

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

_____)	PETITION NO. VI-2017-7
IN THE MATTER OF)	
)	
BLANCHARD REFINING COMPANY)	ORDER RESPONDING TO
GALVESTON BAY REFINERY)	PETITION REQUESTING
GALVESTON COUNTY, TEXAS)	OBJECTION TO THE ISSUANCE OF
)	TITLE V OPERATING PERMIT
PERMIT No. O1541)	
)	
ISSUED BY THE TEXAS COMMISSION ON)	
ENVIRONMENTAL QUALITY)	
_____)	

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

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA or the Agency) received a petition dated April 11, 2017, (the Petition) from the Environmental Integrity Project and Sierra Club (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to the proposed operating permit No. O1541 (the Proposed Permit) issued by the Texas Commission on Environmental Quality (TCEQ) to the Galveston Bay Refinery (Blanchard – Galveston or the facility) in Galveston County, Texas. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and Title 30, Chapter 122 of the Texas Administrative Code (TAC). *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further in Section IV of this Order, the EPA grants in part and denies in part the Petition requesting that the EPA Administrator object to the Permit. Specifically, the EPA grants Claims A and parts of Claims C and D, and denies the rest of the claims.

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

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

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

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 in the following paragraph. A more detailed discussion can be found in *In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the state's response to comments), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.⁵ 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

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.

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).

EPA is left to work out the basis for the petitioner’s objection, contrary to Congress’s express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 (“[T]he Administrator’s requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.”).⁶ Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013).⁷ Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g., In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).⁸

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

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

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.

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

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

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

C. New Source Review

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

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

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

III. BACKGROUND

A. The Galveston Bay Refinery Facility

Blanchard’s Galveston Bay Refinery, located in Galveston County, Texas, consists of 19 major production areas, a wastewater treatment facility, a tank farm for the storage of raw materials and products, and a marine loading facility used to transport material to and from marine vessels and the Galveston Bay Refinery site. The facility is a major source of volatile organic compounds (VOC), sulfur dioxide, particulate matter (PM), nitrogen oxides (NO_x), hazardous air pollutants, and carbon monoxide (CO), and is subject to title V of the CAA. Emission units within the facility are also subject to the PSD program, other preconstruction permitting requirements, and various New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP).

B. Permitting History

Blanchard first obtained a title V permit for the Galveston Bay Refinery Facility in 2004. On March 3, 2009, Blanchard-Galveston submitted an application for a renewal title V permit. TCEQ noticed a draft permit and Statement of Basis on September 6, 2012, subject to a public comment period from September 6, 2012, until October 5, 2012. Notice of a revised draft permit was published on August 28, 2014, and a third revised draft permit was published on December 17, 2015, subject to a public comment period from December 17, 2015 to January 19, 2016. On December 27, 2016, TCEQ submitted the Proposed Permit, along with its Response to Comments (RTC), to the EPA for its 45-day review. The EPA’s 45-day review period ended on February 10, 2017, during which time the EPA did not object to the Proposed Permit. TCEQ issued the final title V permit for the Blanchard-Galveston Bay Refinery Facility on February 22, 2017 (Final Permit). Since the submittal of the Petition, the title V permit has been subsequently revised; the current version of the title V permit was issued on January 15, 2020.⁹

⁹ TCEQ released another draft title V permit revision on June 29, 2021, which has not been finalized as of the date of this Order. *See* Draft Minor Revision to Permit No. O1541 (June 29, 2021); *see also* Statement of Basis for Draft Permit No. O1541 (June 25, 2021).

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 February 10, 2017. Thus, any petition seeking the EPA’s objection to the Proposed Permit was due on or before April 11, 2017. The Petition was received April 11, 2017, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Claim A: The Petitioners Claim That “the Proposed Permit’s Incorporation of Blanchard’s State-Only Major Source Flexible Permit and Texas’s Federally-Approved Minor Source Flexible Permit Rules Fails to Assure Compliance with Applicable Requirements in the Texas State Implementation Plan.”

Claim B: The Petitioners Claim That “The Proposed Permit Fails to Establish a Schedule for Blanchard to Obtain a SIP-Approved Major Source Permit for Projects Authorized by State-Only Flexible Permit No. 47256.”

Both Claim A and Claim B raise issues concerning Flexible Permit No. 47256, which is incorporated by reference into the facility’s title V permit. Because these claims are closely related, the EPA’s response addresses both Claim A and Claim B together.

Petitioners’ Claim: Claims A and B turn on the Petitioners’ characterization of Flexible Permit No. 47256 as “a State-only authorization because it was issued prior to EPA’s approval of Texas’s minor source flexible permit program” regulations. Petition at 8 (citing 79 Fed. Reg. 40666, 40667–68 (July 14, 2014)).

