BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION NO. V-2021-10
	)	
WAELZ SUSTAINABLE PRODUCTS, LLC	)	ORDER RESPONDING TO
CASS COUNTY, INDIANA	)	PETITION REQUESTING
	)	OBJECTION TO THE ISSUANCE OF
PERMIT NO. 017-42728-00056	)	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, 2021 (the Petition) from Cass County Citizens Coalition (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. 017-42728-00056 (the Permit) issued by the Indiana Department of Environmental Management (IDEM) to Waelz Sustainable Products, LLC (WSP or the facility) in Logansport, Cass County, Indiana. The operating permit was issued pursuant to title V of the CAA, 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 in Section IV of this Order, EPA denies the Petition requesting that the EPA Administrator object to the Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 766la(d)(1), requires each state to develop and submit to EPA an operating permit program to meet the requirements of title V of the CAA and 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. EPA granted interim approval of Indiana's title V operating permit program in 1995, and EPA granted full approval in 2001. 66 Fed. Reg. 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. 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* 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 EPA for review. 42 U.S.C. § 7661d(a). Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the proposed permit if 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 EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of 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 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).

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

[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*.

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 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 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 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*).

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, 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

[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.

legal reasoning, evidence, and references is reasonable and persuasive.").[6] Relatedly, 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 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 EPA examines is whether the petitioner has addressed the state or local permitting authority's decision and reasoning contained in the permit record. 81 Fed. Reg. at 57832; *see V Voigt v. EPA*, 46 F.4th 895, 901–02 (8th Cir. 2022); *MacClarence*, 596 F.3d at 1132–33.[9] This includes a requirement that petitioners 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). 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 EPA considers in determining 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). *Id.* If a final permit

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[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); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007) (*Georgia Power Plants Order*); *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); *Georgia Power Plants Order* at 9–13 (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).

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 determining whether to grant or deny the petition. *Id*.

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. 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 EPA's federal PSD program, which applies in areas without a SIP-approved PSD program. 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. 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.

As relevant here, EPA has approved Indiana's PSD and minor NSR programs as part of its SIP. *See* 40 C.F.R. § 52.800 (identifying EPA-approved regulations in the Indiana SIP). Indiana's PSD and minor NSR provisions, as incorporated into Indiana's EPA-approved SIP, are contained in portions of 326 IAC 2.

Where EPA has approved a state's title I permitting program (whether PSD, NNSR, or minor NSR), duly issued preconstruction permits establish the NSR-related "applicable requirements" for the purposes of title V. As with "applicable requirements" established through other CAA authorities, 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 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).[10]

[10] However, as EPA noted in the *Big River Steel Order*, there may be circumstances that "warrant a different approach." *Big River Steel Order* at 11 n.20.

Accordingly, EPA will generally not consider the merits of a permitting authority's NSR permitting decisions in a petition to object to a source's title V permit. *See Big River Steel Order* at 8–9, 14–20.[11] Rather, any such challenges should be raised through the appropriate title I permitting procedures or enforcement authorities. This framework can apply even in situations where an NSR permit is issued at the same time, or even in the same document, as a title V permit. *See Big River Steel Order* at 11–12.

III. BACKGROUND

A. The WSP Facility

Waelz Sustainable Products, LLC operates a new facility in Logansport, Cass County, Indiana. The facility produces Waelz zinc oxide and Waelz iron product from electric arc furnace (EAF) dust generated from steel mini-mills. The facility consists of a number of emission units, including: various buildings, silos, and material transfer systems associated with raw materials; two natural-gas fired Waelz kilns; various buildings, silos, and loading systems associated with finished products; and several diesel-fired and natural gas-fired emergency generators. WSP is permitted as a major source under title V (with emissions of some pollutants over the relevant 100 ton per year threshold), but accepted limitations to restrict its potential emissions below the major stationary source thresholds for PSD (which IDEM determined to be 250 tons per year). The facility is subject to other requirements of the Indiana SIP and its emergency generators are subject to New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants.

EPA conducted an analysis using EPA's EJScreen[12] to assess key demographic and environmental indicators within a five-kilometer radius of the WSP facility. This analysis showed a total population of approximately 1,220 residents within a five-kilometer radius of the facility, of which approximately 15 percent are people of color and 39 percent are low income. In addition, EPA reviewed the EJScreen Environmental Justice Indices, which combine certain demographic indicators with 12 environmental indicators. Three of the 12 Environmental Justice Indices in this five-kilometer area exceed the 70th percentile when compared to the rest of the State of Indiana, including Lead Paint, Superfund Proximity, and RMP Facility Proximity.

[11] EPA views 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*); *Big River Steel Order* at 17, 17 n.30, 19 n.32, 20. Moreover, as 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[s]' remain[] 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.

[12] EJScreen is an environmental justice mapping and screening tool that provides EPA with a nationally consistent dataset and approach for combining environmental and demographic indicators. *See https://www.epa.gov/ejscreen/what-ejscreen*.

B. Permitting History

On March 30, 2020, WSP applied for a combined initial title V permit and minor NSR preconstruction permit. IDEM published notice of a Draft Permit, along with its statement of basis (called a Technical Support Document) on November 16, 2020. The Draft Permit was subject to a public comment period that ran until December 21, 2020. On December 17, 2020, IDEM held a virtual public hearing regarding the Draft Permit documents. On May 3, 2021, IDEM submitted the Proposed Permit, along with its responses to public comments (contained in an Addendum to the Technical Support Document, or ATSD), to EPA for its 45-day review. EPA's 45-day review period ended on June 17, 2021, during which time EPA did not object to the Proposed Permit. IDEM issued Permit No. 017-42728-00056 to WSP on June 18, 2021 (the Final Permit).

C. Timeliness of Petition

Pursuant to the CAA, if EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). EPA's 45-day review period expired on June 17, 2021. Thus, any petition seeking EPA's objection to the Proposed Permit was due on or before August 16, 2021. The Petition was dated and received on August 6, 2021, and, therefore, EPA finds that the Petitioner timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONER

The Petition raises five distinct claims that are not separately numbered. This Order addresses each claim in the order presented in the Petition, referring to these claims as Claims 1 through 5.

Claim 1: The Petitioner Claims That "The Permit is Unlawful Because WSP is a Secondary Metal Production Plant Subject to PSD."

Petitioner's Claim: In the Petitioner's first claim, the Petitioner alleges that WSP should have been considered a "secondary metal production plant," and accordingly that the facility should have been considered a "major stationary source" subject to PSD requirements. *Id*. at 11.

The Petitioner explains that sources that do not belong to one of 28 source categories listed in EPA's regulations are subject to a 250 ton per year PSD "major stationary source" applicability threshold. *Id*. at 5, 12 (citing 42 U.S.C. § 7479(1); 40 C.F.R. § 51.166; 326 IAC 2-2-1(ff)). By contrast, sources that belong to a listed source category—such as "secondary metal production plants"—are subject to a 100 ton per year PSD applicability threshold (and have to include fugitive emissions towards that threshold). *Id*. at 5, 11, 12. The Petitioner implies that emissions of at least one pollutant (particulate matter, or PM) from the WSP facility would exceed that 100 ton per year threshold. *See id*. at 2, 11.

The Petitioner presents multiple arguments to support its position that the WSP facility should be considered a "secondary metal production plant" subject to the lower 100 ton per year threshold. *See id*. at 12–19. The Petitioner's arguments address: the lack of a regulatory definition of this

term, the Petitioner's view of the "clear meaning" of this term, contentions about the Congressional intent behind this term, descriptions of various physical and chemical processes at WSP (addressing arguments from WSP and IDEM), other regulatory definitions and decisions, the relationship between source classifications and the Standard Industrial Classification Manual, and the treatment of similar facilities by other permitting authorities. *See id*. Given EPA's silence on the issue to date, the Petitioner ultimately concludes that it is time for EPA to independently evaluate the status of Waelz kilns under the PSD program. *Id*. at 19. Again, this claim is presented in the context of the Petitioner's assertion that "WSP is a secondary metal production plant subject to PSD." *Id*. at 11.

