BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF: TCEQ Title V Air Operating Permit No. O1598 For TPC Group LLC Houston Plant Issued by the Texas Commission on Environmental Quality	))))))))))	Permit No. O1598

PETITION TO OBJECT TO TITLE V PERMIT NO. O1598 FOR TPC GROUP LLC'S HOUSTON PLANT

INTRODUCTION

Pursuant to 42 U.S.C. § 7661d(b)(2) and 40 C.F.R. § 70.8(d), Harris County Attorney's Office (Petitioner) petitions the Administrator of the United States Environmental Protection Agency (EPA) to object to the renewal of Proposed Federal Operating Permit No. O1598 (Draft Permit) issued by the Texas Commission on Environmental Quality (TCEQ or Commission) to TPC Group LLC's (TPC) Houston Plant (the Facility) located at 8600 Park Place Boulevard in Houston, Harris County, Texas 77017-2513.

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

PETITIONER

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

Attorney's Office (HCAO) fights for the interests of Harris County through the civil justice system to preserve access to clean air and water; ensure safe, healthy neighborhoods; protect consumers against fraud, exploitation, and other bad acts; and defend voting rights.

BACKGROUND

I. Timeline

This Petition addresses TCEQ's renewal of Title V Permit No. O1598, re-authorizing operations at TPC's Houston Plant. TPC filed its renewal application on April 19, 2022. TCEQ's Executive Director proposed to approve TPC's application and issued the Draft Permit. Notice of the application was published in English and in Spanish on October 25, 2023. **Exhibit A**, TEX. COMM'N ON ENVT'L QUALITY, Notice of Draft Federal Operating Permit, Draft Permit No. O1598 (2024) [hereinafter Public Notice]. Several commenters filed for a public hearing in November 2023. A public hearing was set for April 11, 2024, extending the comment period through April 11, 2024.

Petitioner filed a timely written comment identifying deficiencies in the Draft Permit with TCEQ on April 11, 2024. **Exhibit B**, Harris County Attorney's Office Public Comment on the Renewal of Title V Permit No. O1598 [hereinafter Public Comment]. Others filed additional written comments and gave oral testimony at the public hearing on April 11, 2024. Petitioner's comment raised all of the objections discussed below in this petition.

TCEQ responded to public comments on the Draft Permit and sent a proposed permit to EPA for its review. As of November 5, 2024, the proposed permit was subject to EPA review for 45 days, which ended on December 20, 2024. This petition is filed with EPA before the February 17, 2025, deadline.

II. Basis of Petition

This Petition is based on objections to the Draft Permit raised with reasonable specificity during the public comment period and addressed in TCEQ's Response to Comment (RTC) issued after the public comment period. **Exhibit C**, TEX. COMM'N ON ENVT'L QUALITY, Executive Director's Response to Public Comment, Title V Renewal Permit No. O1598 (2024) [hereinafter RTC]. Per the RTC, TCEQ made the following modifications to the Draft Permit after the expiration of the public comment period:

1. The following units listed in the PBR Supplemental Tables dated July 22, 2022, in the application for project 33608, are added to the New Source Review Authorization References by Emissions Unit table in the Proposed Permit: 1F-4242, 2C CARBREM, 45A MAINT, 45B MAINT, AEROSOL, BLAST PY, BLASTING, DES VAC, DMFWASHTOW, F-20 NH3, F-CT-7-RENT, F-CT-TEMP, FNH3DISCNT, LAB BLR 1, LAB BLR 2, MTBE RAIL, PIBFRAC1, PIBFRAC1LD, PIBFRAC2, PIBFRAC2LD, PIBWW CACL2, PLANTMSS18, TANK 1 through TANK 9, TANK 10 through TANK 29, TANK 41 through TANK 44, TANK 49, TANK 51 through TANK 57, TANK 186, TANK 850, TANK 851, TEMP MAINT, WELDING, and WW-PIB.
2. The New Source Review Authorization References Table added new PBRs: 106.183 effective 09/04/2000, 106.227 effective 09/04/2000, and 106.373 effective 09/04/2000.
3. The New Source Review Authorization References Table updated NSR 46307/PSDTX1580/GHGPSDTX202/N288 to the most recent issuance date of 10/22/2024.

None of these modifications address Petitioner's objections raised in the timely filed comment.

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

III. Title V Legal Requirements

To protect public health and the environment, the Clean Air Act prohibits stationary sources of air pollution from operating without or in violation of a valid Title V permit, which must include conditions sufficient to "assure compliance" with all applicable Clean Air Act requirements. 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(1), (c)(1). "Applicable requirements" include all standards, emission limits, and requirements of the Clean Air Act, including those contained in SIPs. 40 C.F.R. § 70.2. Congress intended for Title V to

"substantially strengthen enforcement of the Clean Air Act" by "clarify[ing] and mak[ing] more readily available a source's pollution control requirements." S. Rep. No. 101-228 at 347–48 (1990), *as reprinted in* A Legislative History of the Clean Air Act Requirements of 1990 (1993), at 8687–88. As EPA explained when promulgating its Title V regulations, a Title V permit should "enable the source, states, EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements." Operating Permit Program, Final Rule, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992).

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

If applicable requirements themselves contain no periodic monitoring, EPA's regulations require permitting authorities to add "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." 40 C.F.R. § 70.6(a)(3)(i)(B); *see also In the Matter of Mettiki Coal, LLC*, Order on Petition No. III-2013-1 at 7 (Sept. 26, 2014) (*Mettiki* Order). The D.C. Circuit has also acknowledged that the mere existence of periodic monitoring requirements may not be sufficient to ensure compliance with all applicable regulations. *Sierra Club*, 536 F.3d at 676–77. For example, the court noted that annual testing is unlikely to assure compliance with a daily emission limit. *Id.* Thus, the frequency of monitoring must bear a relationship to the averaging time used to determine

compliance. 40 C.F.R. § 70.6(c)(1) of EPA's regulations require permit writers to supplement periodic monitoring requirements that are inadequate to assure compliance. *Id.* at 675; *see also Mettiki* Order at 7. Permitting authorities must also include a rational for the monitoring and reporting requirements in the permit that is clear and documented in the permit record. *Mettiki* Order at 7–8; 40 C.F.R. § 70.7(a)(5) ("The permitting authority shall provide a statement that sets for the legal and factual basis for the draft permit conditions . . . .").

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

GROUNDS FOR OBJECTION

I. EPA Must Object to the TPC Permit because TCEQ did not Provide Adequate Notice for the Renewal of Draft Permit O1598.

a. Specific Grounds for Objection

The published notice for the comment period of this action was inadequate per TCEQ and EPA's rules. In the Comment, HCAO raised concerns regarding whether the Public Notice was published in the *municipality* in which TPC is located, as required by TCEQ rules.[1] Public Comment at 1–3. TCEQ does not adequately address nor rebut the issues HCAO raised in its comment regarding the public notice issues in the RTC.

b. Applicable Requirements

All permit proceedings must provide adequate procedures for public notice, including offering an opportunity for public comment and a hearing on the draft permit. Notice must be given by one of the methods enumerated in Federal CAA, which includes publishing the notice in a newspaper of general circulation in the area where the source is located. 40 C.F.R. § 70.7(h). A renewal may be issued only if the permitting authority has complied with the requirements for public participation under paragraph (h). § 70.7(a)(1)(ii). These requirements are also reflected in TCEQ's own Title V notice rules. Per these rules, the Executive Director shall direct the applicant to publish a notice of draft permit and preliminary decision, at the applicant's expense, in the public notice section of one issue of a newspaper of general circulation in the municipality in which the site or proposed site is located, or in the municipality nearest to the location of the site or proposed site. 30 Tex. Admin. Code § 122.320.

