Delaware City Refining Company
4550 Wrangle Hill Road
Delaware City, DE 19706
Office: 302.834.6000
Fax: 302.834.6095
www.pbfenergy.com

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CMRRR# 7020 0090 0001 7187 5908
DNREC – Air Quality Management Section
State Street Commons
100 W. Water Street, Suite 6A
Dover, DE 19904
Attn: Division Director

Submitted via E-mail to (Attn: Docket #2020-P-A-0017):
Angela.Marconi@delaware.gov
Lindsay.Rennie@delaware.gov
daqpermittinginfo@delaware.gov
DNRECHearingComments@delaware.gov

Re: Response of permit applicant Delaware City Refining Company LLC to public comments on Draft/Proposed Permit AQM-003/00016 – Part 1 (Renewal 3), Part 2 (Renewal 2), Part 3 (Renewal 3); Docket #2020-P-A-0017

DNREC Hearing Officer/Division of Air Quality:

Delaware City Refining Company LLC ("DCRC") owns and operates the Delaware City Refinery located at 4550 Wrangle Hill Road in Delaware City, Delaware (the "Facility"). The Facility is subject to 7 DE Admin. Code 1130 (Title V) Operating Permit No. AQM-003/00016 – Part 1 (Renewal 2), Part 2 (Renewal 1), Part 3 (Renewal 2), which identifies the requirements of 7 DE Admin. Code 1102 and 1130 that apply to the Facility (the "Title V Permit"). As further discussed below, the Delaware Department of Natural Resources and Environmental Control ("DNREC") recently proposed to renew the Title V Permit, and thereafter received several sets of public comments. The following is DCRC's response to those comments.

1. *Relevant Background*

DCRC submitted to DNREC an application to renew the Title V Permit in May 2019, and a related administrative amendment request in March 2020 (collectively, the "Title V Renewal Application"). Based on the information in the Title V Renewal Application, DNREC determined that all applicable requirements were satisfied and issued a draft/proposed Title V Permit renewal on April 3, 2020 (the "Draft/Proposed Title V Renewal"). DCRC supports the Draft/Proposed Title V Renewal as written and agrees with DNREC's proposal to issue the permit as final pending EPA approval.

Notice of the Draft/Proposed Title V Renewal was published on April 25, 2020. DNREC received comments on the Draft/Proposed Title V Renewal, both during the initial public comment period and following the public hearing, from the following: Delaware Audubon Society, Sierra Club, Environmental Integrity Project, Earthjustice, Environmental Justice Health Alliance for Chemical Policy Reform, and the Widener Environmental and Natural Resources Law Clinic (collectively, the "Commenters"). The Commenters submitted three separate sets of comments addressing the Draft/Proposed Title V Renewal, dated May 22, June 25, and July 31, 2020, respectively (collectively, the "Comments").[1] DNREC also received comments from certain individual members of the aforenamed organizations, including Amy Roe et al. and Mark Martell.[2] No other comments on the Draft/Proposed Title V Renewal were submitted.

In accordance with 7 DE Admin. Code 1130 § 7.10.6, DCRC is submitting the following response to the Comments. We have undertaken to prepare a complete response to such comments, but as noted above, DCRC was given only 15 days to respond to the more than 180 pages of comments submitted by the Commenters. Accordingly, DCRC reserves its right as permit applicant to supplement this response as part of any subsequent communications/proceedings involving the Title V Renewal, including without limitation, in the event the Commenters or other parties seek to challenge the permit following its issuance as final and/or file with EPA a petition to object to the final Title V Renewal.

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[1] DCRC notes that the Commenters were afforded more than three months to prepare their comments on the Draft/Proposed Title V Renewal, with the initial public comment period commencing on April 25, 2020, and the additional public comment period following the public hearing closing on July 31, 2020. During that time, the Commenters submitted more than 180 pages of written comments and supporting documentation, most of which was submitted after close of business on July 31, 2020. By contrast, in accordance with 7 DE Admin. Code 1130 § 7.10.6, DCRC was limited to just 15 days to respond to all such comments. Likewise, after DNREC submits to the United States Environmental Protection Agency ("EPA") its written response to all the comments made on the Draft/Proposed Title V Renewal (including these responsive comments from DCRC), along with the proposed permit, EPA will have only 45 days to determine whether EPA objects to the permit's issuance as final. 7 DE Admin. Code 1130 § 8.2.1. *See, e.g., In the Matter of PacifiCorp Energy*, Order on Petition No. VIII-2016-4 at 16 (Oct. 17, 2016) (hereinafter, "PacifiCorp Order") (citing 42 U.S.C. § 7661a(b)(6)) (EPA's limited review period for a proposed title V permit is consistent with the Clean Air Act's requirement that states implement streamlined procedures for expeditious review of title V permit actions). It is not reasonable, therefore, for DCRC to respond to every point raised by the Commenters. But see section 4.

[2] However, such comments represent "general concerns without specifically identifying how the [Draft/Proposed Title V Renewal] might not be in compliance with the requirements of the CAA," which EPA has long-held are inadequate to demonstrate any flaw in a title V permit. *See, e.g., In the Matter of ESSROC Cement Corp.*, Order on Petition No. V-2017-1 at 4 (Apr. 1, 2020) (denying petition to object to title V permit where petitioners' claims were based on their general concerns about the possibility of an explosion or leaking vapors from the permitted facility located in the vicinity of schools and churches). By way of example only, Amy Roe et al. opine that "[t]he permit does not include sufficient conditions to assure compliance with [the Accidental Release Prevention, Risk Management Program and General Duty requirements]." Roe et al. comments, July 31, 2020 at 1 [sic]. But they do not explain this comment with any reasonable specificity. Similarly, in his "personal comments," Mark Martell states that "my concern is that [the company's] concern over cashflow [during the pandemic] extends to future maintenance costs, and I am worried that hiccups and accidents may not be managed appropriately. This same concern stems from a prior owner history [sic] at the refinery, who was often cited for poor maintenance repairs and upgrades." Martell comments, July 14, 2020. These are general expressions of concern that do not mention the Draft/Proposed Title V Renewal at all. For these reasons, DCRC is not able to respond to such comments. We further note that DNREC's obligation to respond to comments is similarly limited to "significant comments submitted by the applicant and the public." 7 DE Admin. Code 1130 § 7.10.8.

2. *Introduction/Summary of Response to the Comments*

For the reasons explained below, the Comments are inappropriate and should not be considered. First, most of the Comments address permit terms that apply during startup and shutdown periods, thus reflecting the Commenters' remaining dissatisfaction with DNREC's response to the SSM SIP Call as that term is defined below. But because the instant permitting action involves a *single facility*, any comments directed at DNREC's broader programmatic decisions are misplaced in this context. Indeed, DNREC already completed an administrative process, including providing for public participation, to revise its state implementation plan ("SIP") in response to the SSM SIP Call, and in DNREC's view, the revised SIP goes beyond what is necessary to satisfy the state's obligations under the Clean Air Act ("CAA"). Sierra Club even submitted comments during this process. Therefore, any revision to the Draft/Proposed Title V Permit now, in response to the Comments, would effectively condone the Commenters' attempt at an end run around the CAA's SIP revision process and DNREC's related administrative procedures. It may also suggest that DNREC is intending to reevaluate its own SIP revision that was proposed to EPA several years ago.

