BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION NO. V-2019-10
	)	
RIVERVIEW ENERGY CORP.	)	ORDER RESPONDING TO
SPENCER COUNTY, IN	)	PETITION REQUESTING
PERMIT NO. T147-39554-00065	)	OBJECTION TO THE ISSUANCE OF
	)	TITLE V OPERATING PERMIT
ISSUED BY THE INDIANA DEPARTMENT OF	)	
ENVIRONMENTAL MANAGEMENT	)	
	)	

ORDER DENYING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated August 6, 2019 (the Petition) from Southwest Citizens for Quality of Life, Inc. and Valley Watch (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 final permit No. T147-39554-00065 (the Final Permit) issued by the Indiana Department of Environmental Management (IDEM) to the Riverview Energy Corporation (Riverview) in Spencer County, Indiana. This operating permit was issued pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and 326 Indiana Administrative Code (IAC) 2-7-1 *et seq*.; *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)(l) of the CAA, 42 U.S.C. § 766la(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. The state of Indiana submitted a title V program governing the issuance of operating permits on August 10, 1994. The EPA granted interim approval of Indiana's title V operating permit program on November 14, 1995. The EPA granted full approval of Indiana's title V operating permit program in 2001. 66 FR 62969 (December 4, 2001). This program, which became effective on November 30, 2001, is codified in 326 IAC 2-7-1 *et seq*.

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)(l).[1] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[2]

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

[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).

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 when making a determination whether to grant or deny the petition.

C. New Source Review

The major New Source Review (NSR) program is comprised of two core types of preconstruction permit requirements for major stationary sources. Part C of title I of the CAA establishes the Prevention of Significant Deterioration (PSD) program, which applies to new major stationary sources and major modifications of existing major stationary sources for pollutants for which an area is designated as attainment or unclassifiable for the national ambient air quality standards (NAAQS) and for other pollutants regulated under the CAA. CAA §§ 160–169, 42 U.S.C. §§ 7470–7479. Part D of title I of the Act establishes the major nonattainment NSR (NNSR) program, which applies to new major stationary sources and major modifications of existing major stationary sources for those NAAQS pollutants for which an area is designated as nonattainment. CAA §§ 171–193, 42 U.S.C. §§ 7501–7515. The EPA has two largely identical sets of regulations implementing the PSD program. One set, found at 40 C.F.R. § 51.166, contains the requirements that state PSD programs must meet to be approved as part of

[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.

a state implementation plan (SIP). The other set of regulations, found at 40 C.F.R. § 52.21, contains the EPA's federal PSD program, which applies in areas without a SIP-approved PSD program. The EPA's regulations specifying requirements for state NNSR programs are contained in 40 C.F.R. § 51.165.

While parts C and D of title I of the Act address the major NSR program for major sources, section 110(a)(2)(C) addresses the permitting program for new and modified minor sources and for minor modifications to major sources. The EPA commonly refers to the latter program as the "minor NSR" program. States must also develop minor NSR programs to, along with the major source programs, attain and maintain the NAAQS. The federal requirements for state minor NSR programs are outlined in 40 C.F.R §§ 51.160 through 51.164. These federal requirements for minor NSR programs are less prescriptive than those for major sources, and, as a result, there is a larger variation of requirements in EPA-approved state minor NSR programs than in major source programs.

Where the EPA has approved a state's title I preconstruction permitting program (whether PSD, NNSR, or minor NSR), duly issued preconstruction permits will establish the NSR-related "applicable requirements," and the terms and conditions of those permits should be incorporated into a source's title V permit without a further round of substantive review as part of the title V process. *See generally In the Matter of PacifiCorp Energy, Hunter Power Plant*, Order on Petition No. VIII-2016-4 at 8–21 (October 16, 2017) (*PacifiCorp-Hunter Order*); *In the Matter of Big River Steel, LLC*, Order On Petition No. VI-2013-10 at 8–20 (October 31, 2017) (*Big River Steel Order*); 56 Fed. Reg. 21712, 21738–39 (May 10, 1991).[9] The legality of a permitting authority's decisions undertaken in the course of preconstruction permitting is not a subject the EPA will consider in a petition to object to a source's title V permit. *See PacifiCorp-Hunter Order* at 8, 13–19; *Big River Steel Order* at 8–9, 14–20.[10] Rather, any such challenges should be raised through the appropriate title I permit procedures or enforcement authorities.

As relevant here, the EPA has approved Indiana's PSD program as part of its SIP. *See* 40 C.F.R. § 52.800 (identifying EPA-approved regulations in the Indiana SIP). Indiana's PSD provisions,

[9] However, as the EPA noted in *PacifiCorp-Hunter*, there may be a set of circumstances that "warrant a different approach." *PacifiCorp-Hunter Order* at 11 n.21.

[10] The EPA does view monitoring, recordkeeping, and reporting to be part of the title V permitting process and will therefore continue to review whether a title V permit contains monitoring, recordkeeping, and reporting provisions sufficient to assure compliance with the terms and conditions established in the preconstruction permit. *See, e.g., In the Matter of South Louisiana Methanol, LP*, Order on Petition Nos. VI-2016-24 and VI -2017-14 at 10–11 (May 29, 2018) (*South Louisiana Methanol Order*); *PacifiCorp-Hunter Order* at 16, 17, 18, 18 n.33, 19; *Big River Steel Order* at 17, 17 n.30, 19 n.32, 20. Moreover, as the EPA has explained, "[A] decision by the EPA not to object to a title V permit that includes the terms and conditions of a title I permit does not indicate that the EPA has concluded that those terms and conditions comply with the applicable SIP or the CAA. However, until the terms and conditions of the title I permit are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through some other mechanism, such as a state court appeal, the 'applicable requirement' remains the terms and conditions of the issued preconstruction permit and they should be included in the source's title V permit." *Big River Steel Order* at 19; *see PacifiCorp-Hunter Order* at 19; *id*. at 20 ("That the EPA views the incorporation of the terms and conditions of these preconstruction permits into the title V operating permit as proper for purposes of title V does not indicate that the EPA agrees that the state reached the proper decision when setting terms and conditions in the preconstruction permits. . . . The EPA's lack of objection to the inclusion of that requirement in the title V permit does not indicate that the EPA agrees that it is legal or complies with the Act; it merely indicates that a title V permit is not the appropriate venue to correct any such flaws in the preconstruction permit.").

as incorporated into Indiana's EPA-approved SIP, are contained in portions of 326 IAC 2-2-1 *et. seq*.

III. BACKGROUND

A. The Riverview Facility

Riverview Energy Corporation has proposed to construct a direct coal hydrogenation refinery in Dale, Spencer County, Indiana (the facility) designed to convert coal to liquid fuels, specifically diesel and naptha. The facility includes coal unloading, storage, handling, crushing, and drying operations; chemical additive storage and handling operations; a Veba Combi Cracking unit, consisting of various mixing, heating, cracking, separating, distilling, and absorbing systems; sulfur recovery operations; flares; product storage tanks; loading operations; residue solidification operations; utilities operations, including a gas-fired boiler, cooling tower, diesel-fired emergency generator, and diesel-fired emergency fire pump; water supply and treatment operations; hydrogen unit operations; and wastewater treatment operations. Riverview is a major source under both the title V and PSD permit programs because its potential emissions of sulfur dioxide (SO_2), nitrous oxides (NO_x), volatile organic compounds (VOC), and carbon monoxide (CO) each exceed 100 tons per year.[11] Riverview is subject to various New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) as well as requirements based on the Indiana SIP.

B. Permitting History

IDEM received an application for a combined title V operating permit and PSD preconstruction permit for the Riverview facility on January 25, 2018.[12] IDEM issued a draft permit (the Draft Permit) along with its statement of basis (called a Technical Support Document) on October 24, 2018. The Draft Permit was subject to a public comment period that lasted from October 24, 2018 to December 10, 2018, and IDEM held a public hearing on December 5, 2018. Multiple groups and individuals submitted public comments, including EPA Region 5 and the Petitioners. IDEM submitted the proposed permit (the Proposed Permit) to the EPA along with its initial response to comments on April 24, 2019. The EPA's 45-day review period of the title V permit ran from April 24, 2019 to June 7, 2019, during which time the EPA did not object to the title V permit. On June 11, 2019, IDEM issued a final permit (the Final Permit) along with IDEM's final response to comments (contained in an Addendum to the Technical Support Document, known as the Final ATSD).

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed title V permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of

[11] Riverview is considered by IDEM to be a fuel conversion plant, a listed source category subject to the 100 tons per year PSD threshold. 42 U.S.C. § 7479(1); *see* Technical Support Document accompanying Draft Permit at 2, 26.
[12] The facility's title V permit, issued under 326 IAC 2-7 *et seq*., was processed concurrently with a PSD permit, issued under 326 IAC 2-2-1 *et seq*. Both permits were issued in a single permit document (titled Permit No. T147-39554-00065). *See infra* pp. 23–29.

the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The EPA's 45-day review period expired on June 7, 2019. Thus, any petition seeking the EPA's objection to the Permit was due on or before August 6, 2019. The Petition was received on August 6, 2019, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

The Petition contains seven separately enumerated grounds for objection (Petition Claims I through VII), many of which contain multiple subclaims. These claims variously implicate either or both the title V permit and the PSD permit issued by IDEM. The EPA's Order first addresses the four predominantly title V-related claims (Petition Claims I.A, II, VI, and VII), followed by the PSD-related claims (Petition Claims I.B, I.C, III, IV, and V).

