

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	PETITION NO. IV-2021-6
)	
UOP LLC)	ORDER RESPONDING TO
UOP MOBILE PLANT)	PETITION REQUESTING
MOBILE COUNTY, AL)	OBJECTION TO THE ISSUANCE OF
PERMIT No. 503-8010)	TITLE V OPERATING PERMIT
)	
ISSUED BY THE ALABAMA DEPARTMENT)	
OF ENVIRONMENTAL MANAGEMENT)	

**ORDER GRANTING IN PART AND DENYING IN PART A PETITION FOR
OBJECTION TO PERMIT**

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition on April 2, 2021 (the Petition) from Greater-Birmingham Alliance to Stop Pollution (GASP or the Petitioner), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to operating permit No. 503-8010 (the Permit) issued by the Alabama Department of Environmental Management (ADEM) to the UOP LLC Mobile Plant (UOP or the facility) in Chickasaw, Mobile County, Alabama. The operating permit was issued pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and Chapter 355-3-16 of the Alabama Administrative Code. *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 grants in part and denies in part the Petition requesting that the EPA Administrator object to the Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA’s implementing regulations at 40 C.F.R. part 70. The EPA granted interim approval of ADEM’s title V operating permit program in 1995, 60 Fed. Reg. 57346 (November 15, 1995), and the EPA granted full approval of ADEM’s title V program in 2001. 66 Fed. Reg. 54444 (October 29, 2001). This program, which became effective on November 28, 2001, is codified in

Chapter 335-1-7 (“Operating Permit Fees”) and Chapter 335-3-16 (“Operating Permit Regulations for Major Sources”) of the Alabama Administrative Code.

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) 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. 42 U.S.C. § 7661d(a). 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. 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. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

Each petition must identify the proposed permit on which the petition is based and identify the petition claims. 40 C.F.R. § 70.12(a). Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under part 70. 40 C.F.R. § 70.12(a)(2). Any arguments or claims the petitioner wishes the EPA to consider in support of each issue raised must generally be contained within the body of the petition.¹ *Id.*

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). 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); *see also* 40 C.F.R. § 70.12(a)(2)(v).

¹ If reference is made to an attached document, the body of the petition must provide a specific citation to the referenced information, along with a description of how that information supports the claim. In determining whether to object, the Administrator will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. *Id.*

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. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).² Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.³ The petitioner’s demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a “discretionary component,” under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator’s part to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 (“[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements.”); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) “clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made” (emphasis added)).⁴ 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 1130–31.⁵ Certain aspects of the petitioner’s demonstration burden are discussed in the following paragraph. A more detailed discussion can be found in the preamble to the EPA’s proposed petitions rule. *See* 81 Fed. Reg. 57822, 57829–31 (August 24, 2016); *see also 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 a petitioner has provided the relevant analyses and citations to support its claims. For each claim, the petitioner must identify (1) the specific grounds for an objection, citing to a specific permit term or condition where applicable; (2) the applicable requirement as defined in 40 C.F.R. § 70.2, or requirement under part 70, that is not met; and (3) an explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under part 70. 40 C.F.R. § 70.12(a)(2)(i)–(iii). If a petitioner does not identify these elements, 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

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

³ *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.

⁴ *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)).

⁵ *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

1131 (“[T]he Administrator’s requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.”).⁶ Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013).⁷ Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g., In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).⁸

Another factor the EPA examines is whether the petitioner has addressed the state or local permitting authority’s decision and reasoning. Petitioners are required to address the permitting authority’s final decision and final reasoning (including the state’s response to comments) where these documents were available during the timeframe for filing the petition. 40 C.F.R. § 70.12(a)(2)(vi); *see MacClarence*, 596 F.3d at 1132–33.⁹ Specifically, the petition must identify where the permitting authority responded to the public comment and explain how the permitting authority’s response is inadequate to address (or does not address) the issue raised in the public comment. *Id.*

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) generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. 40 C.F.R. § 70.13. 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 required by § 70.7(a)(5) (sometimes referred to as the ‘statement of basis’); any comments the permitting authority received during the public participation process on the draft permit; the permitting authority’s written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; and all 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).

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.

⁹ *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).