[1] HCAO notes that the language of the relevant rule states that the notice must be published in a newspaper of general circulation in the municipality in which the site or proposed site is located, *or* in the municipality nearest to the location of the site or proposed site. 30 Tex. Admin Code § 122.320(b) (emphasis added). HCAO interprets this clause to indicate that, *if* the site is located in an area that is outside of a municipality, putting notice in a newspaper of general circulation in the nearest municipality would suffice. Thus, if a site is located with an incorporated municipality, as is the case with the permit at issue here, notice should be posted in a newspaper in general circulation in that municipality, not a neighboring one. To interpret this rule otherwise would be incongruent with its intent to provide adequate notice to the communities in the vicinity of the site and therefore illogical.

c. Inadequacy of the permit term

TPC is located within the city limits of Houston, Texas. Comment at 1. Therefore, the municipality that the Facility is in, and closest to, is the City of Houston. However, the notice of the Draft Permit was published in publications that circulate in and cater to communities outside of the limits of the City of Houston: the *Pasadena Citizen*, the *Pearland Journal*, and the *Bay Area Citizen*. These publications, referred to in this petition as "zoned editions", are owned and operated by the Houston Chronicle. Al Lewis, *Hearst purchases community newspapers across Houston's suburbs*, Chron. (Jul. 29, 2016), https://www.chron.com/business/article/Hearst-purchases-community-newspapers-across-8617547.php; *Suburbs*, Hous. Chron., https://www.houstonchronicle.com/neighborhood/ (last visited Feb. 13, 2025). They function as separate publications that publish content of specific, localized interest to those respective Houston area suburbs and/or communities and can accompany a Houston Chronicle subscription.

Pasadena is an incorporated municipality in Harris County that is outside of Houston. Pearland is a suburb of Houston located primarily in Brazoria County and is also its own municipality. Pearland is located approximately a thirty-minute to an hour drive from the Facility. *The Bay Area Citizen* covers communities and municipalities both in and outside Harris County in the area abutting Galveston Bay, some of which are approximately an hour drive or more from the Facility. According to this publication's X (formerly Twitter) account, "[t]he Bay Area Citizen newspaper covers nine cities surrounding Clear Lake and Johnson Space Center in the Houston area. **Exhibit D**, @BayAreaCitizen, X https://ww.x.com/bayareacitizen (last visited Feb. 13, 2025).

The Houston Chronicle's website offers further indication that these zoned editions are circulated in municipalities and communities apart from the City of Houston and cater to localized interests. The Houston Chronicle webpage in which one can "sign-up" for and gain online access to the zoned editions is entitled "Suburbs." *Suburbs*, Hous. Chron., https://www.houstonchronicle.com/neighborhood/ (last visited Feb. 13, 2025). Also, TPC is within the 77017 zip code, which is entirely within the City of Houston. It is therefore unlikely that residents of the community surrounding the Facility, which again is sited in Houston proper, would seek out or read zoned editions catering to suburban communities. Publication of notice in the *Pasadena Citizen*, the *Pearland Journal*, and the *Bay Area Citizen* therefore does not meet

the textual requirements of TCEQ rules, nor does it accomplish its intent to give adequate notice to communities around the relevant facilities.

HCAO notes that these publications service the Houston "area," and "area" is the term used to describe the geographic location in which newspaper notice is to be published. 40 C.F.R. § 70.7. However, TCEQ rules, which are incorporated into Texas's SIP, further specify that the notice must be published in a newspaper located within the same municipality as the relevant site, or in the municipality nearest to the proposed site. TPC is within the municipality of the City of Houston. Therefore, notice should have been published in a newspaper servicing the City of Houston, not one that specifically caters to the surrounding cities in the Houston metropolitan area.

Additionally, even if a broader interpretation of the terms "area" and "municipality" are applied, the zoned editions do not meet the intent of 40 C.F.R. § 70.7 The Houston metropolitan area is geographically vast and one of the most populous in the United States. Therefore, residents of "Houston proper" are unlikely to be subscribed to, read, or even have knowledge of newspapers catering to suburban communities outside of the city limits, especially if that suburb is not geographically close to their own neighborhood.

d. Issues raised in public Comments

Petitioner raised these issues with reasonable specificity in the public comment filed with TCEQ on April 11, 2024. *See* Public Comment. The issues regarding public notice are discussed on pages 1–3 of the Comment. *Id.* at 1–3.

e. TCEQ acknowledges the HCAO's concerns in the section of the RTC entitled "Response to Comment 6," but does not adequately address the issues the HCAO raised.

TCEQ's two-paragraph response to the public notice issues Petitioner raised in the Comment neither rebuts nor addresses the issues outlined above.

i. <u>TCEQ claims that TCEQ has verified the published noticed meets the relevant criteria.</u>

In its response, TCEQ stated that the Applicant and TCEQ's Office of Chief Clerk "verified that chosen publications meet the public notice publication criteria stated under 30 TAC Chapter 122.320 which states 'a newspaper of general circulation in the municipality in which the site or proposed site is located, or in the municipality nearest to the location of the site or proposed site.'" RTC at 20.

TCEQ's statement is conclusory and does not address why TCEQ believes that the chosen publications meet any one of the criteria in 30 TAC Chapter 122.320 or how TCEQ "verified" such criteria were met. TCEQ simply restates the rule. TCEQ does not address Petitioner's claim that notice was published outside of the municipality in which the Facility is sited in or present any information to indicate that these zoned editions are, in fact, generally circulated in the municipality of the City of Houston for purposes of meeting the rule requirements. TCEQ's response references little to no facts specific to this permitting action, the Facility, or the issues Petitioner raised. This response is not adequate.

ii. TCEQ states that the applicant submitted the required public notice verification form.

In the same section of the RTC, TCEQ also states that the applicant submitted a "public notice verification form [sic] to TCEQ's Office of Chief Clerk" to verify proof of publication of the newspaper notices and the requested affidavits were furnished in accordance with the regulations and instruction of the TCEQ. RTC at 20. Though TCEQ does not explicitly make this argument, one might deduce that TCEQ is suggesting that this submittal is the method of verification TCEQ is referring to in the paragraph discussed above (though TCEQ does not in actuality make this argument and therefore still did not adequately address Petitioner's comment.)

First, HCAO did not dispute that the applicant submitted the required public notice verification form. Additionally, TCEQ's statement does not address the concerns regarding which locale the relevant publications are in. It merely states the applicant met a procedural requirement in the application process, not whether notice was actually sufficient. It is unlikely an applicant would submit a form attesting to their failure to meet certain rules, and the mere fact that the applicant verified that the applicant published according to TCEQ regulations and instruction does nothing to address the concerns the HCAO raised.

HCAO would also like to note that it is TCEQ's responsibility to address commenters' concerns and administer Texas's Title V Program. It is not the applicant's responsibility. It is therefore irrelevant at this point in the Title V process as to whether the applicant themselves believed they were in compliance with TCEQ's rules, which is certain to almost always be the case due to the applicant's own self-interest.

Further, the HCAO has obtained the referenced verification and affidavit. **Exhibit E**, Published Notice Verification Affidavit for Draft Permit O1598 Renewal [hereinafter Verification Affidavit]. The HCAO is concerned that the information attested to in this affidavit is misleading and / or inaccurate.

