using the incorrect permit provisions in its analysis. The Court, therefore, must in the first instance examine whether violations of special conditions 38 and 39 are actionable under the CAA, and if so, what the statutory scope of liability is for each upset event.[163]

15. The Court first turns to whether special conditions 38 and 39 are an "emission standard or limitation" within the meaning of CAA. An "emission standard or limitation" is defined as "any standard, limitation or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations." 42 U.S.C. § 7604(f)(4). Permit 18287 is a Title V permit within

[163] The Fifth Circuit remanded the case because it determined the Court applied the wrong law. The Court acknowledged in its original opinion (as did the Fifth Circuit opinion) that it did not reach the legal question of whether any violation was actionable under the CAA. Instead, the Court had determined it did not need to address that legal question because, even if the emission events were actionable under the CAA, Plaintiffs did not meet their burden of proof. Exxon contends that because the Fifth Circuit only remanded to this Court with instructions to treat Count I as alleging violations of special conditions 38 and 39, and not MAERT violations, any language in the opinion pertaining to the validity of Exxon's theory that the permits do not govern upset emissions is not binding on remand. To the extent Exxon is correct—that any discussion by the Fifth Circuit pertaining to Exxon's argument that upset emissions are not governed by permits is dicta—the Court notes that it has independently undertaken an analysis of the argument. The Court (as addressed in detail below) agrees with the Fifth Circuit's analysis of Exxon's argument. As such, the Court finds it not necessary to address which portions of the Fifth Circuit's opinion as to Count I may be dicta, and therefore, not binding on the Court on remand.

the meaning of the CAA.[164] Therefore, liability turns on whether the "not authorized" language in special conditions 38 and 39 is a limitation in the permit or an exemption from the permit.

16. On its face, the language in special conditions 38 and 39 is a limitation within the meaning of the CAA. The relevant provision in the special conditions states: "This permit does not authorize upset emissions, emissions from maintenance activities that occur as a result of upsets, or any unscheduled/unplanned emissions associated with an upset. Upset emissions are not authorized, including situations where that upset is within the flexible permit emission cap or an individual emissions limit."[165] The term "not authorized" cannot be interpreted in isolation from the surrounding text. The modifying language within the text, that this provision applies even when an upset is "within the flexible permit emission cap or an individual emissions limit," clarifies any ambiguity as to whether the term "not authorized" should be interpreted as a limitation. Rather than exempting upset emissions from the permit, the terminology provides a further limitation on standards and limitations found elsewhere in the permit.

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[164] Title V permit O1229 incorporates permit 18287.

[165] Plaintiffs' Exhibit 176, Special Condition ¶¶ 38, 39 (emphasis added).

17. Exxon's contention the phrasing of general condition 15 indicates that each special condition would need to explicitly state failure to comply with a limit in a permit is a "violation" where an emission is "not authorized" is unavailing. General condition 15 states: "The permit holder shall comply with all the requirements of this permit. Emissions that exceed the limits of this permit are not authorized ***and*** are violations of this permit."[166] The phrase "are not authorized and are violations of the permit" modifies the first part of the sentence "[e]missions that exceed the limits of this permit." The "not authorized" terminology from special condition 38 and 39 does not parallel the modifying "not authorized and . . . violations of the permit" language in general condition 15, such that the term should not be interpreted as violations unless explicitly deemed such. Special conditions 38 and 39's language is best classified as instead defining when an upset event "exceeds the limits of this permit." As discussed above, by the special conditions' terms, any upset emission—even one within the flexible permit emission cap or an individual emissions limit—exceeds the limits of permit 18287.

