BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION NO. IV-2021-5
	)	
ALABAMA POWER COMPANY	)	ORDER RESPONDING TO
BARRY GENERATING PLANT	)	PETITION REQUESTING
MOBILE COUNTY, ALABAMA	)	OBJECTION TO THE ISSUANCE OF
PERMIT NO. 503-1001	)	TITLE V OPERATING PERMIT
	)	
ISSUED BY THE ALABAMA DEPARTMENT OF	)	
ENVIRONMENTAL MANAGEMENT	)	
	)	

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

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated March 30, 2021 (the Petition) from Sierra Club and Greater-Birmingham Alliance to Stop Pollution (GASP) (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to the final operating permit issued on February 2, 2021 (the Final Permit) by the Alabama Department of Environmental Management (ADEM) to the Alabama Power Company, Barry Generating Plant, facility No. 503-1001 (Barry or the facility) in Mobile County, Alabama. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and Chapter 335-3-16 of the Alabama Department of Environmental Management Administrative Code. *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained in Section IV of this Order, the EPA grants in parts and denies in part the Petition requesting that the EPA Administrator object to the Permit. Specifically, the EPA grants Claim I in part, grants Claim II in part, and denies the rest of the claims.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(l) of the CAA, 42 U.S.C. § 766la(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. ADEM submitted a title V program governing the issuance of operating permits on December 15, 1993. The EPA granted interim

approval of ADEM's title V operating permit program in 1995, 60 Fed. Reg. 57346 (November 15, 1995), and the EPA granted full approval of ADEM's title V program in 2001, 66 Fed. Reg. 54444 (October 29, 2001) This program, which became effective on November 28, 2001, is codified in ADEM Admin. Code r. 335-3-16.

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 the EPA for review. 42 U.S.C. § 7661d(a). Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of the EPA's 45-day review period, petition the Administrator to object to the permit. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

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

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such

[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.*

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 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).[2] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[3] The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).[4] When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g.*, *MacClarence*, 596 F.3d at 1130–31.[5] Certain aspects of the petitioner's demonstration burden are discussed in the following paragraph. A more detailed discussion can be found in the preamble to the EPA's proposed petitions rule. *See* 81 Fed. Reg. 57822, 57829–31 (August 24, 2016); *see also In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether a petitioner has provided the relevant analyses and citations to support its claims. For each claim, the petitioner must identify (1) the specific grounds for an objection, citing to a specific permit term or condition where applicable; (2) the applicable requirement as defined in 40 C.F.R. § 70.2, or requirement under part 70, that is not met; and (3) an explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under part 70. 40 C.F.R. § 70.12(a)(2)(i)–(iii). If a petitioner does not identify these elements, the EPA is left to work out the basis for the petitioner's objection, contrary to Congress's express allocation of the

[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.

burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.").[6] Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013).[7] Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g., In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).[8]

Another factor the EPA examines is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. Petitioners are required to address the permitting authority's final decision and final reasoning (including the state's response to comments) where these documents were available during the timeframe for filing the petition. 40 C.F.R. § 70.12(a)(2)(vi); *see MacClarence*, 596 F.3d at 1132–33.[9] Specifically, the petition must identify where the permitting authority responded to the public comment and explain how the permitting authority's response is inadequate to address (or does not address) the issue raised in the public comment. *Id*.

The information that the EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. 40 C.F.R. § 70.13. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis'); any comments the permitting authority received during the public participation process on the draft permit; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; and all materials available to the permitting authority that are relevant to the permitting

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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); *Georgia Power Plants Order* at 9–13; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (March 15, 2005).

[8] *See also In the Matter of Hu Honua Bioenergy*, Order on Petition No. IX-2011-1 at 19–20 (February 7, 2014); *Georgia Power Plants Order* at 10.

[9] *See also, e.g., Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. App'x *11, *15 (2d Cir. 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012) (denying a title V petition issue where petitioners did not respond to the state's explanation in response to comments or explain why the state erred or why the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007) (*Georgia Power Plants Order*) (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).

decision and that the permitting authority made available to the public according to § 70.7(h)(2). *Id.* If a final permit and a statement of basis for the final permit are available during the agency's review of a petition on a proposed permit, those documents may also be considered when making a determination whether to grant or deny the petition. *Id.*

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

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

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

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

C. New Source Review

The major New Source Review (NSR) program is comprised of two core types of preconstruction permit requirements for major stationary sources. Part C of title I of the CAA

establishes the Prevention of Significant Deterioration (PSD) program, which applies to new major stationary sources and major modifications of existing major stationary sources for pollutants for which an area is designated as attainment or unclassifiable for the national ambient air quality standards (NAAQS) and for other pollutants regulated under the CAA. 42 U.S.C. §§ 7470–7479. Part D of title I of the Act establishes the major nonattainment NSR (NNSR) program, which applies to new major stationary sources and major modifications of existing major stationary sources for those NAAQS pollutants for which an area is designated as nonattainment. 42 U.S.C. §§ 7501–7515. The EPA has two largely identical sets of regulations implementing the PSD program. One set, found at 40 C.F.R. § 51.166, contains the requirements that state PSD programs must meet to be approved as part of a state implementation plan (SIP). The other set of regulations, found at 40 C.F.R. § 52.21, contains the EPA's federal PSD program, which applies in areas without a SIP-approved PSD program. The EPA's regulations specifying requirements for state NNSR programs are contained in 40 C.F.R. § 51.165.

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

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

III. BACKGROUND

A. The Barry Facility

The Barry Plant (Barry), owned by Alabama Power Company (APC), is a coal and gas-fired power station located in Bucks, Alabama (Mobile County). The facility consists of the following boiler units: Units 1 and 2, which are natural gas-fired boiler units; Units 4 and 5, which are coal-fired boiler units; and Units 6A, 6B, 7A, and 7B, which are natural gas-fired combined cycle units. The facility is subject to emission standards for particulate matter (PM), opacity, sulfur dioxide (SO_2), nitrogen oxides (NO_x), mercury, volatile organic compounds (VOCs) and carbon monoxide (CO), among others. The facility also indicates solid fuel handling systems as a significant source of air pollutants.

The EPA conducted an analysis using EPA's EJScreen[10] to assess key demographic and environmental indicators within a five kilometer-radius of the Barry Plant. This analysis showed a total population of approximately 135 residents within a five-kilometer radius of the facility, of which approximately 40 percent are people of color and 37 percent are low income. In addition, the EPA reviewed the EJScreen Environmental Justice Indices, which combine certain demographic indicators with twelve environmental indicators. Two of the twelve Environmental Justice Indices in this five-kilometer area fell between the 70th and 80th percentile in the State of Alabama. The remaining ten of the twelve Environmental Justice Indices in this five-kilometer area fell between the 60th and 70th percentile in the State of Alabama.

B. Permitting History

Alabama Power Company first obtained a title V permit for the Barry Plant in 2003, which was subsequently renewed. On June 25, 2015, Alabama Power Company submitted an application for a renewal title V permit. ADEM published notice of a draft permit on June 30, 2020, subject to a public comment period that ran until October 22, 2020. On December 16, 2020, ADEM submitted the Proposed Permit, along with its responses to public comments (RTC), to the EPA for its 45-day review. The EPA's 45-day review period ended on February 1, 2021, during which time the EPA did not object to the Proposed Permit. ADEM issued the final title V renewal permit (Permit) for the Barry Plant on February 2, 2021.

