

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	
	)	
ABC COKE PLANT	)	PETITION NUMBERS IV-2014-5 AND
TARRANT, ALABAMA	)	IV-2014-6
PERMIT NO. 4-07-0001-03	)	
	)	
WALTER COKE PLANT	)	ORDER RESPONDING TO THE
BIRMINGHAM, ALABAMA	)	PETITIONER'S REQUESTS THAT THE
PERMIT NO. 4-07-0355-03	)	ADMINISTRATOR OBJECT TO
	)	ISSUANCE OF STATE OPERATING
	)	PERMITS
ISSUED BY THE JEFFERSON COUNTY	)	
DEPARTMENT OF HEALTH	)	
_____	)	

**ORDER DENYING PETITIONS FOR OBJECTION TO PERMITS**

**I. INTRODUCTION**

This Order responds to issues raised in two related petitions submitted to the United States Environmental Protection Agency (EPA) by Gasp<sup>1</sup>, an Alabama non-profit membership corporation (the Petitioner) pursuant to Section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2) and 40 Code of Federal Regulations (C.F.R.) § 70.8(d). The two petitions seek the EPA Administrator's objection to operating permits issued by the Jefferson County Department of Health (JCDH) for two coke plants located in Jefferson County, Alabama. Petition IV-2014-5, received on October 3, 2014, addresses the operating permit issued to ABC Coke, a division of Drummond Company, Inc., for its coke plant located in Tarrant, Alabama. Petition IV-2014-6, received on December 2, 2014, addresses the operating permit issued to Walter Coke, Inc. for its coke plant located in Birmingham, Alabama.

**II. STATUTORY AND REGULATORY FRAMEWORK**

**A. Title V Permits**

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA for approval an operating permit program that meets the requirements of title V of the CAA and the implementing regulations at 40 C.F.R. part 70. The EPA granted interim approval to the JCDH for the title V (part 70) operating permits program on November 15, 1995. 60 *Fed. Reg.* 57346. The EPA granted full approval to the JCDH for its operating permit program on

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<sup>1</sup> While "GASP" is written in all capitals in the ABC Coke and Walter Coke petitions, the name is not an acronym. The organization usually only capitalizes the first letter of the name. See <http://gaspgroup.org/about-us/>.

October 29, 2001. 66 *Fed. Reg.* 54444. The regulations in Jefferson County’s federally approved title V program include Chapter 16 (“Operating Permit Fees”) and Chapter 18 (“Operating Permit Regulations for Major Sources”) of the Jefferson County Board of Health Air Pollution Control Rules and Regulations.

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA. CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 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 sources’ compliance with applicable requirements. 57 *Fed. Reg.* 32250, 32251 (July 21, 1992). One purpose of the title V program is to “enable the source, States, the EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements.” *Id.* Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and for assuring compliance with such requirements.

#### **B. Review of Issues in a Petition**

State and local permitting authorities issue title V permits pursuant to EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the permit if the EPA determines that the permit is not in compliance with applicable requirements of the Act. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c) (providing that the EPA will object if the EPA determines that a permit is not in compliance with applicable requirements or requirements under 40 C.F.R. part 70). If the EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act and 40 C.F.R. § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of the EPA’s 45-day review period, to object to the permit.

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 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). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1); *see also New York Public Interest Research Group, Inc. (NYPiRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2003). Under § 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *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); *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82

(10th Cir. 2013); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) (discussing the burden of proof in title V petitions); *see also NYPIRG*, 321 F.3d at 333 n.11. In evaluating a petitioner's claims, the EPA considers, as appropriate, the adequacy of the permitting authority's rationale in the permitting record, including the response to comments (RTC) document.

The petitioner's demonstration burden is a critical component of CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2). As courts have recognized, CAA § 505(b)(2), 42 U.S.C. § 7661(b)(2), contains both a "discretionary component," to determine whether a petition demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty to object where such a demonstration is made. *NYPIRG*, 321 F.3d at 333; *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment whether a petition demonstrates a permit does not comply with clean air requirements."). 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 petitioners have demonstrated that the permit is not in compliance with requirements of the Act. *See, e.g., Citizens Against Ruining the Environment*, 535 F.3d at 667 (stating § 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); *NYPIRG*, 321 F.3d at 334 ("§ 505(b)[2] of the CAA provides a step-by-step procedure by which objections to draft permits may be raised and directs the EPA to grant or deny them, *depending on* whether non-compliance has been demonstrated.") (emphasis added); *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). When courts review 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., Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678; *MacClarence*, 596 F.3d at 1130–31. A more detailed discussion of the petitioner demonstration burden can be found in *In the Matter of Consolidated Environmental Management, Inc. – Nucor Steel Louisiana*, Order on Petition Numbers VI-2011-06 and VI-2012-07 (June 19, 2013) (*Nucor II Order*) at 4–7.