18. The cases Exxon cites in support of holding that special conditions 38 and 39 exempt upset emissions from the permit are inapposite. The analysis of the distinction between "authorizing" and "prohibiting" an event in *Association of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1116 (D.C. Cir. 2001), turned on an

[166] Plaintiffs' Exhibit 176, General Condition ¶ 15 (emphasis added).

agency's reliance on a non-applicable statute to interpret a collective bargaining provision and its interpretation that the lack of authorization in that inapplicable statute prohibited an expenditure. The statutory provision at issue did not use the term "not authorized." *Id.* As such, the D.C. Circuit was not even interpreting the term "not authorized" and differentiating the term from "prohibiting"; any discussion of a lack of authorization merely pertained to the general principle that an expenditure is not authorized unless affirmatively recognized by a law or regulation. *Id.* The special conditions at issue here turn on the definition of the explicit term "not authorized." *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994), involved a statute that did not confer authority to tax, but neither did the statute prohibit taxation if another source of authority for taxing power could be shown. Here, Exxon has not directed the Court to an alternate authority source that authorizes upset emissions.[167] Additionally, in context of the entire text of the provision at issue in special conditions 38 and 39, the term "not authorized" on its face prohibits upset emissions.

19. Nor does Exxon find support for its position in the regulatory framework. Special conditions 38 and 39 pertain to "upset emissions." As permit 18287 does not define the term, the Court turns to the definition found in Texas's regulatory framework. An "upset event" is defined under Texas law as "[a]n

[167] *Infra* ¶¶ III.19–20.

unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions. . . ."[168] 30 TEX. ADMIN. CODE § 101.1 (110). "[U]nauthorized emissions" are defined as "[e]missions of any air contaminant except water, nitrogen, ethane, noble gases, hydrogen, and oxygen that exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by Texas Health and Safety Code, §382.0518(g)." *Id.* § 101.1(108). The regulations themselves refer back to the limitations set out in a permit. Exxon has not pointed the Court to a regulation that governs upset emissions that would potentially conflict with special conditions 38 and 39.[169]

20. The Court has not found any ambiguity as to whether the term "not authorized" in special conditions 38 and 39 pertains to a limitation. The Court found the language in the relevant special conditions is plain on its face and is a

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[168] In full, the definition states: "Upset event--An unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions. A maintenance, startup, or shutdown activity that was reported under §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), but had emissions that exceeded the reported amount by more than a reportable quantity due to an unplanned and unavoidable breakdown or excursion of a process or operation is an upset event." 30 TEX. ADMIN. CODE § 101.1(110).

[169] 30 Texas Administrative Code § 101.1 merely sets out the definitions for terms used in air quality rules; section 101.1 does not provide any affirmative regulation pertaining to those definitions. Even if Exxon were able to direct the Court to such a provision, general provision 13 in permit 18287 states the special conditions in the permit may be more restrictive than the requirement of Title 30 of the Texas Administrative Code. See Plaintiffs' Exhibit 176, General Condition ¶13.

limitation within the meaning of the CAA. Even if there were to be ambiguity, however, the evidence Exxon cites from the TCEQ and the purported applicability of *Auer* deference is unpersuasive. The Agreed Order states: "Emission events and MSS activities, other than planned MSS activities, are not subject to permitting under 30 Tex. Admin. Code Chapters 106 or 116, and are regulated under 30 Tex. Admin. Code Chapter 101 and Tex. Health & Safety Code §§ 382.0215, 382.0216 and 382.085."[170] Chapter 106 pertains to permits by rule. *See* 30 TEX. ADMIN. CODE § 106.4. Chapter 116 pertains to permitting for new construction or modification. *See* 30 TEX. ADMIN. CODE § 116.10. The Agreed Order is best interpreted as stating Exxon cannot receive a permit allowing emissions events or unplanned MSS activities by rule or during new construction and modification. Emissions events and unplanned MSS activity is not exempted from a permit; instead, Exxon is prohibited from receiving a permit allowing emissions events and unplanned MSS activities pursuant to those chapters. The Agreed Order prohibits issuing a permit that allows emissions events and unplanned MSS activities, and states the events and activities are additionally subject to the cited regulatory schemes. A permit could still include a provision that prohibits emissions events and unplanned MSS activities and would be consistent with the Agreed Order.

[170] *Defendants' Exhibit* 222, Finding ¶ I.2.