Title V Claim 1 (Petition Claim I.A): The Petitioners Claim That "The Permit Is Unlawful for the Reasons Provided in EPA Comments on the Draft Permit."

Petition Claim I includes multiple subclaims. Petition Claim I.A features four distinct challenges (not separately enumerated) to Riverview's title V permit based on comments submitted by EPA Region 5 on the Draft Permit. These four subclaims are discussed in the following paragraphs.[13]

1. Opacity monitoring from coal unloading enclosure

Petitioners' Claim: The Petitioners claim that the Permit does not contain any periodic monitoring to assure compliance with a zero percent visible emissions limit for the entrance and exit doors of the coal unloading enclosure. Petition at 8 (citing Permit Condition D.1.1(b)). Citing EPA Region 5 comments on the Draft Permit, the Petitioners assert that "periodic visible emissions monitoring requirements that EPA requested . . . are necessary to comply with title V." *Id*.

Additionally, the Petitioners challenge IDEM's response to the EPA's comment, where IDEM stated that "monitoring requirements for the baghouses and enclosures" would be sufficient. *Id*. at 9 (quoting Final ATSD at 45). The Petitioners disagree, arguing that the monitoring requirements for the baghouse are unrelated to the negative pressure conditions that are required to achieve zero percent visible emissions for the entrance and exit doors. The Petitioners claim that negative pressure conditions can be maintained only by ventilation conditions, fan locations, fan speed, air flows, and other similar variables. *Id.*

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

In order to provide grounds for an EPA objection related to the adequacy of monitoring, petitioners must demonstrate that existing monitoring, recordkeeping, and reporting conditions contained in a title V permit are insufficient to assure compliance with a given permit term. *See* 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(c)(1). This is necessarily a case-by-case inquiry guided

[13] Petition Claims I.B and I.C are based on EPA comments on the Riverview PSD permit and are discussed later in this Order alongside other PSD claims, *infra* pp. 21–29.

by multiple factors and considerations. *See, e.g.*, *In the Matter of CITGO Refining and Chemicals Co.*, Order on Petition No. VI-2007-01 at 6–8 (May 28, 2009) (*CITGO Order*). However, at its most basic level, to demonstrate that a permit does not comply with the Act, petitioners must address existing permit terms and explain why they are insufficient to assure compliance. The Petitioners have failed to do that here.

The Petitioners' claim begins with a brief and unsupported allegation that monitoring initially suggested by the EPA (periodic visible emissions monitoring) is necessary to comply with title V. However, the Petitioners provide no explanation as to why they consider this specific form of monitoring to be necessary. Instead, the Petitioners appear to rely solely on the fact that the EPA made a similar suggestion during the public comment period.[14] As the EPA has previously explained, EPA comment letters (as opposed to formal EPA objections, for example) are generally not determinative. Thus, merely citing to an EPA comment, without any further analysis by petitioners, will generally not be sufficient to demonstrate grounds for an EPA objection.[15]

The only technical arguments advanced by the Petitioners—that negative pressure conditions are critical to achieving compliance with the visible emissions limit on the coal unloading enclosure, and that baghouse monitoring is unrelated to these conditions—are unpersuasive. First, the EPA does not agree with the Petitioners' contention that baghouse testing or performance is "unrelated" to negative pressure conditions. Proper operation of a baghouse such as those employed by Riverview may be used to maintain negative pressure conditions within an enclosure connected to the baghouse.

Second, reading the Petitioners' claim, one might surmise that the Permit contains no other conditions related to maintaining negative pressure at the entrance and exit doors. However, this is not the case; the Petitioners' claim simply fails to consider other relevant permit terms. Specifically, Final Permit condition D.1.5(b) requires:

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[14] Notably, the EPA's comment did not indicate that visible emissions monitoring was necessary to assure compliance. Rather, this suggestion was presented alongside an alternative request that IDEM "explain how the draft permit currently requires the source to demonstrate compliance with the limit." Final ATSD at 45.

[15] *See In the Matter of Superior Silica Sands and Wisconsin Proppants, LLC*, Order on Petition Nos. V-2016-18 & V-2017-2 at 10 n.21 and 19 n.36 (February 26, 2018). As the EPA has previously explained:

> Petitioners cannot merely attach comments from EPA (or any other commenter) to the Petition to support a claim that the Permit is deficient without providing any legal or factual analysis of an alleged deficiency in the Petition itself. Petitioners bear the burden of demonstrating that the alleged flaw – whether identified by the Petitioners or by EPA – resulted in, or may have resulted in, a deficiency in the Permit's content. *See* 42 U.S.C. § 7661d(b)(2). . . . Petitioners' reliance on EPA's comments is also misplaced because it overlooks the fact that EPA, in overseeing the implementation of state Title V programs, frequently provides comments to Title V permitting authorities to suggest revisions, clarifications, and improvements. EPA's comments in this regard do not necessarily constitute findings that permits fail to assure compliance with the Act. Petitioners confuse EPA's suggestions and comments to improve permits with the legal standard EPA must apply in order to object to a permit. . . . Petitioners' attempt to use EPA comments as per se legal evidence of actual deficiencies in the Permit is insufficient to demonstrate a deficiency in the Permit.

In the Matter of Chevron Products Company, Order on Petition No. IX-2004-10 at 5 (March 15, 2005).

> In order to assure compliance with Condition D.1.1 [the 0% visible emissions limit at issue here], the Permittee shall: . . . (b) ventilate the unloading enclosure [to] continuously ensure negative pressure values of at least thirteen-thousandths (0.013) millimeters of mercury (seven-thousandths (0.007) inches of water) across each door[;] or [m]aintain an inward flow of air through the entrance and exit doors at a velocity greater than or equal to 200 feet per minute (1.016 m/sec)."

Final Permit at 65. Additionally, Final Permit Condition D.1.8(a) requires, in part, that Riverview "shall record the negative pressure or velocity at each unloading enclosure opening at least once per day when the associated emissions unit is in operation" (with a reasonable response required if pressure or velocity is outside a specified range), and Condition D.1.11(b) requires that Riverview maintain these daily records of negative pressure or velocity. *Id*. at 66, 67. The Petitioners have neither acknowledged these conditions—which speak directly to the ventilation and negative pressure issues they raised—nor have they evaluated other potentially relevant permit terms.[16] Therefore, the Petitioners have failed to demonstrate that Riverview's current permit terms are insufficient to assure compliance with the Permit's visible emissions limit.

2. Applicability of Subpart H NESHAP

Petitioners' Claim: The Petitioners challenge IDEM's determination that the facility's slop tank and wastewater treatment bioreactor are not considered to be "in organic [hazardous air pollutant] HAP service," and therefore that these units are not subject to 40 C.F.R. part 63 subpart H. Petition at 9. Specifically, the Petitioners take issue with IDEM's response to the EPA's comment on this issue, where IDEM explained that the units do not operate in organic HAP service because "the organic HAP concentration in the wastewater streams present in the units is less than 5% by weight under the operating conditions that may reasonably be expected for the units." *Id*. (quoting Final ATSD at 58). The Petitioners claim that neither IDEM's response nor the Permit indicate what operating conditions may reasonably be expected for the units, and assert that the refinery's design specifications are not yet defined. Additionally, the Petitioners claim that "the Permit lacks monitoring requirements to assure that actual operating conditions reflect the conditions that IDEM 'expect[s].'" *Id.*

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

The Petitioners assert that IDEM should have provided additional justification to support its conclusion that certain emission units do not operate in organic HAP service as that term is defined in 40 C.F.R part 63, subpart H,[17] and, thus, that the subpart H NESHAP does not apply to these units. The Petitioners cite no regulatory authority to support their demand for more

[16] For example, Conditions D.1.5(a) and D.1.9(a), and D.1.11(d) may also be relevant ot the Petitioners' claim. *See supra* note 8 and accompanying text.

[17] 40 C.F.R. § 63.161 ("In organic hazardous air pollutant or in organic HAP service means that a piece of equipment either contains or contacts a fluid (liquid or gas) that is at least 5 percent by weight of total organic HAP's as determined according to the provisions of § 63.180(d) of this subpart. The provisions of § 63.180(d) of this subpart also specify how to determine that a piece of equipment is not in organic HAP service.")

information, nor do the Petitioners explain the level of detail or precision they believe is necessary to support IDEM's decision regarding the applicability of this NESHAP. Moreover, the Petitioners have not advanced a single technical basis (not even a hypothetical one) for questioning IDEM's conclusion. For example, the Petitioners have not even alleged—much less demonstrated—that it is possible for the units at issue to operate in organic HAP service. Nor do the Petitioners discuss any design specifications that are not yet defined, but which might be relevant to the inquiry. Overall, the Petitioners' insistence that more information is required to support IDEM's determination regarding subpart H applicability lacks any supporting citation or analysis.[18] The Petitioners' claim effectively amounts to an attempt to shift the burden from the Petitioners to the state permitting authority. However, section 505(b)(2) of the Act clearly places the burden on *petitioners* to *demonstrate* that a permit does not comply with applicable requirements. 42 U.S.C. § 7661d(b)(2). The Petitioners' conclusory demand for more information from IDEM fails to satisfy this burden.[19]

Regarding the Petitioners' claim that "the Permit lacks monitoring requirements to assure that actual operating conditions reflect the conditions that IDEM 'expect[s],'" Petition at 9, and, by implication, to confirm that the subpart H NESHAP continues to be inapplicable to these units, this claim is also denied. The Petitioners have cited to no authority that would require monitoring in this situation. Moreover, the EPA has recently explained that where a requirement is not currently applicable to a source (and where non-applicability is not dependent on compliance with an enforceable permit limit), title V does not require monitoring to determine whether that requirement might become applicable to the source at some time in the future. *See In the Matter of Newark Bay Cogeneration Partnership LP*, Order on Petition No. II-2019-4 at 12–14 (August 16, 2019).