The EPA has looked at a number of criteria in determining whether the petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the RTC document), where these documents were available during the time frame for filing the petition. *See MacClarence*, 596 F.3d at 1132–33; *see also, e.g., In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 (December 14, 2012) (*Noranda Order*) at 20–21 (denying title V petition issue where petitioners did not respond to state's explanation in RTC or explain why the state erred or the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 (June 22, 2012) (*2012 Kentucky Syngas Order*) at 41 (denying title V petition issue where petitioners did not acknowledge or reply to state's RTC or provide a particularized rationale for why the state erred or the permit was deficient). Another criterion the EPA has examined is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for the petitioner's objection, contrary to

Congress' express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). See *MacClarence*, 596 F.3d at 1131 (“[T]he Administrator’s requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.”); *In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 (September 21, 2011) (*Murphy Oil Order*) at 12 (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring). Relatedly, the EPA has pointed out in numerous orders that, in particular cases, 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 (January 15, 2013) (*Luminant Sandow Order*) at 9; *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 (April 20, 2007) (*BP Order*) at 8; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004-10 (March 15, 2005) (*Chevron Order*) at 12, 24. Also, if the petitioner did not address a key element of a particular issue, the petition should be denied. See, e.g., *In the Matter of Public Service Company of Colorado, dba Xcel Energy, Pawnee Station*, Order on Petition No. VIII-2010-XX (June 30, 2011) at 7–10; and *In the Matter of Georgia Pacific Consumer Products LP Plant*, Order on Petition No. V-2011-1 (July 23, 2012) at 6–7, 10–11, 13–14.

### **III. BACKGROUND**

#### **A. The ABC Coke Plant**

The ABC Coke Plant is located at 900 Huntsville Avenue in Tarrant, Alabama (Jefferson County). The facility includes three coke batteries with related coke crushing and pushing operations and 120 coke ovens, producing approximately 460,000 tons of coke each year. The facility’s title V permit addresses the coke by-products plant (which produces coke), the utilities production plant (which provides the facility’s essential utility services), and the wastewater treatment plant (which treats the facility’s process wastewater). The JCDH issued the facility’s initial title V permit (Permit No. 4-07-0001-01) on November 21, 2003, and issued the renewal permit (Permit No. 4-07-0001-03) on which the petition is based August 11, 2014.

#### **B. The Walter Coke Plant**

The Walter Coke Plant is located at 3500 35<sup>th</sup> Avenue in Birmingham, Alabama (Jefferson County). The facility includes three coke batteries with related coke crushing and pushing operations and 132 coke ovens, producing approximately 730,000 tons of coke each year. The facility’s title V permit addresses the coke by-products plant (which produces coke), the utilities production plant (which provides the facility’s essential utility services), and the wastewater treatment plant (which treats the facility’s process wastewater). The JCDH issued the initial title V permit (Permit No. 4-07-0355-01) on November 11, 2002, and issued the renewal permit (Permit No. 4-07-0355-03) on which the petition is based on October 3, 2014.

#### **C. Timeliness of Petitions**

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

object. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2). Thus, any petition seeking the EPA's objection to the proposed ABC Coke permit was due on or before October 3, 2014, and any petition seeking the EPA's objection to the proposed Walter Coke permit was due on or before December 3, 2014. Gasp filed its ABC Coke Petition on October 3, 2014 and its Walter Coke petition on December 3, 2014. The EPA finds that both Petitions were timely filed.

#### **IV. EPA DETERMINATIONS ON THE ISSUES RAISED BY THE PETITIONER**

##### **A. Petitioner's Claim 1. General Permit Condition Addressing Fugitive Dust Does Not Assure Compliance with the Fugitive Dust Control Requirement in the Alabama State Implementation Plan (SIP).**

*Petitioner's Claim 1.* The Petitioner contends that General Permit Condition 61 (Walter Coke)<sup>2</sup> and General Permit Condition 14 (ABC Coke) do not assure compliance with the general requirement in Alabama's SIP requiring sources to control "fugitive dust." Walter Coke Petition at 3; ABC Coke Petition at 3. This requirement appears in Alabama's SIP at Ala. Admin. Code R. 335-3-4-.02 ("Fugitive Dust and Fugitive Emissions").<sup>3</sup> According to the Petitioner, this permit condition is "unconstitutionally vague and unconstitutionally restrictive." Walter Coke Petition at 3; ABC Coke Petition at 3. To support that claim, the Petitioner points to the Alabama Supreme Court's decision in *Ross Neely Express, Inc. v. ADEM*, 437 So.2d 82 (Ala. 1983). *Id.* According to the Petitioner, in that case the Alabama Supreme Court "struck down a nearly identical State rule governing fugitive dust" because "the requirement to take 'reasonable precautions' to prevent particulate matter from becoming airborne was unconstitutionally vague and the prohibition against the discharge of visible fugitive dust emissions beyond the lot line was unreasonably and unconstitutionally restrictive." *Id.* The Petitioner notes: "While some 'reasonable precautions' have been identified in the final Permit, all unspecified 'reasonable precautions' are unenforceable because they are unconstitutionally vague." Walter Coke Petition at 3; *see also* ABC Coke Petition at 3. The Petitioner further contends that the permits continue to include "the unenforceable and unconstitutionally restrictive prohibition against 'the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate.'" Walter Coke Petition at 3-4; *see also* ABC Coke Petition at 3-4. Thus, according to the Petitioner, General Permit Condition 61 (Walter Coke) and General Permit Condition 14 (ABC Coke) do not assure compliance with applicable requirements. *Id.*

*EPA's Response to Claim 1.* For the reasons described below, the EPA denies the Petitions on these claims. The Petitioner did not demonstrate that the permits lack sufficient specificity regarding the facilities' obligations under the general SIP requirement to "take reasonable precautions" to control fugitive dust to assure compliance with that applicable requirement, and also did not demonstrate that the permit conditions are too broad or too restrictive to be enforceable.

