

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF)	PETITION FOR OBJECTION
)	
Clean Air Act Title V Minor Modification)	
Request and Permit Renewal Request)	
Application for)	
UOP LLC MOBILE PLANT)	Permit No. 503-8010
)	
Final Title V/State Operating Permit)	
Renewal in Mobile County, AL)	
)	
Issued by the Alabama Department of)	
Environmental Management)	

**PETITION TO OBJECT TO THE ISSUANCE OF TITLE V PERMIT NO. 503-8010 FOR
UOP LLC MOBILE PLANT**

Pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d), Greater-Birmingham Alliance to Stop Pollution (“GASP, Inc.” or “the Petitioner”) petitions the Administrator of the United States Environmental Protection Agency (“EPA” or “the Agency”) to object to the Alabama Department of Environmental Management’s (“ADEM”) reissuance of the proposed Title V Operating Permit for UOP, LLC’s Mobile Plant (“UOP Mobile Plant”) Permit, Permit Number 503-8010.¹ Comments submitted by GASP, Inc., Mobile Environmental Justice Action Coalition (“MEJAC”), Clean Healthy Educated Safe Sustainable Africatown (“CHESS”), and the Deep South Center for Environmental Justice² on the draft permit are included as an attachment.³

¹ The undersigned attorneys submit this Petition on behalf of the Petitioner.
² Comments submitted on behalf of GASP, Inc., Mobile Environmental Justice Action Coalition (“MEJAC”), Clean Healthy Educated Safe Sustainable Africatown (“CHESS”), and the Deep South Center for Environmental Justice Comments on Draft Permit No. 503-8010 (Oct. 27, 2020). Hereinafter, “GASP, Inc. Comments”.
³ Attachments include: 1) GASP, Inc. et al. Comments; 2) ADEM RTC; 3) Email from ADEM Regarding the Last Day of EPA’s 45-Day Review Period; 4) Screenshot from Region 4 Proposed Title V Permit Database for UOP

INTRODUCTION

The UOP Mobile Plant is located within Alabama’s “chemical corridor” – a sixty mile stretch of land in Mobile County that is home to at least 28 industrial facilities.⁴ In a 2019 EPA study, Alabama ranked fifth out of all the states in most toxic substances released into the air.⁵ Mobile County had the highest amount of reported toxic releases of all the counties in the state, and the UOP Mobile Plant was the fourth largest contributor to all air releases in the county. Furthermore, the EJ community that surrounds this community is also impacted by the criteria pollutants emitted by the UOP Plant.⁶ Although the NAAQS set threshold ambient concentration limits for the criteria pollutants, issuance of permits to companies that seek approval to construct facilities that emit air pollutants play a key role in protecting public health, because air pollution from new sources can harm and potentially even kill members of the public.⁷

LLC Permit; 5) Map of NATA Air Toxics Cancer Risk for Communities Surrounding UOP Plant Mobile; 6) Map of PM_{2.5} Levels in Communities Surrounding UOP Plant Mobile; 7) Map of Percent Low-Income Communities Surrounding UOP Plant Mobile; 8) Map of Percent People of Color in Communities Surrounding UOP Plant Mobile; and 9) Screenshot of Alabama Proposed Permits at EPA.

⁴ “Chemicals: Catalyst for Growth,” ALABAMA POWER https://mobilechamber.com/wp-content/uploads/2019/06/2019_MAST_Brochure_MARCH28_in-order.pdf.

⁵ See generally Al.com (last visited Mar. 22, 2021); *Alabama Ranks 5th for Industrial Toxic Releases in Air and Water*, ADVANCE LOCAL MEDIA LLC (Mar. 24, 2019), <https://www.al.com/news/2019/03/alabama-ranks-5th-for-industrial-toxic-releases-in-air-and-water.html>.

⁶ See, e.g., Attachment 6.

⁷ See, e.g., *Conservation Law Found. v. Pub. Serv. Co. of New Hampshire*, No. 11-CV-353-JL, at 3 (D.N.H. Sept. 27, 2012) (In Clean Air Act enforcement action against coal-fired power plant, in dismissing claims regarding NOx emissions increases, court finds that “NOx and SO2 emissions have significant adverse effects on public health. These emissions also contribute to the formation of secondary particulate matter that may cause decreased lung function, worsened respiratory infections, heart attacks, and the risk of early death.”); *North Carolina v. EPA*, 531 F.3d 896, 903 (D.C.Cir.2008) (“NOx emissions contribute to the formation of fine particulate matter, also known as PM_{2.5}, as well as ground-level ozone, a primary component of smog.”); *Catawba Cnty. v. EPA*, 571 F.3d 20, 26 (D.C.Cir.2009) (“Elevated levels of fine particulate matter have been linked to “adverse human health consequences such as premature death, lung and cardiovascular disease, and asthma.”); *Ass’n of Irrigated Residents v. EPA*, 686 F.3d 668, 671 n. 1 (9th Cir.2012) (“And ‘even at very low levels,’ inhalation of ozone ‘can cause serious health problems by damaging lung tissue and sensitizing lungs to other irritants.’”); *North Carolina v. TVA*, 593 F.Supp.2d 812, 822 (W.D.N.C. 2009) *rev’d on other grounds*, 615 F.3d 291 (4th Cir. 2010) (In tort case against coal-fired power plants “Court finds that, at a minimum, there is an increased risk of incidences of premature mortality in the general public associated with PM2.5 exposure, even for levels at or below the NAAQS standard of 15 [u]g/m³.”); *Ohio Power Co. v. EPA*, 729 F.2d 1096, 1098 (6th Cir. 1984) (in challenge to Clean Air Act regulation of power plants 25 years ago, court holds “there is now no longer any doubt that high levels of pollution sustained for periods of days can kill. Those aged 45 and over with chronic diseases, particularly of the lungs or heart, seem to be predominantly affected. In addition to these acute episodes, pollutants can attain daily levels which have been shown

Mobile County’s population is 59% White and Mobile’s population is 50.6% Black. Of the people living within a 1-mile radius of UOP Mobile Plant, 62% are minorities and 64% of people are near the poverty line (ratio of household income to poverty level in the past 12 months was less than 2).⁸ Nearly 22% of persons 25 and older do not have a high school diploma; the majority having no more than a high school diploma.⁹ It is well-established that poor communities and communities of color are disproportionately affected by air pollution; Black Americans in particular face a 54 percent higher health burden compared with the overall population of the United States.¹⁰

This Administration’s recent executive order on the climate crisis renews support for Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,¹¹ and calls for federal agencies to make environmental justice an integral part of their missions.¹² Executive action is to be taken by this

to have serious consequences to city dwellers.”); *Sierra Club v. TVA*, 592 F.Supp.2d 1357, 1371 (N.D. Al. 2009) (In Clean Air Act enforcement action against coal-fired power plant, court holds “there is no level of primary particulate matter concentration at which it can be determined that no adverse health effects occur.”); *Catawba County v. EPA*, 571 F.3d 20, 26 (D.C. Cir. 2009) (“A ‘significant association’ links elevated levels of PM2.5 with adverse human health consequences such as premature death, lung and cardiovascular disease, and asthma.”); 70 Fed. Reg. 65,983, 65,988 (Nov. 1, 2005) (“emissions reductions resulting in reduced concentrations below the level of the standards may continue to provide additional health benefits to the local population.”); 71 Fed. Reg. 2620, 2635 (Jan. 17, 2006) (U.S. EPA unable to find evidence supporting the selection of a threshold level of PM2.5 under which the death and disease associated with PM2.5 would not occur at the population level). *See also* Attachment 5.

⁸ EPA EJScreen: 1-Mile Radius Standard Report (Oct 23, 2020), <https://ejscreen.epa.gov/mapper/>; *see also* Attachments 7 & 8.

⁹ EPA EJScreen: 1-Mile Radius Standard Report (Oct 23, 2020), <https://ejscreen.epa.gov/mapper/>.

¹⁰ *EPA Scientists Find Black Communities Disproportionately Hit by Pollution*, THE HILL (Feb. 23, 2018), <https://thehill.com/policy/energy-environment/375289-epa-scientists-find-emissions-greater-impact-low-income-communities#>

¹¹ Exec. Order No. 12898, § 1-101, 59 Fed. Reg. 7629 (Feb. 16, 1994), as amended by Exec. Order No. 12948, 60 Fed. Reg. 6381 (Feb. 1, 1995).

¹² “Executive Order on Tackling the Climate Crisis at Home and Abroad,” § 201 (Jan. 27, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>; *see also*, White House Fact Sheet, “President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government,” (Jan. 27, 2021), available at <https://www.whitehouse.gov/briefing-room/statementsreleases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/>.

