BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	)	
	)	
TCEQ Title V Air Operating Permit	)	
No. O1931	)	
	)	Permit No. O1931
For The Lubrizol Corporation's	)	
Deer Park Plant	)	
	)	
Issued by the Texas Commission on	)	
Environmental Quality	)	

PETITION TO OBJECT TO TITLE V PERMIT NO. O1931 FOR LUBRIZOL'S DEER PARK PLANT

INTRODUCTION

Pursuant to 42 U.S.C. § 7661d(b)(2) and 40 C.F.R. § 70.8(d), Harris County Attorney's Office (Petitioner) petitions the Administrator of the United States Environmental Protection Agency (EPA) to object to the renewal of Proposed Federal Operating Permit No. O1931 (Draft Permit) issued by the Texas Commission on Environmental Quality (TCEQ or Commission) to the Lubrizol Corporation's (Lubrizol) Deer Park Facility (the Facility) located at 41 Tidal Road, Deer Park, Texas 77536.

As discussed below, the Draft Permit fails to comply with requirements in Title V of the Clean Air Act (CAA) and Texas's State Implementation Program (SIP). EPA must object because (1) the Draft Permit is rendered unenforceable as a practical matter and (2) public participation and public access for the Draft Permit's renewal were deficient.

PETITIONER

Harris County, with approximately 4.8 million residents, is the third largest county in the United States and is home to Houston, one of the largest and the most diverse cities in the United States. Harris County and its residents suffer from poor air quality caused by a large, diverse concentration of industry, including the Houston Ship Channel; heavy commuter traffic; emission events; chemical disasters; smog; and other factors. Houston is also the largest U.S. city without zoning laws, which brings these issues right to residents' fence lines. The Harris County Attorney's Office (HCAO) fights for the interests of Harris County through the civil justice system to preserve

access to clean air and water; ensure safe, healthy neighborhoods; protect consumers against fraud, exploitation, and other bad acts; and defend voting rights.

BACKGROUND

I. Timeline

This Petition addresses TCEQ's renewal of Title V Permit No. O1931, re-authorizing operations at Lubrizol's Deer Park Facility. Lubrizol filed its renewal application on March 17, 2023. TCEQ's Executive Director proposed to approve TPC's application and issued the Draft Permit. Notice of the application was published in English and in Spanish on February 28, 2024. **Exhibit A**, TEX. COMM'N ON ENVT'L QUALITY, Notice of Draft Federal Operating Permit, Draft Permit No. O1931 (2024) [hereinafter Public Notice]. The public comment period ended on March 29, 2024.

Petitioner filed a timely written comment identifying deficiencies in the Draft Permit with TCEQ on March 28, 2024. **Exhibit B**, Harris County Attorney's Office Public Comment on the Renewal of Title V Permit No. O1931 [hereinafter Public Comment]. Petitioner's comment raised all of the objections discussed below in this petition.

TCEQ responded to public comments on the Draft Permit and sent a proposed permit to EPA for its review. As of November 26, 2024, the proposed permit was subject to EPA review for 45 days, which ended on January 10, 2025. This petition is filed with EPA before the March 11, 2025 deadline.

II. Basis of Petition

This Petition is based on objections to the Draft Permit raised with reasonable specificity during the public comment period and addressed in TCEQ's Response to Comment (RTC) issued after the public comment period. **Exhibit C**, TEX. COMM'N ON ENVT'L QUALITY, Executive Director's Response to Public Comment, Title V Renewal Permit No. O1931 (2024) [hereinafter RTC]. Per the RTC, TCEQ failed to make any modifications to the Draft Permit after the expiration of the public comment period.

This petition follows content and formatting guidelines specified in Title 40 Code of Federal Regulations Part 70. EPA should object to the issuance of this Permit because it is not in compliance with the applicable requirements contained in the applicable federal regulations nor Texas's SIP. Additionally, EPA should instruct TCEQ to follow the requests and recommendations HCAO makes in this petition.

III. Title V Legal Requirements

To protect public health and the environment, the Clean Air Act prohibits stationary sources of air pollution from operating without or in violation of a valid Title V permit, which must include conditions sufficient to "assure compliance" with all applicable Clean Air Act requirements. 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(1), (c)(1). "Applicable requirements" include all standards, emission limits, and requirements of the Clean Air Act, including those contained in SIPs. 40 C.F.R. § 70.2. Congress intended for Title V to "substantially strengthen enforcement of the Clean Air Act" by "clarify[ing] and mak[ing] more readily available a source's pollution control requirements." S. Rep. No. 101-228 at 347–48 (1990), *as reprinted in* A Legislative History of the Clean Air Act Requirements of 1990 (1993), at 8687–88. As EPA explained when promulgating its Title V regulations, a Title V permit should "enable the source, states, EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements." Operating Permit Program, Final Rule, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992) (to be codified at 40 C.F.R. § 70).

A Title V permit must include all applicable federally enforceable requirements (including requirements enshrined in a State's SIP); compliance certification, testing, monitoring, reporting, and recordkeeping sufficient to assure compliance with these regulations and other terms and conditions of the permit; and enough information for the public to determine how applicable requirements apply to units at the permitted source. 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a), (c); *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996). ("The permit is crucial to implementation of the Act: it contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular source."). If a monitoring requirement is insufficient to assure compliance with the relevant provisions in the permit, it "has no place in a permit unless and until it is supplemented by more rigorous standards." *Sierra Club v. EPA*, 536 F.3d 673, 677 (D.C. Cir. 2008). EPA has recognized the essential function of the Title V operating permit program as "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." *In the Matter of Kinder Morgan Crude & Condensate*, Order on Petition No. VI-2017-15 at 2 (Dec. 16, 2021).