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<sup>2</sup> The Walter Coke Petition refers to General Permit Condition 14, but the correct citation is Condition 61.

<sup>3</sup> The EPA approved Ala. Admin. Code R. 335-3-4-.02 (state effective date 10/15/1996) into Alabama's SIP on June 6, 1997. 62 Fed. Reg. 30991. Nearly identical language appears in Jefferson County Air Pollution Control Rule 6.2 ("Fugitive Dust").

First, regarding the Petitioner's allegation that the permits are too vague to assure compliance with the general SIP requirement to take reasonable precautions to control fugitive dust set forth at Ala. Admin. Code R. 335-3-4-.02, the Petitioner did not explain why the more specific fugitive dust control measures that the JCDH added to the permits in response to public comments are insufficient to assure compliance with the applicable fugitive dust control requirement. Among other things, the JCDH added terms to the permits specifically requiring that the facilities use a vacuum truck/street sweeper/water truck on paved surfaces, use a wet suppression system on unpaved surfaces and piles where conditions are dry and fugitive dust could become airborne and leave property lines, maintain the existing roof/cover over coal conveyors, use water sprays on a point upstream of the coke loading belt, and use water sprays on the rotary pump. Walter Coke Permit Condition 61, ABC Coke Permit Condition 14. While the Petitioner acknowledges the JCDH's addition of these more specific permit requirements, the Petitioner says nothing to refute their adequacy. Therefore, the EPA concludes that the Petitioner has not demonstrated that the fugitive dust requirements in the permits are too vague to assure compliance with the applicable fugitive dust control requirements in Alabama's SIP.

Second, the Petitioner has not demonstrated that the JCDH's inclusion in the permits of the general SIP requirement that the facilities take reasonable precautions to control fugitive dust – in addition to the specifically identified precautions – somehow renders the permits not in compliance with applicable requirements or the requirements of 40 C.F.R. part 70. The general fugitive dust control requirement at Ala. Admin. Code R. 335-3-4-.02 is approved into Alabama's SIP and therefore is an "applicable requirement" that must be addressed in Alabama title V permits. *See* CAA § 504(a), 42 U.S.C. § 7661c(a) ("Each 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."). While a permitting authority may need to include additional, specific permit requirements in a source's title V permit to assure compliance with a general SIP requirement, *see, e.g., In the Matter of Scherer Steam-Electric Generating Plant, et al.*, Order on Petition Nos. IV-2012-1, IV-2012-2, IV-2012-3, IV-2012-4, IV-2012-5 (April 14, 2014) at 19, this does not mean that a permit is deficient if the permitting authority also includes a permit condition reciting the general SIP provision. To the contrary, the JCDH's inclusion of a condition in the Walter Coke and ABC Coke permits reciting the sources' general obligation to take all reasonable precautions to control fugitive dust helps to assure compliance with Ala. Admin. Code R. 335-3-4-.02. *Cf. In the Matter of Hercules, Inc.*, Order on Petition No. IV-2003-1 (Nov. 10, 2004) at 8 (denying petition for objection to permit condition that set forth a general obligation on air pollution sources not to create a nuisance, explaining: "In general, EPA presumes that state nuisance rules . . . are 'general duty' provisions [that] impose general conditions on sources and may be incorporated into title V permits without specific emission limitations and standards.").

To the extent that the Petitioner is arguing that the Alabama Supreme Court's *Ross Neely Express* decision prohibits the JCDH from including the general fugitive dust control provision in title V permits on the basis that it is unconstitutionally vague (even where accompanied by the more specific permit requirements described above), the EPA disagrees. The *Ross Neely Express* decision was issued by a state court in the context of a state enforcement action. A state court cannot invalidate or remove a requirement from the state's federally enforceable SIP, and the

State of Alabama has not requested that the EPA remove the fugitive dust control requirement in Ala. Admin. Code R. 335-3-4-.02 from Alabama's SIP. Furthermore, a permitting authority cannot use a title V permit to modify a SIP. *See, e.g., In the Matter of Midwest Generation, LLC, Crawford Generating Station*, Order on Petition No. V-2004-2 (Mar. 25, 2005) at 18. Thus, contrary to the Petitioner's suggestion, a permitting authority cannot simply choose to omit an applicable SIP requirement from a source's title V permit on the basis that the requirement is too vague. Rather, the permitting authority must include such additional permit terms and conditions in the source's title V permit as needed to assure the source's compliance with the applicable requirement. As discussed above, that is exactly what the JCDH appears to have done in the ABC Coke and Walter Coke permits with respect to the general fugitive dust control requirement in Alabama's SIP. Therefore, the EPA finds that the Petitioner has not demonstrated the Walter Coke and ABC Coke permits are deficient due to inclusion of a general condition reciting the sources' general SIP obligation under Ala. Admin. Code R. 335-3-4-.02 to take reasonable precautions to control fugitive dust.