Notably, one of the Petition's background sections includes an argument that "EPA is statutorily obligated to consider Petitioner's" arguments regarding PSD applicability. *Id*. at 7; *see id*. at 7–10. For support, the Petitioner presents multiple lines of reasoning.

First, the Petitioner claims that the plain language of the CAA requires EPA to object to a title V permit that violates Indiana's NSR program. *Id*. at 8. Specifically, the Petitioner states that CAA § 505(b)(1) requires an EPA objection to permits that do not comply with "the requirements of an applicable implementation plan." *Id*. (quoting 42 U.S.C. § 7661d(b)(1)). The Petition argues that the NSR requirements in the Indiana SIP are "requirements" that become "applicable" when a new source meets the applicability criteria in the SIP. *Id*.

Next, the Petitioner addresses two court decisions. The Petitioner acknowledges a decision from the United States Court of Appeals for the Fifth Circuit, in which that court held that EPA's review under title V should *not* address NSR issues. *Id*. at 9 (citing *Envtl. Integrity Project v. EPA*, 969 F.3d 529 (5th Cir. 2020)). However, the Petitioner focuses on a differing decision from the Court of Appeals for the Tenth Circuit, which reached the opposite result. *Id*. (citing *Sierra Club v. EPA*, 964 F.3d 882 (10th Cir. 2020)). The Petitioner states that in *Sierra Club*, the Tenth Circuit held that the unambiguous definition of "applicable requirements" in EPA's regulations requires EPA to review whether a title V permit ensures compliance with NSR-related requirements of the SIP. *Id*. at 8–9. The Petitioner cites to the following EPA statement, presented in a title V order that was subject to the Tenth Circuit's jurisdiction:

> The EPA acknowledges that *Sierra Club* governs here. At the same time, the EPA continues to believe that the interpretation of the CAA reflected in the Fifth Circuit's decision in *Environmental Integrity Project v. EPA*, 969 F.3d 529 (5th Cir. 2020), is correct. The EPA thus intends, *where supported by the facts of individual permits*, to continue to *apply the reasoning* of *In re Big River Steel, LLC*, Order on Petition VI-2013-10 (Oct. 31, 2017), when issuing title V permits and reviewing petitions on permits for sources in states outside of the Tenth Circuit.

Id. (emphasis in Petition) (quoting *In the Matter of PacifiCorp Energy, Hunter Power Plant*, Order on Petition Nos. VIII-2016-4 & VIII-2020-10 at 15 n.26 (January 13, 2021) (*PacifiCorp-Hunter II Order*)). The Petitioner characterizes EPA's statements in *PacifiCorp-Hunter II*, which limit the reach of the Tenth Circuit's decision in *Sierra Club*, as "unworkable and inequitable." *Id*. Moreover, the Petitioner argues that the Petition at issue here (which concerns the *type* of NSR permit issued to a source) is closely aligned with the *Sierra Club* case considered by the

Tenth Circuit and is distinguishable from the reasoning in EPA's *Big River Steel Order* (which addressed a challenge to the *content* of a PSD permit issued to a source). *Id*. at 9–10.[13] More specifically, the Petitioner argues that the ambiguity in the definition of "applicable requirements" that exists once a title I (NSR) permitting decision is made—a key issue in the *Big River Steel Order*—does not exist here. *Id*. at 10. The Petitioner asserts that the definition of "applicable requirement" is not ambiguous with respect to the question presented here: whether WSP should have been subject to major NSR requirements. *Id*. (citing *Sierra Club*, 964 F.3d at 891).

The Petitioner also alleges that Indiana has a "combined" NSR and title V program, under which a single permit authorizes both construction and operation of a facility. *Id*. at 7. According to the Petitioner, this means that the title V permit issuance procedures—including EPA's review and the public petition opportunity—apply to all federally enforceable conditions in those combined permits, including NSR conditions. *Id*.

Finally, the Petitioner suggests that EPA should review the PSD applicability issues here because the underlying issue is a case of first impression and is accordingly an important policy and legal issue. *Id*. at 10 (citing 40 C.F.R. § 124.19(a)); *see id*. at 12.

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

Claim 1 challenges IDEM's determination that minor NSR requirements—as opposed to major NSR (PSD) requirements—are the applicable requirements of the SIP that apply to the new construction of the WSP facility. This calls into question whether challenges to permit conditions based on preconstruction permitting authority under title I of the CAA should be considered by EPA in reviewing or considering a petition to object to a title V operating permit. As noted in Section II.C of this Order, EPA reviewed this question under similar circumstances in the *Big River Steel Order* and other orders, including an order addressing a permit issued by IDEM to the Riverview Energy facility. *See In the Matter of Riverview Energy Corp.*, Order on Petition No. V-2019-10 at 21–29 (March 26, 2020) (*Riverview Order*). After a review of the structure and text of the CAA and EPA's regulations in part 70, and in light of the circumstances presented by the petitions at issue in those orders, EPA concluded that the title V permitting process was not the appropriate forum to review preconstruction permitting issues even when the NSR permit terms 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 WSP facility, EPA again concludes—as it did under similar circumstances in the *Big River Steel* and *Riverview Orders*—that a title V petition is not the appropriate forum for reviewing the merits of the Petitioners' NSR-related claims, notwithstanding IDEM's decision to issue a single permit document that contains both NSR- and title V-based requirements.

[13] Additionally, the Petitioner suggests that EPA, in another recent title V petition order, reviewed and decided NSR issues along with title V issues. *Id*. at 10 (citing *In the Matter of BP Amoco Chemical Co., Texas City Chemical Plant*, Order on Petition No. VI-2017-6 at 39 (July 20, 2021) (*BP Amoco Texas City Order*)).

As EPA has previously explained:

> 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, 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 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.

Riverview Order at 21–22.

The Petitioner asserts that the NSR requirements in the Indiana SIP are "requirements" that become "applicable" when a new source meets the applicability criteria in the SIP. Petition at 8.[14] This oversimplified view of the statute fails to account for key regulatory provisions that clarify the statute's meaning. As EPA explained in the *Riverview Order*:

> 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.
> > . . .

[14] This Order focuses on the specific arguments raised by the Petitioner concerning EPA's alleged obligation to consider the NSR issues raised in the Petition. Additional discussion of EPA's interpretations of the relevant statutory and regulatory provisions relating to this issue is included in the *Big River Steel Order*. *See Big River Steel Order* at 8–11, 14–20. Further discussion of issues specific to IDEM's issuance of combined NSR and title V permits—including issues not raised in the present Petition—is contained in the *Riverview Order*. *See Riverview Order* at 24–29.

> 40 C.F.R. § 70.2 (emphasis added). . . . [T]here 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). 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. 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). 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. 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.

Riverview Order at 22–23 (emphasis added) (footnote and some citations omitted).

EPA continues to interpret "applicable requirements" in this manner. As relevant to the WSP permit, IDEM's issuance of a minor NSR permit to WSP established and defined the NSR-related "applicable requirements" of the SIP "as they apply" to construction of the WSP facility. In other words, IDEM determined that minor NSR requirements of the SIP—as opposed to the PSD requirements of the SIP—were the NSR-related "applicable requirements" of the SIP. Thus, EPA disagrees that the plain text of the CAA (or EPA's or IDEM's regulations) mandates that EPA revisit IDEM's decisions regarding which NSR requirements of the SIP were applicable.

