BEFORE THE ENVIRONMENTAL APPEALS BOARD
FOR THE STATE OF DELAWARE

In the Matter of	)	
	)	
NOTICE OF ADMINISTRATIVE	)	**EAB No. 2026-_____**
PENALTY ASSESSMENT AND	)	
SECRETARY'S ORDER	)	
No. 2025-A-39		

STATEMENT OF APPEAL BY DELAWARE CITY REFINING COMPANY LLC

Delaware City Refining Company LLC ("DCRC"), by and through its counsel, submits the instant appeal of an action of the Secretary of the Delaware Department of Natural Resources and Environmental Control ("DNREC"). In support of this appeal, DCRC avers as follows:

I. BACKGROUND TO APPEAL

1. This appeal ("Appeal") is taken from issuance by the Secretary of DNREC of the Notice of Administrative Penalty Assessment and Secretary's Order No. 2025-A-39 dated December 21, 2025 (the "Order"). DCRC received service of the Order on December 22, 2025. The Order alleges that DCRC acted in noncompliance with 7 *Del. C*. Ch. 60, state air regulations, and its Title V Permit. A copy of the Order is attached hereto as Exhibit A.

2. DCRC operates a petroleum refinery located at 4550 Wrangle Hill Road, Delaware City (the "Refinery"). DCRC operates certain regulated emission sources at the Refinery, and such sources, as appropriate, are governed by air quality permits issued by DNREC pursuant to its Title V regulations 7 Del. Admin. C. § 1130 (referred to

collectively herein as the "Title V Permit"). The Title V permit includes and imposes certain emission limitations and operating requirements on the Refinery.

3. The Order addresses several separate instances of alleged violations related to flaring, outages of the CO boiler of the Fluid Catalytic Cracking Unit ("FCCU"), and outages of the CO boiler of the Fluid Coking Unit (the "Coker"), which occurred during 2024 and 2025. In every alleged instance, DCRC personnel acted promptly to minimize emissions and to implement corrective measures to prevent future occurrences of such incidents. DCRC also self-reported the incidents to the extent required by applicable permit- and regulatory-based requirements. For these alleged violations, the Order assesses an administrative penalty of $300,000.

4. The Refinery was served with a copy of the Order on December 22, 2025 and filed this Statement of Appeal on January 9, 2026, fewer than 20 days later. Accordingly, this Statement of Appeal is timely filed in accordance with 7 *Del. C.* § 6008(a) and Section 1.1 of the Regulations of the Environmental Appeals Board (the "Board"). *See* 7 Del. Admin. C. § 105-1.1.

5. In accordance with Section 2.3 of the Board's Regulations, a $50 deposit for costs accompanies this Appeal.

II. BASIS FOR APPEAL

A. The Interest Which Has Been Substantially Affected

6. DCRC's interests have been substantially affected by the issuance of the Order because DNREC's interpretations of permit-based and regulatory-based standards as applied to the Refinery are inconsistent with the Refinery's Title V Permit, contrary to

law and fact, and otherwise constitute an abuse of discretion for the reasons set forth below.

7. Relatedly, DCRC's interests have been substantially affected by the issuance of the Order because, if upheld, it would assess a penalty of $300,000 against DCRC. Further, DCRC's interests have been substantially affected by the issuance of the Order because it is based, at least in part, on DNREC's erroneous interpretation of certain statutory, regulatory, and permit requirements. If the Order is upheld, it could effectively validate such erroneous legal interpretation by DNREC, thereby exposing DCRC to potential future enforcement action by DNREC for the same or similar circumstances addressed in the Order, which DCRC asserts are consistent with lawfully permitted conduct.

B. Allegation That The Decision Is Improper

8. For the reasons set forth herein, DCRC asserts that the Order, including the administrative penalty assessed therein, is improper because it is not supported by substantial evidence, is contrary to law and fact, is arbitrary and capricious and constitutes an abuse of discretion.