The Petitioner likewise did not demonstrate that it was inappropriate for the JCDH to include in the permits a provision stating that the permittee "shall not cause or permit the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate." The Petitioner is correct that the Alabama Supreme Court held in *Ross Neely Express* that nearly identical language in an earlier version of Alabama's regulations was unconstitutionally restrictive and therefore unenforceable. However, like the general obligation to control fugitive dust discussed above, the requirement to prevent the discharge of fugitive dust beyond the lot line also is included in Alabama's EPA-approved SIP and therefore constitutes a federally enforceable "applicable requirement" that must be addressed in the Walter Coke and ABC Coke permits. As explained above, the JCDH is legally required to incorporate this provision into title V permits for sources to which it applies; the JCDH does not have authority use a title V permit to amend this requirement to make it less restrictive. *See Midwest Generation* at 18.

Furthermore, the Petitioner did not address the JCHD's RTC on the draft permits that questioned the enforceability of this permit requirement in light of the Alabama Supreme Court's *Ross Neely Express* decision. Specifically, the JCDH explained that the permittees themselves did not object to the enforceability of this provision or to the inclusion of such requirement in their permits. Walter Coke RTC at 10; ABC Coke RTC at 24. The JCDH further explained that the Alabama Department of Environmental Management (ADEM) approved the permit condition in the ABC Coke and Walter Coke permits and that it is federally enforceable. Walter Coke RTC at 7; ABC Coke RTC at 21. The JCDH's response is consistent with federal regulations at 40 C.F.R. § 70.4(b)(3)(xii), which state that the opportunity for judicial review of a permit action "shall be the exclusive means for obtaining judicial review of the terms and conditions of permits." A similar provision appears in Jefferson County Board of Health Air Pollution Control Regulation 18.2.4, which states: "Commencing construction or operation under such an Operating Permit shall be deemed acceptance of all the conditions specified." In accordance with these regulations, because the permittees did not challenge this permit condition at the time of permit issuance, the permittees cannot later defend themselves against enforcement of this permit condition on the basis that it is unconstitutionally restrictive and therefore unenforceable. Furthermore, as the JCHD noted, the permit condition is federally enforceable, meaning that it can be enforced in

federal district court by the EPA pursuant to its enforcement authority under CAA § 113, 42 U.S.C. § 7413, and by members of the public (and the state) in a citizen suit brought in federal court under CAA § 304, 42 U.S.C. § 7604. Because the Petitioner did not explain in the petitions why the JCDH's RTC on this issue was inadequate to demonstrate that this permit condition is enforceable, the Petitioner did not meet its burden of demonstrating that the permit is not in compliance with CAA requirements. *See, e.g., MacClarence*, 596 F.3d at 1132-33.

Therefore, the EPA denies the Petitions on these claims.

**B. Petitioner's Claim 2. Permits Do Not Assure Compliance with the General Prohibition against the Release of "Air Pollution" in the Alabama SIP.**

*Petitioner's Claim 2.* The Petitioner claims generally that the ABC Coke and Walter Coke permits lack adequate provisions to assure compliance with the general SIP prohibition against the release of "air pollution" set forth at Ala. Admin. Code r. 335-3-1-.08.<sup>4</sup> Walter Coke Petition at 4; ABC Coke Petition at 4. This SIP provision provides: "No person shall permit or cause air pollution, as defined in Rule 335-3-1-.02(1)(e) of this chapter by the discharge of any air contaminant for which no ambient air quality standards have been set under Rule 335-3-1-.03(1)." The SIP defines "Air Pollution" to mean "the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, or property, or would interfere with the enjoyment of life or property throughout the State and in such territories of the State as shall be affected thereby." Ala. Admin. Code r. 335-3-1-.02(1)(e).<sup>5</sup> The SIP defines "Air Contaminant" to mean "any solid, liquid, or gaseous matter, any odor, or any combination thereof, from whatever source." Ala. Admin. Code r. 335-3-1-.02(1)(d).<sup>6</sup> The EPA's response below addresses the Petitioner's arguments in two parts. The Petitioner's Claim 2A involves arguments pertaining to inadequate control, monitoring & reporting requirements that are set forth in sections B and D of the petitions. Walter Coke Petition at 4-6; ABC Coke Petition at 4-6. The Petitioner's Claim 2B involves arguments pertaining to permit conditions addressing odor that are set forth in section C of the petitions. Walter Coke Petition at 5-6; ABC Coke Petition at 5.