The first page of the verification is a copy of the page in which the notice was published in the Pasadena Citizen. "Pasadena Citizen" appears in the top left corner of the page and has been highlighted in blue. The affidavit is entitled "Affidavit of Publication for Air Permitting." This appears to be a form with blanks that the newspaper representative fills in with information regarding the relevant newspaper and its circulation.

Here, the name of the newspaper is filled in as "Houston Chronicle dba Pasadena Citizen." However, despite "Pasadena Citizen" being highlighted in the verification and the newspaper being listed as the Pasadena Citizen, the affidavit further states that said newspaper is generally circulated in "Houston." "Houston" appears in a blank space that has been filled in by hand, and the prompt under that blank read "(the **municipality** or **nearest municipality** in which the site or proposed site is located)." Verification Affidavit at 2.

HCAO does not believe that the Pasadena Citizen is a newspaper that generally circulates in Houston for the reasons stated above and in the Comment. Pasadena is a distinct municipality to the east of Houston, and it would make little sense that a zoned edition of a newspaper catering to a suburb would generally circulate in a major city like Houston.

TCEQ is required to adequately respond to Petitioner's concerns regarding Title V permits. This would include, at minimum, indicating how TCEQ confirmed the verification form was accurate and why applicant's notice was sufficient. To do otherwise would render the comment period pointless.

However, TCEQ's response does not address these concerns. Specifically, TCEQ does not address why the chosen publications meet the public notice criteria, how they verified this requirement (other than the applicant themselves stating that the requirement was met), or HCAO's concerns that the publication is not in Houston, the municipality in which this facility is located.

A renewal must not be issued for TPC because the permitting authority has not complied with the requirements for public participation to publish notice in a newspaper of general circulation in the area where the source is located in accordance with 40 C.F.R. § 70.7(h)(1) as required by § 70.7(a)(1)(ii) nor have they adequately responded to Petitioner's Comment.

II. EPA Must Object to the TPC Permit because TCEQ did not Provide Adequate Public Access During the Title V Renewal Process.

a. Specific Grounds for Objection

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

The public notice for Draft Permit No. O1598 stated that "the permit application, statement of basis, and draft permit will be available for viewing and copying at TCEQ's Houston Regional Office beginning the first day of publication of the notice. Public Notice at 1. While the notice technically included the location of these documents, it did not adequately describe the availability of the documents. The notice did not provide clear instructions on how to access these documents (the availability) once at the Houston Regional Office (the location).

b. Applicable Requirements

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

c. Inadequacy of the Permit Term

HCAO employees attempted to view the draft permit, application, statement of basis, and other documents relevant to this Title V renewal at the Houston Regional Office on March 6, 2024. Based on HCAO Employees' visits to the Houston Regional Office, it was apparent that (1) there was no protocol for viewing documents at the Houston Regional Office; (2) there was a misunderstanding amongst TCEQ employees regarding how, when, and even *if* permits were available for public viewing or maintained at that office; and (3) this misunderstanding led to incorrect and contradictory information being shared with the HCAO employees. TCEQ's failure to provide an avenue to view Title V permitting documents renders the public notice for this renewal insufficient.

TCEQ's Title V regulations require Title V notices contain the "location and availability" of the complete permit application, the draft permit, the statement of basis, and all other relevant supporting materials in the public files of the agency. 30 Tex. Admin Code § 122.320(b). Despite these requirements, HCAO employees faced numerous obstacles in obtaining and viewing information related to the permit renewal that should have been publicly available. TCEQ employees gave vague, contradictory, and incorrect answers regarding when, how, and even if permit materials could be viewed at the Regional Office. HCAO employees were told they needed an appointment with TCEQ to view any materials, which was not stated in any of the permit materials and is not necessary under 30 TAC Chapter 122. HCAO employees were told to make an appointment online and could so by searching "records" in the search bar on the front

page of TCEQ's website. This search does not yield results conducive to scheduling an appointment with the Houston Regional Office. Then, after being told they needed an appointment to view permits at the Houston Regional Office, they were then told that they couldn't even view the permits there, because the permits were only located at the Austin Office. This instruction was directly in contradiction to the information provided on the Permit Renewal Notice and the requirements of the applicable state and federal regulations. Public Notice at 1. Later, another TCEQ employee confirmed that it is not possible to make appointments online to view documents at the Houston Regional Office, despite the earlier insistence from a different Regional Office employee that this was the only way HCAO employees could view documents.

While TCEQ's notice for this renewal claimed that the permit materials were "available" for viewing and copying, it failed to layout and describe the additional procedures that the HCAO employees were "required" to complete before being granted access to the documents. There is no information in these notices explaining how a member of the public might go about viewing and copying materials that should be accessible to the general public. The notice for this renewal did not contain sufficient information detailing the "location and availability" of the relevant permit materials and therefore failed to provide proper notice of this action. This failure falls short of the applicable requirements adopted by TCEQ and approved by EPA in Texas's State Implementation Plan.

d. Issues Raised in Public Comments

Petitioner raised these issues with reasonable specificity in the public comment filed with TCEQ on April 11, 2024. *See* Public Comment. The issues regarding public access are discussed on pages 3–4 of the Comment. *Id.* at 3–4.

e. Analysis of TCEQ's Response

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

TCEQ stated in the RTC that the "public participation requirements and all requirements under 30 TAC 122.320 were met" by TCEQ because: (1) a copy of the draft permit and statement of basis were available online; (2) the commenter's experience was "shared with the regional office management for further consideration;" (3) the draft permit was available for viewing and copying at two other locations in addition to the TCEQ Houston Regional Office: the TCEQ central office and the Park Place Regional Library; (4) the public is *now* able to access the permit application at TCEQ's CFR Online website and there is a plan to upload pending applications to their own accessible webpage; and (5) if the public wants a hard copy of the pending permit application and is unable to obtain it from any of the listed locations, it can always just call the designated company contact person listed on the public notice and request assistance. RTC at 21–22.

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

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

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

This is true and not disputed by Petitioner. The Draft Permit and Statement of Basis were available online for the duration of the comment period. Both of these documents are hyperlinked on TCEQ's "All Other Projects Authorized for Public Notice" Title V webpage. *See* https://www.tceq.texas.gov/assets/public/permitting/air/Title_V/announcements/pnwebrpt.htm. But Petitioner never disputed this and the fact that these two documents are available online does not cure TCEQ's failure to make the application and draft permit available for public inspection

at the Houston Regional Office or its failure to properly describe the location and availability of the application, draft permit, statement of basis, and all other relevant supporting materials in the public files of the agency.

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

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

In future Title V comments filed after this one, Petitioner was advised to directly call individuals at the Regional Office using their business cards. This is an effective solution for Petitioner, but it does not solve the public access problem, as other stakeholders in Harris County would still not know who to call or how to go about accessing documents at the Houston Regional Office, especially if they were repeatedly turned away as Petitioners were. Additionally, individuals often leave and change roles in organizations. There is not guarantee that one number given to an interested stakeholder will continue to be an effective method to retrieve publicly available documents.

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

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

This is true and not disputed by petitioner. Petitioner accessed the Draft Permit at the Park Place Regional Library. But, again, TCEQ's performance of one nondiscretionary duty does not relieve it of other, distinct nondiscretionary duties. Ensuring the draft permit was available for

review at Park Place Library and the TCEQ Central Office does not cure TCEQ's failure to comply with other, independent nondiscretionary duties in the Title V Public Notice process. The Executive Director is required to make the draft permit and complete application available for public inspection throughout the comment period at TCEQ's central office *and*, in this instance, the Houston Regional Office. TCEQ does not get to choose at which office it wants to make these documents available for public inspection—it is required to provide for public inspection at both offices.