C. Reasons Why The Decision Is Improper

9. As described below, the Order is improper, not supported by substantial evidence, is contrary to law and fact, is arbitrary and capricious and constitutes an abuse of discretion for several reasons. The absence of a specific refutation of individual allegations should not be construed as an admission by DCRC as to any fact or legal conclusion included within the Order. Instead, except as specifically stated herein,

DCRC does not admit the allegations and/or legal conclusions contained within the Order, and DCRC expressly reserves all rights and defenses relative to such allegations and/or legal conclusions.

i. <u>The Findings and Conclusions Regarding Flaring Incidents are Improper, and the Order's Position with Respect to Emissions Generated by Flaring Incidents is Contrary to Law and Fact, Inconsistent With Applicable Authority, and an Abuse of Discretion.</u>

10. The Order takes the position that while DCRC is "permitted by the Department to utilize the flare system to minimize impacts on the environment, the permit does not allow the emission of pollutants from the flare." Order at 3. Thus, the Order concludes that DCRC has violated 7 *Del. C.* § 6003(a)(1) and Section 2.1 of 7 DE Admin. Code 1102 for the unpermitted release of SO_2 during five flaring events recounted in the Order. Order at 21 (Conclusion No. 1); *see also* Order at 16 (Findings of Fact No. 3).

11. DCRC fundamentally disagrees with DNREC's position as stated above. Contrary to this position, flaring events do not constitute "unpermitted" emission events, nor do they result in specifically unauthorized emissions or otherwise constitute reportable deviations.

12. As background, in support of prior applications for an air quality permit for the flaring system, DCRC and/or its predecessors identified gaseous streams from process operations that would be directed to the flaring system under various operating scenarios. Indeed, as the Order states, the purpose of the flare system "is to safely handle

and dispose of combustible gases and vapors that are released during refinery upsets, startups, and shutdowns in order to minimize impacts on the environment." Order at 3.

13. The operation of numerous and complex process units at a petroleum refinery necessarily results in the intermittent creation of process gases and vapors that cannot be safely managed within the process units, including as a result of startup, shutdown, and malfunction events. By directing these gases and vapors to the flaring system for combustion prior to release to the environment, as acknowledged by DNREC through the Order, operation of the flaring system minimizes impacts of these gases and vapors to the environment.

14. Consistent with the foregoing, the Order expressly acknowledges that applicable air quality permits for the Refinery identify and authorize the use of the flaring systems, but DNREC nevertheless alleges through the Order that such permits do not authorize *emissions* from the flaring system. Such interpretation is inconsistent with DNREC's own regulations governing air permitting, which provide that an air quality permit is required *only* for a source that has the potential to emit one or more air contaminants into the atmosphere. *See* 7 Del. Admin. C. 1102. In other words, if as DNREC contends, the Refinery's flaring system cannot legally be the source of air emissions, then the flaring system would neither require nor be governed by an air quality permit in the first instance. The Order expressly acknowledges that the Refinery's flaring system is subject to and governed by applicable air quality permits, which therefore authorize the flaring system and the emissions expected from such system.

15. The absence from applicable air quality permits of specific emission limits for the regulated parameters related to flaring operations also does not undercut the authorization for flaring operations inherent in the permit authorization. By design and intended operation, the flare is utilized to minimize emissions during *non-routine* and non-forecasted operating conditions. Therefore, by practical necessity, the specific operation of the flare, both in terms of duration and aggregate emission levels, cannot be predicted. DNREC's contention that applicable air quality permits authorize the existence and operation of, but not emissions from, the flare is contrary to both fact and law.

16. DCRC acknowledges that it experienced certain flaring events during the timeframe identified through the Order. However, DCRC states that its operation of the flaring system during such circumstances was consistent with the scope of the authorization granted through applicable air quality permits for the operation of and emissions from such flaring system.

17. DCRC further asserts that its operation of the flaring system during the circumstances addressed in the Order was consistent with the appropriate objective of minimizing impacts to human health and the environment. Each incident identified in the Order as involving use of the flaring system resulted from specific circumstances, and DCRC generally asserts that its actions in these circumstances were consistent with good air pollution control practice in response to an underlying startup, shutdown, or malfunction event.