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The EPA's 45-day review period expired on February 1, 2021. Thus, any petition seeking the EPA's objection to the Permit was due on or before April 5, 2021. The Petition was received March 30, 2021, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

I. Objections Arising from Permit Limits with Potential to Exceed SO_2 NAAQS

Claims I.A–I.D are found on pages 17–24 (Sections I.A–I.D) of the Petition.

Claim I.A: The Petitioners Claim That the "EPA Should Object Because ADEM Failed to Require APC to Demonstrate that Barry's Emissions Will Not Interfere with Maintenance of SO_2 NAAQS."

Petitioners' Claim: The Petitioners claim that ADEM issued the Permit without complying with Alabama's SIP requirements. Specifically, the Petitioners note that Alabama's regulations

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

require APC to demonstrate "that the sulfur oxides emitted, either alone or in contribution to other sources, will not interfere with attainment and maintenance of any primary . . . ambient air quality standard prescribed at Rule 335-3-1-0.3." Petition at 18 (citing Ala. Admin. Code r. 335-3-5-.01(2)(a)). The Petitioners assert that ADEM issued the Permit while having in its possession evidence— as noted below, submitted by Petitioners during the public comment period— demonstrating that the permit's SO_2 limits were not stringent enough to ensure the emissions would not interfere with maintenance of the SO_2 NAAQS. *Id.*

As part of their comments on the draft permit, the Petitioners submitted modeling that they assert demonstrates the permitted SO_2 limit of 1.8 lbs/mmbtu (Permitted SO_2 Limit) is insufficient to ensure compliance with the 2010 SO_2 NAAQS.[11] *Id.* The Petitioners assert that despite having this evidence, ADEM never required APC to demonstrate that the Permitted SO_2 Limit would not interfere with maintenance of the SO_2 NAAQS. *Id.* The Petitioners note that APC sought the same SO_2 limit that was set in its previous title V permit even though this is the first permit ADEM considered for the facility subsequent to the 2010 SO_2 NAAQS promulgation and that fossil-fuel-burning power generation units like those at Barry are the predominant source of SO_2 emissions. *Id.* Additionally, APC submitted no modeling with its application to show that the Permitted SO_2 Limit would achieve compliance with the SO_2 NAAQS. *Id.* The Petitioners state that "[d]espite that, and the modeling evidence that the proposed permit limit was *not strict enough* to preclude 'interference with . . . maintenance of the SO_2 NAAQS, ADEM wrongly issued the Plant Barry Permit with the SO_2 limits that Alabama Power proposed in its application and that predated the 2010 SO_2 NAAQS, citing as authority Ala. Admin. Code r. 335-3-5-.01(1)(a)." *Id.* at 19.

The Petitioners further assert that ADEM's response to comments did not address ADEM's failure to require APC to demonstrate that the Permitted SO_2 Limit would not interfere with maintenance of the SO_2 NAAQS. *Id.* In response to comments on this issue, ADEM explained that the title V operating permit is not the appropriate form for addressing an area's compliance with the NAAQS and suggested that such limits should be made through the SIP program established by the CAA. *Id.* The Petitioners claim that the EPA rejected this argument in a previous order, *In the Matter of Duke Energy, LLC Asheville Steam Electric Plant*, Order on Petition No. IV-2016-06 at 14 (June 30, 2017). Petition at 19. There, the Petitioners assert, North Carolina made similar claims that the title V operating permit was not the appropriate forum because the NAAQS were not applicable requirements, but the EPA rejected this reasoning because the objections were rooted in separate and distinct state regulatory provisions. *Id.*

In light of the modeling that Petitioners supplied, which they assert demonstrates that the permitted SO_2 limits are insufficiently stringent to ensure compliance with the NAAQS, the Petitioners express concern with protection of environmental justice communities living around Barry. *Id.* at 5. The Petitioners also note that "the environmental justice communities in the vicinity of Plant Barry are the communities that have been and will be most, and disproportionately, impacted by Plant Barry's violations of the SO_2 NAAQS." *Id.* at 20. In order

[11] According to Petitioners, modeling the permitted limits could "lead to levels as high as 681 ug/m3 or 430 ug/m3 (depending on what limit one of the coal units complies with), versus the NAAQS limit of 196.2 µg/m3. Petition at 2.

to deliver and secure environmental justice to the communities surrounding Barry, the Petitioners state, when the EPA reviews these objections, the EPA must consider and address the disproportionate and cumulative impacts long arising from Barry's SO_2 emissions. *Id.*

Claim I.B: The Petitioners Claim That the "EPA Should Object Because ADEM Failed to Administer the Air Division to Provide for the Attainment of the NAAQS."

The Petitioners assert that ADEM issued the permit without complying with Ala. Admin. Code r. 335-3-1-.03(3), which the Petitioners claim imposes an obligation on ADEM's Air Division Director to administer the division to attain the NAAQS.[12] Petition at 20. The Petitioners claim:

> Acting to set limits on SO_2 emissions in the [t]itle V [o]perating [p]ermit is part of administering the Air Division, and as such, something that must be done to "provide for the attainment of the [NAAQS]." By issuing the permit in the face of modelling evidence establishing that the SO_2 limit will interfere with the NAAQS, and failing to require APC to demonstrate that the proposed limit would provide for attainment of the SO_2 NAAQS, ADEM's Air Division Director has violated Ala. Admin. Code r. 335-3-1-.03(3).

Id. at 21 (internal citations omitted).

Claim I.C: The Petitioners Claim That the "EPA Should Object Because ADEM Failed to Submit Information Necessary to Adequately Review the Proposed Permit."

The Petitioners assert that ADEM failed to submit necessary information to allow the EPA to adequately review the proposed permit, citing 40 CFR § 70.8(c)(3). Petition at 8, 21. Specifically, the Petitioners contend that ADEM needed to convey a record that supported its decision to retain the pre-existing 1.8 lb/mmbtu SO_2 limit including showing that the limit will achieve compliance with the NAAQS. The Petitioners state that they submitted modeling evidence demonstrating that the permitted SO_2 limit is not adequate to ensure compliance with the NAAQS and ADEM has provided no evidence to the contrary within the permit record. The Petitioners also state that the permit record does not include a demonstration by APC that the limits would not interfere with maintenance of the NAAQS as required by Ala. Admin. Code r. 335-3-5-.01(2)(a); with the demonstration, Petitioners assert that the "EPA would have additional pertinent information to review the proposed permit, regarding compliance with the NAAQS. Petition at 8, 21-22. The Petitioners further cite to *In the Matter of Duke Energy, LLC Asheville Steam Electric Plant Arden, North Carolina*, Petition No. IV-2016-06, in support of their argument that the EPA "should object to the proposed permit because the record is not sufficient to conclude that the permit 'limit[s are] adequate to satisfy the requirements of [a state regulation] in regards to the 2010 1-hour SO_2 NAAQS, or, alternatively, why [that state

[12] Ala. Admin. Code r. 335-3-1-.03 states that the administration of the Division by the Director shall provide for the attainment of the National Primary Ambient Air Quality Standards throughout the state as expeditiously as practicable, but in no case later than 3 years after the date of initial adoption of these rules and regulations or within the time limits specified by section 110(a) of the CAA, as amended (91 Stat. 685), whichever is later.

regulation] does not require a more stringent SO_2 emissions limit to protect the 2010 1-hour SO_2 NAAQS at this time.'" Petition at 22.

