

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	PETITION No. III-2018-1
)	
SANDY CREEK SERVICES, LLC)	ORDER RESPONDING TO
SANDY CREEK ENERGY STATION)	PETITION REQUESTING
MCLENNAN COUNTY, TEXAS)	OBJECTION TO THE ISSUANCE OF
)	TITLE V OPERATING PERMIT
PERMIT No. O3336)	
)	
ISSUED BY THE TEXAS COMMISSION ON)	
ENVIRONMENTAL QUALITY)	

ORDER GRANTING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated January 16, 2018, (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 the proposed operating permit No. O3336 (the Proposed Permit) issued by the Texas Commission on Environmental Quality (TCEQ) to the Sandy Creek Energy Station (Sandy Creek or the facility) in McLennan 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 below, the EPA grants the Petition requesting that the EPA Administrator object to the Permit.

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).¹ Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.²

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

² *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.

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)).³ 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 1130–31.⁴ Certain aspects of the petitioner’s demonstration burden are discussed below. 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 1132–33.⁵ 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 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

³ *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)).

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

⁵ *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).

persuasive.”).⁶ Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013).⁷ Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g., In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).⁸

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

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

When the permitting authority revises a permit or permit record in order to resolve an EPA objection, it must go through the appropriate procedures for that revision. The permitting authority should determine whether its response is a minor modification or a significant modification to the title V permit, as described in 40 C.F.R. § 70.7(e)(2) and (4) or the

⁶ *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (September 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring); *In the Matter of Portland Generating Station*, Order on Petition at 7 (June 20, 2007) (*Portland Generating Station Order*).

⁷ *See also Portland Generating Station Order* at 7 (“[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement].”); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (April 20, 2007); *Georgia Power Plants Order* at 9–13; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (March 15, 2005).

⁸ *See also In the Matter of Hu Honua Bioenergy*, Order on Petition No. IX-2011-1 at 19–20 (February 7, 2014); *Georgia Power Plants Order* at 10.

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 Sandy Creek Energy Station

The Sandy Creek Energy Station, located in McLennan County, Texas, is a pulverized coal-fired electric power generation unit, consisting of one pulverized coal boiler, one multiple shell condensing steam turbine generator, multiple steam surface condensers, one multiple-cell mechanical draft cooling tower, one auxiliary boiler, and various auxiliary equipment and facilities. Pipeline quality natural gas is used as the start-up fuel for the PC boiler and for start-up and operation of the auxiliary boiler. The facility is a major source of volatile organic compounds, sulfur dioxide, particulate matter, nitrogen oxides, hazardous air pollutants, carbon monoxide, sulfuric acid, 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 and National Emission Standards for Hazardous Air Pollutants.

B. Permitting History

On October 30, 2009, Sandy Creek submitted an application for a title V permit for the Sandy Creek Energy Station. TCEQ noticed the draft permit on September 26, 2016, subject to a public comment period from September 26, 2016, until October 26, 2016. On September 29, 2017, TCEQ transmitted the Proposed Permit, along with its Response to Comments and Statement of Basis, to the EPA for its 45-day review. The EPA's 45-day review period started on October 3, 2017 and ended on November 17, 2017, during which time the EPA did not object to the Proposed Permit. TCEQ issued the final title V permit for the Texas City Chemical Plant on November 30, 2017.

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 November 17, 2017. Thus, any petition seeking the EPA's objection to the Proposed Permit was due on or before January 16, 2018. The Petition was received January 16, 2018, 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 Fails to Incorporate Sandy Creek’s Certified Permit by Rule Registrations as Applicable Requirements

Petitioners’ Claim: The Petitioners claim that the title V permit fails to identify certain applicable requirements associated with Permits by Rule (PBRs), and, therefore, fails to include and assure compliance with all applicable requirements. Petition at 4–7.

The Petitioners assert that PBRs often establish generic emission limits and operating requirements that can be identified by reading TCEQ’s PBR rules in 30 TAC Chapter 106. *Id.* at 4. The Petitioners also note that sources may also certify source-specific emission rates for PBRs that are lower than the generic limits established in TCEQ’s PBR rules. *Id.* (citing 30 TAC § 106.6). The Petitioners assert that the emission rates and other representations within these “certified registrations” become federally enforceable permit limits and conditions. *Id.* The Petitioners claim that, because the source-specific requirements contained in certified registrations are not contained in the PBR rules themselves, the certified registrations must be specifically identified in the proposed title V permit. *Id.* at 6.

The Petitioners allege that Sandy Creek has claimed various PBRs to authorize construction and modification of units at the facility. *Id.* at 5. The Petitioners also claim that Sandy Creek certified source-specific emission limits under 30 TAC § 106.6 for several projects with certification numbers 105434 for PBRs 30 TAC 106.261, 106.263, and 106.478 and 129417 for PBRs 30 TAC 106.144 and 106.183. *Id.*

The Petitioners acknowledge that the title V permit incorporates by reference various PBR authorizations. *Id.* at 6. However, the Petitioners assert that in doing so, the Permit only references the PBR rules that establish generic requirements, and that the Permit contains no reference to any certified registrations that establish source-specific limits and operating requirements. *Id.* The Petitioners conclude that the title V permit fails to identify and assure compliance with applicable requirements in Sandy Creek’s certified PBR registrations, warranting an EPA objection. *Id.*

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).⁹ “Applicable requirements,” as defined in the EPA’s and TCEQ’s rules,

⁹ 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

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 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 through the use of incorporation by reference (IBR) in certain circumstances. *See, e.g.,* White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program, 40 (March 5, 1996) (*White Paper Number 2*) (explaining how IBR can satisfy CAA § 504 requirements).¹⁰ 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 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 the 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, Condition 8 of the Sandy Creek 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

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.”).

