

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION No. VI-2017-16
	)	
PHILLIPS 66 COMPANY	)	ORDER RESPONDING TO
BORGER REFINERY	)	PETITION REQUESTING
HUTCHINSON COUNTY, TEXAS	)	OBJECTION TO THE ISSUANCE OF
	)	TITLE V OPERATING PERMIT
PERMIT No. O1440	)	
	)	
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 12, 2017 (the Petition) from the Environmental Integrity Project and Sierra Club (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. O1440 (the Permit) issued by the Texas Commission on Environmental Quality (TCEQ) to the Phillips 66 Borger Refinery (Phillips 66 or the facility) in Hutchinson 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 further 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, C, and D, and a portion of Claim B, and denies the rest of Claim B.

**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).

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). 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).<sup>1</sup> Under

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<sup>1</sup> *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (NYPIRG).

section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.<sup>2</sup>

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)).<sup>3</sup> 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.<sup>4</sup> Certain aspects of the petitioner's demonstration burden are discussed in the following paragraph. A more detailed discussion can be found in *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 the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the state's response to comments), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.<sup>5</sup> Another factor the EPA examines is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the

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<sup>2</sup> *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.

<sup>3</sup> *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)).

<sup>4</sup> *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

<sup>5</sup> *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).

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.”).<sup>6</sup> 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).<sup>7</sup> 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).<sup>8</sup>

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

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<sup>6</sup> *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*).

<sup>7</sup> *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).

<sup>8</sup> *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.

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.

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 Phillips 66 Borger Refinery**

The Phillips 66 Borger Refinery, located in Hutchinson County, Texas, desalts crude oil and recycle streams. The treated crude is then separated into components using atmospheric distillation. Products from this process are used as natural gas liquids feed, fractionated at another unit, or blended into final products (furnace oil, jet fuels, stove oil, kerosene, dual purpose fuel oil, etc.). The facility is a major source of volatile organic compounds, sulfur dioxide, particulate matter, nitrogen oxides, hazardous air pollutants, carbon monoxide, 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).

#### **B. Permitting History**

Phillips 66 first obtained a title V permit for the Borger Refinery in 2004, which was subsequently renewed. On August 28, 2013, Phillips 66 submitted an application for a renewal title V permit. TCEQ noticed the draft permit on October 14, 2015, subject to a public comment period from October 14, 2015, until November 13, 2015. On May 25, 2017, TCEQ transmitted the Proposed Permit, along with its Response to Comments (RTC) and Statement of Basis, to the EPA for its 45-day review. The EPA’s 45-day review period ended on July 14, 2017, during which time the EPA did not object to the Proposed Permit. TCEQ issued the final title V permit for the Borger Refinery on July 25, 2017 (Final Permit). 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 October 23, 2019.

### 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 14, 2017. Thus, any petition seeking the EPA's objection to the Proposed Permit was due on or before September 12, 2017. The Petition was received September 12, 2017, 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 Proposed Permit is Deficient Because it Allows Phillips 66 to Use Texas’s Minor Source Flexible Permit Program to Authorize Modifications to a Major Source.”**

**Petitioners’ Claim:** Claim A concerns Flexible Permit No. 9868A, which is incorporated by reference into the source’s title V permit. Specifically, Claim A turns on the Petitioners’ characterization of this flexible permit as a “a state-only authorization that was issued prior to EPA’s approval of Texas’s minor source flexible permit program rules.” Petition at 8; *see id.* at 9 (citing 79 Fed. Reg. 40666, 40667–68 (July 14, 2014); 40 C.F.R. § 51.105; 42 U.S.C. § 7410(i)). As a result, the Petitioners assert that the source’s title V permit is deficient in part “because it incorporates Phillips 66’s state-only major source flexible permit as a federally enforceable authorization . . . .” *Id.* at 9.

Moreover, the Petitioners assert that “the Proposed Permit is deficient because it fails to assure compliance with applicable federally-approved preconstruction permitting requirements for minor and major sources in the Texas [SIP].” *Id.* at 5. The Petitioners explain that title V permits “must include conditions necessary to assure compliance with applicable requirements, including requirements in a state’s federally-approved [SIP].” *Id.* at 6 (citing 42 U.S.C. § 7661c(a)). Moreover, the Petitioners claim that state-only permits “may not be used to modify a source’s SIP obligations.” *Id.* at 8 (citing 42 U.S.C. § 7410(i)). In contravention of these requirements, the Petitioners claim that the title V permit’s incorporation of the state-only flexible permit allows Phillips 66 to avoid requirements in the SIP—specifically, requirements in 30 TAC Chapter 116, Subchapter B—that the Petitioners assert would otherwise be applicable to construction projects at the facility. *Id.* at 8–9; *see id.* at 10–13 (Petitioners’ rebuttal of TCEQ’s RTC).

The Petitioners acknowledge that the TCEQ flexible permit program is now approved into the Texas SIP. *Id.* at 9. However, the Petitioners assert that Phillips 66 may not use this SIP-approved flexible permit program because, according to the Petitioners, this program is only available to minor sources, not major sources like the Phillips 66 Refinery. *Id.* at 7–8. (citing *Environmental Integrity Project v. EPA*, 610 Fed. Appx. 409 (5th Cir. 2015) (“*Flex II*”), along with various legal filings by Texas associated with related litigation); *see id.* at 13–14 (Petitioners’ rebuttal of TCEQ’s RTC). Accordingly, the Petitioners assert that it is improper for the title V permit to incorporate these SIP-approved flexible permit rules by reference because doing so allows the source to avoid requirements in the SIP—specifically, requirements in 30 TAC Chapter 116, Subchapter B—that the Petitioners assert must apply to projects at this major

source. *Id.* at 5–6 (citing Proposed Permit Special Condition No. 21); *see id.* at 10 (Petitioners’ rebuttal of TCEQ’s RTC).

