BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF HAZLEHURST WOOD PELLETS, LLC JEFF DAVIS COUNTY, GEORGIA PERMIT NO. 2499-161-0023-V-02-4 ISSUED BY THE GEORGIA ENVIRONMENTAL PROTECTION DIVISION	)	PETITION NO. IV-2020-5 ORDER RESPONDING TO PETITION REQUESTING OBJECTION TO THE ISSUANCE OF TITLE V OPERATING PERMIT

ORDER DENYING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated April 14, 2020 (the Petition) from Environmental Integrity Project, on behalf of itself and the Sierra Club and its Georgia Chapter, Dogwood Alliance, the Rachel Carson Council, Partnership for Policy Integrity, Natural Resources Defense Council, and Our Children's Earth Foundation (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to the final operating permit No. 2499-161-0023-V-02-4 (the Final Permit) issued by the Georgia Environmental Protection Division (Georgia EPD) to Hazlehurst Wood Pellets, LLC (Hazlehurst or the facility) in Jeff Davis County, Georgia. The operating permit was issued pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and the Georgia Compilation of Rules and Regulations (Ga. Comp. R. & Regs.) Rule 391-3-1-.03(10). *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further below, the EPA denies the Petition requesting that the EPA Administrator object to the Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 766la(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. The EPA granted full approval of Georgia's title V operating permit program in 2000. 65 Fed. Reg. 36358 (June 8, 2000). This program, which became effective on August 7, 2000, is codified in Ga. Comp. R. & Regs. Rule 391-3-1-.03(10).

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

B. Review of Issues in a Petition

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

Each petition must identify the proposed permit on which the petition is based and identify the petition claims. 40 C.F.R. § 70.12(a). Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under part 70. 40 C.F.R. § 70.12(a)(2). Any arguments or claims the petitioner wishes the EPA to consider in support of each issue raised must generally be contained within the body of the petition.[1] *Id.*

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); *see also* 40 C.F.R. 70.12(a)(2)(v).

[1] If reference is made to an attached document, the body of the petition must provide a specific citation to the referenced information, along with a description of how that information supports the claim. In determining whether to object, the Administrator will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. *Id*.

In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).[2] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[3] The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).[4] When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g.*, *MacClarence*, 596 F.3d at 1130–31.[5] Certain aspects of the petitioner's demonstration burden are discussed below. A more detailed discussion can be found in the preamble to the EPA's proposed petitions rule. *See* 81 FR 57822, 57829–31 (August 24, 2016); *see also In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether a petitioner has provided the relevant analyses and citations to support its claims. For each claim, the petitioner must identify (1) the specific grounds for an objection, citing to a specific permit term or condition where applicable; (2) the applicable requirement as defined in 40 C.F.R. § 70.2, or requirement under part 70, that is not met; and (3) an explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under part 70. 40 C.F.R. § 70.12(a)(2)(i)–(iii). If a petitioner does not identify these elements, the EPA is left to work out the basis for the petitioner's objection, contrary to Congress's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner] support his allegations with

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

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

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

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

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

Another factor the EPA examines is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. Petitioners are required to address the permitting authority's final decision and final reasoning (including the state's response to comments) where these documents were available during the timeframe for filing the petition. 40 C.F.R. § 70.12(a)(2)(vi); *see MacClarence*, 596 F.3d at 1132–33.[9] Specifically, the petition must identify where the permitting authority responded to the public comment and explain how the permitting authority's response is inadequate to address (or does not address) the issue raised in the public comment. *Id*.

The information that the EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. 40 C.F.R. § 70.13. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis'); any comments the permitting authority received during the public participation process on the draft permit; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; and all materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). *Id.* If a final permit and a statement of basis for the final permit are available during the agency's

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

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

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

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

review of a petition on a proposed permit, those documents may also be considered when making a determination whether to grant or deny the petition. *Id*.