If applicable requirements themselves contain no periodic monitoring, EPA's regulations require permitting authorities to add "periodic monitoring sufficient to yield reliable data from the

relevant time period that are representative of the source's compliance with the permit." 40 C.F.R. § 70.6(a)(3)(i)(B); *see also In the Matter of Mettiki Coal, LLC*, Order on Petition No. III-2013-1 at 7 (Sept. 26, 2014) (*Mettiki* Order). The D.C. Circuit has also acknowledged that the mere existence of periodic monitoring requirements may not be sufficient to ensure compliance with all applicable regulations. *Sierra Club*, 536 F.3d at 676–77. For example, the court noted that annual testing is unlikely to assure compliance with a daily emission limit. *Id.* Thus, the frequency of monitoring must bear a relationship to the averaging time used to determine compliance. 40 C.F.R. § 70.6(c)(1) of EPA's regulations require permit writers to supplement periodic monitoring requirements that are inadequate to assure compliance. *Id.* at 675; *see also Mettiki* Order at 7. Permitting authorities must also include a rational for the monitoring and reporting requirements in the permit that is clear and documented in the permit record. *Mettiki* Order at 7–8; 40 C.F.R. § 70.7(a)(5) ("The permitting authority shall provide a statement that sets for the legal and factual basis for the draft permit conditions . . . .").

The EPA Administrator shall object to the issuance of a Title V permit if he determines that the permit fails to include and assure compliance with all applicable requirements. 42 U.S.C. § 7661d(b)(1); 40 C.F.R. § 70.8(c). If the Administrator does not object before the end of the 45-day review period, "any person may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period to make such objection." 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); 30 Tex. Admin. Code § 122.360. The Administrator "shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements," of the Clean Air Act. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1); *see N.Y. Pub. Interest Grp. v. Whitman*, 321 F.3d 316, 333 n.12 (2d Cir. 2003) (explaining that under Title V, "EPA's duty to object to non-compliant permits is nondiscretionary"). The Administrator must grant or deny a petition to object within 60 days of its filing. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

GROUNDS FOR OBJECTION

I. <u>EPA Must Object to the Lubrizol Permit because TCEQ did not Provide Adequate Public Access for the Renewal of Draft Permit O1931.</u>

a. Specific Grounds for Objection

TCEQ is required to provide access to all information relevant to Title V renewals. 30 Tex. Admin. Code § 122.320. The majority of information and documents "collected, assembled, or maintained by the agency is public record open to inspection and copying during regular business hours." *Id.* § 1.5(a). TCEQ's Title V regulations also require the Executive Director to "make *available for public inspection* the complete application and draft operating permit throughout the entire Title V comment period during business hours at the commission's regional office where the relevant site is located." *Id.* § 122.320(g) (emphasis added). TCEQ shall also "direct the applicant to make a copy of the application, draft permit, and statement of basis available for review and copying at a public place in the county in which the site is located or proposed to be located." *Id.* § 122.320(b). The published notice must also include the location and availability of the complete permit application, draft permit, statement of basis, and all other relevant supporting materials in the public files of the agency. *Id.*

The public notice for Draft Permit No. O1931 stated that "the permit application, statement of basis, and draft permit will be available for viewing and copying at TCEQ's Houston Regional Office beginning the first day of publication of the notice." Public Notice at 1. While the notice technically included the location of these documents, it did not adequately describe the availability of the documents. The notice did not provide clear instructions on how to access these documents (the availability) once at the Houston Regional Office (the location). TCEQ also effectively failed to make the necessary documents "available for public inspection" at the Houston Regional Office.

b. Applicable Requirements

In addition to Part 70 of the federal regulations, Title V applicable requirements incorporate "[a]ny standard or other requirement provided for in the applicable [state] implementation plan approved . . ." by EPA. 40 C.F.R. § 70.2. This includes Texas's Title V regulations found in Chapter 122, including those requiring adequate public notice and access. *See* 30 Tex. Admin. Code § 122. The federal regulations also specifically require renewals to provide adequate procedures for public notice. 40 C.F.R. § 70.7(h). TCEQ failed to meet these applicable requirements by failing to provide adequate public access and failing to include the availability of the permit and application in the notice.

c. Inadequacy of the Permit Term

HCAO employees attempted to view the Draft Permit, application, statement of basis, and other documents relevant to this Title V renewal at the Houston Regional Office on March 7, 2024.

Based on HCAO employees' visits to the Houston Regional Office, it was apparent that (1) there was no protocol for viewing documents at the Houston Regional Office; (2) there was a misunderstanding amongst TCEQ employees regarding how, when, and even *if* permits were available for public viewing or maintained at that office; and (3) this misunderstanding led to incorrect and contradictory information being shared with the HCAO employees. TCEQ's failure to provide an avenue to view Title V permitting documents renders the public notice for this renewal insufficient.

