BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF OWENS-BROCKWAY GLASS CONTAINER INC. MULTNOMAH COUNTY, OREGON PERMIT NO. 26-1876-TV-01 ISSUED BY THE OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY	)	PETITION NO. X-2020-2 ORDER RESPONDING TO OBJECTION TO THE ISSUANCE OF TITLE V OPERATING PERMIT

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

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated February 4, 2020, (the Petition) from Earthjustice, on behalf of Cully Air Action Team, Portland Clean Air, Oregon Environmental Council, and Verde (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to the final operating permit No. 26-1876-TV-01 (the Final Permit) issued by the Oregon Department of Environmental Quality (ODEQ) to Owens-Brockway Glass Container Inc. (Owens-Brockway) in Portland, Multnomah County, Oregon. The operating permit was issued pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and OAR 340-218-0010 *et seq*. *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further below, the EPA grants in part and denies in part the Petition requesting that the EPA Administrator object to the Permit. Specifically, the EPA grants Claims A, B, and G and denies the rest of the claims.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(l) of the CAA, 42 U.S.C. § 766la(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. The state of Oregon submitted a title V program governing the issuance of operating permits on November 15, 1993. The EPA granted full approval of Oregon's title V operating permit program in 1995, 60 FR 50106 (September 28,

1995). This program, which became effective on November 27, 1995, is codified in OAR Chapter 340, Division 218.

All major stationary sources of air pollution and certain other sources are required to apply for and operate in accordance with title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. CAA §§ 502(a), 503, 504(a), 42 U.S.C. §§ 7661a(a), 7661b, 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* CAA § 504(c), 42 U.S.C. § 7661c(c). One purpose of the title V program is to "enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." 57 Fed. Reg. at 32251. Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the source's emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements.

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(a), 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 proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of the EPA's 45-day review period, petition the Administrator to object to the permit. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). 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 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)(l).[1] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[2]

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

[2] *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *cf. NYPIRG*, 321 F.3d at 333 n.11.

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

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether 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 state's response to comments), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.[5] Another factor the EPA examines 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's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and

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[3] *See also Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' . . . plainly mandates an objection *whenever* a petitioner demonstrates noncompliance." (emphasis added)).

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

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

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

The information that the EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) on a proposed permit generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement of basis for the draft and proposed permits; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; relevant supporting materials made available to the public according to 40 C.F.R. § 70.7(h)(2); and all other materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). If a final permit and a statement of basis for the final permit are available during the agency's review of a petition on a proposed permit, those documents may also be considered when making a determination whether to grant or deny the petition.

If the EPA grants an objection in response to a title V petition, a permitting authority may address the EPA's objection by, among other things, providing the EPA with a revised permit. *See, e.g.*, 40 C.F.R. § 70.7(g)(4). However, as explained in the *Nucor II Order*, a new proposed permit in response to an objection will not always need to include new permit terms and conditions. For example, when the EPA has issued a title V objection on the ground that the permit record does not adequately support the permitting decision, it may be acceptable for the permitting authority to respond only by providing additional rationale to support its permitting decision. *Id.* at 14 n.10. In any case, whether the permitting authority submits revised permit terms, a revised permit record, or other revisions to the permit, the permitting authority's response is generally treated as a new proposed permit for purposes of CAA § 505(b) and 40 C.F.R. § 70.8(c) and (d). *See Nucor II Order* at 14. As such, it would be subject to the EPA's opportunity to conduct a 45-day review per CAA § 505(b)(1) and 40 C.F.R. § 70.8(c), and an opportunity to petition under CAA § 505(b)(2) and 40 C.F.R. § 70.8(d) if the EPA does not object. The EPA has explained that treating a state's response to an EPA objection as triggering a

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[6] *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (September 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring); *In the Matter of Portland Generating Station*, Order on Petition at 7 (June 20, 2007) (*Portland Generating Station Order*).

[7] *See also Portland Generating Station Order* at 7 ("[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement]."); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (April 20, 2007); *Georgia Power Plants Order* at 9–13; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004-10 at 12, 24 (March 15, 2005).

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

new EPA review period and a new petition opportunity is consistent with the statutory and regulatory process for addressing objections by the EPA. *Nucor II Order* at 14–15. The EPA's view that the state's response to an EPA objection is generally treated as a new proposed permit does not alter the procedures for the permitting authority to make the changes to the permit terms or condition or permit record that are intended to resolve the EPA's objection, however. When the permitting authority modifies a permit in order to resolve an EPA objection, it must go through the appropriate procedures for that modification. For example, when the permitting authority's response to an objection is a change to the permit terms or conditions or a revision to the permit record, the permitting authority should determine whether its response is a minor modification or a significant modification to the title V permit, as described in 40 C.F.R. § 70.7(e)(2) and (4) or the corresponding regulations in the state's EPA-approved title V program. If the permitting authority determines that the modification is a significant modification, then the permitting authority must provide for notice and opportunity for public comment for the significant modification consistent with 40 C.F.R. § 70.7(h) or the state's corresponding regulations.

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

III. BACKGROUND

A. The Owens-Brockway Facility

The Owens-Brockway facility is located in Portland, Oregon and is operated by Owens-Illinois, Inc. The facility manufactures glass containers, primarily beer and wine bottles, that are sold to food and beverage manufacturers. The facility operates two continuously regenerative furnaces for glass-melting, and the exhaust from these furnaces is discharged through three stacks. The Petitioners have raised concerns with the emission of several hazardous air pollutants (HAP), including lead, arsenic, and chromium, as well as sulfur dioxide (SO_2), particulate matter (PM), and opacity.

B. Permitting History

ODEQ received an application for a permit renewal on December 28, 2010. The public comment period began on August 15, 2018. During the public comment period, a public hearing was held on September 19, 2018, and the public comment period ended on September 26, 2018.

During the renewal process, ODEQ was involved in enforcement actions that resulted in two Administrative Orders (also referred to as Penalty Orders), the first being issued on April 22,

2019, for violation of opacity limits. The first Administrative Order prompted source testing on May 15–17 and 20–23, 2019, to demonstrate the facility's compliance with PM and metal HAP emission limits, as well as verify the emission factors for compliance with plant site emission limits (PSEL). The proposed permit was submitted to the EPA along with the Response to Comments (RTC) on October 22, 2019, which began the EPA's 45-day review period that ended on December 6, 2019, during which the EPA did not object to the permit. The Final Permit was then issued by ODEQ on December 10, 2019. ODEQ also issued a second Administrative Order on January 24, 2020, for additional violations of the opacity limit that occurred on March 30, 2019, and August 7, 2019.

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The EPA's 45-day review period expired on December 6, 2019. Thus, any petition seeking the EPA's objection to the Permit was due on or before February 4, 2020. The Petition was received February 4, 2020, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Claim A: The Petitioners Claim That "The Final Permit Lacks Conditions Sufficient to Assure Compliance with the Applicable Particulate Matter Emission Limit in the New Source Performance Standard for Glass Manufacturing (40 CFR Part 60, Subpart CC)."

Claim A includes several sub-claims that are summarized below. Because these claims include substantially overlapping issues, the EPA's response will address all the Claim A issues together following the summaries of the Petitioners' claims.

Claim A.1: The Permit's Method 5 Testing and Opacity Monitoring are Insufficient to assure Compliance with the New Source Performance Standard (NSPS) PM Limit and Exceedance of PM Limits Does Not Result in Corrective Action.

Petitioners' Claim. The Petitioners claim that the title V permit lacks the monitoring, recordkeeping, and reporting sufficient to assure compliance with the PM limit of 0.5 grams per kilogram of glass produced (1 lb PM/ton glass) set forth in the NSPS for glass manufacturing, 40 C.F.R. part 60, subpart CC at § 60.293(b)(1). Petition at 8. The Petitioners claim that this contravenes the requirement under 42 U.S.C. § 7661c(a) and 40 C.F.R. §§ 70.6(a)(1), (c)(1) for a title V permit to "include enforceable emission limitations and standards … and such other conditions as are necessary to assure compliance with the applicable requirements." *Id.* Specifically, the Petitioners contend that stack testing once every 5 years in combination with unenforceable opacity monitoring does not assure compliance with the NSPS PM limit. *Id.* In addition, the Petitioners assert that ODEQ failed to provide a reasoned explanation, as required by 40 C.F.R. § 70.7(a)(5), for why the monitoring, recordkeeping, and reporting required by the NSPS were sufficient to assure compliance with the PM limit. *Id.*

The Petitioners contend that in order for opacity monitoring to adequately "assure compliance" with the NSPS PM limit, the permit must ensure that any exceedance of the correlated opacity level is treated as a violation of the emission standard or requires corrective action, which is not the case in Permit Condition 16. *Id.* at 10.[9] In addition, the Petitioners claim that ODEQ failed to explain why Method 5 testing every 5 years, found in Permit Condition 13, combined with the unenforceable opacity monitoring, is sufficient to assure compliance. *Id.* at 11. The Petitioners note that ODEQ explained that the 20 percent opacity SIP limit in Permit Condition 17 assured compliance with the NSPS PM limit; however, the Petitioners contend that neither the permit nor permit record indicate that the 20 percent opacity limit is relied on to assure compliance with the NSPS PM limit. *Id.* Further, the permit record does not support "that maintaining compliance with the separate 20% opacity limit is sufficient to assure compliance with the NSPS PM limit." *Id.*

The Petitioners argue that ODEQ could have pursued requirements that Owens-Brockway incorporate remedial actions or perform source testing after measuring an exceedance of the opacity limit. *Id.* For support, the Petitioners reference the Compliance Assurance Monitoring Rule as the basis for establishing "monitoring as a method for directly determining continuous compliance with applicable requirements."[10] As another alternative, the Petitioners reiterate that ODEQ could have attempted to demonstrate that the 20 percent opacity limit in Permit Condition 17 could assure compliance with the NSPS PM limit; however, the Petitioners contend that "compliance with the enforceable 20% opacity limit has not been shown to correlate with the facility's compliance with the NSPS PM limit." *Id.* The Petitioners conclude that the EPA should object to the permit and require ODEQ to revise the permit conditions to require sufficient monitoring to assure compliance, or, at a minimum, develop conditions requiring corrective actions when the facility exceeds the correlated opacity standards. *Id.* at 13.