Claim I.D: The Petitioners Claim That the "EPA Should Object Because ADEM Sets Long-Term Emission Limits Inadequate to Protect the Short-Term NAAQS."

The Petitioners claim that the EPA must object because the Permit "improperly relies on 24-hour and 30-day limits to ostensibly protect the 1-hour NAAQS." Petition at 22. As described by the Petitioners, under the Permit, compliance with the 1.8 lb/MMBtu SIP SO_2 limits for both Units 4 and 5 may be demonstrated based on twenty-four hour rolling averaging, and compliance with the 0.20 lb/MMBtu MATS rule limit for Unit 5 may be demonstrated by a 30-boiler-operating-day rolling average. *Id.* The Petitioners state that "[c]ontinued reliance on the 24-hour averaging time for the SO_2 emission limitation of 1.8 lb/MMBtu, or a 30-day rolling average for the 0.2 lbs/MMBtu limit, to determine compliance with permit limits could result in the release of emissions that exceed the permit limitations during multiple hours of the day." *Id.*

The Petitioners explain that the EPA guidance recommends that averaging times for emissions limits should not exceed the averaging time of the applicable NAAQS. *Id.* at 23 (citing U.S. EPA, *Guidance for 1-Hour SO_2 Nonattainment Area SIP Submissions* (April 23, 2014)). The Petitioners further assert, "[A]ny emissions limits based on averaging periods longer than [1 hour] should be designed to have comparable stringency to a 1-hour average limit at the critical emission value." *Id.* (quoting *Guidance for 1-Hour SO_2 Nonattainment Area SIP Submissions* (April 23, 2014)) Lastly, the Petitioners state, "If a permit employs an averaging period longer than one hour, the numerical limit for the SO_2 emissions must be ratcheted down further to provide adequate assurance that those emissions will not cause or contribute to the exceedance of the 1-hour, 75 ppb air quality standard." *Id.*

The Petitioners assert that ADEM failed to address the averaging issue related to the 1-hour SO_2 NAAQS in its response to comments. *Id.* The Petitioners argue that the EPA should object to the Permit based on the Permit's failure to establish an hourly averaging limit or, as an alternative, more stringent numerical emission limits. *Id.* The Petitioners have suggested that the facility has continuous emission monitors that would enable it to measure compliance with emission limits every hour. *Id.*

The Petitioners also object to the 30-day rolling average used for compliance with Unit 5's additional limit of 0.2 lbs/MMBtu. *Id.* The Petitioners acknowledge it is a stricter limit but argue that the 30-day rolling average also creates the risk of violating the 1-hour average NAAQS limit of the 1-hour 75 ppb air quality standard. *Id.*

EPA's Response: For the following reasons, the EPA grants in part and denies in part the Petitioners' request for an objection on this claim. Specifically, the EPA denies Claim I.B and grants the remaining claims (Claims I.A, I.C, and I.D).

Relevant Legal Background

As the Petitioners acknowledge, promulgation of a NAAQS does not, in and of itself, result in an applicable requirement in the form of an emission limit for title V sources.[13] Rather, the measures contained in each state's EPA-approved SIP to achieve the NAAQS are applicable requirements. *See* 40 C.F.R. § 70.2. The CAA provides that the EPA sets the NAAQS, but the states then determine how best to attain and maintain the NAAQS within their boundaries. A NAAQS by itself does not impose any obligations on sources. "A source is not obligated to reduce emissions as a result of the [NAAQS] until the state identifies a specific emission reduction measure needed for attainment (and applicable to the source), and that measure is incorporated into a SIP approved by EPA." Decision on Reconsideration of Petition to Object to Title V Permit for Reliant Portland Generating Station, Upper Mount Bethel Township, Northampton County, PA, 73 *Fed. Reg.* 64615 (October 30, 2008).[14]

In prior orders, the EPA has explained that states have discretion to interpret a "broad, sweeping state-derived general SIP provision [to] not mandate. . . SO_2 emission limits" on a specific source to protect the 2010 1-hour SO_2 NAAQS. *See supra* note 13; *see also In the Matter of TransAlta Centralia Generation, LLC*, Order on Permit No. SW98-8-R3 at 7 (April 28, 2011)

In contrast to orders addressing broad, sweeping, general SIP provision, the EPA has previously granted petitions where a state's EPA-approved SIP regulations impose requirements on a source to undertake a specific analysis to demonstrate attainment with a NAAQS. *See In the Matter of Duke Energy, LLC Asheville Steam Electric Plant,* Order on Petition No. IV-2016-06 at 11–17 (June 30, 2017) (*Duke Asheville Order*); *In the Matter of Duke Energy, LLC Roxboro Steam Electric Plant,* Order on Petition No. IV-2016-07 at 10–15 (June 30, 2017) (*Duke Roxboro Order*); *In the Matter of Public Service of New Hampshire, Schiller,* Order on Petition No. VI-2014-04 at 8–13 (July 28, 2015) (*Schiller Order*). Specifically, in the *Duke Asheville Order, the Duke Roxboro Order* and the *Schiller Order*, the EPA granted the petitioners claims due to a combination of factors. One factor the EPA considered were that the SIP provisions were based on a federal requirement. *Duke Roxboro Order* at 12–13; *Duke Ashville Order* at 16; *Schiller Order* at 9. Further, the SIP provisions regulated specific air pollution emissions rather than containing a more general prohibition on air pollution. *Duke Roxboro Order* at 12–13; *Duke Ashville Order* at 16; *Schiller Order* at 9. Finally, in each case, the states did not provide a clear interpretation in the record explaining scope and timing of the applicability of these SIP provisions as they apply to the source in question, and therefore the EPA required the states to provide a clearer explanation. *Duke Roxboro Order* at 12–13; *Duke Ashville Order* at 16; *Schiller Order* at 9.

[13] *See In the Matter of EME Homer City Generation, LP, et al.,* Order on Petition No. III-2012-06, III-2012-07, and III-2013-02 (July 30, 2014) at 11.

[14] *See also In the Matter of Marcal Paper Mills, Inc.,* Order on Petition No. II-2006-001 (November 30, 2006) at 13; *In the Matter of East Kentucky Power Cooperative Inc., William C. Dale Power Station,* Order on Permit No. V-08-009 (December 14, 2009) at 5; *Cate v. Transcontinental Gas Pipe Line Corp.*, 904 F. Supp. 526, 530 (W.D. Va. 1995) ("It is well-established that the NAAQS are not an 'emission standard or limitation' as defined by the Act.").

Relevant SIP Provisions

Ala. Admin. Code r. 335-3-5-.01(2) and (2)(a) state:

> … every owner or operator of a fuel burning installation having a total rated capacity greater than 1500 million BTU per hour shall:
>
> > (a) Demonstrate, to the satisfaction of the Director, that the sulfur oxides emitted, either alone or in contribution to other sources, will not interfere with attainment and maintenance of any primary or secondary ambient air quality standard prescribed at Rule 335-3-1-.03.

Ala. Admin. Code r. 335-3-1-.03 Ambient Air Quality Standards states:

> (1) Primary and Secondary Standards. The National Primary Ambient Air Quality Standards and National Secondary Ambient Air Quality Standards and accompanying appendices of reference methods, set forth in 40 CFR 50, as the same may be amended or revised, are hereby incorporated and made a part of these regulations and shall apply throughout the State.