EPA acknowledges the *Sierra Club* decision by the Tenth Circuit Court of Appeals, cited by the Petitioner, in which that court disagreed with EPA's interpretation of the definition of "applicable requirements" summarized in the preceding paragraphs. *Sierra Club*, 964 F.3d 882. However, that court's decision does not control here.[15] As EPA has explained:

> EPA continues to believe that the interpretation of the CAA upheld by the Fifth Circuit's decision in *Environmental Integrity Project v. EPA*, 969 F.3d 529 (5th Cir. 2020), is correct. EPA thus intends, where supported by the facts of individual permits, to continue to apply the reasoning of *In re Big River Steel, LLC*, Order on Petition No. VI-2013-10 (October 31, 2017), when issuing and reviewing title V permits and reviewing petitions on permits for sources in states outside of the Tenth Circuit. That is, where EPA has approved a state's title I permitting program, duly

[15] EPA's response to this Petition would be subject to the jurisdiction of the Court of Appeals for the Seventh Circuit.

> issued preconstruction permits establish the NSR-related "applicable requirements" for the purposes of title V. As with "applicable requirements" established through other CAA authorities, 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.

In the Matter of PacifiCorp Energy, Hunter Power Plant, Order on Petition No. VIII-2022-2 at 16 n.29 (September 27, 2022); *see also PacifiCorp-Hunter II Order* at 15 n.26. EPA maintains this position and disagrees with the Petitioner's unexplained allegation that this position is "unworkable and inequitable." Petition at 9.

Determining whether EPA's interpretation of "applicable requirements" (as expressed in the *Big River Steel Order*, *Riverview Order*, and other orders) applies to an individual permit action remains a case-specific decision.[16] In fact, in other situations involving materially different procedural or factual postures, EPA *has* entertained claims in title V petitions involving certain NSR issues.[17] Although the Petitioner attempts to draw legal and factual distinctions to support its claim that EPA should review NSR issues related to the WSP Permit here, none of the Petitioner's arguments, discussed below, are persuasive.

First, the Petitioner's insistence that the "reasoning" of the *Big River Steel Order* is distinguishable from the present case is unpersuasive. Petition at 9. The legal and policy reasoning of the *Big River Steel Order*—including ambiguity in the definition of "applicable requirement," as summarized in the preceding paragraphs—applies not only to questions regarding the content of an NSR permit (at issue in *Big River Steel*), but also to questions

[16] *See supra* note 10.

[17] *See, e.g.*, *In the Matter of ExxonMobil Corp., Baytown Chemical Plant*, Order on Petition No. VI-2020-9 at 13–14 (March 18, 2022) (reviewing claim related to an NSR Plantwide Applicability Limit where a SIP rule specifically provided for adjustments to the limit in a title V renewal permit action); *In the Matter of BP Products North America, Inc., Whiting Business Unit*, Order on Petition No. V-2021-9 at 11–15 (March 4, 2022) (reviewing claim raising issues with an NSR-related emissions limit that was established in a title V, as opposed to NSR, permit action); *In the Matter of Coyote Station Power Plant*, Order on Petition Nos. VIII-2019-1 & VIII-2020-8 at 12–13 (January 15, 2021) (reviewing claim raising NSR-related issues "where no public notice was provided of the underlying NSR permit action," among other reasons). Thus, EPA agrees with the Petitioner's general suggestion that EPA has reviewed NSR issues in some recent title V petition orders. However, none of the examples cited earlier in this footnote, nor the specific example cited by the Petitioner—the *BP Amoco Texas City Order*—lends support to the Petitioner's request to do the same here. The portion of the *BP Amoco Texas City Order* cited by the Petitioner simply indicates that the requirements contained in NSR-based "permits by rule" are applicable requirements that must be properly included or incorporated by reference into a title V permit; this portion of the cited order did not speak to whether the content of any NSR-based "permit by rule" requirements would be reevaluated by EPA in the context of a title V petition. *See BP Amoco Texas City Order* at 39–42.

regarding which type of NSR permit is issued (at issue here).[18] In both cases, the NSR permit issued by the state defines which NSR-related requirements of the SIP are "applicable requirements" for title V purposes. Thus, the fact that the Petition questions the *type* of NSR permit issued to WSP, as opposed to the *content* of the NSR permit issued to WSP, is immaterial.

Second, the Petitioner asserts that because Indiana has a "combined" NSR and title V program, all title V procedures—including the public petition opportunity—attach to all aspects of such a combined permit, including the NSR conditions. Petition at 7. EPA disagrees. EPA previously addressed this precise issue with respect to "combined" permits issued by IDEM in the *Riverview Order*. There, EPA first restated the following discussion from the *Big River Steel Order*:

> 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 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.

Riverview Order at 24–25 (quoting *Big River Steel Order* at 11–12). Then, addressing IDEM's NSR and title V programs, EPA explained:

[18] The *Big River Steel Order* did not limit this interpretation to questions about the content of an NSR permit. *See Big River Steel Order* at 10 ("These source-specific [NSR] permitting actions take the general preconstruction permitting requirements of the SIP—*the requirement to obtain a particular type of permit* and the substantive requirements that must be included in each type of permit—and evaluate at the time of the permitting decision whether and how to apply them to a proposed construction or modification." (emphasis added)); *id*. at 11 n.20 ("This interpretation applies in factual circumstances like those presented in this Petition, where a permitting authority issued a source-specific title I preconstruction permit subject to public notice and comment and for which judicial review was available."); *id*. at 20 n.34 ("This Petition only regards an issued major source PSD permit. However, the EPA has previously applied a similar interpretation and reasoning in denying a petition when the source had been issued a minor NSR permit.").

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. 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 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)." 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." Here, the Riverview public notice referred to the Permit as "the draft new source construction and Part 70 Operating Permit." Similarly, the Draft Permit itself is titled a "Prevention of Significant Deterioration (PSD)/New Source Construction and Part 70 Operating Permit." The TSD accompanying the Draft Permit contains similar language.

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) 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. 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 requirements into a single permit, Indiana chose to apply Title V objection procedures to the entire permit."

Riverview Order at 25–27 (footnotes and some citations omitted).

The Petitioner neither acknowledges these decisions by EPA nor offers any arguments that might rebut the principles restated in the preceding paragraphs. EPA finds that the same principles apply equally well to the combined minor NSR and title V permit issued to WSP. Accordingly, the fact that the Permit was a "combined" NSR and title V permit does not provide a basis for EPA to review the Petitioner's claims related to PSD applicability.

Third, and finally, the Petitioner suggests that because the underlying PSD question at issue—whether a Waelz kiln constitutes a "secondary metal production plant"—is a case of first impression and an important policy and legal issue, EPA must review it in the present title V petition response. Petition at 10, 12 (citing 40 C.F.R. § 124.19(a)). However, the cited regulation does not apply to the EPA Administrator's review of title V petitions challenging title V permits issued by a state agency under an EPA-approved part 70 program. Instead, this regulation applies to the EPA Environmental Appeals Board's (EAB) review of certain types of permits *issued by EPA*.[19] Therefore, the novelty or policy import of the PSD applicability issue presented in WSP provides no basis for the EPA Administrator's review of the current Petition.

For the foregoing reasons, the EPA disagrees with the Petitioner's contentions that EPA must review the Petitioner's PSD applicability claim in this title V petition response. In issuing a minor NSR permit for the construction of the WSP facility under title I of the CAA (specifically, 326 IAC 2-5.1-3), IDEM defined the relevant NSR-based "applicable requirements" for title V permitting purposes. Here, the Petitioners' claims regarding PSD applicability assert that different NSR-based requirements are applicable, thereby questioning the validity of the "applicable requirements" established through the minor NSR permitting process. Reassessing the state's NSR decision is not undertaken pursuant to title V. Rather, IDEM's task under title V is to faithfully incorporate the terms and conditions derived from the NSR requirements and to ensure that the title V permit contains adequate monitoring, recordkeeping, and reporting requirements to assure compliance with those terms and conditions. Unless and until the NSR permitting requirements applicable to WSP are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through another available mechanism,[20] it is appropriate for the source's title V permit to incorporate the minor NSR terms and conditions as applicable

[19] For example, the EAB reviews challenges to title V permits issued by EPA under 40 C.F.R. part 71 or NSR permits issued by EPA under a Federal Implementation Plan. The EAB also reviews challenges to such permits issued on behalf of EPA by a state, local, or tribal permitting authority that has been delegated authority to issue permits on EPA's behalf. Such delegated federal permits are distinguishable from permits issued by a state agency under an EPA-approved part 70 program (or an EPA-approved SIP); the EAB does not have jurisdiction to review the latter type of permits, including the WSP Permit at issue in the Petition.