Second, the Comments cannot be considered for the additional reason that they are outside the procedural scope of what the title V permitting program allows and are barred by basic principles of administrative finality. It is indisputable that Congress intended for title V of the CAA to serve as a mechanism to compile all the applicable air requirements for a regulated facility into a single, user-friendly permitting instrument. Title V was not intended to, and does not allow for, the establishment of *new* or *revised* applicable requirements. Such obligations, by contrast, must be created through title I's preconstruction permitting process or an appropriate operating permit modification as implemented at the state level.

Virtually every, if not every, comment raised by the Commenters goes to a provision of the Facility's Title V Permit that was properly established in accordance with these underlying permitting programs. In order to implement such permit standards in the first instance, DNREC necessarily had to follow the required administrative procedures. This means that any member of the public, including the Commenters, already had the opportunity to register their objections to the permit requirements. Therefore, to allow the Commenters a "second bite at the apple" now would, in effect, rewrite the title V program as intended by Congress and further contravene the fundamental doctrine of administrative finality. Other state permitting authorities have clearly recognized these cornerstones that form the foundation (and limitations) of the title V program.[3]

Third, even if the Comments could lawfully be considered in the title V renewal process (and they cannot, for the reasons discussed herein), such comments fail to identify any condition

[3] In responding to comments from Sierra Club on a title V renewal in its jurisdiction, the Department of Air Quality in Utah, for example, stated that "'[a]ny concerns regarding previous permits should have been raised during public comments at the time those permitting actions took place . . . . [A] Title V operating permit does not impose any new requirements but simply brings together all existing requirements from pervious [sic] permitting actions to aid enforcement . . . .'" PacifiCorp Order at 8.

of the Draft/Proposed Title V Renewal that does not comply with the CAA. Indeed, there is no legal basis supporting a change to the Draft/Proposed Title V Renewal as issued by DNREC. Furthermore, DNREC's submission of the Draft/Proposed Title V Renewal to EPA in the first instance confirms DNREC's determination that the Facility's permit is commensurate with the CAA, including but not limited to, with respect to Delaware's SIP revision in response to the SSM SIP Call.

The Commenters make other ancillary comments on the Draft/Proposed Title V Renewal, but those too are without merit. In particular, the Commenters opine that the Facility's Title V Permit lacks a compliance schedule, but this is incorrect as the Facility is not in *continuing* noncompliance with any applicable permit obligation. The Commenters also argue for the incorporation into the Facility's Title V Permit of physical copies of all applicable operational plans, in addition to incorporating these plans by reference. Such approach is unsupported by any applicable legal standard, and would also lead to the creation of a title V permit that is so lengthy that it would be even more challenging to follow for Facility personnel and Department representatives alike.

DCRC therefore supports the Draft/Proposed Title V Renewal as issued by DNREC and requests that DNREC submit the permit to EPA for final approval.

3. *Specific Response to the Comments*

a. Delaware has already fully satisfied its obligations in response to the SSM SIP Call through proper implementation of regulatory revisions and submission to EPA of a revised SIP; the Commenters cannot be permitted to co-opt a single-facility permit as a means of further objecting to Delaware's SIP response.

In 2015, EPA determined that certain startup, shutdown, and malfunction ("SSM") provisions in 36 states' SIPs did not comply with the CAA, recognizing that, for SIP demonstration purposes, states could not rely on permit- or regulatory-based emission reductions if they did not also account for emissions generated during certain "then-exempted" SSM periods. EPA also confirmed that so-called "blanket exemptions" from emission standards under specific operating scenarios were inconsistent with CAA §§ 111 and 112, as applicable. EPA therefore issued a SIP call directing those states to correct specific SSM provisions in their SIPs (the "SSM SIP Call"). 80 Fed. Reg. 33,840 (Jun. 12, 2015).

Delaware was among the states subject to the SSM SIP Call. Although Delaware did not agree that its SIP was deficient, the state determined to revise certain regulations to remove certain provisions identified in the SSM SIP Call as being inconsistent with the CAA in order to avoid the imposition of potential federal CAA sanctions. DNREC stated "that, from EPA's perspective, the removal of the offending provisions from the SIP should be considered as SIP strengthening, thus approvable and non-controversial." Secretary's Order No.: 2016-A-0047 "*Final Revisions to Delaware's State Implementation Plan ("SIP") to address the Start-up, Shutdown, and Malfunction SIP Call of the United States Environmental Protection Agency (U.S. EPA)*" (proposed SIP revision submitted Sept. 15, 2016, final Secretary's Order issued

Nov. 21, 2016) at 3 (the "Delaware Proposed SIP Revision"). The Delaware Proposed SIP Revision was subject to public notice and comment and a public hearing was held. Both EPA and Sierra Club commented on the Delaware Proposed SIP Revision, and DNREC responded to the comments in a review memorandum issued with the Delaware Proposed SIP Revision. According to DNREC, the "revisions Delaware proposes to make to the SIP [to address the SSM SIP Call] . . . demonstrate[] that these revisions comport with the EPA's interpretation of the [CAA], and are consistent with the EPA's approach for attainment and maintenance of NAAQS." DNREC Hearing Offer's Report accompanying the Delaware Proposed SIP Revision at 2.

The regulatory revisions addressing the SSM SIP Call took effect in Delaware in January 2017, and the Delaware Proposed SIP Revision remains pending before EPA, having received no further comments from the agency. Should EPA's final action on the Delaware Proposed SIP Revision reflect the need for any additional revisions to the state's SIP, the "state [will] make[] [any] necessary revisions to its SIP provisions, [and] any needed revisions to operating permits to reflect the revised SIP provisions will occur in the ordinary course as the state issues new permits or reviews and revises existing permits." *See* 80 Fed. Reg. at 33,957. Absent such recommendation from EPA, Delaware has satisfied its obligation consistent with the SSM SIP Call.

Nevertheless, the Comments largely focus on the Facility's permit terms that apply during periods of startup or shutdown, referring to purported inconsistencies relative to the SSM SIP Call. Clearly, the Commenters are still dissatisfied with DNREC's response to the SSM SIP Call. But while that may be true, it cannot be that the Commenters are afforded the opportunity to push for further revisions to Delaware's SIP in the context of a permitting action for a *single-facility*. The Commenters already had the opportunity to comment on the Delaware Proposed SIP Revision, and Sierra Club did just that. To the extent Sierra Club and the other Commenters remain dissatisfied, their issue is with Delaware's response to the SSM Call, and not with the Facility's own Title V Permit. Relatedly, if DNREC were to revise the Draft/Proposed Title V Renewal in response to the Comments, it could only mean that DNREC is now second-guessing the adequacy of its own SIP, rather than identifying some deficiency in the Facility's Title V Permit. Moreover, this unexpected outcome would likely invite administrative and/or judicial challenges by DCRC and others.

b. The Comments also cannot be considered in the title V renewal process based on the well-established scope of the title V permitting program and the legal doctrine of administrative finality.

i. Governing legal framework

There can be no doubt about the intended (and relatively narrow) purpose of the CAA title V operating permit program: it is a vehicle for compiling the air quality control requirements as they apply to the facility's emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements. 42 U.S.C. §§ 7661a(a), 7661c(a), 7661c(c); 57 Fed. Reg. 32,250, 32,251 (July 21, 1992); *In the Matter of ESSROC Cement Corp.*, Order on Petition No. V-2017-1 at 4 (Apr. 1, 2020); *In the Matter of*

Riverview Energy Corp., Order on Petition No. V-2019-10 (Mar. 26, 2020); *In the Matter of Dow Chemical Company Salt Dome Operations*, Order on Petition No. VI-2015-12 (Feb. 18, 2020); *In the Matter of Wheelabrator Environmental Systems Inc., Wheelabrator Concord Company*, Order on Petition (Oct. 30, 2019); *In the Matter of Mill Creek Generating Station*, Order on Petition No. IV-2017-10 (Oct. 3, 2019); *In the Matter of Newark Bay Cogeneration Partnership LP*, Order on Petition No. II-2019-4 (Aug. 16, 2019); *In the Matter of Algonquin Gas Transmission LLC*, Order on Petition (Apr. 30, 2019); *In the Matter of Hyland Facility Associates Hyland Landfill*, Order on Petition No. II-2016-3 (Apr. 10, 2019); *In the Matter of Cargill, Inc. Bloomington Soybean Processing Plant*, Order on Petition (Mar. 20, 2019). The title V permit program does not, by contrast, impose new substantive air quality control requirements (nor substantive revisions thereto). *Id.* Equally clear is that the title V permitting process does not involve a review of the substantive adequacy of any applicable requirements previously established through the CAA title I preconstruction permitting process.