ADEM's Response

In response to comments on this issue, ADEM stated: "The Title V Operating Permit is not the appropriate forum for addressing an area's compliance with the NAAQS. These determinations are made through the SIP program established by the Clean Air Act." RTC at 1. ADEM further explained that "ADEM has no authority to make emission limits more stringent through a permit action." *Id.* at 2.

The EPA's Analysis

As an initial matter, the EPA denies the Petitioners' request for an objection on Claim I.B. Pursuant to section 505(b)(2) of the CAA, a 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 agency (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. § 766ld(b)(2); 40 C.F.R. § 70.8(d); *see also* 40 C.F.R. § 70.12(a)(2)(v). The Petitioners did not raise the issue of compliance with Ala. Admin. Code r. 335-3-1-.03(3), which the Petitioners claim imposes an obligation on ADEM's Air Division Director to administer the division to attain the NAAQS. Nor did the Petitioners make any demonstration in the Petition that it was impracticable to raise an objection to the issue during the comment period or that the grounds for an objection to the notice arose after the comment period. In any event, the Petitioners have not cited a deficiency in a specific permit term or condition, an applicable requirement under part 70 that is not met, or 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. *See* 40 C.F.R. § 70.12(a)(2)(i)–(iii).[15]

The EPA acknowledges the Petitioners' environmental justice concerns, and the EPA has evaluated the Petition giving focused attention to the concerns raised by the Petitioners. As explained in the following sections, the EPA is granting portions of the Petition where the Petitioners have demonstrated that the Permit fails to assure compliance with applicable requirements.

For the reasons explained below, the EPA finds that the permit and permit record are unclear regarding when and how ADEM would apply Ala. Admin. Code r. 335-3-5-.01(2)(a) to Barry to fulfill the requirement of this regulation for the facility to demonstrate that the SO_2 emissions, either alone or in combination with other sources, will not interfere with the attainment and maintenance of the 2010 SO_2 NAAQS. In particular, for the reasons stated below, the permit record, including the RTC, is insufficient to explain how the Barry title V permit sufficiently incorporates and meets the applicable requirements in Ala. Admin. Code r. 335-3-5-.01(2)(a).

As stated above, the promulgation of the 2010 SO_2 NAAQS did not, in and of itself, mandate the emission limits to avoid a violation of the 2010 SO_2 NAAQS. The Petitioners do not claim that the promulgation of the 2010 SO_2 NAAQS itself requires additional emission limits; rather, the Petitioners rely on Ala. Admin. Code r. 335-3-5-.01(2)(a) to support their claim that the title V permit record must contain a demonstration that the SO_2 emissions at Barry will not interfere with attainment and maintenance of the 2010 SO_2 NAAQS.

General Permit Proviso 29 lists Ala. Admin. Code r. 335-3-5-.01 as the basis for the federally enforceable provision of the permit that states, "Unless otherwise specified in the Unit Specific provisions of this permit, no fuel burning equipment may discharge sulfur dioxide emissions in excess of the emissions specified in [Ala. Admin. Code r.] 335-3-5-.01." Final Permit at 15, General Proviso 29. The Unit Specific provisos include the emissions in Ala. Admin. Code r. 335-3-5-.01(1), as applicable, but do not include any requirement or reference to Ala. Admin. Code r. 335-3-5-.01(2).

As the Petitioners have stated, Ala. Admin. Code r. 335-3-5-.01(2)(a) does not simply incorporate the NAAQS into the SIP. Rather, the regulation requires "every owner or operator of a fuel burning installation having a total rated capacity greater than 1,500 million BTU per hour" to demonstrate that the source's *SO_2 emissions* will not interfere with the attainment and maintenance of any NAAQS under Ala. Admin. Code r. 335-3-5-.03, which includes the *2010 SO_2 NAAQS*. Further, Ala. Admin. Code r. 335-3-5-.01(2)(a) requires this demonstration *in addition* to the SO_2 emission limits approved elsewhere into the SIP (i.e., Ala. Admin. Code r. 335-3-5-.01(1)). Ala. Admin. Code r. 335-3-5-.01(2)(a) does not appear to be a broad, sweeping general prohibition on air pollution such as those at issue in the *2014 Homer City Order;* instead, Ala. Admin. Code r. 335-3-5-.01(2)(a) specifically addresses SO_2 emissions from the source ("either alone or in contribution to other sources") rather than a general prohibition on "air pollution." Therefore, Ala. Admin. Code r. 335-3-5-.01(2)(a) on its face is an applicable

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

requirement that resembles the SIP regulations addressed in the EPA's grants in the *Duke Roxboro Order*, *Duke Asheville Order*, and *Schiller Order.*

In addition, as was the case with the permit records at issue in the *Duke Roxboro Order, Duke Asheville Order*, and *Schiller Order*, ADEM's permit record is unclear as to how ADEM applies Ala. Admin. Code r. 335-3-5-.01(2)(a) in the permitting process. The permit record does not explain when this provision will apply to ensure that the source will not interfere with the attainment and maintenance of the 2010 SO_2 NAAQS and how ADEM will determine if a more stringent SO_2 emissions limit is needed to prevent interference with the attainment and maintenance of the NAAQS. While ADEM does state in the RTC that it will not set emission limits outside of the SIP process,[16] the EPA-approved SIP requires a demonstration separate from SIP-approved limits, specifically for "fuel burning" operations over 1,500 mmbtu/hr, which include all of the Barry units, that these types of units will not interfere with the attainment and maintenance of the NAAQS. ADEM's brief response to comments on this issue does not address the Petitioner's comments regarding the requirements of the SIP itself to evaluate the emissions of these sources.[17]

Direction to ADEM: In responding to this Order, ADEM should provide an adequate response to explain when the demonstration under Ala. Admin. Code r. 335-3-5-.01(2)(a) is required and how that demonstration is made. Specifically, ADEM should explain when and how this provision is implemented in the context of the 2010 SO_2 NAAQS and how that is reflected during the permitting process. If ADEM determines that they need to implement this provision in the context of the 2010 SO_2 NAAQS in this permit, then ADEM should respond to the Petitioners' comments regarding the modeling they submitted in relation to the set limit. In addition, ADEM should address the public comments regarding the averaging time of the current SO_2 emission limits in the permit in relation to the 2010 SO_2 NAAQS. ADEM should explain how the current SO_2 emission limits, like the 1.8 lb/MMBtu, are either designed to assure compliance with another NAAQS or explain how they do assure compliance with the 2010 SO_2 NAAQS in light of the longer averaging times.

II. ADEM's Permit Does Not Comply with the CAA's Substantive Requirements

Prior to detailing the specifics of their remaining claims, the Petitioners identify the statutory and regulatory provisions upon which their claims rely. Specifically, the Petitioners cite to CAA § 504(a), which states that "[e]ach permit issued under [title V] shall include enforceable emission limitations and standards…and such other conditions as are necessary to assure compliance with the applicable requirements of this chapter, including the requirements of the applicable implementation plan." Petition at 24 (citing 42 U.S.C. § 7611(c)). The Petitioners cite to the part 70 regulations, which state that each title V permit must include "[e]missions limitations and standards, including those operational requirements and limitations that assure compliance with

[16] In its Response to Comment, ADEM stated "The Title V Operating Permit is not the appropriate forum for addressing an area's compliance with the NAAQS. These determinations are made through the SIP program established by the Clean Air Act." RTC at 1.