[20] *See infra* note 21 and accompanying text.

requirements. Given that these NSR-based applicable requirements are included verbatim in the WSP title V permit (by virtue of the single permit document), the Petitioner has failed to demonstrate that the title V permit is "not . . . in compliance with applicable requirements" or the requirements of part 70. 40 C.F.R. § 70.8(c)(1); *see* 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). Accordingly, EPA denies Claim 1.

As stated previously, "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." *Big River Steel Order* at 19; *see Riverview Order* at 5 n.10. Instead, it merely indicates that a title V permit is not the appropriate venue to correct any such alleged flaws in the title I preconstruction permit. Thus, EPA's denial of Claim 1 should not be interpreted to indicate EPA's agreement with IDEM's determination that the WSP facility is not a secondary metal production plant nor the broader issues relating to PSD applicability. Likewise, this Order should not be interpreted to limit any other potentially available mechanisms to address the NSR issues raised by the Petitioner, including the opportunity for the public to challenge the NSR permit directly through the state appeal process,[21] the opportunity for the public to initiate a "citizen suit" action under CAA § 304, or the opportunity for EPA to pursue actions under CAA § 113, § 167, and other oversight tools of the CAA. *See, e.g.*, *Riverview Order* at 23–24; *Big River Steel Order* at 15–16. For example, EPA retains the ability to bring an enforcement action under section 113 alleging a violation of title I of the Act for a source's failure to obtain a PSD permit where EPA has evidence that the construction of a source triggered PSD permitting requirements.[22]

Claim 2: The Petitioner Claims That "The Permit Is Unlawful for the Reason Provided in EPA Comments on the Draft Permit."

Petitioner's Claim: The Petitioner claims that the Permit does not include a specific timeframe for restoring normal operation of bag leak detection systems (BLDS) after a malfunction or repair. *See* Petition at 20–21.

The Petitioner observes that comments provided by EPA Region 5, which addressed Conditions D.1.10 and D.2.9 of the Draft Permit, noted the apparent lack of a timeframe for restoring the BLDS after malfunction, failure, or repair. *Id*. at 20. The Petitioner further observes that IDEM responded by updating several permit terms to indicate: "The Permittee shall take reasonable

[21] *See* Ind. Code §§ 4-21.5-3 *et seq*. (Administrative Orders and Procedure Act chapter on adjudicative proceedings), 4-21.5-5 *et seq*. (Administrative Orders and Procedure Act chapter on judicial review); IAC Title 315 (regulations governing adjudicatory proceedings before environmental law judges). It does not appear that the Petitioner pursued such relief with respect to the WSP Permit.

[22] EPA also observes that it is hypothetically possible that classification of the WSP facility as a secondary metal production plant could directly implicate title V permitting—specifically, whether the facility's fugitive emissions count towards the *title V* major source thresholds. *See* 40 C.F.R. § 70.2 (definition of "major source"). The Petitioner presumably did not raise this title V issue in the Petition because there is no live dispute regarding whether the WSP facility is a major source for purposes of title V (it is). However, to the extent the facility's classification as a secondary metal production plant might become relevant to any future permitting action implicating title V applicability, nothing in this Order should be interpreted to limit EPA's or the public's ability to raise such claims at that time.

response steps to restore operation of the bag leak detection system to its normal or usual manner as expeditiously as practicable." *Id*. (citing ATSD at 57).

The Petitioner asserts that this permit language added by IDEM is not specific enough to address BLDS requirements because "as expeditiously as practicable" and "normal or usual manner" are undefined and provide no objective standard for determining compliance. *Id*. The Petitioner further characterizes these terms as not enforceable. *Id*. Accordingly, the Petitioner claims that IDEM's use of these terms was arbitrary and capricious and an abuse of discretion. *Id*.

Additionally, the Petitioner claims that IDEM did not provide a reasoned explanation for why "reasonable response steps" and "as expeditiously as practicable" are sufficient to assure the facility's compliance with all applicable requirements. *Id*. at 21 (citing 40 C.F.R. § 70.7(a)(5)).

The Petitioner suggests that the Permit should be updated to define "normal" operation of the BLDS and to specify a duration (in number of hours) for BLDS repair. *Id*. at 20–21.

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

The Permit contains a number of conditions applicable to the operation and monitoring of baghouses that control PM emissions, including the operation of the BLDS that monitor the baghouses to ensure they are operating properly. At issue is the following requirement in Permit Conditions D.1.10(k) and D.2.9(k):

> In the event that a [BLDS] should malfunction, fail or otherwise need repair, the Permittee shall perform visible emissions notations of the stack exhausts associated with that [BLDS] as follows: . . . [and] (6) The Permittee shall take reasonable response steps to restore operation of the [BLDS] to its normal or usual manner as expeditiously as practicable.

Final Permit at 53, 64–65.

The Petitioner takes issue with the lack of specificity of two phrases: "as expeditiously as practicable" and "normal or usual manner." However, for the reasons explained in the following paragraphs, the Petitioner has not demonstrated that the Permit fails to satisfy the CAA or assure compliance with any CAA requirements simply because it does not define "as expeditiously as practicable" or "normal or usual manner" in greater detail. *See* 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(1), (c)(1).

As an initial matter, the Petitioner's focus on the timeframe for restoring operation of the BLDS neglects to address other relevant permit terms associated with this monitoring regime.[23] When the BLDS are offline, the Permit requires the facility to assess baghouse performance using visible inspections. *See* Final Permit at 53, 64–65. The Petitioner does not address this backstop requirement, much less demonstrate that it is inadequate to assure compliance with the emission limits that rely on the baghouses. Because the Petitioner has not demonstrated that this backstop

[23] *See supra* note 8 and accompanying text.

requirement is insufficient during time periods when the BLDS are offline, the Petitioner consequently has not demonstrated that compliance cannot be assured unless the BLDS are restored to operation within a specific timeframe.

Moreover, with respect to the "as expeditiously as practicable" language, the Petitioner has not explained why prescribing a specific numerical timeline for BLDS repair is necessary to assure compliance with all applicable requirements, or why completing this repair "as expeditiously as practicable" is insufficient to accomplish this end. Given that there could be multiple potential causes of a malfunction, failure, or repair of BLDS equipment, it may not be possible to anticipate—and thus, for the Permit to prescribe—a single appropriate timeframe for restoring normal operation. For example, a single designated timeframe might be infeasible for more complicated repairs, yet could create disincentives to timely address more straightforward repairs. Additionally, the Permit contains a variety of other conditions describing what constitutes "reasonable response steps to restore operation of the emissions unit (including any control device and associated capture system) to its normal or usual manner of operation as expeditiously as practicable in accordance with good air pollution control practices for minimizing excess emissions." Final Permit at 31 (Condition C.13(I)(a)); *see id*. at 31–32 (Conditions C.13(I)(b)–(e)). These conditions further illustrate why it may not be possible to anticipate and prescribe a single appropriate timeframe for restoring normal operation. Overall, EPA is not persuaded by the Petitioner's claim that additional specificity is necessary with respect to BLDS repair timing requirements.