TCEQ's Title V regulations require Title V notices contain the "location and availability" of the complete permit application, the draft permit, the statement of basis, and all other relevant supporting materials in the public files of the agency. 30 Tex. Admin Code § 122.320(b). Despite these requirements, HCAO employees faced numerous obstacles in obtaining and viewing information related to the permit renewal that should have been publicly available. TCEQ employees gave vague, contradictory, and incorrect answers regarding when, how, and even if permit materials could be viewed at the Regional Office. HCAO employees were told they needed an appointment with TCEQ to view any materials, which was not stated in any of the permit materials and is not necessary under 30 Texas Administrative Code Chapter 122. HCAO employees were told to make an appointment online and could so by searching "records" in the search bar on the front page of TCEQ's website. This search does not yield results conducive to scheduling an appointment with the Houston Regional Office. Then, after being told they needed an appointment to view permits at the Houston Regional Office, they were then told that they couldn't even view the permits there, because the permits were only located at the Austin Office. This instruction was directly in contradiction to the information provided on the Permit Renewal Notice and the requirements of the applicable state and federal regulations. Public Notice at 1. Later, another TCEQ employee confirmed that it was not possible to make appointments online to view documents at the Houston Regional Office, despite the earlier insistence from a different Regional Office employee that this was the only way HCAO employees could view documents.

While TCEQ's notice for this renewal claimed that the permit materials were "available" for viewing and copying, it failed to layout and describe the additional procedures that the HCAO employees were "required" to complete before being granted access to the documents. There is no information in these notices explaining how a member of the public might go about viewing and copying materials that should be accessible to the general public. The notice for this renewal did

not contain sufficient information detailing the "location and availability" of the relevant permit materials and therefore failed to provide proper notice of this action. This failure falls short of the applicable requirements adopted by TCEQ and approved by EPA in Texas's State Implementation Plan.

d. Issues Raised in the Public Comment

Petitioner raised these issues with reasonable specificity in the public comment filed with TCEQ on March 28, 2024. *See* Public Comment. The issues regarding public access are discussed on pages 1–5 of the Comment. *Id.* at 1–5.

e. Analysis of TCEQ's Response

TCEQ's Title V public participation requirements are nondiscretionary duties. TCEQ must abide by all requirements set out in its Title V regulations and nothing, including uploading documents online, relieves TCEQ of these duties. *See* 30 Tex. Admin. Code § 122.320. These duties are also separate and independent of one another. *Id.* TCEQ cannot skirt the requirement of making the draft permit and application available at the central and regional office by ensuring the applicant has provided the "public place" with these materials, or vice versa.

TCEQ stated in the RTC that the "public participation requirements and all requirements under 30 TAC 122.320 were met" by TCEQ because: (1) a copy of the Draft Permit and statement of basis were available online; (2) the commenter's experience was "shared with the regional office management for further consideration"; (3) the Draft Permit was available for viewing and copying at two other locations in addition to the TCEQ Houston Regional Office: the TCEQ central office and the Deer Park Public Library; (4) the public is *now* able to access the permit application at TCEQ's CFR Online website and pending applications are now uploaded to their own accessible webpage; and (5) if a stakeholder wants a hard copy of the pending permit application and is unable to obtain it from any of the listed locations, they can always just call the designated Facility contact person listed on the public notice and request assistance. RTC at 9.

Regardless of whatever additional actions are taken, including these five listed in the RTC, TCEQ still must fully comply with 30 Texas Administrative Code § 122.320. The actions that TCEQ stated it took to comply with all of the "public participation requirements and all requirements under 30 TAC 122.320" do not satisfy subsections (b) or (g) of the subchapter. Thus, TCEQ's claim that these five actions met "all requirements under 30 TAC 122.320" is incorrect.

Additionally, TCEQ does not address all of the issues raised by Petitioner in its comment. Petitioner specifically commented on the fact that the availability of the documents was not thoroughly explained in the public notice—TCEQ did not address this in the RTC. Below, the petition explains why each of TCEQ's five stated reasons either do not ensure compliance with all provisions of 30 Texas Administrative Code 122.320, do not adequately address Petitioner's public comment, or both.

i. "A Copy of the Draft Permit and Statement of Basis were Available Online."

This is true and not disputed by Petitioner. The Draft Permit and Statement of Basis were available online for the duration of the comment period. Both of these documents are hyperlinked on TCEQ's "All Other Projects Authorized for Public Notice" Title V webpage. *See* https://www.tceq.texas.gov/assets/public/permitting/air/Title_V/announcements/pnwebrpt.htm. The fact that these two documents are available online does not cure TCEQ's failure to make the application and Draft Permit available for public inspection at the Houston Regional Office or its failure to properly describe the location and availability of the application, Draft Permit, statement of basis, and all other relevant supporting materials in the public files of the agency.

ii. "The Commenter's Experience was Shared with the Regional Office Management for Further Consideration."

Petitioner is glad to know that its experience was shared with the Houston Regional Office and that the issues included in the Comment regarding public access were taken seriously. Petitioner would like to see the outcomes of its experience incorporated into policy at the Houston Regional Office, so that maybe the office will have document access policies that are clear, simple, and able to be both communicated to and understood by the general public in an effective fashion.

In future Title V comments filed after this one, Petitioner was advised to directly call individuals at the Regional Office using their business cards. This is an effective solution for Petitioner, but it does not solve the public access problem, as other stakeholders in Harris County would still not know who to call or how to go about accessing documents at the Houston Regional Office, especially if they were repeatedly turned away as Petitioners were. Additionally, individuals often leave and change roles in organizations. There is no guarantee that one number

given to an interested stakeholder will continue to be an effective method to retrieve publicly available documents.

As such, this action does not cure TCEQ's failure to make the application and Draft Permit available for public inspection at the Houston Regional Office, or its failure to properly describe the location and availability of the application, Draft Permit, statement of basis, and all other relevant supporting materials in the public files of the agency, which are both required by TCEQ rules.

iii. "The Draft Permit was Available for Viewing and Copying at Two Other Locations in Addition to the Houston Regional Office."