In simple terms, the preconstruction permitting process is the mechanism for creating/revising substantive applicable requirements under the CAA, and thus must include the opportunity for meaningful public participation. On the other hand, title V is intended to combine the requirements from preexisting construction permits, along with appropriate compliance demonstration obligations, into a single "user's guide" to facilitate compliance by the regulated community. 42 U.S.C. §7661a(c); 57 Fed. Reg. 32,250, 32,251, 32,277, 32,284 (July 21, 1992). Although the title V process includes the opportunity for public comment, the scope of such comments is necessarily bounded by the programmatic constraints of title V as intended by Congress: i.e., comments on a proposed title V permit may only address (i) whether the permitting authority has properly incorporated the terms from the underlying preconstruction permit, and (ii) whether the corresponding monitoring, recordkeeping, and reporting obligations are sufficient to assure compliance with such terms. To be clear, the title V program does not afford the public (including both permittees and third parties alike) a "second bite at the apple" to raise objections to substantive requirements previously established pursuant to the permitting authority's title I-based permitting process.

EPA was express in its interpretation of the scope of the title V program in its October 2017 PacifiCorp Order denying a title V Petition to Object filed by Sierra Club, concluding as follows:

> "[P]ermitting agencies and the EPA need not reevaluate – in the context of title V permitting, oversight, or [Title V permit] petition responses – previously issued final preconstruction permits, especially those that have already been subject to public notice and comment and an opportunity for judicial review. Concerns with these final preconstruction permits should instead be handled under the authorities found in title I of the [CAA]. Where a final preconstruction permit has been issued, whether it is a major or minor NSR permit, the terms and conditions of that permit should be incorporated as 'applicable requirements' and the permitting authority and the EPA should limit its review to whether the title V permit has accurately incorporated those terms and conditions and

> whether the title V permit includes adequate monitoring, recordkeeping, and reporting requirements to assure compliance with the terms and conditions of the preconstruction permit. *See* 42 U.S.C. § 70.6(a)(3), 70.69(c)(1)." PacifiCorp Order at 19.

Moreover, EPA has not deviated from this approach in responding to any of the other title V petitions filed since the PacifiCorp Order was issued almost three years ago. *See, e.g., In the Matter of Motiva Enterprises LLC*, Order on Petition No. VT-2016-23 (May 31, 2018); *In the Matter of South Louisiana Methanol, LP*, Order on Petition Nos. VI-2016-24 and VI-2017-014 (May 29, 2018); *In the Matter of Pasadena Refining System Pasadena Refinery*, Order on Petition No. VI-2016-20 (May 1, 2019); *In the Matter of Yuhuang Chemical Inc. Methanol Plant*, Order on Petition Nos. VI-2017-5 and VI-2017-13 (Apr. 2, 2018); *In the Matter of ExxonMobil Corporation Baytown Refinery*, Order on Petition No. VI-2016-14 (Apr. 2, 2018); *In the Matter of ExxonMobil Corporation Baytown Olefins Plant*, Order on Petition No. VI-2016-12 (Mar. 1, 2018); *In the Matter of Superior Silica Sands*, Order on Petition Nos. V-2016-18 and V-2017-2 (Feb. 26, 2018). More recently, the United States Court of Appeals for the Fifth Circuit affirmed EPA's view that the title V permitting process is not the appropriate vehicle for re-examining the substantive validity of underlying title I preconstruction permits. *Environmental Integrity Project and Sierra Club v. EPA*, No. 18-60384, 2020 WL 4686995 (Aug. 13, 2020). Distinct from the Fifth Circuit's decision, the Tenth Circuit Court of Appeals remanded the PacifiCorp Order to EPA (just weeks ago) for further consideration of certain aspects of the petition as they relate specifically to the Hunter power plant in Utah, including relative to the interpretation of the term title V "applicable requirements." *See Sierra Club v. EPA*, 964 F.3d 882 (10th Cir. 2020).

Although it is clearly not the case here, as Delaware has already properly satisfied its statutory obligation in response to the SSM SIP Call by implementing appropriate regulatory revisions and a corresponding SIP revision which remains pending before EPA[4], the title V permitting process does not allow for second-guessing of preconstruction permit-based determinations *even* where a title V permit incorporates SIP provisions that EPA has determined are inconsistent with the CAA.[5] Instead, the state's "existing affected SIP provision(s) will remain in place." 80 Fed. Reg. at 33,849. "When the EPA issues a final SIP call to a state, that action alone does not cause any automatic change in the legal status of the existing affected provision(s) in the SIP." *Id.* Therefore, where a party objects to a title V permit with the (mistaken) belief that "the SIP call automatically supersedes the original SIP approval," the reviewing authority "may not, in the context of reviewing a potential objection to a title V permit, ignore or revise duly approved SIP Provisions." *In the matter of Gallatin Fossil Plant*, Order on Petition Nos. IV-2016-11 and IV-2017-17 at 17 (Jan. 30, 2018) (citing *In re Monroe Power Company*, Order on Petition IV-2001-8 (Oct. 9, 2002); *see also In the Matter of Piedmont*

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[4] "Where a state regulatory provision has been approved by the EPA as part of the SIP, it is appropriate for inclusion in a title V permit." 80 Fed. Reg. at 33,849 (citing 40 C.F.R. § 70.1(b)).

[5] The Commenters seem to acknowledge this point by referring to a 2008 letter from EPA Region 6 to the Texas Commission on Environmental Quality for the proposition that revising a permit to address applicable standards during SSM must occur by reopening such permit and providing for public participation. Indeed, this is very reason that the Commenters cannot pursue revisions to the Facility's Title V Permit in the context of the *renewal* process.

Green Power, LLC, Order on Petition No. IV-2015-2 at 28-29 (Dec. 13, 2016) (even where EPA has determined that a provision of a SIP is not in compliance with the CAA, EPA will not object to a permit that includes that provision until there is final action to remove it from the SIP).

ii. Application to current Title V Permit terms

It is within the legal framework described above that the propriety of the context in which the Comments were raised must be evaluated. The title V provisions with which the Commenters take issue[6] were all initially established through previous construction permitting actions (some of which go as far back as the 1980s), and then transferred to state-based operating permits before such provisions were finally incorporated into the Facility's Title V Permit. Importantly, these non-title V permits were all subject to public notice and comment, consistent with the state's required administrative procedures. 7 DE Admin. Code 1125, § 3.14 (establishing public participation in preconstruction permit process).[7] In other words, none of the permit terms addressed through the Comments are "new" to the Draft/Proposed Title V Renewal, the scope of which is clearly defined in DNREC's "Review Memorandum" accompanying the Draft/Proposed Title V Renewal. Instead, the Commenters would demand DNREC to revisit decades-old standards established through the title I permitting process. This action, however, is simply not permissible under the CAA. *See* discussion of Governing legal framework in section 2.a.i. above.

