

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	PETITION No. VI-2020-9
)	
EXXONMOBIL CORP.)	ORDER RESPONDING TO
BAYTOWN CHEMICAL PLANT)	PETITION REQUESTING
HARRIS COUNTY, TEXAS)	OBJECTION TO THE ISSUANCE OF
)	TITLE V OPERATING PERMIT
PERMIT No. O2269)	
)	
ISSUED BY THE TEXAS COMMISSION ON)	
ENVIRONMENTAL QUALITY)	

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

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated September 30, 2020 (the Petition) from the Environmental Integrity Project, Sierra Club, and Texas Campaign for the Environment (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 operating permit No. O2269 (the Permit) issued by the Texas Commission on Environmental Quality (TCEQ) to ExxonMobil Corporation’s Baytown Chemical Plant (the Baytown Chemical Plant or the facility) in Harris County, Texas. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and Title 30, Chapter 122 of the Texas Administrative Code (TAC). *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 in Section IV of this Order, the EPA grants in part and denies in part the Petition requesting that the EPA Administrator object to the Permit. Specifically, the EPA grants Claims A, B, C, D, and G, and denies Claims E and F.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA’s implementing regulations at 40 C.F.R. part 70. The state of Texas submitted a title V

program governing the issuance of operating permits on September 17, 1993. The EPA granted interim approval of Texas's title V operating permit program in 1996, and granted full approval in 2001. *See* 61 Fed. Reg. 32693 (June 25, 1996) (interim approval effective July 25, 1996); 66 Fed. Reg. 63318 (December 6, 2001). This program, which became effective on November 30, 2001, is codified in 30 TAC Chapter 122.

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. 42 U.S.C. §§ 7661a(a), 7661b, 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* 42 U.S.C. § 7661c(c). One purpose of the title V program is to “enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements.” 57 Fed. Reg. at 32251. Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the source's emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements.

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(a) 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. 42 U.S.C. § 7661d(a). 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. 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. 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

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.*

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). 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).

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. 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 in the following paragraph. A more detailed discussion can be found in the preamble to the EPA’s proposed petitions rule. *See* 81 Fed. Reg. 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.

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.

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 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

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).

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 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.*

If the EPA grants a title V petition, a permitting authority may address the EPA's objection by, among other things, providing the EPA with a revised permit. *See, e.g.*, 40 C.F.R. § 70.7(g)(4); *see generally* 81 Fed. Reg. 57822, 57842 (August 24, 2016) (describing post-petition procedures); *Nucor II Order* at 14–15 (same). In some cases, the permitting authority's response to an EPA objection may not involve a revision to the permit terms and conditions themselves, but may instead involve revisions to the permit record. For example, when the EPA has issued a title V objection on the ground that the permit record does not adequately support the permitting decision, it may be acceptable for the permitting authority to respond only by providing an additional rationale to support its permitting decision.

When the permitting authority revises a permit or permit record in order to resolve an EPA objection, it must go through the appropriate procedures for that revision. The permitting authority should determine whether its response is a minor modification or a significant modification to the title V permit, as described in 40 C.F.R. § 70.7(e)(2) and (4) or the corresponding regulations in the state's EPA-approved title V program. If the permitting authority determines that the modification is a significant modification, then the permitting authority must provide for notice and opportunity for public comment for the significant modification consistent with 40 C.F.R. § 70.7(h) or the state's corresponding regulations.

In any case, whether the permitting authority submits revised permit terms, a revised permit record, or other revisions to the permit, and regardless of the procedures used to make such revision, the permitting authority's response is generally treated as a new proposed permit for purposes of CAA § 505(b) and 40 C.F.R. § 70.8(c) and (d). *See Nucor II Order* at 14. As such, it would be subject to the EPA's 45-day review per CAA § 505(b)(1) and 40 C.F.R. § 70.8(c), and an opportunity for the public to petition under CAA § 505(b)(2) and 40 C.F.R. § 70.8(d) if the EPA does not object during its 45-day review period.

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

C. New Source Review

The major New Source Review (NSR) program is comprised of two core types of preconstruction permit requirements for major stationary sources. Part C of title I of the CAA establishes the Prevention of Significant Deterioration (PSD) program, which applies to new major stationary sources and major modifications of existing major stationary sources for pollutants for which an area is designated as attainment or unclassifiable for the national ambient air quality standards (NAAQS) and for other pollutants regulated under the CAA. 42 U.S.C. §§ 7470–7479. Part D of title I of the Act establishes the major nonattainment NSR (NNSR) program, which applies to new major stationary sources and major modifications of existing major stationary sources for those NAAQS pollutants for which an area is designated as nonattainment. 42 U.S.C. §§ 7501–7515. The EPA has two largely identical sets of regulations implementing the PSD program. One set, found at 40 C.F.R. § 51.166, contains the requirements that state PSD programs must meet to be approved as part of a state implementation plan (SIP). The other set of regulations, found at 40 C.F.R. § 52.21, contains the EPA’s federal PSD program, which applies in areas without a SIP-approved PSD program. The EPA’s regulations specifying requirements for state NNSR programs are contained in 40 C.F.R. § 51.165.

While parts C and D of title I of the Act address the major NSR program for major sources, section 110(a)(2)(C) addresses the permitting program for new and modified minor sources and for minor modifications to major sources. The EPA commonly refers to the latter program as the “minor NSR” program. States must also develop minor NSR programs to, along with the major source programs, attain and maintain the NAAQS. The federal requirements for state minor NSR programs are outlined in 40 C.F.R. §§ 51.160 through 51.164. These federal requirements for minor NSR programs are less prescriptive than those for major sources, and, as a result, there is a larger variation of requirements in EPA-approved state minor NSR programs than in major source programs.

Where the EPA has approved a state’s title I permitting program (whether PSD, NNSR, or minor NSR), duly issued preconstruction permits will establish the NSR-related “applicable requirements,” and the terms and conditions of those permits should be incorporated into a source’s title V permit without a further round of substantive review as part of the title V process. *See generally In the Matter of Big River Steel, LLC*, Order On Petition No. VI-2013-10 at 8–20 (October 31, 2017) (*Big River Steel Order*); 56 Fed. Reg. 21712, 21738–39 (May 10, 1991).¹⁰ The legality of a permitting authority’s decisions undertaken in the course of preconstruction permitting is not a subject the EPA will consider in a petition to object to a

¹⁰ However, as the EPA noted in the *Big River Steel Order*, there may be circumstances that “warrant a different approach.” *Big River Steel Order* at 11 n.20.

source's title V permit. *See Big River Steel Order* at 8–9, 14–20.¹¹ Rather, any such challenges should be raised through the appropriate title I permitting procedures or enforcement authorities.

The EPA has approved Texas's PSD, NNSR, and minor NSR programs as part of its SIP. See 40 C.F.R. § 52.270(c) (identifying EPA-approved regulations in the Texas SIP). Texas's major and minor NSR provisions, as incorporated into Texas's EPA-approved SIP, are contained in portions of 30 TAC Chapters 116 and 106.

III. BACKGROUND

A. The ExxonMobil Baytown Chemical Plant

ExxonMobil's Baytown Chemical Plant is part of a large petrochemical complex operated by ExxonMobil Corp. in Baytown, Harris County, Texas. The Baytown Chemical Plant takes feeds from ExxonMobil's Baytown Refinery and Baytown Olefins Plant, in addition to raw material, to recover and produce various products. The Baytown Chemical plant is broken up into three distinct chemical business units identified as Butyl Polymers, Polypropylene, and Olefins & Aromatics, each of which have different process units with different emission units.

The facility is a major source of nitrogen oxides (NO_x), volatile organic compounds (VOC), sulfur dioxide, particulate matter, carbon monoxide, hazardous air pollutants, and greenhouse gases, and is subject to title V of the CAA. Emission units within the facility are also subject to the PSD program, other preconstruction permitting requirements, and various New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP).

The EPA conducted an analysis using EPA's EJSCREEN¹² to assess key demographic and environmental indicators within a five kilometer-radius of the Baytown Chemical facility. This analysis showed a total population of approximately 34,014 residents within a five-kilometer radius of the facility, of which approximately 75 percent are people of color and 43 percent are low income. In addition, the EPA reviewed the EJSCREEN Environmental Justice Indices, which combine certain demographic indicators with eleven environmental indicators. Seven of the 11 Environmental Justice Indices in this five-kilometer area exceed the 80th percentile in the State of Texas with three of the 11 Environmental Justice indices exceeding the 90th percentile.

¹¹ The EPA does view monitoring, recordkeeping, and reporting to be part of the title V permitting process and will therefore continue to review whether a title V permit contains monitoring, recordkeeping, and reporting provisions sufficient to assure compliance with the terms and conditions established in the preconstruction permit. *See, e.g., In the Matter of South Louisiana Methanol, LP*, Order on Petition Nos. VI-2016-24 and VI-2017-14 at 10–11 (May 29, 2018) (*South Louisiana Methanol Order*); *Big River Steel Order* at 17, 17 n.30, 19 n.32, 20. Moreover, as the EPA has explained, “[A] decision by the EPA not to object to a title V permit that includes the terms and conditions of a title I permit does not indicate that the EPA has concluded that those terms and conditions comply with the applicable SIP or the CAA. However, until the terms and conditions of the title I permit are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through some other mechanism, such as a state court appeal, the ‘applicable requirement’ remains the terms and conditions of the issued preconstruction permit and they should be included in the source’s title V permit.” *Big River Steel Order* at 19.

¹² EJSCREEN is an environmental justice mapping and screening tool that provides the EPA with a nationally consistent dataset and approach for combining environmental and demographic indicators. *See* <https://www.epa.gov/ejscreen/what-ejscreen>.

B. Permitting History

ExxonMobil first obtained a title V permit for the Baytown Chemical Plant on April 29, 2004, which was subsequently renewed. On May 29, 2018, ExxonMobil submitted an application for a renewal title V permit. TCEQ published notice of a draft permit on August 23, 2019, subject to a public comment period that ran until September 23, 2019. On December 6, 2019, TCEQ submitted a proposed permit, along with its responses to public comments (RTC), to the EPA for its 45-day review. During this review period, on January 23, 2020, the EPA objected to the December 6, 2019, proposed permit. Objection to Federal Operating Permit No. O2269, ExxonMobil Corporation, Baytown Chemical Plant (January 23, 2020) (*Baytown Chemical Objection Letter*).¹³ Thereafter, by letter dated June 9, 2020, TCEQ submitted a revised version of the proposed permit (Revised Proposed Permit) to the EPA for another 45-day review period. The EPA did not object to the Revised Proposed Permit during this 45-day review period, which ended on July 31, 2020. TCEQ issued the final title V renewal permit for the Baytown Chemical Plant on August 3, 2020. Since the submittal of the Petition, the title V permit has been subsequently revised; the current version of the title V permit was issued on February 2, 2022.

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 July 31, 2020. The EPA's website indicated that any petition seeking the EPA's objection to the Revised Proposed Permit was due on or before September 30, 2020. The Petition was received September 30, 2020, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Claim A: The Petitioners Claim That “The Revised Proposed Permit Improperly Incorporates a Major NSR Permit by Reference.”