**Claim 2A.** The Petitioner claims that the permits' control, monitoring and reporting requirements are insufficient to ensure that the facilities do not emit air toxics, particulates, or odors in violation of the general SIP prohibition against "air pollution." Walter Coke Petition at 4-6; ABC Coke Petition at 4-6. According to the Petitioner, the permits are deficient because they are written "to permit or cause the emission of toxic air pollutants in such quantities and duration as are, or tend to be, injurious to human health; to permit or cause the emission of

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<sup>4</sup> The EPA last approved Ala. Admin. Code R. 335-3-1-.08 into Alabama's SIP on December 8, 2000. 65 Fed. Reg. 76938. Nearly identical language appears in Jefferson County Air Pollution Control Regulation 1.13.

<sup>5</sup> The EPA last approved Ala. Admin. Code 335-3-1-.02(1) (state effective date 9/24/13) on June 1, 2014. 79 Fed. Reg. 33116. The definition of "Air Pollution" set forth in that version of the state's regulations remained unchanged from the definition previously approved into Alabama's SIP. *See* 71 Fed. Reg. 59674 (Oct. 11, 2006). Nearly identical language appears in Jefferson County Air Pollution Control Regulation 1.3.

<sup>6</sup> The EPA last approved Ala. Admin. Code 335-3-1-.02(1) (state effective date 9/24/13) on June 1, 2014. 79 Fed. Reg. 33116. The definition of "Air Contaminant" set forth in that version of the state's regulations remained unchanged from the definition previously approved into Alabama's SIP. *See* 71 Fed. Reg. 59674 (Oct. 11, 2006). Identical language appears in Jefferson County Air Pollution Control Regulation 1.3.



particulates in such quantities and duration as are, or tend to be, injurious to welfare or would interfere with the enjoyment of life or property; to permit or cause the emission of odors which are unpleasant to persons or which tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms of nausea, or which by their inherent chemical or physical nature or method or processing are, or may be, detrimental or dangerous to health.” Walter Coke Petition at 4; ABC Coke Petition at 4. The Petitioner references its comments on the draft permits as evidence that existing emission controls do not eliminate “air pollution.” Walter Coke Petition at 5; ABC Coke Petition at 4-5. The Petitioner further contends that the permits lack monitoring and reporting that is sufficient to assure compliance with the SIP prohibition against “air pollution” because they “fail[] to require the measurement of air toxics that are emitted by the [facilities] and the measurement of air toxics to which the public are exposed.” Walter Coke Petition at 6; ABC Coke Petition at 6.

***EPA’s Response to Claim 2A.*** For the reasons described below, the EPA denies the Petitions on these claims. The Petitioner did not demonstrate that additional control, monitoring, or recordkeeping requirements are needed to assure compliance with the Alabama SIP’s general prohibition against “air pollution.”

Alabama’s broad prohibition against “air pollution,” though part of Alabama’s EPA-approved SIP, is not derived from and does not implement any federal requirement. In prior title V orders, the EPA explained that it defers to the state interpretation of what is required by broadly sweeping “general duty” SIP provisions that are not federally required such as this one, and that such provisions can be incorporated into title V permits without additional emission limits or standards if compliance is otherwise assured. *See, e.g., In the Matter of Hercules, Inc.*, Order on Petition No. IV-2003-1 (Nov. 10, 2004) at 6-9 (concluding that the Petitioners had not demonstrated that the permitting authority was required to add emission limits or standards to a permit to address a broadly worded SIP provision prohibiting emissions of injurious air pollution); *In the Matter of Transalta Centralia Generation, LLC*, Order on Permit No. SW98-8-R3 (April 28, 2011) at 7-8.

As the title V permitting authority for Jefferson County and the state’s delegate for implementing and enforcing the SIP in Jefferson County, the JCDH’s interpretation of what conditions need to be included in title V permits to assure compliance with the general prohibition against “air pollution” at Ala. Admin. Code r. 335-3-1-.08 warrants the EPA’s deference. In response to the Petitioner’s comments on the two draft permits, the JCDH explained that it assures compliance with the prohibition against “air pollution” by enforcing and applying all applicable federal, state, and local regulations, including the federal National Emission Standards for Hazardous Air Pollutants (NESHAP) and Maximum Available Control Technology (MACT) regulations. Walter Coke RTC at 14; ABC Coke RTC at 23.<sup>7</sup> According to the JCDH: “[The facility’s] compliance with these regulations, and the Health Department’s regulatory efforts to maintain

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<sup>7</sup> The ABC Coke and Walter Coke permits incorporate, among other requirements, the air toxics control requirements in 40 C.F.R. part 63, Subpart L (NESHAPs for Coke Oven Batteries), subpart CCCCC (NESHAPs for Coke Ovens: Pushing, Quenching, and Battery Stacks) and subpart ZZZZ (NESHAPs for Standard Stationary Reciprocating Internal Combustion Engines), and the requirements in 40 C.F.R. part 61, subpart L (NESHAPs for Benzene Emissions from Coke By-Product Recovery Plants), FF (NESHAPs for Benzene Waste Operations), and V (NESHAPs for Equipment Leaks—Fugitive Emissions Sources).