Related to the well-held notion that the title V renewal process cannot be used to upend preexisting title I permit-based requirements, the Comments are equally barred by the general doctrine of administrative finality. As noted above, the Facility's historic preconstruction permits were publicly noticed and open for comment. Either the Commenters did not file any comments, or they if they did, then DNREC would have evaluated them and responded accordingly, making adjustments to relevant permit terms where the Department, in its judgment, deemed appropriate.

Much more recently, the current version of the Title V Permit was issued by DNREC in October 2019 in response to a significant modification application submitted by DCRC. Notice of the proposed permit modification was published on August 28, 2019, and public comments were accepted through September 23, 2019.[8]

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[6] Without limitation, such provisions include the startup, shutdown and/or maintenance standards for the following sources: FCCU, FCU, Crude Unit Heaters, Boilers 3 and 4, Boiler 80-2, Combined Cycle Units, and the Sulfur Recovery Area.

[7] Furthermore, subsequent to final permit issuance, "[a]ny person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board within 20 days after receipt of the Secretary's decision or publication of the decision." 7 DE Code § 6008(a). The "Board may affirm, reverse or remand with instructions any appeal of a case decision of the Secretary." 7 DE Code § 6008(b).

[8] See https://dnrec.alpha.delaware.gov/2019/08/25/title-v-significant-permit-modification-application-delaware-city-refining-company/ ("Notice is hereby given that the Delaware City Refining Company having a facility at 4550 Wrangle Hill Road, Delaware City, Delaware, has submitted a request for a significant permit modification pursuant to 7 DE Admin. Code 1130, Section 7 for operating Permit: AQM-003/00016 – Part 1 (Renewal 2)(Revision 4), Part 2 – (Renewal 1)(Revision 4), and Part 3 (Renewal 2)(Revision 4)").

Most if not all of the permit conditions addressed in the Comments were included in the October 2019 Title V modification, but the Commenters did not avail themselves of their opportunity to comment. As such, they cannot be allowed a second opportunity (or third, or fourth, or fifth, as the case may be) to do so now when the Title V Permit is up for renewal.[9] Indeed, to do so would be to sanction an impermissible end run around the required administrative procedures that are integral to the air permitting process, thereby setting a dangerous precedent. Practically speaking, both DNREC and the regulated community must be able to reasonably rely on the finality of an air pollution control permit without fear that at any time an objecting third party could upend specific permit terms that could be as old as the permitted facility itself.

c. Even if the Comments could lawfully be considered in the title V renewal process (and they cannot, for the reasons discussed above), such comments fail to identify any condition of the Draft/Proposed Title V Renewal that does not comply with the CAA.

i. The Comments claiming that certain permit conditions represent impermissible exemptions from emission standards during startup or shutdown are inconsistent with EPA's policy governing such events as implemented through the SSM SIP Call.

As explained above, EPA finalized the SSM SIP Call in 2015. As a result, most of the states, including Delaware, were required to revise their SIPs to address the SSM provisions that EPA concluded did not comply with the CAA. In issuing the SSM SIP Call, EPA was express about the types of standards that are permissible during startup and shutdown events, and those that are not:

> ". . . SIP emission limitations: (i) Do not need to be numerical in format; (ii) do not have to apply to the same limitation (e.g., numerical level) at all times; and (iii) may be composed of a combination of numerical limitations, specific technological control requirements and/or work practice requirements, with each component of the emission limitation applicable during a defined mode of source operation." 80 Fed. Reg. at 33,978-79.

DNREC properly signaled its concurrence with these standards during the public hearing held on the Draft/Proposed Title V Renewal.[10]

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[9] In fact, the same administrative finality principles would likewise extend to DCRC if, for example, the Facility sought to challenge the Title V Permit where the objectionable condition had been introduced in an earlier permit for which no appeal was filed.

[10] See DNREC, Virtual Public Hearing (July 14, 2020), at http://www.dnrec.delaware.gov/Admin/Documents/dnrec-hearings/2020-P-A-0017/DNREC-hearing-presentation.pdf.

But the Commenters grossly misconstrue the scope of the SSM SIP Call in an apparent attempt to sweep in any and every standard applicable during any startup or shutdown period simply because, in their view, such standards are not as stringent as they would like them to be. In this way, the Commenters not only showcase their disregard for EPA's interpretation of its own SSM policy (which, by any measure, is entitled to substantial deference), but also fail to accept as satisfactory the actions Delaware has already completed to meet its obligations in response to the SSM SIP Call. Again, if the Commenters had (and apparently still have) concerns about Delaware's response to the SSM SIP Call, they should have raised them in the context of that prior regulatory action.

ii. The Comments include numerous incorrect factual/technical assumptions about the intended meaning of applicable permit terms.

To meet their burden to justify a revision to the Draft/Proposed Title V Renewal, the Commenters need to identify, with reasonable specificity, the applicable requirements that fail to comply with the CAA. As stated above, the scope of review in the title V renewal context is limited to the adequacy of the permit's existing monitoring, recordkeeping, and reporting conditions to assure compliance with a given permit term. *See, e.g., In the Matter of Riverview Energy Corp.*, Order on Petition No. V-2019-10 at 7 (Mar. 26, 2020) (citing 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(c)(1)). "This is necessarily a case-by-case inquiry guided by multiple factors and considerations. However, at its most basic level, to demonstrate that a permit does not comply with the Act, petitioners must address existing permit terms and explain why they are insufficient to assure compliance." *Id.* (internal citations omitted).

Here, not only do the Comments extend far beyond the permissible scope of review for a title V renewal, in that they focus on substantive applicable requirements rather than the adequacy of the corresponding compliance demonstration provisions, but they also fail to identify specific permit terms that are inconsistent with the CAA. Instead, the Comments are largely based on (incorrect) attenuated theories about what the Commenters think the Title V Permit means. By way of example only, in support of their comment that "[t]he Draft Permit Unlawfully Relaxes Federally Enforceable Requirements for the FCU and FCCU," the Commenters make the following statements (emphasis added):

- "the draft Title V permit *could be read to provide* that the FCU and FCCU are not required to comply with their normal limits";
- "coupled together, those two provisions very strongly *suggest*";
- "Attachment G *appears* to excuse the FCCU";
- "while the effect of this provision is *unclear*, it *could be read to mean*"; and
- "there are also CO and PM-related operational limits . . . [that] *could also be read to mean* that the FCU is not required to comply with its normal CO and PM limits during these periods."

The fundamental problem with these comments is that they are wrong as a factual and technical matter. As such, they cannot reasonably be read as identifying a basis for noncompliance with the CAA. DCRC addresses such comments in greater detail below.

iii. Relevant Comment excerpt, July 31, 2020 comments at 13

"[T]he draft Title V permit could be read to provide that the FCU and FCCU are not required to comply with their normal limits during outages of some (the FCCU) or all (the FCU) of their controls, as long as they comply with certain operational requirements. . . . Coupled together, those two provisions very strongly suggest that, whenever its CO boiler is bypassed or unexpectedly shutdown, the FCCU is excused from compliance with at least CO limits—and perhaps all limits—that apply during normal operations, as long as the FCCU satisfies the operational requirements from Attachment G."