[17] In addition, the area around Barry was not designated nonattainment, and thus the analysis from *In the Matter of Mill Creek Generating Station*, Order on Petition No. IV-2017-10 (October 3, 2019), pages 8-9, is not applicable in this case.

all applicable requirements at the time of permit issuance." *Id.* at 24 (citing 40 C.F.R. § 70.6(a)(1)).

Claims II.A–II.D are found on pages 24–32 (Sections II.A–II.D) of the Petition.

Claim II.A: The Petitioners Claim That the "EPA Should Object Because the Permit Does Not Include Applicable SIP Requirements for Control of Fugitive Emissions from the Coal Handling System and Associated Monitoring, Recordkeeping, and Reporting."

The Petitioners state that the Permit does not include or meet best management practices necessary to eliminate or minimize fugitive dust from the materials handling system. Petition at 24. The Petitioners explain that in response to Petitioners' comments, ADEM "incorrectly interpreted and failed to apply its SIP regulation, Fugitive Dust and Fugitive Emissions, Ala. Admin. Code r. 335-3-4-.02, and did not address Petitioners' concern that the Barry Permit only requires that the plant take 'reasonable precautions,' which is so vague as to be unenforceable." *Id.* (citing RTC Comments at 4–6 and Final Permit at 11, Permit Proviso 18). The Petitioners contend that "the permit must be revised to include more details, specific and enforceable measures, including recordkeeping and reporting requirements that assure compliance with Alabama's SIP and ensure federal enforceability of the permit." *Id*.

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

Under CAA § 504(a), "[e]ach permit issued under this subchapter shall include enforceable emission limitations and standards ... and such other conditions as are necessary to assure compliance with the applicable requirements of this chapter, including the requirements of the applicable implementation plan." Likewise, the EPA's regulations specify that each Title V permit must include "[e]missions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." 40 C.F.R. § 70.6(a)(l); *see* 40 C.F.R. § 70.6(c)(l). The "reasonable precautions" requirement at Ala. Admin. Code r. 335-3-4-.02(1)[18] is an "applicable requirement"

[18] Ala. Admin. Code r. 335-3-4-.02(1)(a)-(c) states:

> (1) No person shall cause, suffer, allow, or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired, or demolished without taking reasonable precautions to prevent particulate matter from becoming airborne. Such reasonable precautions shall include, but not be limited to, the following:
>
> (a) Use, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading of roads, or the clearing of land;
>
> (b) Application of asphalt, oil, water, or suitable chemicals on dirt roads, materials stock piles, and other surfaces which create airborne dust problems;
>
> (c) Installation and use of hoods, fans, and fabric filters (or other suitable control devices) to enclose and vent the handling of dusty materials. Adequate containment methods shall be employed during sandblasting or other similar operations.

for title V purposes. This regulation also identifies specific precautions that "shall" be adopted, including "application of asphalt, oil, water, or suitable chemicals on dirt roads, materials stockpiles, and other surfaces which create airborne dust problems" and "installation and use of hoods, fans, and fabric filters (or other suitable control devices) to enclose and vent the handling of dusty materials." The title V permit, in General Permit Proviso 18, includes certain specific measures, but not all of the ones just quoted. *See* Final Permit at 11. Thus, the Petitioners have demonstrated that the permit lacks specific and detailed measures for the control of fugitive emissions from the coal handling systems

In the RTC, ADEM stated:

> "…ADEM has for many years interpreted its fugitive dust regulations to require development and implementation of fugitive dust control plans only for those facilities for which ADEM determines that there is a need for fugitive dust mitigation. ADEM's records show no finding of fugitive dust issues at Plant Barry, so there is no need to include fugitive dust provisos in the Permit at this time. ADEM has clear authority to require the facility to develop and implement a fugitive dust control plan at any time necessary in the future."

RTC at 4.

Despite this explanation, there is nothing in the plain language of Ala. Admin. Code r. 335-3-4-.02 that would give ADEM the authority to waive the requirements for including reasonable precautions due to the lack of fugitive dust issues stemming from the solid fuel handling system. Even if this specific applicable requirement could be interpreted to allow ADEM to impose a qualification on the applicability to sources, ADEM has not provided a sufficient demonstration that there was, in fact, no finding of fugitive dust issues at Barry.

The Petitioners have also demonstrated that the permit must be revised to include monitoring, recordkeeping, and reporting requirements that assure compliance with the applicable requirement Ala. Admin. Code r. 335-3-4-.02and ensure federal enforceability of the permit. Under title V of the CAA and the EPA's part 70 regulations, every title V permit must include all applicable requirements that apply to a source, as well as any permit terms necessary to assure compliance with these requirements. *See e.g.*, 42 U.S.C. § 7661c(a).[19] In this case, despite General Permit Proviso 18 laying out some of the reasonable precautions required to prevent fugitive dust, the provisions for solid fuel handling systems do not indicate that there is any source-specific monitoring, recordkeeping, and reporting requirements for these units. *See* Final Permit at 55. With no monitoring, recordkeeping, or reporting requirements for the solid fuel handling systems, it is unclear to the EPA how Barry will assure compliance with the requirements (albeit incomplete) under General Permit Proviso 18.

[19] CAA section 504(a) requires the following: "Each permit issued under this subchapter shall include enforceable emission limitations and standards, . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan." *Id; see also* 40 C.F.R. § 70.6(a)(1) ("Each permit issued under this part shall include the following elements: (1) Emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.")

Direction to ADEM: ADEM should include in the permit the specific reasonable precautions that are required to prevent fugitive dust from the source, which includes the solid fuel handling systems, so that the permit terms are consistent with the associated SIP requirements in 335-3-4-.02(1)(a)-(c). ADEM should also update the permit to include relevant monitoring, recordkeeping, and reporting requirements to assure compliance with the reasonable precautions taken to address fugitive dust released from solid fuel handling systems.

Claim II.B: The Petitioners Claim That the "EPA Should Object Because ADEM Fails to Include Emission Controls and Work Practice Standards for Plant Barry's Coal Handling Operations."

The Petitioners provide a description of the coal handling operations as detailed in the statement of basis and Permit application. *See* Petition at 24–25. The Petitioners claim that many of these processes included in the operations release particulate matter (PM_{10} and $PM_{2.5}$) emissions. *Id.* at 25. The Petitioners assert that ADEM characterizes these emissions as fugitive emissions. *Id.* The Petitioners further assert that ADEM claims that "[t]here are no emission standards associated with these systems" and ADEM asserts that "since there are no emission standards no periodic or [compliance assurance monitoring] is required." *Id.* at 24–25. The Petitioners conclude that the Permit therefore fails to require control of emissions at any point in the coal handling operations. *Id.* at 25. As a result, the Petitioners claim that the "EPA should object because ADEM fails to include emission controls and work practice standards for Plant Barry's coal handling operations." *Id.*

EPA's Response: For the following reasons the EPA denies the Petitioners' request for an objection on this claim. Pursuant to section 505(b)(2) of the CAA, a 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 agency (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. § 766ld(b)(2); 40 C.F.R. § 70.8(d); *see also* 40 C.F.R. § 70.12(a)(2)(v). The Petitioners did not raise the issue of PM emission estimates from the coal pile during the public comment period. Nor did the Petitioners make any demonstration in the Petition that it was impracticable to raise an objection to the issue during the comment period or that the grounds for an objection to the notice arose after the comment period. In any event, the Petitioners have not cited a deficiency in a specific permit term or condition, an applicable requirement under part 70 that is not met, or 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. *See* 40 C.F.R. § 70.12(a)(2)(i)–(iii).[20]

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

Claim II.C: The Petitioners Claim That the "EPA Should Object Because ADEM Failed to Require that APC Disclose All Fugitive Emissions from the Coal Handling System."