Claim A.2: The Permit Does Not Specify the Opacity Level that Correlates with Compliance.

Petitioners' Claim. The Petitioners assert that the monitoring, recordkeeping, and reporting for the NSPS PM limit is insufficient to satisfy 42 U.S.C. § 7661c(a) and 40 C.F.R. § 70.6(a)(1) and (c)(1) because the permit fails to identify the opacity value that correlates to compliance with NSPS PM limit. *Id.*

The Petitioners contend that despite the facility performing stack testing to correlate PM compliance with a specific opacity level, the correlated opacity level does not appear in the permit. *Id.* The Petitioners claim that Permit Condition 16.a only explains that "'excess emissions' are all of the opacity values based on a 6-minute average that exceed the Opacity Value corresponding to the 99 percent upper confidence level determined in Condition 15.e or 15.f." *Id.* The Petitioners then assert that Final Permit Conditions 15.e and 15.f, in turn, refer only to "source testing" without identifying a particular test. *Id.*

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[9] Citing 62 Fed. Reg. 54,900, 54,902 (October 22, 1997).
[10] Citing 62 Fed. Reg. 54,900, 54,902 (October 22, 1997).

The Petitioners claim that in the 2003 *Dunkirk Power Order,*[11] the EPA "declared that where a title V permit relies on parametric monitoring to assure compliance with an applicable requirement, the acceptable parametric ranges must be included in the permit." *Id.* at 13. The Petitioners assert that in the RTC, ODEQ stated that opacity values "function as an indicator of PM emissions," and that the NSPS "does not assign a specific value to the opacity limit." *Id.* The Petitioners contend that if a parameter is used to assure compliance, that parameter must be included in the permit, and in this case ODEQ failed to include the correlated opacity value in the permit. *Id.*

Claim A.3: The Permit Does Not Require Owens-Brockway to Correlate Opacity Value with the NSPS PM Limit During Method 5 Testing.

Petitioners' Claim. The Petitioners contend that while the permit requires the facility to perform a Method 5 test once per permit term, there is no requirement that the facility re-correlate the opacity with PM during that testing, as required by 42 U.S.C. § 7661c(a) and 40 C.F.R. § 70.6(a)(1) and (c)(1). *Id* at 14. Specifically, the Petitioners claim that Permit Condition 15.e only requires that the source "may" update the opacity/PM correlation, implying that updating the opacity value is only voluntary even though the testing might demonstrate that the correlated opacity value is no longer accurate. *Id.*

The Petitioners claim that in the RTC, ODEQ explained that the opacity value that correlates with compliance with the NSPS PM limit is established during testing, which the Petitioners consider insufficient, as the correlated opacity value must be periodically confirmed and updated if necessary. *Id.* The Petitioners assert that the word "may" in Permit Condition 15.e leads to an unreliable correlated opacity level, undermining the opacity monitoring for assuring compliance with the NSPS PM limit.[12] *Id.*

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

Relevant Legal Background

In support of the EPA's response to Claim A, below is a brief overview of the relevant legal background related to this claim.

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." CAA § 504(c), 42 U.S.C. § 7661c(c). As the EPA has previously explained:

> To summarize, EPA's part 70 monitoring rules (40 C.F.R. §§ 70.6(a)(3)(i)(A) and (B) and 70 .6(c)(1)) are designed to satisfy the statutory requirement that "[e]ach

[11] *In re Dunkirk Power LLC*, Order on Petition No. II-2002-02 (July 31, 2003) at 20 ("Since parametric monitoring of the [electrostatic precipitator] helps assure compliance with the PM standards, the proper operating ranges for these parameters must be incorporated into Dunkirk's title V permit.").

[12] The Petitioners claim that these permit deficiencies fail to satisfy the requirements of 42 U.S.C. § 7661c(a) and 40 C.F.R. § 70.6(a)(1) and (c)(1).

> permit issued under [title V] shall set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions." CAA § 504(c). As a general matter, authorities must take three steps to satisfy the monitoring requirements in EPA's part 70 regulations. First, under 40 C.F.R. § 70.6(a)(3)(i)(A), permitting authorities must ensure that monitoring requirements contained in applicable requirements are properly incorporated into the title V permit. Second, if the applicable requirement contains no periodic monitoring, permitting authorities must add "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." 40 C.F.R. § 70.6(a)(3)(i)(B). 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, permitting authorities must supplement monitoring to assure such compliance. 40 C.F.R. § 70.6(c)(1). EPA notes that periodic monitoring that meets the requirements of 40 C.F .R. § 70.6(a)(3)(i)(B) will be sufficient to satisfy the requirements of 40 C.F.R. § 70.6(c)(1) (i.e., will be sufficient to assure compliance with permit terms and conditions). In addition, in many cases, monitoring from applicable requirements will be sufficient to assure compliance with permit terms and conditions. For example, monitoring established consistent with EPA's Compliance Assurance Monitoring (CAM) rule (40 C.F.R. part 64) will be sufficient to assure compliance with permit terms and conditions, thus meeting the requirements of 40 C.F.R. § 70.6(c)(1).[13]

In addition, the rationale for the monitoring requirements selected by a permitting authority must be clear and documented in the permit record. 40 C.F.R. § 70.7(a)(5). The determination of whether monitoring is adequate in a particular circumstance generally is a context-specific determination, made on a case-by-case basis. The analysis should begin by assessing whether the monitoring required in the applicable requirement is sufficient to assure compliance with permit terms and conditions. Some factors that permitting authorities may consider in determining appropriate monitoring are: (1) the variability of emissions from the unit in question; (2) the likelihood of a violation of the requirements; (3) whether add-on controls are being used for the unit to meet the emission limit; (4) the type of monitoring, process, maintenance, or control equipment data already available for the emission unit; and (5) the type and frequency of the monitoring requirements for similar emission units at other facilities. Other site-specific factors may also be considered. *Homer City Order* at 45; *CITGO Order* at 6–8.

Relevant Permit Terms and Conditions

This section identifies the relevant permit terms and conditions related to the Petitioners' claim.

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[13] *In the Matter of CITGO Refining and Chemicals Co., L.P., West Plant, Corpus Christi, Tx.,* Order on Petition No. VI-2007-01 (May 28, 2009) (*CITGO Order*) at 6–7; *see also In the Matter of Public Service of New Hampshire,* Order on Petition No. VI-2014-04 (July 28, 2015) at 14; *In the Matter of EME Homer City Generation LP Indiana County, Penn.*, Order on Petition Nos. III-2012-06, III-2012-07, III-2013-02 (July 30, 2014) (*Homer City Order*) at 45.

Permit Condition 12 provides that:

> The emissions of particulate matter from glass melting furnaces GM1 or GM4 must not exceed 0.5 grams per kilogram of glass produced (1 Ib PM/ton glass), as measure[d] in accordance with methods and procedures specified in Condition 13. [40 CFR 60.293 (b)(l)].

Permit Condition 13 provides that:

> Within 5 years from the date of the previous source test and every 5 years thereafter, the permittee must determine the PM emissions from glass melting furnaces GM1 and GM4 in accordance with the following methods and procedures…[14]

Permit Condition 13.b. specifically states:

> Use EPA [M]ethod 5 to determine the PM concentration (Cs) and volumetric flow rate (Qsd) of the effluent gas. The sampling time and sample volume for each run must be at least 60 minutes and 0.90dscm(31.8dscf).

Permit Condition 15 provides that the facility must use continuous opacity monitoring (COMS) to measure the opacity value of visible emissions [40 CFR 60.293 (c)]. Permit Condition 15.e states:

> During the source testing conducted per Condition 13, permittee may calculate 6-minute opacity average from 24 or more data points equally spaced over each 6-minute period during the test runs using COMS. For each furnace A and D, determine the Opacity Value corresponding to the 99 percent upper confidence level of a normal distribution of 6-minute average opacity values.

In addition, Permit Condition 15.f states, "The permittee may reset the Opacity Value for either furnace A or D determined in Condition 15.e by subsequent source testing in accordance with 40 CFR 60.293 (e)."

Permit Condition 16 provides that:

> The permittee must report to DEQ and EPA … all "excess emissions" determined from COMS readings of Condition 15 in accordance with the procedures specified in this condition. [40 CFR 60.7 (d) & (e)].

The Petitioners specifically reference Permit Condition 16.a., which provides that:

> For the purpose of the notification required under this condition (but not for purpose of Condition 43), "excess emissions" are all of the opacity values based on a 6-minute

[14] The remainder of Permit Condition 13 provides the equation for calculating emissions and best practices for the performance test.

> average that exceed the Opacity Value corresponding to the 99 percent upper confidence level determined in Condition 15.e or 15.f.

The Petitioners reference Permit Condition 17, which provides that:

> The permittee must not cause or allow the emissions of any air contaminant into the atmosphere that is equal to or greater than 20% opacity based on 6-minute average, excluding uncombined water, from glass melting furnaces GM1 and GM4. Opacity must be measured in accordance with Condition 18. [OAR 340-208-0110]

Permit Condition 18 requires that Owens-Brockway monitor opacity using COMS.

ODEQ's Response

In response to public comments filed by the Petitioners requesting ODEQ to explicitly state what the NSPS opacity limit is and mandating the facility meet that limit, ODEQ stated:

> The NSPS subpart CC sets the Particulate Matter (PM) limit but it does not assign a specific value to the opacity limit. However, the (draft) permit expressly mandates that Owens meet the 20 percent (%) opacity limit specified in Condition 17. The 20% opacity limit specified in the permit is a federally enforceable limit. The [COMS] required by NSPS subpart CC measures the opacity value from all furnace stacks continuously.

RTC at 3.