22. Exxon further contends the trial evidence establishes agency regulatory policy considers special conditions 38 and 39 not to be stand-alone emissions standards or limitations, and the agency's treatment of these special conditions is entitled to *Auer* deference.[171] At trial, Karen Olson ("Olson"), a former TCEQ permit reviewer and manager, testified that special conditions 38 and 39, "define what is within the scope of the permit and what is not within the scope of the permit as handled through Chapter 101."[172] However, there was no testimony that specifically stated whether upset emissions were within the scope of the permit or not.[173] Even if the Court were to interpret Olson's testimony as stating the agency did not consider special conditions 38 and 39 as stand-alone limitations, *Auer* deference would not apply to that testimony. *See Paralyzed Veterans of Am. V. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997), *abrogated on other grounds by Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199

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[171] *Auer* deference is the proposition that, where an agency's regulation is ambiguous, courts "defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 546 U.S. 50, 59 (2011) (internal quotations omitted).

[172] *Trial Transcript*, 11-149:5 to 150:15.

[173] Further, the Court sustained Plaintiffs' objection to Exxon's tender of Olson for the purpose of "establish[ing] the TCEQ's understanding of the permit, the regulations that apply to the permit, and how the TCEQ views permit and permitting issues, and how they interpreted those rules." *Trial Transcript*, 11-127:8 to 128:5.

(2015) ("A speech of a mid-level official of an agency, however, is not the sort of 'fair and considered judgment' that can be thought of as an authoritative departmental position."). Olson's testimony would be the equivalent of a speech by a mid-level official in *Paralyzed Veterans*, which the Court would not—without more—ascribe authority to as a departmental position. *Auer* deference, therefore, is inapplicable. Accordingly, the Court finds that special conditions 38 and 39 are standards and limitations within the CAA

2. Violations of Special Conditions 38 and 39

23. Plaintiffs contend that each pollutant emitted during an upset event is a separate violation. Exxon does not address this contention. The Court did not reach the question in its initial opinion as to whether violations are determined per upset event or on a contaminant-by-contaminant basis.

24. Interpretations of the CWA provision are instructive when analyzing a CAA provision. *See United States v. Anthony Dell'Aquilla, Enters. & Subsidiaries*, 150 F.3d 329, 338 n.9 (3d Cir. 1998). The CWA utilizes a pollutant-by-pollutant analysis in determining violations. *See Texaco*, 2 F.3d 493, 498–99 (discussing that one unresolved source of trouble can result in violations of multiple parameters, all of which are actionable in citizen's suit). Additionally, the language of special conditions 38 and 39 refers to "upset emissions" not "upset

events."[174] As discussed above, under Texas's regulatory framework "upset events" are defined as resulting in "unauthorized emissions."[175] The Court determines that the statutory framework and language of the special conditions indicate a pollutant-by-pollutant approach should be adopted here. Accordingly, the Court will count each emission of a separate pollutant during an upset event as an individual violation.

25. The evidentiary support cited for violations of Count I is Plaintiff's Exhibits 1A and 1B (stipulated spreadsheets), 587 and 588 (Plaintiffs' corresponding spreadsheets), and 9 (tallied table).[176] These exhibits all reference permit 18287. The information contained within the spreadsheets pertaining to the date, time, duration of release, and amount released is undisputed. The Court found that pursuant to special conditions 38 and 39 these emissions were not authorized in any amount, even if the emissions fell within an emissions cap or

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[174] Plaintiffs' Exhibit 176, Special Condition ¶¶ 38, 39.

[175] *Supra* ¶ III.19.

[176] On remand, Plaintiffs submitted resorted versions of Plaintiffs' Exhibits 587–94. *Description of Re-Sorted Versions of Plaintiffs' Exhibits 587–594*, Document No. 253, Exhibit 3. The resorted versions show how repeated violations of specific emissions were identified and calculated, as well as grouped by duration. The spreadsheets were submitted to the Court in native format. The Court has reviewed the resorted exhibits and finds they are consistent with the spreadsheets initially submitted at trial.

individual emission limit.[177] Therefore, the hourly emission limit is zero. Plaintiff's spreadsheets comport with the Court's analysis of special conditions 38 and 39.