In Claim A, the Petitioners assert that the source’s title V permit is objectionable because it lists this state-only flexible permit as a federally enforceable applicable requirement. *Id.* at 8–9 (citing *Objection to Title V Permit No. O1227, Goodyear Tire & Rubber Company, Houston Chemical Plant* (January 8, 2010) (*Goodyear Objection Letter*) (“Finally, the terms and conditions of flexible permits based upon the requirements of 30 TAC Chapter 116, Subchapter G must be identified as State-only terms and conditions, pursuant to 40 CFR § 70.6(b)(2).”)).¹⁰ To this point, the Petitioners challenge TCEQ’s RTC, in which the state asserted that the definition of “applicable requirement”—which TCEQ explains “is specifically defined in 30 TAC § 122.10(2)(h) to include all requirements of 30 TAC Chapter 116 and any term and condition of any preconstruction permit”—compels it to include the terms of Flexible Permit No. 47256 as applicable requirements. RTC at 30. The Petitioners assert that this argument is contrary to the CAA and has been preempted by numerous administrative orders by the EPA. Petition at 11–12 (citing 18 separate EPA objection orders issued between 2009 and 2011).

¹⁰ The EPA notes that this January 8, 2010, objection was issued under authority delegated by the EPA Administrator to Region 6 to object during the EPA’s 45-day review period. The objection letter is available at https://www.tceq.texas.gov/assets/public/permitting/air/Announcements/epa_goodyear_O1227.pdf.

In Claim A, the Petitioners further assert that the title V permit, by incorporating state-only Flexible Permit No. 47256 as a federally enforceable requirement, fails to assure compliance with the requirements of the Texas SIP. *Id.* at 5–6, 12. The Petitioners explain that title V permits “must include . . . conditions as are necessary to assure compliance with applicable requirements.” *Id.* at 6 (citing 42 U.S.C. § 7661c(a)). Moreover, the Petitioners claim that “State permitting authorities may not use Title V permits to modify applicable requirements in a SIP that apply to any stationary source.” *Id.* (citing 42 U.S.C. § 7410(i); 40 C.F.R. § 70.6(b)(2)). In contravention of these requirements, the Petitioners claim that the title V permit’s incorporation of the state-only flexible permit allows Blanchard to avoid requirements in the SIP—specifically, requirements in 30 TAC Chapter 116, Subchapter B—that the Petitioners assert would otherwise be applicable to past and future construction projects at the facility. *Id.* at 5–6.

The Petitioners acknowledge that the TCEQ flexible permit program is now approved into the Texas SIP. *Id.* at 8. However, the Petitioners assert that Blanchard may not use this SIP-approved flexible permit program because, according to the Petitioners, this program is only available to minor sources, not major sources like the Galveston Bay Refinery. *Id.* at 5–8. (citing *Environmental Integrity Project v. EPA*, 610 Fed. Appx. 409 (5th Cir. 2015) (“*Flex II*”), along with various legal filings by Texas associated with related litigation). Accordingly, the Petitioners reject TCEQ’s suggestion provided in its RTC that, once Blanchard’s flexible permit is renewed under the now EPA-approved flexible permit rules, it will assure compliance with the Texas SIP.

In Claim B, the Petitioners assert: “The Proposed Permit is deficient because it fails to establish a compliance schedule for Blanchard to apply for and obtain a federally-approved major source preconstruction permit for projects authorized by State-only Flexible Permit No. 47256.” *Id.* at 13.

As the Petitioners explain, a title V permit must include a compliance schedule if the source has failed to comply with an applicable requirement at the time of title V permit issuance. *Id.* at 14 (citing 42 U.S.C. §§ 7661b(b), 7661c(a); 40 C.F.R. §§ 70.5(c)(8)(iii)(C), 70.6(c)(3); 30 TAC § 122.142(e)). The Petitioners claim that the Texas SIP required Blanchard to obtain preconstruction authorizations for projects at the facility through the issuance, amendment, or alteration of an NSR permit issued under 30 TAC § 116, Subchapter B. *Id.* at 14–15 (citing 30 TAC §§ 116.110, 116.111, 116.116). The Petitioners assert that these Subchapter B rules “require Blanchard to apply Best Available Control Technology (“BACT”) to each new and modified facility and to obtain a preconstruction authorization before commencing any project that would increase actual emissions from any existing unit, even if the actual increases could be maintained below previously permitted allowables.” *Id.* The Petitioners claim that, contrary to these requirements, the facility “did not obtain a Subchapter B permit authorizing any of the projects covered by State-only Flexible Permit No. 47256.” *Id.* at 13. The Petitioners assert that this failure amounted to a violation of the Texas SIP and the CAA. *Id.* Therefore, the Petitioners contend that the title V permit must include a compliance schedule to remedy this alleged violation. *Id.* at 13, 14.

EPA's Response: For the following reasons, the EPA grants in part and denies in part the Petitioners' request for an objection on these claims. Specifically, the EPA grants Claim A and denies Claim B.