In response to the Petitioners' comments claiming that the permit does not identify the applicable NSPS opacity limit and does not specify the compliance determination method, ODEQ again states that the NSPS specifies the PM limit and requires a COMS to measure visible emissions. *Id.* They further state "While the opacity values are not a direct measurement of PM emissions, they function as an indicator of PM emissions. While the continuous PM monitoring device does not exist, the COMS technology is available to measure the opacity values continuously." *Id.*

Lastly, in response to the Petitioners' comments relating to assuring compliance with the NSPS for glass manufacturing, ODEQ states,

> The permit sets the NSPS PM limit of "1 lbs PM/ton glass manufactured" and requires PM testing (every 5 years) to determine compliance with that PM limit. The opacity value that correlates to the PM emissions rate (< limit) from each furnace is also established during testing, and COMS are used to measure the opacity value continuously.

Id.

EPA Analysis

The EPA finds that the Petitioners have demonstrated that the permit and permit record are inadequate for the EPA to determine if the monitoring required in the permit satisfies compliance with the CAA title V monitoring requirements under Part 70 and Oregon's approved title V program for the NSPS PM limit. While Permit Condition 13 requires stack testing every 5 years using Method 5 and Permit Condition 15 requires opacity monitoring using COMS to assure compliance with the NSPS PM emission limit found in Permit Condition 12, the EPA is unable to determine from the information in the permit record whether the opacity monitoring and Method 5 stack testing alone are sufficient to assure compliance with the NSPS PM limit. Specifically, the permit record currently does not contain the correlated opacity limit or a justification for why the information collected during the Method 5 testing supports a correlated opacity value. From the RTC, it appears that ODEQ believes that the 20 percent opacity limit in Permit Condition 17 *might* assure compliance with the NSPS PM limit; however, the permit does not contain any information to support this assumption or specifically state that compliance with the 20% opacity limit demonstrates compliance with the NSPS PM limit. Rather, the 20% opacity limit appears to be derived solely from a SIP requirement and the EPA cannot determine from the information in the record how it is related to compliance with the NSPS PM limit.[15] The EPA has determined in previous orders that if parametric monitoring is used to help assure compliance with PM standards, the values for these parameters must be included in the permit. *See In the Matter of Dunkirk Power LLC,* Order on Petition No. II-2002-02 at 20 (July 31, 2003) (*Dunkirk Order*) and *In the Matter of Consolidated Edison Co. of NY, INC. Ravenswood Steam Plant,* Order on Petition No. II-2001-08 at 21 (September 30, 2003) (*Ravenswood Order*); *In the Matter of the Huntley Generating Station,* Order on Petition No. II-2002-01 at 20–21. As written, the permit conditions in the Final Permit do not include the opacity value that is used to continuously assure compliance with the NSPS PM limit. The EPA has previously held that a permit should either establish that exceeding the opacity value that corresponds to compliance with the NSPS PM limit results in a violation or that an exceedance of the correlated opacity value results in corrective action and reporting of any exceedances. *Ravenswood Order* at 21.

Additionally, the Petitioners have demonstrated that the permit record does not contain information to support the selection of the correlated opacity value to demonstrate compliance with the NSPS PM limit as determined during the Method 5 stack test. *Dunkirk Order* at 19. The EPA has generally required that permit records must describe in detail and document how the correlation between the opacity and PM emission limit was established. *In the Matter of the Huntley Generating Station,* Order on Petition No. II-2002-01 at 20–21 (July 31, 2003). Furthermore, the Petitioners have demonstrated that the permit is unclear as to whether the opacity value must be updated if stack testing demonstrates that the opacity value in the permit is no longer representative.

Direction to ODEQ: In responding to this order, ODEQ should evaluate whether the 5-year stack testing in combination with the opacity monitoring alone is sufficient to assure compliance

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[15] *See White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program* (March 5, 1996) (*White Paper Number 2*) at 8–9 ("Sources that opt for the streamlining of applicable requirements must demonstrate the adequacy of their proposed streamlined requirements."); 14–16 (outlining the process for comparing different emission limits and developing the permit terms to assure compliance with both underlying applicable emission limits); 11–20 (explaining the process for properly streamlining multiple applicable requirements for one unit).

with the NSPS PM limit in Permit Condition 12 and, if so, include the justification in the permit record. In addition, ODEQ should modify the title V permit to include the correlated opacity value used to assure compliance with the NSPS PM limit and include information in the permit record based on the Method 5 testing to support the selection of the correlated opacity value. Further, ODEQ should either require corrective action if the opacity value is exceeded or establish that an exceedance of the opacity value that corresponds to compliance with the NSPS PM limit is an exceedance of the underlying NSPS PM limit. Finally, if ODEQ determines that the current opacity value no longer assures compliance based on the most recent stack testing, then ODEQ should update the permit to include the appropriate opacity value.

Claim B: The Petitioners Claim That "The Permit Lacks Sufficient Monitoring, Recordkeeping, and Reporting to Assure Compliance with the Applicable Particulate Matter Emission Limit in Oregon's Clean Air Act State Implementation Plan."

Petitioners' Claim. The Petitioners assert that the permit lacks monitoring, recordkeeping, and reporting sufficient to assure compliance with the PM limit of 0.10 gr/scf referenced in Permit Condition 14.[16] Petition at 15. The Petitioners claim that the Oregon SIP Rule does not specify "periodic monitoring" and ODEQ must add monitoring that will "yield reliable data from the relevant time period that are representative of the source's compliance with the permit." *Id.* (citing 40 C.F.R. § 70.6(a)(3)(i)(B)). The Petitioners contend that Permit Condition 35, which requires PM source testing once per permit term (every 5 years), is not "periodic" or sufficient to assure compliance with the 0.10 gr/scf PM limit, and that ODEQ did not provide a reasoned explanation as to why this testing is sufficient to assure compliance. *Id.*

The Petitioners claim that in the RTC, ODEQ stated that the permit relies on "continuous visible emissions monitoring by COMS" as "parametric monitoring." ODEQ RTC at 4. The Petitioners assert that this monitoring only applies to monitoring compliance with the 20 percent opacity limit found in Permit Condition 17, and that the 20 percent opacity limit has not been correlated with the 0.10 gr/scf PM limit. Petition at 15. The Petitioners claim that the permit does not indicate that "monitoring the facility's compliance with the separate 20% opacity limit is intended also to assure compliance with the 0.10 gr/scf PM limit." *Id.*

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

Relevant Permit Terms and Conditions

This section identifies the relevant permit terms and conditions related to the Petitioners' claim.

Permit Condition 14 provides that

> The permittee must not cause or allow the emissions of particulate matter in excess of 0.10 grain per dry standard cubic foot, from glass melting furnaces

[16] The PM limit is found in OAR 340-226-0210.

> GM1 and GM4. Particulate matter emissions can be calculated from the source test results obtained from Condition 35. [OAR 340-226-021 0]

Permit Condition 35 provides that

> Within 5 years from the date of the previous source test and every 5 years thereafter, the permittee must verify the accuracy of the PM_{10}, SO_2, NO_x, CO, and VOC emission factors used to determine compliance with the PSEL by testing in accordance with the methods specified for the pollutant and devices identified. In addition, determine the grain loading rate from each furnace.

In addition, the Petitioners reference Permit Conditions 17 and 18 again.

ODEQ's Response

In response to public comments filed by the Petitioners requesting that ODEQ add annual source testing combined with parametric monitoring to assure compliance with the SIP PM limit, and provide an explanation for the adequacy of the established monitoring, ODEQ stated:

> Both the production based NSPS PM limit and the grain loading limit are the PM emissions standards. See DEQ responses No. 5 to 8 for the way continuous visible emissions monitoring by COMS is used as parametric monitoring.
>
> The NSPS source testing utilizes EPA Method 5 that measures filterable PM only. In addition to EPA Method 5, the (draft) permit also includes DEQ Method 5 to include condensable PM to determine compliance with the 0.10 gr/scf limit specified in the (draft) permit. The PM test results from source test performed on May 15-23, 2019 indicate the grain loading rates from the glass melting furnaces A and D were 0.03 and 0.12 gr/dscf respectively, in compliance with the existing 0.1 gr/scf limit based on 1-significant figure.

RTC at 4.

EPA Analysis

The Petitioners have demonstrated that the permit and permit record are inadequate because the permit does not establish that the once-per-permit-term stack testing and opacity limit of 20% assures compliance with the SIP PM limit in Permit Condition 14 as required by the CAA title V monitoring requirements under Part 70 and Oregon's approved title V program. Permit Condition 35 requires stack testing every 5 years using Method 5 to assure compliance with the SIP PM emission limit set forth in Permit Condition 14. The EPA also notes that ODEQ asserted in the RTC that COMS is used as parametric monitoring for Permit Condition 14 as well. While Permit Conditions 17 and 18 require COMS monitoring to assure compliance with the 20 percent opacity SIP limit, the permit does not identify Permit Conditions 17 and 18 for assuring compliance with the SIP PM limit in Permit Condition 14. The EPA has previously found that a supplemental opacity monitoring requirement for a PM limit is insufficient if the permit and

permit record lacks an explanation for how opacity value assures compliance with the PM limit. *See In the Matter of Motiva Enterprises, Port Arthur Refinery,* Order on Petition No. VI-2016-23 at 10 (May 31, 2018). Rather, Permit Condition 14 only identifies the stack testing in Permit Condition 35 for assuring compliance with the SIP PM limit. Further, neither the permit nor the permit record, including the RTC and Statement of Basis, contain any information demonstrating that compliance with the 20 percent opacity limit in Permit Condition 17 would assure compliance with the SIP PM limit in Condition 14. *See In the Matter of Northampton Generating Co. LP, Northampton Plant,* Order on Petition No. III-2020-1 at 12 (July 15, 2020).[17]

Direction to ODEQ. ODEQ should determine if the 20 percent opacity limit assures compliance with the SIP PM limit based on information gathered during the stack test required by Permit Condition 35 and include that information in the permit record. If ODEQ determines that compliance with the 20 percent opacity limit assures compliance with the SIP PM limit, then ODEQ should modify the title V permit to identify Permit Conditions 17 and 18 as additional conditions for assuring compliance with the SIP PM limit. Additionally, the EPA notes that there may be existing monitoring, recordkeeping, and reporting conditions in the permit that could be used in conjunction with new provisions to assure compliance with the SIP PM limit. For example, Permit Conditions 32 and 33 appear to require monitoring for other PM limits that ODEQ may determine assure compliance with the SIP PM limit in Permit Condition 14.