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

As an initial matter, the EPA agrees with the Petitioners’ characterization of Flexible Permit No. 9868A 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, Goodyear Tire & Rubber Company, Houston Chemical Plant (January 8, 2010) (*Goodyear*



*Objection Letter*).<sup>9</sup> 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. 9868A, as incorporated into the current title V permit, is a state-only authorization. It was, as the Petitioners indicate, issued under regulations which were not part of the EPA-approved Texas SIP.<sup>10</sup> However, the title V permit for Phillips 66 currently incorporates Flexible Permit No. 9868A without qualification, suggesting that it is a federally enforceable requirement of the title V permit. *See* Final Permit at 12 (Special Condition 17), 280.<sup>11</sup> This plainly contravenes the requirement that non-federally enforceable requirements be designated as such and presents a basis for the EPA to object to the Permit. 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. 9868A into Phillips 66’s 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 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). This frustrates a central purpose of the title V program: to “clarify, in a single document, which requirements apply to a source and,

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<sup>9</sup> 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](https://www.tceq.texas.gov/assets/public/permitting/air/Announcements/epa_goodyear_O1227.pdf).

<sup>10</sup> The July 25, 2017 version of the title V permit upon which the Petition is based incorporated the September 24, 2014 version of Flexible Permit No. 9868A. The most recent version of the title V permit, issued on October 23, 2019, incorporates the June 18, 2018 version of Flexible Permit No. 9868A. Although both of these versions of the flexible permit were issued pursuant 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. 9868A, as renewed on November 22, 2005. Although Flexible Permit No. 9868A has since been renewed under the SIP-approved rules, this latest version has not yet been incorporated into the source’s title V permit.

<sup>11</sup> To make matters more complicated, the terms of Flexible Permit No. 9868A are combined with the terms of PSD Permit No. PSDTX102M7 in a single document.

thus, . . . enhance compliance with the requirements of the Act.”<sup>12</sup> Thus, the EPA agrees with the Petitioners that the title V permit cannot be said to “assure compliance” with the SIP requirements that are applicable to the facility. Accordingly, the EPA grants Claim A.

Notably, Phillips 66’s flexible permit was recently renewed and reissued under TCEQ’s now-SIP-approved rules. Flexible Permit No. 9868A (March 26, 2021). 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 this claim. The Petitioners are incorrect to suggest otherwise. *See* Petition at 7–8 (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 Phillips 66’s Borger Refinery). The Petitioners’ arguments on this point 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).<sup>13</sup> Nothing in the EPA’s approval of the 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*.<sup>14</sup> Thus, 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.

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<sup>12</sup> 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, 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.”)

<sup>13</sup> *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.

<sup>14</sup> 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.

**Direction to TCEQ:** In order to resolve the EPA’s objection to Claim A, TCEQ must revise the title V permit to incorporate the SIP-approved, federally enforceable version of Permit No. 9868A into the title V permit.

**Claim B: The Petitioners Claim That “The Proposed Permit Fails to Include Monitoring, Testing, and Recordkeeping Requirements that Assure Compliance with Applicable Requirements.”**

Within Claim B, the Petitioners assert:

The Proposed Permit is deficient because it fails to establish monitoring, testing, and recordkeeping conditions that assure compliance with emission limits in [NSR] permits, including Permits by Rule (“PBRs”) and Standard Permits, that it incorporates by reference and because the permit record does not contain a reasoned explanation supporting the Executive Director’s determination that monitoring, testing, and recordkeeping conditions in the Proposed Permit assure compliance with these requirements.

Petition at 14. Before presenting specific claims, the Petitioners provide background on the requirements of title V related to monitoring. The Petitioners assert that title V permits must contain monitoring, recordkeeping, and reporting conditions that assure compliance with all applicable requirements, including emission limits in NSR permits and PBRs that are incorporated by reference into a title V permit. *Id.* at 16 (citing 42 U.S.C. § 7661c(a), (c); 40 C.F.R. §§ 70.2, 70.6(a)(3), (c)(1); *In the Matter of Wheelabrator Baltimore, L.P.*, Order on Petition, Permit No. 24-510-01886 at 10 (April 14, 2010)). Moreover, the Petitioners contend that the “rationale for the selected monitoring requirements must be clear and documented in the permit record.” *Id.* (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) (*US Steel I Order*)). The Petitioners acknowledge that TCEQ’s Statement of Basis for the Permit states “With the exception of any emission units listed in the Periodic Monitoring or CAM Summaries in the [title V permit], the TCEQ Executive Director has determined that the permit contains sufficient monitoring, testing, recordkeeping, and reporting requirements that assure compliance with the applicable requirements.” *Id.* (quoting Statement of Basis at 105). The Petitioners assert that neither the periodic monitoring or CAM summaries address the requirements at issue in Claim B, and that “the Statement of Basis does not provide a reasoned justification for the Executive Director’s determination that existing provisions in Phillips 66’s NSR, PBRs, and Standard Permits assure compliance with applicable permit limits and operating requirements.” *Id.*

Claim B includes multiple distinguishable subclaims that EPA has rearranged to facilitate the Agency’s analysis. The EPA’s response to Claim B addresses each of the Petitioners’ claims according to the following numbering system (not supplied in the Petition):

- Claim B.1 addresses monitoring associated with PBRs (Petition pages 17–19, 22–23);
- Claim B.2 addresses monitoring associated with Flexible Permit No. 9868A/PSDTX102M7 (Petition pages 19–20, 23–27); and

- Claim B.3 addresses monitoring associated with Permit No. 80799 (Petition Pages 20–21, 23–25, 27–29).

### **Claim B.1: Monitoring associated with PBRs**

***Petitioners’ Claim:*** The Petitioners claim that the title V permit does not assure compliance with applicable PBRs because it does not include specific monitoring for these requirements as required by 42 U.S.C. § 7661c(a) and (c) and 40 C.F.R. § 70.6(a)(3) and (c)(1). Petition at 16, 18–19. In particular, of the nine PBR rules incorporated into the Permit as applicable requirements, the Petitioners cite and describe five PBR rules that establish specific emission limits and standards, but which do not specify monitoring to assure compliance with these limits. *Id.* at 17–18. The Petitioners claim that when a PBR rule does not contain specific monitoring, the only monitoring, recordkeeping, or reporting that applies is contained in Special Condition 19 of the title V permit, which contains a “non-exhaustive list of data Phillips 66 may consider—at its discretion—to determine compliance with PBR requirements.” *Id.* at 18–19. The Petitioners contend that “[t]his outsourcing renders the Proposed Permit deficient” because it fails to specify monitoring conditions that assure compliance with each applicable requirement, and because the permit record does not explain how Special Condition 19 assures compliance with applicable PBR requirements. *Id.* at 19.