Petitioners' Claim: The Petitioners claim that the Permit improperly incorporates by reference (IBR) Permit No. PAL16, an NSR-based Plantwide Applicability Limit (PAL) permit. The Petitioners observe that Special Condition 30 of the title V permit, in conjunction with the Permit's New Source Review Authorization References table, incorporates Permit No. PAL16 by reference. Petition at 6–7.

The Petitioners assert that the EPA approved the use of IBR in Texas title V permits only for requirements in minor NSR permits and Permits by Rule (PBR). *Id.* at 7, 8 (citing *In the Matter of Premcor Refining Group, Inc.*, Order on Petition No. IV-2007-02 at 6 (May 28, 2009) (“Premcor Order”). The Petitioners contend that the EPA “determined that other kinds of applicable requirements—including applicable requirements established by major NSR

¹³ The EPA notes that this January 23, 2020, objection was issued under authority delegated by the EPA Administrator to Region 6 to object during the EPA's 45-day review period. The objection letter is available at <https://www.epa.gov/system/files/documents/2022-01/exxonmobil-objection-letter-o2269-signed.pdf>.

permits—may not be incorporated by reference [in title V permits] without violating 42 U.S.C. § 7661c(a).” *Id.* at 7.¹⁴

The Petitioners characterize PAL permits like Permit No. PAL16 as a “major permit,”¹⁵ as opposed to a minor NSR permit or PBR. *Id.* at 8–9. For support, the Petitioners state that TCEQ described the PAL program as a modification to its PSD and NNSR major source programs, that the EPA’s PAL regulations are found in the PSD and NNSR regulations (which apply to major sources), and that TCEQ’s PAL rules provide that PAL permits may only be issued to existing major sources. *Id.* at 8–9, 10 (citing 36 Tex. Reg 1305 (February 25, 2011); 30 TAC § 116.180(a)(5); 40 C.F.R. §§ 51.165(f), 51.166(w)).

According to the Petitioners, because Permit No. PAL16 is a major source permit (as opposed to a minor NSR permit or PBR), it was improper for TCEQ to IBR—as opposed to directly including or attaching—the requirements of PAL16 into the title V permit. *Id.* at 10.

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

The Petitioners have demonstrated that the Permit impermissibly incorporates emission limitations and other requirements of Permit No. PAL16 and therefore does not satisfy CAA § 504(a).

As the Petitioners observe, the Baytown Chemical title V permit IBRs Permit No. PAL16 along with a variety of other NSR permits, including minor NSR permits and PBRs. *See* Revised Proposed Permit, Special Condition 30 and NSR Authorization References Attachment. The title V permit neither specifies the applicable emission limits nor any other requirements from PAL16 permits, and this permit is not directly attached to the title V permit.¹⁶ At issue is whether this satisfies the Act.

Under title V of the CAA, the EPA’s part 70 regulations, and TCEQ’s EPA-approved title V program rules, every title V permit must include all applicable requirements that apply to a source, as well as any permit terms necessary to assure compliance with these requirements. *E.g.*,

¹⁴ The Petitioners also address a related point from TCEQ’s RTC concerning a 2012 letter from the EPA to TCEQ regarding the EPA’s objections to the IBR of PSD and NNSR permits. *See id.* at 9–10; RTC at Response 2; Letter from Carl Edlund, EPA Region 6, to Steve Hagle, TCEQ (March 21, 2012). The Petitioners assert that this letter did not signal any change in the EPA’s position that only minor NSR permits and PBRs may be incorporated by reference. Petition at 10.

¹⁵ The Petitioners later qualify this assertion, stating: “*If* PAL16 is a federally enforceable permit, it *is* a major source PSD and NNSR permit.” *Id.* at 10 (first emphasis added). This qualification appears to relate to public comments alleging that PAL16 was a state-only, non-federally enforceable permit, which the Petitioners did not pursue in the Petition. *See* Petition Ex. A, Comments, at 1–2.

¹⁶ By contrast, the title V permit does include various requirements established in Permit No. 36476/PSDTX996M1 (a major source PSD permit), which is attached to the title V permit as Appendix B.

42 U.S.C. § 7661c(a).¹⁷ “Applicable requirements,” as defined in the EPA’s and TCEQ’s rules, include the terms and conditions of preconstruction permits issued by TCEQ, including PALs. *See* 40 C.F.R. § 70.2; 30 TAC § 122.10(2)(H).

The CAA § 504 requirement to include all applicable requirements in a title V permit can be satisfied using IBR in certain circumstances. *See, e.g., White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program*, 40 (March 5, 1996) (*White Paper 2*) (explaining how IBR can satisfy the requirements of CAA § 504). The EPA’s longstanding position is that all emission limitations and standards must be included on the face of a title V permit; other provisions, including provisions necessary to assure compliance with those requirements, may be incorporated by reference (provided certain criteria are met). *White Paper 2* at 38, 40. With respect to the title V program in Texas, the EPA has provided additional flexibilities, allowing even certain emission limitations and standards to be incorporated by reference into title V permits. Specifically, when the EPA approved the Texas title V program, the Agency approved TCEQ’s use of IBR for all minor NSR requirements—including the requirements of minor NSR permits under 30 TAC Chapter 116 and PBRs under Chapter 106—provided the program was implemented correctly. *See* 66 Fed. Reg. 63318, 63321–32 (December 6, 2001).¹⁸ The EPA subsequently elaborated on the scope of this approval in two title V petition orders, which explained:

In approving Texas’ *limited* use of incorporation by reference of emissions limitations from minor NSR permits and Permits by Rule, EPA balanced the streamlining benefits of incorporation by reference against the value of a more detailed title V permit and found Texas’ approach for minor NSR permits and Permits by Rule acceptable. *See Public Citizen*, 343 F.3d at 460–61. EPA’s decision approving this use of IBR in Texas’ program *was limited to, and specific to, minor NSR permits and Permits by Rule* in Texas. EPA noted the unique challenge Texas faced integrating requirements from these permits into title V permits. *EPA did not approve (and does not approve of) Texas’ use of incorporation by reference of emissions limitations for other requirements*. Thus, EPA grants the petition on this issue with regard to TCEQ’s use of incorporation by reference for emissions limitations, with the exception of those emissions limitations from minor NSR permits and Permits by Rule

¹⁷ CAA section 504(a) requires the following: “Each permit issued under this subchapter shall include enforceable emission limitations and standards, . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.” 42 U.S.C. § 7661c(a); *see also* 40 C.F.R. § 70.6(a)(1) (“Each permit issued under this part shall include the following elements: (1) Emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.”); § 70.3(c)(1) (“For major sources, the permitting authority shall include in the permit all applicable requirements for all relevant emissions units in the major source.”); 30 TAC § 122.142(2)(B)(i) (“Each permit shall also contain specific terms and conditions for each emission unit regarding the following: . . . the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards.”).

¹⁸ *See also Public Citizen v. EPA*, 343 F.3d 449, 460 (5th Cir. 2003) (upholding the EPA’s approval of incorporation by reference in Texas; stating “Nothing in the CAA or its regulations prohibits incorporation of applicable requirements by reference. The Title V and Part 70 provisions specify what Title V permits ‘shall include’ but do not state how the items must be included.”).

Premcor Order at 5–6; *In the Matter of CITGO Refining and Chemicals Company, L.P.*, Order on Petition No. VI-2007-01 at 11 (May 28, 2009) (*CITGO Order*) (emphasis added). In sum, allowing TCEQ to IBR emission limitations and standards in certain narrow circumstances is the exception, not the rule. The EPA has affirmed these principles on numerous subsequent occasions.¹⁹

In addition to addressing the types of requirements that *can* be incorporated by reference into a title V permit, the EPA has also addressed some of the requirements that *cannot* be incorporated by reference. Specifically, the EPA has objected to TCEQ’s use of IBR for requirements contained in PSD and NNSR permits.²⁰ Citing these prior decisions, TCEQ’s response to comment (RTC) asserts that the “EPA limited the scope of which NSR permits” must be included in (or attached to) title V permits, suggesting that only PSD and NNSR requirements must be directly included. RTC at Response 2. TCEQ is incorrect. Nowhere has EPA suggested that PSD and NNSR permit terms are the *only* requirements that must be included in a title V permit (i.e., the only requirements that cannot be incorporated by reference). Rather, the EPA’s longstanding guidance on this topic has “limited” the types of requirements that *can* be incorporated by reference, not those that *cannot* be incorporated by reference.

Here, the issue remains how to characterize the requirements of PAL16 within this framework. The Petitioners contend that PAL16 is a “major NSR permit,” while TCEQ asserts it is not.²¹ But this debate would be better framed by asking whether PAL16 is a type of minor NSR permit for which the EPA approved IBR.²² The Petitioners argue that PALs are not minor NSR permits; perhaps tellingly, TCEQ does not argue that PAL16 is a minor NSR permit. The EPA appreciates that PAL permits elude straightforward classification.²³ Nonetheless, the EPA does not consider PAL permits—or the emission limitations established therein—to be the type of “minor NSR permit” that can be incorporated by reference into a title V permit. As the Petitioners observe, PALs are an element of the EPA’s and TCEQ’s major NSR program rules, and PALs may be used only by major sources. 40 C.F.R. §§ 51.165(f)(1)(i), 51.166(w)(1)(i),

¹⁹ *E.g.*, *In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition No. VI-2011-05 at 9–10 (January 15, 2013) (“The EPA’s decision approving the use of IBR in Texas’ program was limited to, and specific to, minor NSR permits and PBRs in Texas.”); *In the Matter of Pasadena Refining System, Pasadena Refinery*, Order on Petition No. VI-2016-20 at 8 (May 1, 2018) (“The EPA’s decision approving the use of IBR in Texas’s program was limited to, and specific to, 30 TAC Chapter 116 minor NSR permits and 30 TAC Chapter 106 PBRs in Texas.”).

²⁰ *See, e.g.*, *Premcor Order* at 5–6; *CITGO Order* at 11; *see also* Letter from Al Armendariz, EPA Region 6, to Mark R. Vickery, TCEQ (June 10, 2010); Letter from Carl E. Edlund, EPA Region 6, to Steve Hagle, TCEQ (March 21, 2012).

²¹ Specifically, TCEQ “disagrees that the PAL is a major NSR permit” because, if emissions from a future project stay below the rates established in the PAL, the project will not be subject to major NSR. RTC at Response 2.

²² The EPA’s approval of IBR in Texas is not based on a permit’s classification as a “major NSR permit,” but rather on whether a permit is a “minor NSR permit” or PBR. *See* 66 Fed. Reg. at 63321–32.

²³ PALs do not authorize construction, but rather serve as a mechanism for assessing the applicability of major NSR to future construction, and therefore are distinguishable from both traditional major NSR permits (*i.e.*, a PSD or NNSR permits) that authorize the construction of a new major stationary source or major modification, as well as traditional minor NSR permits (or PBRs) that authorize the construction of a new minor source or minor modification.

52.21(aa)(1)(i); *see also* 30 TAC § 116.180(a)(5).²⁴ As such, they are distinguishable from minor NSR permits and PBRs, and accordingly may not be incorporated into a title V permit by reference in the same manner as minor NSR permits. At minimum, to satisfy CAA § 504(a), the emission limitations of PAL permits must be included on the face of a title V permit. 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a)(1); *White Paper 2* at 38, 40.