3. PM monitoring from baghouses

Petitioners' Claim: The Petitioners raise concerns with the use of baghouse pressure drop monitoring to monitor PM emissions. Petition at 9. The Petitioners suggest that the Permit should instead require the facility to use a bag leak detection system, claiming (based on an EPA comment) that such a system is a more stringent control technology than monitoring pressure drop. *Id.* The Petitioners further allege that IDEM failed to support its claim that monitoring pressure drop is "adequate to establish continuous compliance with applicable limits." *Id.* (quoting Final ATSD at 59).

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[18] *See supra* note 6 and accompanying text.

[19] The EPA's denial of this claim—based on the Petitioners' failure to demonstrate the Permit's noncompliance with the Act—does not reflect the EPA's agreement with or acquiescence to IDEM's conclusions, nor does it reflect an EPA judgment on the merits of subpart H applicability to this facility. Moreover, IDEM has not established a permit shield with respect to the non-applicability of these requirements. *See* 40 C.F.R. § 70.6(f)(1) ("Except as provided in this part, the permitting authority may expressly include in a part 70 permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that . . . (ii) The permitting authority, *in acting on the permit application* or revision, determines in writing that other requirements specifically identified are not applicable to the source, and *the permit* includes the determination or a concise summary thereof." (emphasis added)). Therefore, if information arises indicating that these emission units *are* subject to the subpart H standards, the EPA, IDEM, and the public will not be precluded from pursing appropriate enforcement action.

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

This claim consists exclusively of a conclusory suggestion that bag leak detection systems are a "more stringent control technology"[20] than monitoring pressure drop, and a bare assertion that IDEM failed to support its claim that pressure drop monitoring is adequate to assure compliance with the applicable limits.

The Petitioners do not explicitly claim—much less demonstrate or explain why—monitoring of pressure drop is insufficient to assure compliance with the relevant permit limits. The Petitioners neither identify any emission limit supported by the baghouse pressure drop monitoring nor do they discuss or evaluate the monitoring terms themselves. The Petition contains nothing more than a one-sentence suggestion that an alternative monitoring system would be better (attributing this suggestion to the EPA), without any citation or analysis for support for why their preferred monitoring system might be required.[21]

This claim represents another example of attempted burden-shifting: The Petitioners, without providing any explanation of their own, simply claim that IDEM did not provide a sufficient explanation for its conclusions. However, the Petitioners fail to acknowledge the explanation that IDEM did provide in response to the EPA's suggestions. *See* Final ATSD at 58–59 (differentiating the current situation from other permits where bag leak detection was required and concluding that monitoring pressure drop was adequate to assure continuous compliance with the applicable limits for this source).[22] The Petitioners have failed to demonstrate that the current monitoring is inadequate, or, consequently, that the Permit does not comply with requirements of the Act.

4. VOC monitoring for leak detection

Petitioners' Claim: The Petitioners assert that the Permit contains "insufficient leak detection monitoring for fugitive [VOC] from the refinery's emission units." Petition at 9. Specifically, the Petitioners suggest that IDEM should require the refinery to use optical gas imaging to monitor its fugitive VOC emissions. *Id*.

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

[20] The EPA notes that bag leak detection systems are a type of monitoring methodology, and not a "control technology" as the Petitioners suggest. Thus, this claim—unlike other Petition claims challenging BACT (control technology) determinations—does implicate the EPA's title V authority. *See infra* pp. 21–29.
[21] *See supra* note 6 and accompanying text. This Petition claim contains significantly less detail than the EPA's comment—which, notably, was presented as a suggestion for IDEM and Riverview to consider whether bag leak detection systems "might be appropriate," and did not reflect an EPA conclusion that monitoring pressure drop was inadequate or that bag leak detection was necessary to assure compliance.
[22] *See supra* note 5 and accompanying text.

This claim consists of a two-sentence allegation that the Permit contains insufficient leak detection monitoring and that the permit should require monitoring via optical gas imaging. However, the Petitioners do not present a single reason to support their claim that the Permit's leak detection monitoring is insufficient.[23] The Petitioners also fail to acknowledge or engage with IDEM's explanation that no additional monitoring is necessary.[24] Notably, both the EPA's initial comment as well as IDEM's response acknowledge that EPA regulations provide sources the *option* to use optical gas imaging for leak detection purposes. *See* Final ATSD at 59. The fact that optical gas imaging is an available option does not mean that it is necessary to assure compliance with applicable requirements, and the Petitioners have not presented any information to support their suggestion that it must be required in the Final Permit.

Title V Claim 2 (Petition Claim II): The Petitioners Claim That "The Permit Is Unlawful Because It Relies on Baseless Assumptions About a Technology Never-Before Used in the U.S."

Petitioners' Claim: In this claim, the Petitioners allege that the Permit is based on incomplete information about the facility's design specifications and emissions potential. Petition at 12. The Petitioners provide a bulleted list of examples that purportedly reflect uncertain design parameters and imprecise emissions estimates for various emission units. *See id.* at 12–13. The Petitioners argue that these incomplete design specifications render the Permit deficient under both the Title V and the PSD programs. *Id*. at 12.

Regarding title V, the Petitioners assert that "[t]itle V requires IDEM to evaluate carefully and independently the Refinery's air pollution consequences before issuing a permit" *Id.* at 12. Moreover, the Petitioners assert that "for purposes of title V," permitting authorities must understand the source's precise emissions potential and full "air pollution consequences" of new sources. *Id.* at 13, 12.[25]

Regarding PSD, the Petitioners assert that Congress designed the PSD program to "assure that any decision to permit increased air pollution . . . is made only after careful evaluation of all the consequences of such a decision," and that the EPA requires permitting authorities to make independent determinations about necessary emissions controls. *Id*. at 11–12 (quoting 42 U.S.C. § 7470(5) and citing the EPA's 1990 Draft NSR Workshop Manual). The Petitioners also briefly refer to air quality modeling in this claim. *See id.* at 12.

In responding to comments raising similar issues, IDEM asserted that the "process design is sufficiently detailed to establish that the potential to emit exceeds the thresholds of the Part 70 and PSD programs." Final ATSD at 77. In response, the Petitioners contend that more is required, specifically claiming that "permitting authorities must understand the degree to which a

[23] *See supra* note 6 and accompanying text.
[24] *See supra* note 5 and accompanying text.
[25] Similarly, within the separate Petition Claim III, the Petitioners claim that "title V does not authorize EPA to support permits, like the one at issue in this case, that are based on guesswork as to the permitted source's air pollution impacts." *Id*. at 13. There, the Petitioners conclude that "EPA must object to the Permit because the emissions calculations and modeling on which the Permit is based does not comply with Title V requirements." *Id*. at 16. The remainder of Petition Claim III, which exclusively discusses PSD-related modeling requirements, is discussed below, *infra* pp. 21–29.

source will exceed the threshold." *Id.* at 13. Additionally, the Petitioners assert that "[p]recise emissions estimates are especially critical in this case because the Refinery's predicted emissions are in some cases barely below applicable regulatory thresholds that, if reached, would trigger additional pollution control requirements." *Id*. The only "regulatory thresholds" cited by the Petitioners relate to PSD modeling results comparing the facility's emissions impacts to the 1-hour NO_2 and SO_2 NAAQS. *See id*. at 13 n.74.

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

The Petitioners have failed to demonstrate that the Permit or permit application ran afoul of any requirements related to title V or part 70. The Petitioners do not provide citations to any title V statutory or regulatory authorities to support the title V-related allegations in this claim, including the claim that title V requires an evaluation of "air pollution consequences" in this situation. The EPA notes that the part 70 regulations set forth permit application requirements. *See* 40 C.F.R. § 70.5.[26] The EPA's regulations specifically require that permit applications contain sufficient emissions-related information for the permitting authority to determine which CAA requirements are applicable to the source and to establish compliance with such requirements. *See* 40 C.F.R. § 70.5(c)(3) (section 70.5(c) states that "[a]n application may not omit information needed to determine the applicability of, or to impose, any applicable requirement," and sections 70.5(c)(3)(i)-(viii) list the emission-related information that must be submitted with the title V permit application). In addition, the EPA's regulations require an applicant to supplement or correct an application if new information arises and require that a responsible official certify to the "truth, accuracy, and completeness" of the title V permit application. 40 C.F.R. §§ 70.5(b) and (d). Here, IDEM contends that the application requirements have been satisfied. *See* Final ATSD at 77. The Petitioners counter that more is required by title V, but they provide no citation or analysis explaining why this might be so.[27] Accordingly, the Petitioners have failed to demonstrate that their concerns about allegedly incomplete design specifications establish noncompliance with the relevant part 70 requirements.

The Petitioners, in arguing that title V requires more information, may be conflating more substantive PSD program requirements with the title V permit application requirements. Petition Claim II refers to both PSD and title V "requirements," but the only legal authority cited (42 U.S.C. § 7470(5)) and substantive requirements discussed (emission controls and air quality modeling) relate exclusively to the PSD program, and *not* to title V. *See* Petition at 11–13. As discussed further below, *infra* pp. 21–29, these PSD-related claims are not properly considered in a title V petition response.