18. DCRC further states that, upon each relevant flaring incident that resulted in the emissions of a regulated parameter in excess of an applicable reportable quantity for such parameter, DCRC provided notification to DNREC concerning the incident, as well as follow-up written notification concerning the circumstances giving rise to the event, the impact of the event and the actions taken by DCRC to minimize such impact.

19. It is not possible to operate flares without emitting air pollutants. Thus, DCRC also asserts that if DNREC's position relative to emissions generated from flaring activities is effectively accepted through upholding the Order, then DCRC will remain legally stuck between a rock and a hard place, unable to ensure simultaneous compliance with the equally applicable obligations to minimize air pollution during startup, shutdown, or malfunction events, for which the Refinery necessarily relies on flaring under certain circumstances, and the prohibition on generating emissions through flaring as interpreted by DNREC (and with which DCRC does not agree). It is widely accepted that the broad legal doctrine of impossibility precludes subjecting a regulated party to two or more obligations for which simultaneous compliance is impossible. This is particularly pronounced in the context of multiple conditions of the same air permit.

20. Accordingly, the Order should be reversed with respects to Finding of Fact No. 3 and Conclusion No. 1.

ii. The Order Includes Allegations of Noncompliance at the FCCU COB That are Inconsistent With the Refinery's Title V Permit and With Law and Fact.

21. Among the alleged violations in the Order relating to the FCCU COB are those stemming from a June 10, 2024 incident during which the COB tripped.[1] This incident corresponds to Conclusion No. 6 in the Order, which claims DCRC "is found to be in violation of Section 2.0 of 7 DE Admin. Code 1111 and Condition 3-Table 1.e.5.i.B of Title V Permit-Part 2 (Ren 2), for allowing the emission of 16,689 lbs. of CO without first burning at 1300ºF for at least 0.3 seconds during the FCCU COB incident on June 10, 2024." Order at 22. DCRC disagrees with DNREC's asserted basis for this alleged permit noncompliance for the following reasons:

a. Within the Title V Permit, Operational Limitation J (1.e.5.i.J) states, "Except as provided in Operational Limitation M, this permit does not authorize emissions exceeding the limits set forth in Condition 3 – Table 1.e.2 through 9 including during periods of any unplanned shutdown of the FCCU, or any unplanned shutdown or bypass of the FCCU COB…."

b. Operational Limitation M (1.e.5.i.M) states that in the event of an unplanned shutdown/bypass of the COB, operation of the FCCU shall be in accordance with Attachment G, which is the Refinery turndown matrix. The turndown matrix

[1] DCRC's focus herein on the June 10, 2024 incident described in Conclusion No. 6 of the Order is not an admittance of the other allegations and/or legal conclusions contained within the Order related to the FCCU COB, and DCRC expressly reserves all rights and defenses relative to such allegations and/or legal conclusions.

expressly allows for 24 hours of operation before needing to fully transition to full burn operation (or restart the COB).

c. During the relevant incident, full burn mode was achieved in less than 7 hours and was therefore in accordance with Operational Limitations M and J of the Title V Permit. On this basis, DCRC disagrees that any noncompliance occurred as articulated by DNREC in Conclusion No. 6 of the Order. Such allegation is therefore inconsistent with the Refinery's Title V Permit, its underlying legal authority, and law and fact, is arbitrary and capricious, and represents an abuse of DNREC's discretion.

22. Accordingly, the Order should be reversed with respects to Conclusion No. 6.

iii. The Findings and Conclusions Regarding the BUI Emissions as a Title V Permit Violation are Inconsistent With Applicable Authority.

23. Conclusion No. 20 of the Order takes the position that DCRC has violated its Title V Permit because the SO_2 that was emitted during and through operation of the Back-Up Incinerator ("BUI") between May 25, 2025 and June 11, 2025 exceed the annual SO_2 limit of 182.3 TPY for Emission Unit No. 22, also known as the Coker. Order at 25. There is no factual, legal, or technical support for the Secretary's position.