Direction to TCEQ: In order to satisfy CAA § 504(a), TCEQ must amend the title V permit to properly include the applicable requirements of PAL16. TCEQ may accomplish this in various ways, such as by including the relevant emission limitations of PAL16 within the existing title V permit tables associated with Permit No. 36476/PSDTX996M1, and by attaching the PAL permit to the title V permit.

Claim B: The Petitioners Claim That “The Executive Director Failed to Adjust ExxonMobil’s Plantwide Applicability Limits for NO_x and VOC Downward to Account for Harris County’s Recent Designation as a Serious Ozone Nonattainment Area.”

Petitioners’ Claim: The Petitioners assert that TCEQ failed during the title V renewal proceeding to adjust the NO_x and VOC emission limits in PAL16 to reflect Harris County’s redesignation from moderate to serious nonattainment with the ozone NAAQS. Petition at 11.

The Petitioners claim that when PAL16 was first issued, emission limits were established by adding the significance levels applicable to moderate ozone nonattainment areas—40 tons per year (tpy) for NO_x and VOC—to the facility’s baseline emissions. *Id.*; *see id.* at 12 (quoting 30 TAC 116.188(1), which provides that “[a]n amount equal to the applicable significant level for the PAL pollutant may be added to the baseline actual emissions when establishing the PAL.”).

The Petitioners indicate that these significance levels were later reduced to 15 tpy for NO_x and VOC when Harris County was redesignated as a serious ozone nonattainment area in 2019. *Id.* at 11–12 (citing 84 Fed. Reg. 44238 (August 23, 2019); 30 TAC § 116.12(20)(A), Table 1). However, the Petitioners assert that the NO_x and VOC PAL emission limits have not yet been adjusted to account for the redesignation. *Id.* at 12. As a consequence, the Petitioners assert that the NO_x and VOC PALs incorporated into the title V permit currently fail to reflect the applicable major modification threshold. *Id.* at 13.

As the Petitioners note, TCEQ’s EPA-approved SIP regulations state:

If the compliance date for a state or federal requirement that applies to the PAL source occurs during the PAL effective period, and if the executive director has not already

²⁴ *See also* 30 TAC §116.12 (containing definitions applicable to and shared by PSD, NNSR, and PAL programs); 77 Fed. Reg. 65119 (October 25, 2012) (EPA approval of Texas PAL program as part of revisions to the state’s major NSR program); Letter from Zak Covar, TCEQ, to Carl Edlund, EPA Region 6 (May 3, 2012), available at <https://regulations.gov>, Docket No. EPA-R06-OAR-2011-0332-0007 (characterizing the Texas PAL program as part of the state’s major NSR SIP). In this respect, PAL permits are distinguishable from “flexible” permits in Texas, which are a minor NSR program that can be used by both major and minor sources. *See infra* notes 50–52 and accompanying text. The EPA has allowed the use of IBR for flexible permits.

adjusted for such requirement, the PAL shall²⁵ be adjusted at the time of PAL permit renewal or *federal operating permit renewal*, whichever occurs first.

Id. at 12 (quoting 30 TAC § 116.196(g) (emphasis in Petition)). The Petitioners characterize the new NO_x and VOC significance levels as a “federal requirement that applies to the PAL source” that “occur[red] during the PAL effective period.” *Id.* at 14 (quoting 30 TAC § 116.196(g); citing 42 U.S.C. § 7661c(a)); *see id.* at 12–13 (citing, *inter alia*, 30 TAC § 116.12(20)(A) Table 1; 40 C.F.R. § 70.6(a)(1)). Thus, the Petitioners contend that TCEQ was required to adjust the PAL levels when the facility’s title V permit was renewed. *Id.* at 13.

The Petitioners fault TCEQ’s decision not to make this change during the title V permit renewal. First, the Petitioners address TCEQ’s contention that challenges to PAL16 should have been raised when PAL16 was initially issued in 2011. The Petitioners explain that there was no opportunity to raise this issue in 2011 because Harris County was not redesignated until 2019. *Id.* at 14. Second, the Petitioners reiterate that the Texas SIP expressly requires the requested adjustment as part of the title V renewal process. *Id.* (citing 30 TAC § 116.196(g)).

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

The Petitioners have demonstrated that the permit record is unclear, and that TCEQ has failed to adequately respond to comments, as to whether the Permit complies with applicable requirements of the SIP. As explained by the Petitioners, TCEQ’s EPA-approved SIP rules require:

If the compliance date for a state or federal requirement that applies to the PAL source occurs during the PAL effective period, and if the executive director has not already adjusted for such requirement, the PAL shall be adjusted at the time of PAL permit renewal or federal operating permit renewal, whichever occurs first.

30 TAC § 116.196(g).²⁶

TCEQ’s RTC attempts to dodge the public comments asserting that TCEQ failed to fulfill this requirement. Instead of providing any substantive rebuttal, TCEQ states:

Any challenges to the validity of an NSR permit; including whether it is federally enforceable, references confidential information, or any other comment regarding the completeness or content of the NSR permit; should have been raised or should be raised through the appropriate NSR permit process. It is not appropriate for Commenters to attempt to challenge these issues in a Title V permit action.

RTC at Response 4.

²⁵ The Petition, in reproducing the quoted regulatory text, included the word “should.” Petition at 12. The correct word, included in the regulatory text, is “shall.” 30 TAC § 116.196(g).

²⁶ The EPA’s regulations contain a substantively identical provision. *See* 40 C.F.R. §§ 51.165(f)(10)(v), 51.166(w)(10)(v), 52.21(aa)(10)(v).

TCEQ’s reasoning, which is based on two cited EPA petition orders (the *Hunter I Order* and the *Big River Steel Order*²⁷), reflects a misunderstanding of the EPA’s position governing the relationship between NSR and title V permitting, particularly with regard to the issues raised in this claim. The EPA has explained that in certain circumstances, a duly-issued NSR permit that has been subject to public notice and comment and for which judicial review was available establishes the “applicable requirements” of the SIP for title V purposes, such that decisions made in issuing that NSR permit should not be subject to collateral challenges through the title V permitting process. *E.g.*, *Big River Steel Order* at 8–20. However, this principle is not a *carte blanche* for title V permitting authorities to avoid addressing all issues that implicate NSR permitting. As a general matter, the EPA is concerned by TCEQ’s repeated attempts to apply the principles set forth in the *Big River Steel Order* (and other orders) to situations in which those principles do not properly apply. For example, the EPA’s January 23, 2020, objection to the initial Baytown Chemical Plant proposed permit was based, in part, on TCEQ’s improper reliance on the *Hunter I* and *Big River Steel Orders* to avoid addressing certain issues through the title V permitting process.²⁸ More to the point, this principle is simply not relevant to Claim B of the Petition. The Petitioners’ claim is not a challenge to the terms or validity of Permit No. PAL16, as issued in 2011. Rather, the Petitioners’ claim concerns an entirely separate issue: TCEQ’s regulatory obligation under the SIP to adjust the PAL limits to reflect newly-applicable requirements *in the present title V permitting action*. This SIP-based, forward-looking, title V-implemented obligation to adjust a PAL is an “applicable requirement” for title V purposes. 40 C.F.R. § 70.2; 30 TAC § 122.10(2)(H). TCEQ offers no substantive justification for avoiding this obligation in the current permit action. As a result, it is not clear from the permit record whether the title V permit assures compliance with all applicable requirements. Moreover, TCEQ’s RTC effectively does not respond to the significant public comments raising this issue. 40 C.F.R. §§ 70.7(h)(6), 70.8(a)(1)(i)–(ii), 70.8(c)(iii). Accordingly, the EPA grants Claim B.

Direction to TCEQ: TCEQ must amend the permit record to include a response to comments concerning TCEQ’s obligation to fulfill the requirements of 30 TAC § 116.196(g) in the present title V renewal permit action. To the extent that TCEQ determines that no adjustments to the emission limits in PAL16 are necessary, it must explain the basis for this decision, including the significance levels used to establish the emission limits presently in PAL16.

The EPA expects this to be a straightforward task. Specifically, although ExxonMobil’s December 2007 application for PAL16 requested that a 40 tpy significance level be used to

²⁷ TCEQ cites (and restates text from) *In the Matter of PacificCorp Energy Hunter Power Plant, Emery County, Utah*, Order on Pet. No. VIII-2016-4 (October 16, 2017) (*Hunter I Order*) and *In the Matter of Big River Steel, LLC*, Order on Petition No. VI-2013-10 (October 31, 2017) (*Big River Steel Order*). The *Hunter I Order* was vacated by the U.S. Court of Appeals for the Tenth Circuit. *Sierra Club v. EPA*, 964 F.3d 882 (10th Cir. 2020). However, the ultimate disposition of that case is not directly relevant to this Order, as judicial review of this Order is not within the Tenth Circuit’s jurisdiction. The *Big River Steel Order* was not reviewed by the courts. However, the U.S. Court of Appeals for the Fifth Circuit, in whose jurisdiction the present action resides, upheld an order expressing similar principles to the *Hunter I* and *Big River Steel Orders*. *Environmental Integrity Project v. EPA*, 960 F.3d 236 (5th Cir. 2020).

²⁸ *Baytown Chemical Objection Letter* at 8; see also the EPA’s response to Claim D, which raises similar issues to the EPA’s objection. The EPA has expressed similar concerns with other permitting authorities’ misinterpretations of the *Hunter I* and *Big River Steel Orders*. See *In the Matter of Coyote Station Power Plant*, Order on Petition Nos. VIII-2019-1 & VIII-2020-8 at 12–13 (January 15, 2021).

establish the NO_x and VOC limits, it does not appear that this 40 tpy significance level *was* used when TCEQ issued PAL16.²⁹ After ExxonMobil submitted its December 2007 application, but before PAL16 was issued in 2011, the Houston-Galveston-Brazoria area was redesignated as severe nonattainment with the 1997 8-hour ozone NAAQS.³⁰ As a result, at the time PAL16 was issued in 2011, the relevant significance level was 25 tpy for both NO_x and VOC—the same significance level as is currently applicable (due to the area’s 2019 designation as serious nonattainment with the 2008 8-hour ozone NAAQS). 30 TAC § 116.12(20)(A), Table 1. Provided the emission limits in PAL16 were—and are—based on that lower 25 tpy significance level, TCEQ may be able to reasonably conclude that no adjustments to the NO_x and VOC limits in PAL16 were required based on the 2019 nonattainment redesignation of the Houston-Galveston-Brazoria area.

Claim C: The Petitioners Claim That “The Revised Proposed Permit Fails to Provide Sufficiently Detailed NESHAP Applicability Determinations.”

Petitioners’ Claim: The Petitioners challenge the manner by which the Permit IBRs certain applicable NESHAP requirements.

The Petitioners explain that the Permit includes a table identifying multiple emission units subject to requirements in 40 C.F.R. part 63, subpart DDDDD (the subpart DDDDD NESHAP). Petition at 14–15. The permit table incorporating the requirements of subpart DDDDD states, for example, “The permit holder shall comply with the applicable limitation, standard, and/or equipment specification requirements of 40 CFR Part 63, Subpart DDDDD,” or “The permit holder shall comply with the applicable monitoring and testing requirements of 40 CFR Part 63, Subpart DDDDD.” *Id.* (quoting numerous identical references within the Permit).