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

The Clean Air Act's procedural requirements ensure that the permitting authority can take public comments into account when making a permitting decision. Violations of procedural requirements that impede the public's opportunity to comment and have their input considered by the permitting authority could cause harm requiring corrective action. *In re Russell City Energy Center*, 14 E.A.D. 159, 176 (EAB 2008). This harm is not attributed to any impact on the final permitting decision but rather the deprivation of the public's opportunity to comment and be heard. *Id.* So, even though Petitioner was eventually able to retrieve the documents it needed, TCEQ still failed to comply with its nondiscretionary Title V duties, depriving members of the public of the opportunity to comment and have their views on the permit considered.

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

TCEQ's action to now make applications publicly accessible is a great step in the direction of providing all stakeholders with the opportunity for meaningful public participation. But, making pending permit applications available online does not cure TCEQ's failure to accurately include and describe the location and availability of the application, draft permit, statement of

basis and all other relevant supporting materials in the public notice for the permit renewal at issue in this petition.

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

This is technically true and not disputed by Petitioner. The general public has the ability to "just call" the company contact person listed on the public notice if all else fails. But, what if this also fails? An HCAO employee called TPC's listed company contact, Jason Sanders, multiple times leading up to the end of the public comment period. The employee called the listed number on April 5, April 8, and April 9. No one picked up the phone and the HCAO employee left Mr. Sanders a voicemail introducing themselves and explaining what they needed each time. The employee never received a call back from Mr. Sanders or anyone at TPC during the comment period. On January 31, 2025, an HCAO employee again attempted to call Mr. Sanders. *See* **Exhibit F**, Email Summary of Call with Mr. Jason Sanders. After explaining the purpose of the call in regard to the TPC renewal process and requesting a copy of the legal notice affidavit, Mr. Sanders informed the employee that he was a contractor and didn't know what the employee was talking about. *Id.* When asked who the employee should reach out to instead, Mr. Sanders said he did not know. *Id.*

So, while it is technically true that stakeholders can always "just call" the company contact listed on the public notice, this fact does not cure TCEQ's failure to accurately include the "location and availability" of the application, draft permit, statement of basis, and all other relevant supporting materials in the public files of the agency in the relevant public notice because (1) the HCAO employee was not able to reach Mr. Sanders and receive the relevant documents during the public comment period; (2) placing the contact information of a corporate representative on the public notice is a separate notice requirement under § 122.320 that does not relieve TCEQ of its other nondiscretionary duties; and (3) once HCAO employees finally were able to reach the company contact listed on the public notice after the comment period had ended, Mr. Sanders stated he had no knowledge of documents that were part of the permit record.

TCEQ claims that the performance of these five actions met the "the public participation requirements and all requirements under 30 TAC 122.320." Not only is this incorrect, as shown above, but by relying on these five actions, none of which were dispute by Petitioner in its

comment, TCEQ fails to meaningfully respond in any way to Petitioner's Comment on the public access issue. Instead of responding to Petitioner's comment and showing how TCEQ complied with the portions of 30 TAC 122.320 that were disputed, it points out unrelated actions that were not disputed by Petitioner.

III. EPA Must Object to the TPC Permit because of Improper Incorporation of the PBR Supplemental Tables.

a. Specific Grounds for Objection

Permits by Rule (PBRs) apply to units with significant emissions at TPC, including units subject to Prevention of Significant Deterioration (PSD) requirements. Yet TPC's Title V Permit does not adequately incorporate or assure compliance with the applicable requirements in TPC's PBRs and related registrations because those requirements are not properly incorporated by reference into the Title V Permit. In particular, at least two versions of four Permit by Rule Supplemental Tables (Tables A, B, C and D) were prepared. These Tables identify applicable PBRs by number and, for registered PBRs, provide a registration number and associated monitoring. In order to view these Tables, the public must go to TCEQ's online database to search for the actual PBRs and registrations to view the underlying requirements. The PBR Supplemental Tables, however, are not located with the permit, their location is not adequately identified in the permit, and the Tables were not adequately accessible during the public comment period.

Permit Special Condition No. 28 states:

> Permit holder shall comply with the requirements of New Source Review authorizations issued or claimed by the permit holder for the permitted area, including permits, *permits by rule (including the terms, conditions, monitoring, recordkeeping, and reporting identified in registered PBRs and permits by rule identified in the PBR Supplemental Tables dated July 22, 2022 in the application for project 33608*), standard permits, flexible permits, special permits, permits for existing facilities including Voluntary Emissions Reduction Permits and Electric Generating Facility Permits issued under 30 TAC Chapter 116, Subchapter I, or special exemptions referenced in the New Source Review Authorization References attachment. These requirements:
>
> A. Are incorporated by reference into this permit as applicable requirements
>
> B. *Shall be located with this operating permit*

C. Are not eligible for a permit shield.

Draft Permit at 15 (emphasis added).

The applicable requirements from TPC's PBRs and their registrations are not properly incorporated by reference into the Title V Permit through Special Condition 28 because: (1) the permit states that all requirements incorporated by reference "shall be located with this operating permit" and neither PBRs, PBR registrations, nor the PBR Supplemental Tables are located with the permit, and (2) these documents are not otherwise reasonably accessible. Notice of TPC's Permit and the resulting comment period were likewise inadequate because the PBR Supplemental Tables were not accessible at the locations specified in the notice and required by TCEQ regulations.

b. Applicable Requirements

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

In addition, each application for a Title V permit renewal must be subject to notice and an opportunity for public comment and a hearing. 40 C.F.R. § 70.7. The notice of a draft permit and preliminary decision must include the location and availability of the complete permit application, the draft permit, the statement of basis, and "all other relevant supporting materials in the public files of the agency." 30 Tex. Admin. Code § 122.320(b)(6). Further, a permit applicant must make a copy of the application, draft permit, and statement of basis available for review and copying at a public place in the county in which the site is located or proposed to be located. 30 Tex. Admin. Code § 122.320(b). And the TCEQ must make "available for public inspection the draft permit and the complete application throughout the comment period during

business hours at the commission's central office and at the commission's regional office where the site is located." 30 Tex. Admin. Code § 122.320(g).

c. Inadequacy of the permit term

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

EPA has further told TCEQ that:

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

Id. at 40 (emphasis added).

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

> [A] general statement in the Title V permit incorporating the PBR Supplemental Table without providing additional information detailing where the table is located *is not specific enough to effectively incorporate these requirements by reference*. In order to satisfy the requirement in title V that the Permit "set forth," "include," or "contain" monitoring to assure compliance with all applicable requirements, a special condition incorporating the PBR Supplemental Table would need to include, at a minimum, the date of the application and *specific*

> *location of the table, for example by providing a page number from the application*.

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

Special Condition 28 does not provide the specific location where the public can find the PBR Supplemental Tables. To the contrary, Special Condition 28 simply states that all of the new source review requirements incorporated into the permit "shall be located with this operating permit." Neither the PBRs, their associated registrations, nor the PBR Supplement Tables were located with the permit. While the PBR rule citations, effective dates, and "registration numbers" are referenced in Tables that are included in the Permit, the PBR Supplemental Table with its PBR monitoring was not included in the permit, located with the permit, nor was it reasonably available to the public during the public comment period.