As an initial matter, the EPA agrees with the Petitioners' characterization of Flexible Permit No. 47256 as a "state-only" authorization, as this permit was issued pursuant to rules that were not approved by the EPA into the Texas SIP. Since at least 2007, the EPA has consistently described this type of flexible permit as "state-only" and not federally enforceable. Notably, when the EPA approved the Texas flexible permitting program into the SIP in 2014, the EPA explained:

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

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

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

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

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

Moreover, as the Petitioners acknowledge, the EPA has objected to the issuance of title V permits incorporating these state-only permits on nearly 20 occasions. *E.g., Goodyear Objection Letter*. These objections were based in part on 40 C.F.R. § 70.6(b)(2), which mandates that "the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements," such as an EPA-approved SIP. Accordingly, on numerous occasions between 2009 and 2011, the EPA directed TCEQ: "[T]he terms and conditions of

flexible permits based upon the requirements of 30 TAC Chapter 116, Subchapter G must be identified as State-only terms and conditions, pursuant to 40 CFR § 70.6(b)(2).” *E.g., Goodyear Objection Letter.*

Here, it can hardly be contested that the version of Flexible Permit No. 47256, as incorporated into the current title V permit, is a state-only authorization. It was, as the Petitioners indicate, issued under regulations which were not part of the EPA-approved Texas SIP.¹¹ However, the title V permit for Blanchard currently incorporates Flexible Permit No. 47256 without qualification, suggesting that it is a federally enforceable requirement of the title V permit. *See* Final Permit at 21 (Special Condition 28), 777.¹² This plainly contravenes the requirement that non-federally enforceable requirements be designated as such and presents a basis for the EPA to object to the Permit. 40 C.F.R. § 70.6(b)(2). This requirement is important because if state-only provisions are not appropriately designated, they may conflict with or undermine federally enforceable provisions that should otherwise apply.

This concern is particularly relevant in the case of flexible permits. Flexible permits issued by TCEQ provide sources with an alternative to complying with otherwise-applicable requirements of the Texas SIP. *See* 30 TAC § 116.710 (a) (“[A] flexible permit . . . allows for physical or operational changes . . . as an *alternative* to obtaining a new source review permit under §116.110 of this title (relating to Applicability), or *in lieu of* amending an existing permit under §116.116 of this title (relating to Changes to Facilities).” (emphasis added)). Because of this, the incorporation of state-only Flexible Permit No. 47256 into Blanchard’s title V permit renders the title V permit unclear and misleading about the requirements that apply to the facility. Specifically, the permit suggests that the facility may rely on the state-only flexible permit to authorize future modifications instead of following the requirement to obtain an authorization under the relevant SIP-approved rules (e.g., those in Chapter 116, Subchapter B, or in a flexible permit issued under the now SIP-approved Subchapter G). This frustrates a central purpose of the title V program: to “clarify, in a single document, which requirements apply to a source and, thus, . . . enhance compliance with the requirements of the Act.”¹³ Thus, the EPA agrees with the

¹¹ The February 22, 2017 version of the title V permit, upon which the Petition is based, incorporated the November 2, 2015 version of Flexible Permit No. 47256. The most recent version of the title V permit, issued on January 15, 2020, incorporates the July 8, 2019 version of Flexible Permit No. 47256. Although both of these versions of the flexible permit were issued subsequent to the EPA’s approval of the TCEQ flexible permit program rules, neither of those permits were issued pursuant to the now-SIP-approved rules. Instead, they reflected alterations or amendments to the non-SIP-approved version of Flexible Permit No. 47256 initially issued on July 13, 2005. An application to renew this permit under the SIP-approved rules has been pending since July 10, 2015. *See* https://www2.tceq.texas.gov/airperm/index.cfm?fuseaction=airpermits.project_report&proj_id=238478.

¹² To make matters more complicated, the terms of Flexible Permit No. 47256 are combined with the terms of PSD Permit No. PSDTX402M3 in a single document.

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

Petitioners that the title V permit cannot be said to “assure compliance” with the SIP requirements that are applicable to the facility. Accordingly, the EPA grants Claim A.

In Claim B, the Petitioners argue the Permit must contain a compliance schedule because Blanchard allegedly relied on state-only Flexible Permit No. 47256 to authorize various unidentified and undescribed projects. However, the Petitioners have not demonstrated that a compliance schedule is necessary.

The EPA’s regulations and TCEQ’s EPA-approved regulations provide that a compliance schedule is required “for sources that are not in compliance with all applicable requirements at the time of permit issuance.” 40 C.F.R. § 70.5(c)(8); *see also id.* § 70.6(c); 30 TAC §§ 122.132(d)(iii), 122.142(d)(1). However, the EPA will not object to a permit where the Petitioners have provided no specific evidence to demonstrate that the facility is not in compliance with applicable requirements of the Act. *In the Matter of Bunge North American, Inc.*, Order on Petition No. VI-2016-02 at 6–7 (June 7, 2017) (citing *Georgia Power Plants Order* at 9–10). The demonstration requirement is particularly important with respect to the inclusion of a compliance schedule in light of the interplay between compliance schedules and the Agency’s enforcement prerogatives.¹⁴