Claim C: The Petitioners Claim That "The Final Permit Lacks Conditions Sufficient to Assure Compliance with the Requirement to Take "Reasonable Precautions" to Control Fugitive Dust."

Petitioners' Claim. The Petitioners claim that the Final Permit does not assure compliance with Oregon SIP Rule OAR 340-208-0210 because the permit does not specify what "reasonable precautions" must be taken to prevent fugitive dust as required by 40 C.F.R. § 70.6(a)(l). Petition at 16. Specifically, the Petitioners contend that Permit Condition 6 requires Owens-Brockway to take "reasonable precautions" to control fugitive dust but does not specify what constitutes "reasonable precautions." *Id.* The Petitioners also assert that Permit Condition 7 directs Owens-Brockway to monitor and record visible emissions and take corrective actions but "fails to identify what fugitive dust control activities the facility is required to undertake." *Id.*

The Petitioners contend that the EPA objected to a similar permit deficiency in the 2014 *Scherer Steam-Electric Generating Plant Order*.[18] The Petitioners claim that Georgia's title V permits at issue in *Scherer* incorporated a SIP requirement for fugitive emissions that is similar to the Oregon SIP rule. *Id* at 16–17. The Petitioners claim that the EPA objected to Georgia's permits on the basis that "without details regarding what type of actions qualify as 'reasonable precautions' to control fugitive dust at these facilities, the permits do not assure compliance with

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[17] *See White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program* (March 5, 1996) (White Paper Number 2) at 11–20 (explaining the process for properly streamlining multiple applicable requirements for one unit).

[18] *In the Matter of Scherer Steam-Electric Generating Plant Juliette, Georgia, et al.,* Order on Petition Nos. IV-2012-1, IV-2012-2, IV-2012-3, IV-2012-4, and IV-2012-5 (April 14, 2014) at 19.

Georgia SIP Rule 391-3-1-.02(2)(n)1," and thus the EPA should similarly object to the Final Permit. *Id.* (quoting *Scherer* at 18).

The Petitioners claim that in the RTC, ODEQ "rejected the Petitioners' request to add specificity to the permit regarding fugitive dust control measures on the basis that '[t]he monitoring requirements specified in condition 7 are more effective than narrowly defining what the fugitive emissions are. As stated in condition 7.b, any visible emissions present (inside the plant) requires corrective action.'" *Id.* The Petitioners assert that the applicable requirement is not to wait to take corrective action after observing visible emissions, but that Owens-Brockway must take reasonable precautions to control fugitive dust. *Id.*

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

Relevant Permit Terms and Conditions

This section identifies the relevant permit terms and conditions related to the Petitioners' claim.

Permit Condition 6 provides that:

> The permittee must not cause, suffer, allow, or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired or demolished; or any equipment to be operated, without taking reasonable precautions to prevent particulate matter from becoming airborne in accordance with OAR 340-208-0210.

Permit Condition 7 provides that:

> The permittee must inspect the area where fugitive visible emissions could occur, including but not limited to material transport and storage equipment, raw material unloading and handling area, cullet crushers, etc.
>
> 7.a. The visible emissions survey must be conducted daily during periods when the potential for visible emissions exists such as when materials are being unloaded or when waste bins are being emptied, and during dry high-wind days.
>
> 7.b. If visible fugitive emissions are present, check the equipment/operations for malfunction and correct the problem as needed.
>
> 7.c. Inspect the material loading and unloading activities and improve the housekeeping activities and practices to help minimize fugitive emissions.
>
> 7.d. Record in a log, the date, weather conditions, inspection results and any clean-up and/or corrective actions taken.

EPA's Analysis

The Petitioners have not demonstrated that the permit lacks sufficient specificity regarding the facility's obligations under the general SIP requirement, OAR 340-208-0210, to take "reasonable

precautions" to control fugitive dust to assure compliance with that applicable requirement. Further, the Petitioners have not demonstrated that the permit conditions are too broad to be enforceable.

First, the Petitioners have not demonstrated that the ODEQ's inclusion in the Final Permit of the general SIP requirement that the facility take reasonable precautions to control fugitive dust—in addition to the specifically identified precautions and corrective action in Permit Condition 7—somehow renders the permit not in compliance with applicable requirements or the requirements of 40 C.F.R. part 70. While the Petitioners claim that the permit does not include operational requirements and limitations to assure compliance with OAR 340-208-0210, the Petitioners have not demonstrated that the monitoring, preventative maintenance, and corrective action in Permit Condition 7 does not assure compliance with OAR 340-208-0210.[19] In this case, ODEQ has interpreted the general SIP condition to take "reasonable precautions" to control fugitive dust to be satisfied by the monitoring, preventative maintenance, and corrective action specified in Permit Condition 7. ODEQ confirmed in the RTC that Permit Conditions 6 and 7 were assuring compliance with the SIP requirement as demonstrated by a recent inspection of the facility. In response to ODEQ's justification in the RTC, the Petitioners contend that the facility's proactive measures to prevent fugitive dust by identifying and repairing potential problem areas shows that the terms of Permit Condition 7 are inadequate because no fugitive dust was actually observed. To the contrary, EPA concludes that the state's and Owens-Brockway's actions to identify and improve potential sources of fugitive dust demonstrate that the requirements of the permit are sufficient. For example, this type of preventative maintenance, possibly before fugitive dust is observed, is required by Permit Condition 7.c. The Petitioners do not mention or analyze how this specific requirement for preventative maintenance impacts the Permit's ability to assure compliance with the requirement that reasonable precautions be taken to prevent fugitive dust. Therefore, the Petitioners have failed to analyze key terms and conditions in the permit and have not demonstrated that the permit conditions do not assure compliance with OAR 340–208–0210.[20]

The Petitioners' citations to the *Scherer Steam-Electric Generating Plant Order,* in which the EPA granted a Title V petition on a claim related to a similar SIP condition, does not inherently demonstrate that ODEQ's interpretation and implementation of its SIP requirement is unreasonable or contrary to the applicable requirements of the CAA.[21] The EPA notes that the permit conditions present in the *Scherer Steam-Electric Generating Plant Order* lacked specificity about what actions would be taken to prevent fugitive dust. The Petitioners have not demonstrated that the same facts exist here since the Final Permit does include specific monitoring, preventative maintenance, and corrective action provisions to prevent fugitive dust in Permit Condition 7 (e.g., requiring preventative inspection and practices, daily monitoring, and corrective action if fugitive dust is observed).

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[19] *See In the Matter of ABC and Walter Coke Plants*, Order on Petition Nos. IV-2014-5 and IV-2014-6 (July 15, 2016) at 6.

[20] *See supra* notes 6–8 and accompanying text explaining that the demonstration burden is not met when petitioners make general assertions and fail to address key terms and conditions.

[21] *See In the Matter of ABC and Walter Coke Plants*, Order on Petition Nos. IV-2014-5 and IV-2014-6 (July 15, 2016) at 11.

Claim D: The Petitioners Claim That "The Final Permit Fails to Assure Compliance with the Applicable Chromium Emission Limit Under 40 C.F.R. Part 63, Subpart SSSSSS ("6S")."

Petitioners' Claim. The Petitioners claim that the Final Permit does not include monitoring, recordkeeping, and reporting sufficient to assure compliance with the 0.02 lbs HAP per ton glass emission limit referenced in Permit Condition 20 as required by 42 U.S.C. 7661c(a) and 40 C.F.R. § 70.6(a)(1), (a)(3) and (c)(1).[22] Petition at 18. The Petitioners contend that Permit Condition 22.e authorizes the facility to demonstrate Furnace D's compliance with the HAP limit for chromium using a chromium emission factor derived from the results of the facility's May 2019 source testing. However, the Petitioners claim that the May 2019 source test was unreliable because it was not conducted while producing green glass, which has the greatest potential to emit chromium. *Id.* Further, the Petitioners contend that the Final Permit does not contain any provisions that prevent the facility from producing the higher-emitting glass in Furnace D. *Id.* at 19.

The Petitioners assert that "despite the fact that the chromium emission factor resulting from the May 2019 testing likely underestimates the facility's chromium emissions, Final Permit Condition 22 generally authorizes Owens-Brockway to utilize the emission factor obtained from the May 2019 testing to demonstrate its compliance with the 0.02 lbs HAP/ton glass emission limit throughout most of the permit term." *Id.* The Petitioners further claim that Permit Condition 21 requires source testing "every 5 years," so the facility can utilize the "unreliable" chromium emission factor from the May 2019 source test for the entirety of the permit term. *Id.*

The Petitioners reference the 2016 *Piedmont Green Power Order*[23] and the 2016 *Pope and Talbot, Inc., Lumber Mill Order*[24] to justify their claim that the permit record should support selected emission factors and that ODEQ should provide a clear basis for establishing the chromium emission factor. *Id.* at 18–19.

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

Relevant Permit Terms and Conditions

This section identifies the relevant permit terms and conditions related to the Petitioners' claim.

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[22] The 0.02 lbs HAP per ton glass emission limit is applicable to Furnace D and is required by 40 C.F.R, § 63.11451.
[23] *In the Matter of Piedmont Green Power*, Order on Petition No. IV-2015-2 (December 13, 2016) at 15 (the permitting authority "must provide a reasoned explanation in the Final Permit's Statement of Basis for how the chosen approach [to demonstrating compliance] makes the HAP limits enforceable as a practical matter").
[24] *In the Matter of Pope and Talbot, Inc., Lumber Mill,* Order on Petition No. VIII-2006-04 (March 22, 2007) at 11 (objecting to a title V permit where the "HAP emission calculations are not properly documented—in particular the emission factor used for methanol" where "the basis for establishing" the methanol limit was "unclear")

Permit Condition 20 provides that:

> The permittee must limit the mass emission rate of production-based metal HAP (i.e., glass manufacturing metal HAPs) based on a 3-hour block average to less than 0.02 pounds per ton of glass produced (0.02 Ibs HAP/ton glass). [§63.11451]

Permit Condition 21 provides that:

> Within 5 years from the date of the previous source test and every 5 years thereafter, the permittee must determine the production-based metal HAP emissions from glass melting furnace D (GM4) in accordance with the following methods and procedures…

Permit Condition 21.a provides that the facility is to "Perform Source testing while the furnace is operating at the maximum production rate; and while producing glass that has the highest potential to emit the production-based metal HAP."