The Petitioners challenge the adequacy of these high-level citations to the subpart DDDDD NESHAP. The Petitioners argue that TCEQ’s failure to specifically identify which requirements within subpart DDDDD are applicable “is inconsistent with the black-letter requirements in Texas’s federally-approved Title V regulations.” *Id.* at 15. Specifically, the Petitioners claim that the Texas regulations require that title V permits include detailed applicability determinations, including:

[T]he specific regulatory citations in each applicable requirement . . . identifying the emission limitations and standards; and . . . the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards . . . sufficient to ensure compliance with the permit.

²⁹ ExxonMobil’s December 2007 permit application requested limits of 541.14 tpy NO_x and 1429.45 tpy VOC, which included a 40 tpy addition for the significance levels. Petition Ex. I. However, the limits included in the 2011 PAL16 permit (which are retained in the April 14, 2017, version of PAL16 incorporated into the present title V permit) were established at 526.14 NO_x and 1414.45 tpy VOC. Permit No. PAL16, MAERT (June 16, 2011), available at <https://records.tceq.texas.gov>, Content ID # 5052115. The 2011 permit limits are exactly 15 tpy less than those requested by ExxonMobil; this likely indicates that TCEQ applied a 25 tpy significance level (instead of a 40 tpy significance level) when establishing the limits.

³⁰ The Houston-Galveston-Brazoria area was designated as severe nonattainment with the now-revoked 1997 8-hour ozone NAAQS between October 31, 2008, and December 8, 2016. 73 Fed. Reg. 56983 (October 31, 2008); 81 Fed. Reg. 78691 (December 8, 2016).

Id. (quoting 30 TAC § 122.142(b)(2)(B) (alterations in petition)). Contrary to this requirement, the Petitioners assert that the Permit fails to identify which of the many potentially-applicable subpart DDDDD provisions apply to the facility. *Id.* at 15–16. Similarly, because the Permit lacks detail about which subpart DDDDD requirements apply, the Petitioners claim that it runs afoul of the requirement that “[e]ach permit issued under this part shall include . . . [e]missions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.” *Id.* at 15 (quoting 40 C.F.R. § 70.6(a)(1)).

The Petitioners also address TCEQ’s RTC, in which the state suggested that it would include more detailed citations within the Permit at a later date. *See id.* at 16 (citing RTC at Response 6). The Petitioners assert that TCEQ cannot delay the more specific applicability determinations because the effective date of applicable requirements is established by EPA’s rules, not by TCEQ’s preferences, and because title V permits must include and assure compliance with all applicable requirements. *Id.* at 16-17 (citing 40 C.F.R. § 70.6(a) and (c)).

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

The Petitioners have demonstrated that the Permit does not include or adequately incorporate the specific applicable requirements of the subpart DDDDD NESHAP to which the Baytown Chemical Plant is subject.

As explained with respect to Claim A, under title V of the CAA, the EPA’s part 70 regulations, and TCEQ’s EPA-approved title V program rules, every title V permit must include all applicable requirements that apply to a source, as well as any permit terms necessary to assure compliance with these requirements. *E.g.*, 42 U.S.C. § 7661c(a).³¹ The CAA § 504 requirement to include all applicable requirements in a title V permit can be satisfied using IBR in certain circumstances. *See, e.g., White Paper 2* at 40 (explaining how IBR can satisfy the requirements of CAA § 504). In all cases where IBR is employed, the title V permit must contain references that are “detailed enough that the manner in which the referenced material applies to the facility is clear and is not reasonably subject to misinterpretation.” *White Paper 2* at 37. Moreover, “Where only a portion of the referenced document applies, . . . permits must specify the relevant section of the document.” *Id.*³²

Requirements of a NESHAP that apply to emission units at a facility are “applicable requirements.” 40 C.F.R. § 70.2; 30 TAC § 122.10(2)(I)(ii). The EPA has previously addressed the manner by which NESHAP (or NSPS) requirements may be incorporated by reference into title V permits. In 1999, the EPA rejected suggestions that states have the discretion to include high-level citations to an entire NESHAP subpart, stating: “The permit needs to cite to whatever

³¹ *See supra* note 17.

³² The EPA has also explained: “Where the cited applicable requirement provides for different and independent compliance options . . . , the permitting authority generally should require that the part 70 permit contain (or incorporate by reference) the specific option(s) selected by the source.” *White Paper 2* at 39. This principle is even more relevant in situations where a NESHAP includes different regulatory requirements, only some of which apply to specific emission units at the source (i.e., to situations where determining the applicable requirements of the NESHAP depends not on the option chosen by the source, but rather on the option dictated by the regulations).

level is necessary to identify the applicable requirements that apply to each emissions unit or group of emission units (if generic grouping is used), and to identify how those units will comply with the requirements.”³³ The EPA has also objected to title V permits that have attempted to IBR NESHAP (or NSPS) requirements without providing sufficient detail to determine the specific requirements that apply to emission units at the source. Specifically, in the *Tesoro Order*, the EPA found that references to sections of a NESHAP that were not associated with specific emission units created ambiguity and applicability questions that “render[ed] the Permit unenforceable as a practical matter and incapable of meeting the Part 70 standard that it assure compliance with all applicable requirements.” *In the Matter of Tesoro Refining*, Order on Petition No. IX-2004-06 at 8 (March 15, 2005). Additionally, in the *ETC Waha Order*, the EPA found that high-level references to an entire NSPS subpart, which did not identify the specific requirements within the subpart that applied to each emissions unit, similarly failed to comply with the CAA. *In the Matter of ETC Texas Pipeline, Ltd. Waha Gas Plant*, Order on Petition No. VI-2020-3 at 17–19 (January 28, 2022).³⁴

TCEQ’s EPA-approved title V regulations contain language that is consistent with the EPA’s guidance on this issue. Specifically, as noted by the Petitioners, the TCEQ regulations require title V permits to include:

[D]etailed applicability determinations, which include . . . (i) the specific regulatory citations in each applicable requirement . . . identifying the emission limitations and standards; and . . . (ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards . . . sufficient to ensure compliance with the permit.

30 TAC § 122.142(b)(2)(B).

Here, the Petitioners have demonstrated that the Permit is deficient because it fails to identify, with specific regulatory citations, the applicable emission limitations and other requirements of the subpart DDDDD NESHAP to which the emission units at the Baytown Chemical Plant are subject. As noted by the Petitioners, for multiple emission units subject to subpart DDDDD, the Permit’s Applicable Requirements Summary Table cites only 40 C.F.R. § 63.7505 and indicates: “The permit holder shall comply with the applicable limitation, standard, and/or equipment specification requirements of 40 CFR Part 63, Subpart DDDDD” (or a similar variation of this text with respect to testing, monitoring, recordkeeping, or reporting requirements). *E.g.*, Revised Proposed Permit at 118, 252, 257, 260, 293, 295, 297, 300, 303, 304, 306, 313, 316, 334, 336, 338, 436, 449, 450. Neither 40 C.F.R. § 63.7505,³⁵ nor any other Permit term, nor any portion of the permit record identifies which specific requirements apply to the affected emission units. As the

³³ Letter from John S. Seitz, EPA, to Robert Hodanbosi and Charles Lagges, STAPPA/ALAPCO, Enclosure B at 6 (May 20, 1999).

³⁴ Notably, both the *Tesoro* and *ETC Waha Orders* involved relatively complex NESHAP and NSPS regulations containing multiple requirements, only some of which were applicable to individual emission units at the respective sources. There may be other situations where it is possible for a title V permit to clearly and unambiguously incorporate the requirements of a more straightforward NESHAP or NSPS regulation with less detailed references.

³⁵ This cited provision contains general requirements, such as the obligation to comply with the specific emission limits, work practice standards, and operating limits of subpart DDDDD, but does not itself identify which requirements are applicable to different units. *See* 40 C.F.R. § 63.7505.

Petitioners correctly assert, this is especially problematic given the complexity of the subpart DDDDD NESHAP, which contains many different potential requirements that only apply to emission units meeting certain criteria. The Permit's vague, high-level references render it impossible to determine which of these requirements of the subpart DDDDD NESHAP are applicable to specific emission units at the Baytown Chemical Plant. Thus, the Permit cannot be said to include or assure compliance with the applicable requirements of the subpart DDDDD NESHAP. 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(1), (c).

This deficiency in the Permit is highlighted by TCEQ's RTC, which suggests that even the state is not—or was not at the time of permit issuance—certain about which specific requirements of subpart DDDDD are applicable to the facility. In responding to comments regarding this issue, TCEQ stated:

It has been a long-standing practice for TCEQ to list high level applicable requirements in the Title V permit's Applicable Requirement Summary when the TCEQ has not developed the Decision Support System (DSS) for certain state and federal applicable requirements. The DSS consists of Requirement Reference Tables (RRT), unit attribute forms and regulatory flowcharts that assist in making applicability determinations which include monitoring/testing, recordkeeping, and reporting requirements. After these documents are developed, detailed citations will be included in the permit with the first permit project submitted that addresses the subject units. Even with the high level applicable requirements, the permit holder is always required to keep appropriate records of monitoring/testing and other requirements to certify compliance and report deviations with the regulations addressed by the high level applicable requirements. TCEQ's position is that high level requirements are enforceable as the records will indicate the compliance options and monitoring data that were used to certify compliance with the emission limitations and standards.

RTC at Response 6.

The EPA appreciates the complexity of some EPA regulations, and is willing to assist permitting authorities seeking to understand how these regulations apply to individual facilities. However, it is ultimately the permitting authority's responsibility to issue title V permits that include (that is, identify with sufficient detail and clarity) all applicable requirements. This responsibility cannot be deferred to some later date by including high-level placeholder citations and waiting for a source to identify more specific requirements in some other document. Further, the source's obligation to keep records and submit compliance certifications or deviation reports is not relevant to the CAA requirement that the Permit itself includes, effectively IBRs, or assures compliance with the applicable requirements. Because the Permit does not satisfy these requirements, the EPA objects. 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(1), (c).

Direction to TCEQ: TCEQ must revise the title V permit to include the applicable requirements of the subpart DDDDD NESHAP. If TCEQ wishes to accomplish this by incorporating certain applicable requirements of subpart DDDDD by reference, it must ensure that the Permit is unambiguous as to which requirements of this subpart (including the emission limitations and

standards, as well as the applicable testing, monitoring, recordkeeping, and reporting requirements) are applicable to emission units at the Baytown Chemical Plant.

Claim D: The Petitioners Claim That “The Proposed Permit Fails to Assure Compliance with ExxonMobil’s Plantwide Applicability Limits.”

Petitioners’ Claim: The Petitioners claim that the permit fails to identify specific monitoring to assure compliance with the PAL emission caps, that TCEQ has not provided a rationale to support the adequacy of the selected monitoring, and that TCEQ was wrong to suggest that issues concerning the adequacy of monitoring are not appropriately raised in a title V permit action. Petition at 19, 22.

The Petitioners explain that Permit No. PAL16 is combined with Permit No. 20211 (both of which are incorporated into the title V permit), and that the “only provision” within this combined permit explaining how the source should determine compliance refers to a regulation governing flexible permits (not PAL permits) and multiple permit application documents from 2006 that predated the PAL limits. *Id.* at 17, 19–20 (citing Permit No. 20211/PAL16, Special Condition 16).