Special Condition 28 additionally states that the permit incorporates "permits by rule (including the terms, conditions, monitoring, recordkeeping, and reporting identified in registered PBRs and permits by rule identified in the PBR Supplemental Tables dated July 22, 2022, in the application for project 33608)." This provision includes the date of the PBR Supplemental Tables but fails to adequately specify the location of the Tables in the over 240-page application through page numbers or other locational information. Draft Permit at 15. Nor does the permit explain how the public can find the application during the life of the permit. The lack of information on the Supplemental Table's location fails to meet the EPA's minimum requirements for incorporating PBRs and their associated registrations through the use of PBR Supplemental Tables.

This failure frustrates the purpose of Title V. The HCAO attempted to review the permit, application, and PBR Supplemental Tables during the comment period in three different ways: (1) at the TCEQ Regional Office, (2) through a request to TCEQ for an electronic version of the documents, and (3) at the Park Place Regional Library. As explained above, contrary to TCEQ's rules, the HCAO was unable to review the documents in person during the comment period during business hours at the TCEQ Regional Office.

As previously stated, the Title V program was created to simplify and streamline both the reporting and enforcement mechanisms for air permits. Requiring applicants to compile all relevant terms and applicable requirements and include them within the permit "enable[s] the

source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." 57 Fed. Reg. at 32,251. The failure of TPC's permit to properly incorporate applicable requirements related to PBRs into the permit undermines the purpose of the Title V by interfering with the ability of the public and regulators to engage with and enforce such requirements, during the public comment period and throughout the life of the permit. The inability to access the PBR Supplemental Tables during the comment period also violates regulatory requirements for public engagement.

d. Issues raised in public Comments

Petitioner raised this issue on pages 4–6 of its Public Comment. Public Comment at 4–6.

e. Analysis of states response

In TCEQ's Responses to Petitioner's PBR-related objections, it stated:

> As was previously announced on May 6, 2022, beginning August 1, 2022, all site operating permit (SOP) applications for initial and renewal projects, and revisions with PBR updates were required to include the revised Permits by Rule Supplemental Table (Form OP-PBRSUP). Renewal application for FOP O1598 received by TCEQ on April 19, 2022, did include an OP-PBRSUP form (dated April 14, 2022) on page 129-148. During the review, an updated OP-PBRSUP dated July 22, 2022, was submitted on August 1, 2022.
>
> Proposed Permit, Special Condition No. 28 references "the terms, conditions, monitoring, recordkeeping, and reporting identified in registered PBRs and permits by rule identified in the PBR Supplemental Tables dated July 22, 2022, in the application for project 33608".
>
> For permit "location" purposes, the ED notes that a copy of the renewal application (including the OP-PBRSUP form) is considered to be a part of the application representation and hence it is a part of the official permit record for FOP O1598/Project 33608. The official permit record is accessible at TCEQ Central Office, 12100 Park 35 Circle, Building E, First Floor, Austin, Texas 78753 and at TCEQ's CFR Online website upon issuance of the project 34921.
>
> While the Commenter encountered difficulty in understanding the structure and organization of the permit application FOP O1598 placed in a binder at the Park Place Regional Library, it appears that the Commenter was able to access the permit application including the PBR Supplemental Table.

> As noted earlier in Response to Comment 7, the public is able to access the permit record at TCEQ's CFR Online website upon "issuance" of the FOP. Also, as stated above, if public would like to obtain a hard copy of a "pending" permit application (including the PBR Supplemental Table) during the public notice phase, and the public was unable to obtain a copy of the draft permit application for FOP O1598 at any of the listed locations to view the OP-PBRSUP table – at TCEQ Central Office or the Park Place Regional Library or TCEQ's Houston Regional Office, the public always has the option to simply call the designated company contact person listed on the public notice and request assistance.
>
> Also, as noted in Response to Comment 7, Title V permit applications submitted after September 1, 2024 for FOP projects, which are subject to public notice or public announcement requirements, will be available on our website: Title V Applications (texas.gov).

RTC at 23–24.

TCEQ's response neither addresses nor rebuts Petitioner's arguments that the incorporation of the PBR Supplemental Tables is improper and deficient. TCEQ does not rebut that the PBR Supplemental Tables were not attached to the permit and that the permit did not include a specific reference to their location within the over 240-page permit application. This is plainly in violation of Title V and EPA's express instructions to TCEQ regarding the PBR Supplemental Tables.

Despite the fact that this failure resulted in the HCAO being unable to obtain the correct PBR Supplemental Tables during the comment period, TCEQ argues that: (i) access issues notwithstanding, "it appears" the HCAO was able to access the permit application and PBR Supplemental Table; (ii) if the application and PBR Supplemental Tables were not available at the library and Regional TCEQ offices, the HCAO could have requested them from the Applicant or viewed them at the TCEQ office in Austin; and (iii) the application is part of the "official permit record" which will be available at TCEQ's CFR online website.

i. <u>HCAO's Eventual Access to the Permitting Materials does not Remedy TCEQ's Failure to Properly Incorporate the PBR Supplemental Tables into the Permit.</u>

On April 3, 2024, the HCAO did receive a copy of TPC's permit application by email from TCEQ's Houston Regional Office. HCAO was also able to physically access relevant

application materials at the library listed in the Public Notice. However, TCEQ eventually providing HCAO with the application directly and the physical accessibility of the permit materials at the library does not remedy the Permit's failure to properly incorporate by reference the applicable requirements related to TPC's PBRs. Title V does not simply require that the Tables be in some way available to some people. In this case, the draft permit was required to specify how the public could obtain the application (not only during the comment period but also during the life of the permit) and where in the application the Tables were located so that the public could access them and meaningfully contribute during the Permit's comment period and so that the PBR requirements of the Permit would be practicably enforceable over its lifetime.

The fact that the Supplemental Tables may not be *impossible* to publicly access does not mean they are sufficiently accessible to satisfy the purposes of Title V. One of Congress's key objectives in creating the Title V program was "the issuance of comprehensive permits that clarify how sources must comply with applicable requirements." White Paper No. 2 at 38. To achieve this objective, permitting authorities should "balance the streamlining benefits achieved through use of incorporation by reference with the need to issue comprehensive, unambiguous permits useful to all affected parties." *Id.* at 38. EPA has plainly stated that TCEQ's incorporation by reference of PBR Supplemental Tables that are included in an application must reference the specific location of the Tables in the application. *Phillips 66* Order at 15–16. This information is needed to make supplemental tables not just potentially accessible, but sufficiently accessible to interested persons. The failure to specify where in the hundreds of pages of the application the PBR supplemental tables were located and how the public could find the application over the life of the permit violated Title V's requirements. As a result of this failure, the HCAO faced difficulty in accessing the Supplemental PBR Tables, as detailed in this petition.

The deficiencies in the information regarding location of the supplemental tables and the impediments to public access of the supplemental table are violations of Title V procedural requirements that are vital to fulfilling purposes of the statute.

Additionally, the permitting authority cannot rely on the doctrine of harmless error to dismiss these shortcomings. This doctrine can be applicable to agency actions, but "only 'when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached.'" *U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 215 (5th Cir. 1979) (quoting *Braniff Airways v. CAB*, 379 F.2d 453 (1967)). The Clean Air Act's

procedural requirements ensure that the permitting authority can take public comments into account when making a permitting decision. *In re Russell City*, at 175. Violations of procedural requirements that impede the public's opportunity to comment and have their input considered by the permitting authority could cause harm requiring corrective action. *Id.* at 176. This harm is not attributed to any impact on the final permitting decision but rather the deprivation of the public's opportunity to comment and be heard. *Id.* As shown, the insufficient information about the location of the Supplemental Table and the barriers to physical access to the supplemental table affect the procedures used and deprive members of the public of the opportunity to comment and have their views on the permit considered.

ii. Even if the Applicant was Willing to Provide the HCAO with the Application and PBR Supplemental Tables and if Those Documents were Available at TCEQ's Austin Office, That Does Not Absolve TCEQ of its Failure to Comply with Regulatory Requirements for Making the Information Available.