This is true and not disputed by Petitioner. But, again, TCEQ's performance of one nondiscretionary duty does not relieve it of other, distinct nondiscretionary duties. Ensuring the Draft Permit was available for review at the Deer Park Library and the TCEQ Central Office does not cure TCEQ's failure to comply with other, independent nondiscretionary duties in the Title V Public Notice process. The Executive Director is required to make the Draft Permit and complete application available for public inspection throughout the comment period at TCEQ's central office *and*, in this instance, the Houston Regional Office. TCEQ does not get to choose at which office it wants to make these documents available for public inspection—it is required to provide for public inspection at both offices.

Likewise, the fact that the Draft Permit was available for viewing and copying at the central office and the Deer Park Library also does not cure TCEQ's failure to accurately include the "location and availability" of the application, draft permit, statement of basis, and all other relevant supporting materials in the public files of the agency in the relevant public notice. The "availability" of these documents is not properly described in the public notice if, after following the instructions in the notice and attempting to access the documents at the Houston Regional Office, an individual is met with a myriad of obstacles in doing so, just as Petitioner was.

The Clean Air Act's procedural requirements ensure that the permitting authority can take public comments into account when making a permitting decision. Violations of procedural requirements that impede the public's opportunity to comment and have their input considered by the permitting authority could cause harm requiring corrective action. *In re Russell City Energy Center*, 14 E.A.D. 159, 176 (EAB 2008). This harm is not attributed to any impact on the final

permitting decision but rather the deprivation of the public's opportunity to comment and be heard. *Id.* So, even though Petitioner was eventually able to retrieve the documents it needed, TCEQ still failed to comply with its nondiscretionary Title V duties, depriving members of the public of the opportunity to comment and have their views on the permit considered.

iv. "The Public is *Now* Able to Access the Permit Application at TCEQ's 'CFR Online' Website and There is a Plan to Upload Pending Applications to Their Own Accessible Webpage."

TCEQ's action to now make applications publicly accessible is a great step in the direction of providing all stakeholders with the opportunity for meaningful public participation. But, making pending permit applications available online does not cure TCEQ's failure to accurately include and describe the location and availability of the application, Draft Permit, statement of basis and all other relevant supporting materials in the public notice for the permit renewal at issue in this petition.

v. "The Public Can Always Just Call the Designated Company Contact Person Listed on the Public Notice and Request Assistance."

While it is technically true (and not disputed by Petitioner) that stakeholders can always "just call" the company contact listed on the public notice, this fact does not cure TCEQ's failure to accurately include the "location and availability" of the application, Draft Permit, statement of basis, and all other relevant supporting materials in the public files of the agency in the relevant public notice. Despite being listed on the notice, there is no guarantee that the information for the corporate representative is valid or that a stakeholder will reach the listed contact in the short, thirty-day public comment period. Additionally, placing the contact information of a corporate representative on the public notice is a separate notice requirement under § 122.320 that does not relieve TCEQ of its other nondiscretionary duties.

TCEQ claims that the performance of these five actions met the "the public participation requirements and all requirements under 30 TAC 122.320." Not only is this incorrect, as shown above, but by relying on these five actions, none of which were dispute by Petitioner in its Comment, TCEQ fails to meaningfully respond in any way to Petitioner's Comment on the public access issue. Instead of responding to Petitioner's Comment and showing how TCEQ complied

with the portions of 30 Texas Administrative Code 122.320 that were disputed, it points out unrelated actions that were not disputed by Petitioner.

II. EPA Must Object to the Lubrizol Permit because TCEQ Failed to Ensure the Location of the Permit By Rule (PBR) Supplemental Tables were Specifically Identified.

a. Specific Grounds for Objection

Lubrizol's Title V Permit does not adequately incorporate or assure compliance with the applicable requirements in Lubrizol's PBRs and related registrations because those requirements are not properly incorporated by reference into the Title V Permit. PBR Supplemental Tables identify applicable PBRs by number and, for registered PBRs, provide a registration number and the associated monitoring. The PBR Supplemental Tables, however, are not located with the permit, their location is not adequately identified in the permit, and the Tables were not adequately accessible during the public comment period.

Permit Special Condition No. 10 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 (including the terms, conditions, monitoring, recordkeeping, and reporting identified in registered PBRs and permits by rule identified in the PBR Supplemental Tables dated January 8, 2024 in the application for project 34921*), standard permits, flexible permits, special permits, permits for existing facilities including Voluntary Emissions Reduction Permits and Electric Generating Facility Permits issued under 30 TAC Chapter 116, Subchapter I, or special exemptions referenced in the New Source Review Authorization References attachment. These requirements:
>
> A. Are incorporated by reference into this permit as applicable requirements
> B. *Shall be located with this operating permit*
> C. Are not eligible for a permit shield.

Draft Permit at 9–10 (emphasis added).