Here, the Petitioners have failed to demonstrate that there are applicable requirements with which the facility was not in compliance at the time of permit issuance. The Petitioners suggest that Blanchard failed to obtain the correct type of preconstruction authorizations at various times in the past based on its reliance on the state-only flexible permit. However, the Petitioners provide only generic references to “projects covered by State-only Flexible Permit No. 47256,” Petition at 13, and do not discuss or describe *any* specific changes to the facility that were not properly authorized.¹⁵ Accordingly, the Petitioners have not demonstrated that the facility failed to obtain the required preconstruction authorizations for any particular projects or that the NSR authorizations for any emission unit are incomplete or fail to comply with the SIP. The Petitioners thus have not demonstrated that the source is not in compliance with any particular applicable requirement that should have applied to a particular emission unit. *See* 40 C.F.R. § 70.2 (defining “applicable requirement[s]” “as they apply to emission units”); *see also In the*

¹⁴ *See Sierra Club v. EPA*, 557 F.3d 401, 411–412 (6th Cir. 2009) (upholding EPA’s denial of petition for compliance schedule where enforcement action had been commenced and settled without admission of liability). Even where there is evidence in the record that an enforcement action is underway (which the Petitioners have not presented here), the EPA has in the past applied a multi-factored analysis to determine whether a compliance schedule is warranted: (1) the kind and quality of information underlying the agency’s original finding that a prior violation occurred, (2) the information the petitioner puts forward in addition to the agency’s enforcement actions, (3) the types of factual and legal issues that remain in dispute, (4) the amount of time that has lapsed between the original decision and the current one and (5) the likelihood that a pending enforcement case could resolve some of those issues. *See id.* at 406–407 (upholding these factors as a reasonable interpretation of 42 U.S.C. § 7661d(b)(2)); *accord Sierra Club v. Johnson*, 541 F.3d 1257, 1267-69 (11th Cir. 2008) (initiation of enforcement action for PSD violation is not in and of itself sufficient to demonstrate that compliance schedule is warranted).

¹⁵ For example, the Petitioners do not provide any description of the emission units at issue, the projects themselves, any emissions increases associated with such projects, or how specific regulatory requirements (such as BACT) should have been applied to these projects.

Matter of ExxonMobil Baytown Refinery, Order on Petition No. VI-2016-14, at 17–18 (April 2, 2018). Therefore, Claim B and the Petitioners’ request for a compliance schedule is denied.¹⁶

It is also worth noting that the redress sought by the Petitioners through a compliance schedule—a requirement for the facility to obtain a federally enforceable authorization for projects previously authorized by the state-only flexible permit—will effectively be accomplished by the issuance of a SIP-approved flexible permit and the incorporation of that permit into the title V permit.¹⁷

The Petitioners are incorrect to suggest otherwise. *See* Petition at 5–8 (arguing that issuing a SIP-approved flexible permit would not resolve the Petitioners’ concerns because the SIP-approved flexible permit program is only available to authorize construction at minor sources, not major sources like Blanchard’s Galveston Bay Refinery). The Petitioners’ arguments on this point conflate the distinction between minor *sources* (and major sources) and minor NSR *programs*. Major sources routinely use minor NSR programs to authorize modifications that do not qualify as “major modifications.” Specific to the Texas flexible permits program, the EPA has repeatedly explained: “the Flexible Permit program can be used for both true minor sources and for minor modifications at existing major sources[.]” 79 Fed. Reg. 8368, 8380 (February 12, 2014).¹⁸ Nothing in the EPA’s approval of the Texas flexible permits program, nor in the Fifth Circuit’s *Flex I* and *Flex II* decisions, indicated that only minor *sources* may take advantage of this minor NSR *program*.¹⁹ Thus, to the extent that the Petitioners’ claims are predicated on the notion that SIP-approved flexible permits are unavailable to major sources, they are mistaken.

¹⁶ In concluding that the Petitioners have not met their burden to demonstrate a flaw in the title V permit, the EPA is not making any judgment regarding the propriety of Blanchard’s reliance on the flexible permitting process with respect to any past or future modifications to the facility. To the extent that a facility relied or relies on a state-only flexible permit to authorize a construction project, rather than following the otherwise applicable NSR requirements in the Texas SIP, this type of compliance issue should be addressed through the appropriate title I permitting channels or enforcement actions.

¹⁷ An application to renew Permit No. 47256 under TCEQ’s EPA-approved flexible permitting rules is currently pending with TCEQ. *See supra* note 11.

¹⁸ *See also id.* (“Each of these amendments to the Flexible Permit Program ensures that the program is for minor NSR actions and that for any minor amendments to a major source, the source will retain its major source requirements (*i.e.*, cannot be used to circumvent the major source requirements.)”); *id.* at 8378 n.7 (“These sources include minor sources as well as major sources seeking minor modifications to their facilities.”). These clear statements came from the preamble to the proposed rule conditionally approving the Texas flexible permits program. Some of the Petitioners subsequently challenged the accompanying final rule, which was upheld by the Fifth Circuit in *Flex II*, which the Petitioners cite.