The Petitioners assert that this condition is insufficient to assure compliance with the PAL emission limits because it relies on the Texas flexible permit rules instead of the PAL rules. *Id.* at 20. The Petitioners assert that EPA determined the monitoring requirements in these flexible permitting rules to be less stringent than those required under federal PAL rules. *Id.* (citing 75 Fed. Reg. 41312, 41317 (July 15, 2010)).³⁶

Moreover, the Petitioners note that this condition refers to permit applications from 2006 that were associated with a flexible permit, and which predated the promulgation of TCEQ’s PAL rules (which were not approved until 2012) as well as the establishment of PAL16. *Id.* at 20, 21, 22. The Petitioners contend that such permit terms that predated the PAL rules and PAL16 permit “cannot be sufficient to assure compliance with applicable PAL monitoring requirements or the limits established by PAL16,” and that TCEQ “could not have evaluated PAL16 for consistency with these requirements as part of [its] review of that permit prior to the promulgation of the new [PAL] requirements.” *Id.* at 21, 22.

Additionally, the Petitioners contend that the Permit is deficient because it does not on its face identify the emission factors and control efficiencies used to demonstrate compliance with the limits in Permit No. 20211/PAL16. *Id.* at 18, 21 (citing *In the Matter of United States Steel, Granite City Works*, Order on Petition No. V-2011-2 at 9-12 (December 3, 2012)).

The Petitioners also assert that the relevant permit application documents are not available through TCEQ’s electronic file room website, notwithstanding a provision in the Permit’s Statement of Basis that states that relevant permit documents may be obtained through this electronic file room. *Id.* at 21, 21 n.9 (citing Statement of Basis at 313). The Petitioners note that

³⁶ The Petitioners note that the vacatur of the cited rule by the Fifth Circuit Court of Appeals did not turn on EPA’s discussion of the sufficiency of monitoring in the flexible permit rules. *Id.* at 20 n.8.

EPA has objected to permits that incorporated documents that were not readily available to the public. *Id.* at 21 (citing *Premcor Order* at 4–5).

The Petitioners also assert that TCEQ’s “failure to provide a rationale for the sufficiency of the monitoring requirements in Permit No. 20211/PAL16 is enough to render the Revised Proposed Permit deficient,” warranting an EPA objection. *Id.* at 19 (citing 40 C.F.R. § 70.7(a)(5); *In the Matter of United States Steel, Granite City Works*, Order on Petition No. V-2009-03 at 7-8 (January 31, 2011)). The Petitioners even question whether TCEQ has ever reviewed whether the monitoring requirements in Permit No. 20211/PAL16 comply with the PAL rules. *Id.* at 19.

Finally, the Petitioners address TCEQ’s RTC, in which the state suggested that issues concerning the monitoring associated with (a NSR permit) are beyond the scope of review in the source’s title V permit renewal. The Petitioners assert that the EPA rebutted this position in its objection to the ExxonMobil Baytown Chemical permit. *Id.* at 22 (citing *Baytown Chemical Objection Letter* at 8).

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

The Petitioners have demonstrated that the permit record is unclear, and that TCEQ has failed to adequately respond to comments, concerning whether the monitoring in Permit No. 20211/PAL16, as incorporated by reference into the title V permit, is sufficient to assure compliance with the relevant PAL emission limits.

In responding to comments challenging the sufficiency of the monitoring regime in Permit No. 20211/PAL16, TCEQ’s sole reply was as follows:

See response to comment 1. The TCEQ implements the periodic monitoring requirements of 30 TAC § 122.142(c) (and other monitoring requirements) for NSR permits through the NSR permit project review to determine the appropriate monitoring associated with the NSR permit and specifying those monitoring requirements in the NSR permit or permit record. Any challenges to the validity of an NSR permit; including whether it is federally enforceable, references confidential information, or any other comment regarding the completeness or content of the NSR permit; should have been raised or should be raised through the appropriate NSR permit process. It is not appropriate for Commenters to attempt to challenge these issues in a Title V permit action.

RTC at Response 8.³⁷

As discussed with respect to Claim B, this response reflects a fundamental misunderstanding of the relationship between NSR permits and title V permits. Moreover, on January 23, 2020, the EPA objected to an identical line of reasoning, as applied to the sufficiency of monitoring for

³⁷ This RTC also references TCEQ’s response to comment 1, in which TCEQ further detailed the basis for this position, citing the EPA’s *Hunter I* and *Big River Steel Orders*.

PBRs in the previous version of the permit for this same facility. Specifically, as the Petitioners correctly observe, the EPA explained:

This is a misinterpretation by TCEQ of the [*Hunter I Order*]. As the EPA has previously explained, “claims concerning whether a title V permit contains enforceable permit terms, supported by monitoring [recordkeeping, and reporting] sufficient to assure compliance with an applicable requirement or permit term (such as an emission limit established in a [NSR] permit), *are* properly reviewed during title V permitting. The statutory obligations to ensure that each title V permit contains ‘enforceable emission limitations and standards’ supported by ‘monitoring . . . requirements to assure compliance with the permit terms and conditions,’ 42 U.S.C. § 7661c(a), (c), apply independently from and in addition to the underlying regulations and permit actions that give rise to the emission limits and standards that are included in a title V permit.” See *South Louisiana Methanol Order*³⁸ at 10; *Yuhuang II Order*³⁹ at 7-8; [*Hunter I*] *Order* at 16, 17, 18, 18 n.33, 19; *Big River Steel Order* at 17, 17 n.30, 19 n.32, 20. Therefore, regardless of the monitoring, recordkeeping, and reporting initially associated with a minor NSR permit or PBR, TCEQ has a statutory obligation independent of the process of issuing those permits to evaluate monitoring, recordkeeping, and reporting in the title V permitting process to ensure that these terms are sufficient to assure compliance with all applicable requirements and title V permit terms. *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008); see *Motiva Order*⁴⁰ at 25-26.

Baytown Chemical Objection Letter at 11.

In short, TCEQ was wrong to assert that the title V permitting process is not the appropriate forum to evaluate the sufficiency of monitoring associated with the PAL emission limits. Because TCEQ failed to substantively respond to the Petitioners’ comments on this issue, and because the permit record contains no other justification for the monitoring associated with these limits, the EPA grants this claim. 40 C.F.R. § 70.7(a)(5); (h)(6). Without such a justification, the EPA cannot evaluate whether the Permit assures compliance with all applicable requirements. 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(c)(1).

Direction to TCEQ: TCEQ must amend the permit record to respond to the comments concerning the monitoring supporting the PAL emission limits in Permit No. 20211/PAL16, and to provide a justification for said monitoring. Ultimately, TCEQ must ensure that the Permit contains sufficient monitoring for all units subject to the PALs (including units that are authorized by PBRs, as noted in Claim G). In responding to comments and considering whether the Permit needs to be amended to include or more clearly identify the relevant monitoring, TCEQ should keep in mind the direction provided by the EPA in recent title V petition orders. For example, TCEQ must ensure that the permit clearly identifies the specific location of any

³⁸ *In the Matter of South Louisiana Methanol, LP*, Order on Petition Nos. VI-2016-24 & VI-2017-14 (May 29, 2018).

³⁹ *In the Matter of Yuhuang Chemical Inc. Methanol Plant*, Order on Petition Nos. VI-2017-5 & VI-2017-13 (April 2, 2018).

⁴⁰ *In the Matter of Motiva Enterprises LLC, Port Arthur Refinery*, Order on Petition No. VI-2016-23 (May 13, 2018).

monitoring or emission calculation methods specified in a permit application (which must be readily available). *See, e.g., In the Matter of Kinder Morgan Crude & Condensate LLC, Galena Park Terminal*, Order on Petition No. VI-2017-15 at 18–20 (December 16, 2021); *In the Matter of Premcor Refining Group Inc., Valero Port Arthur Refinery*, Order on Petition No. VI-2018-4 at 26–28 (November 30, 2021).

Claim E: The Petitioners Claim That “The Revised Proposed Permit Fails to Establish a Schedule for ExxonMobil to Comply with its Commitment to Obtain a SIP-Approved Chapter 116, Subchapter B Permit for Units and Emissions Authorized by State-Only Flexible Permit No. 20211/PAL16.”

Petitioners’ Claim: The Petitioners assert that the Revised Proposed Permit is deficient because it does not contain a compliance schedule that would require ExxonMobil to convert what the Petitioners describe as a “state-only” flexible permit into a SIP-approved major source permit. Petition at 24, 26 (citing 42 U.S.C. § 7661c(a)).

The Petitioners observe that Flexible Permit No. 20211 was issued prior to the EPA’s approval of the Texas flexible permitting program, and accordingly contend that this permit is a state-only permit that is not federally enforceable. *Id.* at 24 (citing 79 Fed. Reg. 40666, 40667–68 (July 24, 2014)). The Petitioners also observe that in 2011, ExxonMobil submitted a supplement to its annual title V compliance certification, indicating the company’s commitment to replace this flexible permit with a permit under TCEQ’s EPA-approved regulations in 30 TAC Chapter 116, subchapter B (this is known as “de-flexing” the permit). *Id.* at 23.

The Petitioners contend that “ExxonMobil’s commitment to submit an application to convert its flexible permit into a SIP-approved [30 TAC] Chapter 116, Subchapter B permit is a federally enforceable applicable requirement.” *Id.* at 24. The Petitioners assert that ExxonMobil must follow through with this initial commitment, and that the title V permit must include a compliance schedule compelling ExxonMobil to do so. *Id.* at 26.

As the Petitioners observe, although ExxonMobil submitted a permit application to obtain a 30 TAC Chapter 116, subchapter B permit in 2012, the company subsequently withdrew that application. *Id.* at 23. Instead, ExxonMobil submitted an application to obtain a new flexible permit under the now-SIP-approved flexible permitting regulations in 30 TAC Chapter 116, subchapter G. *See id.* at 25. The Petitioners argue that this alternative is not available. Specifically, the Petitioners argue that the Baytown Chemical Plant is not eligible for a SIP-approved flexible permit because it is a major source, whereas the flexible permitting program is allegedly only available to minor sources. *Id.* at 24–26 (citing *Environmental Integrity Project v. EPA*, 610 Fed. Appx. 409 (5th Cir. 2015) (“*Flex IP*”), along with various legal filings by Texas associated with related litigation).

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

The only basis for objection identified in the Petition is the claim that the Permit must contain a compliance schedule because ExxonMobil committed, in a compliance certification, to “de-

flexing” Permit No 20211, but has not yet done so. On this issue, the Petitioners have not demonstrated that a compliance schedule is necessary.