Id. 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. *Id.*

If the EPA grants a title V petition, a permitting authority may address the EPA's objection by, among other things, providing the EPA with a revised permit. *See, e.g.*, 40 C.F.R. § 70.7(g)(4); *see generally* 81 Fed. Reg. 57822, 57842 (August 24, 2016) (describing post-petition procedures); *Nucor II Order* at 14–15 (same). In some cases, the permitting authority's response to an EPA objection may not involve a revision to the permit terms and conditions themselves, but may instead involve revisions to the permit record. For example, when the EPA has issued a title V objection on the ground that the permit record does not adequately support the permitting decision, it may be acceptable for the permitting authority to respond only by providing an additional rationale to support its permitting decision.

When the permitting authority revises a permit or permit record in order to resolve an EPA objection, it must go through the appropriate procedures for that revision. The permitting authority should determine whether its response is a minor modification or a significant modification to the title V permit, as described in 40 C.F.R. § 70.7(e)(2) and (4) or the corresponding regulations in the state's EPA-approved title V program. If the permitting authority determines that the modification is a significant modification, then the permitting authority must provide for notice and opportunity for public comment for the significant modification consistent with 40 C.F.R. § 70.7(h) or the state's corresponding regulations.

In any case, whether the permitting authority submits revised permit terms, a revised permit record, or other revisions to the permit, and regardless of the procedures used to make such revision, the permitting authority's response is generally treated as a new proposed permit for purposes of CAA § 505(b) and 40 C.F.R. § 70.8(c) and (d). *See Nucor II Order* at 14. As such, it would be subject to the EPA's 45-day review per CAA § 505(b)(1) and 40 C.F.R. § 70.8(c), and an opportunity for the public to petition under CAA § 505(b)(2) and 40 C.F.R. § 70.8(d) if the EPA does not object during its 45-day review period.

When a permitting authority responds to an EPA objection, it may choose to do so by modifying the permit terms or conditions or the permit record with respect to the specific deficiencies that the EPA identified; permitting authorities need not address elements of the permit or the permit record that are unrelated to the EPA's objection. As described in various title V petition orders, the scope of the EPA's review (and accordingly, the appropriate scope of a petition) on such a response would be limited to the specific permit terms or conditions or elements of the permit record modified in that permit action. *See In the Matter of Hu Honua Bioenergy, LLC*, Order on Petition No. VI-2014-10 at 38–40 (September 14, 2016); *In the Matter of WPSC, Weston*, Order on Petition No. V-2006-4 at 5–6, 10 (December 19, 2007).

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. 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. 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 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.

The EPA has approved Alabama’s PSD, NNSR, and minor NSR programs as part of its SIP. *See* 40 C.F.R. § 52.50 (identifying EPA-approved regulations in the Alabama SIP. Alabama’s major and minor NSR provisions, as incorporated into Alabama’s EPA-approved SIP, are contained in portions of Alabama Administrative Code 335-3-14 and 335-3-15.

III. BACKGROUND

A. The UOP Plant

The UOP Plant, owned by UOP LLC, is located at 1 Linde Dr., Chickasaw, Alabama. The facility is a chemical production plant that produces synthetic materials to be used as adsorbents and/or catalyst in various manufacturing application. The facility is a major source under title V for particulate matter (PM and PM10), carbon monoxide (CO), and nitrogen oxides (NOx).

The EPA conducted an analysis using EPA’s EJSCREEN¹⁰ to assess key demographic and environmental indicators within a five-kilometer radius of the UOP facility. This analysis showed a total population of approximately 26,711 residents within a five-kilometer radius of the facility, of which approximately 81 percent are people of color and 64 percent are low income. In addition, the EPA reviewed the EJSCREEN Environmental Justice Indices, which combine certain demographic indicators with eleven environmental indicators. All eleven EJ indices in

¹⁰ EJSCREEN is an environmental justice mapping and screening tool that provides the EPA with a nationally consistent dataset and approach for combining environmental and demographic indicators; see <https://www.epa.gov/ejscreen/what-ejscreen>.

this five-kilometer area exceed the 80th percentile in the State of Alabama, with seven of the eleven EJ indices exceeding the 90th percentile.