Similarly, the Petitioner has not cited any authority or provided any analysis for why the Permit must specifically define "normal or usual manner" as it relates to the BLDS. Notably, the Petitioner neglects to acknowledge numerous other permit terms governing the BLDS that effectively dictate the normal operations of those devices. *See* Final Permit at 52–53, 63–64 (Conditions D.1.10(a)–(j), D.2.9(a)–(j)).[24]

The Petitioner's challenge to IDEM's permit record (pursuant to 40 C.F.R. § 70.7(a)(5)) is similarly unpersuasive. EPA's regulations require that a state "provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." 40 C.F.R. § 70.7(a)(5). As EPA has previously stated:

> In reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet a procedural requirement, such as [providing] . . . a statement of basis meeting the requirements of 40 C.F.R. § 70.7(a)(5), the EPA considers whether the petitioner has demonstrated that the permitting authority's alleged failure resulted in, or may have resulted in, a deficiency in the content of the permit.

In the Matter of US Steel Seamless Tubular Operations, LLC, Fairfield Works Pipe Mill, Order on Petition No. IV-2021-7 at 8 (June 16, 2022). Additionally, in evaluating claims alleging that a

[24] *See supra* notes 6–8 and accompanying text. These permit terms include requirements involving, among other things: calibration, operation, and maintenance of BLDS in accordance with manufacturer's specifications; manufacturer certifications regarding the detection capability of each system; establishing and locating alarms; specifications, adjustments, and continuous recording of outputs; and BLDS installation location.

permit does not satisfy 40 C.F.R. § 70.7(a)(5), a petitioner "must demonstrate that the record as a whole, including the statement of basis and response to comments, does not support the terms and conditions of the permit." *Id*. at 8–9. Here, IDEM responded to comments from EPA Region 5 by adding language to the Permit that addressed EPA's comment. As described in the preceding paragraphs, the Petitioner has not demonstrated that this language runs afoul of the Act. Accordingly, the Petitioner has not demonstrated that IDEM failed to satisfy 40 C.F.R. § 70.7(a)(5) simply because it did not proactively explain the specific word choices in the new language it added to the Permit in response to EPA's comment.

Claim 3: The Petitioner Claims That "The Permit Is Unlawful Because It Relies on Deficient and Erroneous Calculations."

Petitioner's Claim: The Petitioner challenges the use of AP-42 emission factors to calculate emissions for purposes of determining PSD applicability. *See* Petition at 21–23.

The Petitioner observes that IDEM relied on AP-42 emission factors to calculate emissions from various units. *Id*. at 22. The Petitioner asserts that these calculations are deficient and "may underestimate the amount of emissions" at the facility. *Id*. For support, the Petitioner quotes a November 2020 Enforcement Alert published by EPA, in which EPA reminded agencies of the potential consequences of improperly using AP-42 emission factors in permitting decisions. *Id*. at 21–22 (citing Petition Ex. O). Elaborating, the Petitioner suggests that AP-42 factors are average values that should have been adjusted to derive maximum emission rates for purposes of calculating PTE. *Id*. at 22.

The Petitioner explains the relevance of these allegedly inaccurate emission calculations as follows:

> These emission factors serve as a basis for the Permit and for IDEM's conclusions that the Plant is a Synthetic Minor as opposed to a PSD source. It is possible that use of proper emission factors may have resulted in PTE of some regulated NSR pollutants to be greater than 250 tons per year, making the Plant a major source regardless of the secondary metal production classification discussed *supra*.

Id. at 22.

Additionally, the Petitioner challenges IDEM's RTC relating to AP-42 emission factors, in which the state acknowledged commenters' concerns with using AP-42 emission factors and indicated, among other things, "that the PTE calculations are sufficiently conservative for purposes of determining permitting level[s] and applicability of state and federal rules and regulations." *Id*. at 21 (quoting ATSD at 17, 205). The Petitioner characterizes this "generalized response" from IDEM as "arbitrary and capricious" and assert that it fails to provide the legal and factual basis for using AP-42 factors, contrary to 40 C.F.R. § 70.7(a)(5). *Id*.

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

The Petitioner's challenges to the use of AP-42 emission factors are presented exclusively as a challenge to IDEM's decision to issue WSP a minor NSR permit—as opposed to a PSD permit—to authorize the facility's construction. As explained with respect to Claim 1, that NSR permitting decision is not subject to EPA's review in the present title V petition response. Accordingly, to the extent Claim 3 involves emission calculations related to PSD applicability, it is denied.

To the extent that the Petitioner intended to claim that its concerns regarding emission calculations resulted in a problem beyond PSD applicability, any such argument is not clear. Other than its references to PSD applicability, the Petitioner does not identify any connection between the allegedly improper emission calculations and any CAA requirement with which the Permit does not comply. 40 C.F.R. § 70.12(a)(2)(ii)–(iii).[25] The Petitioner also does not identify any connection between the emission calculations and any particular permit terms that might be deficient as a result of the calculation issues. 40 C.F.R. § 70.12(a)(2)(i). Although the Petitioner alludes to several emission units for which AP-42 emission factors were used to calculate emissions, the Petitioner does not provide any information or analysis regarding the emission calculations for these units, nor the relevance of those calculations to any permit terms. Absent a demonstration that the erroneous calculations resulted in a deficiency in the title V permit, this claim presents no basis for EPA's objection. *See, e.g.*, *In the Matter of Drummond Co., Inc., ABC Coke Plant*, Order on Petition No. IV-2019-7 at 17–18 (June 30, 2021) (denying claim alleging inaccurate emission calculations in a permit application where a petitioner did not demonstrate how those concerns related to the title V permit at issue).

The Petitioner also challenges the allegedly general nature of IDEM's RTC on this emission calculation issue. However, the public comments that gave rise to IDEM's explanation were similarly general. None of the comments squarely asserted that the use of AP-42 emission factors led to a miscalculation of PTE in a manner relevant to the terms of the Permit (whether regarding PSD applicability or any other permit terms). The Petitioner specifically identifies several comments upon which this Petition claim is based. *See* Petition at 21 n.141. The first three cited comments were either vague and generalized or not relevant to emission calculations. [26] IDEM's response to these generalized concerns spans several pages and is more detailed than the comments that prompted it (albeit not as detailed as the Petitioners now wish). *See* ATSD at 16–17. The EAB confronted a situation similar to that present here in the context of PSD permits,[27] stating in a 2018 decision: "Where a comment lacks specificity and precision, the permit issuer's obligation to respond is similarly tempered. It is well settled that permit issuers need not guess

[25] Even with respect to PSD applicability, the Petitioner only discusses the relevance of the emission calculations in a general sense, speculating that the improper use of emission factors "*may have resulted* in PTE of some regulated NSR pollutants to be greater than 250 tons per year." Petition at 22. Even if EPA were to consider this claim in the context of PSD applicability—which EPA is not considering—this type of generalized, hypothetical claim would not satisfy the Petitioner's demonstration burden under CAA § 505(b)(2). *See supra* note 7 and accompanying text.
[26] *See* ATSD at 132 ("The emission statement requires an estimate of emissions, not actual emissions of all pollutants. How can you ensure the safety of our citizens?"), 159 ("Are the measurements and calculations from WSP subjective- if multiple people measure and calculate will each person come up with different measurements and calculations? Is there any state control to certify the measurements and calculations of WSP - like the measurements of mercury, lead and any other hazardous pollutants that WSP will be emitting? Or does WSP make their best assumption with any checks and balances?"), 177 (no discussion of emission calculations).
[27] As noted in footnote 19, the EAB reviews challenges to certain types of permits—including PSD Permits—issued by EPA or by another permitting authority delegated to issue permits on EPA's behalf.

the meaning behind imprecise comments and are under no obligation to speculate about possible concerns that were not articulated in the comments." *In re: Tuscon Electric Power*, 17 E.A.D. 675, 695 (EAB 2018) (internal quotations and citations omitted); *see In the Matter of Georgia-Pacific Consumer Operations LLC, Crossett Paper Operations*, Order on Petition Nos. VI-2018-3 & VI-2019-12 at 15 (February 22, 2023) (*Crossett Order*). The fourth comment cited by the Petitioner was more specific, but it raised different concerns than those articulated in this Petition claim. Specifically, the cited comment includes discussion of PTE calculations for mercury, lead, chromium, manganese, and other HAPs. *See* ATSD at 200–203. That comment did not relate to Petitioner's general concerns regarding the use of AP-42 emission factors or to PTE calculations relevant to PSD applicability. In any case, to the extent this comment could be considered relevant, IDEM offered a detailed response, which the Petitioner does not address. *See* ATSD at 203–205; 40 C.F.R. § 70.12(a)(2)(vi).[28] Overall, the Petitioner has not demonstrated that IDEM's response to public comments regarding emission calculations ran afoul of 40 C.F.R. § 70.7(a)(5) or any other EPA regulations governing the preparation of permit records or responding to comments. *See, e.g.*, 40 C.F.R. § 70.7(h)(6).