The allegations in Petition Claim II are similar to the issues raised in Petition Claim VII, in that the Petitioners also assert they were deprived adequate public participation opportunities due to a lack of complete facility information during the public comment period. As explained in prior

[26] *See also In the Matter of Superior Silica Sands and Wisconsin Proppants, LLC*, Order on Petition Nos. V-2016-18 & V-2017-2 at 7–12 (February 26, 2018); White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program at 30–36 (March 5, 1996); White Paper for Streamlined Development of Part 70 Permit Applications at 6–9 (July 10, 1995).
[27] *See supra* note 6 and accompanying text.

title V petition orders, claims involving the permit application content requirements of 40 C.F.R. § 70.5 can be related to distinct claims involving the public participation requirements of 40 C.F.R. § 70.7(h) because public participation can be improperly impaired if the title V permit application and record do not include the information required by title V and applicable regulations. *See, e.g.*, *In the Matter of Yuhuang Chemical Inc.*, Order on Petition No. VI-2015-03 at 6–8 (August 31, 2016) (*Yuhuang I Order*); *In the Matter of Cash Creek Generation, LLC*, Order on Petition No. IV-2010-4 at 8–10 (June 22, 2012) (*Cash Creek II Order*). In this case, as discussed in response to this claim and to title V Claim 3 (Petition Claim VII) below, the Petitioners have not demonstrated that the permit application was deficient or that the public was provided insufficient information to meaningfully participate in the permitting process.

Title V Claim 3 (Petition Claim VII): The Petitioners Claim That "The Permit Is Unlawful Because Its Issuance Violated Public Participation Requirements."

Petitioners' Claim: In Petition Claim VII, the Petitioners claim that a title V permit may be issued only if the permitting authority has complied with public participation requirements. Petition at 23 (citing 40 C.F.R. §§ 70.7(a)(1)(ii) and 70.7(h)). More specifically, the Petitioners claim that Indiana's operating permit program rules require IDEM to provide the public with "information sufficient to notify the public as to the emissions implications" of an air permit prior to permit issuance. *Id*. (quoting 32 IAC 2-7-17(c)(1)(C)(iv)). The Petitioners allege that IDEM failed to satisfy these requirements because the "emission implications" of the facility are not clear, due to missing plant information and erroneous calculations, among other reasons not specifically identified. *Id*.

Additionally, the Petitioners assert that IDEM withheld hundreds of relevant public records[28] until it was too late for the public to evaluate the information in these records. *Id.* The Petitioners indicate that they filed public records requests on June 19, 2018, and November 14, 2018, but that no documents were produced until June 3, 2019 (six months after the close of the public comment period). *Id.* at 23–24. The Petitioners claim that, by "withholding these public records until it was too late for Petitioners or other members of the public to evaluate them, IDEM failed to provide the public with "information sufficient to notify the public as to the emissions implications" of the Permit in violation of Indiana's federally-approved title V regulations. *Id*. at 24.

The Petitioners note that the EPA has previously explained that "the unavailability during the public comment period of information needed to determine the applicability of or to impose an applicable requirement also may result in a deficiency in the permit's content" and therefore may warrant an objection to the permit. *Id*. (quoting *Cash Creek II Order* at 9). The Petitioners conclude by asserting that, "Because IDEM did not make critical information available during the public comment period, EPA must object to the Permit." *Id.*

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

[28] The only description of these records in the Petition refers to "notes, including from meetings and telephone calls" between Riverview and IDEM. *Id*.

As the Petitioners suggest, a title V permit may not be issued unless it complies with the public participation requirements of 40 C.F.R. § 70.7(h). 40 C.F.R. §§ 70.7(a)(1)(ii), 70.8(c)(3)(iii). Moreover, as the Petitioners note, the EPA will object to a permit if a petitioner demonstrates that the unavailability of certain information during the comment period deprived the public of the meaningful opportunity to participate during the permitting process, *e.g.,* by showing that the lack of such information could have resulted in a flaw in a title V permit.[29] Here, however, the Petitioners have failed to demonstrate that the lack of information during the public comment period violated any requirements of section 70.7(h) (or IDEM's EPA-approved regulations), deprived the public of the opportunity to meaningfully participate in the permitting process, or resulted in a flaw in the Permit.

The only legal authority presented as a basis for EPA objection is a provision in Indiana's EPA-approved title V program requiring that public notices contain "information sufficient to notify the public as to the emissions implications of those activities." Petition at 23 (quoting 326 IAC 2-7-17(c)(1)(C)(iv)). The EPA's public participation regulations do not contain a similar requirement, but do require that states provide the public with information relating to "the activity or activities involved in the permit action" along with "all other materials available to the permitting authority . . . that are relevant to the permit decision." 40 C.F.R. §70.7(h)(2).[30] It is not clear to the EPA what more—if anything—Indiana's provision requires beyond the EPA's public notice requirements. Absent *any* analysis by the Petitioners explaining why the documents allegedly withheld during the public comment period would shed light on the "emission implications" of the facility, the EPA defers to IDEM regarding the extent to which its EPA-approved title V permit regulations require more than part 70 requires. In this case, IDEM disagreed with public comments suggesting the state had not provided sufficient information to the public, and asserted that the Permit "complies with the public participation requirements at . . . 326 IAC 2-7-17." Final ATSD at 87. Moreover, IDEM asserted that "the voluminous materials . . . [provided] during the public comment period provide sufficient information to allow for public participation in the permit review process." *Id*. The Petitioners do not engage with or specifically refute IDEM's conclusions,[31] but instead they simply allege generally that the project's "emissions implications" are not clear, without further analysis.[32] Specifically, the Petitioners provide no explanation of what they interpret this phrase to mean, what level of detail it might require, or how the lack of information in the public notice may have violated the state's regulatory provision, much less the requirements of part 70. The Petitioners also do not provide any examples in which Indiana has interpreted its regulations as requiring more information than was available in this case. Given IDEM's conclusion that its public participation requirements

[29] As noted above with respect to Petition Claim II, this principle related to the title V public participation requirements is sometimes related to the regulations governing the content of title V permit applications in 40 C.F.R. § 70.5. *See Yuhuang I Order* at 6–8; *Creek II Order* at 8–10.

[30] Although 326 IAC 2-7-17(c)(1)(C)(iv) includes a requirement that the public notice for a title V permit identify the "activity or activities involved in a Part 70 permit action" (which resembles a portion of 40 C.F.R. § 70.7(h)(2)), the Indiana regulation goes on to further require identification of "information sufficient to notify the public as to the emissions implications of those activities." This latter requirement of Indiana's regulations goes beyond the demands of § 70.7(h)(2), and the Petitioners have not suggested another portion of the EPA's regulations that establish similar requirements.

[31] *See supra* note 5 and accompanying text.

[32] *See supra* notes 6 and 7 and accompanying text.

were satisfied, and the Petitioners' failure to demonstrate that more information was necessary to satisfy the EPA's part 70 public participation requirements in 40 C.F.R. § 70.7 or Indiana's regulation at 326 IAC 2-7-17(c)(1)(C)(iv), the Petitioners have not demonstrated grounds for an EPA objection on this issue.[33]

Additionally, the Petitioners claim that IDEM withheld "hundreds of public records" until after the public comment period. Petition at 23. As IDEM notes, public records requests are distinct from the permitting process. *See* Final ATSD at 87. Public records requests potentially involve a broader scope of records and different timelines than those associated with issuing a title V permit. Thus, not everything that might be obtained through a public records request need be included in a permit's public notice package. Here, IDEM concluded that "the voluminous materials … [available] during the public comment period provide[d] sufficient information to allow for public participation in the permit review process." Final ATSD at 87. The Petitioners have not engaged with or refuted this conclusion with any analysis of additional documents (which the Petitioners subsequently received) that should have been provided during the public comment period.[34] The only description of the missing documents—which the Petitioners describe as "critical"—refers to "notes, including from meetings and telephone calls" between Riverview and IDEM. It is not apparent to the EPA that this type of information would need to be included as part of the permit application or included in the statement of basis for the draft permit. In any case, the Petitioners have provided no examples or discussion of specific information that might have been "relevant to the permit decision" and which accordingly should have been available during the public comment period. 40 C.F.R. § 70.7(h)(2); *see In the Matter of U.S. Dep't of Energy, Hanford Operations*, Order on Petition No. X-2019-8 at 32 (February 19, 2020). Accordingly, the Petitioners have failed to demonstrate that IDEM's issuance of the Riverview Permit failed to comply with relevant regulatory requirements or otherwise deprived the Petitioners of a meaningful opportunity to participate in the permitting process. *See Yuhuang I Order* at 6–8; *Cash Creek Order* at 8–10.

Title V Claim 4 (Petition Claim VI): The Petitioners Claim That "The Permit's Monitoring and Reporting Requirements for Flaring Emissions Do Not Comply with Title V."

Petitioners' Claim: The Petitioners assert that the Permit's treatment of emissions from three flares is insufficient for three reasons:

First, the Petitioners claim that the Permit sets emission levels for the flares based on estimates of the frequency, duration, and flow rate of flaring events that the Petitioners contend are unsupported. Petition at 22.