26. Each day of violation is subject to a civil penalty under the CAA. *See* 42 U.S.C. § 7413(b); 40 C.F.R § 19.4. Neither party has directed the Court to a definition within a statute or permit for the term "day." The Court adopts the definition of "day" as a twenty-four hour period, as has been adopted in the context of the CWA. *See San Francisco Baykeeper v. W. Bay Sanitary Dist.*, 791 F. Supp. 2d 719, 762 (N.D. Cal. 2011) (noting the twenty-four hour period calculation, as opposed to a calendar day definition, was more favorable to the defendant, the non-moving party). As the Court found each separate emission of a pollutant during an upset event is a separate violation, to the extent multiple violations by the same pollutant occur on the same calendar day, those violations are counted as separate violations. However, a continuous violation of pollutant resulting from one upset event utilizes the twenty-four hour period definition in calculating days of violations.

[177] To the extent the spreadsheets reference MAERT limits the Court will consider those violations in the alternative under Count II. The Court will analyze permit 18287 violations individually under each count. To the extent Counts I and II overlap—and as consistent with the Circuit's instructions on remand—the Court will not double count any violations under Counts I and II in calculating the penalties.

27. The Court has reviewed the spreadsheets and tallied table submitted by Plaintiffs relevant to Count I and agrees with the methodology used in calculating the total violations per pollutant listed therein. The evidence shows the refinery emitted twenty-four different pollutants in continuing or repeated violations totaling 10,583 days of violations. Accordingly, the Court finds under Count I, Plaintiffs have proven 10,583 days of repeated or continued violations of special conditions 38 and 39 by a preponderance of the evidence.

b. Count II

28. Plaintiffs contend—given the Fifth Circuit's holding that even if the numerical limits per pollutant within a permit vary due to amendment or renewal, exceeding those differing limits qualifies as a violation of the same permit—the violations in Count II are undisputed. Exxon contends it merely stipulated the data in the evidentiary spreadsheets supporting Count II was correct, but did not concede that entries on those spreadsheets listing the emission limit as zero or not authorized were violations.

29. The Court's initial opinion found Plaintiffs' spreadsheets supporting their allegations of violations of the hourly MAERT limits needed to reference and provide corroborating evidence of repeated or continuing violations of a specific permit condition. Additionally, the Court found where the numeric limit for a specific permit varied, each numeric violation constituted a separate permit for

purposes of showing repeated violations. Only as to the chemical plant permits, did the Court find the spreadsheets corroborated repeated violations of the same, specific hourly emission limitation.[178] The Fifth Circuit held the Court erred in treating variations in numerical limits for a pollutant within a permit due to amendment or renewal as different conditions or limitations. "[W]ith respect to specific limits on particular pollutants from particular sources that change numerically due to amendments or renewal . . . such limits constitute the same 'standards or limitations' for purposes of determining whether violations are 'repeated' or 'ongoing' under the CAA citizen suit provision." *Env't Tex. Citizen Lobby v. ExxonMobil Corp.*, 824 F.3d 507, 519 (5th Cir. 2016) (citing 42 U.S.C. §§ 7604(a)(1) & (f)(4)). The Court was instructed on remand to calculate the correct number of actionable Count II violations using the correct definition of the "same standard or limitation."

30. Exxon contends the Fifth Circuit only vacated in part the Court's initial conclusions of law for Count II. Undisturbed by the Circuit's opinion, Exxon argues, are the Court's initial conclusions of law paragraphs 19, 22, and 25. These paragraphs originally found that where certain emissions were listed as "not specifically authorized" or authorized by the particular permit, the spreadsheets did

[178] The Court found sixteen violations of Count II utilizing that interpretation of violating the same, specific permit condition. *See Findings of Fact and Conclusions of Law*, Document No. 225, Appendix.