24. The annual limit of 182.3 TPY applies to *permitted* emissions during normal operating conditions of the Coker. This is the only operating scenario contemplated by the underlying permit application giving rise to the relevant Title V Permit condition, and thus the only operating scenario that can be authorized by the Title V Permit as a legal matter in accordance with the federal Clean Air Act Title V program,

as implemented by DNREC, and DNREC's own environmental control statutory and regulatory authority. By contrast, SO_2 emissions from the BUI—which *only* operates when the Coker COB is offline which is categorically not a normal operating condition—*never* occur during normal operations nor are they permitted emissions. *See also* Order at 12 (noting that in "normal operations" Coker burner flue gas is routed to the Coker COB, but when the Coker COB is bypassed, that gas is routed to the BUI to control emissions).

25. DCRC agrees with DNREC's interpretation of the Title V Permit that this annual limit applies under standard operating conditions at the Coker and COB. But there is no support for DNREC's interpretation that the same annual limit applies to both standard operating conditions *and* to abnormal operation conditions. Simply put, the annual TPY limit cannot be applied to the standard operating configuration and also to multiple alternative operating configurations, including, without limitation, to the one at issue here: operation of the BUI to control emissions when the Coker COB is offline.

26. DNREC's Order further demonstrates the inconsistency of its own position. Conclusion No. 19 of the Order alleges that DCRC violated 7 *Del. C.* § 6003(a)(1) and Section 2.1 of 7 Del. Admin. C. 1102 because the release of SO_2 through the use of the BUI stack between May 25, 2025 and June 11, 2025 was an "unpermitted release." Order at 25. The Order then alleges a separate violation in Paragraph 20 for the same incident, claiming that the "unpermitted release" cited in Paragraph No. 19 also constitutes a violation of DCRC's Title V Permit's TPY limit. DNREC's position—alleging that DCRC's SO_2 emissions from the BUI are both an unpermitted release *and*

that the same SO_2 emissions violate DCRC's Title V Permit's annual TPY limit—is inherently inconsistent and an abuse of discretion.

27. DNREC's assertion that the SO_2 emissions from the BUI stack are both an unpermitted release and count towards whether DCRC complies with its annual limit for SO_2 emissions is a novel interpretation. The relevant permit conditions governing the Coker and COB have remained unchanged for years, and under Permit Condition 3 – Table 1 Part 2.da.1.H,[2] DNREC never interpreted the annual limit as applying outside the normal operating condition until after the COB outage that occurred late May to mid-June 2025. Indeed, DNREC first articulated its apparent new position relative to the use of the BUI in a Notice of Violation issued to DCRC following that outage with virtually no explanation for the change. DCRC submitted a written response to the Notice to DNREC challenging this interpretation.

28. Ultimately, DNREC's abrupt change to effectively bifurcate the short-term concentration standard and the annual emissions limit in the referenced permit condition and the resulting enforcement posture is inconsistent with DNREC's longstanding practice, including without limitation under the Title V Permit, of interpreting emissions during non-normal or alterative operating scenarios as being unpermitted or unauthorized and therefore not subject to such annual permit limitations. DNREC's reversal on this fundamental issue is unjustified, and without any underlying

[2] DNREC has not alleged that the BUI was operated outside the requirements set forth in subsection 1 of this condition.

explanation in the Order or otherwise is arbitrary and capricious and represents an abuse of DNREC's discretion.

29. Accordingly, Conclusion No. 20 of the Order should be reversed.

iv. The Order Fails to Apply the Facts to the Assessment of the Administrative Penalty Factors Under 7 *Del. C.* § 6005(b)(3).