[the facility's] compliance, best ensure that [the facility] does not emit prohibited air pollution." Walter Coke RTC at 24-25; ABC Coke RTC at 23.

The JCDH also responded to the Petitioner's assertion in comments on the draft permit that ambient air toxic concentrations in the vicinity of the two facilities demonstrate that the permit conditions are insufficient to assure compliance with the "air pollution" prohibition. Specifically, in response to comments on the draft Walter Coke permit, the JCDH explained that it implements the MACT standards to ensure that air toxic emissions are controlled, and notes that the EPA completes residual risk assessments of MACT plants within 8 years of promulgation of each applicable MACT to determine if individual chemical or cumulative chemical incremental cancer risks are above or below the acceptable levels. Walter Coke RTC at 14. *See also* ABC Coke RTC at 26 (explaining that the JCDH conducts air toxic monitoring in conjunction with the EPA, and that based on monitored concentrations, the EPA then typically conducts a risk assessment to determine if it is necessary to reduce emissions further). Specifically with respect to air toxics concentrations around the Walter Coke facility, the JCDH explained that while the Birmingham Air Toxics Study conducted for a site located across the street from Walter Coke initially indicated increased incremental cancer risk estimates above the acceptable risk level, "the subsequent North Birmingham Air Toxics Study yielded cancer risk estimates at [the same site] to be within the acceptable risk level and the cancer risk estimates at Riggins Elementary, along the back perimeter of Walter Coke, to also be within the acceptable risk level." Walter Coke RTC at 18-19. The JCDH went on to conclude: "Thus far, the Department has not been given any information to indicate that the cancer risks from Walter Coke are above acceptable EPA levels." Walter Coke RTC at 14. Regarding air toxics concentrations around the ABC Coke facility, Jefferson County explained that "a relatively recent assessment of air toxics conducted (School Air Toxics Study) by the USEPA in Tarrant City, with the monitoring site located at Tarrant Elementary School, yielded concentrations of benzene, arsenic, lead, and benzo(a)pyrene that were found to be below levels of concern, levels at which adverse health effects have been observed." ABC Coke RTC at 25. *See also* ABC Coke RTC at 64 ("[C]oncentrations of air toxics as measured at Tarrant Elementary during the School Air Toxics Monitoring campaign did not result in any unacceptable risks, as determined by the USEPA.").

Likewise, the JCDH responded to concerns raised in public comments on the draft permits regarding odor and particulates allegedly emanating from the two facilities. With respect to comments from the community on the draft ABC Coke permit alleging problems with odor and black soot, the JCDH explained that it inspected the area and found no issues at the time of the inspection. ABC Coke RTC at 1. Regarding concerns raised about odor from the Walter Coke plant, the JCDH noted that its inspectors inspect the facility at least four times a year to observe operations, to determine compliance, and to complete perimeter surveillance. Walter Coke RTC at 30. The JCDH further explained: "With respect to your concerns about health, the applicable rules and regulations incorporated into the permit are meant to reduce, minimize, and/or eliminate pollutants so that citizens' health will not be adversely affected." ABC Coke RTC at 62; *see also* Walter Coke RTC at 26. Finally, the JCDH noted that it responds to citizen's complaints and concerns about excess emissions emanating beyond property lines and encouraged commenters to notify the JCDH using the agency's toll-free number so that a prompt investigation can be made. Walter Coke RTC at 7; ABC Coke RTC at 1, 21.

In the Petitions, the Petitioner makes no attempt to demonstrate that the JCDH's interpretation of the SIP prohibition against "air pollution" as generally being implemented through implementation and enforcement of existing federal, state, and local regulations is unreasonable or contrary to the applicable requirements of the CAA. The Petitioner only makes a general assertion that the title V permits do not assure compliance with the general SIP prohibition against the release of "air pollution" set forth at Ala. Admin. Code r. 335-3-1-.08 because the permits allow the emission of injurious toxic air pollutants, particulates, and odors. Walter Coke Petition at 4-5; ABC Coke Petition at 4-5. However, the Petitioner has not explained why enforcing and applying all applicable federal, state, and local regulations, including applicable NESHAP and MACT regulations, is insufficient to assure compliance with the general SIP prohibition against air pollution. Moreover, the Petitioner did not acknowledge or refute the JCDH's responses to concerns raised during the public comment period regarding ambient air toxics concentrations, unpleasant odors, and soot discharges, but instead simply incorporated its comments on the draft permits by reference into the petitions. Finally, the Petitioner did not identify any specific control, monitoring, or reporting requirement that the JCDH improperly omitted from the permits.

Based on the sweeping nature of the SIP provision at issue – broadly prohibiting "air pollution" from all sources and addressing "any air contaminant for which no ambient air quality standards have been set" – as well as the provisions already in the permit, the EPA's prior *Transalta* and *Hercules* orders, consideration of the JCDH's interpretation of the provision, and the lack of any explanation by the Petitioner as to why the JCDH's response to comments was inadequate, the EPA concludes that the Petitioner did not meet its burden of demonstrating that the JCDH was required to include additional control, monitoring, or reporting requirements to assure compliance with Ala. Admin. Code r. 335-3-1-.08. *See MacClarence*, 596 F.3d at 1132-33.