DCRC Response:

The relevant provisions of the Draft/Proposed Title V Renewal do not exempt the FCCU or the FCU from complying with applicable CO limits during unplanned shutdown of the units' controls, in particular the CO boiler. To the contrary, during an unplanned shutdown of the CO boiler in partial burn mode, the Facility will experience an unpermitted excess emissions event for CO and has, therefore, consistently reported such events as exceedances. This approach is borne out in the 2018 settlement agreement between DCRC and DNREC, which lists nine separate reportable releases that occurred when the FCCU CO boiler was offline. The inclusion of Attachment G also does not provide the Facility relief from applicable CO emission limits; rather it specifies procedures that must be followed *to minimize emissions* when the CO boiler experiences an unplanned startup or shutdown until compliance with the required CO limits is achieved through conversion of the CO boiler from partial burn to full burn mode of operation. When the CO boiler reaches full burn mode of operation, there is complete combustion of the CO, meaning the CO limits are satisfied even without the use of the boiler, and the 1300 deg F minimum temperature limit therefore does not apply.

In the case of a planned shutdown of the CO boiler or in the event of planned operation of the CO boiler at firebox temperatures less than 1300 deg F, the Facility is required to operate in full burn mode prior to bypassing/shutting down the CO boiler and/or reducing the firebox temperature below 1300 deg F. The Facility also has to control CO emissions in accordance with Draft/Proposed Title V Renewal Condition 3 – Table 1.e.5.i.B, which restricts CO emissions from the FCCU WGS+ to 500 ppmv dry as a 1-hour average, and 3,085 TPY, and prohibits CO emissions unless it is combusted at no less than 1300 deg F for at least 0.3 seconds in the FCCU CO boiler or combusted in the FCCU regenerator when operating in full burn mode.

As with the FCCU CO boiler, during an unplanned shutdown of the FCU CO boiler in partial burn mode, the refinery will experience an unpermitted excess emissions event for CO and has, therefore, consistently reported such events as exceedances. The 2018 settlement agreement referenced above lists 12 separate reportable releases that occurred when the FCU CO boiler was offline. The Draft/Proposed Title V Renewal also establishes procedures to be followed when the FCU CO boiler experiences an unplanned startup or shutdown event to minimize emissions, including reducing feed rate to the FCU and preparing the backup incinerator for use if needed. In the event of a planned shutdown of the FCU, the FCU CO boiler

or the WGS, the Facility must continue to operate the FCU CO boiler and WGS until there is no feed entering the reaction section of the FCU prior to commencing shutdown of the FCU CO boiler and/or the WGS. Draft/Proposed Title V Renewal Condition 3 – Table 1.da.1.i.D.

Therefore, the Title V Permit does not excuse the Facility from complying with applicable CO limits for the either the FCCU or the FCU following an unplanned or planned outage of the CO boiler.

More critically, there is no legal justification supporting any revision to the current emission standards that apply during periods of startup and shutdown of the FCCU or the FCU. As with virtually all of the provisions of the Draft/Proposed Title V Renewal, the relevant alternative limits applicable during startup/shutdown of the FCCU and the FCU were established years ago through Delaware's preconstruction permitting process. Although in the intervening years, DNREC implemented certain regulatory revisions in response to the SSM SIP Call, DNREC did not also undertake to revise the startup/shutdown limits for these units (in the context of issuing the Draft/Proposed Title V Renewal or otherwise), evidencing DNREC's determination that such standards are still consistent with Delaware's SIP as revised in response to the SSM SIP Call. Apart from the SIP, there is no other regulatory-based standard that would support revising such emission limits for the FCCU or the FCU.

iv. Relevant Comment excerpt, July 31, 2020 comments at 14-16

> *"The draft permit also includes similar provisions applicable to the FCU. It provides that the FCU—within 24 hours after commencement of operation of its backup incinerator and outages of its controls (the CO boiler, Belco prescrubber, and wet gas scrubber)—must, 'at a minimum,' meet certain operational limits. Those operational limits include very high hourly SO_2 limits ranging from 2,961-4,441.5 lbs/hour, depending on the feed weight '% S.' Title V Permit Condition 3 – Table 1, Part 2(da)(1)(i)(E). While the effect of this provision is unclear, it could be read to mean that the FCU is not required to comply with its normal limits during these outage periods—including allowing the FCU to comply only with SO_2 limits that are much higher than the SO_2 limits that apply during normal operations, and excusing the FCU from complying with any limits at all for other pollutants."*

DCRC Response:

The Commenters point to Condition 3 – Table 1, Part 2.da.1.i.E of the Draft/Proposed Title V Renewal, conjecturing that such condition authorizes higher SO_2 emissions from the FCU during operation of the backup incinerator and other periods when the CO boiler, Belco prescrubber, and WGS are offline, and further, that such emissions would exceed the applicable annual limit if the FCU continued to operate under such "outage" conditions year round. But in so doing, the Commenters misinterpret the meaning of the relevant permit condition, and therefore such comment is both inaccurate and without merit.

The referenced condition does not allow an increase in SO_2 emissions over any extended period. Rather, it prescribes the required operating conditions, including the corresponding

reduced FCU feed rate, feed weight, and SO_2 emissions that must be achieved within no more than 24 hours following commencement of the outage of the relevant control. In recognition of such limits, if SO_2 emissions during an outage exceed applicable permitted limits, the Facility reports them as such. Total emissions for a CO boiler outage event are also captured and included when determining compliance with the annual SO_2 limit of 182.3 TPY. Draft/Proposed Title V Renewal Condition 3 - Table 1.da.3.i.A. Indeed, the CAA does not require that an emission limit "be composed of a single, uniformly applicable numerical emission limitation" or "a static, inflexible limit." 80 Fed. Reg. 33,899-900. "The critical aspect" is that emissions are limited "on a continuous basis, regardless of whether the emission limitation as a whole is expressed numerically or as a combination of numerical limitations, specific control technology requirements and/or work practice requirements applicable during specific modes of operation, and regardless of whether the emission limit is static or variable." 80 Fed. Reg. 33,900

Furthermore, during operation of the backup incinerator, the Facility is subject to required operating parameters to ensure emissions are minimized during a CO boiler outage event. Specifically, the requirement to operate the backup incinerator at a minimum of 1300 deg F and at a minimum retention time of 0.3 seconds ensures CO destruction and compliance is maintained with the normal 500 ppm hourly limit. The requirement to operate at 1700 deg F to achieve the 0.19 grain/dscf requirement ensures PM emissions are minimized during unplanned outages. Annual permit limits for CO and PM remain in effect and compliance with such limits must be demonstrated. Draft/Proposed Title V Renewal Condition 3 - Table 1.da.1.i.H.1.

v. Relevant Comment excerpt, July 31, 2020 comments at 17-18

> *"[T]he permit is written in a way that strongly suggests that many of the limits listed for the FCCU and FCU only apply when particular controls are being operated."*

DCRC Response:

The relevant comment seems to ignore the basic concept that if an emission source is outfitted with an air pollution control device, as contemplated by the relevant permitting authorization, then the emission source must not be operated if the control is not being operated. *See, e.g.,* 7 DE Admin. Code 1102 § 11 (permit satisfaction is conditioned on demonstration of satisfactory performance of control device; potential emission projections based on application of control device require corresponding permit-based emission limit reflecting control device use at all times). With respect to the Facility, the Draft/Proposed Title V Renewal provides that the Belco pre-scrubber, the WGS, the caustic polishing scrubber, and in the case of the FCU, the SNCR system, shall be operating properly *at all times* when the FCCU and FCU, respectively, are operating. Draft Proposed Title V Renewal Condition 3-Table 1.e.1.i.B; Condition 3-Table 1.da.1.i.C. This obligation extends to periods of planned startup and shutdown, and, accordingly, in the event of unplanned shutdown events, the Facility reports any excess emissions as exceedances. Draft/Proposed Title V Renewal Condition 3 - Table 1.e.1.i.C; Condition 3 - Table 1.da.1.i.D. The Facility's permit therefore does not specify relief from these limits during unplanned outages, but rather defines requirements to minimize emissions during unplanned outages. Finally, as noted above, the planned startup and shutdown limits need not apply to the

CO boiler when the FCCU regenerator is operating in full burn mode, because total CO combustion is achieved under such operating conditions.