¹⁰ In upholding the EPA’s approval of IBR in Texas, the U.S. Court of Appeals for the Fifth Circuit noted: “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.” *Public Citizen, Inc. v. U.S. E.P.A.*, 343 F.3d 449, 460 (5th Cir. 2003).

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 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.¹¹ 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, it is not clear that the Permit currently includes or incorporates 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 below, 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.

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.¹²

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

¹¹ As the Petitioners point out, this is problematic given that, by their nature, the certified source-specific emission limits contained in registered PBRs are necessarily different than the contained in the PBR rules they are associated with. 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.").

¹² See https://www.tceq.texas.gov/permitting/air/nav/air_status_permits.html.

submitted after August 1, 2020.¹³ Further, TCEQ will include the registration numbers in the New Source Review Authorization References by Emission 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 with the agreements underpinning the EPA's approval of the IBR of PBRs—namely that “PBRs will be 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 B: The Petitioners Claim That the Proposed Permit Fails to Include Monitoring, Recordkeeping, and Reporting Requirements that Assure Compliance with Incorporated PBR Requirements.

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 9–12. Specifically, the Petitioners claim that when a PBR does not contain specific monitoring in the rule, the only monitoring, recordkeeping, and reporting that applies is contained in special conditions 9 and 10 of the title V permit, which is a “non-exhaustive list of data Sandy Creek may consider, at its discretion, to determine compliance with PBR requirements.” *Id.* at 7–8, 11. The Petitioners contend that special conditions 9 and 10 alone do not satisfy the requirement for all title V permits to “contain monitoring, recordkeeping, and reporting conditions that assure compliance with all applicable requirements.” *Id.* at 10–11 (citing *Wheelabrator Order* at 10).

The Petitioners contend that the title V permit incorporates the following PBRs to which Special Conditions 9 and 10 apply: PBRs 30 TAC §§ 106.144, 106.183, 106.227, 106.261, 106.262, 106.263, 106.265, 106.371, 106.454, 106.472, 106.473, and 106.511. *Id.* at 10. The Petitioners detailed the requirements of some of these PBRs which the Petitioners claim contain specific emission limits and standards which are applicable requirements of the Proposed Permit.

For all PBRs incorporated into the Permit, the Petitioners claim that neither the title V permit nor the Statement of Basis identifies monitoring that assures compliance with the emission limits established under 30 TAC § 106.4(a)(1). *Id.* at 11. The Petitioners contend that the only monitoring or recordkeeping that does apply is contained in Special Conditions 9 and 10. Because these special conditions allow the source to determine the monitoring, recordkeeping, and reporting after the permit is issued, the Petitioners claim that it is “impossible to know whether the periodic monitoring chosen by the source assures compliance.” *Id.*

As a final point, the Petitioners contend that Special Condition 10 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 11–12 (citing *In the Matter of Shell Chemical LP and Shell Oil Co.*, Order on Petitions Nos. VI-2014-04 and VI-2014-05 (Sept. 24, 2015) (*Deer Park Order*) at 15).

¹³ 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* (May 11, 2020 letter).

EPA's Response: For the reasons set forth under the heading “*EPA Analysis*” below, the EPA grants the Petitioners’ request for an objection on this claim.

Relevant Permit Terms and Conditions

Special Condition 9 of the Sandy Creek title V permit states:

The permit holder shall comply with the general requirements of 30 TAC Chapter 106, Subchapter A or the general requirements, if any, in effect at the time of the claim of any PBR.

Final Permit at 9.

Special Condition 10 of the Sandy Creek title V permit states:

The permit holder shall maintain records to demonstrate compliance with any emission limitation or standard that is specified in a permit by rule (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 9

EPA Analysis

The Petitioners have demonstrated that with regard to the monitoring, recordkeeping, and reporting requirements for PBRs, the Sandy Creek title V permit does not assure compliance with the CAA, part 70, and Texas’s approved title V program.¹⁴ Specifically, the Petitioners have demonstrated that the PBRs that contain specific emission limits and standards, do not contain

¹⁴ With regard to the Petitioners’ general assertion that the title V permit is deficient because Special Condition 10 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 Sand Creek title V permit under Special Condition 10.