Additionally, the Petitioners contend that the Permit is deficient because “[i]t fails to require permit records demonstrating compliance with PBR limits to be made available to the public, as required by Texas’s Title V program.” *Id.* at 19 (citing *In the Matter of Shell Chemical LP and Shell Oil Co*, Order on Petition Nos. VI-2014-04 and VI-2014-05 at 15 (September 24, 2015) (*Shell Deer Park Order*)). Addressing TCEQ’s RTC, the Petitioners suggest that records in Phillips 66’s possession may not be publicly accessible, and that publicly accessible compliance certifications only contain detailed information about noncompliance, as opposed to information demonstrating compliance. *Id.* at 22–23.

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

Special Condition 19 of the Phillips 66 title V permit states:

The permit holder shall maintain records to demonstrate compliance with any emission limitation or standard that is specified in a [PBR] or Standard Permit listed in the New Source Review Authorizations attachment. The records shall yield reliable data from the relevant time period that are representative of the emission unit’s compliance with the PBR or Standard Permit. These records may include, but are not limited to, production capacity and throughput, hours of operation, safety data sheets (SDS), chemical composition of raw materials, speciation of air contaminant data, engineering calculations, maintenance records, fugitive data, performance tests, capture/control device efficiencies, direct pollutant monitoring (CEMS, COMS, or PEMS), or control device parametric monitoring. These records shall be made readily accessible and available as required by 30 TAC § 122.144. Any monitoring or recordkeeping data indicating noncompliance with the PBR or

Standard Permit shall be considered and reported as a deviation according to 30 TAC § 122.145 (Reporting Terms and Conditions).

Final Permit at 12.

The Petitioners have demonstrated that with regard to the monitoring, recordkeeping, and reporting requirements for PBRs, the Phillips 66 title V permit does not assure compliance with the CAA, part 70, and Texas's approved title V program.<sup>15</sup> Specifically, the Petitioners have demonstrated that PBRs incorporated by reference into the title V permit do not contain any additional PBR-specific monitoring, recordkeeping, and reporting and rely solely on the general requirements in Special Condition 19. Further, the Petitioners have demonstrated that the general, large list of monitoring, recordkeeping, and reporting options under Special Condition 19 may not be adequate for all PBRs. As explained in the EPA's *Motiva Order*,<sup>16</sup> a streamlined approach to monitoring, such as in Special Condition 19, can be appropriate for generally applicable requirements for insignificant units. *Motiva Order* at 26 (citing White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program, 32 (March 5, 1996) (*White Paper Number 2*)). However, the EPA cannot determine if any PBRs in the title V permit apply only to insignificant units.

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).<sup>17</sup> Special Condition 18 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 or for the general emission limits found in Subchapter A. Likewise, Special Condition 19 does not specify any particular monitoring requirements and instead allows Phillips 66 to select the monitoring,

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<sup>15</sup> Regarding the Petitioners' general assertion that the title V permit is deficient because Special Condition 19 fails to require permit records demonstrating compliance with PBR limits be made available to the public as required by Texas's Title V program, the EPA disagrees. The only citation the Petitioners provide is to the EPA's 2015 *Shell Deer Park Order*, claiming that "the permit records for demonstrating compliance with PBRs must be available to the public as required under the approved Texas title V program." Petition at 32 (quoting *Shell Deer Park Order* at 15). However, the quote the Petitioners provide from the *Shell Deer Park Order* was only paraphrasing Special Condition 24 in the Shell Deer Park title V permit, which requires that PBR "records shall be made readily accessible and available as required by 30 TAC § 122.144." Shell Deer Park Chemical Plant Proposed Permit at 21. This same requirement exists verbatim in the Phillips 66 title V permit under Special Condition 30.

<sup>16</sup> *In the Matter of Motiva, Port Arthur Refinery*, Order on Petition No. VI-2016-23 at 27–32 (May 31, 2018) (*Motiva Order*).

<sup>17</sup> 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).

recordkeeping, or reporting it will use to assure compliance. Because neither these generic permit terms nor the PBRs themselves require Phillips 66 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). The Petitioners have demonstrated that the generic Special Condition 19 also contains no assurance that the monitoring or recordkeeping selected by the source will, as a technical and legal matter, be sufficient to ensure compliance. Because the Permit does not specify any particular monitoring or recordkeeping requirement, 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 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). Even if the monitoring, recordkeeping, or reporting is eventually specified in a compliance certification, that does not remedy the fact that the title V permit itself still does not include the monitoring, recordkeeping, or reporting.<sup>18</sup> Therefore, the Petitioners have demonstrated that for PBRs authorizing non-insignificant units, Special Condition 19 does not contain monitoring, recordkeeping, and reporting requirements sufficient to assure compliance with the requirements in each PBR.

***Direction to TCEQ:*** The EPA notes that TCEQ has begun including a list of PBRs that only apply to insignificant units in the statement of basis for title V permits. *See e.g.*, Statement of Basis for Draft Title V Permit for Odfjell Terminal Houston at 7–8 (December 20, 2020). To the extent that any PBRs apply solely to insignificant units, TCEQ should make those clarifications in the Permit and permit record, as necessary, and evaluate whether the general monitoring conditions are sufficient to assure compliance for these insignificant units.<sup>19</sup>

For PBRs that apply to non-insignificant units, TCEQ should specify the monitoring, recordkeeping, and reporting that assures compliance with the requirements of the PBRs in the Phillips 66 title V permit. If any underlying PBRs contain monitoring, recordkeeping, and reporting, TCEQ should identify those PBRs in the permit record and determine if the monitoring in those PBRs is adequate. On the other hand, if any PBRs do not contain any underlying monitoring, recordkeeping, or reporting, then TCEQ should specify what monitoring, recordkeeping, or reporting will assure compliance with the requirements of those PBRs and the emission limits in 30 TAC § 106.4(a)(1) as they apply to units authorized by those PBRs. If the title V permit, Chapter 116 NSR permits, NSPS, NESHAP, or enforceable representations in an application already contain adequate terms to assure compliance with PBR, then TCEQ should amend the Permit to identify such terms and explain how these requirements assure compliance with the requirements and emission limits for each PBR that applies to significant units. However, if the title V permit and all enforceable, properly incorporated documents do not

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<sup>18</sup> *See* RTC at 14. The requirement that a title V permit contain sufficient monitoring and the requirement that sources submit compliance certifications are independent (albeit related) obligations.