TCEQ's regulations specify that, during the public comment period on a Title V permit, the application and draft permit must be made available for review and copying: (1) at a public place in the county in which the site is located or proposed to be located (here, the Park Place Regional Library) and (2) "throughout the comment period during business hours at the commission's central office and at the commission's regional office where the site is located." 30 Tex. Admin. Code § 122.320(b), (g). TPC's draft permit and application were not available as required and this prevented the HCAO from accessing the PBR Supplemental Tables.

The HCAO tried to review application materials, including the PBR Supplemental Tables at the Park Place Regional Library.

The HCAO also tried repeatedly to view the permit and application at the TCEQ Regional Office. TCEQ employees repeatedly denied the HCAO access to the permit application during business hours, in violation of clear regulatory requirements. TCEQ employees gave vague, contradictory, and incorrect answers about when, how, and if the materials could be viewed at the Regional Office and made it clear that 1) the Regional Office lacks protocol for viewing documents and 2) there is a misunderstanding between TCEQ employees about how, when, and if permits are accessible to the public for viewing or kept at the Regional Office.

The HCAO cannot confirm whether or not the draft permit and application with the correct PBR Supplemental Tables were available in Austin at the Central TCEQ office during the public comment period. There is no requirement that interested stakeholders must exhaust every method of access, which in this case would include traveling over 150 miles to Austin. Even if the documents were available for review in Austin, that does not address the failure of the permit to identify the specific location of the Tables within the application and it would not excuse the failure to make the application and draft permit available for review during working hours during the comment period at TCEQ's Regional Office.

Further, TCEQ's response that "the public always has the option to simply call the designated company contact person listed on the public notice and request assistance" is irrelevant. RTC at 24. While the public notice did include a phone number for Mr. Jason Sanders as a point of contact through which "[f]urther information may also be obtained for TPC Group LLC," the notice did not state that Mr. Sanders could provide copies of the permit and application. Public Notice at 2. Nor does there appear to be any legal requirements or timeline for him to do so. Further, even if Mr. Sanders had provided the HCAO with a copy of the application and PBR Supplemental Tables, it would not excuse TCEQ's failure to comply with its own regulations requiring it to make the Application available at its Regional Office during business hours while the comment period was pending.

iii. <u>The Fact that the Permit and Application Are Part of the "Official Permit Record" and Will Eventually Be Available Online Does Not Address the Permit Deficiencies.</u>

TCEQ's response that the application should be posted on CFR online "on issuance" of the permit does not address or rebut the HCAO's comment regarding the inaccessibility of permit documents and deficiency of the permit more generally. TCEQ continually indicates that CFR Online is where the public will have to go to obtain copies of PBR Supplemental Tables, through the application, during the life of the permit. However, the permit itself, the application, and related PBR documents, including the PBR Supplemental Tables, are not currently available through the CFR Online database, despite the permit having been issued.

Further, any attempt to use TCEQ's CFR online system will make it clear why the PBR Supplemental Tables should be included in or attached to the permit, rather than left in the

application. TCEQ's CFR Online is a complex, disjointed, and user-unfriendly system, which does not provide a clear pathway to access the documents TCEQ claims are readily available to the public. The search process is so onerous that TCEQ has published an 18-page instruction packet explaining how to navigate its search functions, referred to as a "quick guide" to the system, attached hereto as Exhibit G. *See* **Exhibit G**, Texas Commission on Environmental Quality CFR Online "Quick Guide."

As an example of how difficult and time-consuming it is to use this system to find an application, a search for Permit No. O1598 pulls up over one hundred results, with nine separate files labeled "Initial Application" with "begin" dates since 2022. A user must click on and download each file to see what it includes. None of them were the application for this renewal and none of them included the PBR Supplemental Tables. And even if the public can find the application and the PBR Supplemental Tables, they will still need to find the actual PBRs and their associated registrations using the CFR online system, necessitating hours more work to simply compile the permit's applicable requirements.

To search CFR online for a PBR, a user must first locate the applicable PBR registration number. The PBR registration numbers, while technically included within the Permit, are inconspicuously listed among several other permit numbers in the PBR tables, without any identifying label or note which would let the public know that they are "registration" numbers. Even if a user can determine the correct PBR registration number, searching CFR online via a PBR registration number generates multiple results and a user must, again, view every document one at a time to see its contents.

Where the search does populate, it often does not generate the necessary information. A search for PBR registration number 168520 generated 3 results, (1) an operational status notification, (2) an annual operational status report, and (3) a PBR Technical Review. The PBR Technical Review states that

> TPC has submitted an annual notification summary of fugitive projects for calendar year 2021 under 106.261. TPC has included 106.262 in this registration to authorize emissions with an L value less than 200 mg/m3.TPC will authorize over fifty fugitive projects at the chemical plant. Listed below are fifteen projects from the submitted application, *the other projects are listed in the application file.*

Exhibit H, PBR 168520 Technical Review (emphasis added). The application file, however, is not one of the documents produced in response to the CFR search. Even with the aid of TCEQ's

lengthy instructions and the proper search criteria, a user is likely to struggle to locate the specific documents they are seeking.

IV. EPA Must Object to the TPC Permit because Vague and Unclear Language Used in the Permit Renders it Unenforceable as a Practical Matter.

a. Specific Grounds for Objection

All permit terms and conditions must be enforceable as a practical matter. Public Comment at 8; *see In the Matter of Salt River Project Agricultural Improvement and Power District*, *Agua Fria Generating Station*, Order on Petition No. IX-2022-4 at 20 (July 28, 2022) (ordering state agency to ensure all permit terms are enforceable as a legal and practical matter); *see also In the Matter of Salt River Project Agricultural Improvement and Power District, Coolidge Generating Station*, Order on Petition No. IX-2024-7 at 11 (Sept. 11, 2024) (finding that petitioner demonstrated that even though certain limits were legally enforceable, the permit was deficient because the limits were not enforceable as a practical matter). Certain terms and conditions in the permit contain vague and unclear language that is not enforceable as a practical matter, rendering the permit deficient. Comment at 8. These terms and conditions include: Conditions 3(A)(iv)(1), 3(A)(iv)(2), 3(A)(iv)(3), 3(A)(iv)(4), 3(A)(iv)(5)(a)–(b), 3(B)(iii)(1), 3(B)(iii)(2), 3(B)(iii)(3), 3(B)(iii)(4)(a), 3(C), 6(A)(i) and (iii), and 26.

b. Applicable Requirements

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

c. Inadequacy of the permit term

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

d. Issues raised in public Comments

Petitioner raised these issues with reasonable specificity in the public comment filed with TCEQ on April 11, 2024. *See* Public Comment. The issues regarding unclear and vague language in the permit are included on pages 8–10 of the Comment. *Id.* at 8–10.

e. Analysis of states response

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

i. "Operating"

Petitioner argued that the term "operating," as it was used in Special Conditions, was too vague to be enforceable. Public Comment at 8. It is unclear whether the term "operating" means a unit is capable of operating for the entire quarter or is actually operating for the entire quarter. Depending on which interpretation is used, the permit's requirements are different. One use may make more sense than the other depending on the Special Condition where it is used and vice versa.