B. Permitting History

ADEM issued the UOP's initial title V permit on August 15, 2003, which was renewed in 2012. The current action is the facility's second renewal permit. For this permit, ADEM published notice of a draft permit (the Draft Permit), along with a Statement of Basis document, on July 6, 2020, with a 30-day public comment period that originally ran until August 5, 2020, which was extended to October 27, 2020. On December 16, 2020, ADEM transmitted a proposed permit (the Proposed Permit), along with its response to public comments (RTC), to the EPA. The EPA's 45-day review period ended on February 1, 2021, during which time the EPA did not object to the Proposed Permit. On February 2, 2021, ADEM issued a final permit (the Final Permit) to UOP.

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. CAA § 505(b)(2). The EPA's 45-day review period expired on February 1, 2021. Thus, any petition seeking the EPA's objection to the Proposed Permit was due on or before April 5, 2021. The Petition was dated and received on April 2, 2021, and, therefore, was timely filed.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONER

Claim 1: The Petitioner Claims That “the Statement of Basis Should Include Additional Information to Fulfill Required Elements of § 502 of the CAA.”

Claim 1 is found on pages 8–14 (Section I.A.i) of the Petition.

Petitioner's Claim: The Petitioner claims that ADEM failed to include key information in the statement of basis that is required under 40 C.F.R. § 70.7(a)(5) and necessary for meaningful public review. Petition at 8–9, 11. Specifically, the Petitioner asserts that the statement of basis is lacking five key elements:

1. Attainment status of the area in which UOP Mobile Plant operates;
2. Construction and permitting history of UOP Mobile Plant;
3. An adequate summary of what the facility is and what it produces. Currently, even at the emissions unit level, it is not clear what each unit does in its relation to the production of chemicals;
4. An explanation of the plantwide applicability limits (hereinafter “PALs”) and what PALs exist and to which emissions units they apply; and
5. A description of how specific emission points within certain emissions units will meet more stringent limits to avoid PSD review. More information is needed than merely asserting “the facility has committed to more stringent limits.”

Id. at 11–12. The Petitioner contends that the EPA has previously held that the information requested by the Petitioner are “elements which, if applicable should be included in the statement of basis.” *Id.* at 12.¹¹

In addition, the Petitioner claims that ADEM failed to adequately respond to the Petitioner’s comments requesting that this information be added to the statement of basis. *Id.* at 10, 13. The Petitioner asserts that ADEM provides no direct response to the statement of basis issues and only responds to some of their concerns in relation to other public comments. *Id.* at 13. The Petitioner contends that even where ADEM responded at all, the response was not sufficient. *Id.* at 13–14.

EPA’s Response: For the following reasons, the EPA grants in part and denies in part the Petitioner’s request for an objection on this claim. Specifically, the EPA denies the Petitioner’s claim with regards to elements 3 and 4 and grants the Petitioner’s claim with regard to elements 1, 2, and 5.

With regard to element 3 (adequate summary of what the facility is and what it produces), the Petitioner has failed to address key information in the record and has failed to demonstrate a flaw in the permit. In the RTC, ADEM provided a brief explanation of the facility and stated, “A summary of the products produced and the processes utilized by the facility can be located in the Major Source Operating Permit renewal application.” RTC at 1. While the Petitioner acknowledges ADEM response, they do not appear to have attempted to look for the application or locate the requested information in the application. The EPA was easily able to locate the renewal application in Alabama’s eFile¹² system by following the suggested steps in ADEM’s public notice.¹³ Given the availability of this application, the Petitioner has not demonstrated why this particular information must be in the statement of basis in this particular instance. While the Petitioner is correct that EPA’s 2014 memorandum regarding statement of basis content suggested that a description of the facility be included in the statement of basis, the EPA specifically explained that these are not “‘hard and fast’ rules” and that “[s]uch information could also be included in other parts of the permit record.”¹⁴ Because the Petitioner does not engage with ADEM’s response to comments on this point and did not acknowledge in its Petition that this information is in fact in the permit record, the Petitioner has failed to make a specific demonstration as to why the description of the facility must be duplicated in the statement of basis in addition to its inclusion in another part of the permit record, like the application.¹⁵

With regard to element 4 (explanation of PALs), the Petitioner has failed to adequately address the state’s response and demonstrate a flaw in the permit. In the RTC, ADEM clearly explained

¹¹ Citing Memorandum from Stephen D. Page on Implementation Guidance on Annual Compliance Certification Reporting and Statement of Basis Requirements for Title V Operating Permits (Apr. 30, 2014), Attachment 2 at 2–3.