Therefore, to the extent this claim could be interpreted as relating to requirements other than PSD applicability, it is denied.

Claim 4: The Petitioner Claims That "The Permit is Unlawful because It Fails to Assure Continuous Compliance with Emission Limitations."

Petitioner's Claim: The Petitioner claims that the Permit contains insufficient monitoring to assure continuous compliance with various emission limits. *See* Petition at 23–28.

The Petitioner asserts that 326 IAC 2-7-5(3)[29] requires permits to ensure "continuous compliance." Additionally, the Petitioner argues that when an underlying applicable requirement does not require periodic testing, title V permits must contain "such periodic monitoring specifications sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the Part 70 permit . . . . Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement." *Id*. at 23–24 (quoting 326 IAC 2-7-5(3)(A)(ii)).[30]

The Petitioner cites multiple specific permit terms with allegedly insufficient monitoring, including permit terms addressing: (i) PM, PM_{10}, $PM_{2.5}$, lead, manganese, and chromium emissions from units controlled by various baghouses and scrubbers associated with the Receiving Building, Pelletizing Building, Pellets Receiving Building, Carbon/Limestone Receiving Building, WIP Building, Truck Unloading, Rotary Dryer, Rail Dryer, WIP Conveyor, Transition Buildings Dust Collectors, and Waelz Kilns Product Collectors; (ii) mercury emissions from the Waelz Kilns Product Collectors, and (iii) dioxin/furan emissions from the

[28] *See also supra* note 9 and accompanying text.
[29] The Petition attributes this language to 326 IAC 2-7-5(5). That citation appears to be a typographical error, as the quoted language is found in 326 IAC 2-7-5(3).
[30] The Petition attributes this language to 326 IAC 2-7-5(5)(ii). That citation appears to be a typographical error, as the quoted language is found in 326 IAC 2-7-5(3)(A)(ii).

Rotary Dryer, Rail Unloading, and Waelz Kilns Product Collectors. *Id*. at 25–26 (citing Permit Conditions D.1.5, D.2.5). For all these emission units and pollutants, the Petitioner states that the Permit requires an initial stack test, followed by periodic stack tests every five years. *Id*. at 26.

The Petitioner claims that this 5-year testing frequency "is arbitrary and capricious and cannot ensure continuous compliance." *Id*. at 26. For support, the Petitioner argues that "[s]tack test monitoring frequency must be established based on the variability of the underlying emissions in order to ensure continuous compliance." *Id*.; *see id*. at 24. The Petitioner makes various statements concerning the relationship between monitoring frequency and emissions variability. The Petitioner states generally that emissions of pollutants "are never constant" because they "depend on a myriad of process, control device and other factors." *Id*. at 24. The Petitioner states that EPA has widely recognized variability in emissions data. *Id*. The Petitioner states that "proper monitoring requires that the monitoring method should be able to track and capture that variability." *Id*. The Petitioner contends that "[a] stack test, which lasts just a few hours, cannot provide sufficient representative data, especially for sources whose emissions can vary significantly, for all of the non-tested hours." *Id*. at 25.

The Petitioner faults IDEM's response to public comments requesting more frequent stack testing frequency, arguing that IDEM failed to provide a "reasoned explanation for why the selected monitoring . . . requirements are sufficient to assure the facility's compliance with each applicable requirement." *Id*. at 24 (quoting 40 C.F.R. § 70.7(a)(5)). The Petitioner asserts that, "if IDEM is proposing to use a very infrequent testing regimen such as in this Permit, it has the burden of showing why the underlying variability is so minimal that the infrequent test frequency is proper." *Id*. at 24; *see id*. at 26.

The Petitioner also addresses the Permit's use of parametric monitoring in conjunction with the stack tests. The Petitioner argues generally:

> [Parametric] monitoring is sufficiently predictive only if certain basic conditions are met: (i) that all of the parameters that affect emissions (or most of them) of a particular pollutant are identified; and then (ii), if possible, robust, predictive, mathematical relationships are established between the parameter(s) and the pollutant in question across the full range of parameter/pollutant spaces. This method actually requires significant data collection to first identify the parameters and then quantify the relationships between the parameters and the pollutant emissions.

Id. at 25 (citing Petition Ex. G). Here, the Petitioner acknowledges that the Permit requires operation of BLDS, daily visible emissions monitoring requirements, and the requirement to monitor the flow rate of wet scrubbers once per day. *Id*. at 26. The Petitioner states that "these are all good indicators of whether the underlying controls (*i.e.*, fabric filters and the scrubbers) are operating." *Id*. (citing Petition Ex. G). However, because "the permit does not require that relationships between these parameters and the emissions of the pollutants noted above be first established," the Petitioner argues that "a crucial predicate and requirement of parametric monitoring is missing." *Id*. (citing Petition Ex. G).

Additionally, with respect to dioxin/furans, the Petitioner further states that, "given the lack of knowledge about dioxin/furans and the sensitivity of the affected population, IDEM had a duty to require more frequent stack tests to establish a baseline of emissions, require more frequent testing, and ensure the protection of public health through additional analysis like a health risk assessment." *Id*. at 27.[31]

The Petitioner proffers various other general remarks and suggestions regarding monitoring in title V permits. *See id*. at 23–25. The Petitioner suggests that continuous emissions monitoring systems (CEMS) are the "obvious choice" for directly monitoring various pollutants. *Id*. at 24. The Petitioner asserts that 326 IAC 2-7-5(3)[32] "not only provides ample authority but in fact demands that CEMS be required, at a minimum on the units with the greatest emissions, to ensure the source is in continuous compliance." *Id*. at 25. The Petitioner then suggests a framework for deciding which units and pollutants should be monitored by CEMS. *See id*. The Petitioner also emphasizes the importance of clear, enforceable monitoring requirements, especially in synthetic minor permits. *Id*. at 24 (citing a report from EPA's Office of Inspector General). Finally, the Petitioner discusses environmental justice considerations and suggests that the level of monitoring that might be sufficient in a location without environmental justice concerns may not be sufficient in an area that is already burdened with pollution and other challenges. *Id*. at 27–28.

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

As an initial matter, the CAA requires that all petition claims "shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period." 42 U.S.C. § 7661d(b)(2); *see* 40 C.F.R. §§ 70.8(d), 70.12(a)(2)(v). As EPA has explained:

> EPA believes that Congress did not intend for petitioners to be allowed to create an entirely new record before the Administrator that the State has had no opportunity to address. Accordingly, the Agency believes that the requirement to raise issues "with reasonable specificity" places a burden on the petitioner, absent unusual circumstances, to adduce before the State the evidence that would support a finding of noncompliance with the Act.

56 Fed. Reg. 21712, 21750 (May 10, 1991). The CAA provides that this requirement will not bar petition claims where "the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period." 42 U.S.C. § 7661d(b)(2).