<sup>19</sup> The EPA has explained that if a regular program of monitoring, recordkeeping, and reporting for insignificant units would not significantly enhance the ability of the permit to assure compliance with the applicable requirements, general monitoring requirements or even no monitoring can sometimes satisfy title V and 40 C.F.R. § 70.6(a)(3)(i). *See White Paper Number 2* at 32.

contain monitoring, recordkeeping, and reporting requirements sufficient to assure compliance with the PBR requirements, then TCEQ must add such terms to the Permit.

The EPA notes that TCEQ is planning to specify the monitoring for certain PBRs in a PBR Supplemental Table provided by applicants. *See* Letter from Tonya Baer, Deputy Director of Air, TCEQ, to David Garcia, Director, Air and Radiation Division, Region 6, U.S. EPA, *Permits by Rule Programmatic Changes*, 2 (May 11, 2020) (the May 11, 2020 Baer Letter). Specifically, the EPA understands that TCEQ is now requiring title V applicants to fill out the PBR Supplemental Table, which TCEQ will then incorporate into the title V permit through a general condition in the title V permit. *E.g.*, Colorado Bend I Power Title V Permit No. O2887 at 5, Special Condition 7 (March 11, 2021).

It is important to explain what is required for something to be properly incorporated by reference such that the title V permit actually includes all applicable requirements. As the EPA has explained:

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. Citations, cross references, and incorporations by reference must be detailed enough that the manner in which any referenced material applies to a facility is clear and is not reasonably subject to misinterpretation. Where only a portion of the referenced document applies, applications and permits must specify the relevant section of the document. Any information cited, cross referenced, or incorporated by reference must be accompanied by a description or identification of the current activities, requirements, or equipment for which the information is referenced.

*White Paper Number 2* at 37. Additionally, the EPA explained:

Incorporation by reference in permits may be appropriate and useful under several circumstances. Appropriate use of incorporation by reference in permits includes referencing of test method procedures, inspection and maintenance plans, and calculation methods for determining compliance. One of the key objectives Congress hoped to achieve in creating title V, however, was the issuance of comprehensive permits that clarify how sources must comply with applicable requirements. Permitting authorities should therefore balance the streamlining benefits achieved through use of incorporation by reference with the need to issue comprehensive, unambiguous permits useful to all affected parties, including those engaged in field inspections.

*Id.* at 38.

Title V applications can be hundreds of (and sometimes over a thousand) pages long, and a search of the TCEQ online database will usually return multiple title V applications for a specific facility that has had multiple revisions and renewals. Thus, 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 minimum, the date of the application and specific location of the table, for example by providing a page number from the application. Alternatively, a more straightforward approach that would obviate these IBR-related concerns would be for TCEQ to directly include (*i.e.*, attach) this PBR Supplemental Table as an enforceable part of the title V permit itself.

Additionally, although this table requires the applicant to specify monitoring, recordkeeping, and reporting for “claimed (not registered)” PBRs, the table does not appear to address monitoring for registered PBRs. For registered PBRs, the EPA understands that TCEQ intends to start having applicants include monitoring in the registration form.<sup>20</sup> However, TCEQ has not indicated how it will appropriately incorporate that monitoring into an enforceable part of the title V permit. The EPA understands that TCEQ’s EPA-approved regulations state: “All representations with regard to construction plans, operating procedures, and maximum emission rates in any certified registration under this section become conditions upon which the facility permitted by rule shall be constructed and operated.” 30 TAC § 106.6(b). However, the fact that the PBR regulations state that information in the application will be conditions upon which the facility permitted by rule shall be constructed and operated has little to no bearing on whether those provisions are “included” or “contained” in a title V permit, as required by the Act, the EPA’s regulations, and TCEQ’s EPA-approved regulations. *E.g.*, 42 U.S.C. § 7661c(c).<sup>21</sup> For a requirement to be included in a title V permit, the Permit must include it (or properly incorporate it by reference).

IBR is a prominent feature of TCEQ’s title V program. When the EPA approved the Texas title V program, the EPA balanced the streamlining benefits of IBR against the value of a more detailed title V permit and approved TCEQ’s use of IBR for PBRs, provided the program was implemented correctly. *See* 66 Fed. Reg. 63318, 63321–32 (December 6, 2001).<sup>22</sup> In its program approval, the EPA indicated that monitoring specified in the *terms and conditions* of a minor NSR permit could be incorporated into the title V permit.<sup>23</sup> The EPA did not suggest that

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<sup>20</sup> TCEQ has stated that it will require applicants to “[u]pdate PBR application representations with monitoring that is sufficient to demonstrate compliance.” May 11, 2020 Baer Letter at 3.

<sup>21</sup> *See supra* note 17.

<sup>22</sup> *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.”).

<sup>23</sup> 66 Fed. Reg. at 63324 (“[A]ll the title V permits will incorporate the necessary [monitoring, recordkeeping, and reporting] which will assure compliance with the title V permit, including [minor] NSR and PBR requirements. . . . [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.”).



unidentified application representations for minor NSR permits or PBRs would automatically be considered to be incorporated by reference into a title V permit as adequate monitoring, recordkeeping, and reporting. Rather, as far as application representations are concerned, TCEQ's EPA-approved title V regulations expressly require that such representations be identified in the Permit itself. *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)).