¹² Available at <http://app.adem.alabama.gov/efile/>.

¹³ Facility/Permit No. 503-8010 Public Notice (July 6, 2020) at 1; UOP Major Operating Permit Renewal Application (May 17, 2017), available at <http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104321037&dbid=0>.

¹⁴ Memorandum from Stephen D. Page on Implementation Guidance on Annual Compliance Certification Reporting and Statement of Basis Requirements for Title V Operating Permits (Apr. 30, 2014), Attachment 2 at 3–4.

¹⁵ See *supra* notes 6–7 and accompanying text.

that UOP does not have a PAL. RTC at 6. In the Petition, the Petitioner only restates the comment that the statement of basis must include an explanation of PALs and what emission unit they apply to. Petition at 11. The Petitioner did not address the state’s explanation that the facility is not subject to any PALs or otherwise demonstrate that the facility is actually subject to a PAL. Therefore, the Petitioner has failed to address the state’s final reasoning and failed to demonstrate a flaw in the permit.¹⁶

With regard to elements 1 (attainment status), 2 (construction and permitting history), and 5 (synthetic minor limits and justification for monitoring, recordkeeping, and reporting), the EPA grants the Petitioner’s claim because the state has failed to adequately respond to significant public comments as required by 40 C.F.R. § 70.8(a)(1). Well-established principles of administrative law provide that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments.¹⁷ In this case, comments on the content of the statement of basis are significant comments because they concern the requirement under 40 C.F.R. § 70(a)(5) to provide a statement of basis for the draft permit.¹⁸ The EPA has long required permitting authorities to respond to significant comments¹⁹ and now codified this principle in 40 C.F.R. § 70.8(a)(1), requiring states to provide a response to all significant comments to the EPA with the proposed permit.²⁰ For elements 1 and 2, ADEM appears to have completely ignored the Petitioner’s public comments and did not provide any response to these concerns in the RTC. For element 5, the state did explain that the synthetic minor limits were located “in the permit record,” and also explained in the public notice that the administrative record was available on ADEM’s eFile system.²¹ However, ADEM did not provide any further helpful information on the synthetic minor limits or point to any justification that the monitoring, recordkeeping, and reporting requirements would assure compliance with these synthetic minor limits. Without some specificity, simply stating that information about the synthetic minor limits is “in the permit record” is not a sufficient response to the public’s detailed comments and does not satisfy the requirements of 40 C.F.R. 70.8(a)(1). Therefore, the EPA grants the Petitioner’s claim that the state did not adequately address the Petitioner’s claim that the statement of basis does not contain information on attainment status; construction and permitting history; or the synthetic minor limits and the justification for associated monitoring, recordkeeping, and reporting.

¹⁶ See *supra* note 9 and accompanying text.

¹⁷ See, e.g., *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (“[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”).

¹⁸ See 85 Fed. Reg. 6431, 6436 (February 5, 2020) (“Significant comments in this context include, but are not limited to, comments that concern whether the title V permit includes terms and conditions addressing federal applicable requirements and requirements under part 70, including adequate monitoring and related recordkeeping and reporting requirements.”).

¹⁹ See generally *In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC*, Petition No. 11-2000-07, Order on Petition No. II-2000-07 (May 2, 2001) (applying the concepts of meaningful public participation and logical outgrowth to title V); *In the Matter of Murphy Oil USA, Inc., Meraux Refinery*, Petition No. 2500-00001-V5, Order on Petition No. VI-2011-02 (Sept. 21, 2011) (discussing a response to significant comments as “an inherent component of any meaningful notice and opportunity for comment.”); see also *In the Matter of Blanchard Refining Company, Galveston Bay Refinery*, Order on Petition No. VI-2017-7 at 35 (August 9, 2021).

²⁰ See 85 Fed. Reg. at 6439–40 (discussing the EPA’s historical implementation of this principle, its new regulations codifying this requirement, and providing guidance on what constitutes a “significant comment”).

²¹ RTC at 5; Facility/Permit No. 503-8010 Public Notice (July 6, 2020) at 1.