¹⁹ In addition to the clear statements made in proposing to approve the Texas flexible permits program (quoted in the preceding footnote), the EPA explained in its final conditional approval that “this is a minor NSR *program*.” 79 Fed. Reg. 40666, 40668, 40669 (July 14, 2014) (emphasis added). Similarly, the Fifth Circuit’s *Flex I* and *Flex II* opinions refer repeatedly to “Minor NSR” and “Major NSR”—referring to the two programs, not necessarily the type of source. *Texas v. EPA*, 690 F.3d 670 *passim* (5th Cir 2012) (*Flex I*); *Flex II*, 610 Fed. Appx. 409 *passim* (5th Cir. 2015). Neither decision implies that only minor *sources* may take advantage of the flexible permit minor NSR *program*. Instead, both decisions acknowledge that major sources could use the flexible permit program, albeit not in a way that allowed them to avoid Major NSR for a modification that would otherwise trigger it. *See Flex I*, 690 F.3d at 686 (rejecting concerns that major sources might “avoid Major NSR by exploiting the Flexible Permit Program” because “[m]ajor sources cannot use a flexible permit to avoid Major NSR without violating the law.”); *Flex II*, 610 Fed. Appx. at 410 (quoting the preceding passage from *Flex I*). This means that while existing major sources may use a flexible permit to authorize minor modifications, they cannot use a flexible permit to authorize a modification that would otherwise be subject to major NSR. To do so would amount to a violation of the SIP.

Direction to TCEQ: In order to resolve the EPA’s objection to Claim A, TCEQ must revise the title V permit to either designate the current version of Permit No. 47256 as a non-federally enforceable authorization per 40 C.F.R. § 70.6(b)(2), or it must incorporate a SIP-approved, federally enforceable version of Permit No. 47256 into the title V permit. If TCEQ elects the latter approach, the EPA encourages TCEQ to prioritize the prompt issuance of a SIP-approved flexible permit to Blanchard, as the EPA’s objection will not be resolved until such a permit is issued and the title V permit is revised to incorporate it.

Claim C: The Petitioner Claims That the Proposed Permit Fails to Identify, Incorporate, and Assure Compliance with all Requirements in Permits by Rule Claimed by Blanchard.

Petitioners’ Claim: The Petitioners raise multiple issues related to the title V permit’s incorporation of requirements established by Permits by Rule (PBR).

First, for PBRs that are “registered” by the source—some of which may include “certified” emission limits or requirements that differ from those in the PBR rules—the Petitioners acknowledge that the accompanying registration numbers are included in the title V permit next to the units authorized by those registered PBRs. Petition at 18. However, the Petitioners assert that “nothing in the Proposed Permit or Statement of Basis explains what a PBR certification or registration is or explains how information in Blanchard’s certifications and registrations modifies generic requirements in the TCEQ’s Chapter 106 rules.” *Id.* Thus, the Petitioners assert that the Permit “fails to properly incorporate and assure compliance with applicable PBR requirements.” *Id.* at 19.

Second, for PBRs that are unregistered, the Petitioners claim that the title V permit is unclear as to how much pollution Blanchard is authorized to emit for each unit because the title V permit is unclear as to how the emission limits from 30 TAC § 106.4 apply when multiple units are authorized by the same PBR. *Id.* at 19. For support, the Petitioners identify 306 tanks as being authorized by PBR 30 TAC § 106.472 (9/4/2000) and assert that the Permit does not identify which units were authorized as part of the same project or as part of different projects. *Id.* The Petitioners state, “If each of the listed units was authorized independently and the 106.472 (9/4/2000) PBR was claimed 306 times, then cumulative VOC emissions authorized under the general PBR limit would be 7,650 tons per year (306 * 25 TPY).” *Id.* The Petitioners also provide other examples of multiple emission units authorized by other PBRs. *Id.* at 20. Therefore, the Petitioners conclude that because the title V permit “is ambiguous as to whether these units are authorized to emit 25 tons per year of VOC, 7,650 tons per year of VOC, or some other amount, the [title V permit] fails sufficiently incorporate PBR requirements by reference and does not assure compliance with applicable requirements.” *Id.* In addition, the Petitioners claim that the issue of unclear emission limits for PBRs is complicated by the fact that many PBRs affect emission units already covered by major and minor source case-by-case NSR permits under 30 TAC § 116. *Id.* at 21–23.