The Petitioners claim that the "EPA should object because ADEM failed to require that APC disclose all fugitive emissions from the coal handling system." Petition at 26. The Petitioners explain that ADEM relied on PM emissions estimates from the Permit application, which stated PM emissions are expected to be approximately 45.9 tons per year. *Id.* at 26 (citing Statement of Basis at 18). The Petitioners contend that the calculations used to derive this estimate include unspecified AP-42 emission factors and a "study of the coal pile at TVA's Plant Colbert." *Id.* The Petitioners state:

> APC fails to include with its application the coal pile study or provide a reference for the public to find the study. Moreover, APC failed to explain how a study of another company's coal pile located in Northwest Alabama, which no longer operates, is representative of fugitive emissions from Plant Barry's coal pile.

Id. The Petitioners further assert that the estimates only include emissions from the surface area of the "Columbian coal pile" and fails to estimate fugitive emissions from the rest of the operations. *Id.* The Petitioners provide a listing of additional areas they assert should be included in the estimations. *See id.* at 26–27.

EPA's Response: For the following reasons, the EPA denies the Petitioners' request for an objection on this claim. Pursuant to section 505(b)(2) of the CAA, a 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 agency (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. § 766ld(b)(2); 40 C.F.R. § 70.8(d); *see also* 40 C.F.R. § 70.12(a)(2)(v). The Petitioners did not raise the issue of PM emission estimates from the coal pile. Nor did the Petitioners make any demonstration in the Petition that it was impracticable to raise an objection to the issue during the comment period or that the grounds for an objection to the notice arose after the comment period. In any event, the Petitioners have not cited a deficiency in a specific permit term or condition, an applicable requirement under part 70 that is not met, or 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. *See* 40 C.F.R. § 70.12(a)(2)(i)–(iii).[21]

Claim II.D: The Petitioners Claim That the "EPA Should Object Because ADEM Fails to Include the SIP Requirements to Control Fugitive Emissions and Permit Provisos for Monitoring, Recordkeeping and Reporting."

The Petitioners outline two SIP regulations with emission standards they assert apply to the coal handling systems. *See* Petition at 27. These regulations include a 20 percent opacity limit and limitations and work practice standards that apply to fugitive emissions. *Id.* at 27 (citing

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

Ala. Admin. Code r. 335-3-4-.01(1) and Ala. Admin. Code r. 335-3-4-.02, respectively). The Petitioners claim that the statement of basis does not recognize these regulations as applicable requirements that apply to the coal handling system. *Id.* at 27–28. The Petitioners acknowledge that the Permit includes an opacity limit of 20 percent for the Solid Fuel Handling Systems but assert that the Permit lacks associated requirements for compliance and performance test methods and procedures, emission monitoring, and recordkeeping and reporting. *Id.* at 28. Therefore, the Petitioners contend that the Permit fails to satisfy the requirement for all title V permits to contain monitoring, recordkeeping, and reporting conditions that assure compliance with all applicable requirements. *Id.* (citing to Permit Proviso for Solid Fuel Handling Systems, Emission Standards, Proviso 1 at 55).

The Petitioners cites to their public comments, which stated that "the permit terms and conditions fail to include any mention of barge coal unloading, conditions to restrict emissions (watering, wetting agents, enclosures or covering), and lacks monitoring, recordkeeping and reporting requirements." GASP and Sierra Club Comments on Draft Permit No. 503-1001 (October 22, 2020) at 18; Petition at 29. The Petitioners disagree with ADEM's response to this comment, which states "[t]here are no requirements other than those listed [in] the General Provisos that are applicable to barge coal unloading." RTC 4; Petition at 28. The Petitioners claim that this statement is inconsistent with the Statement of Basis, which describes the Solid Fuel Handling Systems as including delivery of coal by barges and unloading coal from barges. Petition at 28 (citing Statement of Basis at 18).

The Petitioners describe the fugitive dust regulation as having four distinct requirements, which include:

- Persons must take reasonable precautions to prevent particulate matter from becoming airborne, including a non-exhaustive list of specific control devices and practices;
- A restriction on visible emissions beyond the lot line;
- Authority for the Director to order treatment or destruction of fugitives that escape from a building or equipment that cause a nuisance or violate a regulation; and
- The owner or operator of any source or combination of sources on contiguous property which has the potential to emit 100 t/yr of particulates and which is located in the nonattainment areas of Etowah, Jefferson or Mobile must submit a plan for control of fugitive dust and fugitive emissions to the Director for approval.

Petition at 29 (citing Ala. Admin Code r. 335-3-4-.02(1)-(4)).

The Petitioners acknowledge that Permit General Proviso 18 includes the "reasonable precaution" provisions found in the SIP regulation; however, they assert that it does not include the requirement in any enforceable way and lacks required monitoring, recordkeeping and reporting provisions. *Id.* at 29. The Petitioners cite to the *2014 Georgia Power Order*,[22] in which

[22] *Order Granting in Part and Denying in Part Five Petitions for Objections to Permits*, Petitions Nos. IV-2012-1-IV-2012-2, IV-2012-3, IV-2012-4 and IV-2012-5 (April 14, 2014) (*2014 Georgia Power Order*).

the EPA granted requests to object to vague terms regarding fugitive dust requirements, specifically, similar "reasonable precautions" provisions, and stated:

> While the SIP regulation identifies various fugitive dust control methods that may constitute 'reasonable precautions' it does not mandate the use of any of those methods. For a Title V permit to assure a particular source's compliance with this requirement, consistent with 40 C.F.R. § 70.6(a)(1) […] the permit terms must specify the emissions limitations and standards, including those operational requirements and limitations that assure compliance with the applicable requirement in Georgia['s] SIP.

Id. at 29–30 (quoting *2014 Georgia Power Order*). The Petitioners claim that the Barry Permit is even more flawed because General Proviso 18(a) requires the use of "reasonable precautions" but does not include the control methods that are provided in the SIP regulation. *Id.* at 30.

EPA's Response: For the following reasons, the EPA denies the Petitioners' request for an objection on this claim. Pursuant to section 505(b)(2) of the CAA, a 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 agency (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. § 766ld(b)(2); 40 C.F.R. § 70.8(d); *see also* 40 C.F.R. § 70.12(a)(2)(v). The Petitioners did not raise the issue of monitoring, recordkeeping or reporting related to the 20 percent opacity limit for Solid Fuel Handling Systems—including barge coal unloading—with reasonable specificity in public comments. Nor did the Petitioners make any demonstration in the Petition that it was impracticable to raise an objection to the issue during the comment period or that the grounds for an objection to the notice arose after the comment period. Although the Petitioners did assert in their public comments that the permit terms and conditions failed to include any mention of barge coal unloading, or conditions to restrict emissions, and that the permit lacked monitoring, recordkeeping and reporting requirements for barge coal unloading, this assertion was not presented in the context of the 20 percent opacity limit for Solid Fuel Handling Systems.