In the RTC, TCEQ states that "all special terms and conditions (STCs) in a site operating permit (SOP) are generated based on applicant's responses to questions listed in OP-REQ1 form." RTC at 29. It continues and notes that this terminology is consistent with "definitions, terminology, and text language" used in the Title V TCEQ regulations, federal regulations, and "terminology used by EPA and various industry trade organizations." *Id.* Lastly, TCEQ notes that enforceability of the permit is "assured since the Title V permit holder is required to file a permit compliance certification (PCC) report annually to certify compliance." *Id.* None of these points address the issue with the unclear meaning of the phrase "operating" nor clarify which interpretation is to be used when reading the permit.

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

And while TCEQ claims that its use of "operating" is "consistent with the definitions, terminology, and text language used in 30 TAC Chapter 122," and "the applicable rule text used in state and federal regulations," neither "operate" nor "operating" is defined in 30 TAC Chapter 122 or 40 C.F.R. Part 70. *See* 30 Tex. Admin. Code § 122.10; *see also* 40 C.F.R. § 70.2. Additionally, language in the permit is generated based on an applicant's response to the form, but that does nothing ensure compliance with the Clean Air Act. Plus, these forms could easily be changed by TCEQ to ensure that they are incorporating language that is not vague nor unclear. TCEQ's final point—that enforceability of the permit is ensured because the permit holder is

required to file a compliance certification—is a logically circular argument and does not meaningfully response to HCAO's assertion that the meaning of "operating" in the permit is so vague and unclear as to be unenforceable.

ii. "Shall be Maintained"

Petitioner argued that the phrase "shall be maintained" as it was used in Special Conditions 3(A)(iv)(3), 3(B)(iii)(2), and 26, was too vague to be enforceable. Comment at 8. Conditions 3(A)(iv)(3) and 3(B)(iii)(2) state "records of all observations shall be maintained" and Condition 26 states that records "sufficient to demonstrate compliance with the established limits shall be maintained." *Id.* In the RTC, TCEQ used the same arguments in justifying its use of "operating" to justify its use of "shall be maintained." It argues that (a) "all special terms and conditions (STCs) in a site operating permit (SOP) are generated based on applicant's responses to questions listed in OP-REQ1 form," (b) this terminology is consistent with "definitions, terminology, and text language" used in the Title V TCEQ regulations, federal regulations, and "terminology used by EPA and various industry trade organizations," and (c) enforceability of the permit is "assured since the Title V permit holder is required to file a permit compliance certification (PCC) report annually to certify compliance." RTC at 29. TCEQ reiterates, in a separate paragraph, that the use of "shall be maintained" in Special Conditions 3(A)(iv)(3) and 3(B)(iii)(2) is incorrect because the permit holder must file a permit compliance certification (PCC) report on an annual basis and deviation reports on a semi-annual basis to demonstrate that it complies with all requirements contained in the permit. *Id.* "Therefore," TCEQ states, "compliance and enforceability of the Proposed Permit is assured." *Id.*

There are several issues with TCEQ's argument. As pointed out above in dealing with the phrase "operating," TCEQ's responses (a), (b), and (c) do not address the issue raised in the public comment and, even if they did, inadequately address the fact that the permit's use of "shall be maintained" is so vague and unclear that it renders each Special Condition in the permit as a whole unenforceable as a practical matter. It does not matter if the words contained in STCs are generated from applicant's answers on application forms. STCs in a permit *must* be clear and enforceable. *Waha* Order at 17 ("The Title V permit should contain references that are detailed enough that the manner in which the referenced material applies to the facility is clear and is not reasonably subject to misinterpretation."); *Tesoro* Order at 9 (finding that ambiguities in the

petition rendered "the permit unenforceable as a practical matter" and detracted "from the usefulness of the permit as a compliance tool for the facility"). The usage is also not necessarily consistent with state and federal regulations and terminology used by TCEQ and trade organizations. The phrases "shall be maintained" or "sufficient to demonstrate" are not defined in either set of regulations. *See* 30 Tex. Admin. Code § 122.10; *see also* 40 C.F.R. § 70.2. And, even if they are generally used by EPA and various industry trade organizations, that does not necessarily mean the phrase is clear and understandable. A Title V permit is meant to be viewed, interpreted, and understood by the general public. Valero Order at 2. Anyone, not just EPA employees and those in industry trade organizations, should be able to read a Title V permit and understand what regulations the facility is subject to, how it is meant to achieve compliance, and how it is supposed to monitor compliance. *Id.* Lastly, TCEQ claims that compliance is ensured because permit holders must demonstrate compliance with the regulations by filing a permit compliance certification and deviation reports. But, merely filing a certification does not ensure a facility is in compliance and deviation reports often contain instances of non-compliance. Not only is TCEQ's claim incorrect but it does not deal with the issues Petitioner raised. Special Conditions 3(A)(iv)(3) and 3(B)(iii)(2) are unclear. Requiring the facility to submit a PCC does not make them any clearer.

TCEQ also fails to respond to Petitioner's argument regarding Special Condition 26. Condition 26 requires that records "sufficient to demonstrate compliance with the established limits shall be maintained." This phrase does not demonstrate what needs to be recorded, how the record is to be recorded, or how the record is meant to ensure compliance. It is so vague and unclear that it is not enforceable as a practical matter and TCEQ does not address this issue in the RTC. Petitioner recommends that TCEQ replace this vague language with terms that create and communicate concrete monitoring requirements.

iii. "RO"

In multiple Special Conditions, the Permit makes reference to the abilities of the "RO" regarding compliance, but this term is not defined anywhere in the text of the Permit nor is it included in the Permit's acronym list. Petitioner's Comment at 9; *see* Draft Permit at 5–6. The Special Conditions state that the RO may certify compliance with relevant regulations when there are no visible emissions present and provides instructions for the RO when there are visible

emissions present. How can this provision guarantee compliance if the general public reading the permit cannot understand the method by which the permit's compliance is to be certified? "RO" in this instance is unclear because it could mean anything—an individual, a company, a department of TCEQ, or a certain type of machine.

The HCAO requested that TCEQ define the term RO in the permit's attached acronym list. Instead, TCEQ states "the abbreviation for responsible official (RO) is well known in the field of federal air permitting and is well defined in the applicable Title V" state and federal regulations. RTC at 30. TCEQ's first point is either incorrect, irrelevant, or both. It does not cite any proof that the term is "well-known" in the field of federal air permitting. Even if it were well-known in the field of air permitting, that does not mean TCEQ can include an unexplained acronym in the permit. Title V permits are meant to serve as a resource for anyone in the general public to access and understand what regulations and monitoring a facility is subject to. Valero Order at 2. By using an unexplained acronym, even if it is well-known in the federal air permitting field, TCEQ fails to accomplish the purpose of the Title V program.