Permit Condition 22 provides that:

> The permittee must perform all required monitoring from the time the affected furnace is charged with any one of the production-based metal HAP and continue until the end of transition period. [§63.11455 (e)]

Permit Condition 22.e contains the provisions and equation for determining compliance with the metal HAP emission rate standard specified in Permit Condition 20.

EPA Analysis

The Petitioners have not demonstrated that the monitoring provisions in the Final Permit are inadequate to assure compliance with the HAP emission limit in Permit Condition 21. The Petitioners' reasoning for why stack testing and source specific emission factors are insufficient to assure compliance with the chromium emission limit is that the source can "utilize the unreliable chromium emission factor determined based on the May 2019 source testing . . . ." Petition at 19. Assuming the Petitioners are correct that the May 2019 source test did not include the highest emitting glass and, therefore, does not properly represent the source's emissions, this does not demonstrate a flaw with a particular *permit term*. Rather, this would indicate that the stack test did not meet the requirements of Permit Condition 21.a, which requires the stack test to be conducted "while producing glass that has the highest potential to emit the production based metal HAP." Final Permit at 10. To the extent the Petitioners are claiming that the Final Permit allows the facility to rely on the emission factors developed during the May 2019 stack test, Permit Condition 22.d only allows the emission factors to be updated when a stack test is performed in accordance with Permit Condition 21.a. If the May 2019 test did not include green glass as the highest emitting production material, then the Final Permit itself does not allow Owens-Brockway to use emissions factors from the May 2019 source test. Therefore, the Petitioners have not established that the Final Permit itself lacks adequate conditions. Rather, the

Petitioners' arguments, if valid, point to potential noncompliance with the source's current permit conditions, not a flaw in the permit itself.

Claim E: The Petitioners Claim That "The Final Permit Fails to Assure Compliance with the Facility's General Duty to Prevent Accidental Releases under Clean Air Act § 112(r)(1)."

Petitioners' Claim. The Petitioners claim that the Final Permit does not mention or assure compliance with Owens-Brockway's general duty under CAA § 112(r)(1)[25] "to identify hazards which may result" from the accidental release of extremely hazardous substances, and "to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur." Petition at 20. The Petitioners assert that Permit Condition 11 comes closest to addressing the General Duty Clause, stating that the facility must file a Risk Management Plan if the facility became subject to the accidental release regulations under 40 C.F.R. Part 68. *Id.* at 21.

The Petitioners contend that because the facility produces, processes, handles, and stores listed hazardous substances, the General Duty Clause qualifies as an applicable requirement that must be included in the permit. 40 C.F.R. § 70.2.[26] *Id.* at 20. The Petitioners then claim that because the permit does not identify Clean Air Act § 112(r)(1) as an "applicable requirement," it lacks the conditions sufficient to assure compliance with this "critical public safeguard." *Id.* at 21. The Petitioners assert that despite provisions for a Risk Management Plan under Permit Condition 11, a Risk Management Plan is related to CAA § 112(r)(7), not CAA § 112(r)(1)'s General Duty Clause. *Id.* at 21. The Petitioners further contend that despite the facility not being subject to CAA § 112(r)(7)'s Risk Management Plan requirements,[27] the facility is still subject to the General Duty Clause. *Id.* at 21.

The Petitioners assert that in the only title V petition order addressing the General Duty Clause—the 1997 *Shintech Order*[28]—the EPA concluded that the General Duty Clause was an "applicable requirement." *Id.* However, the Petitioners note that the EPA also indicated that the Shintech permit did not need to include detailed information regarding compliance with the General Duty Clause; instead, EPA concluded that it was sufficient for the permit to include a generic permit condition consistent with the requirements in 40 C.F.R. § 68.215 concerning Risk Management Plans. *Id.* The Petitioners argue that Shintech does not apply here because that case involved a facility that was subject to part 68, while Hazelhurst is not. *Id.*

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[25] The Petitioners state "Clean Air Act § 112(r)(1), commonly referred to as the 'General Duty Clause,' applies to any facility that produces, processes, handles, or stores any amount of a hazardous substance listed pursuant to Clean Air Act § 112(r)(3) or any other 'extremely hazardous' substance." Petition at 20. The Petitioners further reference 61 Fed. Reg. 31668, 31680 (June 20, 1996), contending that EPA has explained that § 112(r)(1) is "a self-executing statutory requirement" that "requires no regulations or other EPA action to take effect." Petition at 20.

[26] The Petitioners state that 40 C.F.R. § 70.2 defines "[a]pplicable requirement" to include [a]ny standard or other requirement under section 112 of the Act."

[27] Permit Review Report at 20.

[28] *In the Matter of Shintech, Inc.*, Order on Petition, Permit Nos. 2466-VO, 2467-VO, 2468-VO (September 10, 1997).

The Petitioners claim that even if the facility were subject to 40 C.F.R. part 68, which are the regulations promulgated to implement CAA § 112(r)(7), simply incorporating the language of 40 C.F.R. § 68.215 would not be enough to assure compliance with the General Duty Clause. *Id.* The Petitioners assert that "there is no indication in either the part 68 regulations or in the preamble to those regulations that the EPA promulgated those regulations to address how title V permits are to assure compliance with Clean Air Act section 112(r)(1)." *Id.* (citing 61 Fed. Reg. 31668 (June 20, 1996)) The Petitioners contend that because the Final Permit does not identify the facility's obligation under section 112(r)(1), it cannot assure compliance with applicable requirements.[29] *Id.*

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

The Petitioners' claim rests on the suggestion that the General Duty Clause of CAA § 112(r)(1) is an "applicable requirement" for title V purposes. However, as explained *In the Matter of Hazelhurst Wood Pellets, LLC*, Order on Petition IV-2020-5 (Dec. 31, 2020) and further below, this suggestion is inconsistent with the CAA. The General Duty Clause is *not* an "applicable requirement" for the purposes of title V, and as such, title V permits need not—and should not—include terms to assure compliance with the General Duty Clause as it is an independent requirement outside of the scope of title V.

The General Duty Clause provides:

> The owners and operators of stationary sources producing, processing, handling or storing such substances have a general duty in the same manner and to the same extent as section 654 of title 29 to identify hazards which may result from such releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur. For purposes of this paragraph, the provisions of section 7604 of this title shall not be available to any person or otherwise be construed to be applicable to this paragraph.

42 U.S.C. § 7412(r)(1). While the Petitioners cite to the requirements of the General Duty Clause, they fail to mention, let alone reconcile, a key limitation of the General Duty Clause: "For purposes of this paragraph, the provisions of section 7604 of this title *shall not be available* to any person or otherwise be construed to be applicable to this paragraph." *Id.* (emphasis added). This clause means that citizen suits under CAA § 304, 42 U.S.C. § 7604, shall not be available to enforce the requirements of the General Duty Clause;[30] instead, it may only be enforced by the EPA under CAA § 113, 42 U.S.C. § 7413. However, if, as the Petitioners suggest, the requirements of the General Duty Clause were included in a title V permit, they

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[29] Petitioners reference *Sierra Club*, 536 F.3d at 673, for the proposition that "a permitting authority is obligated to add monitoring, recordkeeping, and reporting requirements to a source's title V permit where needed to assure the source's compliance with an applicable requirement."

[30] No state has delegation of the General Duty Clause. Because CAA § 304 is the only federal authority through which citizens *and* state or local air agencies could enforce this type of CAA requirement, neither citizens nor state and local air agencies may enforce the General Duty Clause under the CAA.

would be enforceable through enforcement of the title V permit itself. This is because any person may, under 42 U.S.C. § 7604(a)(1), bring a suit "against any person . . . who is alleged to have violated . . . or be in violation of (A) an emission standard or limitation under this chapter . . . ." In turn, "emission standard or limitation" is defined to include, *inter alia*, "*any* other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter . . . ." 42 U.S.C. § 7604(f)(4) (emphasis added). Put simply, all standards and limitations in title V permits are enforceable by citizens under section 304. *Id.*; 40 C.F.R. § 70.6(b)(1); *see United States v. Gonzales*, 520 U.S. 1, 5 (1997).[31] However, the unambiguous statutory language in section 112(r)(1) prohibits the General Duty Clause from being enforced by citizens under section 304. Thus, there is a direct conflict between the Petitioners' arguments that the requirements of the General Duty Clause must be contained in the facility's title V permit and the statutory limitation on enforcement of the General Duty Clause. The Petition does not mention this conflict, let alone suggest a potential resolution. In this case, the specific prohibition on enforcement of the General Duty Clause by citizen suit must govern over the general enforceability of title V permits. *See Nitro-Lift Technologies L.L.C. v. Howard*, 568 U.S. 17, 21 (2012).

Other text within the General Duty Clause further evinces congressional intent that the General Duty Clause would not be implemented through permitting. The statute indicates that the CAA § 112(r)(1) general duty shall be "in the same manner and to the same extent as section 654 of title 29"—that is, the general duty clause within the Occupational Safety and Health Act (OSH Act). The OSH Act provision, enacted in 1970, is not implemented through site-specific permits, nor are citizen suits authorized to enforce it. *See generally* 29 U.S.C. §§ 651–678. If Congress had intended the CAA General Duty clause to be implemented in a fundamentally different manner than the OSH Act provision on which it was explicitly modeled—*e.g.*, through a permitting program that could be enforced by citizens—it could have specifically said so. However, instead, Congress precluded citizen enforcement under the CAA General Duty Clause and nowhere did Congress imply that it would be implemented through permitting.