Direction to ADEM: ADEM must respond to the significant comments regarding the lack of information in the statement of basis. The information referenced in the July 1, 2014, Stephen Page memorandum is a general guidance for what should be included in the statement of basis for a title V permit.²² In some circumstances, it could be reasonable for a state to conclude that some of this information could be contained elsewhere in the permit record. However, in this case, ADEM should, at a minimum, respond to these significant public comments to specifically identify which documents and pages contain this information. With regard to the Petitioner’s claim that the statement of basis does not contain a justification for the monitoring, recordkeeping, and reporting for the synthetic minor limits, ADEM indicates that the justification for the monitoring is in the record without identifying where in the record. Even if a previous iteration of the permit provided a justification for the monitoring, recordkeeping, and reporting, ADEM should either repeat that justification in the response to comments document or specifically identify the location of the justification and confirm whether the monitoring, recordkeeping, and reporting is still adequate.

Claim 2: The Petitioner Claims That “ADEM Fails to Include Adequate Monitoring, Recordkeeping, and Reporting Requirements.”

Claim 2 is found on pages 14–17 (Section I.A.i) and 27–33 (Section II) of the Petition.

Petitioner’s Claim: The Petitioner claims that the permit does not contain adequate monitoring, recordkeeping, and reporting to assure compliance with the 20% and 40% opacity limits,²³ the PM emission limits, and SO₂ emission limits in the permit. Petition at 14–15, 30–32. Further, the Petitioner contends that the permit record lacks a justification that the monitoring, recordkeeping, and reporting in the permit assures compliance with these limits. *Id.* at 15, 30–32.

The Petitioner asserts that the permit only requires that visible emissions be checked “at least once per day on at least two days per calendar week” using Method 9 for the opacity and PM emission limits. *Id.* at 15. The Petitioner claims that the permit record does not provide a justification for why Method 9 observations twice per week assure compliance with a 6-minute average opacity limit and the various hourly PM emission limits, such as the 0.30 lb/hr PM limit for unit EP-138, 0.10 lb/hr, 0.084 lb/hr, and 0.05 lb/hr PM, PM₁₀, and PM_{2.5} limits for unit EP-141. *Id.* at 31–32 (citing Draft Permit at 1-3, 2-1, 2-3, 3-3, 4-4, 5-3, 6-3, 17-4, and throughout). Further, the Petitioner claims that the permit allows for “‘alternate test methods’ to be used with prior approval by ADEM (without any discussion as to how these alternate methods can be determined—including whether or not those methods must be based on EPA-approved alternatives or whether public input will be accepted).” *Id.* at 15. In addition, the Petitioner claims that the permit contains no monitoring, recordkeeping, and reporting for the hourly SO₂ emission limits and the record contains no justification for the lack of monitoring, recordkeeping, and reporting. *Id.* at 32–33.

²² See generally Stephen D. Page on Implementation Guidance on Annual Compliance Certification Reporting and Statement of Basis Requirements for Title V Operating Permits (Apr. 30, 2014), Attachment 2.

²³ Alabama Administrative Code Chapter 333-3-4-.01(1).

In addition, the Petitioner claims that ADEM's response to comment was inadequate because ADEM only identified when the visible emission monitoring was added to the permit in 2003 and did not actually explain how the visible emission checks twice per week assure compliance with opacity and hourly PM limits. *Id.* The Petitioner asserts that the RTC did not address the rationale for the lack of SO₂ monitoring, recordkeeping, and reporting at all. *Id.*

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

The Petitioner has demonstrated that the permit record is inadequate to explain the rationale for the monitoring, recordkeeping, and reporting in the permit for the 20% and 40% opacity limits, and the various PM and SO₂ emission limits (including hourly limits). Additionally, ADEM did not adequately respond to public comments raising these concerns. While the RTC does refer to the 2003 permit and permit record for the rationale for the selected monitoring, recordkeeping, and reporting, ADEM provides no further details as to where the rationale for the monitoring is in the permit record. While it may be reasonable for ADEM to not restate the rationale for all monitoring, recordkeeping, and reporting in the statement of basis for this renewal permit, ADEM must adequately respond to significant public comments regarding the adequacy of monitoring, recordkeeping, and reporting during permit renewals.²⁴ In this case, the comments raised specific concerns regarding opacity, PM, and SO₂ emission limits with short averaging times, and ADEM did not explain how two visible emissions monitoring checks per week would assure compliance with opacity and hourly PM emission limits. Further, the permit record does not include any explanation for how the provision allowing the alternative test methods assures compliance with the opacity and PM limits. In addition, ADEM did not provide any explanation for the lack of SO₂ monitoring, recordkeeping, and reporting in the permit.