Here, The Petitioner identifies eight comments or sets of comments that ostensibly form the basis of this Petition claim. *See* Petition at 23 n.149; 40 C.F.R. § 70.12(a)(2)(v). None of these comments closely resemble the Petition claim itself, but portions of some of these comments do

[31] Related to this allegation, the Petitioner claims that the Permit abrogates a rule requiring that preconstruction permits be "protective of the public health." *Id*. at 27 (citing 326 IAC 2-1.1-5(5)).
[32] The Petition attributes this authority to 326 IAC 2-7-5(5). That citation appears to be a typographical error, as the relevant provision is 326 IAC 2-7-5(3).

raise issues repeated in the Petition. For example, multiple comments raised general concerns with the requirement to test various pollutants every five years, and some comments suggested generally that more frequent testing or CEMS should be required. *See* ATSD at 11, 62–67, 109, 134, 148, 163, 196.[33] One of these comments also touched on the alleged variability in the chemical composition of EAF dust—an issue similar to, but distinct from, the Petitioner's discussion of emissions variability as a basis for requiring more frequent testing or monitoring. *See* ATSD at 196–97.

Other issues and arguments in this Petition claim were not raised at all, or were not raised with reasonable specificity, during the public comment period. For example, the Petitioner's concerns relating to the Permit's parametric monitoring requirements were not raised in public comments. This portion of the petition relies almost exclusively on an expert report attached to the Petition (Exhibit G). Neither the information in this report nor the Petitioner's current arguments regarding parametric monitoring were raised before IDEM during the public comment period.[34] The Petitioner does not allege that it was impracticable to do so (and EPA sees no reason why it would have been, given that the parametric monitoring terms at issue were included in the Draft Permit subject to the public's review). Thus, that portion of the Petitioner's claim was not preserved for EPA's review in the current Petition and is denied. 42 U.S.C. § 7661d(b)(2), 40 C.F.R. §§ 70.8(d), 70.12(a)(2)(v).

Regarding the portions of the Petition that were raised in public comments—including general allegations that the permit should include more frequent monitoring than 5-year stack tests—the Petitioner has not demonstrated that the Permit does not assure compliance with all applicable requirements and permit limits. Determining the appropriate frequency for testing (or other monitoring provisions) is inherently a case-specific inquiry, depending on various factors. *See, e.g.*, *In the Matter of CITGO Refining and Chemicals Company L.P.*, Order on Petition No. VI-2007-01 at 6–8 (May 28, 2009). Here, the Petitioner challenges numerous emission limits that apply to different pollutants from different emission units. Instead of explaining why this monitoring regime is insufficient with respect to any individual permit terms, the Petition simply alleges that the 5-year stack test frequency is insufficient for *all* of the various pollutants and emission units cited—but not further discussed—by the Petitioner. It is impossible to determine from the Petition whether this monitoring regime is sufficient or insufficient with respect to any individual permit terms.

The only technical support for the Petitioner's challenges to the 5-year stack test frequency involves general allegations regarding the relationship between monitoring frequency and emissions variability. EPA agrees that variability in emissions is a key factor in assessing the sufficiency of monitoring requirements. However, even accepting for the sake of argument that these allegations related to emissions variability were raised with reasonable specificity in public comments, the Petitioner's arguments on this point are too vague and generic to demonstrate a

[33] Other comments raised more general concerns and did not specifically address the 5-year stack test frequency. *See* ATSD at 131, 138, 221. Additionally, one of the comments identified by the Petitioner does not appear to have any relationship to the monitoring issues raised in this claim. *See* ATSD at 177.

[34] None of the public comments identified by the Petitioner raised this issue at all, much less with "reasonable specificity." *See* Petition at 23 (citing ATSD at 11, 62–67, 109, 131, 134, 138, 147, 163, 177, 196, 221). The report upon which the Petition relies was dated August 6, 2021—during the petition period, and well after the close of the public comment period.

basis for EPA's objection. The Petitioner does not present any evidence or discussion of actual variability in emissions with respect to any of the specific emission units or pollutants at issue. Overall, the Petitioner's claim is general and conclusory and lacks sufficient citation and analysis for EPA to determine whether the 5-year stack test frequency is or is not sufficient with respect to any particular pollutants emitted from any particular emission units.[35]

Additionally, to demonstrate that stack test requirements in a proposed permit are insufficient to assure compliance with the permit terms, EPA expects petitioners to evaluate not only the frequency of stack testing, but also any other relevant permit terms—such as parametric monitoring requirements—that establish the overall monitoring regime. As explained previously, any criticism of parametric monitoring requirements was not raised in public comments and therefore was not preserved in the Petition.

Instead of presenting any specific evidence to support its claim, the Petitioner challenges IDEM's justification for the current permit requirements. However, here, too, the Petitioner does not present any specific legal or technical challenges to IDEM's conclusions, but instead merely insists that IDEM should have explained more. In so doing, the Petitioner expressly attempts to shift the burden to IDEM. *See* Petition at 24 ("[I]f IDEM is proposing to use a very infrequent testing regimen such as in this Permit, *it has the burden* of showing why the underlying variability is so minimal that the infrequent test frequency is proper." (emphasis added)). Although IDEM does have an obligation to support its permitting decisions in the permit record, it is the *Petitioner* who ultimately bears the burden to demonstrate that the Permit does not comply with the CAA (and/or that IDEM's decision was contrary to the Act, unreasonable, and/or nonresponsive to public comments) in a petition asking the Administrator to object to the issuance of this Permit. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.12(a)(2)(vi).[36] Because the Petitioner has not met that burden with regard to variability or any other factor relevant to stack test frequency, the Petitioner has presented no basis for EPA's objection to the Permit.

To the extent that the Petitioner's claim relates to mercury or dioxins/furans, it is important to recognize that title V permits must contain sufficient testing and monitoring to assure compliance with all applicable CAA requirements and permit terms. 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(c)(1). Here, the Petitioner does not identify any applicable requirement or permit limit governing emissions of mercury or dioxins/furans with which the Permit does not assure compliance. In fact, the Permit contains no specific limitations on mercury or dioxin/furan emissions.[37] Thus, to the extent the Petitioner claims that the permit contains insufficient monitoring of mercury or dioxin/furans, it has not identified any basis for EPA's objection on this issue.

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

[36] More specifically, a petitioner must "explain how the permitting authority's response to the comment is inadequate to address the issue raised in the public comment." 40 C.F.R. § 70.12(a)(2). Here, IDEM's obligation to "address the issue raised in the public comment" insofar as emissions variability was concerned was arguably tempered by the fact that the Petitioner's current arguments regarding variability were not squarely raised in public comments. *See* ATSD at 196–97; *see also In re: Tuscon Electric Power*, 17 E.A.D. 675, 695 (EAB 2018); *Crossett Order* at 15.

[37] *See* ATSD at 18 (explaining uncontrolled potential emissions of mercury), 19–20 (describing mercury testing but not mercury limits), 42 (explaining IDEM's limited authority to establish limitations on dioxins/furans).

Finally, EPA understands the Petitioner's general arguments regarding the benefits that CEMS may provide in assuring continuous compliance,[38] the need for sufficient monitoring in "synthetic minor" permits, and the importance of monitoring to communities with environmental justice concerns. However, because the information provided by the Petitioners does not demonstrate that the Permit currently lacks sufficient monitoring to assure compliance with all applicable requirements, EPA need not decide whether these additional considerations would support imposing more stringent monitoring requirements.

Claim 5: The Petitioner Claims That "The Permit Is Unlawful Because Its Issuance Violated Public Participation Requirements."

Petitioner's Claim: The Petitioner claims that IDEM did not make information relevant to the facility's "emission implications" available during the public comment period. *See* Petition at 28–29.

The Petitioner asserts that prior to issuing the Permit, IDEM was required to provide the public with "information sufficient to notify the public as to the emissions implications" of the permit. *Id*. at 28 (quoting 326 IAC 2-7-17(c)(1)(C)(iv)). The Petitioner further states that EPA has 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 *In the matter of Cash Creek Generation, LLC*, Order on Petition No. IV-2010-4 at 9 (June 22, 2012)).