Therefore, the EPA denies the Petitions on these claims.

**Claim 2B.** The Petitioner claims that the permit condition entitled "Abatement of Obnoxious Odors" (General Condition 45 in both permits) does not assure compliance with the general SIP prohibition against "air pollution" at Ala. Admin. Code r. 335-3-1-.08 because it allows the facilities to emit unlawful odors when such odors have not been characterized as "obnoxious" by a Department inspector or when the Health Officer has not determined that such odors may be abated by measures that are "technically and economically feasible" for the company to implement. Walter Coke Petition at 5; ABC Coke Petition at 5. The Petitioner also contends that these permit conditions are vague and unenforceable. Walter Coke Petition at 6; ABC Coke Petition at 5.

**EPA's Response to Claim 2B.** For the reasons described below, the EPA denies the Petitions on these claims.

The Walter Coke and ABC Coke permits each contain two separate permit conditions addressing odor. The first condition includes (almost verbatim) the general SIP requirement at Ala. Admin.

Code R. 335-3-4-.02(3)<sup>8</sup> providing that the State can require a source to abate emissions of “dust, gases, mist, odorous matter, vapors, or any combination thereof” that cause a nuisance or violate a rule. *See* Walter Coke General Permit Condition 61, ABC Coke General Permit Condition 14.<sup>9</sup>

The second permit condition that addresses odor in the Walter Coke and ABC Coke permits, General Condition 45 in both permits, is the condition that is of concern to the Petitioner. Condition 45 is entitled “Abatement of Obnoxious Odors” and states: “This operating permit is issued with the condition that, should obnoxious odors arising from the plant operations be verified by Department inspectors, measures to abate the odorous emissions shall be taken upon a determination by this Department that these measures are technically and economically feasible.”

Regarding the Petitioner’s argument that Condition 45 improperly authorizes unlawful odors when such odors have not been characterized as “obnoxious” by a Department inspector or when the Health Officer has not determined that such odors may be abated by measures that are “technically and economically feasible” for the company to implement, the JCDH explained in response to comments on the draft permit that Permit Condition 45 does not limit the JCDH’s general authority to require a source to abate unlawful odors. Walter Coke RTC at 3, ABC Coke RTC at 24. To the contrary, the JCDH pointed out that a separate permit condition in each permit specifically quotes and includes the regulatory provision establishing that authority. *Id.* According to the JCDH, Condition 45’s requirement that the sources comply with any odor abatement measures ordered by the JCDH supplements – rather than restricts – the general odor provision separately included in the permits (at Condition 61 in the Walter Coke permit and Condition 14 in the ABC Coke permit). *Id.*

The Petitioner says nothing to refute the JCDH’s explanation that Condition 45 supplements, rather than restricts, the JCDH’s general authority to require odor abatement. Likewise, the Petitioner offers no support for its general allegation that Condition 45 is vague and unenforceable. Therefore, the EPA finds that the Petitioner did not demonstrate that the permit conditions addressing odor are vague and unenforceable or insufficient to assure compliance with the prohibition against “air pollution” in Alabama’s SIP at Ala. Admin. Code r. 335-3-1-.08.

Therefore, the EPA denies the Petitions on these claims.

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<sup>8</sup> Ala. Admin. Code R. 335-3-4-.02(3) states: “When dust, gases, mist, odorous matter, vapors, or any combination thereof escape from a building or equipment in such manner and amount as to cause a nuisance or to violate any rule or regulation, the Director may order that the building or equipment in which processing, handling, and storage are done be tightly closed and ventilated in such a way that all air and gases and air or gas-borne material leaving the building or equipment are treated by removal or destruction of air contaminants before discharge to the open air.”

<sup>9</sup> Jefferson County Board of Health Air Pollution Control Regulation 6.2, which is identical in substance to the SIP-approved ADEM regulation at Ala. Admin. Code R. 335-3-4-.02, is cited as the basis for this permit condition in the Walter Coke and ABC Coke permits.

**C. Petitioner’s Claim 3. The Public Did Not Have a Fair and Meaningful Opportunity to Comment on the Walter Coke Permit Application because the JCDH Redacted Emissions Data and Signatories from the Version of the Walter Coke Permit Application Provided to Gasp.**

*Petitioner’s Claim 3.* The Petitioner contends that the public did not have a fair and meaningful opportunity to comment on the Walter Coke permit application because the JCDH redacted emissions data and signatories from the version of the permit application released to Gasp. Walter Coke Petition at 7. Specifically, the Petitioner states that it submitted a written request to the JCDH on April 23, 2014, requesting an opportunity to review the Walter Coke permit application, emissions testing data, emissions estimates and bases, application, company-provided analysis, and other documents. *Id.* According to the Petitioner, the title V permit application provided by the JCDH had “nearly all emissions data and signatories redacted.” *Id.* The Petitioner states: “These redactions are not permissible under Jefferson County Air Pollution Control Regulations, Part 1.6; the Alabama Air Pollution Control Act, Ala. Code § 22-28-20; and the Clean Air Act, 42 U.S.C. §§ 7414(c) and 7661b(e).” *Id.* The Petitioner further states that on May 12, 2014, it “demanded that the Health Officer provide [Gasp] with Walter Coke’s justification for the redactions made in the application” and also requested “that the Health Officer provide a copy of his determination that the ‘showing’ made by Walter Coke, Inc. is ‘satisfactory.’” *Id.* According to the Petitioner, the JCDH did not respond to the Petitioner’s request. *Id.*

*EPA’s Response to Claim 3.* For the reasons described below, the EPA denies the Walter Coke Petition on this claim.