Direction to ADEM: ADEM must adequately respond to the significant comments regarding the monitoring, recordkeeping, and reporting for the opacity, PM, and SO₂ limits in the permit. ADEM should modify the permit record and respond to public comments regarding the justification in the record for the monitoring, recordkeeping, and reporting for the opacity, PM, and SO₂ limits. If the 2003 permit record contains some justification for the monitoring, recordkeeping, and reporting, ADEM should specifically cite to those portions of the record, including page numbers, when responding to the significant comments.

In the process of developing and properly referencing a justification for the monitoring, recordkeeping, and reporting, if ADEM determines that additional monitoring, recordkeeping, and reporting is necessary to assure compliance with hourly emission limits, then ADEM should modify the permit as necessary. For example, if the permit currently only contains twice per week opacity observations for an hourly opacity limit, ADEM should consider whether additional direct or parametric monitoring, such as hourly parametric monitoring of a control device or hourly records of fuel flow, would be necessary to assure ongoing compliance with the hourly limit.

²⁴ See *supra* notes 16–17 and accompanying text.

Claim 3: The Petitioner Claims That “ADEM Has Not Demonstrated UOP Mobile Plant is Entitled to a Permit Shield.”

Claim 3 is found on pages 17–19 (Section I.A.ii) of the Petition.

Petitioner’s Claim: The Petitioner claims that the Permit should not include a permit shield because ADEM has not provided a rationale for the permit shield. Petition at 18. Specifically, the Petitioner asserts that the record fails to explain how “based on merely thirteen inspections, several of which were unable to observe emission units of significant concern, the State has sufficient information to grant a permit shield over the entire plant.” *Id.* In addition, the Petitioner states, “The only information provided in the Final Permit as to the existence of the permit shield is in General Permit Proviso No. 33, which states that a permit shield already exists under the facility’s operating permit.” *Id.* Further, the Petitioner contends that the permit shield cannot apply to PSD and that “the permit shield cannot preclude enforcement for violations of a standard or requirement unless the permit contains “a specific determination” that PSD does not apply.” *Id.* at 18–19.

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

The Petitioner has not demonstrated that the permit shield granted in the UOP permit in General Provision No. 33 is inconsistent with 40 C.F.R. § 70.6(f). The Petitioner claims that General Provision No. 33 does not provide any details on the extent of the permit shield; however, this provision incorporates by reference the applicable requirements and nonapplicability determinations in Section 3 of the title V renewal application.²⁵ As the EPA explained under the response to Claim 1, the EPA was easily able to locate the renewal application on Alabama’s eFile²⁶ system, and Section 3 clearly identifies the requirements that ADEM approved for the permit shield.²⁷ General Provision No. 33 makes it clear that the permit shield extends only to requirements that are identified specifically in the title V permit, either as an applicable requirement or in a nonapplicability determination in Section 3 of the application.²⁸ This language does not extend the shield to compliance with or violation of applicable requirements that are not specifically included in the permit or nonapplicability determination.

With regard to the Petitioner’s claim that the permit shield applies to NSR in general, Section 3 of the application is clear that the source is subject to PSD.²⁹ While the Petitioner is correct that the title V permit contains synthetic minor NSR limits that apply to the source to avoid PSD review for a particular modification, the permit shield only shields the source from an enforcement action for violation of PSD for that particular modification as long as the source complies with its synthetic minor NSR limits. The permit shield does not and cannot shield the

²⁵ Final Permit at 0-10, General Provision No. 33.

²⁶ Available at <http://app.adem.alabama.gov/efile/>.

²⁷ Facility/Permit No. 503-8010 Public Notice (July 6, 2020), Section 3, 3-1; UOP Major Operating Permit Renewal Application (May 17, 2017), available at <http://ef.adem.alabama.gov/WebLink/DocView.aspx?id=104321037&dbid=0>.

²⁸ *In the Matter of Onyx Environmental Services*, Order on Petition No. V-2005-1, 12 (February 1, 2006).