On a very basic level, the Commenters seem confused about the emission source-control device distinction. Certainly, a control device is not capable of generating air emissions, and therefore the emission standards at issue necessarily apply to the emission source (even though the applicable emission limit is based on the required application of the relevant control device).

vi. Relevant Comment excerpt, July 31, 2020 comments at 18

"[T]he draft permit unlawfully provides for alternative NOx limits during malfunctions and maintenance of the FCCU's SNCR."

DCRC Response:

Irrespective of any specific NOx limits applicable to the FCCU under distinct operating scenarios, the Facility has historically been and remains subject to a Facility-wide emission cap for NOx emissions, consistent with 7 DE Admin. Code 1142. DCRC and DNREC recently entered into a settlement agreement that confirmed the applicability of such Facility-wide standard for NOx emissions and provided for the issuance of certain revised preconstruction permits/state-based operating permits consistent with the terms of the settlement agreement. Such permits were properly subject to public notice and comment before being proposed for incorporation into the Title V Permit through the Draft/Proposed Title V Renewal. Additionally, the same issues involving the Facility-wide NOx cap, as well as the approach used to resolve such issues among DCRC and DNREC, also apply to certain other emission sources/equipment at the Facility, including but not limited to, Boilers 3 and 4 and the combustion turbines (Combined Cycle Units).

vii. Relevant Comment excerpt, July 31, 2020 comments at 18

"The draft permit could be read to unlawfully provide an alternative NESHAP limit during malfunctions of the FCCU where none exists in the NESHAP regulations. Specifically, the permit suggests that—instead of complying with the NESHAP CO limit of 500 ppm during startup, shutdown, malfunction, and hot standby—the FCCU can comply with an alternative limit of maintaining the O2 concentration in the exhaust gas from the regenerator overhead at or above 1 volume percent. See Title V Permit Condition 3 – Table 1, Part 2(e)(9)(iii)(B)-(C). Under the NESHAP regulations, however, this alternative limits only applies during startup, shutdown, and hot standby—not malfunctions. 40 C.F.R. 63.1565(a)(5). While the draft permit's alternative limit during malfunctions could possibly only apply to the FCCU's HCN limit of 45 lb/hr, the draft permit is unclear whether the alternative limit also applies to the CO limit. DNREC cannot relax EPA's NESHAP requirements, including the applicability of the 500 ppm CO limit; only EPA may revise its regulations. See May 22, 2020 comments at 12-14. Thus, DNREC should delete the language that allows compliance with the alternative limit during malfunctions."

DCRC Response:

DCRC recognizes that the applicable regulatory standard for control device parameters for complying with CO and inorganic HAP emissions limitations is limited to startup, shutdown, and hot standby periods, and does not extend to malfunctions. 40 C.F.R. § 63.1565(a)(5). Consistent with such standard, the applicable Operational Limitations in the permit do not refer to malfunctions. Accordingly, DCRC believes the reference to "malfunction" in the corresponding Compliance Method provision was an unintended oversight and could be eliminated. In any event, the Facility does not interpret the relevant permit condition as applying during malfunctions.

viii. Relevant Comment excerpt, July 31, 2020 comments at 18-20

"The Draft Permit Provides Unlawful Startup and Shutdown Exemptions for the Crude Unit Heaters, Boiler 80-2, and Combined Cycle Units. These startup and shutdown exemptions are unlawful because they violate the Clean Air requirement that emission limits apply continuously, not only during some periods of time."

DCRC Response:

As noted above, the Commenters seek to impermissibly expand the scope of the SSM SIP Call. In addition to the reasons discussed above in section 3.c.vii. regarding the authorized application of the NOx Facility-wide limitation, including as an appropriate alternative to source-specific limitations under certain operating scenarios, DCRC reiterates that an emission limit need not be static nor take a singular form under all operating conditions to comply with the CAA requirement that emission limits apply continuously. Here, the relevant units identified in the Comments (Boilers 3 and 4, Boiler 80-2, the Crude Unit Heaters, and the Combined Cycle Units) are all subject to the Facility-wide NOx limit, as well as both short-term and annual limits for other pollutant parameters.

ix. Relevant Comment excerpt, July 31, 2020 comments at 23

"The Draft Permit's Provisions Covering the Sulfur Recovery Area Contain Incomprehensible Requirements, Fail to Accurately Reflect Applicable NESHAP and NSPS Requirements, and Include Unlawful Startup and Shutdown Provisions."

DCRC Response:

The Commenters are not tasked with implementing the requirements of the Facility's Title V Permit. That job rests with the Facility's personnel, who have been responsible for interpreting and demonstrating compliance with the relevant terms for many years, some for decades. Although from an external perspective certain permit language may appear ambiguous on its face, when you overlay the significant practical experience that comes from years of

demonstrated permit compliance, the intended meaning generally becomes clear. If it is not, then the Facility works closely with DNREC to ensure the proper understanding of the subject permit condition. With respect to the percent oxygen limit referenced in the comments, DCRC can confirm that, in practice, 250 ppm is treated as the applicable standard under all normal operating scenarios, thus dispelling the notion of any perceived ambiguity.

During shutdown, the Facility must go through required melting and burnout steps to eliminate any remaining sulfur on the reactor beds and the catalyst, respectively. Operationally, this is essential to save the catalyst and allow for operations to safely open up the equipment for turnaround maintenance. It is also consistent with the shutdown requirements in 40 C.F.R. § 63.1568, as applicable. For these reasons, such approach represents the best practice in the industry and is used by any facility equipped with an SRU/SCOT, not just the Facility.

d. Contrary to the Comments, certain preconstruction permits/state operating permits are not ripe for incorporation into the Facility's Title V Permit; such permits will properly be incorporated through subsequent Title V Permit modifications.

The Commenters state that DNREC, in its Review Memorandum, identified nine permits that have been issued to DCRC but that DNREC is not now incorporating into the Title V Permit. July 31, 2020 Comments at 31; DNREC Review Memorandum at 4-5. The Commenters claim that the requirements from these nine permits must be incorporated into the Title V Permit during the instant renewal process.

Under DNREC's title V regulations, a source is required to incorporate preconstruction permit conditions within 12 months of commencing operation of the permitted source. 7 DE Admin. Code 1130, § 5.1.1.4. For the reasons explained below, the nine permits listed in DNREC's Review Memorandum are not yet appropriate for incorporation into the Title V Permit through this renewal.

- Ethanol Marketing Project
  - *Permit: APC-1988/0125-OPERATION (A6)(MACT)* – This permit, which contains provisions allowing the Marketing Terminal to operate the VaVaC system, was incorporated into the Title V Permit for the Marketing Terminal through an application submitted on May 14, 2019.
  - *Permit: APC-1988/0125-CONSTRUCTION (A7)(MACT)* – This permit authorized the Marketing Terminal to complete installation of ethanol loading equipment at a later date up through the expiration of the three year construction period. This project was not implemented, and therefore this preconstruction permit will expire and will not be incorporated into the Title V Permit.
- Low Sulfur Fuels Project Extension
  - *Permit: APC-2015/0058-CONSTRUCTION(NSPS)(EXT)* – Reformer SGHGBATS2015-02 – This permit was just issued on July 10, 2020, long after the issuance of the Draft/Proposed Title V Renewal. Under Section 1.5 of the permit, DCRC is required to submit a complete supplement to the Title V Permit

application within 12 months of requesting a permit to operate. This necessary precondition to Title V incorporation has not yet occurred.