Administration to tackle the climate crisis at home by “immediate review of harmful rollbacks of standards that protect our air, water, and communities” as well as increasing environmental justice monitoring and enforcement through new or strengthened offices at the EPA, Department of Justice, and Department of Health and Human Services.¹³ The Administration plans on strengthening clean air and water protections holding domestic polluters accountable for their actions and delivering environmental justice to all communities in the United States.¹⁴

EPA defines environmental justice as the fair treatment and meaningful involvement of all people regardless of race, color, national origin or income with respect to the development, implementation, and enforcement of environmental laws, regulations and policies.¹⁵ In its Environmental Justice Strategic Plan for 2016-2020 (“EJ 2020”), EPA outlined its goal to deepen environmental justice practice within its programs to improve the health and environmental of overburdened communities, and stated its aim to establish a framework for considering environmental justice in EPA-issued permits.¹⁶ These actions by the EPA underscore the agency’s commitment to ensuring that “vulnerable, environmentally burdened, economically disadvantaged communities”¹⁷ have access to a safe and healthy environment.

The EPA has also recognized that “Title V can help promote environmental justice through its underlying public participation requirements,” as well as through monitoring, compliance certification, reporting and other measures.¹⁸ Indeed, “[f]ocused attention to the adequacy of monitoring and other compliance assurance provisions is warranted” where a

¹³ *Id.*

¹⁴ *Id.*

¹⁵ GASP, Inc. Comments, *supra* note 4, at 23.

¹⁶ EJ 2020 Action Agenda – The U.S. EPA’s Environmental Justice Strategic Plan for 2016-2020, EPA (May 2016), at iii. Hereinafter, “EPA’s EJ 2020 Action Agenda.”

¹⁷ *Id.*

¹⁸ *In re US Steel Corp – Granite City Works*, Petition Number V-2011-2 (Order on Petition) (Dec. 3, 2012), at 5.

facility “is home to a high density of low-income and minority populations and a concentration of industrial activity”.¹⁹

BACKGROUND

I. Facility

According to the Statement of Basis (SOB), the UOP Mobile Plant is “a chemical production plant that produces synthetic materials to be used as adsorbents and/or catalyst in various manufacturing applications.”²⁰ It is “a major source for particulate matter (PM and PM₁₀), carbon monoxide (CO), nitrogen oxides (NO_x), and carbon dioxide equivalents (CO_{2e}).”²¹ It is also “a major source for PSD.”²² Based on testimony provided by the site leader for the UOP facility at the public hearing for the proposed renewal permit, the UOP plant has been in operation for 55 years, since 1965.²³

II. Permit History

The renewal application states that the UOP Mobile Plant’s “active Title V Air Permit ... was issued on November 19, 2012” and scheduled to expire on November 18, 2017.²⁴ The application was submitted sometime in May 2017.²⁵ An addendum to the application was submitted almost two years later in April 2019.²⁶

¹⁹ *Id.*

²⁰ ADEM Major Source Operating Permit, No. 503-8010, Statement of Basis at 1.

²¹ *Id.*

²² *Id.*

²³ Testimony of Robert Given, ADEM Hearing Transcript at 13 (Oct. 20, 2020), *available at* <https://mosaiceps.epa.gov/sites/default/files/FRU/UOP%20Hearing%20Transcript.pdf>.

²⁴ Renewal Application (Public Copy), 1-1.

²⁵ *Id.* at 2 (date stamp “May 2017”).

²⁶ GASP, Inc. Comments, n. 39.

ADEM put the Draft Permit out for comment on September 16, 2020.²⁷ ADEM extended the comment period through October 27, 2020, and held a public hearing on October 20, 2020.²⁸ GASP, Inc. submitted comments on the Draft Permit before the comment deadline, on October 27, 2020.²⁹ ADEM transmitted the Proposed Permit to the EPA on or about December 16, 2020,³⁰ and the EPA's 45-day review period ended on Monday, February 1, 2021.³¹ This Petition is filed April 2, 2021, within sixty days following the end of U.S. EPA's 45-day review period.³² 42 U.S.C. § 7661d(b)(2).

The Administrator must grant or deny this petition within sixty days after it is filed. 42 U.S.C. § 7661d(b)(2). If the Administrator determines that the Permit does not comply with the requirements of the CAA, or fails to include any "applicable requirement," he/she must object to issuance of the permit. 42 U.S.C. § 7661b(b); *see also* 40 C.F.R. § 70.8(c)(1) ("The [U.S. EPA]

²⁷ Hearing SJC MSOP 2REN Public Hearing Transcript, ADEM eFile (10/20/2020) 4.

²⁸ See ADEM Notice of Public Hearing, [https://mosaiceps.epa.gov/sites/default/files/FRU/PN_Public%20Hearing%20Notice%20\(October%202020%202020\).pdf](https://mosaiceps.epa.gov/sites/default/files/FRU/PN_Public%20Hearing%20Notice%20(October%202020%202020).pdf).

²⁹ GASP, Inc. Comments, *supra* note 4.

³⁰ Departing from its historical practice of transmitting one or two permits at the same time, ADEM transmitted a total four Title V permits to EPA on the same day, all of which have significant public interest. ADEM generally staggered the public notice and comment schedule for the UOP permit (state public comment period ended October 26, 2020) with the three permits for Alabama Power Company (APC) plants: APC Plant Barry (state public comment period ended October 22, 2020); APC Gaston Steam Electric Generating Plant (Permit No. 411-0005, state public comment period ended July 29, 2020); and APC Greene County Steam Electric Generating Plant (Permit No. 405-0001, state public comment period ended July 29, 2020)). ADEM's staggered schedule allowed the staff person assigned the APC permits and management to process the APC's permits sequentially. Rather than continue the sequential processing for the four permits, ADEM elected to transmit all four of these permits all on the same day. ADEM's simultaneous submittals of the draft Title V permits meant EPA's 45-day review and objection clock ran simultaneously. On the day after EPA's deadline to object, ADEM's Director issued all four permits. The result of ADEM's departure from its historical practice set a single deadline - April 5, 2021 - for the public to file petitions on any of the four permits. *See*, Attachment 9 (for the 94 permits in EPA's database, ADEM rarely submits more than one or two permits to EPA on the same day; when ADEM has simultaneously submitted permits on the same day, none of ADEM's other simultaneous submittal and issuance dates are for permits with the level of public interest for the four permits it issued on February 2, 2021).

³¹ *See* Attachment 4, Screenshot from Region 4 Proposed Title V Permit Database Indicating Petition Period End Date for UOP LLC Permit No. 503-8010.

³² Please note that the EPA's webpage indicates that the petition period ends on April 4, 2021 (which is a Sunday); out of an abundance of caution, however, this petition is filed April 2, 2021. The webpage also indicates that the EPA's 45-day review period ended on January 31, 2021 (which is also a Sunday). *See* Attachment 3, Email from ADEM Regarding the Last Day of EPA's 45-Day Review Period for Draft Permit No. 503-8010.

Administrator *will object* to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part.”) (emphasis added).

III. Petitioner

GASP, Inc. is a non-profit health advocacy organization fighting for healthy air and environmental justice in the greater-Birmingham area through education, advocacy, and collaboration. GASP, Inc. is actively involved in addressing community concerns involving air quality and environmental justice throughout Alabama. One way in which GASP, Inc. seeks to improve air quality and address historic and ongoing environmental justice issues in these communities is through advocating for stronger Title V permits.

SPECIFIC OBJECTIONS

The U.S. EPA Administrator must object to the Title V permit for UOP Mobile Plant because it does not comply with 40 C.F.R. Part 70. All of these issues below, other than a failure to respond to comments were raised with reasonable specificity in public comments on the Draft Permit. In particular:

- I.** The Draft Permit is deficient because many conditions are incorporated from UOP Mobile Plant’s original air permit, which was not cited as the source of the conditions nor made available to the public for review (p. 8)
 - A.** ADEM fails to meaningfully engage with Petitioner’s comments regarding specific permit deficiencies (p. 10)
 - B.** The statement of basis lacks substantive information required for public review (p. 25)
- II.** ADEM has not shown that monitoring requirements in Draft Permit are consistent with the applicable requirements therein (p. 28)
 - A.** ADEM fails to adequately respond to Petitioner’s assertion that the Draft Permit lacks sufficient information to demonstrate compliance with the requisite monitoring conditions (p. 30)

I. The Proposed Permit is deficient because many conditions are incorporated from UOP Mobile Plant’s original air permit, which was not cited as the source of the conditions nor made available to the public for review during the comment period.

