Petitioner support its argument. Title V permits must contain “conditions as are necessary to assure compliance with applicable requirements” of the CAA. 42 U.S.C. § 7661c(a). Although “applicable requirements” are defined in the EPA regulations to include “any requirement concerning accident prevention under section 112(r)(7) of the Act,” this definition refers to such requirements “*as they apply* to emission units in a part 70 source.” 40 C.F.R. § 70.2 (emphasis

¹⁶ Because RMP applicability is based on the actual on-site presence of a substance (and not the potential capacity to store a substance), the means by which a source maintains its inventory under the threshold—whether through a state-law mechanism like a DPCC plan or by simply managing its inventory—is not relevant to the core factual question of whether RMP obligations are applicable.

added). Thus, with one exception not relevant here,¹⁷ only requirements that *currently, actually* apply to a source are considered “applicable requirements.” By contrast, requirements that do not apply to a source (like the RMP preparation requirement here) are not “applicable requirements.” Accordingly, the CAA does not provide that such non-applicable requirements should be included in a title V permit or supported in a permit by monitoring, recordkeeping, and reporting requirements. *See In the Matter of Hyland Facility Associates, Hyland Landfill*, Order on Petition No. II-2016-3 at 5 (April 10, 2019) (explaining that where there is no “applicable requirement” that must be included in the permit, there is no need for monitoring to assure compliance with such a nonexistent requirement). By their plain text, the other statutory and regulatory provisions cited by the Petitioner expressly only require monitoring, recordkeeping, and reporting to the extent necessary to assure compliance with *existing* permit terms with which a source must comply. *See* 42 U.S.C. § 7661c(c) (“Title V permits must set forth “monitoring . . . and reporting requirements to assure compliance with the *permit terms and conditions*.”) (emphasis added); 40 C.F.R. § 70.6(c)(1) (requiring monitoring, recordkeeping, and reporting requirements “sufficient to assure compliance with the *terms and conditions of the permit*”) (emphasis added); 70.6(a)(3)(i)(B) (where an applicable requirement does not contain periodic testing or monitoring, the permit must contain “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance *with the permit*”) (emphasis added); *see also Sierra Club v. EPA*, 536 F.3d at 675 (addressing the requirement for monitoring sufficient to assure compliance with “the *terms and conditions of the permit*,” quoting CAA § 504(c)); *id.* at 677 (“By its terms, this mandate [in CAA § 504(c)] 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.”) (emphasis added).

Similarly, none of the other authorities cited by the Petitioner support its suggestion that title V permits must include monitoring to determine whether a currently inapplicable RMP requirement may become applicable in the future. Most notably, each of the title V petition orders cited by the Petitioner involved a materially different situation than that present here. For example, in the *Kodak II*, *Hu Honua I*, and *Piedmont Green Power* Orders, a permittee had accepted binding, enforceable limits designed to restrict its potential to emit (PTE) a certain pollutant beneath a relevant regulatory threshold. Notably, each of these limits were embodied in an *existing permit term* with which the source was already required to comply. As such, the title V permits for these sources were required to include sufficient monitoring, recordkeeping, and reporting provisions to assure compliance with these permit terms and to ensure those conditions were enforceable.¹⁸ None of the examples cited throughout the Petition dealt with the question presented here: whether additional monitoring is necessary to ensure that a source does not exceed a threshold *where a permit contains no limits associated with that threshold*. This distinction relates to the fact that the RMP program is fundamentally different than other CAA programs. As noted above, unlike some other programs where applicability may be based on a source’s *potential* emissions

¹⁷ The exception is for “requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates.” 40 C.F.R. § 70.2.

¹⁸ This was necessary not only to satisfy the title V monitoring requirements discussed above (which apply to terms and conditions of a permit), but also to ensure that the limits restricting PTE were enforceable as a practical matter. *See, e.g.*, 42 U.S.C. § 7661c(c); 40 C.F.R. §§ 70.6(a)(3), (c)(1) (monitoring provisions); *id.* § 70.2 (definition of “potential to emit” discussing the need for limits restricting PTE to be enforceable).

(thus giving rise to the need for enforceable limits intended to restrict potential emissions below the relevant threshold), applicability of RMP requirements is based on the *actual presence* of a substance in amounts exceeding a threshold at any given moment in time. Accordingly, neither the capacity of a source to store a substance in amounts exceeding a threshold nor the likelihood of this occurring are relevant to determining applicability. Therefore, no enforceable limits are necessary to restrict a facility's potential storage capacity in order to avoid RMP applicability¹⁹ (and no such limits are present in Newark Bay's title V permit). In the absence of any such limits that apply to a source, the Petitioner is incorrect to assert that a title V permit must include monitoring provisions to determine whether a source may exceed an applicability threshold.²⁰

The remaining supporting arguments in sections I.A through I.C of the Petition's Grounds for Objection are similarly unpersuasive and fail to demonstrate that the Permit must contain this additional monitoring and reporting.

Regarding the Petitioner's arguments in section I.A that the facility's episodic certification of the non-applicability of CAA § 112(r)(7) in permit applications is not frequent enough, the EPA determined that this *would* be frequent enough when it promulgated the part 68 rules. As explained above, the EPA's rules and guidance do not require sources to confirm the non-applicability of RMP requirements beyond an indication of applicability in their permit applications, leaving state permitting authorities to decide whether additional steps are necessary. *See* 61 Fed. Reg. at 31690. Notably, the source—not the state—has the primary obligation to determine whether the RMP preparation requirement is applicable (*i.e.*, whether it is required by part 68). *E.g.*, 1996 RMP Rule RTC at 28-97; *see* 61 Fed. Reg. at 31690. Regarding NJDEP's duties to verify that a source has registered and submitted an RMP (and to enforce this

¹⁹ *See supra* note 16.