not corroborate violations of "specific conditions." As such, Exxon contends it is free on remand to challenge the sufficiency of entries on the spreadsheets that use the notations "not specifically authorized" or an hourly emissions limit rate of zero, to prove repeated violations. Exxon is mistaken. Footnote five of the Circuit's opinion forecloses any argument on remand as to whether these entries constitute violations. In that note, the Circuit addresses Exxon's argument on appeal "that it 'never admitted' any entries under Count II were violations, 'and the district court plainly understood that position since it did not find liability on all of the allegations in' that count." *Env't Tex.*, 824 F.3d at 518 n.5. Holding that Exxon conceded that filing a reportable STEERS event is a violation, the Circuit explained this Court's finding of no liability on some events did not necessitate the Court having adopted Exxon's position. *Id.* Because the CAA requires proving repeated violations, the existence of a single reported violation does not create per se liability under the CAA. *Id.* The Court noted in its initial findings (which the Circuit's opinion cited) that Exxon "[did] not dispute that the alleged violations under Count II . . . of Plaintiff's complaint constitute violations of an emission standard or limitation."[179] The Circuit's opinion did not find any error with the finding that the Count II violations were undisputed. Therefore, the Court declines

[179] *Findings of Fact and Conclusions of Law*, Document No. 225, ¶ III.9, ¶ III.9 n.153.

on remand to revisit that conclusion. Accordingly, the Court finds, as to Exxon's contention it is entitled to contest on remand whether entries for which the limit is listed as zero or not specifically authorized are violations, the Courts initial findings forecloses that argument on remand.[180]

31. The Circuit's analysis of Counts III and IV is instructive to the extent Exxon contends the Court's initial conclusion, that entries with limitations listed as "not specifically authorized" or zero were not corroborated and therefore not proven, was not vacated. The Circuit interpreted the Court's initial conclusions of law paragraphs 19, 22, and 25 as not being corroborated as to the "same limit"—not that an entry listing the limit as "not authorized" or zero required additional corroboration. *Env't Tex.*, 824 F.3d at 521. The term corroboration referred not to additional evidentiary proof that an entry was a violation, but instead to whether such a violation was repeated or continuous such that it would be actionable under the CAA.[181] Accordingly, the Court finds as consistent with the Circuit's opinion,

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[180] *Supra* ¶ III.9 n.153; *Findings of Fact & Conclusions of Law*, Document No. 225, ¶ III.9 n.153.

[181] To the extent the Court's initial conclusions could be interpreted to support Exxon's theory, the Court finds any such interpretation is foreclosed by the Fifth Circuit's opinion. Specifically, the opinion states: "[T]he district court clearly assumed each Count II event counted by Plaintiffs was undisputed as a violation because it limited its focus in its findings of fact and conclusions of law to whether identical numerical permit limits were present in Plaintiffs' tables such that repeated or ongoing violations of the *same* limits were 'corroborated.'" *Env't Tex.*, 824 F.3d at 524. Whether this characterization of the Court's initial conclusions simplified any nuances in that opinion is immaterial on remand. The Circuit vacated Count II in its entirety, not in part. Exxon

that where a limit is listed as zero or "not authorized," that term refers to a limitation within the CAA and any entry on the spreadsheet listed as such is a violation. In calculated the number of violations, the Court below will note the permit conditions the Plaintiffs allege were violated and the spreadsheets providing the evidentiary support documenting those violations. [182]

32. General condition 8 and special condition 1 of each of Exxon's state-issued permits identify a MAERT. For each pollutant, the MAERT identifies the pollution source, termed the "emission point." Flexible permits contain a single

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is attempting on remand to assert arguments the Circuit specifically found were waived. In repeated footnotes, in regards to Count II, the Circuit stated: "Exxon never contested those emissions as violations below, and the district court rightly understood there was no dispute on the point." *Id.* at 524 n. 9; *see also*, *id.* at 518 n.5 (noting Exxon did not contest on the record whether "specific entries in which the emission quantity—standing alone—would appear to fall below the applicable listed threshold were not shown to be violative of MAERT limits"). The Court interprets these notes as instructing it to consider each entry on Count II as an undisputed violation and that any interpretation otherwise would be error. On remand, the Circuit did give Exxon leave to contest whether an entry on the spreadsheet was attributable to planned MSS activity. *Id.* at 519. In other words, Exxon was free on remand to direct the Court to which entries were attributable to authorized MSS activity (essentially to assert which violations were subject to affirmative defenses). Violations that result from planned MSS activity are an affirmative defense pursuant to 30 Texas Administrative Code § 101.222. Except to the extent Exxon has addressed MSS activity in its briefing on the affirmative defenses, Exxon has not otherwise directed the Court to which violations could be attributable to planned MSS activity. Accordingly, the Court on this count will treat all violations as uncontested and then determine when it addresses Exxon's affirmative defenses whether all the repeated violations provide a basis for liability under the CAA.