Therefore, TCEQ should include or identify the monitoring, recordkeeping, and reporting from the application forms for registered PBRs (in addition to the claimed but not registered PBRs). With these changes, and provided the PBR Supplemental Table is either included or sufficiently incorporated by reference into the title V permit, the title V permit should include identifiable monitoring, recordkeeping, and reporting necessary to assure compliance with the emission limits and standards in the PBRs.

### **Claim B.2: Monitoring in Flexible Permit No. 9868A/PSDTX102M7**

***Petitioners' Claim:*** The Petitioners assert that Flexible Permit No. 9868A/PSDTX102M7 does not include any special conditions specifying monitoring or calculation methodologies for units subject to the flexible permit emission caps. Petition at 19–20, 25.<sup>24</sup> Instead, the Petitioners note that this permit allows off-permit recordkeeping as a substitute for the special conditions required by the TCEQ's flexible permitting rules. *Id.* at 19–20 (citing Flexible Permit No. 9868A/PSDTX102M7, Special Condition 57). The Petitioners assert that any recordkeeping conducted by the source to assure compliance with the flexible permit caps must be identified in a permit application, available during the comment period, and ultimately included in the source's title V permit. *Id.* at 20.

The Petitioners then address TCEQ's RTC, in which the state suggested that Phillips 66's flexible permit applications contain information about how Phillips 66 calculates emissions. Specifically, the Petitioners challenge TCEQ's claim that "application representations that describe the calculation methodology for the emissions are not required to be listed in the NSR permit document itself." RTC at 15. The Petitioners assert that this runs afoul of the requirement

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<sup>24</sup> For support, the Petitioners cite TCEQ's flexible permit program rules, which are now approved into the SIP. The Petitioners claim that "[f]lexible permits must specify methods for calculating annual and short term emissions from each type of facility covered by a multi-unit emissions cap to assure compliance with the caps." *Id.* at 19 (citing 30 TAC § 116.715(c)(5)(A), (B)). Moreover, the Petitioners state that flexible permits "must include special conditions" that require monitoring methods that "accurately determine all emissions of . . . pollutants in terms of mass per unit of time." *Id.* (quoting 30 TAC § 116.715(d)). The EPA observes that these cited authorities are part of the Texas flexible permitting rules that are now part of the EPA-approved SIP. It is not clear to the EPA whether these regulations governed the state-only version of Flexible Permit No. 9868A that is incorporated into the current title V permit, or whether the Petition claims should be judged against this authority alongside the authorities based in title V (cited in the introduction to Claim B). However, given that each of the emission limits at issue in Claim B are defined in mass per unit of time, the EPA's analysis of whether the Permit assures compliance with these limits under the title V monitoring authorities will inherently also address this SIP-based authority, to the extent it is applicable. These concerns related to the legal authority that governs the terms of Flexible Permit No. 9868A/PSDTX102M7 will cease to be an issue once TCEQ incorporates the new SIP-approved version of Flexible Permit No. 9868A into the title V permit.

that flexible permits “specify methods for calculating annual and short term emissions for each pollutant for a given type of facility.” Petition at 26 (quoting 30 TAC § 117.715(c)(5)(B)). Additionally, the Petitioners assert that “Phillips 66’s application files do not necessarily include information about the calculation methodologies that assure compliance with multi-unit emission caps in the Flexible Permit” because Special Condition 57 merely directs the source to develop a recordkeeping program, and does not require such recordkeeping to be identified in an application or based on calculation methodologies included in an application. *Id.* at 26–27. The Petitioners also note that TCEQ “does not identify which application(s), if any, contain currently enforceable representations regarding the methods Phillips 66 must use to assure compliance with multi-unit emission caps in the Flexible Permit.” *Id.* at 27.

Additionally, the Petitioners address a portion of TCEQ’s RTC that is relevant to both Claims B.2. and B.3. Specifically, the Petitioners address TCEQ’s contention that “the title V permit process is not an opportunity to comment on the validity of other permitting processes, including NSR permits and the contents of such permits . . . including monitoring, reporting, recordkeeping, and testing.” RTC at 15. The Petitioners disagree and assert that “[t]he [CAA], EPA’s Title V regulations, and Texas’s federally-approved Title V permitting rules each require that Title V permits issued by the TCEQ include monitoring sufficient to assure compliance with *all* applicable requirements,” including those in NSR permits. Petition at 24–25 (citing 42 U.S.C. § 7661c(a), (c), 40 C.F.R. § 70.6(a)(3), (c)(1); 30 TAC § 122.142(c); *Sierra Club v. EPA*, 536 F.3d 673, 674–75 (D.C. Cir. 2008)).

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

As an initial matter, the EPA shares the Petitioners’ concerns with TCEQ’s suggestion that questions concerning the sufficiency of monitoring established in an NSR permit are outside the scope of the current title V proceeding. These issues are clearly within the scope of review. *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008); 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(a), (c); 30 TAC § 122.142(c). The EPA also shares the Petitioners’ concerns with the state’s apparent reliance on the general recordkeeping provision in Special Condition 57 of Flexible Permit No. 9868A/PSDTX102M7,<sup>25</sup> and on information contained in unspecified permit applications, as a means of assuring compliance with relevant emission limits in that permit. See the EPA’s response and direction to TCEQ regarding Claim B.1. However, the Petitioners have not demonstrated within Claim B.2 how these general concerns are relevant to whether the title V permit assures compliance with any specific permit terms.