III. BACKGROUND

A. The Hazlehurst Wood Pellets Facility

Hazlehurst Wood Pellets, LLC is a wholly owned subsidiary of Fram Renewable Fuels, LLC. Hazlehurst operates a wood pellet mill in Hazlehurst, Georgia, which commenced operation in late 2013. Hazlehurst produces wood pellets that are ultimately burned in Europe to produce electricity. The mill originally consisted of three wood dryer lines, three pellet lines, and three pellet coolers, and was designed to produce up to 525,600 oven dried tons (ODT)/year of wood pellets. The current permit action involves a modification to the facility, including: replacing the mill's three wood dryer lines with a single wood-fired burner/furnace providing direct heat to a new dryer, adding one new chipper, two green hammermills, seven dry hammermills, and three pellet lines with a total of fifteen presses and three coolers. The new dryer has a capacity of 78 ODT per hour, and an annual throughput capacity of 675,000 ODT. Particulate matter (PM) emissions from the furnace and dryer will be controlled with a wet electrostatic precipitator, PM emissions from the dry hammermills will be controlled by cyclofilters, and PM emissions from the presses and coolers will be controlled by baghouses. Volatile organic compound (VOC) and organic hazardous air pollutant (HAP) emissions from the furnace and dryer will be controlled with a Regenerative Thermal Oxidizer. VOC and HAP emissions from the dry hammermills, presses, and coolers will be controlled with a Regenerative Catalytic Oxidizer.

B. Permitting History

Georgia EPD issued Hazlehurst's initial title V permit on August 18, 2015. Hazlehurst applied for a permit modification on May 6, 2019 related to the changes described above. Georgia EPD provided public notice of a draft permit modification (the Draft Permit) on September 4, 2019, followed by a public comment period that ran until October 4, 2019. On December 31, 2019, Georgia EPD submitted a proposed permit (the Proposed Permit), along with its response to public comments (RTC), to the EPA for its 45-day review of the Proposed Permit. The EPA did not object to the Proposed Permit. On February 26, 2020, Georgia EPD issued a final permit No. 2499-161-0023-V-02-4 (the Final Permit) to Hazlehurst.

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The EPA's 45-day review period expired on February 14, 2020. Thus, any petition seeking the EPA's objection to the Permit was due on or before April 14, 2020. The Petition was dated and received on April 14, 2020, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

IV. DETERMINATION ON CLAIM RAISED BY THE PETITIONERS

Petitioners' Claim: The Petitioners claim that the title V permit for Hazelhurst is deficient because it does not mention or assure compliance with the requirement of CAA § 112(r)(1)—the "General Duty Clause"—to "identify hazards which may result" from extremely hazardous substances and "to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur." Petition at 4. The Petitioners allege that the EPA has described the General Duty Clause of CAA § 112(r)(1) as self-executing and needing no regulations to take effect. *Id.*

The Petitioners argue that the General Duty Clause applies to the facility because the permit record shows that the facility "produces, processes, handles, and stores numerous listed hazardous substances." *Id.* Specifically, the Petitioners allege that wood dust produced by Hazlehurst is an extremely hazardous substance due to its flammability and propensity to cause explosions. *Id*. at 4–6.

The Petitioners then argue that the General Duty Clause is an "applicable requirement" for purposes of title V because the definition of "applicable requirement" in 40 C.F.R. § 70.2 includes "any standard or other requirement under section 112 of the Act." *Id*. at 4, 8. The Petitioners assert that in the only title V petition order addressing the General Duty Clause—the 1997 *Shintech Order*[10]—the EPA concluded that the General Duty Clause was an "applicable requirement." *Id*. at 7. However, the Petitioners note that the EPA also indicated that the Shintech permit did not need to include detailed information regarding compliance with the General Duty Clause; instead, EPA concluded that it was sufficient for the permit to include a generic permit condition consistent with the requirements in 40 C.F.R. § 68.215 concerning Risk Management Plans. *Id*. The Petitioners argue that *Shintech* does not apply here because that case involved a facility that was subject to part 68, while Hazelhurst is not. *Id*. The Petitioners continue that even if the facility were subject to part 68, the generic permit term based on 40 C.F.R. § 68.215 that the EPA found sufficient in *Shintech* is not sufficient to assure compliance with the General Duty Clause, because 40 C.F.R. § 68.215 does not assure compliance with the requirements of the General Duty Clause. *Id*. Accordingly, the Petitioners argue that Condition 7.10 of the Hazlehurst Permit—which requires the facility to prepare a Risk Management Plan if the facility becomes subject to 40 C.F.R. part 68—is insufficient because this term relates to compliance with CAA § 112(r)(7), not the General Duty Clause of CAA § 112(r)(1). *Id*. at 3–4.