The applicable requirements from Lubrizol's PBRs and the corresponding registrations are not properly incorporated by reference into the Title V Permit through Special Condition 10 because: (1) the location of the PBR Supplemental Table was not specifically identified in the Draft Permit and (2) the Supplemental Table was not located with the Draft Permit.

b. Applicable Requirements

Title V permits must include all a source's applicable requirements; monitoring, testing, recordkeeping; and other conditions necessary to assure compliance with the applicable requirements. 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(1), (3). "Applicable requirements" for Texas Title V permits include the terms and conditions of preconstruction permits issued by TCEQ, including the requirements contained in a PBR claimed by the source and any source-specific emission limits established through a certified registration associated with a PBR. 40 C.F.R. § 70.2; 30 Tex. Admin. Code § 122.10(2)(H); *See In the Matter of Oak Grove Management Company*, Petition No. VI-2017-12 at 13 (Oct. 15, 2021).

c. Inadequacy of the Permit Term

While TCEQ can use incorporation by reference to incorporate certain applicable requirements into a Title V permit, EPA has long stated that incorporation by reference "may only be done to the extent that its manner of application is clear." U.S. EPA, *White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program*, (Mar. 5, 1996) at 40 [hereinafter White Paper No. 2]. And EPA "does not recommend that permitting authorities incorporate into [Title V] permits" certain information "such as the application.*" Id.* at 39.

EPA has further stated that:

> "Information that would be . . . incorporated by reference into the issued permit must first be currently applicable *and available* to the permitting authority and public . . . . Referenced documents must also be specifically identified. Descriptive information such as the title or number of the document and the date of the document must be included *so that there is no ambiguity as to which version of which document is being referenced*."

Id. at 40 (emphasis added).

Lubrizol's Permit fails to incorporate all applicable requirements because the purported incorporation by reference of requirements contained in Lubrizol's PBRs and related registrations is inadequate. PBR requirements are purportedly incorporated into the Title V permit by reference through tables that include the PBR rule citation and the effective date of the rule, and for registered PBRs, the "registration number" and the PBR Supplemental Table, which identifies required PBR monitoring. As the EPA has stated,

> [A] general statement in the Title V permit incorporating the PBR Supplemental Table without providing additional information detailing where the table is located *is not specific enough to effectively incorporate these requirements by reference*. In order to satisfy the requirement in title V that the Permit "set forth," "include," or

> “contain” monitoring to assure compliance with all applicable requirements, a special condition incorporating the PBR Supplemental Table would need to include, at a minimum, the date of the application and *specific location of the table, for example by providing a page number from the application*.

In the Matter of Phillips 66 Company, Borger Refinery, Order on Petition No. VI-2017-16 at 16 (Sept. 22, 2021) (emphasis added) [hereinafter *Phillips 66* Order].

Special Condition 10 does not provide the specific location where the public can find the PBR Supplemental Tables. To the contrary, Special Condition 10 simply states that all of the new source review requirements incorporated into the permit “shall be located with this operating permit.” Special Condition 10 clearly refers to the Tables and states the date they were submitted and the application number they are part of, but this falls short of the incorporation requirement laid out by EPA. The PBR Supplement Tables are not specifically identified nor are they located with the permit.

Special Condition 10 additionally states that the permit incorporates “permits by rule (including the terms, conditions, monitoring, recordkeeping, and reporting identified in registered PBRs and permits by rule identified in the PBR Supplemental Tables dated January 8, 2024, in the application for project 34921).” Draft Permit at 9–10. This provision includes the date of the PBR Supplemental Tables but fails to adequately specify the location of the Tables in the application by including page numbers or other location-identifying information. *Id.* Nor does the permit explain how the public can find the application during the life of the permit. The lack of information on the Supplemental Table’s location fails to meet the EPA’s minimum requirements for incorporating PBRs and their associated registrations through the use of PBR Supplemental Tables.

The Title V program was created to simplify and streamline both the reporting and enforcement mechanisms for air permits. Requiring applicants to compile all relevant terms and applicable requirements and include them within the permit “enable[s] 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 32,251. The failure of Lubrizol’s permit to properly incorporate applicable requirements related to PBRs into the permit undermines the purpose of the Title V by interfering with the ability of the public and regulators to engage with and enforce such requirements, during the public comment period and throughout the life of the permit. This failure frustrates the purpose of Title V.

d. Issues Raised in the Public Comment

Petitioner raised these issues with reasonable specificity in the public comment filed with TCEQ on March 28, 2024. *See* Public Comment. The issues regarding public access are discussed on pages 6–7 of the Comment. *Id.* at 6–7.

e. Analysis of TCEQ's Response

TCEQ's response neither fully addresses nor rebuts Petitioner's arguments that the incorporation of the PBR Supplemental Tables is improper and deficient. In its response, TCEQ points out (1) that the application included the Permits by Rule Supplemental Table Form (OP-PBRSUP); (2) that Special Condition 10 references "the terms, conditions, monitoring, recordkeeping, and reporting identified in registered PBRs and permits by rule identified in the PBR Supplemental Tables dated January 8, 2024, in the application for project 34921;" and (3) that for "location" purposes, a copy of the renewal application is considered part of the official application representation and was accessible at TCEQ offices. RTC at 11. TCEQ also includes the same arguments used to rebut Petitioner's comments about public access: that the permit record is available at TCEQ offices and that the public "always has the option to simply call the designated company contact person listed on the public notice and requests assistance." *Id.* While these claims are mostly true, they do not meaningfully respond to the issues Petitioner raised, and thus fail to rebut Petitioner's arguments about TCEQ's failure to specifically identify the PBR Supplemental Tables and locate the Tables with the Draft Permit.

i. <u>Failure to Properly Incorporate the PBR Supplemental Table</u>

TCEQ claims that because the OP-PBRSRUP was included in the renewal application and because Special Condition 10 references "the terms, conditions, monitoring, recordkeeping, and reporting identified in registered PBRs and permits by rule identified in the PBR Supplemental Tables dated January 8, 2024, in the application for project 34921," the location of the PBR Supplemental Table was sufficiently identified and thus incorporated into the permit. This is incorrect.