The Petitioners' view is also at odds with statutory provisions within title V, which require that states must have the authority to enforce title V permits in order to receive EPA approval of their permitting programs. CAA § 502(b)(5); 42 U.S.C. § 7661a(b)(5); *see also* 40 C.F.R. § 70.4(b)(3). However, the CAA General Duty Clause is enforceable only by the federal government.[32] The EPA has not delegated authority to implement or enforce the General Duty Clause to state or local air agencies.[33] Were the requirements of the General Duty Clause to be included within individual title V permits, states would be unable to enforce these provisions, contradicting CAA § 502(b)(5). If the Petitioners' argument were accepted and applied nationwide, all state and local title V programs would be fundamentally flawed—an absurd result Congress could not have intended. *See United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989).

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[31] As discussed below, the EPA's regulations contain a limited exception to this principle, which is not applicable to the General Duty Clause.

[32] *See supra* note 30.

[33] Additionally, some states are prohibited by state law from having general duty authorities. 58 Fed. Reg. 62262, 62278 (November 26, 1993).

Notably, each of the relevant statutory provisions discussed above—the General Duty Clause of section 112(r)(1), the relevant portion of section 304 authorizing citizen suits to enforce title V permit terms, and the entirety of title V—were promulgated in the same legislative package: the 1990 CAA Amendments. Accordingly, the statutory conflict between these provisions is best understood as reflecting an intentional choice by Congress to fundamentally distinguish the General Duty Clause in section 112(r)(1) from other CAA requirements that would be implemented through the title V permitting program. *See Maracich v. Spears*, 570 U.S. 48, 65 (2013) ("It is necessary and required that an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning."); *see also Erlenbaugh v. United States*, 409 U.S. 239, 243-45 (1972) ("[In pari materia] is but a logical extension of the principle that individual sections of a single statute should be construed together . . . . [T]he rule's application certainly makes the most sense when the statutes were enacted by the same legislative body at the same time.").

Following the statutory text, the EPA's regulations provide: "All terms and conditions in a part 70 permit . . . are enforceable by the Administrator and citizens under the Act." 40 C.F.R. 70.6(b)(1).[34] Additionally, in order to be approvable by the EPA, state programs under part 70 must demonstrate authority to enforce permits. *Id.* § 70.4(b)(3)(vii). Neither of these regulatory requirements are compatible with the Petitioners' view that the General Duty Clause—which is enforceable only by the EPA—should be included in title V permits.

Reading the EPA's regulations to provide for citizen enforcement of requirements that Congress specifically prohibited from being subject to citizen enforcement would be contrary to law. The EPA can—and must—read its regulations in a manner consistent with the statute. *See Sierra Club v. EPA*, 536 F.3d 673, 680 (D.C. Cir. 2008) ("[A]n agency's interpretation of its own regulations must 'meet the test of consistency with the underlying statute.'" (quoting *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390, 1395 (D.C. Cir. 1991))). In order to avoid conflicting with and undermining the express limitations in the Act, as well as the EPA's related regulatory provisions, it is best to read the remainder of the EPA's regulations such that the requirements of the General Duty Clause are not "applicable requirements" for purposes of title V. *See Foothill Presbyterian Hosp. v. Shalala*, 152 F.3d 1132, 1134 (9th Cir. 1998) ("In reviewing an administrative agency's construction of a statute *or regulations*, we must reject constructions that are contrary to clear congressional intent or that frustrate the policy that Congress sought to implement." (citing *French Hosp. Med. Ctr.*, 89 F.3d at 1416) (emphasis added)); *see also Long Island Care at Home LTD v. Coke*, 551 U.S. 158, 169–170 (2007) (resolving a conflict between two regulations by, *inter alia*, considering the congressional intent of the statute). The EPA's definition of "applicable requirement" in 40 C.F.R. § 70.2 (and 71.2) may reasonably be read to exclude the requirements of the General Duty Clause.

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[34] This principle is subject to one exception: certain terms in a title V permit that are not based on the CAA may be labeled as "state-only" requirements that are not federally enforceable or enforceable by citizens through section 304. *Id.* § 70.6(b)(2). The General Duty Clause, which is based on the CAA, is not eligible for this treatment. Beyond this limited exception, neither the statute nor regulations contemplate other means by which the enforceability of title V permit terms could be restricted in a manner consistent with the limitations in the General Duty Clause discussed above.

In asserting that "applicable requirements" include "any standard or other requirement under section 112 of the Act," the Petitioners have omitted the following important piece of this definition: "including any requirement concerning accident prevention under section 112(r)(7) of the Act." 40 C.F.R. § 70.2. Given that the goal of preventing and minimizing accidental releases under section 112(r) is fundamentally different than the traditional emission standards and other requirements under section 112,[35] it was important for EPA to specifically identify section112(r)(7) within the definition of "applicable requirement," lest it—along with the rest of section 112(r)—fall outside the ambit of title V. In other words, the EPA identified section 112(r)(7) as the exception that proves the rule: "section 112(r) was not intended to be primarily implemented or enforced through title V." 57 Fed. Reg. 32250, 32275 (July 21, 1992). Accordingly, the best reading of this regulation, in light of the statutory conflict, is that the EPA intended to make clear that certain requirements related to section 112(r)(7) *should* be considered applicable requirements alongside more traditional emission standards under section 112, such as the National Emission Standards for Hazardous Air Pollutants (NESHAP) under section 112(d). By contrast, the EPA's decision to not identify other requirements under section 112(r)—including the section 112(r)(1) General Duty Clause—reflects EPA's intention *not* to treat these other provisions under section 112(r) as applicable requirements for title V purposes.[36] Unlike the Petitioners' interpretation, this reading of the EPA's regulations avoids the potential conflict with congressional limitations on enforcement of the General Duty Clause and is therefore the best interpretation of our regulations..

Excluding the General Duty Clause from the definition of "applicable requirement" is also consistent with how the EPA has described and implemented both the title V and 112(r) programs since their inception in the early 1990s.[37] Contrary to the Petitioners' allegation, and as discussed further below, the EPA did *not* conclude in *Shintech* that the General Duty Clause is an applicable requirement for title V purposes, and the EPA is unaware of having ever suggested this elsewhere. Moreover, although the EPA is also unaware of an instance in which it clearly and explicitly stated that the section 112(r)(1) General Duty Clause is *not* an applicable requirement for title V purposes, this has been implicit in nearly every relevant discussion of the two programs. In discussing the extent to which the section 112(r) programs would be implemented through title V, the EPA has consistently suggested that the only "applicable requirements" related to section 112(r) are those related to section 112(r)(7) risk management plans. *See, e.g.*, 57 Fed. Reg. 32250, 32275–76 (July 21, 1992); 60 Fed. Reg. 13526, 13526, 13535–36 (March 13, 1995); 61 Fed. Reg. 31668, 31688–89 (June 20, 1996).[38] Specifically, the

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[35] S*ee* 57 FR 32250, 32275 (July 21, 1992) ("The EPA recognizes, however, that [a Risk Management Plan under section 112(r)(7)] is not in any sense a 'permit' to release substances addressed therein, and that section 112(r) was not intended to be primarily implemented or enforced through title V." (citing 42 U.S.C. § 7412(r)(7)(F)).

[36] The EPA also recognizes that the regulations pertain to "*any* standard or other requirement" of section 112, and that such language should normally be read broadly. S*ee Gonzales*, 520 U.S. at 5. But the statutory conflict identified above counsels that there must be a limitation on how broadly this language sweeps. *See Maracich*, 570 U.S. at 65, The same logic may not necessarily apply to other portions of the EPA's definition of "applicable requirement" that are not subject to the same statutory constraints as the General Duty Clause.

[37] The EPA understands that most, and perhaps all, permitting authorities implementing part 70 programs have historically followed the same view. Here, in responding to public comments, ODEQ concluded that Owens-Brockway had not triggered the Risk Management Plan requirements of part 68. RTC at 7.

[38] The EPA has reiterated this stance through guidance as well. *See, e.g.*, Memorandum, Title V Program Approval Criteria for Section 112 Activities (April 13, 1993), available at *https://www.epa.gov/sites/production/files/2015-*

EPA has indicated that the inclusion of a limited set of permit terms implementing section 112(r)(7) would be sufficient to satisfy all title V-related obligations under section 112(r). *See, e.g.*, 60 Fed. Reg. at 13536; 61 Fed. Reg. at 31688. Moreover, given that "section 112(r) was not intended to be primarily implemented or enforced through title V," 57 Fed. Reg. at 32275, the EPA has, through rulemaking, limited the extent to which even the section 112(r)(7)-related "applicable requirements" would be implemented through title V.[39] The Petitioners' assertion that title V permits must include permit terms related to the General Duty Clause that are even more specific than those the EPA has established for risk management plans would go well beyond the EPA's long-held view of the section 112(r)-related "applicable requirements."

In the *Shintech Order* cited by the Petitioners, the EPA more directly addressed, and rejected, arguments that section 112(r)(1) General Duty Clause requirements should be included in a title V permit. Contrary to the Petitioners' characterization of that order, the EPA did *not* conclude that section 112(r)(1) established "applicable requirements" for title V purposes. Rather, the central point in *Shintech*, as in prior EPA statements, was that the only section 112(r)-based requirements that need be satisfied through title V are those related to the risk management plan provisions of section 112(r)(7) and 40 C.F.R. part 68. The EPA explained: "compliance with the provisions of 40 CFR § 68.215 . . . is sufficient to satisfy the legal obligations of section 112(r) for purposes of part 70." *Shintech Order* at 12. The EPA therefore rejected the *Shintech* petitioners' request for additional permit terms related to section 112(r)(1), while noting the independent enforceability of the General Duty Clause. *Id.* at 12 n.9 ("[C]ompliance with the requirements of part 68 does not relieve Shintech of its legal obligation to meet the general duty requirements of section 112(r)(1) of the Act . . . . Section 112(r)(1) remains a self-implementing requirement of the Act, and EPA expects and requires all covered sources to comply with the general duty provisions of 112(r)(1)").[40] Moreover, contrary to the Petitioners' suggestion, the core lesson from *Shintech* is just as applicable in the present case, notwithstanding that the source in *Shintech* was subject to part 68 requirements, while Owens-Brockway is not. In fact, in the 2001 *Pencor-Masada Order*,[41] the EPA applied similar principles to a source that was not subject to part 68 requirements. There, the EPA reiterated that the General Duty Clause is a self-implementing requirement, unaffected by the terms of a source's title V permit. *Pencor-Masada Order* at 31–32 n.38.