Third, the Petitioners claim that the title V permit does not identify any emission unit or group of units for 20 PBRs listed in the title V permit: 106.122 (9/4/2000), 106.183 (6/18/1997), 106.227

(3/14/1997), 106.231 (9/4/2000), 106.262 (9/4/2000), 106.263 (11/1/2001), 106.352 (11/22/2012), 106.353 (3/14/1997), 106.355 (3/14/1997), 106.371 (3/14/1997), 106.373 (3/14/1997), 106.373 (7/8/1998), 106.432 (3/14/1997), 106.433 (3/14/1997), 106.451 (3/14/1997), 106.452 (3/14/1997), 106.471 (3/14/1997), 106.473 (3/14/1997), 106.512 (3/14/1997), and 106.533 (3/14/1997). *Id.* at 23. Therefore, the Petitioners contend that the title V permit is unclear as to how the PBRs apply to emission units at the Blanchard facility and thereby undermines the enforceability of PBR requirements. *Id.* (citing *Objection to Title V Permit No. O2164, Chevron Phillips Chemical Company, Philtex Plant* at ¶ 7 (August 6, 2010));²⁰ *In the Matter of Shell Chemical LP and Shell Oil Co*, Order on Petition Nos. VI-2014-04 and VI-2014-05, at 11–15 (September 24, 2015) (*Shell Deer Park Order*)).

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

Under title V of the CAA, the EPA’s part 70 regulations, and Texas’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. 42 U.S.C. § 7661c(a).²¹ “Applicable requirements,” as defined in the EPA’s and TCEQ’s rules, include the terms and conditions of preconstruction permits issued by TCEQ, including requirements contained in a PBR that is claimed by a source, as well as source-specific emission limits established through certified registrations associated with PBRs. *See* 40 C.F.R. § 70.2; 30 TAC § 122.10(2)(H).

The CAA requirement to include all applicable requirements in a title V permit can be satisfied using incorporation by reference (IBR) in certain circumstances. *See, e.g.*, White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program, 40 (March 5, 1996) (*White Paper Number 2*) (explaining how IBR can satisfy the requirements of CAA § 504).²² 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

²⁰ The EPA notes that this August 6, 2010, objection was issued under authority delegated by the EPA Administrator to Region 6 to object during the EPA’s 45-day review period. The objection letter is available at <https://www.tceq.texas.gov/assets/public/permitting/air/Announcements/epa-chevron-2164.pdf>.

²¹ CAA section 504(a) requires the following: “Each permit issued under this subchapter shall include enforceable emission limitations and standards, . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.” *Id.*; *see also* 40 C.F.R. § 70.6(a)(1) (“Each permit issued under this part shall include the following elements: (1) Emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.”); *id.* § 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.”).

²² 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).

program approval that “PBR are incorporated by reference into the title V permit by identifying . . . the PBR by its section number.” *Id.* at 63324. Notably, the EPA and TCEQ also agreed as part of the approval process that “PBRs will be cited to the lowest level of citation necessary to make clear what requirements apply to the facility.” *Id.* at 63322 n.4. This agreement is consistent with TCEQ’s regulations approved by the EPA. *See* 30 TAC § 122.142(2)(B)(i) (“Each permit shall also contain specific terms and conditions for each emission unit regarding the following: . . . the *specific regulatory citations* in each applicable requirement or state-only requirement *identifying the emission limitations and standards.*” (emphases 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.”).

First, regarding *registered* PBRs, the Petitioners have not demonstrated that the manner by which the Permit incorporates registered PBRs is inadequate. The NSR Authorization References by Emissions Unit table currently includes registration numbers next to emission units authorized by registered PBRs. 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.²³ The inclusion of these registration numbers next to the emission units to which they apply conforms with TCEQ’s EPA-approved regulations, 30 TAC § 122.142(2)(B)(i), as well as the agreements underpinning the EPA’s approval of the IBR of PBRs—namely that “PBRs will be cited to the lowest level of citation necessary to make clear what requirements apply to the facility.” 66 Fed. Reg. at 63322 n.4. Thus, the EPA denies this portion of Claim C.

Second, regarding the Petitioners’ claim that the title V permit is unclear as to what emission limits apply to emission units authorized by *unregistered* PBRs, this issue is now moot. As a result of EPA orders granting similar claims in the *Motiva* and *Pasadena Orders*,²⁴ TCEQ has clarified how the emission limits under 30 TAC § 106.4(a)(1) apply and has begun including clarifying text in the statement of basis for permits as they are renewed or revised. *See* Letter from Michael Wilson, Director, Air Permits Division, TCEQ, to Jeff Robinson, Director, Air and Radiation Division, Region 6, U.S. EPA, *Executive Director’s Response to EPA Objections Regarding Permits by Rule* (June 13, 2018) (the June 13, 2018 Wilson Letter). Specifically, within the Statement of Basis that accompanied the January 15, 2020 revision to Blanchard’s title V permit, TCEQ included the following explanation, in relevant part:

The TCEQ has interpreted the emission limits prescribed in 30 TAC §106.4(a) as both emission thresholds and default emission limits. The emission limits in 30 TAC §106.4(a) are all considered applicable to each facility²⁵ as a threshold matter to ensure that the owner/operator qualifies for the PBR authorization. Those same

²³ *See* https://www.tceq.texas.gov/permitting/air/nav/air_status_permits.html.

²⁴ *In the Matter of Motiva, Port Arthur Refinery*, Order on Petition No. VI-2016-23 at 27–32 (May 31, 2018); *In the Matter of Pasadena Refining System, Pasadena Refinery*, Order on Petition No. VI-2016-20 at 10–15 (May 1, 2018).