Additionally, TCEQ states that the term is "well-defined" in 30 TAC Chapter 122 and 40 CFR Part 70, where the state and federal Title V regulations are located, respectively. This is also false and TCEQ provided no citations or proof of the location of the definitions in either set of regulations. The term "RO" is not defined nor explained in the "Definitions" subsection of 30 TAC Chapter 122. *See* 30 Tex. Admin. Code § 122.10. And while the term "responsible official" is defined in the federal regulations, there is no hint or indication that "RO" is a common or often-used abbreviation for the term. *See* 40 C.F.R. § 70.2. Because the Permit's use of the term "RO" is so unclear as to make the permit unenforceable as a practical matter, TCEQ should add the term and its meaning to the Permit's acronym table on page 250.

iv. <u>"Significant Odor"</u>

Special Conditions 6(A)(i) and 6(A)(iii) require the Facility comply with specific control and inspection requirements regarding the filling of stationary gasoline vessels. Draft Permit at 7–8, Public Comment at 9–10. Special Condition 6(A)(i) references 30 Tex. Admin. Code § 115.222(3), which reads "no avoidable gasoline leaks, as detected by sight, sound, or smell, exist anywhere in the liquid transfer or vapor balance systems." 30 Tex. Admin. Code § 115.222(3). Special Condition No. 6(A)(iii) references 30 Tex. Admin. Code § 115.224(1), which reads

"inspections for liquid leaks, visible vapors, or significant odors resulting from gasoline transfer shall be conducted at gasoline dispensing facilities. Gasoline transfer shall be discontinued immediately when any liquid leaks, visible vapors, or significant odors are observed and shall not be resumed until the observed issue is repaired."

Neither "significant" nor "significant odor" is defined in 30 TAC Chapter 115, and thus the phrase is subject to interpretation in its relation to detection of gasoline odors. *See* 30 Tex. Admin. Code § 115.10. In condition 6(A)(i), the permit adds in the word "significant" without defining it, muddying a relatively clear burden in the rule of a leak detected by *any* smell of gasoline. Permit at 7. Even if the cited rules do not define the word "significant," the Permit must do so, such that all requirements are enforceable. The word "significant" must be defined, e.g., by providing an acceptable limit, such as the detection of any gasoline odor. Without having a clear definition of what constitutes a "significant odor" of gasoline, this Special Condition is so vague as to not be enforceable as a practical matter.

TCEQ does not respond to this point in the RTC.

v. <u>"Manufacturer's Specifications"</u>

TCEQ uses the term "manufacturer's specifications" throughout the Periodic Monitoring Summaries in the Permit. Comment at 10; Permit at 193, 200–09. It uses this phrase to specify how heaters and boilers should be maintained, calibrated, and operated. Specifically, the permit orders that "[t]he monitoring instrumentation shall be maintained, calibrated, and operated in accordance with manufacturer's specifications or other written procedures." Comment at 10; Permit at 193, 200–09. These "specifications" are neither explained nor included in the draft permit, application, statement of basis, or any other document in the permit record.

In the RTC, TCEQ argues "that descriptive CAM text is included for 'informational purposes only' and it does not replace the applicable requirements for the flare units listed in the ARS of the proposed permit." RTC at 30. First, the language Petitioner takes issue with is found in the Periodic Monitoring Summary, not the CAM summaries.

Second, Petitioner does not argue that language in the periodic monitoring summary somehow replaces or takes precedence over the language in the Applicable Requirements Summary (ARS), such as the requirements under 30 TAC Ch. 115.722(c)(1) that HRVOC flare units are subject to. Rather, Petitioner takes issue with the vague use of the phrase

"manufacturer's specifications" in the Periodic Monitoring Summary. This phrase is not defined, making it vague and unclear. It also references third-party documents that create requirements for monitoring at the facility, but are not found within the permit record.

Permits can incorporate information by reference in certain circumstances. This permit incorporates many relevant rules and statutes by reference, which is an accepted use of the incorporation by reference (IBR) method. Permits can include information via IBR if applicability issues and compliance obligations are clear, and the permit contains additional terms and conditions necessary to assure compliance with all applicable requirements. *Tesoro* Order at 8. IBR is also generally allowed when the cited requirement "is part of the public docket or is otherwise readily available, current, clear and unambiguous, and currently applicable." *Id.* These exceptions do not apply here, as the "manufacturer's specifications" do not create clear compliance obligations and the document(s) are not part of the public docket nor otherwise readily available, current, clear and unambiguous, or currently applicable.

TCEQ attempts to create monitoring requirements in the Periodic Monitoring Summary by referencing an unknown and unincorporated third-party document. This is in an improper use of IBR and does not meet the applicable requirements of the Clean Air Act which require permits to contain all appropriate and relevant monitoring information and the terms and test methods of unit calibrations.

Petitioner requests that the permit holder include the "manufacturer's specifications" it refers to in the permit application and thus the permit record.

vi. <u>"Promptly"</u>

TCEQ states that its use of "promptly" in multiple NSR provisions, despite the term being subjective and unmeasurable, is justified because "references to promptness of remedial action is [sic] typically stated in the applicable regulations or work practice standards that typically define the applicable requirements for a unit." RTC at 30. TCEQ then quotes a provision of 30 TAC Chapter 115.718, which sets out regulations for monitoring and inspection requirements for oil and natural gas services in ozone nonattainment areas. RTC at 30; 30 Tex. Admin. Code § 115.718(e).

TCEQ argues "promptly" is properly used in these NSR provisions because the true definition of promptly is actually contained in whatever "applicable regulation or work practice

standard" defines or creates the applicable requirements for a unit. RTC at 30. But none of the provisions that Petitioner took issue within its comment—NSR Permit 22052 Special Condition 12(E)(3), NSR Permit 46307 Special Condition 28(C), NSR Permit 46426 Special Condition 8, and NSR Permit 19806 Special Condition 17(C)—contain any reference to any such "applicable regulation of work practice standard." Comment at 10; NSR Draft Permit 22052 at 11; NSR Draft Permit 46307 at 8; NSR Draft Permit 46426 at 8; NSR Draft Permit 19806 at 3. "Promptly," as used in these NSR provisions, is so vague and unclear that it renders these provisions of the permit unenforceable as a practical matter. The word could mean anything: an hour, twenty-four hours, a week, as soon as the relevant employee can get around to it. There is no single, enforceable definition.

While TCEQ states that the actual definition of "promptly" is included in the relevant applicable regulation or work practice standard, it fails to cite or include either of these in each of the provisions where it uses "promptly." There are no applicable regulations and no workplace standards cited. In fact, the regulation it cites as an example, 30 TAC 115.718(e), is not cited in any of the relevant NSR provisions, or any or the NSR permits at all. If, by citing this subsection, TCEQ is suggesting that "promptly" means "as soon as practicable" and/or "no later than five calendar days" after the defect is discovered, as the subsection states, the relevant NSR provisions should include this actual language.

Petitioner requests that TCEQ replace the open-ended term "promptly" with an outer time limit like "within 24 hours."

CONCLUSION

As explained above and detailed in the timely filed public comments, the Draft Permit is deficient and does not meet the requirements of the Clean Air Act. Petitioner urges the Administrator to object to the issuance of Permit O1598 as required by the Clean Air Act.

Respectfully submitted this February 17, 2025, on behalf of the Harris County Attorney's Office.

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LIST OF EXHIBITS

Exhibit	Title
A	**Notice of Draft Federal Operating Permit for Draft Permit No. O1598**
B	**Harris County Attorney's Office Public Comment on the Renewal of Title V Permit No. O1598**
C	**Texas Commission on Environmental Quality's Response to Comment on the Renewal of Title V Permit No. O1598**
D	**Bay Area Citizen X Account**
E	**Published Notice Affidavit for Draft Permit O1598**
F	**Email Summary of Call with Mr. Jason Sanders**
G	**Texas Commission on Environmental Quality CFR Online "Quick Guide"**
H	**PBR 168520 Technical Review**