The Petitioners argue that a permit that does not identify a facility's obligations can obviously not assure compliance with them. *Id*. at 7. The Petitioners also argue that after the *Shintech Order*, the D.C. Circuit made clear that a permitting authority is obligated to add monitoring, recordkeeping, and reporting to a title V permit where needed to assure compliance with an applicable requirement. *Id*. Therefore, the Petitioners argue that, in order to assure compliance with the General Duty Clause, the Hazlehurst Permit must be revised to:

> (1) Identify Clean Air Act section 112(r)(1) as an applicable requirement with respect to the facility's handling of combustible dust.

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

> (2) Specifically require the facility to prepare a hazard analysis identifying the hazards associated with explosive dust and the facility's processes, potential fire and explosion scenarios, and the consequences of a fire or explosion.
> (3) Establish specific design and operation standards that the facility must meet to prevent a dust-related fire or explosion.
> (4) Establish recordkeeping and reporting requirements sufficient to demonstrate that the facility is meeting its General Duty Clause obligations.

Id. at 7–8.

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

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

The General Duty Clause provides:

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

42 U.S.C. § 7412(r)(1). While the Petitioners cite to the requirements of the General Duty Clause, they fail to mention, let alone reconcile, a key limitation of the General Duty Clause: "For purposes of this paragraph, the provisions of section 7604 of this title *shall not be available* to any person or otherwise be construed to be applicable to this paragraph." *Id*. (emphasis added). This clause means that citizen suits under CAA § 304, 42 U.S.C. § 7604, shall not be available to enforce the requirements of the General Duty Clause; [11] instead, it may only be enforced by EPA under CAA § 113, 42 U.S.C. § 7413. However, if, as the Petitioners suggest, the requirements of the General Duty Clause were included in a title V permit, they would ostensibly be enforceable through enforcement of the title V permit itself. This is because any person may, under 42 U.S.C. § 7604(a)(1), bring a suit "against any person . . . who is alleged to have violated . . . or be in violation of (A) an emission standard or limitation under this chapter . . . ." In turn, "emission standard or limitation" is defined to include, *inter alia*, "*any* other

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

standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter . . . ." 42 U.S.C. § 7604(f)(4) (emphasis added). Put simply, all standards and limitations in title V permits are enforceable by citizens under section 304. *Id*.; 40 C.F.R. § 70.6(b)(1); *see United States v. Gonzales*, 520 U.S. 1, 5 (1997).[12] However, the unambiguous statutory language in section 112(r)(1) prohibits the General Duty Clause from being enforced by citizens under section 304. Thus, there is a direct conflict between the Petitioners' arguments that the requirements of the General Duty Clause must be contained in the facility's title V permit and the congressional limitation on enforcement of the General Duty Clause. The Petition does not mention this conflict, let alone suggest a potential resolution. In this case, the specific prohibition on enforcement of the General Duty Clause by citizen suit must govern over the general enforceability of title V permits. *See Nitro-Lift Technologies L.L.C. v. Howard*, 568 U.S. 17, 21 (2012).

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

The Petitioners' view is also at odds with statutory provisions within title V, which require that states must have the authority to enforce title V permits in order to receive EPA approval of their permitting programs. CAA § 502(b)(5); 42 U.S.C. § 7661a(b)(5); *see also* 40 C.F.R. § 70.4(b)(3). However, the CAA General Duty Clause is enforceable only by the federal government.[13] The EPA has not delegated authority to implement or enforce the General Duty Clause to state or local air agencies.[14] Were the requirements of the General Duty Clause to be included within individual title V permits, states would be unable to enforce these provisions, contradicting CAA § 502(b)(5). If the Petitioners' argument were accepted and applied nationwide, all state and local title V programs would be fundamentally flawed—an absurd result Congress could not have intended. *See United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989).

Notably, each of the relevant statutory provisions discussed above—the General Duty Clause of section 112(r)(1), the relevant portion of section 304 authorizing citizen suits to enforce title V permit terms, and the entirety of title V—were promulgated in the same legislative package: the 1990 CAA Amendments. Accordingly, the statutory conflict between these provisions is best

[12] As discussed below, the EPA's regulations contain a limited exception to this principle, which is not applicable to the General Duty Clause.
[13] *See supra* note 11.
[14] Additionally, some states are prohibited by state law from having general duty authorities. 58 Fed. Reg. 62262, 62278 (November 26, 1993).