Notably, after presenting the general arguments that the Petitioners (and the EPA) take issue with, TCEQ went on to identify and explain numerous specific conditions in Permit No. 9868A/PSDTX102M7 that contain monitoring and recordkeeping designed to assure compliance with the relevant flexible permit emission limits. In fact, TCEQ provided more than six single-spaced pages of explanation of the precise type of specific conditions that the Petitioners assert

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<sup>25</sup> The June 18, 2018 version of Flexible Permit No. 9868A/PSDTX102M7, as incorporated into the most recent October 23, 2019 version of the title V permit, contains an identical condition to that contained in the September 24, 2014 version of Flexible Permit No. 9868A/PSDTX102M7, as incorporated into the July 25, 2017 version of the title V permit, on which the Petition is based.

are missing from this permit. *See* RTC at 15–23. Thus, it is clear from both the face of Permit No. 9868A/PSDTX102M7 and TCEQ’s RTC that the Petitioners are incorrect that this permit “fails to establish special conditions with monitoring and emission calculation methods for each category of unit covered by a multi-unit emission cap in Phillips 66’s Flexible Permit.” Petition at 25. To the contrary, this permit *does* include at least some such special conditions. The Petitioners do not address any of these conditions nor the portions of TCEQ’s RTC addressing these conditions.<sup>26</sup> More importantly, the Petitioners have not identified any specific emission units or emission limits that are not sufficiently supported by these specific conditions. That is, the Petitioners have not identified any category of emission unit for which the general recordkeeping provision in Special Condition 57 provides the only assurance of compliance, or for which information in an unspecified permit application provides the only assurance of compliance. Accordingly, the Petitioners have not presented sufficient information, citation, or analysis within Claim B.2 to demonstrate that the title V permit fails to assure compliance with any particular permit terms or applicable requirements.<sup>27</sup> Accordingly, the Petitioners have not demonstrated a basis for an EPA objection on this issue.

### **Claim B.3: Monitoring in Permit No. 80799**

***Petitioners’ Claim:*** The Petitioners assert that the Permit is deficient because it does not identify monitoring applicable during periods of maintenance, startup, and shutdown (MSS) at units authorized by other permits. Petition at 21. The Petitioners explain that “Permit No. 80799 authorizes new emissions—emissions during planned MSS activities—from units previously authorized by Phillips 66’s PSD permits and Flexible Permit while requiring Phillips 66 to accommodate the new emissions under existing limits and emission caps established by the Company’s PSD permits and Flexible Permit.” *Id.* at 27. The Petitioners claim that additional monitoring specific to MSS is necessary “to ensure that planned MSS emissions authorized by Permit No. 80799 do not contribute to violations of applicable limits in Phillips 66’s PSD permits and Flexible Permit.” *Id.* at 21.

The Petitioners explain that Permit No. 80799 states that MSS emissions related to equipment listed in Attachment B (specifically, valve and piping maintenance/replacement, pipeline pigging, compressor maintenance, maintenance on pumps, and heat exchanger maintenance) “shall be calculated using the number of work orders or equivalent that month and the emissions associated with that activity in the permit application.” *Id.* (quoting Permit No. 80799, Special Condition 2).<sup>28</sup> For other MSS emissions, this permit states that “the emissions shall be estimated using the methods identified in the permit application, consistent with good engineering practice.” *Id.* (quoting Permit No. 80799, Special Condition 2(E)). The Petitioners assert that both of these conditions are insufficient because (1) they do not identify specific monitoring

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<sup>26</sup> *See supra* notes 5 and 8 and accompanying text.

<sup>27</sup> *See supra* notes 6 and 7 and accompanying text.

<sup>28</sup> The Petitioners cite the September 12, 2011 version of Permit No. 80799, instead of the October 9, 2014 version incorporated into the title V permit, because, according to the Petitioners, a copy of the 2014 permit’s Special Conditions was not available during the title V permit public comment or petition periods. The EPA’s response is similarly based on the September 12, 2011 version of the Special Conditions in Permit No. 80799, as those Special Conditions apparently did not change when the October 9, 2014 version of Permit No. 80799 was issued. The same 2014 version of that permit is incorporated into both the July 25, 2017 version of the title V permit, upon which the Petition is based, as well as the most recent October 23, 2019 version of the title V permit.

methods or calculation methodologies, (2) they do not identify the application(s) containing the relevant information, and (3) TCEQ has not explained how the application representations assure compliance with the relevant limits. *Id.* (citing *US Steel I Order*).

The Petitioners also address TCEQ's RTC and assert that TCEQ has not explained how the special conditions identified by TCEQ are sufficient to assure compliance with the emission limits in the other permits affected by Permit No. 80799. *Id.* at 28–29.

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

Similar to Claim B.2, the Petitioners' general allegations in Claim B.3 are insufficient to demonstrate that the Permit does not contain sufficient monitoring to assure compliance with any particular emission limits or permit terms. The Petitioners challenge two generally applicable permit terms that allow Phillips 66 to rely on emission calculation methodologies specified in an unidentified permit application(s). However, the Petitioners do not demonstrate that any specific emission units or activities rely on these permit terms as the sole means of assuring compliance with any particular emission limits or other applicable requirements.

The only example provided by the Petitioners of activities that appear to rely on these monitoring provisions is a brief reference to certain routine maintenance activities listed in Attachment B of Permit No. 80799—specifically, valve and piping maintenance/replacement, pipeline pigging, compressor maintenance, maintenance on pumps, and heat exchanger maintenance. However, the Petitioners do not identify any emission limits or other requirements to which these activities are subject, and it is not clear to the EPA from the face of Permit No. 80799 that these activities are subject to any particular emission limits.<sup>29</sup> Title V permits must contain monitoring sufficient to assure compliance with all applicable requirements and permit terms. *E.g.*, 42 U.S.C. 7661c(c). Because the Petitioners have not explained what, if any, requirements are applicable to the maintenance activities listed in Attachment B, they have failed to demonstrate that additional monitoring is necessary to assure compliance with any such requirements (which may or may not exist).

In the context of other MSS activities (which the Petitioners do not identify), the Petitioners indicate that other NSR permits establish emission limits that apply to these unspecified activities. This appears to be true, for example, for those activities that are listed in Attachment D of Permit No. 80799.<sup>30</sup> However, the Petitioners do not examine any of the numerous emission units or activities listed in this attachment, nor the emission limits (or alternative MSS limits) to which they are subject, and provide no analysis to demonstrate that any such emission units lack sufficient monitoring during MSS activities. Notably, as TCEQ's RTC suggests,<sup>31</sup> at least some of the activities listed in Attachment D *are* subject to specific conditions within Permit No. 80799 that establish or identify specific monitoring or emission calculation methodologies

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<sup>29</sup> By contrast, certain other activities identified in Attachment D of the same permit *are* subject to additional requirements contained in other permits. *See* Permit No. 80799, Special Conditions 1, 2, 12, Attachment D.

<sup>30</sup> *See supra* note 29.