The Title V program is structured to “make it easier for the public to learn what requirements are being imposed on sources to facilitate public participation in determining what future requirements to impose.”³³ EPA has recognized that “when a title V petition 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 meaningfully participate during the permitting process.”³⁴ In determining whether petitioner has met this burden, EPA 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.”³⁵

EPA has recognized in numerous prior orders that “the unavailability during the public comment period of information needed to determine the applicability of or to impose an applicable requirement also may result in a deficiency in the permit’s content.”³⁶ A permitting authority’s failure to provide “all relevant materials” to support the permit’s issuance prevents the public from knowing “how the title V permit might be said to meet” the relevant CAA

³³ 56 Fed. Reg. 21712, 21713 (May 10, 1991).

³⁴ *In the matter of U.S. Department of Energy – Hanford Operations, Benton County, Washington*, Petition No. X-2016-13, Order on Petitioner (Oct. 15, 2018), at 11. See also *In re Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC*, Petition No. 11-2000-07, Order on Petition (May 2, 2001) (applying the concepts of meaningful public participation and logical outgrowth to title V); cf., e.g., *In re Murphy Oil USA, Inc., Meraux Refinery*, Petition No. 2500-00001-V5, Order on Petition (September 21, 2011) (discussing a response to significant comments as “an inherent component of any meaningful notice and opportunity for comment” (citing *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977))).

³⁵ *In the matter of U.S. Department of Energy – Hanford Operations, Benton County, Washington*, Petition No. X-2016-13, Order on Petitioner (Oct. 15, 2018), at 11 [hereinafter “*Hanford 2018 Order*”].

³⁶ *Hanford 2018 Order*, *supra* note 20, at 11. See also *In re Cash Creek Generation, LLC*, Petition No. IV-2010-4, Order on Petition (June 22, 2012), at 9; *In re Louisiana Pacific Corporation*, Petition No. V-2006-3, Order on Petition (November 5, 2007); *In re WE Energies Oak Creek Power Plant*, Order on Petition (June 12, 2009); *In re Alliant Energy-WPL Edgewater Generating Station*, Petition No. V-2009-02, Order on Petition (August 17, 2010).

requirements.³⁷ Therefore, the unavailability of relevant information during the public comment period may cause a permit not to be in compliance with applicable requirements or the requirements of 40 C.F.R. Part 70.³⁸ Petitioner’s comments explain that the Statement of Basis (“SOB”) associated with the Draft Permit is lacking key relevant information that is necessary for meaningful public review. Throughout the comments, Petitioner identifies instances in which information is absent from the SOB and the permit record.

Indeed, the SOB “must contain a brief description of the origin or basis for each permit condition or exemption.”³⁹ It is more than a short form of the permit and “must highlight elements that EPA and the public would find important to review.”⁴⁰ It should not simply restate the permit, but instead include “a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and U.S. EPA a record of the applicability and technical issues surrounding the issuance of the permit.”⁴¹ A permitting authority’s failure to adequately explain its permitting decisions in the SOB or elsewhere in the permit record “is such a serious flaw that the adequacy of the permit itself is in question.”⁴²

These concerns are especially important because EPA has been involved in expanding public participation in permitting for several years. This lack of information for public comment also goes against EPA’s vision regarding the integration of environmental justice into all aspects

³⁷ *Hanford 2018 Order*, at 12.

³⁸ *Id.*

³⁹ *In re Midwest Generation, LCC, Waukegan Generating Station*, Petition No. V-2004-5 (Order on Petition) (Sept. 22, 2005), at 8.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

of EPA’s work in order to “achiev[e] better environmental outcomes and reduc[e] disparities in the nation’s most overburdened communities.”⁴³

EPA stressed the importance of transparency and dialogue for positive permitting outcomes in any community.⁴⁴ These concerns are amplified for overburdened communities that may lack the resources to access information needed to meaningfully engage in the permitting process. Without an adequate SOB and citations to specific permit terms in the underlying Prevention of Significant Deterioration (“PSD”) permit (or synthetic minor limitations), members of these communities – and the public, including those representing the concerns and interests in these communities – cannot ensure that UOP Mobile Plant is meeting all applicable requirements. As “meaningful involvement” is a key pillar of environmental justice, a permitting authority’s failure to provide relevant information to the public as part of the public comment process only reinforces the injustices faced by communities of color and low-income communities—depriving them of a fair opportunity to weigh-in on the polluting activities affecting their lived experiences.

A. ADEM fails to meaningfully engage with Petitioner’s comments regarding specific permit deficiencies.

It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments.⁴⁵ In the Response to Comments, ADEM entirely fails to respond or inadequately responds to several of Petitioner’s claims. Petitioner’s specific comments and the responses at issue are outline below.

⁴³ EPA’s EJ 2020 Action Agenda, at iii.

⁴⁴ *Id.* at 38052.

⁴⁵ *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (“the opportunity to comment is meaningless unless the agency responds to significant points raised by the public”). See, e.g., *In re Louisiana Pacific Corporation*, at 4-5 (Nov. 5, 2007).

- i. *Comment II-A: The Statement of Basis Should Include Additional Information to Fulfill Required Elements of § 502 of the CAA.*⁴⁶

As noted in Petitioner’s comments, 40 C.F.R. §70.7(a)(5) requires that a permitting authority provide “a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it.”⁴⁷ Additionally, “a statement of basis must describe the origin or basis of each permit condition or exemption. However, it is more than just a short form of the permit. It should highlight elements that EPA and the public would find important to review.”⁴⁸ “Thus, it should include a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and U.S. EPA a record of the applicability and technical issues surrounding the issuance of the permit.”⁴⁹ A permitting authority’s failure to adequately explain its permitting decisions in the SOB or elsewhere in the permit record “is such a serious flaw that the adequacy of the permit itself is in question.”⁵⁰

In Comment II-A, Petitioner lists several key information that should be included in the SOB but are not:

1. Attainment status of the area in which UOP Mobile Plant operates;
2. Construction and permitting history of UOP Mobile Plant;
3. An adequate summary of what the facility is and what it produces. Currently, even at the emissions unit level, it is not clear what each unit does in its relation to the production of chemicals;
4. An explanation of the plantwide applicability limits (hereinafter “PALs”) and what PALs exist and to which emissions units they apply; and

⁴⁶ GASP, Inc. Comments, *supra* note 4, at 2.

⁴⁷ *Id.*

⁴⁸ *In the Matter of Onyx Environmental Services*, Order on Petition No. V-2005-1 (February 1, 2006), at 13.

⁴⁹ *Id. See, e.g.*, In Re Port Hudson Operations, Georgia Pacific, Petition No. 6-03-01, at pages 37-40 (May 9, 2003); In Re Doe Run Company Buick Mill and Mine, Petition No. VII-1999-001, at pages 24-25 (July 31, 2002); In Re Fort James Camas Mill, Petition No. X-1999-1, at page 8 (December 22, 2000).

⁵⁰ *In re Midwest Generation, LCC, Waukegan Generating Station*, Petition No. V-2004-5 (Sept. 22, 2005), at 8.

5. A description of how specific emission points within certain emissions units will meet more stringent limits to avoid PSD review. More information is needed than merely asserting “the facility has committed to more stringent limits.”⁵¹

EPA has identified the information listed above as “elements which, if applicable, should be included in the statement of basis.”⁵² The attainment status of the area in which the source is located, for example, is presumably easy to indicate. As is the compliance history of the source (which would also indicate whether or not a compliance schedule is a necessary element in the permit). While Petitioner did not identify any significant compliance issues in its public comment, Petitioner did ask that ADEM confirm that no compliance issues exist.⁵³ In the Comment, Petitioner requested ADEM include the above information in the Draft Permit “in order to fulfill their duty to ascertain that the Permit Analysis highlights elements EPA and the public would find important to review.”⁵⁴

ADEM provides no direct response to the above claim regarding key factual information missing from the SOB.⁵⁵ The only references in ADEM’s response to missing information in the SOB are related to separate comments made by Petitioner regarding the lack of compliance history,⁵⁶ lack of any basis for the facility’s permit shield,⁵⁷ and that the draft permit does not contain PALs. ADEM does not respond at all to Petitioner’s assertion that the information listed above is not included in the SOB. As the EPA has previously recognized, however, failing to provide information relating to the permitting authority’s decision-making (especially with

⁵¹ *Id.* at 2–3.

⁵² Memorandum from Stephen D. Page on Implementation Guidance on Annual Compliance Certification Reporting and Statement of Basis Requirements for Title V Operating Permits (Apr. 30, 2014), at 13, available at <https://www.epa.gov/sites/production/files/2015-08/documents/20140430.pdf>.

⁵³ GASP, Inc. Comments, *supra* note 4, at 3.

⁵⁴ *Id.*

⁵⁵ *See generally* RTC.