Second, the Petitioners claim that the Permit does not require the refinery to directly monitor emissions from its flares. Instead, the Petitioners state that the Permit requires monitoring of the sulfur content of gas streams vented to the flares along with the presence of a pilot flame. The

[33] Additionally, given that the permitting process involved the issuance of both a title V and PSD permit, the information available during the public comment period—such as the emissions modeling associated with the PSD permit—included far more emissions-related information than would typically be required in a title V permit.
[34] *See supra* note 5 and accompanying text.

Petitioners suggest that this is insufficient and that monitoring of flare emissions outputs is necessary to satisfy title V requirements. *Id.*

Third, the Petitioners claim that the requirement to report emissions exceedances from the flares "is insufficient under Title V and New Source Performance Standards" because quarterly reporting "would preclude IDEM from correcting inaccurate assumptions about the refinery's flaring emissions and from instituting the necessary pollution controls until it is too late to prevent or mitigate unauthorized flaring events." *Id.*

After discussing potential environmental consequences associated with flaring events, the Petitioners conclude by stating: "Without sufficient monitoring and reporting requirements associated with the Refinery's flares or a reasonable and technically valid estimate of the likely number of annual flaring events, EPA must object to the Permit as unlawful under Title V." *Id.* at 23.

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

Regarding the first portion of Petition Claim VI, it is unclear what potential deficiency the Petitioners meant to allege in challenging how the Permit "sets emissions levels" for the flares. The Petitioners do not cite any title V-based statutory or regulatory requirements related to these challenges, nor do the Petitioners explain how their challenges relate to any permit terms or applicable requirements. The only citation provided by the Petitioners is to an appendix to the Final ATSD containing a potential to emit (PTE) summary for the flares; this citation is presented without any context relevant to title V. To the extent that this claim relates generally to the facility's PTE calculations, the EPA notes that all such estimates for new sources are based to some degree on assumptions, and the Petitioners have not demonstrated that the assumptions used by IDEM were unreasonable. More importantly, again, the Petitioners have not explained how these PTE calculations have any relevance to the Riverview title V Permit. To the extent that this claim was meant to challenge emissions estimates used in conducting air quality impacts modeling or in establishing Best Available Control Technology (BACT) limits,[35] these are PSD-related issues. As introduced in Section II.C and discussed further below, *infra* pp. 21–29, these types of PSD-related issues are not properly considered in a title V petition response.

Regarding the second portion of Petition Claim VI (related to flare monitoring), this issue was not raised with reasonable specificity during the public comment period. 42 U.S.C. § 7661d(b)(2). No portion of any public comments requested direct emissions monitoring from the flares or challenged the sufficiency of existing flare monitoring provisions, and the Petitioners have not demonstrated that it was impracticable to do so. Thus, the Petitioners are barred from raising this claim now. *Id*.

[35] The Petitioners reference public comments that discuss, in part, air quality modeling. *See* Petition at 22 (citing Final ATSD at 78–79). The Petitioners could have also been referring to BACT limits on the flares established in Condition D.5.1, which appear related to the second and third issues raised in this claim. *See id*. (citing Permit Conditions D.5.4, D.5.6, D.5.7, and D.5.10).

However, even if this issue had been raised during the public comment period, the Petitioners have failed to demonstrate that the Permit lacks sufficient monitoring. Similar to the Petition Claim I.A (Title V Claim 1) monitoring issues discussed above, this portion of Petition Claim VI consists of two conclusory sentences alleging—without any support—that the Permit's current flare monitoring is not sufficient to assure compliance with (unidentified) emission limits for the flares.[36] The Petitioners appear to imply that "monitoring of the flares' emissions outputs"—*i.e.*, periodic monitoring of stack emissions—is necessary. However, direct periodic monitoring of emissions is not always necessary (or, in some cases, even possible); monitoring of relevant parameters or variables related to emissions may be sufficient in certain situations to assure compliance, particularly for flare emissions. In any case, determining the necessary monitoring is inherently a case-specific inquiry depending on multiple considerations, including the nature of the limit in question and the sufficiency of existing monitoring conditions. *See CITGO Order* at 6–8. Here, the Petitioners have not even identified the relevant limit(s) they believe are not supported by adequate monitoring, nor do the Petitioners evaluate the Permit's existing monitoring provisions.[37] In sum, the Petitioners have not provided a single argument to demonstrate that the current flare monitoring provisions are inadequate or that additional direct monitoring of emissions from the flares is necessary.

Regarding the third portion of Petition Claim VI (related to reporting), the Petitioners have similarly failed to demonstrate that the Permit is deficient. The Petitioners present a conclusory allegation that quarterly exceedance reporting is insufficient to assure compliance, but do not demonstrate why.[38] The Petitioners' sole argument is that "the Permit's quarterly reporting schedule would preclude IDEM from correcting inaccurate assumptions about the Refinery's flaring emissions and from instituting the necessary pollution controls until it is too late to prevent or mitigate unauthorized flaring events." Petition at 22. However, the Petitioners do not cite to or evaluate any relevant underlying title V requirements or explain how their concerns align with the scope of these authorities.[39] *See* 42 U.S.C. § 7661c(c); 40 C.F.R § 70.6(c)(1). Monitoring, recordkeeping, and reporting provisions are generally designed to assure compliance with a particular standard or limit, and are not directly related to "correcting inaccurate assumptions" or "instituting necessary pollution controls." Here, it appears that the Petitioners' stated concerns may be more related to PSD modeling ("correcting inaccurate assumptions") or establishing BACT limits ("instituting necessary pollution controls"), and less related to title V permit content issues. *See infra* pp. 21–29.

To the extent that this claim does implicate title V authorities, the Petitioners have failed to identify and evaluate all relevant permit terms or present any relevant arguments as to why the title V Permit might require a more frequent reporting schedule.[40] The Petitioners do not cite any title V permit limits associated with the allegedly inadequate reporting condition. The only reporting requirement cited by the Petitioners (Condition D.5.10) requires quarterly reporting of

[36] *See supra* note 7 and accompanying text.
[37] *See supra* note 8 and accompanying text.
[38] *See supra* note 7 and accompanying text.
[39] *See supra* note 6 and accompanying text.
[40] *See supra* note 8 and accompanying text.

carbon dioxide equivalent (CO2e) emissions (in order to assure compliance with a CO2e emission limit in Condition D.5.1(g)). This CO2e reporting condition appears unrelated to assuring compliance with flare emissions limits more generally (*i.e.*, limits on other pollutants), or to "correcting inaccurate assumptions" or "instituting the necessary pollution controls." To the extent the Petitioners intended to refer to other reporting requirements—such as reporting associated with the subpart Ja NSPS (as alluded to in the Petition and IDEM's response to comments) or other BACT limits[41]—the Petitioners have not identified or evaluated any such requirement in the Permit, nor have they demonstrated that additional reporting is necessary to assure compliance with any such requirement. Notably, subpart Ja NSPS only requires semiannual (every six months) reporting of exceedences. 40 C.F.R. § 60.108a(d) (incorporating the semiannual reporting requirements of 40 C.F.R. § 60.7(c)). Additionally, for purposes of demonstrating compliance with the subpart Ja NSPS, IDEM explained that quarterly reporting is standard practice and that it had no information to indicate that more frequent reporting is necessary for this particular facility. *See* Final ATSD at 86. The Petitioners neither address nor attempt to refute the state's reasoning,[42] and have overall failed to demonstrate that more frequent reporting is necessary.[43]

PSD Claims (Petition Claims I.B, I.C, III, IV, and V)

Petition Claims I.B, I.C, III, IV, and V all raise issues that concern decisions made by IDEM in issuing Riverview's PSD permit, including challenges to how IDEM established BACT limits as well as challenges to PSD-related modeling conducted by the source. The EPA's response to all of these claims is presented below.

Petitioners' Claim: The "Background" portion of the Petition (specifically, Background Section II.C) asserts that the "EPA Must Consider Petitioners' Demonstration that this Combined Title V/PSD Permit Does Not Comply with PSD Requirements." Petition at 6. Among more general arguments,[44] the Petitioners argue that the nature of Indiana's "combined" PSD and title V programs obligates the EPA to review their PSD claims, grant the Petition, and object to the Permit. Specifically, the Petitioners claim:

> Because Indiana chose to adopt a combined Title V/PSD program under which a single permit authorizes both construction and operation, like the Permit at issue in

[41] It is unclear whether the Petitioners intended to refer to Condition D.5.11, which also contains quarterly reporting conditions.
[42] *See supra* note 5 and accompanying text.
[43] Additionally, the Petitioners have provided no connection between their brief discussion of the environmental health impacts of continuous, unauthorized flaring, and the current Riverview title V Permit. *See* Petition at 22–23. In any case, to the extent the facility engages in "continuous, unauthorized flaring" in violation of title V permit terms, this could present grounds for enforcement action, including through a CAA § 304 citizen suit.
[44] Specifically, the Petitioners claim that the PSD "requirements" in the Indiana SIP "become 'applicable' when a new source of air pollution meets the statutory and regulatory applicability criteria for the PSD construction program." *Id*. (citing Merriam-Webster Online Dictionary definition of "applicable"). The Petitioners argue, therefore, that "Congress' directive that EPA must object to a permit if it is 'not in compliance with the applicable requirements of this chapter,' unambiguously requires EPA to object to a permit that does not comply with PSD construction requirements." *Id*. at 7 (quoting 42 U.S.C. § 7661d(b)(1)).