²⁰ Beyond the *Kodak II*, *Hu Honua I*, and *Piedmont Green Power* Orders, the other authorities cited by the Petitioner are even less relevant to the issue at hand. Regarding the Petitioner's arguments based on other title V regulations related to the frequency of monitoring, compliance certifications, or enforceability of permit conditions, Petition at 7, the Petitioner has not demonstrated how these provisions have any bearing on whether monitoring is required to determine whether a requirement applies in the first instance. These requirements, like the core title V monitoring requirements discussed above, relate to *existing* permit conditions and *existing*, actually applicable requirements. *See* 40 C.F.R. § 70.6(a)(3)(i)(B), (a)(3)(iii), (b)(1). Regarding the other court and EAB decisions cited by the Petitioner (*i.e.*, the *Appalachian Power* D.C. Circuit decision and the *Shell Offshore* EAB decision), these cases involved requirements to assure compliance with *existing* applicable requirements and permit terms and did not speak to the use of monitoring to determine whether requirements that are not applicable might apply in the future. Regarding the various EPA documents cited by the Petitioner, the EPA's discussion in the *Woodside Order* concerned one of the factors the EPA recommends permitting authorities consider when determining whether monitoring requirements are sufficient to assure compliance with an *existing* permit requirement. *See Woodside Order* at 9. The EPA granted in part the petition underlying the *Motiva Port Arthur Order* because the EPA could not determine whether the permit contained sufficient monitoring to assure compliance with specific "permit by rule" requirements *that were applicable* to the source and *incorporated by reference* into the title V permit. *See Motiva Port Arthur Order* at 24. The EPA's approval of the Washington part 70 program hinged on whether the state could categorically exempt insignificant emission units from monitoring, recordkeeping, and reporting necessary to assure compliance with requirements *that applied* to those insignificant emission units. *See* 67 Fed. Reg. at 43576–77. The Petitioner's manipulated quote taken from the *Keyspan Order* distorted the meaning of the relevant passage, which explained that "[i]f a source is subject to these [section 112(r)] requirements, its permit must include certain conditions necessary to implement and assure compliance with such requirements." *Keyspan Order* at 18 (emphasis added); *see, e.g., Yeshiva, Action Packaging, Kings Plaza Order* at 11 (same).

requirement when necessary), the EPA's regulations and guidance do not prescribe any specific approach that a state must follow to satisfy these requirements. *See* 40 C.F.R. § 68.215(e)(1), (e)(4); *see also id.* § 68.215(b).²¹ Instead, in responding to comments concerning state oversight over applicability determinations in the 1996 RMP rules, the EPA explained:

EPA has modified the rule requirements so that the air permitting authority may select for itself the appropriate mechanisms (such as source audits, record reviews, source inspections, or completeness checks) and time-frame, in conjunction with source certifications, to ensure that permitted sources are in compliance with the part 68 requirements. These oversight mechanisms do not need to be used on each source to be effective.

1996 RMP Rule RTC at 28-115. Here, the EPA understands that NJDEP has worked diligently with Newark Bay to verify that Newark Bay is not required to submit an RMP and ensure that the facility complies with the RMP applicability provisions of part 68.

The Petitioner's assertion in section I.B that additional monitoring is necessary because aqueous ammonia *may* be present at Newark Bay above relevant RMP thresholds is not persuasive. As described above, RMP applicability depends on the *actual* on-site presence of a regulated substance, and the *potential* capacity or likelihood of a source to store amounts in excess of the thresholds is not relevant to the question of applicability. The Petitioner's challenges in section I.C to the sufficiency of existing permit terms related to the aqueous ammonia tank are also not relevant to this inquiry, as the three permit conditions identified by the Petitioner are not designed to assure compliance with, nor determine the applicability of, any RMP-related requirements. Therefore, the fact that these permit terms may not provide sufficient data to indicate whether RMP obligations are triggered is immaterial; that is not their function, nor is it necessary that these permit terms elicit such information. As explained above, title V permits need not contain enforceable provisions to restrict the applicability of RMP. The fact that Newark Bay manages its inventory below the relevant threshold is sufficient; its plans for doing so need not be made enforceable through the title V permit nor be publicly available in order to be effective.

Finally, the Petitioner failed to acknowledge or evaluate one permit term that *is* relevant to RMP applicability, thus failing to address a key aspect relevant to its claim.²² Permit Condition Ref. #15 for Subject Item FC (Facility) states: "Prevention of Accidental Releases: Facilities producing, processing, handling or storing a chemical, listed in the tables of 40 CFR Part 68.130, and present in a process in a quantity greater than the listed Threshold Quantity, shall comply with all applicable provisions of 40 CFR 68." Draft Permit at p. 4 of 78; Proposed and Final Permit at p. 4 of 79. This condition is similar to a permit term the EPA endorsed in the 2004 *North River Order*, in which the EPA determined that this type of flexible, generic permit term is

²¹ For example, nothing in the 1999 EPA guidance cited by the Petitioner (or any other authority discussed within this Order) suggests that a state must require monitoring or reporting in a source's title V permit in order to verify that a source is not subject to RMP preparation requirements in order to fulfill the state's obligations under § 68.215(e)(1).

²² *See supra* note 8 and accompanying text.