²⁹ Facility/Permit No. 503-8010 Public Notice (July 6, 2020), Section 3, 3-1; UOP Major Operating Permit Renewal Application (May 17, 2017).

source in its entirety from PSD review if an unpermitted modification has been or were to be made at the facility.³⁰ Therefore, the Petitioner has not demonstrated that General Provision 33 could preclude an appropriate enforcement action for alleged violations PSD or any other requirements not covered by General Provision 33 and Section 3 of the application.

To the extent that the Petitioner is claiming that ADEM did not adequately respond to public comments regarding the permit shield, the Petitioner has not demonstrated that ADEM's response was insufficient. The Petitioner asserts that all ADEM responded with was "[a]s part of its application, the facility requested a permit shield." The Petitioner's assertion on this point is inaccurate since ADEM clearly pointed to Section 3 of the application in its response and explained that compliance with the conditions of this permit shall be deemed compliance with any applicable requirements as of the date of permit issuance" and that "requirements listed as non-applicable in such section are not applicable to this source." RTC at 3. The Petitioner has failed to address the state's response and seems to wholly ignore the fact that the state directed the Petitioner to Section 3 of the application for the extent of the permit shield.³¹

Claim 4: The Petitioner Claims That "Many conditions for Specific Emissions Units Contain Severe Deficiencies in That They Merely Cite to Applicable Requirements Whole Cloth."

Claim 4 is found on pages 19–20 (Section I.A.iii) of the Petition.

Petitioner's Claim: The Petitioner claims that ADEM did not address the Petitioner's public comments regarding the lack of specificity for citations of authority in the title V permit. Petition at 19. The Petitioner asserts that the title V permit and permit record do not contain specific enough citations to the authority for applicable requirements in the title V permit. Petition at 19. Specifically, the Petitioner contends that for all units except EU 023, the permit generally cites to Alabama Administrative Code "335-314-.04 which contains fifty-eight pages of subparts." *Id.* at 20. Therefore, the Petitioner concludes that the title V permit fails to identify the specific origin and authority of each permit term and condition as required by the CAA and Part 70. *Id.*

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

The Petitioner has demonstrated that the permit record is inadequate to address the Petitioner's concern regarding the lack of specific citation to authority for various applicable requirements in the title V permit. In particular, the Petitioner has demonstrated ADEM did not adequately respond to public comments raising these concerns since the RTC did not address these comments at all. As explained in the response to Claim 1, Part 70 requires that states respond to all significant public comments, and the Petitioner has demonstrated that these comments were significant.³² In this case, the comments raised specific concerns about the general citations in the title V permit to ADEM's approved NSR permitting program under Alabama Administrative

³⁰ For a further discussion of the types of permit shields available to a source, see *Pacificorp Energy, Hunter Power Plant*, Order on Petition No. VIII-2016-4, at 21 (October 16, 2017).

³¹ See *supra* note 9 and accompanying text.

³² See *supra* notes 16–17 and accompanying text.

Code 335-314-.04. Given the lack of response by ADEM, the EPA cannot determine from the information in the record how these general citations might be said to satisfy the requirement to include references to the applicable statutory or regulatory provisions that form the legal and factual basis for the applicable requirements in the permit.³³

Direction to ADEM: ADEM must adequately respond to the significant comments regarding the lack of specific citations to authority throughout the permit, such as Alabama Administrative Code 335-314-.04. While addressing these public comments, ADEM should modify the permit or permit record as necessary to identify the specific authority for the applicable requirements, including emission limits, monitoring, recordkeeping, and reporting. For example, if the authority for a limit is an NSR permit, then ADEM should specifically identify the NSR permit as the origin of those applicable requirements.

Claim 5: The Petitioner Claims That “The Draft Permit Is Deficient Because It Does Not Include Practically Enforceable Emission Limits and Monitoring, Recordkeeping and Reporting Necessary To Avoid the Prevention of Significant Deterioration Requirements.”

Claim 5 is found on pages 20–25 (Section I.A.iv) of the Petition.