²⁵ The EPA notes that TCEQ’s regulations define “facility” as an individual emission unit. *See* 30 TAC § 116.10(4); 79 Fed. Reg. 40666, 40668 n.3 (July 14, 2014).

emission limits are also the default emission limits if the specific PBR does not further limit emissions or there is no lower, certified emission limit claimed by the owner/operator.

Statement of Basis for Permit No. O1541 at 324 (October 31, 2019). Thus, the EPA denies this portion of Claim C.

Third, regarding the Petitioners' claim that some PBRs are not associated with any emission units in the title V permit, the Petitioners have demonstrated that neither the Permit nor permit record establish to which emission units certain PBRs identified by the Petitioners apply.²⁶ While the New Source Review Authorization References by Emission Unit table identifies emission units for most of the PBRs in the title V permit, neither this table nor any other portion of the permits identify the specific emission units to which the aforementioned PBRs apply.

Direction to TCEQ: The EPA understands that TCEQ has begun a process to clarify which PBRs only apply to insignificant units at all facilities as their title V permits are renewed or revised. For example, in the statement of basis accompanying the pending revision to Blanchard's title V permit, TCEQ noted that the following PBRs apply only 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 Permit No. O1541 at 7–8 (June 25, 2021). To the extent any PBRs in the Blanchard title V permit apply only to insignificant units, such changes would likely satisfy the requirements of the CAA and TCEQ's approved program.²⁷

For the remaining PBRs that do not apply only to insignificant units, TCEQ must explain to which emission units the PBRs identified in the Petition (and which still remain in the title V permit) apply. To accomplish this, TCEQ could update the title V permit and list these PBRs next to the applicable emission units in the New Source Review Authorization References by Emission Unit table.

Claim D: The Petitioners Claim That the Proposed Permit Fails to Assure Compliance with Emission Limits and Operating Requirements Established by Blanchard's New Source Review Permits, Including Permits by Rule.

Within Claim D, the Petitioners assert:

The Proposed Permit is deficient because it fails to establish monitoring, reporting, and recordkeeping requirements that assure ongoing compliance with emission

²⁶ The EPA notes that some of the PBRs identified by the Petitioners have been removed from the latest January 15, 2020 version of the title V permit, but this problem still persists for other PBRs identified by the Petitioners.

²⁷ In *White Paper Number 2*, the EPA explained that Part 70 allowed "considerable discretion to the permitting authority in tailoring the amount and quality of information required" for insignificant units in title V permits. *White Paper Number 2* at 30. The EPA explained that applicable requirements related to insignificant units can be addressed in title V permits with minimal or no reference to any specific emissions unit, activity, or emissions information. *White Paper Number 2* at 4, 31.

limits in [NSR] permits that it incorporates by reference and because the permit record does not contain a reasoned explanation supporting the Executive Director's determination that monitoring provisions in the Proposed Permit assure compliance with these requirements.

Petition at 27–28. Before presenting specific claims, the Petitioners provide background on the requirements of title V related to monitoring. *Id.* at 30. The Petitioners assert that title V permits must contain monitoring, recordkeeping, and reporting conditions that assure compliance with all applicable requirements, including emission limits in NSR permits and PBRs that are incorporated by reference into a title V permit. *Id.* (citing 42 U.S.C. § 7661c(a), (c); 40 C.F.R. §§ 70.2, 70.6(a)(3), (c)(1); *In the Matter of Wheelabrator Baltimore, L.P.*, Order on Petition, Permit No. 24-510-01886 at 10 (April 14, 2010) (*Wheelabrator Baltimore Order*)). Moreover, the Petitioners contend that the “rationale for the selected monitoring requirements must be clear and documented in the permit record.” *Id.* (citing 40 C.F.R. § 70.7(a)(5); *In the Matter of United States Steel, Granite City Works*, Order on Petition No. V-2009-03 at 7–8 (January 31, 2011) (*US Steel I Order*)). The Petitioners acknowledge that TCEQ's Statement of Basis for the Permit states “With the exception of any emission units listed in the Periodic Monitoring or CAM Summaries in the [title V permit], the TCEQ Executive Director has determined that the permit contains sufficient monitoring, testing, recordkeeping, and reporting requirements that assure compliance with the applicable requirements.” *Id.* at 29 (quoting Statement of Basis at 278). The Petitioner asserts that neither the periodic monitoring or CAM summaries address the requirements at issue in Claim D, and that “the Statement of Basis does not provide a reasoned justification for the Executive Director's determination that existing provisions in Blanchard's NSR permits and PBRs assure compliance with applicable permit limits and operating requirements.” *Id.* at 29–30.