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

Following the statutory text, the EPA's regulations provide: "All terms and conditions in a part 70 permit . . . are enforceable by the Administrator and citizens under the Act." 40 C.F.R. 70.6(b)(1).[15] Additionally, in order to be approvable by the EPA, state programs under part 70 must demonstrate authority to enforce permits. *Id*. § 70.4(b)(3)(vii). Neither of these regulatory requirements are compatible with the Petitioners' view that the General Duty Clause—which is enforceable only by the EPA—should be included in title V permits.

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

In asserting that "applicable requirements" include "any standard or other requirement under section 112 of the Act," the Petitioners have left off the following important piece of this definition: "including any requirement concerning accident prevention under section 112(r)(7) of the Act." 40 C.F.R. § 70.2. Given that the goal of preventing and minimizing accidental releases under section 112(r) is fundamentally different than the traditional emission standards and other

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

requirements under section 112,[16] it was important for EPA to specifically identify 112(r)(7) within the definition of "applicable requirement," lest it—along with the rest of section 112(r)—fall outside the ambit of title V. In other words, the EPA identified section 112(r)(7) as the exception that proves the rule: "section 112(r) was not intended to be primarily implemented or enforced through title V." 57 Fed. Reg. 32250, 32275 (July 21, 1992). Accordingly, the best reading of this regulation, in light of the statutory conflict, is that the EPA intended to make clear that certain requirements related to section 112(r)(7) *should* be considered applicable requirements alongside more traditional emission standards under section 112, such as the National Emission Standards for Hazardous Air Pollutants (NESHAP) under section 112(d). By contrast, the EPA's decision to not identify other requirements under section 112(r)—including the section 112(r)(1) General Duty Clause—reflects EPA's intention *not* to treat these other provisions under section 112(r) as applicable requirements for title V purposes.[17] Because this reading of EPA's regulations would avoid the potential conflict with congressional limitations on enforcement of the General Duty Clause, this interpretation of the EPA's regulations is superior to that offered by the Petitioners.

Excluding the General Duty Clause from the definition of "applicable requirement" is also consistent with how the EPA has described and implemented both the title V and 112(r) programs since their inception in the early 1990s.[18] Contrary to the Petitioners' allegation, and as discussed further below, the EPA did *not* conclude in *Shintech* that the General Duty Clause is an applicable requirement for title V purposes, and the EPA is unaware of having ever suggested this elsewhere. Moreover, although the EPA is also unaware of an instance in which it clearly and explicitly stated that the section 112(r)(1) General Duty Clause is *not* an applicable requirement for title V purposes, this has been implicit in nearly every relevant discussion of the two programs. In discussing the extent to which the section 112(r) programs would be implemented through title V, the EPA has consistently suggested that the only "applicable requirements" related to 112(r) are those related to section 112(r)(7) risk management plans. *See, e.g.*, 57 Fed. Reg. 32250, 32275–76 (July 21, 1992); 60 Fed. Reg. 13526, 13526, 13535–36 (March 13, 1995); 61 Fed. Reg. 31668, 31688–89 (June 20, 1996).[19] Specifically, the EPA has indicated that the inclusion of a limited set of permit terms implementing 112(r)(7) would be sufficient to satisfy all title V-related obligations under section 112(r). *See, e.g.*, 60 Fed. Reg. at 13536; 61 Fed. Reg. at 31688. Moreover, given that "section 112(r) was not intended to be primarily implemented or enforced through title V," 57 Fed. Reg. at 32275, the EPA has, through

[16] S*ee* 57 FR 32250, 32275 (July 21, 1992) ("The EPA recognizes, however, that [a Risk Management Plan under section 112(r)(7)] is not in any sense a 'permit' to release substances addressed therein, and that section 112(r) was not intended to be primarily implemented or enforced through title V." (citing 42 U.S.C. § 7412(r)(7)(F)).
[17] The EPA also recognizes that the regulations pertain to "*any* standard or other requirement" of section 112, and that such language should normally be read broadly. S*ee Gonzales*, 520 U.S. at 5. But the statutory conflict identified above counsels that there must be a limitation on how broadly this language sweeps. *See Maracich*, 570 U.S. at 65, The same logic may not necessarily apply to other portions of the EPA's definition of "applicable requirement" that are not subject to the same statutory constraints as the General Duty Clause.
[18] The EPA understands that most, and perhaps all, permitting authorities implementing part 70 programs have historically followed the same view. Here, in responding to public comments, Georgia EPD stated: "EPD disagrees that the General Duty Clause is an applicable requirement for the purposes of Title V Permitting." RTC at 3.
[19] The EPA has reiterated this stance through guidance as well. *See, e.g.*, Memorandum, Title V Program Approval Criteria for Section 112 Activities (April 13, 1993), available at *https://www.epa.gov/sites/production/files/2015-08/documents/t5-112.pdf*; Memorandum, Relationship between the Part 70 Operating Permit Program and Section 112(r) (June 24, 1994), available at *https://www.epa.gov/sites/production/files/2015-08/documents/opp112r.pdf*.