- *Permit: APC-2015/0060-CONSTRUCTION (EXT)* – Cooling Tower – This permit was just issued on July 10, 2020, long after the issuance of the Draft/Proposed Title V Renewal. Under Section 1.5 of the permit, DCRC is required to submit a complete supplement to the Title V Permit application within 12 months of requesting a permit to operate. This necessary precondition to Title V incorporation has not yet occurred.
- *Permit: APC-2015/0061-CONSTRUCTION (NSPS) (EXT)* – Flare – This permit was just issued on July 10, 2020, long after the issuance of the Draft/Proposed Title V Renewal. Under Section 1.5 of the permit, DCRC is required to submit a complete supplement to the Title V Permit application within 12 months of requesting a permit to operate. This necessary precondition to Title V incorporation has not yet occurred.

- FCU Ultra Low NOX Burner Project Extension
  - *Permit: APC81/0829-CONSTRUCTION/OPERATION (Amendment 10)(PSD-NSR)(EXT)* – This permit expires on February 3, 2021, and as of this date, DCRC does not intend to implement this project.
- FCCU Manway Control Project
  - *Permit: APC-93/0350 – CONSTRUCTION/OPERATION (Amendment 2)(NESHAP)* – This permit was issued on September 4, 2019. Under Section 1.5 of the permit, DCRC is required to submit an application to modify the Title V Permit within 12 months of the date of the permit. DCRC's application for a renewal of the Title V Permit was submitted on May 10, 2019, before receipt of this permit.
- Marine Vapor Recovery System Amendment
  - *Permit: APC95/0471-CONSTRUCTION/OPERATION (Amendment 6)(LAER)(MACT)(NSPS)* – This permit was issued on September 25, 2019. Under Section 1.5 of the permit, DCRC is required to submit an application to modify the Title V Permit within 12 months of the date of the permit. DCRC's application for a renewal of the Title V Permit was submitted on May 10, 2019, before receipt of this permit.
- Wastewater Treatment Plant (WWTP) Cuff Oil Processing Project
  - *Permit: APC-81/1008-CONSTRUCTION (A5)(NESHAP)* – This permit was issued on September 27, 2019. Upon completion of construction, DNREC will issue a permit to operate the source, which permit will presumably require DCRC to submit an application to modify the Title V Permit within 12 months of the date of that permit, consistent with applicable regulatory-based procedures. DCRC's application for a renewal of the Title V Permit was submitted on May 10, 2019, before receipt of this permit.

e. The Draft/Proposed Title V Renewal properly excludes a compliance schedule.

The Commenters claim that DCRC is "not in compliance" with applicable requirements and therefore a compliance schedule should be included in the Title V Permit. July 31, 2020

Comments at 36-45. The Commenters list certain past compliance incidents at the Facility that have either not resulted in any formal enforcement action whatsoever, or that have been formally resolved between DCRC and DNREC. Yet, they fail to identify a single *outstanding* instance of noncompliance.

EPA's and DNREC's regulations require a "schedule of compliance for sources that are not in compliance with all applicable requirements." 40 C.F.R. § 70.5(c)(8)(iii)(C); 7 DE Admin. Code 1130 §§ 5.4.8.3.3; 6.3.3. EPA has explained that a compliance schedule is required in a title V permit where the source is not in compliance with applicable requirements at the time of permit application submittal. *In the Matter of Bunge North America, Inc. Destrehan Grain Elevator St. Charles Parish, Louisiana*, Order on Petition No. VI-2016-2 at 6 (June 7, 2017) ("Bunge North America Order").

Similar to the list and chart that the Commenters included in their comments, the petitioners in the Bunge North America Order provided only "a chart documenting a number of inspection reports, warning letters, and conference reports related to the LDEQ enforcement actions." *Id.* EPA found that "the mere fact that an enforcement action has been initiated is not sufficient to demonstrate noncompliance with applicable requirements for permitting purposes." *Id.* (citing *Sierra Club v. Johnson*, 541 F.3d 1257, 1267–68 (11th Cir. 2008)). As the Eleventh Circuit noted in *Sierra Club v. Johnson*, "a violation notice 'is simply one early step in the EPA's process of determining whether a violation has, in fact, occurred.'" 541 F.3d at 1267. In denying the petitioners' request for an objection, EPA noted that "the Petitioners do not address any specific aspects of ongoing enforcement actions or otherwise explain why the circumstances underlying such enforcement actions demonstrate that Bunge remained out of compliance with any particular permit term or applicable requirement at the time of permit application or issuance." Bunge North America Order at 6.

So too here, the Commenters have failed to point to any specific aspect of ongoing noncompliance, such that DCRC was out of compliance with any applicable requirement at the time Title V Renewal Application was submitted. Rather, on January 27, 2020, DCRC entered into a settlement agreement with DNREC that resolved a Notice of Administrative Penalty Assessment and Secretary's Order No. 2019-A-0043, which resolved any outstanding NOVs issued through the date of DCRC's submission of the Title V Renewal Application on May 10, 2019.[11] Any NOVs issued after May 10, 2020: (1) relate to isolated incidents that are neither outstanding nor ongoing; (2) have not resulted in any formal enforcement action; and (3) are not considered in determining whether a compliance schedule is required. Bunge North America Order at 6. In addition, as noted above, the mere existence of an NOV is not sufficient to demonstrate noncompliance with applicable requirements for permitting purposes.

Furthermore, any self-reported deviations listed in Exhibit 3 of the comments: (1) relate to discrete events that are neither outstanding nor ongoing; (2) are encompassed in an NOV or

[11] *See* Settlement Agreement (Jan. 27, 2020), at http://www.dnrec.delaware.gov/Info/Documents/20200127-DNREC-DCRC-settlement-agreement-AQ-permit-violations.pdf; *see also* Notice of Administrative Penalty Assessment and Secretary's Order No. 2019-A-0043 (Nov. 11, 2019), at http://www.dnrec.delaware.gov/Info/Documents/Secretarys-Order-No-2019-A-0043.pdf.

otherwise have not resulted in any formal enforcement action; and (3) are not considered in determining whether a compliance schedule is required, to the extent that they occurred after May 10, 2019. Indeed, the mere reporting of a deviation through a title V-based periodic compliance report or otherwise does not mean that any noncompliance in fact occurred. The Commenters have therefore failed to meet the requisite burden for demonstrating that a compliance schedule is required as part of the Draft/Proposed Title V Renewal.

f. There is no applicable legal obligation to physically affix to the Title V Permit the specific operating plans to which the Facility is subject, where the compliance obligations of such plans are otherwise clearly incorporated by reference in the Title V Permit.

As a general matter, any assertion by the Commenters that this or any other title V permit must have attached to it the documentation comprising any operating plans that apply to the permitted facility through the title V permit is wholly unsupported by law. It is also practically infeasible.