08/documents/t5-112.pdf; Memorandum, Relationship between the Part 70 Operating Permit Program and Section 112(r) (June 24, 1994), available at *https://www.epa.gov/sites/production/files/2015-08/documents/opp112r.pdf.*

[39] When the EPA promulgated the final part 68 risk management plan rules in 1996, the agency determined that "generic terms in [title V] permits and certain minimal oversight activities" would assure compliance with risk management plan requirements. 61 Fed. Reg. at 31689; *see also* 57 FR 32250, 32275 (July 21, 1992) ("The EPA recognizes, however, that an RMP is not in any sense a 'permit' to release substances addressed therein, and that section 112(r) was not intended to be primarily implemented or enforced through title V." (citing 42 U.S.C. § 112(r)(7)(F)). For sources subject to both part 68 and title V, these permit content and state oversight requirements are codified at 40 C.F.R. § 68.215. For additional information concerning the limited intersection between risk management plans and title V permits, *see In the Matter of Newark Bay*, Order on Petition No. II-2019-4 at 9–16 (August 16, 2019).

[40] In the *Shintech Order*, the EPA also explained that it would be improper to shield a source from liability under the General Duty Clause through a title V permit shield. *Id.*

[41] *In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC*, Order on Petition No. II-2000-07 (May 2, 2001).

Similar to the EPA's title V guidance, the EPA's longstanding guidance concerning the implementation of the General Duty Clause suggests that the General Duty Clause is not to be implemented through title V. Notably, in the EPA's comprehensive Guidance for Implementation of the General Duty Clause ("GDC Guidance"),[42] the EPA details the mechanisms through which the General Duty Clause would be implemented and enforced, and never once mentions permitting.

The change of course the Petitioners request here—an EPA determination that the General Duty Clause is an "applicable requirement" with which the Owens-Brockway title V permit must assure compliance—would have massive programmatic impacts, upsetting the administration of both the title V and General Duty Clause programs nationwide. The EPA expects that the majority of major sources subject to the title V program may, at some time or another, also have obligations under the General Duty Clause. If the General Duty Clause is considered an "applicable requirement," thousands of title V permits nationwide would need to be reopened to include conditions necessary to identify and assure compliance with the clause. Such an enormous resource burden by the state air agencies that implement the title V program would hardly make sense given that these same air agencies cannot enforce the General Duty Clause.[43] This is clearly not an outcome that either Congress or the EPA envisioned when establishing these two programs.[44]

Other practical concerns—closely related to the legal issues discussed above—weigh against implementing the General Duty Clause through title V. For example, it is unclear how a title V permit containing General Duty Clause requirements could be structured in order to avoid the statutory constraints on enforcement discussed above. Neither the Act nor the EPA's regulations provide that certain portions of the title V permit can be labeled "enforceable only by the EPA"; to the contrary, all federally-enforceable permit terms must necessarily be enforceable by the state agencies issuing the permits as well as the public at large. *See* CAA §§ 304(a)(1), (f)(4), 502(b)(5)(E), 504(c); 40 C.F.R. §§ 70.4(b)(3)(vii), 70.6(b)(1). Additionally, if the General Duty Clause is to be considered an "applicable requirement" that states have no authority to enforce, the EPA could be obligated to issue notices of deficiency to all 117 state, local, and tribal permitting authorities nationwide for their failure to enforce all aspects of the title V program. *See* 40 C.F.R. § 70.10(b), (c)(1), Appx A. In order to remedy that deficiency, the EPA could have to take over the issuance of all title V permits, or to issue partial permits to nearly every title V source to cover these sources' General Duty Clause obligations. *See id.* § 70.10(b)(2)(iii); *see also* 40 C.F.R. part 71. These are clearly not reasonable propositions,[45] but nonetheless ones that would follow from the Petitioners' reasoning.

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[42] Guidance for Implementation of the General Duty Clause, Clean Air Act Section 112(r)(1), EPA 550-B00-002 (May 2000), available at *https://www.epa.gov/sites/production/files/documents/gendutyclause-rpt.pdf.*

[43] No statutory or regulatory mechanism currently exists for the EPA to establish General Duty Clause requirements for all title V sources nationwide. In any case, this would present an even greater resource issue for the EPA and would run against Congress's intent that the tite V program is to be primarily implemented by the states, not the EPA. *See* 42 U.S.C. § 7661a; *see, e.g.*, *Environmental Integrity Project v. EPA*, 969 F.3d 529, 536, 545 (5th Cir. 2020).

[44] The EPA, like Congress, does not "hide elephants in mouseholes." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

[45] Such outcomes would be contrary to congressional intent for the title V program to be primarily administered by states. *See supra* note 42.

In addition to these untenable impacts to title V permitting, determining that the General Duty Clause must be included in title V permits would fundamentally alter the EPA's implementation and enforcement of the General Duty Clause itself. The EPA has always described the General Duty Clause as a "self-implementing requirement" (a characterization the Petitioners acknowledge) or a "self-enabling requirement." 61 Fed. Reg. 31668, 31680 (June 20, 1996 Letter from Mathy Stanislaus, Assistant Administrator, EPA Office of Solid Waste and Emergency Response, to Hon. Mike Pompeo, U.S. House of Representatives (August 1, 2013)) (Stanislaus-Pompeo Letter). This means, quite simply, that the General Duty Clause is meant to be implemented and enforced independently, beyond the strictures of the title V permitting program or any set of regulations as a direct requirement of the CAA. Although the title V permitting program offers clear benefits for identifying and assuring compliance with other types of more typical emission standard-based requirements under regulations promulgated under the CAA,[46] the title V program is a particularly poor fit for implementing the General Duty Clause for multiple reasons.

The General Duty Clause is, as its name suggests, a *general* duty. Identifying *specific* obligations within each source's title V permit would conflict with the notion of a general duty. Moreover, determining whether an individual source has satisfied this general duty is highly circumstance-specific. The EPA interprets the General Duty Clause to generally require owners and operators to adhere to recognized industry practices and standards in addition to any applicable government regulations. GDC Guidance at 2, 11–12. However, there may be situations where circumstances make a particular industry standard or municipal code inapplicable, unsuitable, or insufficient for a given source, and there may be other ways to abate hazards than those listed in a particular industry standard or municipal code. Each source's obligations are dependent on the detailed knowledge of each individual source. Even in the absence of an industry standard, a source's knowledge of a potential hazard and a feasible means to abate it is relevant to its general duty under CAA § 112(r)(1). *See* GDC Guidance at 12. Should a source learn of a hazard and a feasible means to abate it after its permit is written, the General Duty Clause would ordinarily hold the source responsible for its knowledge. Given that the factual circumstances and knowledge at the source, as well as any relevant industry guidelines, can change frequently, the source's obligation under the General Duty Clause are necessarily fluid.[47] If General Duty Clause obligations were to be included in title V permits as applicable requirements, the relevant permit

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[46] The EPA has sometimes also referred to these types of emission standards, such as NSPS or NESHAP standards, as "self-implementing." However, the intent of this phrase is different in that context than in the context of the General Duty Clause which is implemented in the absence of "implementing" regulations. The requirements of the General Duty Clause flow directly from the statute. Meanwhile, for emission standards like NSPS or NESHAP standards, the EPA means that they are "self-implementing" once regulations are promulgated. In other words, the source must comply with the standard even though the requirements may not be identified in the source's title V permit. This is in contrast with some other programs the EPA administers, such as certain requirements under the Clean Water Act. Some new requirements under the Clean Water Act only become effective once they are incorporated into a source's National Pollutant Discharge Elimination System permit. *See, e.g.*, *Texas Oil & Gas Ass'n et al v. US EPA*, 161 F.3d 923, 928 (5th Cir. 1998) ("Despite their central role in the framework of the CWA, ELGs are not self-executing. They cannot be enforced against individual dischargers, and individual dischargers are under no legal obligations to obey limits set by ELGs. Rather, ELGs achieve their bite only after they have been incorporated into NPDES permits." (citing *American paper Inst. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993); *American Petroleum Inst.*, 661 F.2d 340, 344 (5th Cir. 1981)).

[47] While identifying the potential hazards at Owens-Brockway *may* be relatively straightforward, this is certainly not the case for more complex sources such as refineries or chemical plants.

terms would need to be constantly updated to accurately reflect a source's obligations. Overall, identifying specific General Duty Clause requirements would not only curtail the flexibilities rightly available to a source, but it would also undermine the General Duty Clause by limiting the scope of a source's potential obligations to those specific requirements contained in the permit.[48] For these reasons, the EPA has rejected requests to define and restrict General Duty Clause obligations through rulemaking. *E.g.*, Stanislaus-Pompeo Letter. It would be similarly inappropriate to define and restrict these obligations through title V permit terms.

In summary, the CAA specifically prohibits the General Duty Clause from being enforced through the citizen suit provision in section 304 that is available for all standards and limitations included in title V permits. Therefore, the EPA must interpret its regulations such that the General Duty Clause is not an applicable requirement for purposes of title V permitting. This is consistent with the EPA's implementation of both the title V and General Duty Clause programs since their inception in the early 1990s. Moreover, this is consistent with sound policy and avoids massive nationwide programmatic impacts that would follow from the Petitioners' position.

Claim F: The Petitioners Claim That "The Final Permit Fails to Assure Compliance with the Plant Site Emission Limits (PSELs) for Lead (Pb) and Sulfur Dioxide (SO_2)."