To the extent the Petitioners again raise claims here related to the monitoring, recordkeeping, and reporting to assure compliance with the reasonable precautions taken to prevent fugitive dust, the EPA has addressed and granted a claim regarding these issues in the response to Claim II.A of this order.

III. Objections Arising from ADEM's Failure to Demonstrate Compliance

Claims III.A–III.D are found on pages 32–38 (Sections II.E.1, II.E.2, II.F, and II.G) of the Petition.

Claim III.A: The Petitioners Claim That the "EPA Should Object Because ADEM Failed to Determine Compliance."

The Petitioners assert that the CAA and part 70 regulations[23] require that the permit contain requirements to submit an annual compliance certification, which must include "the status of compliance for the facility's emission limitations, standards and work practices for each term or condition of the permit that is the basis of the certification" and whether the facility as a whole is in compliance. Petition at 32. The Petitioners further claim that CAA § 114(a)(3) states that the compliance certification shall include whether the compliance is continuous or intermittent. *Id.* The Petitioners claim that ADEM has not determined the compliance status of Barry or on a unit-by-unit basis, thus the EPA must object and direct ADEM to make the determinations of the compliance status. *Id.* at 33.

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

The EPA finds that the Petitioners have not demonstrated that the title V permit does not satisfy the compliance certification requirements of 40 C.F.R. 70.6(c)(5) or Alabama's approved title V program at Ala. Admin. Code r. 335-3-16-.07(e). The CAA and part 70 regulations cited by the Petitioners require that the permit contain requirements to submit an annual compliance certification, and the Barry Permit does contain such requirements in General Proviso 12.[24] In addition, the EPA finds the Petitioners are factually incorrect that the 2019 Compliance Certification does not include whether compliance was continuous or intermittent on a unit-by-unit basis. Based on the information in the 2019 Compliance Certification,[25] in particular, the column with the heading, "Source Description," Barry has certified compliance for "all units" as well on a unit-by-unit basis. Therefore, the Petitioners have failed to consider a key element regarding this claim, which is the fact that the compliance certification contains the information requested by the Petitioners.[26] Therefore, the Petitioners have not demonstrated a flaw in the current title V permit and are incorrect as to their assertions regarding the 2019 Compliance Certification.

Claim III.B: The Petitioners Claim That the EPA Must Object Because ADEM Failed to Obtain "Accurate and Complete Compliance Certifications from the Applicant."

The Petitioners contend that the 2019 Compliance Certification, which was the most recent available at the time of public comment, did not certify continuous compliance with all permit conditions or facility-wide compliance. Petition at 33. Based on this contention, Petitioners claim that ADEM should not have issued the final permit. *Id.* The Petitioners state that the lack of an

[23] The Petitioners cite 40 C.F.R. §§ 70.6(c)(1), 70.6(c)(5), 70.6(c)(5)(ii), 70.6(c)(5)(iii)(A)-(D), and 40 C.F.R. § 70.6(c)(5)(iv).
[24] Permit at 8–9
[25] The 2019 Compliance Certification can be found through ADEM's eFile system: http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104018297&dbid=0
[26] *See supra* note 8 and accompanying text.

adequate compliance certification leads to difficulty determining the true compliance status of the facility and could create challenges in bringing an enforcement action. *Id*.

The Petitioners assert that the 2019 Compliance Certification does not specify the methods to determine compliance, instead indicates "intermittent" as the method. *Id.* at 34. The Petitioners assert both that the omission of required information regarding the facility's current compliance status in the compliance certification negates the ability to "assure compliance with applicable requirements as mandated by 40 C.F.R. §§ 70.1(b) and § 70.6." *Id.* at 36. Further, the Petitioners contend that by listing compliance as "intermittent," the facility admitted it was not incompliance with the applicable requirements and, thus, there should be a schedule for compliance. *Id.* at 35–36. The Petitioners claim that the requirement that the permit indicate methods to determine compliance is critical because the compliance plan and schedule required under § 70.5(a)(8) are dependent on the source's compliance status at the time of permit issuance. *Id.* at 36.

The Petitioners state that ADEM appeared to misunderstand the compliance certification requirements when responding to comments by the Petitioners, stating, in the RTC:

> A compliance schedule is necessary only when a facility is not in compliance with applicable requirements at the time of issuance of the permit. Here, Alabama Power is in compliance with applicable requirements. … The above comment claims Alabama Power's application does not comply with 40 CFR 70.6(c)(5)(iii)(B). The cited rule does not apply.

RTC at 5 (Comment 16 Response) and 11 (Comment 36 Response) (internal citations omitted); Petition at 34.

The Petitioners disagree with this response. *See* Petition at 34. They contend that several of the elements in 40 C.F.R. § 70.6(c)[27] apply to permits regardless of the source's compliance status, including 40 C.F.R. § 70.6(c)(5)(iii)(B), which requires that the compliance certification include:

> The identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section. If necessary, the owner or operator also shall identify any other material information that must be included in the certification to comply with section 113(c)(2) of the Act, which prohibits knowingly making a false certification or omitting material information.

Id. (quoting 40 C.F.R. § 70.6(c)(5)(iii)(B)). The Petitioners claim that ADEM's response is incorrect because this regulation is not limited to noncompliant sources. *Id.* The Petitioners further claim that the provisions in this regulation require the permit to contain terms requiring the compliance certification to identify methods for each term and condition of the permit. *Id*. For these reasons the Petitioners state that the EPA must require ADEM obtain complete and

[27] The Petitioners cite to the example of 40 C.F.R. § 70.6(c)(5)(iii), which they claim identifies what the permit must require for certifying compliance with terms and conditions contained in the permit, including emission limitations, standards, or work practices.

accurate information to determine compliance at Barry. *Id.* at 37.

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

Based on EPA's examination of the Petition and the permit record, including the 2019 Compliance Certification, the EPA finds that the Petitioners have not demonstrated that the title V permit and the 2019 Compliance Certification does not satisfy the requirements of part 70 or Alabama's approved title V program. First, the Petitioners have not demonstrated that the information and level of detail in the 2019 Compliance Certification does not satisfy the requirements of 40 C.F.R. §§ 70.5(c)(9) and 70.6(c)(5) or Alabama's approved title V program at Ala. Admin. Code r. 335-3-16-.07(e). Based on the EPA's evaluation of the 2019 Compliance Certification , the compliance certification includes whether the compliance itself is intermittent or continuous, whether the methods for determining compliance are continuous or intermittent, and identification of the methods for determining compliance.[28] The Petitioners have provided no direct analysis of any particular permit terms, monitoring, recordkeeping, or reporting that may or may not need more detail in the 2019 Compliance Certification. As the EPA explained in 2014, "The certification should include sufficient specificity and must identify the terms and conditions that are being covered by the certification."[29] The EPA also explained that the certification must also contain the methods or other means used to determine compliance but "there may be different ways to meet this requirement."[30] As explained by ADEM, the 2019 Compliance Certification includes citations to the relevant permit conditions and the type of information used to determine compliance, such as monitoring, recordkeeping, reporting, or work practice standards. *See* RTC at 5. The Petitioners have not provided any analysis of why the level of detail contained in the 2019 Compliance Certification is inappropriate for any particular permit conditions in the Barry Permit. Rather, the Petitioners only made the general assertion that Barry's 2019 Compliance Certification "was incomplete because it failed to identify the methods it used to determine compliance." The EPA finds that this general, conclusory argument does not meet the demonstration burden.[31]