EPA specifically requires that in order for a Title V permit to properly "set forth, include, or contain" monitoring necessary to assure compliance with all applicable requirements, such as monitoring required for PBR compliance, "a special condition incorporating the PBR Supplemental Table would need to include, at a minimum, the date of the application and *the specific location of the table, for example by providing a page number from the application*." *Phillips 66* Order at 16 (emphasis added). A general statement incorporating the PBR

Supplemental Table without providing all necessary information detailing exactly "where the table is located *is not specific enough to effectively incorporate these requirements by reference*." *Id.* (emphasis added).

Special Condition 10 includes the date the PBR Supplemental Tables were submitted and the application number they were included in. The condition does not, however, include the specific location, either by providing a page number or some other method of identification. TCEQ's attempt to properly incorporate the table by reference falls short of EPA requirements and TCEQ's response to Petitioner's comment does not meaningfully or properly address this failure.

ii. PBR Tables were not Located with the Draft Permit

TCEQ also argues that the PBR Supplemental Table was technically located with the Draft Permit because the renewal application, including the OP-PBRSUP form, "is considered part of the application representation[,] . . . is a part of the official permit record for FOP 1931/Project 34921," and was accessible at TCEQ's Central Office. RTC at 11. Yet these facts do not ensure that the Supplemental Table is "located with this operating permit" as Special Condition 10 requires.

A Title V permit is not the same document as a Title V permit renewal application. Each document has specific requirements and the two are not identical, interchangeable, nor collapsible. *Compare* 30 Tex. Admin. Code §122.132 (listing the state requirements for Title V applications), *and* 40 C.F.R. § 71.5 (listing the federal requirements for Title V applications), *with* 30 Tex. Admin. Code § 122.142 (listing the state requirements for Title V permits), *and* 40 C.F.R. § 71.6 (listing the federal requirements for Title V permits). Including information in the application does not necessarily ensure that the information is included in the Draft Permit. State and federal rules refer to these documents individually and require each to be made available, not just as the "permit record" or "application representation." 30 Tex. Admin. Code § 122.320 (creating specific requirements for the application, draft permit, and statement of basis, rather than the permit record as a whole). If a stakeholder asks for Title V Permit O1931 at TCEQ's Central Office or Houston Regional Office, they will receive a copy of the Permit, not the application, entire permit record, or supporting documents. But Special Condition 10 requires that the PBR Supplemental Tables be located with the operating permit. TCEQ failed to ensure the Supplemental Tables were properly located with the Draft Permit.

iii. Public Access Arguments

In addition to the arguments above, TCEQ includes points reminding Petitioner of the alleged availability of these documents online and at TCEQ offices. Petitioner has already rebutted these arguments above, in Section II, and these rebuttals apply here as well. Similar to the other arguments TCEQ made regarding Supplemental Tables in the RTC, none of TCEQ's points about the public availability of the permit record, the designated company contact person, nor the Title V application page properly address or rebut the PBR Supplemental Table issues Petitioner raised.

III. EPA Must Object to the Lubrizol Permit because Vague and Unclear Recordkeeping Requirements, Monitoring and Reporting Standards, and Language used in the Permit Renders it Unenforceable as a Practical Matter.

a. Specific Grounds for Objection

All permit terms and conditions must be enforceable as a practical matter. Public Comment at 8; *see In the Matter of Salt River Project Agricultural Improvement and Power District*, *Agua Fria Generating Station*, Order on Petition No. IX-2022-4 at 20 (July 28, 2022) (ordering state agency to ensure all permit terms are enforceable as a legal and practical matter); *see also In the Matter of Salt River Project Agricultural Improvement and Power District, Coolidge Generating Station*, Order on Petition No. IX-2024-7 at 11 (Sept. 11, 2024) (finding that petitioner demonstrated that even though certain limits were legally enforceable, the permit was deficient because the limits were not enforceable as a practical matter). Certain terms and conditions in the permit contain vague and unclear language that is not enforceable as a practical matter, rendering the permit deficient. Public Comment at 8. These terms and conditions include Conditions 3(A)(iv)(1), 3(A)(iv)(3), 3(B)(iii)(1), 3(B)(iii)(2), 3(C)(iii)(1), and 3(C)(iii)(2).

b. Applicable Requirements

Federal Title V regulations require that a permit's emissions limitations and standards assure compliance with all applicable requirements. 40 C.F.R. § 70.6(a)(1). Periodic monitoring in the permit must be "sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit" and "shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement." *Id.* § 70.6(a)(3)(i)(B). Information and "requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods" must also be clear and enforceable. *Id.* § 70.6(a)(3)(i)(C). TCEQ failed to meet these applicable requirements

by using vague and unclear language throughout the permit that does not fully describe the necessary reporting, monitoring, and recordkeeping requirements.

c. Inadequacy of the Permit Term

All permit terms and conditions must be enforceable as a practical matter. Public Comment at 8; *In the Matter of Tesoro Refining and Marketing*, Order on Petition No. IX-2004-6 at 9 (Mar. 15, 2005) [hereinafter *Tesoro* Order]. When permit terms and conditions cannot be enforced as a practical matter, a Title V permit cannot assure compliance with all applicable requirements as required by the Clean Air Act. 40 C.F.R. § 70.6(a)(1). Additionally, periodic monitoring terms that are vague or unclear prevent the facility from yielding reliable data from the relevant time periods. *In the Matter of ETC Texas Pipeline, LTD, Waha Gas Plant*, Order on Petition No. VI-2020-3 at 17 (Jan. 28, 2022) ("The Title V permit should 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.") [hereinafter *Waha* Order]; *Tesoro* Order at 9 (finding that ambiguities in the petition rendered "the permit unenforceable as a practical matter" and detracted "from the usefulness of the permit as a compliance tool for the facility"). Petitioner objected to multiple instances of vague and unclear language in the permit, which each individually render the Draft Permit unenforceable as a practical matter.