any additional PBR-specific monitoring, recordkeeping, and reporting and solely rely on the general requirements in Special Conditions 9 and 10. Further, the Petitioners have demonstrated that the general list of monitoring, recordkeeping, and reporting options under special conditions 9 and 10 may not be adequate for all PBRs. As explained in the EPA's *Motiva Order*,¹⁵ a streamlined approach to monitoring, such as in special conditions 9 and 10, can be appropriate for generally applicable requirements for *insignificant* units. *Motiva Order* at 26; *White Paper Number 2* at 32. 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).¹⁶ Special Condition 9 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, the Petitioners have demonstrated that Special Condition 10 does not specify any particular monitoring requirements and instead allows Sandy Creek to select the monitoring, recordkeeping, or reporting it will use to assure compliance. Because neither this generic permit term nor the PBRs themselves require Sandy Creek 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 Conditions 9 and 10 also contain 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.¹⁷ Therefore, the Petitioners have demonstrated that for PBRs authorizing non-insignificant units, Special

¹⁵ *In the Matter of Motiva Enterprises, LLC Port Arthur Refinery*, Order on Petition No. VI-2016-23 (May 31, 2018).

¹⁶ 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).

¹⁷ The requirement that a title V permit contain sufficient monitoring and the requirement that sources submit compliance certifications are independent (albeit related) obligations.

Conditions 9 and 10 do not contain adequate monitoring, recordkeeping, and reporting requirements that assures compliance with the requirements in each PBR.

Direction to TCEQ: In responding to this order, TCEQ should specify the monitoring, recordkeeping, and reporting that assures compliance with the requirements of the PBRs that apply to non-insignificant units in the Sandy Creek title V permit. If the underlying PBR contains monitoring, recordkeeping, and reporting requirements, TCEQ should identify those PBRs in the permit record and determine if the monitoring in those PBRs is adequate. On the other hand, if the PBRs do not contain any underlying monitoring, recordkeeping, or reporting, like 30 TAC §§ 106.261, 106.262, 106.263, and 106.473, 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, NSPSSs, NESHAPs, or enforceable representations in an application already contain adequate terms to assure compliance with PBRs, then TCEQ should amend the Permit to identify such terms and explain in the permit record how these other 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 contain adequate monitoring, recordkeeping, and reporting that assures compliance with the requirements and limits identified, then TCEQ should add such terms to the Permit.

The EPA notes that TCEQ is already planning to begin specifying the monitoring for certain PBRs in the 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*, at 2 (May 11, 2020 letter). It is important to also explain what is required for something to be incorporated by reference so that the title V permit actually includes all applicable requirements. Title V of the CAA requires that all applicable requirements and adequate monitoring, recordkeeping, and reporting is “set forth,” “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).¹⁸ In order for something to be incorporated by reference, one must first *reference* it. As the EPA has explained:

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

¹⁸ 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).

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 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.

First, 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 itself. *E.g.*, Colorado Bend I Power title V Permit No. O2887 at 5, Special Condition 7, (March 11, 2021). Since title V applications can be hundreds (if not over a thousand) pages long, a general statement incorporating the PBR Supplemental Table in all title V permits without providing additional information detailing where the table is located is not specific enough to meet the standards described above. 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. In order to satisfy the requirement in title V for the Permit to set forth, include, or contain the applicable requirements, the special condition incorporating this table needs to include, at minimum, the date of the application and specific location of the supplemental 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.

Second, while 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 the registered PBRs. For registered PBRs, the EPA understands that TCEQ intends to start having applicants include monitoring in the registration form.¹⁹ However, TCEQ has not

¹⁹ In its May 11, 2020 letter, TCEQ stated that it will require applicants to “[u]pdate PBR application representations with monitoring that is sufficient to demonstrate compliance.” Letter from Tonya Baer, Deputy Director of Air,

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).²⁰ 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).²¹ 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.²² The EPA did not suggest that 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.

TCEQ, to David Garcia, Director, Air and Radiation Division, Region 6, U.S. EPA, *Permits by Rule Programmatic Changes*, at 3.

²⁰ *See supra* note 18.

²¹ *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.").

²² *Id.* 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] MNSR permits so incorporated are fully enforceable under the full approved title V program that we are approving in this action.").

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 or are not sufficient to assure compliance for these insignificant units.²³ 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. For example, in the statement of basis of title V Permit No. O3027 for Odfjell Terminal Houston, the TCEQ noted that the following PBRs apply to insignificant units: 30 TAC §§ 106.102, 106.122, 106.141, 106.143, 106.148, 106.149, 106.161, 106.162, 106.163, 106.229, 106.241, 106.242, 106.243, 106.244, 106.266, 106.301, 106.313, 106.316, 106.317, 106.318, 106.319, 106.331, 106.333, 106.372, 106.391, 106.394, 106.414, 106.415, 106.431, 106.432, 106.451, 106.453, 106.471, 106.531. *See e.g., Statement of Basis for Draft Title V Permit for Odfjell Terminal Houston at 7–8 (December 20, 2020).* The EPA directs TCEQ to make similar clarifications for the Sandy Creek title V permit and then determine if the monitoring, recordkeeping, and reporting in special conditions 9 and 10 are sufficient for these insignificant units.

V. CONCLUSION

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

Dated: June 30, 2021

Michael S. Regan
Michael S. Regan
Administrator

²³ 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 CFR § 70.6(a)(3)(i). *See White Paper Number 2 at 32.*