Petitioner’s Claim: The Petitioner claims that ADEM did not adequately respond to the Petitioner’s public comments regarding the origin and authority of the synthetic minor NSR limits and the underlying permit establishing those limits. Petition at 23. The Petitioner generally claims that the title V permit and permit record do not appear to contain an NSR permit establishing the synthetic minor limits that restricted UOP’s PTE to avoid PSD review. *Id.* at 22. The Petitioner states:

For example, Permit Unit No. 001, which covers three steam generation boilers, UOP states that “the boilers are subject to the state allowable particulate limit for fuel burning equipment; however, to purportedly avoid PSD review, the facility has committed to a more stringent particulate limit...of 3.4 lb/hr.”

*Id.*³⁴ The Petitioner claims that neither the title V permit nor statement of basis cite to the underlying permit where these limits were established. *Id.* at 23. The Petitioner asserts that the title V permit merely cites to generally to Alabama Administrative Code 335-3-14-.04 for origin of the synthetic minor limits. *Id.* The Petitioner contends that ADEM response fails to explain how the state’s NSR regulations alone without a permit action give it the authority to establish synthetic minor limits. *Id.* at 24.

EPA’s Response: For the following reasons, the EPA grants the Petitioner’s request for an objection on this claim.

³³ See 40 C.F.R. § 70.7(a)(5); Alabama Administrative Code 335-3-16-.05 (a) (“In addition, the permit shall include: 1. A statement or reference to the origin and authority for each term or condition in the permit and any difference in form as compared to the applicable requirement under this Chapter upon which the term or condition is based...”).

³⁴ Citing Statement of Basis at 2–3. See also Petition pages 24–25 for a further examples of synthetic minor emission limits.

The Petitioner has demonstrated that the permit record is inadequate to address the Petitioner's concern regarding the underlying NSR permit action establishing the synthetic minor NSR limits in the title V permit. Specifically, the Petitioner has demonstrated ADEM did not adequately respond to public comments raising these concerns. In the RTC, ADEM only stated: "The synthetic minor PSD emission limitations are located in the permit record. Furthermore, the ADEM construction and operating permits that were issued to enact these limitations were justified at the time of issuance." RTC at 6. While other portions of the record, like the renewal application, are easily located in the eFile system, the public and the EPA cannot be expected to locate an unidentified NSR permitting decision in a permit record spanning hundreds of documents when the permit does not provide any citation to the actual NSR permitting decision. As explained in the response to Claim 1, Part 70 requires that the state respond to all significant public comments and the Petitioner has demonstrated that these comments were significant.³⁵ In this case, the comments raised specific concerns about the origin of authority for the synthetic minor NSR limits and requested the state to direct the public to the NSR permitting action that established those limits. ADEM's general response that the permit record contains the synthetic minor limits does not address the Petitioner's concerns. Similar to the issue granted in Claim 4, the permit and permit record's general citation to the NSR permitting regulations under Alabama Administrative Code 335-314-.04 is insufficient to identify the origin of the synthetic minor emission limits. Further, this general citation and the RTC are insufficient for the EPA and the public to actually locate the NSR permitting decision establishing these synthetic minor NSR limits.

Direction to ADEM: ADEM must adequately respond to the significant comments regarding the underlying permitting decision for the synthetic minor NSR limits. Specifically, ADEM should provide a direct citation to the NSR permit and permitting record establishing those limits and include a copy of these documents in its current permitting record for this Title V permit renewal.³⁶ While addressing these public comments, ADEM should modify the permit or permit record as necessary to properly incorporate and cite to the NSR permitting decision creating these synthetic minor NSR limits. On the other hand, if ADEM established these synthetic minor limits using their title V permit program authority and not their approved NSR program, then ADEM should modify the title V permit to cite to the correct authority and modify the record to explain the technical basis for establishing these limits.³⁷

³⁵ See *supra* notes 16–17 and accompanying text.

³⁶ EPA notes that the eFile system appears to support sharing specific links to documents and encourages ADEM to provide direct links to documents to the public in the future when documents are requested.

³⁷ See 40 C.F.R. §§ 70.2 (Definition of "Emissions allowable under the permit"), 70.6(b)(1); Alabama Administrative Code 335-3-16-.01 (i), 335-3-16-.06 (1); 57 Fed. Reg. 32250, 32279 (July 12, 1992) ("Title V permits are an appropriate means by which a source can assume a voluntary limit on emissions for purposes of avoiding being subject to more stringent requirements.").

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 grant in part and deny in part the Petition as described above.

Dated: APR 27 2022



Michael S. Regan
Administrator