d. Issues Raised in the Public Comment

Petitioner raised these issues with reasonable specificity in the public comment filed with TCEQ on March 28, 2024. *See* Public Comment. The issues regarding unclear and vague language in the permit are included on pages 8–11 of the Comment. *Id.* at 8–11.

e. Analysis of TCEQ's Response

HCAO identified and commented on multiple instances of vague and unclear language in the Draft Permit, which each render the Permit unenforceable as a practical matter. In Petitioner's Comment, each phrase or language issue that is too vague or unclear to be enforceable is grouped together, even if the phrase is used in different conditions throughout the permit. For the sake of clarity in this petition, HCAO uses the original grouping of these issues.

i. <u>"Operation"</u>

Petitioner argued that the term "operating," as it was used in Special Conditions 3(A)(iv)(1), 3(B)(iii)(1), and 3(C)(iii)(1), was too vague to be enforceable. Public Comment at 8. It is unclear whether the term "operating" means a unit is capable of operating for the entire quarter

or is actually operating for the entire quarter. Depending on which interpretation is used, the permit's requirements are different. One use may make more sense than the other depending on the Special Condition where it is used and vice versa.

In *State v. Texas Pet Foods Inc.*, the Texas Supreme Court held that the word "operation" in a permit administered under the Texas Clean Air Act did not require proof that a unit actually operated and produced material every day. *State v. Tex. Pet Foods, Inc.*, 591 S.W.2d 800, 805 (Tex. 1979). Rather, the facility was "in operation" if it remained capable of producing and was maintained as part of the facility's operation. *Id.* Yet in the Draft Permit "operating" was used to mean actual production, despite this holding from the Texas Supreme Court. Public Comment at 10. TCEQ fails to meaningfully respond to this portion of the comment and clarify what "operating" means in the Draft Permit.

In the RTC, TCEQ states that "all special terms and conditions (STCs) in a site operating permit (SOP) are generated based on applicant's responses to questions listed in OP-REQ1 form." RTC at 14. It continues and notes that this terminology is consistent with "definitions, terminology, and text language" used in the Title V TCEQ regulations, federal regulations, and "terminology used by EPA and various industry trade organizations." *Id.* Lastly, TCEQ notes that enforceability of the permit is "assured since the Title V permit holder is required to file a permit compliance certification (PCC) report annually to certify compliance." *Id.* None of these points address the issue with the unclear meaning of the phrase "operating" nor clarify which interpretation is to be used when reading the Draft Permit.

TCEQ did not address in the RTC which of the possible interpretations it meant to use. Instead, it just said that all terminology for the Draft Permit's STCs is from forms the facility is required to fill out as part of its application for a permit renewal and that these terms comply with applicable regulations and are used by EPA and industry trade organizations. Even if this point was actually responding to Petitioner's issue with the phrase "operating," it does not adequately defend TCEQ's view as TCEQ is the party creating and requiring facilities to fill out OP-REQ1.

And while TCEQ claims that its use of "operating" is "consistent with the definitions, terminology, and text language used in 30 TAC Chapter 122," and "the applicable rule text used in state and federal regulations," neither "operate" nor "operating" is defined in 30 TAC Chapter 122 or 40 C.F.R. Part 70. *See* 30 Tex. Admin. Code § 122.10; *see also* 40 C.F.R. § 70.2. The potential for multiple reasonable interpretations of this term necessitated a clarification from the

Texas Supreme Court in *Texas Pet Foods*, and a similar clarification is warranted here. Without such a clarification, the term remains so vague and unclear as to not be enforceable.

Additionally, language in the permit is generated based on an applicant's response to the form, but that does nothing to ensure compliance with the Clean Air Act. Plus, these forms could easily be changed by TCEQ to ensure that they are incorporating language that is not vague or unclear. TCEQ's final point—that enforceability of the permit is ensured because the permit holder is required to file a compliance certification—is a logically circular argument and does not meaningfully response to HCAO's assertion that the meaning of "operating" in the permit is so vague and unclear as to be unenforceable.

ii. <u>Record "Maintenance"</u>

Petitioner argued that the Draft Permit's use the phrase "shall be maintained" in Special Conditions 3(A)(iv)(3), 3(B)(iii)(2), and 3(C)(iii)(2) was too vague to be enforceable. Public Comment at 8. Conditions 3(A)(iv)(3), 3(B)(iii)(2), and 3(C)(iii)(2) state "records of all observations shall be maintained." *Id.* In the RTC, TCEQ used the same arguments in justifying its use of "operating" to justify its use of "shall be maintained." It argues that (a) "all special terms and conditions (STCs) in a site operating permit (SOP) are generated based on applicant's responses to questions listed in OP-REQ1 form," (b) this terminology is consistent with "definitions, terminology, and text language" used in the Title V TCEQ regulations, federal regulations, and "terminology used by EPA and various industry trade organizations," and (c) enforceability of the permit is "assured since the Title V permit holder is required to file a permit compliance certification (PCC) report annually to certify compliance." RTC at 14. TCEQ reiterates, in a separate paragraph, that the use of "shall be maintained" in Special Conditions 3(A)(iv)(3) and 3(B)(iii)(2) is correct because the permit holder must file a permit compliance certification (PCC) report on an annual basis and deviation reports on a semi-annual basis to demonstrate that it complies with all requirements contained in the permit. *Id.* "Therefore," TCEQ states, "compliance and enforceability of the Proposed Permit is assured." *Id.* TCEQ fails to rebut this issue in Special Condition 3(C)(iii)(2) even though this condition also uses "shall be maintained" is a manner that is so vague as to be unenforceable.