⁵⁶ RTC at 3. (“There is no need for the Statement of Basis to contain a section dedicated to compliance history. Information on the facility’s compliance history is available on ADEM’s eFile system.”).

⁵⁷ *Id.* at 3. (“As part of its application, the facility requested a permit shield. This request is granted by the inclusion of General Proviso No. 33 in the current Title V Permit and Draft Permit . . .”).

respect to how the source can “avoid PSD review”⁵⁸) is “such a serious flaw that the adequacy of the permit itself is in question.”⁵⁹

For example, ADEM’s response to comments that it suggested “referred to UOP LLC as a chemical refinery or requested a summary of what the facility produces” was as follows:

UOP LLC is a facility that produces synthetic materials to be used as adsorbents and/or catalyst in various manufacturing applications (SIC: 2819). A summary of the products produced and the processes utilized by the facility can be located in the Major Source Operating Permit renewal application.⁶⁰

The SOB’s response is disingenuous. Its two-sentence response show the haste in which it responded to detailed and thoughtful comments. Moreover, the extremely terse responses are disrespectful of the organizations and individuals that attempted to review and meaningfully provide detailed and extensive comments on ADEM’s draft permit. In addition to GASP, Inc. and the other organizations that joined in those comments, ADEM received comments from the President of the Mobile County NAACP,⁶¹ the Vice Chair of the Sierra Club Mobile Bay Group’s Executive Committee,⁶² and a member of the public who explained:

[a]ny resident living along the fenceline of this refinery will tell you that the plant's emissions don't just stink. They cause headaches, respiratory irritation, asthma, and more. The health effects of pollution generated should not be treated as an externality to be paid by residents of this environmental justice community, but as a factor that the refinery should be dealing with, to the satisfaction of applicable laws and regulations and the neighboring community. Compliance can only be determined by requiring adequate monitoring to measure polluting output.⁶³

Furthermore, at ADEM’s public hearing on October 20, 2020, the President of the Mobile Environmental Justice Action Coalition, Ramsey Sprague, also testified at the hearing.⁶⁴ Mr.

⁵⁸ See SOB throughout.

⁵⁹ *In re Midwest Generation, LCC, Waukegan Generating Station*, Petition No. V-2004-5 (Sept. 22, 2005), at 8.

⁶⁰ RTC at 1.

⁶¹ Email from Robert E. Clopton Sr. President, Mobile County NAACP, to Mr. Gore (Oct. 19, 2020).

⁶² Letter from Carol Adams-Davis to Ronald W. Gore (Oct. 27, 2020).

⁶³ Letter from Lella B. Lowe to Ronald W. Gore (Oct. 27, 2020).

⁶⁴ Testimony of Ramsey Sprague, President of the Mobile Environmental Justice Action Coalition, ADEM Hearing Transcript at 20-59 (Oct. 20, 2020).

Sprague explained that “the Mobile Environmental Justice Action Coalition was formed seven years ago by Africatown residents in response to a major influx of industrial activities” and that the group has “been fighting very hard for the integrity of the Africatown neighborhood plan itself, which calls for greater accountability for industrial pollution in the area.”⁶⁵ He further testified that MEJAC has “concerns about this UOP permit renewal ... as a major source and one of the largest, if not the largest, emitter in the toxic release inventory in the entire Africatown planning area.”⁶⁶ He expressed concern about the lack of any facility-based monitoring except for visual inspection and standard OSHA compliance, and noted that fence-line monitoring was needed, particularly on the north side of the facility which is directly adjacent to a residential neighborhood.⁶⁷

In sum, EPA must object to the Final Permit because the SOB is lacking basic information necessary for meaningful public review, and ADEM does not sufficiently respond to Petitioner’s concerns.

*i. Comment III: ADEM Fails to Include Adequate Monitoring, Recordkeeping, and Reporting Requirements.*⁶⁸

Compounding the identified information lacking in the SOB, Petitioner noted in Comment III that ADEM did not fulfill its obligations to set forth the legal and factual basis for the permit conditions under 40 C.F.R. § 70.7(a)(5). In particular, no rationale for its monitoring regime for UOP Mobile Plant was given.⁶⁹ Permitting authorities are required to set forth adequate monitoring requirements and the rationale for such requirements in the SOB, “describing why the chosen monitoring regime is adequate to assure compliance with the

⁶⁵ *Id.* at 22.

⁶⁶ *Id.*

⁶⁷ *Id.* at 24-26.

⁶⁸ GASP, Inc. Comments, *supra* note 4, at 4.

⁶⁹ *Id.* at 5.

emissions limit.”⁷⁰ The permit establishes a limit of “not more than one 6-minute average opacity greater than 20% in any 60-minute period and no 6-minute average opacity greater than 40%” for nearly every emission point.⁷¹ But to verify compliance, ADEM only requires that visible emissions be checked “at least once per day on at least two days per calendar week”⁷² Moreover, while these visual inspection checks are to be based on EPA Reference Method 9, “alternate test methods” may be used with prior approval by ADEM (without any discussion as to how these alternate methods can be determined—including whether or not those methods must be based on EPA-approved alternatives or whether public input will be accepted). EPA must object to the Final Permit because it fails to provide adequate rationale to the monitoring regime determinations for UOP Mobile Plant under 40 C.F.R. § 70.7(a)(5) with ADEM unable to assure proper compliance with limits.

Furthermore, the rationale for the selected monitoring requirements is not “clear and documented in the permit record.”⁷³ UOP Mobile Plant’s original air permit, which may have established such rationale, was not contained in the permit record during the public comment period.⁷⁴ The proposed monitoring for opacity is not sufficient because it fails to ensure compliance on a continuous basis (a minimum two observations a week is far from adequate to ensure compliance with a 1 hour standard). Moreover, “the permit record, as it exists currently available to Commenters and the public, is virtually silent on these critical analyses”⁷⁵ and lacked a reasoned analysis to support the proposed monitoring. Petitioner’s requested ADEM

⁷⁰ *Id.* at 4. *See also* In re United States Steel Corporation – Granite City Works, Petition No. V-2009-03, Order Responding to Petitioner’s Request that the Administrator Object to Issuance of State Operating Permit, at 6-7.

⁷¹ *See* Proposed Permit throughout.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

supplement its SOB with its supporting rationale, and include in the permit record all underlying SIP permits, and re-notice the Draft Permit for public comment.⁷⁶

ADEM does not provide an adequate response to Petitioner's concern regarding the deficient permit record. In response to Petitioner's comment regarding the lack of monitoring rationale, ADEM simply states that "[d]uring the initial issuance of UOP LLC's Major Source Operating Permit on August 15, 2003, visible emission checks were incorporated to indicate proper operation of the control equipment. Proper operation of the control equipment precludes visible emissions. Therefore, the absence of visible emissions indicates that the emission point is meeting the applicable standard."⁷⁷ While ADEM might reasonably assume that an "absence of visible emissions indicates that the emission point is meeting the applicable standard,"⁷⁸ the response ignores Petitioner's concern that the *frequency* of required inspections (a mere twice per week) is sufficient to ensure compliance. Moreover, EPA has explained that incorporation by reference may be useful in many instances, but "the obligation to issue permits that are clear and meaningful to all affected parties, including those who must comply with or enforce their conditions" remains.⁷⁹ Without clearly written permit terms, citizens will likely be barred from enforcement actions. "Generally, EPA expects that Title V permits will explicitly state all emission limitations and operational requirements for all applicable emission units at a facility."⁸⁰ In any case, ADEM failed to include the August 15, 2003 Major Source Operating Permit in the final administrative record. If the original Title V permit sets forth the monitoring

⁷⁶ *Id.*

⁷⁷ *Id.* at 1.

⁷⁸ RTC, Response to Comment 3.

⁷⁹ In The Matter Of: The Premcor Refining Group, Inc. Port Arthur, Texas Permit Number O1498, Order Responding to Petitioner's Request that the Administrator Object to the Issuance of a Title V Operating Permit (May 28, 2009) at 5.

⁸⁰ *Id.*

rationale, it is important for Petitioner and the public to verify that all necessary conditions have been incorporated into the permit.

ADEM mischaracterizes Petitioner's comments regarding the original air permit. Petitioner referenced the unavailability of UOP Mobile Plant's original air permit several times through its comments.⁸¹ In response, ADEM states that the "facility has never been required to apply for a SMOP [(synthetic minor operating permit)],"⁸² but otherwise ignores Petitioner's contention that the original air permit was unavailable and was not provided to Commenters even after a records request was made on October 21, 2020.⁸³ EPA must object to the Final Permit because the Petitioner and the public were unable to verify all of the necessary conditions required to be incorporated within the permit due to the absence of the 2003 Major Source Operating Permit. Rather than providing the permit as readily available for determining the verification of these conditions, ADEM mischaracterizes and ignores these concerns.