[182] As noted in the previous footnote, the following subsections calculate the repeated violations in total. The Court will address in the section on affirmative defenses whether all the repeated violations proven in Count II give rise to liability under the CAA prior to calculating the base number used in determining the amount of a penalty to assess.

hourly emission limit for a pollutant—a cap—governing all sources in aggregate. 30 TEX. ADMIN. CODE § 116.715(c)(7). Standard permit MAERTs list the hourly emission limit per pollutant for each source.[183] "An exceedance of the flexible permit emission cap(s) or individual emission limitations is a violation of the permit." *Id.* § 116.715(b). MAERTs, and any other special conditions listed in a permit, govern the emission limits for flexible permits. *Id.* § 116.715(c)(7) (stating only those sources of emissions and air contaminants listed in the table are permitted). The corollary of the MAERT defining the universe of sources and contaminants a permit allows within the limits set forth is, that if an emission is not listed in the MAERT, it is not allowed by permit and not authorized. Therefore, the effective limit for that unauthorized contaminant is zero.

33. Plaintiffs submitted spreadsheets in native format sorted based on the information provided in the stipulated spreadsheets. The Court has reviewed Plaintiffs' spreadsheets and determined that violations are properly counted, based on the above findings, where the emissions rate is "not specifically authorized," zero, or where portions of an emission is authorized, but the emission exceeds the applicable pounds/hour rate limit, without any additional corroboration needed. As with Count I, the Court concludes the use of a twenty-four hour period, as opposed to a calendar day, to calculate days of violation is appropriate.

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[183] *See e.g.*, *Plaintiffs' Exhibit* 139 at ETSC 076146–47.

i. Refinery Flexible Permit 18287[184]

34. Refinery Flexible Permit 18287 provides for MAERT limitations in general conditions 8 and 15, special condition 1, and the table set forth in accordance with those conditions.[185] General condition 8 provides, in relevant part, that "[f]lexible permitted sources are limited to the emission limits and other conditions specified in the table attached to the flexible permit."[186] General condition 15 requires the permit holder to comply with all requirements of the permit, and states emissions exceeding the limits thereof are not authorized and are permit violations.[187] Special condition 1 provides that "[t]his permit covers only those emissions from those points listed in the attached table entitled "Emission Sources – Emission Caps,' and the facilities covered by this permit are authorized to emit to the emission rate limits and other conditions specified in this permit."[188]

35. The evidentiary support cited for MAERT violations of permit 18287 is Plaintiff's Exhibits 2A and 2B (stipulated spreadsheets), 589 and 590 (Plaintiffs'

[184] Count II violations involving 18287 are calculated here without respect to the Court's findings on Count I. The Count II violations are to an extent duplicative of the Count I violations. In calculating the amount of a penalty to assess, the Court will use the violations in Count I, as special conditions 38 and 39 are more restrictive than the MAERT limitations in Count II, and encompass the Count II violations.

[185] *Plaintiffs' Exhibit* 176 at ETSC 077534.

[186] *Plaintiffs' Exhibit* 176, General Condition ¶ 8.

[187] *Plaintiffs' Exhibit* 176, General Condition ¶ 15.