> this petition, Title V's permit issuance procedures apply to all federally enforceable conditions included in these combined permits, including EPA review and the opportunity for members of the public to petition EPA to object to deficient proposed permits.
>
> Under circumstances where a state has chosen to integrate its PSD and Title V permitting requirements, it is infeasible to restrict the public's Title V petition opportunity solely to those permit conditions that are found to be sufficiently Title V-related. In such combined permits, construction and operating conditions are intertwined, making it impractical for EPA or courts to determine whether permit conditions stem from Title V or the PSD program. For example, Indiana's PSD and operating permit programs both impose monitoring and recordkeeping requirements on a new source of air pollution.

Id. (footnotes omitted).

Moreover, the Petitioners cite two Federal Register notices associated with the EPA's approval of Indiana's PSD program. In its final conditional approval of the state's PSD program, the EPA stated:

> [I]n determining whether a Title V permit incorporating PSD provisions calls for EPA objection under section 505(b) [Title V] . . . EPA will review the process followed by the permitting authority in determining [BACT], assessing air quality impacts, meeting Class I area requirements, and other PSD requirements, to ensure that the required SIP procedures . . . were met. EPA will also review whether any determination by the permitting authority was made on reasonable grounds properly supported on the record, described in enforceable terms, and consistent with all applicable requirements. Finally, EPA will review whether the terms of the PSD permit were properly incorporated into the operating permit.

Petition at 7–8 (quoting 68 Fed. Reg. 9892, 9894–95 (March 3, 2003) (ellipses in Petition)). Additionally, the Petitioners note that in its final program approval, the EPA stated: "[A]pproval of Indiana's PSD program does not divest EPA of the duty to continue appropriate oversight to insure that PSD determinations made by Indiana are consistent with the requirements of the CAA, Federal regulations and the SIP." *Id*. at 7 (quoting 69 Fed. Reg. 29071, 29072 (May 20, 2004)).

Accordingly, before presenting their specific claims, the Petitioners contend that "if a petitioner shows that Indiana issued a permit that does not comply with the state's federally-approved regulations governing PSD permitting or 'exercise[d] discretion under such regulations [that] was unreasonable or arbitrary,' then EPA must object to the permit's issuance." *Id*. at 8 (quoting *Cash Creek II Order* at 4).

In a separate section of the Petition, the Petitioners detail multiple claims related to IDEM's issuance of a PSD permit to Riverview. In Petition Claim I.B, the Petitioners challenge the sufficiency of various emissions controls selected by IDEM as BACT for various emission units

at the facility. *See id*. at 10–11. In Petition Claim I.C, the Petitioners assert that IDEM's reliance on "baseless" assumptions concerning flare emissions undermined the accuracy of the source's NAAQS and PSD increment modeling. *See id*. at 11. Similarly, in Petition Claim III, the Petitioners again challenge "erroneous and deficient emissions calculations" in support of their challenges to the source's NAAQS and PSD increment modeling. *See id*. at 13–16. In Petition Claim IV, the Petitioners present three more subclaims to support their contentions that the facility's air quality impacts modeling was flawed. *See id*. at 16–18. Finally, in Petition Claim V, the Petitioners return to IDEM's BACT determinations, presenting multiple subclaims challenging the BACT analysis for various emission units and pollutants. *See id*. at 19–21.

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

Petition Claims I.B, I.C, III, IV, and V all involve determinations made by IDEM based exclusively on requirements under the PSD provisions in part C of title I of the CAA and IDEM's corresponding EPA-approved SIP regulations.[45] These claims present the question of whether the merits of challenges to permit conditions based on preconstruction permitting authority under title I of the Clean Air Act should be considered by the EPA in reviewing or considering a petition to object to a title V operating permit. As noted in Section II.C of this Order, the EPA reviewed this question under similar circumstances in the *Big River Steel Order*. After a review of the structure and text of the CAA and the EPA's regulations in part 70, and in light of the circumstances presented by the petition at issue in that order, the EPA concluded that the title V permitting process was not the appropriate forum to review preconstruction permitting issues even when the PSD conditions based on title I requirements were developed at the same time as the title V permit and included in the same permit document. After considering the situation presented in the Petition regarding the Riverview facility, the EPA has concluded—as it did under similar circumstances in the *Big River Steel Order*—that a title V petition is likewise not the appropriate forum for reviewing the merits of the Petitioners' PSD-related claims here, notwithstanding IDEM's decision to issue a single permit document that contains both PSD- and title V-based requirements.

In circumstances such as those present here, where a permitting authority authorizes the construction of a particular facility under title I under conditions that were subject to public notice and comment, and provides the opportunity for judicial review,[46] the terms and conditions of that preconstruction authorization "define certain applicable SIP requirements for the title V source" for purposes of title V permitting. 57 Fed. Reg. at 32259. This interpretation, as explained more fully in the *Big River Steel Order*, is based on a variety of factors. Notably, section 504 of the CAA requires title V permits to "include enforceable emissions limits and

[45] As noted above in the EPA's discussion of Petition Claim II, *supra* note 25, within Petition Claim III the Petitioners incorrectly allege that "Title V does not authorize EPA to support permits, like the one at issue in this case, that are based on guesswork as to the permitted source's air pollution impacts," and "EPA must object to the Permit because the emissions calculations and modeling on which the Permit is based does not comply with Title V requirements." Petition at 14, 16. Contrary to the Petitioners' suggestion, title V contains no such requirements related to air pollution impacts or related modeling. Rather, in the case here, air pollution impacts modeling requirements are established by the PSD program.

[46] As explained *infra* pp. 23–24, the Petitioners have pursued a separate state-level challenge to the Permit—including some of the PSD-related issues raised in the title V Petition—which is pending.

standards . . . to assure compliance with applicable requirements of this chapter." 42 U.S.C. § 7661c(a). However, the term "applicable requirements" is not defined in the Act and the Act does not specify how to determine what the "applicable requirements" are for a particular title V permit.

The Petitioners offer their interpretation of this statutory language (along with dictionary definitions) to support their assertion that EPA must consider all PSD-related issues in a title V petition. *See* Petition at 7. However, the Petitioners fail to acknowledge relevant regulatory provisions that clarify the meaning of this statutory provision. The EPA's regulations specifically define the "applicable requirements" under title V as they relate to PSD-based requirements. *See* 40 C.F.R. § 70.2; *see also* 326 IAC 2-7-1(6)(A) and (B) (identical to EPA definition in relevant part). Among other definitions not relevant here:

> *Applicable requirement* means all of the following *as they apply* to the emission units in a part 70 source . . . :
> (1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter [and]
> (2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including Parts C or D, of the Act.
> . . .

40 C.F.R. § 70.2 (emphasis added). As the EPA first noted in *PacifiCorp-Hunter*, there is an ambiguity in the two parts of this regulatory definition when a source has already obtained a preconstruction permit. To resolve this ambiguity, the EPA interprets the part 70 regulations to mean that the issuance of a title I preconstruction permit, in this case a PSD permit, "define[s] certain applicable SIP requirements for the title V source" under both relevant provisions of the definition, for purposes of title V permitting. *Big River Steel Order* at 10 (quoting 57 Fed. Reg. at 32259); *PacifiCorp-Hunter Order* at 10 (same). Under the first section of the definition, the permitting authority's source-specific title I permitting decisions define which SIP-based preconstruction permitting requirements (*i.e.*, the requirement to obtain a particular type of permit and the substantive requirements that must be included in each type of permit) apply to the activities authorized by the preconstruction permit. *Big River Steel Order* at 10–11; *PacifiCorp-Hunter Order* at 10–11. That is, in issuing the preconstruction permit, the permitting authority defines the preconstruction permitting SIP requirements "as they apply" to the source at that time. *Big River Steel Order* at 10–11 (quoting 40 CFR § 70.2); *PacifiCorp-Hunter Order* at 11 (same). Under the second section of the definition, when a permitting authority applies those requirements of the SIP to issue a preconstruction permit, the source-specific "applicable requirements" are then reflected in the terms and conditions of the preconstruction permit. *Big*

River Steel Order at 11; *PacifiCorp-Hunter Order* at 11.[47] Consequently, the terms and conditions of such a PSD permit should be included in a source's title V permit without further substantive review through the title V process, including the title V petition process.[48] This interpretation of the EPA's regulations and the rationale supporting the interpretation are more fully explained in the *Big River Steel* and *PacifiCorp-Hunter Orders*. *See Big River Steel Order* at 8–11, 14–20; *PacifiCorp-Hunter Order* at 8–11, 13–20.

Here, the PSD-based conditions in the permit IDEM issued to Riverview were developed based on regulations approved by the EPA under title I of the CAA, specifically, 326 IAC 2-2-1 *et seq*. Therefore, these conditions define the "applicable requirements" under title I of the Act for purposes of title V permitting. *See Big River Steel Order* at 9–20; *PacifiCorp-Hunter Order* at 8–21. The task of IDEM under title V was to faithfully incorporate the terms and conditions derived from the PSD requirements and to ensure that the title V permit contains adequate monitoring, recordkeeping, and reporting requirements to assure compliance with those terms and conditions.[49] *Big River Steel Order* at 8–9, 14–20; *PacifiCorp-Hunter Order* at 8, 13–18; *see Citizens Against Ruining the Environment,* 535 F.3d at 672 ("Title V does not impose additional requirements on sources but rather consolidates all applicable requirements in a single document to facilitate compliance."). Unless and until Riverview's PSD requirements are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through another available mechanism, the source's title V permit properly incorporates the PSD terms and conditions as applicable requirements.