Petitioners' Claim. The Petitioners claim that the Final Permit fails to assure compliance with the facility's PSELs for Pb and SO_2 as required by 42 U.S.C. 7661c(a) and 40 C.F.R. § 70.6(a)(1), (c)(1) because it allows the facility to use emission factors for Pb and SO_2 that exceed the actual emissions from the facility documented in the May 2019 source tests. Petition at 22. Specifically, Petitioners argue that the EPA must object to the Final Permit because the permit allows the permittee to use emissions factors that underestimate Pb and SO_2 emissions to demonstrate compliance with applicable PSELs. *Id.* In support of this argument, Petitioners reference emissions tests conducted in May 2019 and a January 24, 2020 Notice of Civil Penalty Assessment and Order ("2020 Penalty Order") issued by ODEQ. *Id.* at 22–23.

In addition, the Petitioners contend that ODEQ did not provide an explanation in the Permit Review Report for how the Final Permit can assure compliance with the applicable Pb and SO_2 PSELs if it allows the facility to calculate its emissions using emission factors that are lower than the furnaces' actual emission rates. *Id.* at 23.

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

Relevant Permit Terms and Conditions

This section identifies the relevant permit terms and conditions related to the Petitioners' claim.

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[48] Were the General Duty Clause treated as a permit term, a source could argue it was shielded from the duty by the terms of the permit for hazards identified after the permit was issued. The potential for sources to request a title V permit shield to cover General Duty Clause obligations would exacerbate these concerns, notwithstanding that such a permit shield would not be appropriate, as the EPA has previously explained. *See Shintech Order* at 12 n.9.

Permit Condition 32 provides that:

> The plant site emissions must not exceed the following limits for any 12 consecutive calendar moth period: [OAR 340-222-0035 through OAR 340-222-0041]

Pollutant:	**PM_{10}**	**$PM_{2.5}$**	**SO_2**	**NO_X**	**CO**	**VOC**	**GHG (CO_{2e})**	**Pb**
PSEL: (tons/yr)	109	100	184	382	99	39	100,521	0.5

Permit Condition 33 provides that:

> The permittee must determine compliance with the Plant Site Emissions Limits specified in Condition 32 in accordance with the procedures, test methods, and frequencies identified in this condition. The permittee must retain records of all parameters used to determined compliance with the PSEL:

Permit Condition 33.b requires the permittee to determine compliance with the PSELs by performing a monthly calculation using specified emissions factors for Furnace A (Emission Unit GM1) and Furnace D (Emission Unit GM4). The Pb emissions factor for both furnaces is 1.65×10^{-3} lbs/ton glass. The SO_2 emissions factor for both furnaces is 2.1 pounds per ton glass.

According to the Title V Permit Review Report (26-1876-TV-01), the Pb PSEL is set at the generic level in accordance with OAR 340-222-0040. The generic level for Pb equals the significant emission rate minus 0.1 ton.[49] Permit Review Report at 17. ODEQ derived the Pb emissions factor based on the generic PSEL for Pb and the permittee's glass production capacity. *Id.* According to the Title V Permit Review Report, ODEQ determined the SO_2 emissions factor by averaging several historic source tests for both furnaces. *Id.* at 4.

EPA's Analysis

The Petitioners have not demonstrated that the Final Permit fails to assure compliance with the PSELs for Pb and SO_2. As discussed above, in order for the petitioner to meet its demonstration burden, the petitioner must address the permitting authority's final decision and reasoning, including the Response to Comments. *See MacClarence*, 596 F.3d at 1132–33; *see also Nucor II* at 7. In addition, a petitioner must support its allegations "with legal reasoning, evidence, and references." *MacClarence*, 596 F.3d at 1131. If a petitioner fails to provide such support, then the EPA is left to work out the basis for petitioner's objection, contrary to Congress's express allocation of the burden of demonstration to the petitioner. *Id.* at 1132–33; see also *Nucor II* at 7.

Here, the Petitioners have not demonstrated that the Final Permit fails to assure compliance with the PSELs for Pb and SO_2. The Petitioners did not specifically address or analyze ODEQ's decision to determine the SO_2 emissions factors by averaging historic source test results. As stated above, the EPA expects the petitioner to address the permitting authority's decision and reasoning. *See MacClarence*, 596 F.3d at 1132–33. In addition, The Petitioners failed to

[49] OAR 340-200-0020(161)(j).

demonstrate that ODEQ was unreasonable in deciding to require additional source tests and data collection prior to modifying the Pb and SO_2 emissions factors. In its 2020 Penalty Order, ODEQ cited the May 2019 source test and required the permittee to conduct additional testing to verify the emission rates. The Petitioners have not supplied legal reasoning, evidence, and references to sufficiently demonstrate that ODEQ's decision to require additional emissions testing before modifying the title V permit runs afoul of the applicable CAA requirements or is otherwise unreasonable or arbitrary. *See MacClarence*, 596 F.3d at 1131; *In the Matter of CEMEX*, Order on Petition No. VIII-2008- 01 (April 20, 2009) at 10. Therefore, the EPA denies Petitioners claim that the Final Permit fails to assure compliance with the PSELs for Pb and SO_2.

Claim G: The Petitioners Claim That "The Final Permit Unlawfully Omits an Enforceable Compliance Schedule to Bring Owens-Brockway Into Compliance with Applicable Opacity and PM Limits."

Petitioners' Claim. The Petitioners claim that because the 2019 and 2020 Penalty Orders indicate that the facility is not in compliance with applicable opacity and PM limits, the Final Permit must include a compliance schedule as required by 40 C.F.R. § 70.5(c)(8)(iii)(C). Petition at 23. Specifically, the Petitioners claim that the 2019 and 2020 Penalty Orders indicate that the facility was in violation of the 20% opacity limit set forth in Permit Condition 17, and the 0.10 gr/dscf PM limit found in Permit Condition 14 at the time of permit issuance.[50] *Id.* The Petitioners contend that because the 2019 Penalty Order and May 2019 testing occurred before the issuance of the Final Permit, ODEQ was aware that the facility was "not in compliance with all applicable requirements at the time of permit issuance," which necessitates inclusion of a compliance schedule in the permit. *Id.* at 24.[51] The Petitioners further assert that the 2019 Penalty Order instructed the facility to submit to ODEQ "for approval a comprehensive written Corrective Action Plan (CAP II) that includes an implementation schedule to achieve and maintain compliance with the opacity limit in Condition 11 of the [pre-existing] Permit [containing the 20% opacity limit]" within 120 days of the order becoming final, which the Final Permit does not include.[52] *Id.*

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

The Petitioners have demonstrated that Owens-Brockway was not in compliance with the terms of the Final Permit at the time of permit issuance. Therefore, the Petitioners have demonstrated that the Final Permit should have had a compliance schedule as required by 40 C.F.R. § 70.5(c)(8)(iii)(C). Specifically, the Petitioners have demonstrated that the 2019 Administrative Order was signed on April 22, 2019, before the Final Permit was issued on December 10, 2019. Therefore, the Administrative Order was an applicable requirement at the time of permit issuance and should be reflected in the Final Permit.

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[50] The 20% opacity limit is found in Oregon's SIP Rule OAR 340-208-0110 and the 0.10 gr/dscf PM limit is found in Oregon's SIP Rule OAR 340-226-0210.

[51] Citing 40 C.F.R. §§ 70.5(c)(8)(iii)(C), 70.6(c)(3).

[52] 2019 Penalty Order, Section IV, ¶ 6.

Because Administrative Orders reflect the conclusion of a administrative process resulting from the enforcement of "applicable requirements" under the Act, all CAA-related requirements in such Administrative Orders are appropriately treated as "applicable requirements" and must be included in title V permits, regardless of whether the applicability issues have been resolved in the Administrative Order. This view is consistent with: (1) EPA's part 70 regulations[53] (2) statements the EPA made at the time these regulations were issued;[54] and (3) EPA's practice implementing title V. *In the Matter of CITGO Refining and Chemicals Company L.P.,* Order on Petition VI-2007-01 at 12–13 (May 28, 2009). [55]

Direction to ODEQ. Due to the PM violations identified in the petition and Administrative Orders, pursuant to 40 C.F.R. § 70.5(c)(8)(iii)(C), ODEQ should include a compliance schedule in Owens-Brockway's title V permit. ODEQ should also consider using the 2019 and/or the 2020 Administrative Orders for the basis of the compliance schedule aimed at bringing Owens-Brockway into compliance with applicable opacity and PM limits. The issuance of more recent Administrative Orders indicate that noncompliance may be an ongoing issue. In addition to the applicable opacity and PM limits, ODEQ should consider whether a compliance schedule is necessary for performance testing for applicable chromium limits that complies with the requirements of the Permit, as noted in claim D.

V. CONCLUSION

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

Dated: May 10, 2021

Michael S. Regan
Administrator

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[53] *See*, e.g., 40 C.F.R. § 70.5(c)(8)(iii)(C) (compliance schedules "shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject").

[54] See, e.g., 57 Fed. Reg. 32250, 32255 (July 21, 1992) (preamble to the 1992 final part 70 rule) ("[s]ources seeking to obtain or renew a part 70 permit cannot be shielded from enforcement actions alleging violations of any applicable requirements (including orders and consent decrees) that occurred before, or at the time of, permit issuance.").

[55] *See In the Matter of East Kentucky Power Cooperative, Inc. Hugh L. Spurlock Generating Station*, Order on Petition IV-2006-4 at 17 (August 30, 2007) ("should the proposed consent decree be entered by the court in the related enforcement action, [the State and the source] would need to appropriately respond by incorporating the compliance schedule(s) required by the consent decree into the permit."); *In the Matter of Dynergy Northeast Energy Generation*, Order on Petition No. 11-2001-06, at 29–30 (November 18, 2001) ("conditions from [a] 1987 Consent Decree are applicable requirements that must be included in [the source's] title V permit."); see also *Sierra Club v. EPA*, 557 F.3d 401,411 (6th Cir. 2008) (noting EPA's view that, once the consent decree is final, it would be incorporated into the source's title V permit as appropriate).