The EPA’s regulations and TCEQ’s EPA-approved regulations provide that a compliance schedule is required “for sources that are not in compliance with all applicable requirements at the time of permit issuance.” 40 C.F.R. § 70.5(c)(8); *see also id.* § 70.6(c); 30 TAC §§ 122.132(d)(iii), 122.142(d)(1). However, the EPA will not object to a permit where the Petitioners have provided no specific evidence to demonstrate that the facility is not in compliance with applicable requirements of the Act. *In the Matter of Bunge North American, Inc.*, Order on Petition No. VI-2016-02 at 6–7 (June 7, 2017) (citing *Georgia Power Plants Order* at 9–10). The demonstration requirement is particularly important with respect to the inclusion of a compliance schedule in light of the interplay between compliance schedules and the Agency’s enforcement prerogatives.⁴¹

Here, the Petitioners have failed to demonstrate that there are applicable requirements with which the facility was not in compliance at the time of permit issuance. The Petitioners’ request for a compliance schedule hinges on their assertion that “ExxonMobil’s commitment to submit an application to convert its flexible permit into a SIP-approved Chapter 116, Subchapter B permit is a federally enforceable applicable requirement.” Petition at 24. This assertion is not supported by any citations or analysis⁴² and appears incorrect. *See* 40 C.F.R. § 70.2 (definition of “applicable requirement”). Beyond this, the Petitioners provide no basis for including a compliance schedule. For example, the Petitioners do not even allege, much less demonstrate, that ExxonMobil violated the SIP by failing to obtain the correct type of preconstruction authorizations for past modifications (e.g., because the facility relied on the state-only flexible permit to avoid obtaining a subchapter B permit). Accordingly, the Petitioners have not demonstrated that the source is not in compliance with any applicable requirement that should have applied to a particular emission unit. *See* 40 C.F.R. § 70.2; *see also In the Matter of ExxonMobil Baytown Refinery*, Order on Petition No. VI-2016-14, at 17–18 (April 2, 2018) (*Baytown Refinery Order*); *In the Matter of BP Amoco Chemical Co., Texas City Chemical Plant*, Order on Petition No. VI-2017-6 at 8–9 (July 20, 2021) (*BP Amoco Order*); *In the Matter of Blanchard Refining Co., Galveston Bay Refinery*, Order on Petition No. VI-2017-7 at 11–12

⁴¹ *See Sierra Club v. EPA*, 557 F.3d 401, 411–412 (6th Cir. 2009) (upholding EPA’s denial of petition for compliance schedule where enforcement action had been commenced and settled without admission of liability). Even where there is evidence in the record that an enforcement action is underway (which the Petitioners have not presented here), the EPA has in the past applied a multi-factored analysis to determine whether a compliance schedule is warranted: (1) the kind and quality of information underlying the Agency’s original finding that a prior violation occurred, (2) the information the petitioner puts forward in addition to the Agency’s enforcement actions, (3) the types of factual and legal issues that remain in dispute, (4) the amount of time that has lapsed between the original decision and the current one and (5) the likelihood that a pending enforcement case could resolve some of those issues. *See id.* at 406–407 (upholding these factors as a reasonable interpretation of 42 U.S.C. § 7661d(b)(2)); *accord Sierra Club v. Johnson*, 541 F.3d 1257, 1267-69 (11th Cir. 2008) (initiation of enforcement action for PSD violation is not in and of itself sufficient to demonstrate that compliance schedule is warranted).

⁴² The Petitioners occasionally cite CAA § 504(a) and 40 C.F.R. § 70.6(a) and (c)(3), without explaining the relevance of these citations. The first two cited provisions simply establish that title V permits must contain and assure compliance with all applicable requirements; the first and last citations allude to compliance schedules. However, none of these provisions speak to the circumstances in which a compliance schedule is necessary or why ExxonMobil’s commitment within a compliance certification would amount to an “applicable requirement,” the violation of which would necessitate a compliance schedule.

(August 9, 2021) (*Blanchard Order*). Accordingly, the Petitioners' claim requesting a compliance schedule is denied.⁴³

Nonetheless, the EPA agrees with the Petitioners' characterization of Flexible Permit No. 20211 as a "state-only" authorization, as this permit was issued pursuant to rules that were not approved by the EPA into the Texas SIP. Since at least 2007, the EPA has consistently described this type of flexible permit as "state-only" and not federally enforceable. Notably, when the EPA approved the Texas flexible permitting program into the SIP in 2014, the EPA explained:

[T]he commenters appear to be implying that this approval [of the modern Texas flexible permits program] will transform state-only flexible permits issued since 1994 into federally approved permits upon the effective date of this rule. This is not the case and the EPA strongly rejects any suggestion to the contrary[.]

The state established and submitted for EPA approval a Flexible Permit Program in 1994. As described in detail below, the Flexible Permit Program we are conditionally approving today consists of 18 revisions to the Texas Administrative Code presented to the EPA in 7 submittals between 1994 and 2013 and contains new provisions that were never in any earlier version of the Flexible Permit Program submitted to the EPA. Those provisions could not have been used as a legal basis for establishing terms and conditions of state-only permits issued in the 1990s. Because those permits were not issued under the regulations that we are approving today, there can be no assurance that the state-only permits fully comply with all elements of the Flexible Permits Program we are approving today. Accordingly, today's action cannot make those state-only permits federally approved unless and until a permit is reissued under the authority of the program being approved today with terms and conditions defined by that program.

79 Fed. Reg. 40666, 40668 (July 14, 2014). Additionally, TCEQ has acknowledged:

A flexible permit issued or renewed prior to September 12, 2014 is a valid state permit. However, it is not a SIP approved permit. A flexible permit issued or renewed prior to September 12, 2014 *may be re-evaluated* under the current 30 TAC Chapter 116, Subchapter G requirements *to become* SIP approved.

TCEQ, Air Permit Reviewer Reference Guide: Flexible Permit Application Review Summary, APDG 6280v2 (Revised December 2014) (emphasis added).

Moreover, the EPA has objected to the issuance of title V permits incorporating these state-only permits on nearly 20 occasions. *E.g.*, Objection to Federal Operating Permit No. O1227,

⁴³ In concluding that the Petitioners have not met their burden to demonstrate a flaw in the title V permit, the EPA is not making any judgment regarding the propriety of ExxonMobil's reliance on the flexible permitting process with respect to any past or future modifications to the facility. To the extent that a facility relied or relies on a state-only flexible permit to authorize a construction project, rather than following the otherwise applicable NSR requirements in the Texas SIP, this type of compliance issue should be addressed through the appropriate title I permitting channels or enforcement actions.

Goodyear Tire & Rubber Company, Houston Chemical Plant (January 8, 2010) (*Goodyear Objection Letter*).⁴⁴ These objections were based in part on 40 C.F.R. § 70.6(b)(2), which mandates that “the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements,” such as an EPA-approved SIP. Accordingly, on numerous occasions between 2009 and 2011, the EPA directed TCEQ: “[T]he terms and conditions of flexible permits based upon the requirements of 30 TAC Chapter 116, Subchapter G must be identified as State-only terms and conditions, pursuant to 40 CFR § 70.6(b)(2).” *E.g.*, *Goodyear Objection Letter*.

Here, it can hardly be contested that the version of Flexible Permit No. 20211 incorporated into the current title V permit is a state-only authorization. It was, as the Petitioners indicate, issued under regulations that were not part of the EPA-approved Texas SIP.⁴⁵ However, the title V permit for the Baytown Chemical Plant currently incorporates Flexible Permit No. 20211 without qualification, suggesting that it is a federally enforceable requirement of the title V permit. *See* Revised Proposed Permit at 16 (Special Condition 30), 607.⁴⁶ This plainly contravenes the requirement that non-federally enforceable requirements be designated as such. 40 C.F.R. § 70.6(b)(2). This requirement is important because if state-only provisions are not appropriately designated, they may conflict with or undermine federally enforceable provisions that should otherwise apply.

This concern is particularly relevant in the case of flexible permits. Flexible permits issued by TCEQ provide sources with an alternative to complying with otherwise-applicable requirements of the Texas SIP. *See* 30 TAC § 116.710 (a) (“[A] flexible permit . . . allows for physical or operational changes . . . as an *alternative* to obtaining a new source review permit under §116.110 of this title (relating to Applicability), or *in lieu of* amending an existing permit under §116.116 of this title (relating to Changes to Facilities).” (emphasis added)). Because of this, the incorporation of state-only Flexible Permit No. 1176 into the Baytown Chemical Plant title V permit renders the title V permit unclear and misleading about the requirements that apply to the facility. Specifically, the permit suggests that the facility may rely on the state-only flexible

⁴⁴ The EPA notes that this January 8, 2010, objection was issued under authority delegated by the EPA Administrator to Region 6 to object during the EPA’s 45-day review period. The objection letter is available at https://www.tceq.texas.gov/assets/public/permitting/air/Announcements/epa_goodyear_O1227.pdf.

⁴⁵ TCEQ’s RTC does not contest, but rather implicitly acknowledges, this position. *See* RTC at Response 10. The final August 3, 2020, version of the title V permit upon which the Petition is based incorporated the April 14, 2017, version of Flexible Permit No. 20211. The most recent version of the title V permit, issued on February 2, 2022, incorporates the September 16, 2019, version of Flexible Permit No. 20211. Although both of these versions of the flexible permit were issued subsequent to the EPA’s approval of the TCEQ flexible permit program rules, neither of those permits were issued pursuant to the now-SIP-approved rules. Instead, they reflected alterations or amendments to the non-SIP-approved version of Flexible Permit No. 20211, as renewed in 2006.

⁴⁶ To make matters more complicated, the terms of Flexible Permit No. 20211 are combined with the terms of Permit No. PAL16 in a single document, and the authority for each individual permit term is not apparent from the face of the combined permit. *See* 40 C.F.R. § 70.6(a)(1)(i) (“The permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.”); 30 TAC § 122.142(b)(2) (“Each permit shall also contain the specific terms and conditions for each emission unit regarding the following: . . . the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards”); *see also In the Matter of U.S. Dep’t of Energy, Hanford Operations*, Order on Petition No. X-2019-8 at 13 n.17 (February 19, 2020).

permit to authorize future modifications instead of following the requirement to obtain an authorization under the relevant SIP-approved rules (e.g., those in Chapter 116, Subchapter B, or in a flexible permit issued under the now SIP-approved Subchapter G).⁴⁷ This frustrates a central purpose of the title V program: to “clarify, in a single document, which requirements apply to a source and, thus, . . . enhance compliance with the requirements of the Act.”⁴⁸

However, nowhere within the Petition do the Petitioners argue that these issues form a basis for EPA’s objection to the Permit.⁴⁹ Moreover, as TCEQ explains and as the Petitioners acknowledge, an application to renew and reissue the Baytown Chemical Plant’s flexible permit under TCEQ’s now-SIP-approved rules is currently pending. RTC at Response 10. Revising the title V permit to incorporate this newest, SIP-approved version of the flexible permit, replacing the prior, non-SIP-approved version, should resolve the issues that EPA has identified, as well as those underlying the Petitioners’ request for a compliance schedule.

The Petitioners are incorrect to suggest otherwise. *See* Petition at 24–26 (arguing that issuing a SIP-approved flexible permit would not resolve the Petitioners’ concerns because the SIP-approved flexible permit program is only available to authorize construction at minor sources, not major sources like ExxonMobil’s Baytown Chemical Plant). As the EPA has previously explained,⁵⁰ the Petitioners’ arguments on this point appear to conflate the distinction between minor *sources* (and major sources) and minor NSR *programs*. Major sources routinely use minor NSR programs to authorize modifications that do not qualify as “major modifications.” Specific to the Texas flexible permits program, the EPA has repeatedly explained: “the Flexible Permit program can be used for both true minor sources and for minor modifications at existing major sources[.]” 79 Fed. Reg. 8368, 8380 (February 12, 2014).⁵¹ Nothing in the EPA’s approval of the

⁴⁷ This concern persists independent from the pending issuance of a valid SIP-approved flexible permit to ExxonMobil. Here, the current version of the Baytown Chemical Plant’s title V permit (upon which the Petition is based) incorporates the older state-only flexible permit, which was based on different flexible permitting rules that were *not* SIP-approved. Until the title V permit is updated to replace the state-only flexible permit with a SIP-approved flexible permit, there remains an implication within the title V permit that the source may rely on this prior flexible permit in disregard of the proper SIP-approved mechanisms.