<sup>31</sup> *See* RTC at 23.

relevant during MSS. The Petitioners neither acknowledge those conditions<sup>32</sup> nor identify any emission units or emission limits that are not sufficiently supported by these specific conditions. That is, the Petitioners have not identified any specific emission limits or emission units that rely exclusively on the application representations referenced in Special Condition 2 to establish a monitoring or calculation methodology. Thus, although the EPA shares the Petitioners' concerns with the reliance on unidentified permit applications, the Petitioners have not presented sufficient information, citation, or analysis within Claim B.3 to demonstrate how these general concerns are relevant to whether the title V permit assures compliance with any specific permit terms.<sup>33</sup> Accordingly, the Petitioners have not demonstrated a basis for an EPA objection on this issue.

**Claim C: The Petitioners Claim That “The Proposed Permit Fails to Incorporate Phillips 66’s Certified PBR Registrations as Applicable Requirements.”**

**Petitioners’ Claim:** The Petitioners assert that the Permit omits applicable requirements because it does not identify certified PBR registrations that establish source-specific emission limits that are more stringent than the default emission limits in the general PBR rules. Petition at 29. The Petitioners list a number of these certified registrations (by registration number) and the emission limits they establish. *Id.* at 30–34. The Petitioners indicate that although the Permit identifies the general PBR rules and various PBRs claimed by Phillips 66, it does not identify these certified registrations or the emission limits they establish, nor does the Permit specify how compliance with these source-specific limits is assured. *Id.* at 35. The Petitioners also assert that, because these certified registrations are not effectively incorporated into the title V permit, and are thereby not practically enforceable, they cannot be relied upon by the source to avoid otherwise-applicable major NSR requirements. *See id.* at 35–37.

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

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).<sup>34</sup> “Applicable requirements,” as defined in the EPA’s and TCEQ’s rules, include the terms and conditions of preconstruction permits issued by TCEQ, including requirements contained in a PBR that is claimed by a source, as well as source-specific emission

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<sup>32</sup> *See supra* note 8 and accompanying text.

<sup>33</sup> *See supra* notes 6 and 7 and accompanying text.

<sup>34</sup> 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.” *Id.*; *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.”).

limits established through certified registrations associated with PBRs. *See* 40 C.F.R. § 70.2; 30 TAC § 122.10(2)(H).

The CAA requirement to include all applicable requirements in a title V permit can be satisfied using incorporation by reference (IBR) in certain circumstances. *See, e.g.*, White Paper Number 2 at 40 (explaining how IBR can satisfy the requirements of CAA § 504).<sup>35</sup> When the EPA approved the Texas title V program, the Agency balanced the streamlining benefits of IBR against the value of a more detailed title V permit and approved TCEQ’s use of IBR for minor NSR requirements (including PBRs), provided the program was implemented correctly. *See* 66 Fed. Reg. 63318, 63321–32 (December 6, 2001). The EPA stated as a condition of program approval that “PBR are incorporated by reference into the title V permit by identifying . . . the PBR by its section number.” *Id.* at 63324. Notably, the EPA and TCEQ also agreed as part of the approval process that “PBRs will be cited to the lowest level of citation necessary to make clear what requirements apply to the facility.” *Id.* at 63322 n.4. This agreement is consistent with TCEQ’s regulations approved by the EPA. *See* 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.*” (emphasis added)). This is also consistent with the EPA’s longstanding position that materials incorporated by reference must be clearly identified in the permit. *See, e.g.*, White Paper Number 2 at 37 (“Referenced documents must also be specifically identified.”).

Turning to the issues raised in the Petition, the Petitioners have demonstrated that the title V permit does not properly incorporate applicable requirements established in source-specific certified PBR registrations. Condition 17 of the Phillips 66 title V permit indicates the following:

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, [and other types of permits] . . . referenced in the New Source Review Authorization References attachment. These requirements:

A. Are incorporated by reference into this permit as applicable requirements

. . .

Thus, the title V permit clearly incorporates those NSR authorizations, including PBRs, that are referenced in the New Source Review Authorization References attachment. In the title V permit, the New Source Review Authorization References table and the New Source Review Authorization References by Emissions Unit table (both part of the aforementioned attachment) include references to PBRs by citing various PBR rule numbers and the effective date of each PBR rule. Therefore, it is clear that the requirements contained within the PBR rules cited in these two tables are incorporated by reference into the title V permit.

However, the title V permit does not appear to incorporate other requirements associated with PBR authorizations that are not directly referenced in the New Source Review Authorization References attachment or elsewhere in the title V permit. For example, as the Petitioners point out, the New Source Review Authorization References attachment contains no reference to

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<sup>35</sup> *See supra* note 22.

registered PBRs that contain requirements (including certified source-specific emission limits) that differ from those contained in the PBR rules that the title V permit does directly reference.<sup>36</sup> Although the registered PBRs containing source-specific emission limits are available online, that does not resolve the question of whether the title V permit itself currently includes or incorporates these requirements.

In sum, because the permit contains no direct reference to certain source-specific requirements (e.g., certified emission limits) derived from registered PBRs, the Permit does not currently include or incorporate all requirements that are applicable to the facility, as required by the CAA, the EPA's regulations, TCEQ's regulations, the agreements underlying the EPA's approval of IBR in Texas, and the EPA's longstanding position concerning IBR. Therefore, the EPA is granting the Petition with respect to this claim. As discussed further in the following paragraphs, however, the EPA believes that this issue can, and most likely will, be resolved expeditiously by a straightforward solution that the Agency understands TCEQ to be in the process of implementing.<sup>37</sup>

***Direction to TCEQ:*** In order to resolve the EPA's objection on this claim, the EPA directs TCEQ to modify the title V permit to incorporate certified PBR registrations in a manner that clearly identifies each registration and the emission unit(s) to which it applies. The most straightforward way to do this would involve a reference to the registration numbers associated with each certified PBR registration. These registration numbers function like permit numbers, as they each identify a specific document that contains the specific requirements that apply to the source, including any certified source-specific emission limits taken per 30 TAC § 106.6. Thus, the registration numbers point directly to the specific requirements that are applicable to the source. The registered PBR requirements themselves may be found either online or in person at the TCEQ file room.<sup>38</sup>

Incorporating certified registration numbers could be accomplished in various ways. The EPA understands that TCEQ intends to require permit applicants to fill out a PBR Supplemental Table, which will include registration numbers for all registered PBRs, in all title V applications submitted after August 1, 2020.<sup>39</sup> Further, TCEQ will include the registration numbers in the New Source Review Authorization References by Emissions Unit table with the unit/group/process ID number to which they apply. The EPA expects that this practice would conform with TCEQ's EPA-approved regulations, 30 TAC § 122.142(2)(B)(i), as well as the agreements underpinning the EPA's approval of the IBR of PBRs—namely that “PBRs will be

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<sup>36</sup> This is problematic given that, by their nature, the certified source-specific emission limits contained in registered PBRs are necessarily different than the limits contained in the PBR rules with which they are associated. *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.”).