Any facility that is required to hold a title V permit is, by its very nature, complex. These typically larger industrial facilities are often subject to a host of different operational and/or technical plans. While it is indisputable that title V permits generally incorporate such plans by reference (as they should), they rarely if ever, incorporate the specific information/documentation comprising such plans. Instead, permitted facilities are obligated to maintain copies of relevant plans on site, both so facility personnel can access them at any time and so agency representatives can review them during routine or other field inspections. To find that an already lengthy title V permit (DCRC's is more than 400 pages) must also incorporate hundreds of additional pages from various technical plans would lead to unwieldy permit management and substantially increase the likelihood that something is missed. The Comments on this topic therefore rub up against one of the hallmarks of the title V program: a title V permit is supposed to be user-friendly to facilitate compliance with all applicable requirements under the CAA. There is also the further complicating factor that any change to an operating plan would require a formal permit modification, thereby disincentivizing facility personnel from maintaining accurate and up-to-date plans reflective of current operating conditions.

More specifically, the Commenters state that EPA's regulations require DCRC to develop and implement a flare management plan and that therefore DNREC is required to attach a copy of the flare management plan to the Title V Permit. July 31, 2020 Comments at 32-33. The Commenters are correct that DCRC is required to develop and implement a flare management plan. *See* 40 C.F.R. § 60.103a; 40 C.F.R. § 63.670(o). The Commenters, however, are incorrect, and fail to cite any support for their contention, that DNREC is required to attach a copy of the flare management plan to the Title V Permit. The requirement to develop and implement a flare management plan is the "applicable requirement" that must be included, and in fact is included, in the Draft/Proposed Title V Renewal. *See* Draft/Proposed Title V Renewal Condition 3, Table 1, Part 2(n)(1)(ii)(H); Part 2(n)(3)(i); Part 2(n)(3)(v).

A permittee is required to re-submit a flare management plan for approval under limited circumstances, which include where the permittee: (1) adds an alternative baseline flow rate, (2)

revises an existing baseline, (3) installs a flare gas recovery system or is required to change flare designations and monitoring methods as described in 40 C.F.R. § 60.107a(g), or (4) alters the design smokeless capacity of the flare. *See* 40 C.F.R. § 60.103a(b)(2); 40 C.F.R. § 63.670(o)(2)(ii). Attaching a copy of the flare management plan to the Title V Permit would subvert this re-submission and review process by requiring the permittee to submit an application for an amendment to the Title V Permit *each and every time* the flare management plan is revised, even when EPA's regulations would not require such approval. This comment lacks a legal basis, and a copy of the flare management plan should therefore not be attached to the Title V Permit, consistent with DNREC's current approach.

g. The Title V Permit properly addresses the CAA's Risk Management Plan ("RMP") requirements consistent with other, approved title V permits as affirmed by EPA.

The Commenters state that the Title V Permit should state whether 40 C.F.R. Part 68 applies to the Facility and should contain all of the conditions listed at 40 C.F.R. § 68.215(a)(2). The Commenters specifically cite Condition 2(p)(1) of the Title V Permit, which states as follows:

> In the event this stationary source, as defined in the State of Delaware 7 DE Admin. Code 1201 "Accidental Release Prevention Regulation" Section 4.0, is subject to or becomes subject to Section 5.0 of 7 DE Admin. Code 1201 (as amended March 11, 2006), the owner or operator shall submit a risk management plan (RMP) to the Environmental Protection Agency's RMP Reporting Center by the date specified in Section 5.10 and required revisions as specified in Section 5.190. A certification statement shall also be submitted as mandated by Section 5.185. *[Reference: 7 DE Admin. Code 1130 Section 6.1.4 dated 12/11/00, 7 DE Admin. Code 1201 as amended March 11, 2006 and Delaware; Approval of Accidental Release Prevention Program, Federal Register Vol. 6, No. 11 pages 30818-22 dated June 8, 2001]*

In 2004, EPA determined that this type of flexible, generic permit term is sufficient to ensure compliance with the RMP requirements and, in support of its determination, stated as follows:

> NYPIRG alleges that the permit must state whether CAA § 112(r) applies to the facility . . . .
>
> The reference to Risk Management Plans ("RMP") appears at Condition 25 of the permit. This condition states, in part: "If a chemical ... listed in Tables 1, 2, 3 or 4 of 40 CFR § 68.130 is present in a process in quantities greater than the threshold quantity listed in Table 1, 2, 3 or 4, the following requirements will apply."

> The condition goes on to list these requirements. This condition is written generally because of the nature of the section 112(r) requirements, which are different from other applicable permit requirements. Since applicability is based on having a listed 40 CFR § 68.130 substance over the threshold quantity located at the facility, applicability may fluctuate over the life of the permit. Therefore, although general section 112(r) permit conditions do not definitively state whether an individual source is subject to the risk management plan requirements, the permit structure ensures that the permit covers any newly subject source, or any source whose applicability fluctuates, thereby ensuring that the section 112(r) permit obligations remain up to date.
>
> . . .
>
> The North River title V permit currently states that NYCDEP must comply with part 68 and certify appropriately if a listed chemical is present above threshold quantities. This language is appropriate and need not be amended. As explained above, if North River were to trigger the section 112(r) and Part 68 requirements, the requirements of Condition 25 would become applicable to the source. For these reasons, EPA denies the petition with respect to this issue . . . .

See In the Matter of NYCDEP North River Water Pollution Control Plant, Order on Petition No. II-2002-11 at 24–25 (Sept. 24, 2004); *see also In the Matter of Newark Bay Cogeneration Partnership LP*, Order on Petition No. II-2019-4 at 15-16 (Aug. 16, 2019) ("EPA determined that this type of flexible, generic permit term is sufficient to ensure that CAA § 112(r) permit obligations remain up to date, even where the applicability of RMP could fluctuate over the life of the permit.") The current language in the Draft/Proposed Title V Renewal is unquestionably consistent with these parallel provisions from other title V permits that EPA has already deemed to be adequate for CAA compliance.

The Commenters also incorrectly claim that the "general language in the draft permit on compliance certification" does not address Part 68 requirements, yet Condition 2(p)(1) specifically provides that, if DCRC is subject to or becomes subject to the RMP requirements, a "certification statement shall also be submitted as mandated by Section 5.185" of 7 DE Admin. Code 1201.

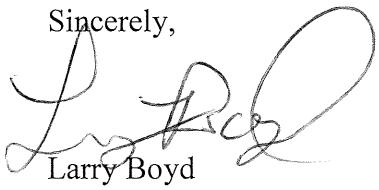
4. *Additional General Objections and Conclusion*

To the extent not otherwise addressed above, DCRC disagrees with the remaining comments identified by the Commenters in the following sections of the comments submitted on July 31, 2020: Section II.A. (affirmative defenses); Section II.B. (director's discretion provisions); Section III (origin and authority for permit conditions); Section IV (fenceline monitoring and NESHAP/NSPS); Section V (permit shield); Section IX (general duty requirement); and Section XI (fenceline monitoring). DCRC also disagrees with the comments relating to environmental justice, submitted by the Commenters in their comments dated June 25,

2020, recognizing that DNREC's permitting process properly accounts for relevant environmental justice considerations. In this way, DNREC's determination to issue the Draft/Proposed Title V Renewal reflects the Department's prior conclusion that any environmental impact associated with the operation of air emission sources governed by the Facility's Title V Permit is acceptable in light of relevant environmental justice factors.

For all of the reasons set forth above, DCRC supports the Draft/Proposed Title V Renewal as issued by DNREC and requests that DNREC submit such permit to EPA for final approval. DCRC appreciates this opportunity to provide its response addressing the Comments and looks forward to continuing relevant discussions with DNREC. Should you have any questions or need any additional information, please contact me.

Sincerely,



Larry Boyd
Environmental Manager
Delaware City Refining Company