Without a clear understanding of the rationale for the selected monitoring requirements, EPA must object to the Final Permit.

*ii. Comment IV: ADEM Has Not Demonstrated UOP Mobile Plant is Entitled to a Permit Shield.*⁸⁴

In Comment IV, Petitioner states that "[t]he SOB fails to explain how, based on merely thirteen inspections, several of which were unable to observe emission units of significant concern, the State has sufficient information to grant a permit shield over the entire plant."⁸⁵

⁸¹ See GASP, Inc. Comments, *supra* note 4, at 5 ("[T]he permit record does not contain the original air permit that likely established such rationale."); *Id.*, at 19 ("Because the original air permit establishing the PSD limited referred to throughout the Draft Permit is neither part of the permit record nor publicly available..."), etc. Petitioner does state at one point that the original air permit may be a Synthetic Minor Operating Permit, but does not claim this as a fact. *Id.* at 22.

⁸² RTC, at 6.

⁸³ GASP, Inc. Comments, n.101.

⁸⁴ *Id.* at 5.

⁸⁵ *Id.* at 7.

Petitioner requested that the permit shield be removed in its entirety because of the lack of information as to the rationale of the permit shield.⁸⁶

Ala. Admin. Code r. 335-3-16-.10 explains that ADEM may include a permit shield in an operating permit, provided that “such applicable requirements are included and are specifically identified in the permit” or that ADEM “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.”⁸⁷ The only information provided in the Final Permit as to the existence of the permit shield is in General Permit Proviso No. 33, which states that a permit shield already exists under the facility’s operating permit.⁸⁸ Per Ala. Admin. Code r. 335-3-16-.2(2), applications for permit renewal are “subject to the same procedural requirements that apply to an initial issuance.” Therefore, ADEM cannot simply rely on justification from a previous permit, but must make that information available so that the public and EPA can review and verify that the previous rationale is still applicable in this permit renewal.

In its response, ADEM simply states that “[a]s part of its application, the facility requested a permit shield.”⁸⁹ ADEM provides no other explanation as to why the permit shield was granted and what specific requirements are not applicable to the source. Therefore, ADEM does not provide an adequate response to Petitioner’s concern that a permit shield was granted with only thirteen inspections conducted over ten years.

Further, the permit shield purportedly shields the facility from PSD and other applicable requirements because the source “avoids” PSD review through the permit terms that purport to allow it to escape PSD review. However, nowhere in the SOB or permit did ADEM provide an

⁸⁶ Id.

⁸⁷ Ala. Admin. Code r. 335-2-16-.10(1)(a)–(b).

⁸⁸ ADEM Major Source Operating Permit, No. 503-8010, at 0-10.

⁸⁹ RTC at 3.

adequate explanation as to how the facility manages to “avoid” applicable requirements (and, for that matter, how those efforts might be federally enforceable). Because the permit shield extends only to requirements which are included specifically in a title V permit, “either as an applicable requirement or in a nonapplicability determination” the permit shield cannot preclude enforcement for violations of a standard or requirement unless the permit contains “a specific determination” that PSD does not apply.⁹⁰

*iii. Comment VII: Many conditions for Specific Emissions Units Contain Severe Deficiencies in That They Merely Cite to Applicable Requirements Whole Cloth.*⁹¹

Title V permit requirements must be written with enough specificity in order to assure that the permit applicant, the general public, as well as the regulatory authorities are provided knowledge for what requirements apply.⁹² “Citizen enforceability is intrinsically tied to federal enforceability and was seen by Congress as vitally important to the success of the CAA.”⁹³ A draft permit must include all applicable emission limits and standards⁹⁴ and must be supported by monitoring, recordkeeping, and reporting requirements “sufficient to enable regulators and citizens to determine whether the limit has been exceeded and, if so, to take appropriate enforcement action.”⁹⁵

In Comment VII, Commenters noted that many conditions in UOP Mobile Plant’s Draft Permit for specific Emissions Units (“EUs”) contain deficiencies in that they merely cite to

⁹⁰ See, e.g., *In re Midwest Generation, LCC, Waukegan Generating Station*, Petition No. V-2004-5 (Sept. 22, 2005), 5; see also *In re Valero Refining Co. Benicia, California Facility*, Petition No. IX-2004-07, 25 (granting claim because the SOB failed to “address how the requirements of a subsumed regulation are satisfied by another regulation, not simply that the requirements are satisfied by another regulation.”).

⁹¹ *Id.* at 14.

⁹² Doe Run, *supra* note 37, at 11 (citing to 40 C.F.R. § 70.6).

⁹³ Joyce M. Martin, Crossroads for Federal Enforcement of the Clean Air Act, 6 Duke Environmental Law & Policy Forum 77-104 (1996), available at: <https://scholarship.law.duke.edu/delpf/vol6/iss1/2>.

⁹⁴ See CAA §§ 502(a) and 504(a), 42 U.S.C. §§7661a(a) and 7661c(a) and 57 Fed. Reg. 32,250, 32,251 (July 21,1992) (EPA final action promulgating the part 70 rule).

⁹⁵ GASP, Inc. Comments, *supra* note 4, at 19.

applicable requirements broadly, which contain different methods or standards for compliance that are not specifically applied to the source.⁹⁶ Throughout UOP Mobile Plant’s Final Permit, for all EUs except 023, the underlying regulation is cited broadly to Ala. Admin. Code r. 335-3-14-.04 which contains fifty-eight pages of subparts.⁹⁷ Accordingly, ADEM fails to identify with specificity the origin and authority of each permit term and condition.

ADEM did not address Petitioner’s concern regarding a lack of specificity in citations at any point in its response. Petitioner’s comment is significant because, as stated above, the regulation cited contains fifty-eight pages of subparts. Members of the impacted EJ community cannot determine which standards apply to each EU if specific citations are not given, nor can members of the community meaningfully comment on ADEM’s rationale for inclusion of specific terms and conditions. EPA should object to the Final Permit and require that ADEM include the required specificity.

- iv. *Comment IX: The Draft Permit is deficient because it does not include practically enforceable emission limits and monitoring, recordkeeping and reporting necessary to avoid the Prevention of Significant Deterioration requirements.*⁹⁸

Consideration of whether a facility constitutes a “major stationary source” for Prevention of Significant Deterioration (hereinafter “PSD”) purposes depends on whether the facility emits or has the potential to emit (hereinafter “PTE”) certain pollutants in excess of specified thresholds: the threshold for sources within listed categories, including chemical production plants such as UOP Mobile Plant, is 100 tons per year; for all other sources, 250 tons per year.⁹⁹

⁹⁶ GASP, Inc. Comments, *supra* note 4, at 14–15.

⁹⁷ *Id.* See, e.g., Draft Permit, 2-1, 3-1, 4-1, and 17-1 (among others).

⁹⁸ *Id.* at 18.

⁹⁹ See 42 U.S.C. § 7479(1) (defining “major emitting facility”); Ala. Admin. Code r. 335-3-16-.01(1)(q) (defining “Major Source”); see also 40 C.F.R. § 51.166(b)(1)(i) (defining “major stationary source” in EPA regulations that identify minimum requirements for SIP approved PSD programs); cf. 40 C.F.R. § 52.21 (b)(1)(i) (defining “major stationary source” in EPA regulations for PSD permits issued under the EPA’s permitting authority).

Therefore, if a permit applicant agrees to enforceable limits that are sufficient to restrict PTE, the facility's "maximum capacity to emit" for PTE purposes is calculated based on those limits.¹⁰⁰ In order for an emission limit to be enforceable as a practical matter, the permit must clearly specify how emissions will be measured or determined for purposes of demonstrating compliance with the limit.¹⁰¹ Commenters stated, "[w]here every EU except 003 and 023 are subject to synthetic minor PSD emissions limitations, UOP Mobile Plant clearly agreed to enforceable limits that are sufficient to restrict PTE."¹⁰²

In order to determine whether the terms and conditions that are included in a Title V permit are "enforceable as a practical matter" to limit PTE and exempt the source from PSD review, we apply the definition of PTE. The definition of PTE states that:

Any physical or operation limitation' on the ability of a source to emit a pollutant shall be considered in calculating the potential to emit if the limitation is federally enforceable.¹⁰³

"In describing what is meant by "physical or operational limitation," the regulation specifically refers to (1) air pollution control equipment, (2) restrictions on hours of operation, and (3) restrictions on the amount of material combusted, stored, or processed. ... The definition at no point suggests that the term "physical or operational limitation" extends to restrictions on actual emissions."¹⁰⁴

¹⁰⁰ *In the Matter of: Yuhuang Chemical Inc. Methanol Plant St. James Parish, Louisiana*, Order on Petition No. VI-2015-03 (Aug. 31, 2016) at 13 (quoting *In the Matter of Hu Ilonua Bioenergy Facility*, Order on Petition No. IX-2011-1 (Feb. 7, 2014) at 9 (*Hu Honua Order*); *Cash Creek Order* at 15; *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 (June 22, 2012) at 28 (*Kentucky Syngas Order*)).