Challenges to the PSD terms (such as BACT limits) and to IDEM's application of its PSD rules (such as those related to air quality modeling) are not properly raised through the title V petition process. Instead, any challenges to the PSD conditions in the combined permit should be raised through the appropriate title I avenues or through an enforcement action. Specifically, citizen

[47] In this context, a PSD permit only defines the applicable requirement for purposes of title V permitting. The interpretation of title V provisions reflected in this Order does not address anyone's ability to review a determination concerning the PSD permit terms and conditions under other titles of the Act. *See PacifiCorp-Hunter Order* at 20–21.

[48] As the EPA has explained, "[A] decision by the EPA not to object to a title V permit that includes the terms and conditions of a title I permit does not indicate that the EPA has concluded that those terms and conditions comply with the applicable SIP or the CAA. However, until the terms and conditions of the title I permit are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through some other mechanism, such as a state court appeal, the 'applicable requirement' remains the terms and conditions of the issued preconstruction permit and they should be included in the source's title V permit." *Big River Steel Order* at 19; *see PacifiCorp-Hunter Order* at 20 ("That the EPA views the incorporation of the terms and conditions of these preconstruction permits into the title V operating permit as proper for purposes of title V does not indicate that the EPA agrees that the state reached the proper decision when setting terms and conditions in the preconstruction permits. . . . The EPA's lack of objection to the inclusion of that requirement in the title V permit does not indicate that the EPA agrees that it is legal or complies with the Act; it merely indicates that a title V permit is not the appropriate venue to correct any such flaws in the preconstruction permit.").

[49] Given that the PSD permit document and title V permit document are one and the same, IDEM clearly accomplished this first task (to faithfully incorporate the PSD terms and conditions into the title V permit), and the Petitioners have either not alleged or not demonstrated any flaw with respect to the second task (to ensure that the title V permit contains adequate monitoring, recordkeeping, and reporting requirements).

oversight may still be accomplished through either the state appeal process[50] or through a citizen suit under CAA § 304, depending on the type of issues involved. In fact, the Petitioners here have followed the proper title I pathway by challenging the Permit—including some of the PSD-related issues raised in the title V Petition—through the Indiana administrative appeals system. *See* Ind. Code § 4-21.5-3 *et seq*. (Administrative Orders and Procedure Act chapter on adjudicative proceedings); IAC Title 315 (regulations governing adjudicatory proceedings before environmental law judges). This proceeding at the Indiana Office of Environmental Adjudication (Indiana OEA) is currently ongoing. *See* Objection to the Issuance of PSD/New Source Construction and Part 70 Operating Permit No. T147-39554-00065, Riverview Energy Corporation, Dale, Spencer County, Indiana, Indiana OEA Cause No. 19-A-J-5073 (dated July 9, 2019). Any eventual decision by the Indiana OEA can be judicially reviewed through the Indiana state court system. Ind. Code § 4-21.5-5 *et seq*. (Administrative Orders and Procedure Act chapter on judicial review). This state administrative process, followed by the opportunity for state court adjudication, is the proper process under the CAA to obtain review of these preconstruction permitting decisions and will provide the Petitioners ample opportunity to present their challenges. The complex legal and technical PSD questions posed in both the Petition and the administrative appeal warrant resolution through an in-depth adjudicatory process provided by the state administrative and court system—where all interested parties, including Riverview and IDEM, can actively participate and develop a full record for review—rather than through the limited, 45-day administrative review process or 60-day petition review period in title V.[51] *See Big River Steel Order* at 17–19; *PacifiCorp-Hunter Order* at 17–18. If the ongoing state administrative appeal results in any changes to the PSD terms and conditions in Riverview's permit, this will consequently alter the "applicable requirements" that must be reflected in the source's title V permit. *See, e.g.*, 40 C.F.R. § 70.7(f)(1); Final Permit Condition B.17. Until then, the Petitioners may not attempt to separately litigate IDEM's preconstruction permitting decisions through a title V petition to the EPA. *Big River Steel Order* at 18; *see, e.g.*, *Sini v. Citibank, N.A.*, 990 F.Supp.2d 1370, 1379 (S.D. Fl. 2014) ("Another factor [in favor of *Colorado River* abstention when there are parallel proceedings in state court] . . . is the danger of conflicting rulings based on identical facts.").

This reading of part 70 takes into account the authority and procedures IDEM used to issue the PSD and title V permits for Riverview: specifically, IDEM's decision to include PSD and title V conditions within a single permit document. The Petitioners offer various reasons as to why this procedural streamlining should result in EPA's substantive review of (and potential objection to) PSD-derived permit terms. None of these arguments are convincing.

The EPA confronted a nearly identical situation in the *Big River Steel Order*. There, the EPA explained:

> "The facility's title V permit, issued under APC&EC Regulation 26, was processed concurrently with a PSD permit, issued under APC&EC Regulation 19. Both

[50] *See* 77 Fed. Reg. 65305, 65306 (October 26, 2012) (EPA "interpret[s] the CAA to require an opportunity for judicial review of a decision to grant or deny a [preconstruction] permit, whether issued by EPA or by a State under a SIP-approved . . . program"); 72 Fed. Reg. 72617, 72619 (January 24, 1996).

[51] Unlike an adjudicatory process in state court, there is no defined mechanism in title V or the EPA' regulations for the permitted source to participate by submitting technical or legal arguments to counter the Petitioners'.

> permits were issued in a single permit document (titled Permit No. 2305-AOP-R0), due to the structure of Arkansas's EPA-approved regulations governing the procedures for issuance of title V permits and preconstruction permits. . . . This makes clear that while issued within one permit document, there were in fact two permits issued by ADEQ: (1) the PSD permit under Regulation 19, and (2) the title V permit, which incorporates the terms and conditions of that PSD permit as an "applicable requirement," under Regulation 26. While ADEQ processed the PSD permit and the title V permit concurrently, this is a choice made by the state as a matter of administrative efficiency. . . . The EPA does not interpret this procedural streamlining—which effectively combines the public notice, comment, and permit issuance procedures for the preconstruction permit issued under Regulation 19 and the operating permit issued under Regulation 26—to establish a public petition opportunity under title V on the preconstruction permitting determinations made in issuing the PSD permit. The CAA establishes this petition opportunity on the title V permit alone and provides a different mechanism for EPA and citizen oversight of preconstruction permitting decisions under title I. The EPA does not read APC&EC Regulation 19, Chapter 11 to independently establish a public petition opportunity under title V on the PSD permit issued by ADEQ where such petition opportunity would be unavailable in a circumstance where the title I and title V permitting processes were separate.

Big River Steel Order at 11–12 (footnote omitted);[52] *see also South Louisiana Methanol Order* at 9 n.21.

Here, similar to the Arkansas permit programs considered in *Big River Steel*, Indiana has two separate sets of EPA-approved regulations governing its PSD and title V programs: a PSD program in 326 IAC 2-2-1 *et seq*. and a title V program in 326 IAC 2-7-1 *et seq*. These programs are based on distinct federal and state statutory and regulatory authorities and feature significant differences in both their substantive and procedural requirements.[53] However, the two programs do feature some overlapping public participation requirements, including requirements for public notice, the opportunity for public comment, and the opportunity for judicial review through the state court system. Accordingly, some permitting authorities, like IDEM, choose to streamline the permit issuance process by completing action on a source's title V and PSD permit applications at the same time, or even by combining both the PSD-based terms and title V-based terms in a single permit document.

In the case at hand, this procedural streamlining does not, as the Petitioners suggest, mean that IDEM's PSD and title V *programs* are "combined." Rather, it would be more accurate to say that the Riverview Permit is a combined PSD and title V *permit*, derived from and fulfilling the requirements of two separate regulatory programs. This is consistent with how IDEM describes

[52] *See id*. at 11 n.22 ("Indeed, as discussed further below, in this instance involving the BRS permit, the Petitioner invoked the state appeal process and had an opportunity for a thorough review of the propriety of the preconstruction permitting conditions for the facility through this title I process.").
[53] For example, as discussed further below, only title V of the Act contains an opportunity for formal EPA objection, or for public petitions requesting such an EPA objection. 42 U.S.C. § 7661d(b)(2).

its permit issuance process, both in general and with respect to the Riverview Permit. For example, a 2002 Indiana Protocol for Incorporating Federally-Approved Permits into Title V Operating Permits (agreed to by IDEM and EPA Region 5) indicates: "Combined New Source Review (NSR)/Title V permits shall state that the combined permit serves as both a Title V and a NSR permit (specifying minor NSR, major nonattainment area NSR, or PSD as appropriate)."[54] Similarly, the protocol states that "The public notice shall state that both a Title V and a NSR action are occurring simultaneously. A [Technical Support Document (TSD)] will accompany the NSR/Title V permit at public notice. The TSD will state that the permit serves as the Title V and the NSR permit." *Id*. at 2. Here, the Riverview public notice referred to the Permit as "the draft new source construction *and* Part 70 Operating Permit." Spencer County Journal-Democrat at 10 (October 24, 2018) (emphasis added). Similarly, the Draft Permit itself is titled a "Prevention of Significant Deterioration (PSD)/New Source Construction *and* Part 70 Operating Permit." Draft Permit at 1 (emphasis added). The TSD accompanying the Draft Permit contains similar language. Draft TSD at 2.