rulemaking, limited the extent to which even the 112(r)(7)-related "applicable requirements" would be implemented through title V.[20] The Petitioners' assertion that title V permits must include permit terms related to the General Duty Clause that are even more specific than those the EPA has established for risk management plans would go well beyond the EPA's long-held view of the 112(r)-related "applicable requirements."

In the *Shintech Order* cited by the Petitioners, the EPA more directly addressed, and rejected, arguments that section 112(r)(1) General Duty Clause requirements should be included in a title V permit. Contrary to the Petitioners' characterization of that order, the EPA did *not* conclude that section 112(r)(1) established "applicable requirements" for title V purposes. Rather, the central point in *Shintech*, as in prior EPA statements, was that the only section 112(r)-based requirements that need be satisfied through title V are those related to the risk management plan provisions of section 112(r)(7) and 40 C.F.R. part 68. The EPA explained: "compliance with the provisions of 40 CFR § 68.215 . . . is sufficient to satisfy the legal obligations of section 112(r) for purposes of part 70." *Shintech Order* at 12. The EPA therefore rejected the Shintech petitioners' request for additional permit terms related to section 112(r)(1), while noting the independent enforceability of the General Duty Clause. *Id*. at 12 n.9 ("[C]ompliance with the requirements of part 68 does not relieve Shintech of its legal obligation to meet the general duty requirements of section 112(r)(1) of the Act . . . . Section 112(r)(1) remains a self-implementing requirement of the Act, and EPA expects and requires all covered sources to comply with the general duty provisions of 112(r)(1)").[21] Moreover, contrary to the Petitioners' suggestion, the core lesson from *Shintech* is just as applicable in the present case, notwithstanding that the source in *Shintech* was subject to part 68 requirements, while Hazlehurst is not. In fact, in the 2001 *Pencor-Masada Order*,[22] the EPA applied similar principles to a source that was not subject to part 68 requirements. There, the EPA reiterated that the General Duty Clause is a self-implementing requirement, unaffected by the terms of a source's title V permit. *Pencor-Masada Order* at 31–32 n.38.

Similar to the EPA's title V guidance, the EPA's longstanding guidance concerning the implementation of the General Duty Clause suggests that the General Duty Clause is not to be implemented through title V. Notably, in the EPA's comprehensive Guidance for Implementation of the General Duty Clause ("GDC Guidance"),[23] the EPA details the

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

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

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

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

mechanisms through which the General Duty Clause would be implemented and enforced, and never once mentions permitting.

The change of course the Petitioners request here—an EPA determination that the General Duty Clause is an "applicable requirement" with which the Hazlehurst title V permit must assure compliance—would have massive programmatic impacts, upsetting the administration of both the title V and General Duty Clause programs nationwide. The EPA expects that the majority of major sources subject to the title V program may, at some time or another, also have obligations under the General Duty Clause. If the General Duty Clause is considered an "applicable requirement," thousands of title V permits nationwide would need to be reopened to include conditions necessary to identify and assure compliance with the clause. Such an enormous resource burden by the state air agencies that implement the title V program would hardly make sense given that these same air agencies cannot enforce the General Duty Clause.[24] This is clearly not an outcome that either Congress or the EPA envisioned when establishing these two programs.[25]

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

In addition to these untenable impacts to title V permitting, determining that the General Duty Clause must be included in title V permits would fundamentally alter the EPA's implementation and enforcement of the General Duty Clause itself. The EPA has always described the General Duty Clause as a "self-implementing requirement" (a characterization the Petitioners acknowledge) or a "self-enabling requirement." 61 Fed. Reg. 31668, 31680 (June 20, 1996 Letter

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

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

[1] Such outcomes would be contrary to congressional intent for the title V program to be primarily administered by states. *See supra* note 24.

from Mathy Stanislaus, Assistant Administrator, EPA Office of Solid Waste and Emergency Response, to Hon. Mike Pompeo, U.S. House of Representatives (Aug. 1, 2013)) (Stanislaus-Pompeo Letter). This means, quite simply, that the General Duty Clause is meant to be implemented and enforced independently, beyond the strictures of the title V permitting program or any set of regulations as a direct requirement of the CAA. Although the title V permitting program offers clear benefits for identifying and assuring compliance with other types of more typical emission standard-based requirements under regulations promulgated under the CAA,[26] the title V program is a particularly poor fit for implementing the General Duty Clause for multiple reasons.