Under 40 C.F.R. § 70.7(a)(1), a permit may be issued only if, among other things, the permitting authority “has received a complete application” and “has complied with the requirements for public participation under paragraph (h) of this section.” With regard to a permit application, the EPA’s regulations provide: “An application may not omit information needed to determine the applicability of, or to impose, any applicable requirement . . .” 40 C.F.R. § 70.5(c). The regulations require each title V permit to include, among other things, “[e]mission limits and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance” and “compliance certification, testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.” 40 C.F.R. § 70.6(a)(1), (c)(1). Regarding public participation, the regulations require that permit proceedings “provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit.” 40 C.F.R. § 70.7(h). Finally, the regulations require that public “notice shall identify . . . a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, all relevant supporting materials . . . and all other materials available to the permitting authority that are relevant to the permit decision.” 40 C.F.R. § 70.7(h)(2).<sup>10</sup>

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<sup>10</sup> Jefferson County’s EPA-approved title V regulations at Jefferson County Board of Health Air Pollution Control Rules and Regulations Chapter 18 implement 40 C.F.R. part 70’s permit application and public participation requirements.

When a title V petitioner seeks an objection based on the unavailability of information during the public comment period in violation of title V's public participation requirements, the petitioner must demonstrate that the unavailability deprived the public of the opportunity to participate meaningfully during the permitting process. See *In the Matter of Consolidated Emtl. Mgmt. Inc.—Nucor Steel*, Order on Petition Nos. VI-2010-05, et al. (Jan. 30, 2014) at 40; *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 (June 22, 2012) at 9; *In the Matter of Cash Creek Generation, LLC*, Order on Petition No. IV -2010-4 (June 22, 2012) at 7. "EPA generally looks to whether the petitioner has demonstrated "that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content . . . Without such a showing, it may be difficult to conclude that the ability to comment on the information would have been meaningful." *Kentucky Syngas* at 8. In addition, "where a permitting authority provides an explanation for its decision not to make something available during the public comment period, the petitioner bears the burden of demonstrating that the permitting authority's explanation is unreasonable." *Nucor* at 40; *Kentucky Syngas* at 8.

In this case, the Petitioner has not met its burden of demonstrating that the alleged omission of emissions information from the permit application and/or the unavailability of this information during the public comment period caused or may have caused the permit not to be in compliance with applicable requirements or requirements of 40 C.F.R. part 70. In particular, the Petitioner makes no attempt to demonstrate that omission of this information from the permit application meant that the application lacked information "necessary to determine the applicability of, or to impose, any applicable requirement . . ." as required by 40 C.F.R. § 70.5(c). Nor does the Petitioner otherwise identify how the alleged unavailability of this information during the public comment period may have resulted in a permit deficiency or deprived the public of meaningful participation in the permitting process.

Furthermore, the Petitioner fails to address the JCDH's response to comments made by Gasp during the public comment period. Specifically, the JCDH explained that it emailed the Petitioner a version of the permit application from which emissions information was not redacted on May 14 and 15 (after Gasp's May 12 request that the JCDH justify redactions made from a previously supplied version of the permit application). *Walter Coke RTC* at 9. The JCDH stated that the only information redacted from the version of the application supplied to Gasp on May 14 and 15 was the facility's production data, which the JCDH contends it properly withheld pursuant to Jefferson County Board of Health Air Pollution Control Rule 18.15.4. *Id.* Finally, the JCDH noted that it extended the comment period at the start of the notice period (beyond the 30-day comment period required by federal regulations) in anticipation of information requests and to provide enough time for public review. *Id.* The public comment period ended on June 16, 2015. *Walter Coke Public Hearing Transcript* at 4. The Petitioner neither acknowledged nor refuted the JCDH's response that it did in fact provide the requested emissions data to Gasp and that the agency legitimately withheld the facility's production data from public disclosure.

Therefore, the EPA denies the Walter Coke Petition on this claim.

**V. CONCLUSION**

For the reasons set forth above and pursuant to CAA § 505(b)(2), 42 U.S.C. 7661d(b)(2), Subchapter 18.15 of the Jefferson County Board of Health Air Pollution Control Rules and Regulations, and 40 C.F.R. § 70.8(d), I hereby deny the Petitions as to the claims described herein.

Dated: July 15, 2016

  
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Gina McCarthy  
Administrator