⁴⁸ 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see id.* (“The title V permit program will 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.”); *see also* Conference Report on S. 1630—Clean Air Act Amendments: Speech of Hon. Michael Bilirakis of Florida in the House of Representatives (Oct. 26, 1990), reprinted in 6 Environment and Natural Resources Policy Division of the Congressional Research Service of the Library of Congress, Legislative History of the Clean Air Act Amendments of 1990, at 10767-69 (1998) (explaining that the title V program served three purposes, including “to facilitate enforcement by providing a single reference for all of a major source’s operating limits and requirements under the Clean Air Act.”)

⁴⁹ This is notable because the same Petitioners *did* raise such claims in petitions on other permits, such as the April 11, 2017 petition on Blanchard’s Galveston Bay Refinery and the September 12, 2017 petition on the Phillips 66 Borger Refinery, to which the EPA separately responded. *See Blanchard Order* at 9–11; *In the Matter of Phillips 66 Co., Borger Refinery*, Order On Petition No. VI-2017-16 at 8–10 (September 22, 2021) (*Phillips 66 Order*).

⁵⁰ *See BP Amoco Order* at 12; *Blanchard Order* at 12; *Phillips 66 Order* at 10.

⁵¹ *See also id.* (“Each of these amendments to the Flexible Permit Program ensures that the program is for minor NSR actions and that for any minor amendments to a major source, the source will retain its major source requirements (i.e., cannot be used to circumvent the major source requirements).”), *id.* at 8378 n.7 (“These sources include minor sources as well as major sources seeking minor modifications to their facilities.”). These clear statements came from the preamble to the proposed rule conditionally approving the Texas flexible permits program. Some of the Petitioners subsequently challenged the accompanying final rule, which was upheld by the Fifth Circuit in *Flex II*, which the Petitioners cite.

Texas flexible permits program, nor in the Fifth Circuit’s *Flex I* and *Flex II* decisions, indicated that only minor *sources* may take advantage of this minor NSR *program*.⁵² To the extent that the Petitioners’ claim is predicated on the notion that SIP-approved flexible permits are unavailable to major sources, it is mistaken.

Claim F: The Petitioners Claim That “The Revised Proposed Permit Improperly Incorporates Confidential Permit Terms.”

Petitioners’ Claim: The Petitioners claim that the Revised Proposed Permit improperly incorporates confidential permit terms contained in permit applications associated with several minor NSR permits.

The Petitioners explain that the title V permit incorporates by reference minor NSR Permit Nos. 96220, 28441, and 8586. Petition at 26. Prior to the EPA’s January 23, 2020, objection to the initial Baytown Chemical proposed permit, these minor NSR permits contained special conditions that established binding operational limitations by referencing various confidential provisions in permit applications. *See id.* at 26–27 (describing the types of provisions that were made confidential). The Petitioners note that the EPA objected to the title V permit’s incorporation of these confidential provisions because title V permit terms, including operational limits, cannot be confidential. *Id.* at 27–28 (citing *Baytown Chemical Objection Letter* at 3–5; 42 U.S.C. § 7661b(e); 40 C.F.R. § 70.6(b)(1)). The Petitioners further note that, in response to the EPA’s objection, TCEQ revised the three minor NSR permits to remove the references to confidential application files and explained that those confidential operational limits were not related to emission calculations or necessary to determine compliance with any permit emission limits. *Id.* at 27, 29–30 (citing Petition Ex. D, TCEQ’s June 9, 2020, Response to EPA Objection).

The Petitioners assert that the changes made in response to the EPA’s objection were insufficient. The Petitioners observe that the confidential representations still exist within the permit applications. According to the Petitioners, although the minor NSR permits no longer directly reference these confidential provisions, the confidential provisions remain enforceable conditions of the minor NSR permits that are incorporated into the title V permit. *Id.* at 29. Put another way, the Petitioners suggest that these confidential operational limitations “are Title V permit terms.” *Id.* For support, the Petitioners cite 30 TAC § 116.116(a)(1), which states “The

⁵² In addition to the clear statements made in proposing to approve the Texas flexible permits program (quoted in the preceding footnote), the EPA explained in its final conditional approval that “this is a minor NSR *program*.” 79 Fed. Reg. 40666, 40668, 40669 (July 14, 2014) (emphasis added). Similarly, the Fifth Circuit’s *Flex I* and *Flex II* opinions refer repeatedly to “Minor NSR” and “Major NSR”—referring to the two programs, not necessarily the type of source. *Texas v. EPA*, 690 F.3d 670 passim (5th Cir. 2012) (*Flex I*); *Flex II*, 610 Fed. Appx. 409 passim (5th Cir. 2015). Neither decision implies that only minor *sources* may take advantage of the flexible permit minor NSR *program*. Instead, both decisions acknowledge that major sources could use the flexible permit program, albeit not in a way that allowed them to avoid major NSR for a modification that would otherwise trigger it. *See Flex I*, 690 F.3d at 686 (rejecting concerns that major sources might “avoid major NSR by exploiting the Flexible Permit Program” because “[m]ajor sources cannot use a flexible permit to avoid Major NSR without violating the law.”); *Flex II*, 610 Fed. Appx. at 410 (quoting the preceding passage from *Flex I*). This means that while existing major sources may use a flexible permit to authorize minor modifications, they cannot use a flexible permit to authorize a modification that would otherwise be subject to major NSR. To do so would amount to a violation of the SIP and the CAA.

following are the conditions upon which a permit . . . [is] issued: (1) representations with regard to construction plans and operation procedures in an application for a permit[.]” *Id.* at 27 (quoting 30 TAC § 116.116(a)(1) (alterations in Petition)). The Petitioners further assert that this provision, which is part of the EPA-approved SIP, is an “applicable requirement” for title V purposes. *Id.* at 28 (citing 40 C.F.R. §§ 52.2270(c), 70.2). The Petitioners therefore suggest that operational limits contained within applications are enforceable applicable requirements. *Id.* at 28, 31. The Petitioners also cite TCEQ and EPA statements indicating that “the permit application, and all the representations in it, is part of the permit when it is issued and as such is enforceable.” *Id.* at 27–28 (quoting *Baytown Refinery Order* at 8).

Because the title V permit allegedly still incorporates these confidential application representations, the Petitioners assert that it violates the CAA prohibition on confidential permit terms and fails to assure compliance with all applicable requirements. *Id.* at 31 (citing 42 U.S.C. §§ 7661b(e), 7661c(a); 40 C.F.R. § 70.6(a), (b)(2)).

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

As the Petitioners observe, and as EPA explained in its January 23, 2020 objection, the contents of a title V permit (e.g., binding operational limits) cannot be confidential, and nor can any “emissions data.” 42 U.S.C. §§ 7414(c), 7661b(e); 40 C.F.R. § 2.301(a)(2)(i); *Baytown Chemical Objection Letter* at 3–5; see *Baytown Refinery Order* at 8–10. The Baytown Chemical Plant title V permit proposed on December 6, 2019, incorporated by reference minor NSR Permit Nos. 96220, 28441, and 8586, which in turn contained specific conditions expressly incorporating by reference certain confidential limitations contained in permit applications. As a result, the title V permit effectively incorporated by reference these confidential operational limitations, contrary to section 503(e) the CAA. Accordingly, the EPA objected. *Baytown Chemical Objection Letter* at 3–5.

The Revised Proposed Permit effectively severed the connection between the confidential NSR permit application representations and the contents of the title V permit. The title V permit now incorporates updated versions of minor NSR Permit Nos. 96220, 28441, and 8586, which no longer contain specific conditions incorporating confidential information. (TCEQ explained that the confidential information previously incorporated into these permits was either not necessary to calculate emissions or demonstrate compliance with any permitted emission limits, was replaced by non-confidential terms, or was duplicative or unnecessary. See Petition Ex. D, TCEQ’s June 9, 2020, Response to EPA Objection at 3–4.) Thus, with respect to these minor NSR permits, the title V permit no longer contains any confidential terms and conditions that would run afoul of CAA § 503(e).

The Petitioners’ assertions to the contrary are based on the mistaken premise that, notwithstanding the removal of all references to confidential information in the relevant NSR permit terms, those confidential limitations remain applicable to the facility and “are Title V permit terms.” Petition at 29.

The EPA does not dispute that TCEQ’s EPA-approved regulations provide that sources in Texas are bound by representations made in their applications for NSR permits, such that these application representations can become legally enforceable.⁵³ However, as the EPA has previously explained,⁵⁴ the fact that application representations may be legally enforceable in Texas has little to no bearing on whether these representations are included in a title V permit,⁵⁵ and accordingly whether such representations are contents of the title V permit. That is, a source’s obligation to independently comply with a requirement to which it is subject—whether it be contained in a NSPS, NESHAP, SIP, court-approved Consent Decree, NSR permit, or NSR permit application representation—does not inherently or automatically result in that requirement being included in a title V permit. For a requirement to be included in a title V permit, the permit must include it.

To be sure, a title V permit may effectively include application representations by incorporating those representations by reference (or even by incorporating them into a NSR permit that is then incorporated by reference into the title V permit). The EPA’s expectations for incorporation by reference are explained in further detail in Claims A and C of this Order, as well as in *White Paper 2*. At the most basic level, in order for something to be incorporated by reference, one must first *reference* it.

When the EPA approved TCEQ’s use of IBR for minor NSR requirements, the EPA indicated that the *terms and conditions* of a minor NSR permit would be incorporated into the title V permit.⁵⁶ The EPA did not suggest that unidentified application representations would be considered to be incorporated by reference into a title V permit. Rather, as far as application representations are concerned, TCEQ’s EPA-approved title V regulations expressly require that such representations be identified. *See* 30 TAC § 122.140 (“The only representations in a permit application that become conditions under which a permit holder shall operate are the following: . . . (3) any representation in an application *which is specified in the permit* as being a condition under which the permit holder shall operate.” (emphasis added)).

Here, there can be no doubt that the Baytown Chemical Plant title V permit incorporates by reference Permit Nos. 96220, 28441, and 8586, and all the terms and conditions specified on the

⁵³ *See* 30 TAC § 116.116(a) (“The following are the conditions upon which a permit, special permit, or special exemption are issued: (1) representations with regard to construction plans and operation procedures in an application for a permit, special permit, or special exemption; and (2) any general and special conditions attached to the permit, special permit, or special exemption itself.”).

⁵⁴ *See, e.g., BP Amoco Order* at 30–32.

⁵⁵ 42 U.S.C. § 7661c(a), § 70.6(a)

⁵⁶ 66 Fed. Reg. 63318, 63324 (December 6, 2001) (“[U]nder the incorporation by reference process, Texas must incorporate all terms and conditions of the [minor] NSR permits and PBR, which would include emission limits, operational and production limits, and monitoring requirements. We therefore believe that the terms and conditions of the [minor] NSR permits so incorporated are fully enforceable under the full approved title V program that we are approving in this action.”).

face of those permits.⁵⁷ However, it does not follow that all application representations from unidentified permit applications underlying various iterations of these NSR permits are also effectively incorporated by reference into the title V permit. Notably, the confidential application representations at issue are no longer directly referenced by either the NSR permits associated with these applications or the title V permit. Thus, they are not included in the title V permit, and accordingly, the title V permit does not run afoul of CAA § 503(e).