The General Duty Clause is, as its name suggests, a *general* duty. Identifying *specific* obligations within each source's title V permit would conflict with the notion of a general duty. Moreover, determining whether an individual source has satisfied this general duty is highly circumstance-specific. The EPA interprets the General Duty Clause to generally require owners and operators to adhere to recognized industry practices and standards in addition to any applicable government regulations. GDC Guidance at 2, 11–12. However, there may be situations where circumstances make a particular industry standard or municipal code inapplicable, unsuitable, or insufficient for a given source, and there may be other ways to abate hazards than those listed in a particular industry standard or municipal code. Each source's obligations are dependent on the detailed knowledge of each individual source. Even in the absence of an industry standard, a source's knowledge of a potential hazard and a feasible means to abate it is relevant to its general duty under CAA § 112(r)(1). *See* GDC Guidance at 12. Should a source learn of a hazard and a feasible means to abate it after its permit is written, the General Duty Clause would ordinarily hold the source responsible for its knowledge. Given that the factual circumstances and knowledge at the source, as well as any relevant industry guidelines, can change frequently, the source's obligation under the General Duty Clause are necessarily fluid.[27] If General Duty Clause obligations were to be included in title V permits as applicable requirements, the relevant permit terms would need to be constantly updated to accurately reflect a source's obligations. Overall, identifying specific General Duty Clause requirements would not only curtail the flexibilities rightly available to a source, but it would also undermine the General Duty Clause by limiting the scope of a source's potential obligations to those specific requirements contained in the

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

[27] While identifying the potential hazards at Hazelhurst *may* be relatively straight-forward, this is certainly not the case for more complex sources such as refineries or chemical plants.

permit.[28] For these reasons, EPA has rejected requests to define and restrict General Duty Clause obligations through rulemaking. *E.g.*, Stanislaus-Pompeo Letter. It would be similarly inappropriate to define and restrict these obligations through title V permit terms.

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

V. CONCLUSION

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

VI. JUDICIAL REVIEW

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal are the proper forum for petitions for review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) when the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, if "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." For locally or regionally applicable actions, the CAA reserves to EPA complete discretion whether to invoke the exception in (ii) by making, and publishing, a finding that the action is based on a determination of nationwide scope or effect.

This Order is locally applicable because it denies the single claim raised by the Petition and applies, on its face, to a single source in a single state. *Sierra Club v. EPA*, 926 F.3d 844, 849 (D.C. Cir. 2019). However, I am exercising the complete discretion afforded to me under the Clean Air Act to make and publish a finding that this action is based on a finding of nationwide scope or effect. The sole basis for the EPA's decision to deny the Petition is a determination regarding the correct legal interpretation of various provisions of the CAA, a pure question of law. Specifically, as described above, EPA has clarified its long-standing interpretation (since the 1990 CAA Amendments) that the General Duty Clause in CAA section 112(r)(1), when read in context with the Act's citizen-suit provision, is not an "applicable requirement" for purposes of title V. This Order does not rely on any source-, permit-, or state-specific facts and, because the Petition raises only a single claim, this Order addresses no other claims that might involve

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

source-, permit-, or state-specific facts. In deciding whether to invoke the exception by making and publishing a finding that this locally applicable action is based on a determination of nationwide scope or effect, I have also taken into account a number of policy considerations, including my judgment balancing the benefit of obtaining the D.C. Circuit's authoritative centralized review versus allowing development of the issue in other contexts and the best use of agency resources. Based on my evaluation of these policy considerations in light of the unique circumstances presented by this Order, I am exercising the complete discretion afforded to me by the CAA and hereby find that this Order is based on a determination of nationwide scope or effect under CAA section 307(b)(1).

Dated: 12/31/2020

Andrew R. Wheeler
Administrator