[188] *Plaintiffs' Exhibit* 176, Special Condition ¶ 1.

corresponding spreadsheets), and 10 (tallied table). The Court has reviewed the spreadsheets and tallied table submitted by Plaintiffs relevant to Count II, permit 18287, and agrees with the methodology used in calculating the total violations per pollutant listed therein. The evidence shows the refinery emitted twenty-four different pollutants in continuing or repeated violations totaling 7,920 days of violations. Accordingly, the Court finds as to permit 18287, Plaintiffs have proven 7,920 days of repeated or continued violations of MAERT limits by a preponderance of the evidence.[189]

ii. Olefins Plant Flexible Permit 3452

36. Olefins Plant Flexible Permit 3452 provides for MAERT limitations in general condition 8, special condition 1, and the table set forth in accordance with those conditions.[190] General condition 8 provides, that "[t]he total emissions of air contaminants from any of the sources of emissions must not exceed the values stated on the table attached to the permit entitled 'Emission Sources – Maximum Allowable Emission Rates.'"[191] Special condition 1 provides that "[t]his permit authorizes emissions only from those points listed in the attached

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[189] The Court finds the Count II violations as to permit 18287 in the alternative to any violations found as to that permit in Count I.

[190] *Plaintiffs' Exhibit* 132 at ETSC 076033 et seq.

[191] *Plaintiffs' Exhibit* 133, General Condition ¶ 8.

table entitled "Emission Points, Emission Caps, and Individual Emission Limitations."[192]

37. The evidentiary support cited for MAERT violations of permit 3452 is Plaintiff's Exhibits 2C and 2D (stipulated spreadsheets), 591 and 592 (Plaintiffs' corresponding spreadsheets), and 10 (tallied table). The Court has reviewed the spreadsheets and tallied table submitted by Plaintiffs relevant to Count II, permit 3425, and agrees with the methodology used in calculating the total violations per pollutant listed therein. The evidence shows the plant emitted fourteen different pollutants in continuing or repeated violations totaling 4,038 days of violations. Accordingly, the Court finds as to permit 3452, Plaintiffs have proven 4,038 days of repeated or continued violations of MAERT limits by a preponderance of the evidence.

iii. Chemical Plant Permits: 4600 (Flare Stack 23), 5259 (Furnaces), 20211 (Flare Stack 12, Butyl Units, Aromatics Units), 36476 (Flare 28, Syngas Fugitives), and No Permit Authorization[193]

38. The Chemical Plant permits provide for MAERT limitations in general condition 8, special condition 1, and the tables set forth in accordance with

[192] *Plaintiffs' Exhibit* 133, Special Condition ¶ 1.

[193] The Court in its initial findings of fact and conclusions of law did find repeated violations of the Chemical Plant permits on Count II. However, as the Circuit determined the Court used an erroneous definition of the term "same permit," the Court reanalyzes the Chemical Plant permits anew using the correct standard. This necessitates entering entirely new findings as to these permits.

the conditions of permits 4600, 5259, 20211, 36476. General condition 8 of permits 4600, 5259, and 36476 provides, that "[t]he total emissions of air contaminants from any of the sources of emissions must not exceed the values stated on the table attached to the permit entitled 'Emission Sources – Maximum Allowable Emission Rates.'"[194] General condition 8 of permit 20211 provides, in relevant part, that "[f]lexible permitted sources are limited to the emission limits and other conditions specified in the table attached to the flexible permit."[195] Special condition 1 of permits 4600 and 36476 provides that "[t]his permit authorizes emissions only from those points listed in the attached table entitled "Emission Sources – Maximum Allowable Emission Rates' and facilities covered by this permit are authorized to emit subject to the emission rate limits on that table and other operating conditions specified in this permit."[196] Special condition 1 of permit 5259 states that "[t]his permit covers only those sources of emissions listed in the attached table entitled 'Emission Sources – Maximum Allowable Emission Rates,' and those sources are limited to the emission limits and other conditions

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[194] *Plaintiffs' Exhibit* 140, General Condition ¶ 8; *Plaintiffs' Exhibit* 144, General Condition ¶ 8; *Plaintiffs' Exhibit* 139, General Condition ¶ 8.

[195] *Plaintiffs' Exhibit* 123, General Condition ¶ 8.

[196] *Plaintiffs' Exhibit* 140, Special Condition ¶ 1; *Plaintiff's Exhibit* 139, Special Condition 139. The MAERT table for permit 4600 is located at *Plaintiffs' Exhibit* 140 at ETSC 76161 et seq. The MAERT table for permit 36476 is located at *Plaintiffs' Exhibit* 140 at 076146 et seq.