The Petitioner alleges that IDEM failed to provide such information, which the Petitioner describes as "critical." *Id*. at 29. The Petitioner provides two examples of allegedly missing information: First, the Petitioner references two public records requests filed by the Petitioner, to which IDEM had not responded at the time of petition filing. *Id*. (citing Petition Ex. O). Second, the Petitioner references a public comment that noted the alleged lack of full emissions disclosure and provided a mass balance calculation allegedly showing that the Permit did not account for all emissions. *Id*. (citing ATSD at 200–206).

The Petitioner discusses another instance—regarding a different facility, Riverview—in which an Indiana administrative law judge found that IDEM violated 326 IAC 2-7-17(c)(1)(C)(iv) under similar factual circumstances. *Id*. at 28–29.

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[38] Throughout the Petition, the Petitioner focuses on the Indiana regulatory requirement that title V permits "assure that all reasonable information is provided to evaluate *continuous compliance* with the applicable requirements." 326 IAC 2-7-5(3) (emphasis added). EPA's equivalent regulations do not include the word "continuous," but this does not change the fact that a source must, at all times, comply with its permit. *See, e.g.*, 42 U.S.C. § 7661a(a); 40 C.F.R. § 70.6(a)(6)(i), 70.7(b). Thus, phrase "assure . . . continuous compliance" in IDEM's regulations appears to carry the same meaning as the phrase "assure compliance" used throughout EPA's regulations, and it does not appear that IDEM's regulations would provide a different threshold for determining the sufficiency of monitoring in an IDEM-issued permit. *See* 40 C.F.R. § 70.6(a)(3), (c). Although continuous monitoring systems (like CEMS) can provide valuable information, the CAA is clear that "continuous emissions monitoring need not be required" in order to ensure that a source continually complies with relevant emission limits, so long as "alternative methods are available that provide sufficiently reliable and timely information for determining compliance." 42 U.S.C. § 7661c(b).

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

As explained with respect to Claim 4, the CAA requires that all petition claims "shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period." 42 U.S.C. § 7661d(b)(2); *see* 40 C.F.R. §§ 70.8(d), 70.12(a)(2)(v).

Here, no public comments (from the Petitioner or other entities) alleged that the public was deprived of information concerning the project's "emissions implications" in violation of 326 IAC 2-7-17(c)(1)(C)(iv).[39] Not only was the overarching issue not raised, but no public comments for this Permit discussed the public records requests that were briefly referenced in the Petition as support for this claim. The only aspect of this claim that was raised in public comments is the single sentence relating to mass-balance equations used to calculate emissions of various pollutants. However, the public comment raising that issue did so in a manner entirely unrelated to the claim the Petitioner now makes. Specifically, the comments did not mention 326 IAC 2-7-17(c)(1)(C)(iv) and did not suggest that the public was deprived of relevant information concerning the "emission implications" of this facility. Instead, these comments featured a detailed technical rebuttal to the emission calculations contained in the permit application and/or Draft Permit. *See* ATSD at 200–203. Any connection between this comment and the Petitioner's present claim is too tenuous to satisfy the statutory requirement that petition claims be raised with reasonable specificity during the public comment period. The Petitioner does not claim that it was impracticable to raise this claim during the public comment period or that the grounds for objection arose after that time. Therefore, EPA denies Claim 5. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. §§ 70.8, 70.12(a)(2)(v).

Even if this claim had been squarely raised in public comments (or if the Petitioner could have successfully demonstrated that an exception to this requirement applied), the Petition fails to demonstrate a flaw in the permit process regarding this issue. Notably, EPA confronted a similar claim in the *Riverview Order*; the Petitioner acknowledges the similar fact pattern there, but neglects to acknowledge or attempt to distinguish EPA's order responding to those facts.[40] In *Riverview*, EPA stated:

[39] Petitioners are required to identify where each petition claim was raised with reasonable specificity in public comments (or demonstrate that an exception to this requirement is applicable). 40 C.F.R. §70.12(a)(2)(v). The Petitioner did not do so here. Moreover, EPA's independent review of the public comments did not reveal any public comments addressing this issue.

[40] Instead of acknowledging or attempting to distinguish EPA's *Riverview Order*, the Petitioner instead cites an Indiana state administrative law judge's decision on the Riverview permit. A state administrative law judge is in a different position to evaluate whether a state satisfied state laws than EPA. Among other differences, any proceeding before a state tribunal would presumably involve some opportunity for fact finding or presentation of evidence. By contrast, in EPA's consideration of a title V petition, EPA's task is restricted to determining whether a petitioner has presented sufficient information within the Petition itself to demonstrate that a permit or permit process does not comply with the CAA or the relevant implementing regulations. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. §§ 70.8(d), 70.12(a)(2). Therefore, EPA views the Indiana administrative law judge decision (cited by the Petitioner) as less relevant to the current proceeding than EPA's own *Riverview Order*. Additionally, EPA notes that the Petitioner could have—but apparently did not—seek review of the Permit through the state administrative review channel that resulted in the Riverview administrative law judge decision.

> 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). 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. . . . The Petitioners . . . simply allege generally that the project's "emissions implications" are not clear, without further analysis. 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 . . . 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.

Riverview Order at 15–16.

The same general reasoning applies here. It is not clear from the Petition what "critical information" with "emissions implications" was omitted or withheld during the public comment period. The Petitioner does not identify what information (or even what type of information) was unavailable. The Petitioner also does not explain why this information might have been relevant to the terms of the Permit.

The Petitioner's reference to its public record requests provides no support for its claim. EPA explained the relationship between public records requests and permitting requirements in the *Riverview Order*, stating:

> Additionally, the Petitioners claim that IDEM withheld "hundreds of public records" until after the public comment period. As IDEM notes, public records requests are distinct from the permitting process. 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.

Riverview Order at 16 (citations omitted). Here, the Petitioner does not discuss the content of its public records requests, but instead simply includes a brief reference to an exhibit purportedly containing these requests. This type of unexplained reference to an exhibit that *might* contain information supporting its allegation is not sufficient to demonstrate that the Permit or permit process failed to satisfy the Act.[41] Moreover, the referenced exhibit was not actually attached to the Petition submittal.[42] Given the lack of explanation within the Petition and the absence of the exhibit itself, it is not clear how or why these public records requests would be relevant.

The Petitioner's only specific example of allegedly missing emissions information is a one-sentence reference to public comments "providing a mass balance calculation to show that not all emissions were accounted for in the Permit." Petition at 28. However, as explained earlier in EPA's response to this claim, the public comment relating to this issue does not appear relevant, as it does not make any allegations regarding *missing* emissions information or 326 IAC 2-7-17(c)(1)(C)(iv), but instead features a *dispute* over emission calculations included in the permit record. Moreover, IDEM responded to this comment with information about the emission calculations at issue. *See* ATSD at 203–205.The Petitioner does not acknowledge this response, much less demonstrate why it was insufficient to address the specific issue raised in that comment. 40 C.F.R. § 70.12(a)(2)(vi).

In sum, not only were the issues in Claim 5 not raised in public comments, but the Petitioner also has not demonstrated that IDEM failed to satisfy 326 IAC 2-7-17(c)(1)(C)(iv) or any EPA regulations potentially relevant to this issue. Accordingly, EPA denies this claim.

V. CONCLUSION

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

Dated: MAR 14 2023

Michael S. Regan
Administrator

[41] A petitioner must include all arguments or claims it wishes EPA to consider within the Petition itself. 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 be contained within the body of the petition, or 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.").

[42] Petition Exhibit O, as referenced in the Petition, contains an EPA Enforcement Alert related to a different topic. No other Petition exhibits contain the public records requests at issue here.