30. The Order assess a blanket $300,000 administrative penalty against DCRC "for the violations identified in" the Order. DNREC claims it based this penalty on its consideration of the factors stated in 7 *Del. C.* § 6005(b)(3) (the "Factors"), but the Order provides only a cursory discussion of the Factors and does not apply the relevant facts with sufficient detail to allow DCRC to understand how DNREC calculated the penalty. *See* Order at 26–28. The Order's penalty assessment must be reversed, because the Order: (a) fails to explain how DNREC's consideration of the Factors corresponds in a meaningful way to its determination that $300,000 is an appropriate penalty; and (b) fails to apportion the penalty amount (and the Secretary's consideration of the Factors) among the twenty-one separate incidents discussed in the Order spanning 2024 to 2025. Assessing a broad penalty for these violations without explaining why the penalty is appropriate and detailing the apportionment of the penalty is contrary to law and an abuse of discretion under 7 *Del. C.* § 6005(b)(3).

31. The Order's cursory recitation of the Factors without sufficient explanation of the Secretary's consideration of those Factors is contrary to relevant authority. In *Delaware Solid Waste Auth. v. Delaware Dep't of Nat. Res. & Env't*

Control,[3] the Delaware Supreme Court affirmed the Board's decision reversing a DNREC administrative penalty where the accompanying order "did not provide any analysis of why the penalties assessed . . . were appropriate in light of the discretionary factors listed in § 6005(b)(3)." Here, DNREC's discussion of the Factors in the Order likewise fails to provide any analysis explaining how the Secretary arrived at the $300,000 penalty.

32. In addition, the Order makes no attempt to apportion the $300,000 penalty among the twenty-one incidents described in the Order. This failure to apportion the penalty among those incidents does not allow DCRC or the Board to meaningfully evaluate the penalty in relation to any specific alleged violation. Therefore, if the Board reverses any one alleged violation—as it should for the reasons stated herein—the Board must reverse the entire penalty assessed, as DNREC has failed to provide the means of apportioning the penalty.

33. Apportionment of the penalty is also necessary to evaluate whether DNREC complied with Section 6005(b)(3) in imposing a penalty for each individual alleged violation. Under Section 6005(b)(3), DNREC "may impose an administrative penalty of not more than $40,000 for each day of violation." Because the Order does not explain how DNREC calculated the $300,000 penalty, DCRC cannot discern whether DNREC has assessed a penalty in excess of that amount for a particular day of violation. Similarly, DCRC cannot determine if DNREC considered and applied the Factors to

[3] *Delaware Solid Waste Auth. v. Delaware Dep't of Nat. Res. & Env't Control*, 250 A.3d 94, 119 (Del. 2021).

assess a penalty for each alleged violation. Thus, the imposition of a blanket $300,000 penalty without explanation as to the penalty for each alleged violation is inconsistent with 7 *Del. C.* § 6005(b)(3) and the Delaware Supreme Court's holding in *Delaware Solid Waste Auth. v. Delaware Dep't of Nat. Res. & Env't Control*.

34. Accordingly, the Order should be reversed with respect to the administrative penalty assessment.

D. Reservation of Rights, Counsel, and Estimate of the Number of Witnesses and Time for Hearing

35. DCRC reserves the right to assert additional grounds for appeal and reserves the right to amend this Statement of Appeal. Particularly, in accordance with the Board's rules, DCRC was afforded only twenty (20) days in which to file this Appeal to ensure protection of its legal rights. Such amount of time is insufficient to fully evaluate the alleged violations as opined by DNREC in the Order. The scope of alleged noncompliance addressed through the Order spans two full calendar years, implicates numerous and complex processes and units at the Refinery, and a breadth of relevant operating conditions. It is therefore possible that DCRC may need to supplement this Appeal in advance of the requested hearing.

36. DCRC has authorized the following attorney to represent it in this matter before the Environmental Appeals Board:

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Relative to the hearing of this matter before the Board, DCRC estimates that it will call four witnesses and that the presentation of its testimony and other evidence will require two to three days of hearing, not including any time DNREC needs to have its case heard.

Dated: January 9, 2026

Respectfully Submitted,

/s/ Michael W. Teichman

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