There are several issues with TCEQ's argument. As pointed out above in dealing with the phrase "operating," TCEQ's responses (a), (b), and (c) do not address the issue raised Petitioner's Comment and, even if they did, inadequately address the fact that the Permit's use of "shall be

maintained" is so vague and unclear that it renders each Special Condition in the Draft Permit, and thus the Draft Permit as a whole, unenforceable as a practical matter. It does not matter if the words contained in STCs are generated from applicant's answers on application forms. STCs in a permit *must* be clear and enforceable. *Waha* Order at 17 ("The Title V permit should 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."); *Tesoro* Order at 9 (finding that ambiguities in the petition rendered "the permit unenforceable as a practical matter" and detracted "from the usefulness of the permit as a compliance tool for the facility"). The usage is also not necessarily consistent with state and federal regulations and terminology used by TCEQ and trade organizations. The phrases "shall be maintained" or "shall maintain" are not defined in either set of regulations. *See* 30 Tex. Admin. Code § 122.10; *see also* 40 C.F.R. § 70.2. And, even if they are generally used by EPA and various industry trade organizations, that still does not necessarily mean the phrase is clear and understandable. A Title V permit is meant to be viewed, interpreted, and understood by the general public. *In the Matter of Valero Refining-Texas L.P., Valero Houston Refinery*, Order on Petition No. VI-2021-8 at 2 (June 30, 2022) [hereinafter *Valero* Order]. Anyone, not just EPA employees and those in industry trade organizations, should be able to read a Title V permit and understand what regulations the facility is subject to, how it is meant to achieve compliance, and how it is supposed to monitor this compliance. *Id.* Lastly, TCEQ claims that compliance is ensured because permit holders must demonstrate compliance with the regulations by filing a permit compliance certification and deviation reports. But, merely filing a certification does not ensure a facility is in compliance and deviation reports often contain instances of non-compliance. Not only is TCEQ's claim incorrect but it does not deal with the issues Petitioner raised. Special Conditions 3(A)(iv)(3), 3(B)(iii)(2), 3(C)(iii)(2) are unclear. Requiring the Facility to submit a PCC does not make them any clearer.

iii. <u>"RO"</u>

Special Condition 3 makes reference to the abilities of the "RO" regarding compliance, but this term is not defined anywhere in the text of the Draft Permit nor is it included in the Draft Permit's acronym list. Public Comment at 11–12; *see* Draft Permit at 5–7. The Special Conditions state that the RO may certify compliance with relevant regulations when there are no visible emissions present and provides instructions for the RO when there are visible emissions present. How can this provision guarantee compliance if the general public reading the permit cannot

understand the method by which the permit's compliance is to be certified? "RO" in this instance is unclear because it could mean anything—an individual, a company, a department of TCEQ, or a certain type of machine.

HCAO requested that TCEQ define the term RO in the permit's attached acronym list. Instead, TCEQ states "the abbreviation for responsible official (RO) is well known in the field of federal air permitting and is well defined in the applicable Title V" state and federal regulations. RTC at 15. TCEQ's first point is either incorrect, irrelevant, or both. It does not cite any proof that the term is "well-known" in the field of federal air permitting. Even if it were well-known in the field of air permitting, that does not mean TCEQ can include an unexplained acronym in the permit. Title V permits are meant to serve as a resource for anyone in the general public to access and understand what regulations and monitoring a facility is subject to. *Valero* Order at 2. By using an unexplained acronym, even if it is well-known in the federal air permitting field, TCEQ fails to accomplish the purpose of the Title V program.

Additionally, TCEQ states that the term is "well-defined" in 30 TAC Chapter 122 and 40 CFR Part 70, where the state and federal Title V regulations are located, respectively. This is also false and TCEQ provided no citations or proof of the location of the definitions in either set of regulations. The term "RO" is not defined nor explained in the "Definitions" subsection of 30 TAC Chapter 122. *See* 30 Tex. Admin. Code § 122.10. And while the term "responsible official" is defined in the federal regulations, there is no hint or indication that "RO" is a common or often-used abbreviation for the term. *See* 40 C.F.R. § 70.2. Because the Permit's use of the term "RO" is so unclear as to make the permit unenforceable as a practical matter, TCEQ should add the term and its meaning to the Permit's acronym table on page 110.

CONCLUSION

As explained above and detailed in the timely filed public comments, the Draft Permit is deficient and does not meet the requirements of the Clean Air Act. Petitioner urges the Administrator to object to the issuance of Permit No. O1931 as required by the Clean Air Act.

Respectfully submitted this March 10, 2025, on behalf of the Harris County Attorney's Office.

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LIST OF EXHIBITS

Exhibit	Title
A	**Notice of Draft Federal Operating Permit for Draft Permit No. O1931**
B	**Harris County Attorney's Office Public Comment on the Renewal of Title V Permit No. O1931**
C	**Texas Commission on Environmental Quality's Response to Comment on the Renewal of Title V Permit No. O1931**