¹⁰¹ See *In the Matter of: Yuhuang Chemical Inc. Methanol Plant St. James Parish, Louisiana*, Order on Petition No. VI-2015-03 (Aug. 31, 2016) at 14.

¹⁰² GASP, Inc. Comments, *supra* note 4, at 19.

¹⁰³ 40 C.F.R. § 52.21(b)(4), ALA. ADMIN. CODE r. 335-3-14-.04 (2)(d).

¹⁰⁴ *U.S. v. Louisiana-Pacific Corp.*, 682 F.Supp. 1122, 1132 (1987), *accord Cascade Kelly Holdings* at 1105. After the Court's decision, and in subsequent years, as EPA is aware, it issued numerous documents that provided guidance, explanations, and examples for federal, state and local air permitting agencies, all of which echoed the Louisiana-Pacific Court's decision. Craig Potter, Assistant Administrator for Air and Radiation, Thomas L. Adams Jr., Assistant Administrator for Enforcement and Compliance Monitoring, and Francis S. Blake, General Counsel, Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency, (Sept. 23, 1987) (Clean Air Act Compliance Enforcement Compendium, 1988 ed. Volume 1, at pdf 312,

As EPA has explained:

Importantly, only limits that meet certain enforceability criteria may be used to restrict a facility's PTE. and the permit must include sufficient terms and conditions such that the source cannot lawfully exceed the limit. *See, e.g., Cash Creek Order* at 15 (explaining that an “emission limit can be relied upon to restrict a source's PTE only if it is legally and practicably enforceable”); *In the Matter of Orange Recycling and Ethanol Production Facility. Pencor- Masada Oxynol, LLC*, Petition No. 11-2001-05 (April 8, 2002) at 4-7 (2002 Pencor- Masada Order). One of the key concepts in evaluating the enforceability of PTE limits is whether the limit is enforceable as a practical matter. *See, e.g., 2002 Pencor-Masada Order* at 4- 7 (emphasizing the importance of practical enforceability in the permit terms and conditions that limit PTE). Moreover, the concept of “federal enforceability” has also been interpreted to encompass a requirement for practical enforceability.¹⁰⁵

For example, Permit Unit No. 001, which covers three steam generation boilers, UOP states that “the boilers are subject to the state allowable particulate limit for fuel burning equipment; however, to purportedly avoid PSD review, the facility has committed to a more stringent particulate limit...of 3.4 lb/hr.”¹⁰⁶ ADEM uses similar language throughout the SOB, for all emissions units except 003 and 023, stating that the facility has “committed to more stringent particulate” limits in order to avoid PSD review.¹⁰⁷ The emission limits in the Final Permit are inadequate to establish synthetic minor status, they are not consistent with the definition of PTE that requires that the permit terms include physical or operation limitations.

<https://nepis.epa.gov/Exe/ZyPDF.cgi/91021SF7.PDF?Dockey=91021SF7.PDF>; 57 FR 13498, 13541, 13548 (April 16, 1992) (EPA’s General Preamble to the 1990 CCA Amendments that guides permitting agencies when they revise their NSR permit programs, notably it references EPA’s 1987 memorandum that established the enforceability criteria for writing rules and permitting); John Seitz and Robert Van Heuvelen, “Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit,” at 5-6 (Jan. 22, 1996), <https://www.epa.gov/sites/production/files/2015-07/documents/pottoemi.pdf>; John S. Seitz, Director, Office of Air Quality Planning and Standards, OAR, EPA and Eric Schaeffer, Director, Office of Regulatory Enforcement, OECA, EPA, “Potential to Emit (PTE) Guidance for Specific Source Categories,” at 2 (April 14, 1998), <https://www.epa.gov/sites/production/files/2015-08/documents/lowmarch.pdf>.

¹⁰⁵ *In the Matter Yuhuang Chemical Inc.*, Petition No. VI-2015-03, at 14 (Aug. 31, 2016), available at https://www.epa.gov/sites/production/files/2016-09/documents/yuhuang_response2015_0.pdf. (“2016 Yuhuang Chemical”)

¹⁰⁶ Statement of Basis, UOP LLC Mobile Plant, Permit No. 503-8010, at 2-3.

¹⁰⁷ *See id. generally.*

Additionally, commenters stated that “UOP Mobile Plant clearly agreed to enforceable limits that are sufficient to restrict PTE.”¹⁰⁸ Petitioner is unable to meaningfully engage in whether limits that meet certain enforceability criteria may be used to restrict a facility’s PTE, and the permit must include sufficient terms and conditions such that the source cannot lawfully exceed the limit. Because the original air permit establishing the PSD limits referred to throughout the Draft Permit is neither part of the permit record nor publicly available, Petitioner is unable to determine what, if any, analysis was performed by ADEM to establish these limits.¹⁰⁹

In response to Commenter’s claim, ADEM states that “the synthetic minor PSD emission limitations are located in the permit record”, and furthermore the “permits that were issued to enact these limitations were justified at the time of issuance.”¹¹⁰ Petitioner was unable to find any documentation in the permit record that discussed how the specified emissions limits were calculated and how exactly UOP Mobile Plant had “committed to more stringent particulate matter limits.” Furthermore, ADEM’s response fails to identify what these “permits that were issued” refers to or where they can be found.

Moreover, the Final Permit – as was done in the Draft Permit - cites Ala. Admin. Code r. 35-3-14-.04 as ADEM’s authority for issuing the synthetic minor limits for all the units at UOP Mobile Plant, and the permit provisos explain “[t]his source is subject to synthetic minor PSD emission limitations.” Ala. Admin. Code r. 35-3-14-.04 contains ADEM’s regulations for the PSD permitting program. Those regulations apply to major sources that apply for and are granted major source PSD permits. While a permit applicant seeking a permit to construct uses the

¹⁰⁸ GASP, Inc. Comments, *supra* note 4, at 19.

¹⁰⁹ *Id.*

¹¹⁰ RTC at 6.

definitions in the PSD regulations, for example the regulations on how to estimate PTE, ADEM's PSD regulations do not specify and provide it with authority to create permit terms and conditions to allow sources to avoid the PSD permitting requirements. Indeed, when EPA approved the State's Title V program it explained that the State's regulations were approved for use to establish synthetic minor sources.¹¹¹ Furthermore, ADEM's SOB and Response to Comment document fail to explain how the PSD regulations give it authority to establish synthetic minor limits in the Final Permit for UOP.

Finally, per 335-3-16-.2(2), applications for permit renewal are "subject to the same procedural requirements that apply to an initial issuance." Therefore, ADEM cannot simply rely on justification from a previous permit, but must make that information available so that the public and EPA can review and verify that the previous rationale is still applicable in this permit renewal. Thus, ADEM's response – and package submitted to EPA – is insufficient as it does not address Petitioner's comments. The Title V renewal permit includes particulate matter, sulfur dioxide, and nitrogen oxide emission limits for twenty-three separate units within the facility that purport to allow the source to avoid PSD permitting, but the final SOB, response to comments and permit all fail to provide authority, a basis, and rationale to explain and support inclusion of those synthetic minor limits. For example, while the SOB explains that Permit Unit No. 001 – Steam Generation Boilers are subject to the state allowable SO₂ limit for fuel combustion (1.8 lb/MMBtu), *citing* Rule 335-3-5-.01(1)(a), UOP purportedly "committed to a more stringent SO₂ limit" for one boiler (Boiler No. 8020; Emission Point-107) to "avoid PSD review," SOB, at 3. That limit is 9.0 lb/hr, *see* Draft Permit, at 1-1. Of course, there's no explanation to indicate how ADEM arrived at that limit and we must assume that it is more stringent than the MMBtu

¹¹¹ Approval and Promulgation of Implementation Plans Alabama: Approval of Revisions to Construction and Operation Permit Regulations for Synthetic Minor Sources, 59 Fed. Reg. 52,915 (October 20, 1994).

limitation. There is also no discussion as to why the other two boilers should not also be limited to 9.0 lb/hr, if that limit is indeed more stringent and appropriate. The public is left to assume also that the 9.0 lb/hr limit is connected to a permit that purportedly limits the boilers to firing natural gas only, *see* SOB, at 3 (“Since the three process heat boilers are permitted to fire natural gas only ... no periodic monitoring is required”), but that permit was not identified in the SOB or as the source of requirements for the limit detailed in the permit, *see* Draft Permit, 1-1 (SO₂ limit for EP-107, citing to “Rule 335-3-14-.04,” or ADEM’s PSD program).