Claim G: The Petitioners Claim That “The Revised Proposed Permit Fails to Specify Monitoring, Testing, and Recordkeeping Requirements Sufficient to Assure Compliance with Applicable Requirements for Projects Authorized by PBR.”

Petitioners’ Claim: The Petitioners note that the title V permit incorporates by reference various PBRs applicable to the facility, as well as the general conditions in 30 TAC Chapter 106, Subchapter A (which include the emission limits at 30 TAC § 106.4). Petition at 31–32, 38. The Petitioners assert that the Permit does not specify monitoring sufficient to assure compliance with these PBR-based applicable requirements. *Id.* at 31, 37 (citing 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a), (c)). The Petitioners summarize the requirements of various applicable PBRs and explain that the PBR rules themselves do not specify monitoring that assures compliance with the relevant requirements. *See id.* at 38–40. The Petitioners further assert that the Permit’s Special Conditions 31 and 32, which address all PBRs, do not specify the monitoring necessary to assure compliance with PBR emission limits and operating requirements, but instead provide the source a non-exhaustive menu of options that the Petitioners characterize as meaningless. *Id.* at 40–41.

The Petitioners observe that the EPA previously objected to the Baytown Chemical Plant permit on the basis that it did not contain sufficient monitoring to assure compliance with various PBRs. *Id.* at 41 (citing *Baytown Chemical Objection Letter* at 9). The Petitioners assert that TCEQ’s response to this objection—adding a table to the Permit’s Statement of Basis that purportedly identifies monitoring relevant to PBRs—is insufficient for multiple reasons. *See id.* at 41–45; *see also id.* at 33–36 (reproducing the table). First, the Petitioners assert that this table does not establish enforceable monitoring requirements because it is part of the Statement of Basis, which is not an enforceable part of the Permit. *Id.* at 42–43 (citing *In the Matter of Midwest Generation, LLC, Waukegan Generating Station*, Order on Petition No. V-2016-10 at 7 (September 15, 2020)). Second, even if this table were enforceable, the Petitioners claim it is deficient because it contains high-level citations and does not specifically identify the monitoring provisions that assure compliance with the relevant requirements. *Id.* at 43 (citing 30 TAC § 122.142(b)(2)(B)). Third, the Petitioners assert that many of the NSR permit conditions listed in this table are insufficient because they cannot be used to accurately determine emissions in mass per unit of time. *See id.* at 43–45 (citing 30 TAC § 116.186(c)(2) and providing specific examples of allegedly deficient conditions).

⁵⁷ Special Condition 30 of the title V permit states: “Permit holder shall comply with the requirements of New Source Review authorizations issued or claimed by the permit holder for the permitted area, including permits, permits by rule, standard permits, flexible permits, . . . referenced in the New Source Review Authorization References attachment. These requirements: A. Are incorporated by reference into this permit as applicable requirements.” Revised Proposed Permit at 16. Permit Nos. 96220, 28441, and 8586 are listed in the New Source Review Authorization References attachment. Revised Proposed Permit at 607.

The Petitioners also address TCEQ's RTC and note that the EPA rejected TCEQ's suggestion that the adequacy of monitoring associated with PBRs is beyond the scope of issues to be addressed in the current title V permitting action. *Id.* at 46–47 (citing *Baytown Chemical Objection Letter* at 8).

Within Claim G, in addition to their claims concerning monitoring associated with PBR requirements, the Petitioners also occasionally refer to monitoring associated with the site-wide limits in Permit No. PAL16. *See id.* at 32, 37, 42–45. The Petitioners assert that emissions from any units authorized by PBRs must be quantified for purposes of demonstrating compliance with the PAL limits in Permit No. PAL16. *Id.*⁵⁸

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

The Petitioners have demonstrated that the title V permit does not include monitoring sufficient to assure compliance with all applicable requirements relevant to units authorized by PBRs. 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(c).

As the EPA has explained in numerous petition orders since the agency's January 23, 2020 Objection,⁵⁹ it is TCEQ's responsibility, as the title V permitting authority, to ensure that the title V permit "set[s] forth" monitoring sufficient to assure compliance with all applicable requirements. 42 U.S.C. § 7661c(c); *see id.* § 7661c(a); 40 C.F.R. § 70.6(a), (a)(3), (c); 30 TAC § 122.142(c).⁶⁰

As the Petitioners observe, the Permit incorporates by reference numerous PBRs (including PBRs 106.261, 106.262, 106.263, 106.264, 106.371, 106.472, 106.473, and 106.511, among others) that establish applicable requirements, including operational and emission limitations. The Permit also incorporates by reference the general requirements in 30 TAC Chapter 106 Subchapter A, including, as applicable, the emission limits in 30 TAC § 106.4. Generally speaking, the PBRs incorporated into the Permit (including those identified in the EPA's *Baytown Chemical Objection Letter* and in the Petition) do not specify monitoring to assure compliance with these requirements. Moreover, the only potentially relevant permit terms—

⁵⁸ The EPA's response to the Petitioners' claims addressing monitoring associated with Permit No. PAL16 is presented with respect to Claim D.

⁵⁹ *See, e.g., In the Matter of Sandy Creek Services, LLC, Sandy Creek Energy Station*, Order on Petition No. III-2018-1 at 12–13 (June 30, 2021); *Waha Order* at 12. The EPA has addressed similar issues in six additional orders between the *Sandy Creek* and *Waha Orders*.

⁶⁰ 42 U.S.C. § 7661c(a) ("Each permit issued under [title V of the CAA] shall *include* . . . such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan."), 7661c(c) ("Each permit issued under [title V of the CAA] shall *set forth* . . . monitoring and reporting requirements to assure compliance with the permit terms and conditions."); 40 C.F.R. § 70.6(a) ("Each permit issued under this part shall *include* . . ."), 70.6(a)(3)(i) ("Each permit shall *contain* the following requirements with respect to monitoring: . . ."); 70.6(c) ("All part 70 permits shall *contain* the following with respect to compliance: . . . testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit."); 30 TAC § 122.142(c) ("Each permit shall *contain* periodic monitoring requirements that are sufficient to yield reliable data from the relevant time period that are representative of the emission unit's compliance with the applicable requirement, and testing, monitoring, reporting, or recordkeeping sufficient to assure compliance with the applicable requirement.") (all emphasis added).

Special Conditions 31 and 32—are insufficient to bridge this gap. Special Condition 31 incorporates the general requirements for PBRs found in 30 TAC Chapter 106, Subchapter A. These requirements do not specify any monitoring methods for demonstrating compliance with the emission limits and standards set forth in the PBRs. Likewise, Special Condition 32 does not specify any particular monitoring requirements and instead allows ExxonMobil to select the monitoring, recordkeeping, or reporting it will use to assure compliance. Because neither these generic permit terms nor the PBRs themselves require ExxonMobil to follow a particular monitoring or recordkeeping methodology, the title V permit cannot be said to “set forth” monitoring sufficient to assure compliance. 42 U.S.C. § 7661c(c). Further, neither the relevant PBR rules nor Special Condition 32 contain any assurance that the monitoring or recordkeeping selected by the source will, as a technical and legal matter, be sufficient to ensure compliance with PBR-specific requirements. Because the Permit does not specify or specifically incorporate any particular monitoring or recordkeeping requirement selected by the source, neither the public nor the EPA can ascertain from the Permit what monitoring or recordkeeping methodology the source has elected to use, or whether this methodology is sufficient to assure compliance with all PBR-specific applicable requirements. This effectively prevents both the public and the EPA from exercising the participatory and oversight roles provided by the CAA. *See* 42 U.S.C. §§ 7661a(b)(6), 7661d(a), (b); *see also* 40 C.F.R. §§ 70.7(h), 70.8(a), (c), (d).

TCEQ’s initial response to the EPA’s Objection was to establish a table that “provides a summary of the applicable regulations and/or NSR Special Condition numbers that contain monitoring/testing and or recordkeeping requirements for the PBRs identified in the objection.” Petition Ex. D, TCEQ’s June 9, 2020, Response to EPA Objection at 13. That proposed solution fails because, among other reasons, this table is not an enforceable part of the title V permit. In order to satisfy the CAA mandate that title V permits “set forth” monitoring sufficient to assure compliance with all applicable requirements, the Permit itself must either include, or clearly incorporate by reference, specific monitoring requirements that are sufficient to assure compliance with all applicable requirements associated with units authorized by PBRs. Because the Permit does not yet satisfy this requirement, the EPA grants Claim G.

Direction to TCEQ: TCEQ must revise the Permit to specify monitoring, recordkeeping, and reporting sufficient to assure compliance with all applicable requirements associated with PBRs. This includes the requirements of individual PBR rules that are either claimed or registered by the source, any additional or alternative requirements contained in certified PBR registrations, and the generic emission limits in 30 TAC § 106.4, as applicable and necessary. If TCEQ contends that specific underlying PBR regulations already contain adequate monitoring, recordkeeping, and reporting, TCEQ should identify those PBR specific requirements in the permit record. If TCEQ believes that monitoring associated with other CAA requirements—such as monitoring elsewhere in the title V permit, Chapter 116 NSR permits, NSPSs, NESHAPs, or enforceable representations in an application (e.g., a NSR permit application, or an application associated with a registered PBR)—will also serve to assure compliance with PBR requirements, then TCEQ should amend the Permit to specifically identify such terms and explain in the permit record how these requirements assure compliance with the requirements and emission limits for each relevant PBR requirement. However, if the title V permit and all enforceable, properly incorporated documents do not contain adequate monitoring, recordkeeping, and reporting that

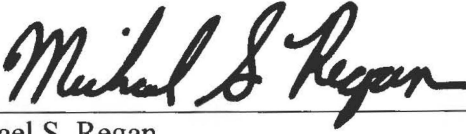
assures compliance with the requirements and limits identified, then TCEQ must add or incorporate such terms into the Permit.

TCEQ could accomplish this in various ways.⁶¹ One mechanism, currently being implemented by TCEQ for at least some PBR requirements, involves requiring permit applicants to identify the specific monitoring requirements associated with individual PBR requirements in a “PBR Supplemental Table,” which is then specifically incorporated by reference into the title V permit through a revised Special Condition. If this approach were employed for all applicable requirements associated with all PBRs, that would resolve the EPA’s objection. As the EPA has explained, there are other potential solutions that could resolve the EPA’s objection. If TCEQ pursues other options, it must ensure that monitoring, recordkeeping, and reporting requirements are either included or clearly and unambiguously incorporated into the title V permit. Moreover, TCEQ must ensure that such requirements are sufficient to assure compliance with all applicable PBR requirements, including claimed PBRs, registered PBRs, and the requirements of 30 TAC 106.4, as applicable.

V. CONCLUSION

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

Dated: MAR 18 2022



Michael S. Regan
Administrator

⁶¹ In the course of resolving other recent petition orders, the EPA has been working with TCEQ on an appropriate solution to this admittedly complex programmatic issue. *See, e.g.*, EPA Comments on Sandy Creek Power Station (October 1, 2021), available at <https://www.epa.gov/system/files/documents/2021-10/epa-comments-on-sandy-creek-power-station.pdf>.