IDEM's decision to issue a single permit document to satisfy the legal requirements of two distinct permitting programs does not alter the applicability of the requirements associated with each respective program. For example, substantive requirements unique to PSD would not be applied to establish or evaluate non-PSD-based title V permit terms (such as terms based on the Indiana SIP or federal NSPS or NESHAP regulations). Likewise, procedural requirements unique to title V (including the title V objection and petition opportunity)[55] would not be extended to substantive elements of the permit action unique to the PSD permitting process (such as air quality modeling or the establishment of BACT limits). After all, EPA's objection authority, and the public's ability to petition EPA to object, are confined by the Act to title V permits. *See* 42 U.S.C. § 7661d(b). As explained in prior orders, the EPA does not believe that Congress, in establishing title V and the EPA objection authority, intended to broaden the oversight tools already available for title I permitting decisions. *See Big River Steel Order* at 15–16; *PacifiCorp-Hunter Order* at 14–15.[56] The procedures by which IDEM issues PSD and title V permits does not alter this basic principle. Accordingly, the EPA disagrees with the Petitioners' suggestion that, "By combining construction permit requirements and operating permit

[54] Indiana Protocol or Incorporating Federally-Approved Permits into Title V Operating Permits at 1 (January 16, 2002) (2002 Indiana Protocol), *available at https://www.epa.gov/sites/production/files/2017-11/documents/indiana_protocol_for_incorporating_federally-approved_permits.pdf.*

[55] Various other procedural requirements are unique to title V, including, for example, requirements related to permit applications (40 C.F.R. § 70.5), mailing lists (40 C.F.R. § 70.7(h)(1)), reopening for cause (40 C.F.R. § 70.7(g)), and notifying affected states (40 C.F.R. § 70.8(b)).

[56] *See also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

requirements into a single permit, Indiana chose to apply Title V objection procedures to the entire permit."[57] Petition at 7.

The Petitioners argue that it would be "impractical" or "infeasible to restrict the public's Title V petition opportunity solely to those permit conditions that are found to be sufficiently Title V-related" because in combined permits, "construction and operating conditions are intertwined." Petition at 6. The EPA disagrees. Title V permits (whether initially combined with a PSD permit or subsequently revised to incorporate the terms of a previously-issued PSD permit) "shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based." 40 C.F.R. § 70.6(a)(1)(i). IDEM's Protocol for incorporating PSD permits into title V permits similarly states: "For each NSR permit term or condition, IDEM will indicate the permit number and the specific NSR program under which it was issued in the permit condition and the Technical Support Document (TSD) for the Title V permit." 2002 Indiana Protocol at 1. In the Riverview Permit, identifying PSD-based permit terms (such as the BACT limits challenged by the Petitioners) is a straightforward task, readily apparent from the face of the Permit. *See, e.g.*, Final Permit at 75 (Condition D.3.1) (heading to permit terms identifying them as "Prevention of Significant Deterioration (PSD) BACT" limits and citing IDEM's PSD regulations, then individually identifying each limit as a "PSD BACT" limit).

To support their "impracticality" argument, the Petitioners note that both IDEM's PSD and title V programs impose monitoring and recordkeeping requirements, and both regulatory programs are cited as the basis for certain monitoring and recordkeeping conditions in the Permit. *Id*. at 6–7. This specific example actually undermines the Petitioners' argument. As the EPA explained in the *South Louisiana Methanol Order*:

> Unlike the BACT determination claims discussed above, claims concerning whether a title V permit contains enforceable permit terms, supported by monitoring sufficient to assure compliance with an applicable requirement or permit term (such as an emission limit established in a PSD permit), are properly reviewed during title V permitting. The statutory obligations to ensure that each title V permit contains "enforceable emission limitations and standards" supported by "monitoring . . . requirements to assure compliance with the permit terms and conditions," 42 U.S.C. § 7661c(a), (c), apply independently from and in addition to the underlying regulations and permit actions that give rise to the emission limits

[57] Additionally, the EPA notes that the 2002 Indiana Protocol suggests an intention by the EPA and IDEM *not* to upset the appeal procedures for the title I and title V aspects of combined permits. Specifically, the Protocol states: "IDEM's use of a combined permit shall not affect the ability of any person to appeal a PSD permit to EPA's Environmental Appeals Board (EAB) in accordance with 40 C.F.R. Part 124. Appeal to the EAB of a PSD permitting action may result in a stay of the effectiveness of the permit for purposes of Title I. Appeal of the permit, for purposes of Title I, and review and objection of the permit for purposes of Title V, shall follow the procedures at 40 C.F.R. Part 124, IC 13-15-6 appeal of agency issue or deny permit, and 40 C.F.R. Part 70, respectively." 2002 Indiana Protocol at 2. The Protocol refers to the EAB because at that time, IDEM issued federal PSD permits under a delegation of authority by EPA, and such permits were appealable to the EAB. Now, IDEM issues PSD permits based on its own EPA-approved state rules, and appeals are heard through the state administrative appeal and court system. This does not change the basic principle expressed in the Protocol—*i.e.*, that title I and title V appeal procedures should not be impacted by the issuance of a combined permit.

> and standards that are included in a title V permit. Therefore, the EPA will address the merits of those portions of the Petition that challenge the enforceability of emission limits and the sufficiency of monitoring conditions in the Permit.

South Louisiana Methanol Order at 10–11 (footnote omitted); *see Big River Steel Order* at 17, 17 n.30, 19 n.32, and 20; *PacifiCorp-Hunter Order* at 16, 17, 18, 18 n.33, and 19. Accordingly, although monitoring, recordkeeping, and reporting requirements can be an area of overlap between the PSD and title V programs, the sufficiency of monitoring conditions will always be subject to review through title V. *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008). Therefore, the initial origin of these requirements is irrelevant to determining whether the EPA will review whether the title V permit contains sufficient monitoring; the straightforward answer is that these are title V requirements that are subject to review in the title V process. Overall, in the circumstances present here, the EPA finds no difficulty in separating requirements that are exclusively derived from PSD from those that are derived from title V and subject to its unique review authorities.

The Petitioners also argue that the EPA must consider the substantive PSD issues in this title V petition because of statements in Federal Register preambles associated with the EPA's approval of Indiana's PSD program. These preamble statements, which indicated that EPA would review PSD-related issues through its title V oversight mechanisms, simply reflected the EPA's understanding at that time and mirrored similar non-binding statements made elsewhere during this time period, such as in title V petition orders. Notably, in both the *Big River Steel* and *PacifiCorp-Hunter Orders*, the EPA acknowledged similar statements, including statements made in the PSD SIP approvals for other states. *See Big River Steel Order* at 13 n.24 (citing Oregon and Idaho SIP approvals and explaining, "In these approvals the EPA pointed to its authority under title I, sections 113 and 167, and stated that title V 'has added new tools' for addressing concerns with implementation of PSD requirements by allowing for objection to title V permits under section 505(b) of the Act. However, the authority to revisit an issued preconstruction permit in the title V process does not appear to have been dispositive to the approval of these PSD programs as the EPA could still conduct oversight using its title I authorities."); *see also PacifiCorp-Hunter Order* at 12 n.23 (same); *see also id.* at 11–13. Like the Oregon and Idaho approvals referenced in *Big River Steel* and *PacifiCorp-Hunter*, the Indiana SIP approval did not rely on the availability of title V oversight as a basis for approving the state's PSD program (*i.e.*, as a substitute for title I oversight mechanisms that were otherwise lacking). Instead, these program approvals also referenced the relevant title I oversight authorities (the Petitioners omit this discussion from the quoted material provided in the Petition) and simply described the title V objection authority as an "added new tool[]" for oversight. 68 FR at 9894–95. In sum, the preamble statements quoted by the Petitioners simply reflected the EPA's interpretations and policies as they existed at the time, but which no longer reflect the EPA's understanding of the relationship between Indiana's PSD and title V programs.

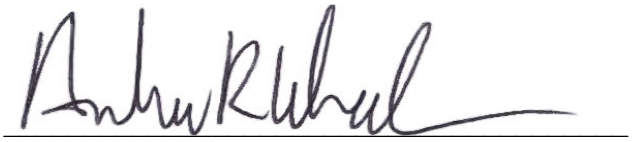
For the reasons presented above, the EPA disagrees with the Petitioners' contentions that the EPA must review the Petitioners' PSD claims in this title V petition response. In developing Riverview's PSD permit conditions, IDEM defined the relevant title I-based "applicable requirements" for title V permitting purposes. Here, the Petitioners' claims regarding PSD issues question the propriety of "applicable requirements" established through the PSD permit issuance

process. Given that these PSD-based applicable requirements are included verbatim in the Riverview title V Permit (by virtue of the single permit document), the Petitioners have failed to demonstrate that the title V permit is "not . . . in compliance with applicable requirements" or the requirements of part 70.[58] 40 C.F.R. § 70.8(c)(1); *see* 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). Accordingly, the EPA denies these PSD-related claims.

V. CONCLUSION

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

Dated: 03/26/2020



Andrew R. Wheeler
Administrator

[58] As noted above, Petitioners *could have* demonstrated that the title V permit, despite incorporating the terms and conditions of the PSD permit verbatim, failed to meet the requirements of part 70 because it lacked adequate monitoring, recordkeeping, or reporting or because it failed to comply with part 70 procedural requirements. However, Petitioners have not demonstrated any such flaws, as discussed in EPA's Response to Title V Claims 1–4 (Petition Claims I.A, II, VI, and VII).