EPA must object to the Final Permit because the synthetic minor limits are not practically enforceable, ADEM fails to provide legal authority for creating the limits, and it does not contain all applicable emission limits and requirements, including any underlying permits or nonapplicability determinations relied upon to “avoid PSD review.”

B. The Statement of Basis Lacks Substantive Information Required for Public Review

Under 40 C.F.R. § 70.7(a)(5), the permitting authority is obligated to set forth the legal and factual basis for the Draft Permit conditions. EPA has stated that while a Title V permit may contain information in reference to a rule or existing permit, it must provide that the information referenced is publicly available and detailed to the extent that it shows how the applicable requirement applies.¹¹² If this information is not provided as described, it may result in a “deficiency in the permit’s content.”¹¹³

A Title V permit may incorporate an existing permit or applicable requirement by reference to provide further detail on monitoring, recordkeeping, or reporting, “but only to the extent that the information is publicly available, detailed enough that the manner in which the

¹¹² *In the Matter of Doe Run Company and Buick Mine and Mill*, Petition No. VII-1999-001, Order on Petition (July 31, 2002), at 12 [hereinafter “*Doe Run*”].

¹¹³ *Hanford 2018 Order*, *supra* note 20, at 11.

citation applies to a facility is clear, and is not reasonably subject to misinterpretation.”¹¹⁴ Material incorporated into a permit by reference must be specific enough to define how the applicable requirement applies, and the referenced material should be unambiguous in how it applies to the permitted facility.¹¹⁵ Further, EPA has recognized in numerous prior orders that “the unavailability during the public comment period of information needed to determine the applicability of or to impose an applicable requirement also may result in a deficiency in the permit’s content.”¹¹⁶ The permit record, at the time of public comment, did not contain any clear and documented rationale for any of the monitoring requirements set forth in the Draft Permit for the twenty-three emission units at the facility. Petitioner attempted to obtain the original permit establishing these conditions through a records request from ADEM, but ADEM failed to produce any such permit before the end of the public comment period.¹¹⁷ EPA must object to the Final Permit because the existing 2003 permit incorporated within the Draft Permit by reference is not publicly available or detailed enough to not be reasonably subject to misinterpretation. ADEM does not rectify this concern and instead fails to produce any such permit before the end of the public comment period.

The Draft Permit also does not cite to or include a record of any exercise of the Director’s discretion for which monitoring requirements in Ala. Admin. Code r. 335-3-14-.04 are applicable to the source.¹¹⁸ The Draft Permit must include all monitoring, reporting and recordkeeping

¹¹⁴ *Doe Run*, *supra* note 37, at 12.

¹¹⁵ *Id.*

¹¹⁶ *Hanford 2018 Order*, *supra* note 20, at 11. See also *In re Cash Creek Generation, LLC*, Petition No. IV-2010-4, Order on Petition (June 22, 2012), at 9; *In re Louisiana Pacific Corporation*, Petition No. V-2006-3, Order on Petition (November 5, 2007); *In re WE Energies Oak Creek Power Plant*, Order on Petition (June 12, 2009); *In re Alliant Energy-WPL Edgewater Generating Station*, Petition No. V-2009-02, Order on Petition (August 17, 2010).

¹¹⁷ Letter from Haley Colson Lewis, Gasp to Azure Jones, ADEM (Oct. 21, 2020) and Response from Azure Jones, ADEM to Haley Colson Lewis, Gasp (Oct. 23, 2020) (on file with author).

¹¹⁸ ADEM, Draft Permit No. 503-8010 for UOP, LLC (June 30, 2020).; GASP, Inc., Mobile Environmental Justice Action Coalition (“MEJAC”), Clean Healthy Educated Safe Sustainable Africatown (“CHESS”), and the Deep South Center for Environmental Justice Comments on UOP Plant Mobile, *supra* note 3, at 15.

requirements to assure compliance with standards without a record of the Director's discretion for which monitoring requirements are applicable under Ala. Admin. Code r. 335-3-14-.04. However, this is not properly provided if a record of the Director's discretion on which monitoring requirements apply to each condition is only referred to through ADEM Admin. Code r. 335-3-14-.04.¹¹⁹

Taking the requirement of Ala. Admin. Code r. 335-3-14-.04 together with the Director's Discretion for air quality monitoring, it appears that UOP Mobile Plant had gained approval by the Director for the monitoring requirements detailed in the specific conditions.¹²⁰ The Draft Permit, however, does not have a record of the Director's discretion for which monitoring requirements in subparts of Ala. Admin. Code r. 335-3-14-.04 are applicable to the source.¹²¹

UOP Mobile Plant's Final Permit is insufficient and fails to provide for the public's ability to determine the applicability of requirements. EPA must object to the Final Permit because Petitioners and other commenters were unable to evaluate whether ADEM had established adequate permit terms and conditions within the Draft Permit. ADEM has not displayed that it has established adequate permit terms which has limited the ability for public participation as required by 40 C.F.R. § 70.7(h).

¹¹⁹ *Id.*

¹²⁰ GASP, Inc. Comments, *supra* note 4, at 15.

¹²¹ *Id.*

II. ADEM has not shown that monitoring requirements in Draft Permit are consistent with the applicable requirements therein.

The CAA requires that “[e]ach permit issued under [title V] shall set forth ... monitoring ... requirements to assure compliance with the permit terms and conditions.”¹²² EPA’s title V rules create a three-step process for permitting authorities to meet this statutory requirement.¹²³

First, monitoring requirements contained in applicable requirements must be incorporated into the permit.¹²⁴ Second, if an applicable requirement contains no periodic monitoring, the permit must include additional “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit.”¹²⁵ Third, if there is some periodic monitoring in the applicable requirement, but that monitoring is not sufficient to assure compliance with permit terms and conditions, the permit must contain supplemental monitoring to assure such compliance.¹²⁶ In addition, the rationale for the monitoring requirements selected by a permitting authority must be clear and documented in the permit record.¹²⁷

In the Draft Permit, ADEM states that “the Major Source Operating Permit that the facility is currently operating under specifies the types and frequency of monitoring, record keeping and periodic testing required to demonstrate compliance” and further explains that adherence to these permit conditions is a guideline for the facility’s compliance program.¹²⁸ The Draft Permit also indicates that three sources at the facility are subject to Compliance Assurance

¹²² 42 U.S.C. § 7661c(c).

¹²³ *In the Matter of Tennessee Valley Authority, Bull Run, Clinton*, Petition No. IV-2015-14, Order on Petition (Nov. 16, 2016) at 8 [hereinafter “*Bull Run*”].

¹²⁴ 40 C.F.R. § 70.6(a)(3)(i)(A); *Bull Run* Order at 8.

¹²⁵ 40 C.F.R. § 70.6(a)(3)(i)(B).

¹²⁶ 40 C.F.R. § 70.6(c)(1).

¹²⁷ 40 C.F.R. § 70.7(a)(5).

¹²⁸ ADEM, Draft Permit No. 503-8010 for UOP, LLC (June 30, 2020) at 36.

Monitoring (CAM) per 40 C.F.R. § 64, and outlet opacity by visual inspection is the chosen monitoring approach for each source. However, the only rationale provided for this determination is that the existing requirements “are listed in the current Title V Air Permit, and therefore qualify as presumptively acceptable monitoring.”¹²⁹ This is insufficient.¹³⁰

ADEM’s responses to these concerns, as further described below, are insufficient to address the specific issues regarding a lack of clear rationale for the selected monitoring requirements. In order to meet the requirements of the CAA, monitoring requirements must be clear, specific, and available for the public to review.¹³¹

This deficiency of information regarding compliance, monitoring, recordkeeping and reporting is especially important considering the environmental justice concerns expressed by those in the community surrounding UOP Mobile Plant and the organizations speaking on their behalf at the public hearing. Public comments and public hearing testimony clearly expressed the need for monitoring so that those impacted by emissions from this plant can track and monitor emissions.¹³² Title V requires that ADEM meaningfully respond to all commenters, including those in frontline EJ communities. Although ADEM received both written comments and public

¹²⁹ *Id.* at 52.

¹³⁰ GASP, Inc. Comment, *supra* note 4, at 5.