<sup>37</sup> Regarding the Petitioners' suggestion that the Permit's defective incorporation of certified registrations renders these registrations not practically enforceable, and accordingly that they cannot be relied upon to avoid otherwise applicable major NSR requirements, these concerns should be resolved when TCEQ revises the Permit to clearly incorporate the certified registrations.

<sup>38</sup> *See* [https://www.tceq.texas.gov/permitting/air/nav/air\\_status\\_permits.html](https://www.tceq.texas.gov/permitting/air/nav/air_status_permits.html).

<sup>39</sup> *See* May 11, 2020 Baer Letter.

cited to the lowest level of citation necessary to make clear what requirements apply to the facility.” 66 Fed. Reg. at 63322 n.4.

**Claim D: The Petitioners Claim That “The Proposed Permit Fails to Assure Compliance with Requirements in Permit No. 80799.”**

**Petitioners’ Claim:** The Petitioners claim that the Permit does not identify any emission units at the Borger Refinery that are subject to the requirements in Permit No. 80799. Petition at 37. The Petitioners note that the title V permit incorporates Permit No. 80799 by reference in its entirety by listing that permit in the New Source Review Authorization References table. *Id.* at 38. However, unlike other NSR permits that are also incorporated by reference, the Petitioners claim that Permit No. 80799 is not associated with any emission units within the New Source Review Authorization References by Emissions Unit table. *Id.* at 38–39. The Petitioners assert that the Permit’s failure to explain how the applicable requirements in Permit No. 80799 apply to individual emission units renders the Permit deficient. *Id.* (citing 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a)(1) and (c); *White Paper Number 2* at 37; *Shell Deer Park Order* at 11–17).

Additionally, the Petitioners assert that the Permit is incomplete because it contains no reference to certain emission units authorized by Permit No. 80799 (specifically, units 66FL4, MSS-VAC, MSSAIRMOVERS, MSS-BLAST, MSS-FRAC, MSS-VES, MSS-MAINTACT, MSS-EQP, MISC MSS, MSS-DRAINING, MSS-CHEM, MSS-TANK, F-68-4A, F-68-4B, F-68-4C, F-68-4D, F-68-4E, F-68-4F, F-68-4G, and F-68-4H). *Id.* at 39. Because the Permit does not identify these emission points as part of the title V source covered by the Permit, the Petitioners claim that the Permit does not identify and assure compliance with all applicable requirements that apply to these units. *Id.*

The Petitioners contend that TCEQ’s RTC did not address either of these concerns. *Id.* at 40.

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

As explained with respect to Claims B.1 and C, the CAA requirement that title V permits include all applicable requirements may be satisfied using IBR, provided, among other things, that the title V permit is clear and unambiguous as to how the requirements apply to the source. *See White Paper Number 2* at 37–41. It is particularly important that all requirements that apply to a specific emission unit or piece of equipment (as opposed to generic site-wide requirements) be specifically identified as applicable requirements for the emission units to which they apply. *See, e.g.,* 40 C.F.R. § 70.2 (defining “applicable requirement” as “any term or condition of any preconstruction permit issued pursuant to regulations approved or promulgated through rulemaking under title I,” insofar “*as they apply to emission units* in a part 70 source” (emphasis added)); 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” (emphasis added)); *White Paper Number 2* at 37 (“Any information . . . incorporated by reference must be accompanied by a description or identification of the current activities, requirements, or equipment for which the information is referenced.”). Moreover, as the



Petitioners note, the EPA has objected to multiple title V permits that did not identify to which units applicable requirements (specifically, requirements established by PBRs) apply. *E.g., Shell Deer Park Order* at 14; *Motiva Order* at 30. The problem here is the same.

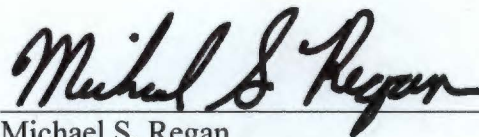
The requirements in Permit No. 80799 are applicable to a variety of specific emission units at the Phillips 66 Borger Refinery. However, the title V permit contains no indication of which emission units are subject to these applicable requirements, and TCEQ has provided no cogent explanation for the title V permit's failure to establish this connection.<sup>40</sup> For this reason, the EPA grants Claim D.

**Direction to TCEQ:** TCEQ must specify to which emission units the requirements of Permit No. 80799 apply. TCEQ could accomplish this by adding references to Permit No. 80799 within the title V permit's New Source Review Authorization References by Emissions Unit table. To the extent that the emission points identified within Permit No. 80799 do not align with the emission units identified in the title V permit (as suggested by the Petitioners), TCEQ should explain any such inconsistencies and ensure that the title V permit includes all non-insignificant emission units subject to applicable requirements in Permit No. 80799.

## 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: SEP 22 2021



Michael S. Regan  
Administrator

<sup>40</sup> TCEQ's RTC states: "The MSS requirements are part of the underlying NSR permit and have no additional unique MSS requirements listed in the [title V permit] other than by incorporation of the underlying NSR authorization in the [title V permit]. The only exception would be if either a federally enforceable rule or a State SIP requirement included an MSS applicable requirement unique to that specific rule." RTC at 31. The EPA, like the Petitioners, does not understand the relevance of this response.