Furthermore, the Petitioners have not demonstrated that the 2019 Compliance Certification lacks sufficient detail related to the instances of noted intermittent compliance. While the Petitioners claim that the 2019 Compliance Certification indicates that Barry was in intermittent compliance with certain permit terms, the Petitioners have provided no analysis of the reasons for the intermittent compliance identified in the 2019 Compliance Certification. For example, the 2019 Compliance Certification notes that Barry was in intermittent compliance with some permit terms because there were periods of missing CEMS data despite the source operating the CEMS in compliance with the applicable requirements. *See* 2019 Compliance Certification at 10, fn. 3. As the EPA has previously explained, a compliance certification must include whether compliance with the permit terms is continuous or intermittent and the source must "note as

[28] *See supra* note 8 and accompanying text.
[29] *Memorandum on Implementation Guidance on Annual Compliance Certification Reporting and Statement of Basis Requirements for Title V Operating Permit*s, Steve Page, Director of OAQPS, U.S. EPA at Attachment 1, page 4 (April 30, 2014).
[30] *Id.* at 5.
[31] *See supra* note 7 and accompanying text.

possible exceptions to compliance, any deviations from the permit requirements and any excursions, or exceedances as defined in part 64, or other underlying applicable requirements, during which compliance is required." 66 Fed. Reg. 12872, 12874 (March 1, 2001). Here, Barry noted the possible exceptions to compliance, such as the missing CEMS data, and the Petitioners have failed to provide any analysis of that information in the context of their claim. Therefore, the EPA finds that the Petitioners have ignored key elements relevant to the 2019 Compliance Certification and finds that the general assertions about the lack of information do not meet the demonstration burden.[32]

In addition, the Petitioners have not demonstrated that the instances of noted intermittent compliance necessarily require ADEM to include a compliance schedule in the permit. As explained above, the intermittent compliance is not necessarily related to a violation of an emission limit and rather, there can be instances were missing data or other deviations from permit terms can result in intermittent compliance and the permit can require corrective action to resolve the intermittent compliance. As Barry explained in the 2019 Compliance Certification , they indicated intermittent compliance because "the methods used to determine compliance may have indicated exceptions to compliance, the status of compliance may be indeterminable, or the permit may have provided for additional actions that show the underlying requirement was not violated." 2019 Compliance Certifications at 9, fn. 2. While the Petitioners claim that a compliance schedule is necessary, the Petitioners have not provided any analysis explaining why particular instances of intermittent compliance require a compliance schedule rather than those instances already being resolved by the additional actions required by the permit. The EPA has previously explained that "Federal, state, and local authorities must exercise discretion when determining the appropriate course of action when assessing potential violations of applicable requirements. Such decisions are highly discretionary."[33] In this case ADEM evaluated the intermittent compliance and determined that "[t]here are no ongoing compliance issues which would necessitate a compliance schedule," and, as explained above, the Petitioners general assertions regarding intermittent compliance do not meet the demonstration burden.[34]

Claim III.C: The Petitioners Claim That the EPA Must Object Because Plant Barry "Failed to Include All Applicable Requirements in the Application."

The Petitioners contend that the permit application lacks information required by 40 C.F.R. § 70.5(c)(4), which includes "citation and description of all applicable requirements." Petition at 37. The Petitioners assert that NSR requirements apply but are not included in the compliance certification. *Id.* The Petitioners assert that because ADEM did not require Barry to describe each underlying requirement, the public cannot identify existing requirements from NSR permits that should be incorporated into the title V permit. *Id.* The Petitioners then claim that the RTC and title V permit omit citations to preexisting NSR permits without providing any explanation. *Id.*

[32] *See supra* note 7 and 8 and accompanying text.
[33] *In the Matter of Midwest Generation, LLC, Waukegan*, Order on Petition at 7 (June 14, 2007) (denying a claim regarding intermittent compliance on a compliance certification because the Petitioners did not demonstrate continued noncompliance and the state reasonably determined that a compliance schedule as not necessary).
[34] *See supra* note 7 and accompanying text.

EPA's Response: For the following reasons, the EPA denies the Petitioners' request for an objection on this claim. Pursuant to section 505(b)(2) of the CAA, a 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 agency (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. § 766ld(b)(2); 40 C.F.R. § 70.8(d); *see also* 40 C.F.R. § 70.12(a)(2)(v). The Petitioners did not raise the issues outlined in Claim III.C with reasonable specificity, nor did the Petitioners make any demonstration in the Petition that it was impracticable to raise an objection to the issue during the comment period or that the grounds for an objection to the notice arose after the comment period.

Claim III.D: The Petitioners Claim That the "EPA Must Object Because ADEM Fails to Provide Information Required to Include a Permit Shield."

The Petitioners claim that neither ADEM's draft nor the final Statement of Basis provide the basis for including a permit shield, which is contrary to requirements in 40 C.F.R. § 70.6(f)(1)(ii). Petition at 37. The Petitioners contend that the conditions to include a permit shield are not met because ADEM "cannot rely on the applicant's alleged compliance certification because it is incomplete and incorrectly compiled," ADEM "did not address the compliance certification issues," and ADEM "did not demonstrate that all the applicable requirements are included in the permit." *Id.* The Petitioners assert that the EPA should require ADEM to obtain the missing compliance certification information and should require that ADEM provide a detailed rationale in the permit record explaining why Barry is entitled to a permit shield. *Id.* at 38.

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

To the extent the Petitioners are claiming that the compliance certifications are flawed and therefore a permit shield is not appropriate under Alabama's title V program, the EPA previously explained in response to Claims III.A and III.B that the Petitioners have not demonstrated that the compliance certifications were flawed.[35] Therefore, the Petitioners have not established the grounds upon which they assert that a permit shield was inappropriately granted. Nor have Petitioners explained how an alleged flaw in compliance certifications are relevant to the validity of the permit shield. Therefore, the Petitioners have not demonstrated a flaw in the title V permit related to the permit shield.

With regards to the Petitioners claim that the record does not include a justification for the permit shield, the Statement of Basis for Barry includes an explanation of what applicable requirements are included in the title V permit and what requirements are not applicable to Barry.[36] To the extent the Petitioners are concerned that the permit shield will shield Barry from applicable requirements that are not addressed by the title V permit, they are mistaken as to how the permit

[35] *See supra* pages 20–23.
[36] The Statement of Basis can be found through ADEM's eFile system: http://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104455628&dbid=0&cr=1

shield granted under Ala. Admin. Code r. 335-3-16-.10 applies.[37] As Alabama's regulations state, the permit shield *only* applies to applicable requirement specifically included in the permit or those that are determined, in writing in the permit, to not apply. *See* Ala. Admin. Code r. 335-3-16-.10(a) and (b).[38]

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 grant in part and deny in part the Petition as described in this Order.

Dated: JUN 14 2022

Michael S. Regan
Administrator

[37] Ala. Admin. Code r. 335-3-16-.10 notes that ADEM may include:

> a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that:
>
> > (a) Such applicable requirements are included and are specifically identified in the permit; or
> >
> > (b) The Department, in acting on the permit application or revision, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or a concise summary thereof.

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