¹³¹ See *In the Matter of Consolidated Environmental Management, Inc. - Nucor Steel St. James Parish, Louisiana Pig Iron and DRI Manufacturing*, VI-2010-05, VI-2011-06 and VI-2012-07 (2014), at 46; referencing *Wheelabrator Baltimore, L.P.*, WL 5924235 (2010) at 10; *In Re Doe Run Company Buick Mill and Mine*, VII-1999-001 (2002) at 11.

¹³² Public Hearing Transcript, 21 (“in our discussion with the community members, they’re very concerned over some of the discrepancies and ... the lack of monitoring, especially in the permit itself.”); 24 (“the fact that they’re dealing with noxious odors on a regular basis is a very severe concern ... it’s clear that UOP – that the permit as it’s written, the application, would not provide for any facility-based monitoring whatsoever aside from visual inspection ... That, to me, is ... inadequate”); and 25 (“It’s residential properties that line the – the north side of the fence. But facility-based monitors need to be implemented for the purposes of not just the – the neighbors, but also for the workers present.”).

testimony raising issues with the Draft Permit, ADEM responded without sufficient specificity to illustrate which party the agency was responding to.¹³³

A. ADEM fails to adequately respond to Petitioner’s assertion that the Draft Permit lacks sufficient information to demonstrate compliance with the requisite monitoring conditions.

Petitioner assert in its comments that ADEM is required to explain how visual observations (in lieu of continuous monitoring) relates to the opacity limit that must be met at all times.¹³⁴ Petitioner states that “[t]he Draft Permit’s opacity monitoring requirements are inadequate to assure compliance with the opacity limits therein because monitoring is too infrequent, uses inadequate methods,” and is inconsistent with the relevant state and federal regulations.¹³⁵

This information is crucial because it will explain how the selected monitoring that was selected assures compliance with the terms and conditions of the permit.¹³⁶ ADEM has not made any such showing, neither in the Final Permit nor in any other record within the permit record.¹³⁷ Final permits are required to contain monitoring requirements which “assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement.”¹³⁸

ADEM responded to Petitioner’s concerns by stating that “visible emission checks indicate the proper operation of the control equipment,” and that “[p]roper operation of the

¹³³ See RTC generally.

¹³⁴ GASP, Inc. Comments, *supra* note 4, at 14.

¹³⁵ GASP, Inc. Comments, *supra* note 4, at 14.

¹³⁶ *In the Matter of EME Homer City Generation LP Indiana County, Pennsylvania*, EPA Order on Petition, Petition Numbers III-2012-06, III-2012-07, and III-2013-02 (July 30, 2014) at 47.

¹³⁷ ADEM, Draft Permit No. 503-8010 for UOP, LLC, *supra* note 18, at 49-54.

¹³⁸ 40 C.F.R. § 70.6(a)(3)(i)(B); *see also* 40 C.F.R. § 70.6(c)(1).

control equipment precludes visible emissions.”¹³⁹ ADEM simply concluded that “the absence of visible emissions indicates that the emission point is meeting the applicable standard.”¹⁴⁰

This response is inadequate. ADEM explains the purpose of an opacity limit, but not how the selected monitoring is sufficient to ensure compliance with the opacity limit. This does not meaningfully respond to the issue raised. Proper operation of control equipment cannot be assumed; the whole point of a title V permit is to ensure compliance. If control equipment fails or is operated incorrectly, then there will be visible emissions; the key is whether the monitoring is sufficient to yield reliable data in a relevant time period to assure compliance with the continuous opacity limit. Thus, there is an unexplained disconnect in the Final Permit between the selected monitoring method (visible emissions) and the method to assure compliance (visible emissions checks occurring at minimum once per day on at least two days per week).

EPA has routinely granted petitions where the permitting authority has not provided a sufficient explanation for use of Method 9 to monitor compliance with continuous opacity limits.¹⁴¹ While these examples varied in the frequency of the observations from weekly to annually, ADEM provides no explanation for why a twice-a-week frequency is adequate. In any case, for a continuous opacity limit a continuous monitoring system, such as a COMS, is necessary, unless it can be demonstrated that a COMS is not feasible.¹⁴² ADEM’s response provides no basis for such a demonstration. The same defect involves visible monitoring as an

¹³⁹ RTC, at 5.

¹⁴⁰ RTC, at 5.

¹⁴¹ See, *In the Matter of Public Service Co. of Colorado, dba Xcel Energy, Pawnee Station*, Order on Petition No. V111-2010-XX at 20-21 (June 30, 2011) (finding insufficient explanation of the adequacy of annual Method 9 tests for monitoring opacity at certain operations); *In the Matter of EME Homer City Generation LP Indiana County, Penn.*, Order on Petition Nos. III-2012-06, III-20 12-07, III-2013-02 at 45 (finding insufficient explanation of the adequacy of weekly Method 9 observations). See also, *In the Matter of PacifiCorp's Jim Bridget and Naughton Electric Utility Steam Generating Plants*, Order on Petition No. VIII-00-1 (November 16, 2000) at 19 (finding quarterly Method 9 observations inadequate to assure compliance with a SIP opacity limit).

¹⁴² *Bull Run* Order at 10.

indicator for compliance with the particulate matter emission rate. Nowhere in the permit record does ADEM explain how visible inspections are an appropriate monitoring method for particulate matter emission rates. However, throughout the permit for nearly every emission unit, ADEM states that “[a]s an indicator of compliance with the particular matter (PM) emission rate and the opacity standard, [the emission point] shall be checked for visible emissions at least once per day on at least two days per calendar week while the equipment is in operation.”¹⁴³ Even assuming, *arguendo*, that visible inspections are adequate to assess compliance with an opacity standard (despite the availability of COMS), ADEM makes no attempt to explain why or how visible inspections can establish compliance with a PM emission rate (including limits as distinct as 0.30 lb/hr; 0.10 lb/hr; 0.083 lb/hr; 0.05 lb/hr).¹⁴⁴ Further, ADEM omits altogether any monitoring requirements for the SO₂ emission rates without any explanation or justification.¹⁴⁵ EPA must object to the Final Permit because it fails to adequately specify how visible inspection are in compliance with a proper monitoring method for particulate matter emission rates and ADEM has made any explanation to how the monitoring was appropriately determined.

In order to provide for a proper notice and opportunity to comment, regulatory authorities should provide significant comments, such as Petitioner’s, with a meaningful response.¹⁴⁶ There is no justification within the UOP Mobile Plant’s Draft Permit, or the permit record, for how the two times per week visible emissions checks will assure compliance with a continuous opacity limit. Nor is there any explanation as to why visible inspections suffice as “adequate” monitoring for demonstrating compliance with a PM emissions rate or as to why SO₂ monitoring is not

¹⁴³ See, e.g., Draft Permit, 1-3; 2-3; 3-3; 4-4; 5-3; 6-3; 17-4; and throughout.

¹⁴⁴ *Id.* at 2-1.

¹⁴⁵ See, e.g., Draft Permit, 1-3; 2-3; 3-3; 4-4; 5-3; 6-3; 17-4; and throughout.

¹⁴⁶ *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (“the opportunity to comment is meaningless unless the agency responds to significant points raised by the public”). See, e.g., *In re Louisiana Pacific Corporation*, at 4-5 (Nov. 5, 2007).

required at all. A Title V operating permit must include proper monitoring requirements for the emission units affected with requirements that do not include monitoring or where monitoring is not sufficient to assure compliance.¹⁴⁷ The files provided on ADEM's e-file also do not readily produce a record for which monitoring requirements are applicable. A lack of specificity in the monitoring requirements and availability to that specificity impinges on providing a meaningful notice and opportunity to comment.

As such, EPA must object to the Final Permit because a Title V operating permit must include proper monitoring requirements to assure compliance, and require ADEM to re-notice the Draft Permit to correct this deficiency with sufficient analysis that the monitoring assures compliance.

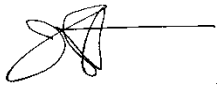
CONCLUSION

EPA must object to the Final Permit. The Final Permit is deficient because many conditions are incorporated from UOP Mobile Plant's original air permit, which was not made available to the public for review. Further, EPA must object and require ADEM to revise the monitoring, recordkeeping and reporting requirements so that they ensure compliance with opacity limits and other applicable requirements. Finally, EPA must object to the Final Permit because ADEM erroneously relies on its PSD regulations to create synthetic minor limits, Moreover, the permit terms for the emission units seeking to escape PSD do not meet the requirements for practical enforceability. EPA must require that ADEM revise the purported synthetic minor terms, including sufficient reasoning, as without practically enforceable permit terms, the UOP Mobile Plant is subject to PSD permit requirements.

¹⁴⁷ *In the Matter of EME Homer City Generation LP Indiana County, Pennsylvania*, *supra* note 17.



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