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

- Claim D.1 addresses monitoring associated with PBRs (Petition pages 30–32, 40–43);
- Claim D.2 addresses monitoring of emission limits established by Flexible Permit No. 47256/PSDTX402M3 (Petition pages 32–33, 43);
- Claim D.3 addresses monitoring of planned maintenance, startup, and shutdown (MSS) activities authorized by Flexible Permit No. 47256/PSDTX402M3 (Petition pages 33, 43);
- Claim D.4 addresses monitoring of VOC emissions from flares authorized by Flexible Permit No. 47256/PSDTX402M3 (Petition pages 34–35, 44–45);
- Claim D.5 addresses monitoring of VOC emissions from pressure tanks authorized by Flexible Permit No. 47256/PSDTX402M3 (Petition pages 35, 45–46);
- Claim D.6 addresses monitoring of VOC emissions from material transfer operations authorized by Flexible Permit No. 47256/PSDTX402M3 (Petition pages 35–36, 46–47); and
- Claim D.7 addresses monitoring of CO, NO_x, PM₁₀, and VOC emission limits for a pipe still and associated equipment in Permit No. 19599/PSDTX023 (Petition pages 36–40, 47–50).

Claim D.1: Monitoring associated with PBRs

Petitioners' Claim: The Petitioners claim that the title V permit does not assure compliance with applicable PBRs because it does not include specific monitoring for these requirements as required by 42 U.S.C. § 7661c(a) and (c) and 40 C.F.R. § 70.6(a)(3) and (c)(1). Petition at 30–32. In particular, among the more than 500 units authorized by PBRs, the Petitioners contend that PBR 30 TAC § 106.472 (9/4/2000) authorizes emissions from more than 306 tanks and loading facilities at Blanchard. *Id.* at 31. The Petitioners assert that this PBR contains nothing more than a list of chemicals and does not contain any specific monitoring. *Id.* The Petitioners claim that when a PBR rule does not contain specific monitoring, the only monitoring, recordkeeping, or reporting that applies is contained in Special Conditions 29 and 30 of the title V permit, which contain a “non-exhaustive menu of options that Blanchard may pick and choose from at its discretion to demonstrate compliance.” *Id.* at 31. The Petitioners contend that Special Conditions 29 and 30 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 31–32 (citing *Wheelabrator Baltimore Order* at 10). Moreover, the Petitioners contend that these provisions are so vague that the EPA and the public cannot evaluate “whether the monitoring methods Blanchard actually uses to determine compliance with PBR requirements are consistent with Title V.” *Id.* at 31.

Additionally, the Petitioners contend that Special Condition 30 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 32 (citing *Shell Deer Park Order* at 15). The Petitioners claim that all of the 17 compliance files they were able to locate on TCEQ’s website were labeled as confidential. *Id.* at 42–43.

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

Special Condition 29 of the Blanchard 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 22.

Special Condition 30 of the Blanchard 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).

Id.

The Petitioners have demonstrated that with regard to the monitoring, recordkeeping, and reporting requirements for PBRs, the Blanchard title V permit does not assure compliance with the CAA, part 70, and Texas's approved title V program.²⁸ Specifically, the Petitioners have demonstrated that PBRs incorporated by reference into the title V permit do not contain any additional PBR-specific monitoring, recordkeeping, and reporting and rely solely on the general requirements in Special Conditions 29 and 30. Further, the Petitioners have demonstrated that the general, large list of monitoring, recordkeeping, and reporting options under Special Conditions 29 and 30 may not be adequate for all PBRs. As explained in the EPA's *Motiva Order*, a streamlined approach to monitoring, such as in Special Conditions 29 and 30, can be appropriate for generally applicable requirements for insignificant units. *Motiva Order* at 26 (citing *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

²⁸ Regarding the Petitioners' general assertion that the title V permit is deficient because Special Condition 30 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 Blanchard title V permit under Special Condition 30. The Petitioners' suggestion that some of the compliance files are being treated as confidential and are not publicly available might indicate a problem with TCEQ's administration of its operating permits program. See 40 C.F.R. § 70.4(b)(3)(viii). However, the Petitioners have not demonstrated that this concern is related to a flaw in the Permit that could be resolved by an EPA objection.

U.S.C. § 7661c(c); *see id.* § 7661c(a); 40 C.F.R. § 70.6(a), (a)(3), (c); 30 TAC § 122.142(c).²⁹ Special Condition 29 incorporates the general requirements for PBRs found in 30 TAC Chapter 106, Subchapter A. These requirements do not specify any monitoring methods for demonstrating compliance with the emission limits and standards set forth in the PBRs or for the general emission limits found in Subchapter A. Likewise, Special Condition 30 does not specify any particular monitoring requirements and instead allows Blanchard to select the monitoring, recordkeeping, or reporting it will use to assure compliance. Because neither these generic permit terms nor the PBRs themselves require Blanchard 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 29 and 30 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.³⁰ Therefore, the Petitioners have demonstrated that for PBRs authorizing non-insignificant units, Special Conditions 29 and 30 do not contain monitoring, recordkeeping, and reporting requirements sufficient to assure compliance with the requirements in each PBR.

Direction to TCEQ: As explained with respect to Claim C, 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, including in the statement of basis accompanying the draft minor revision to Blanchard’s title V permit. *See* Statement of Basis for Draft Permit No. O1541 at 7–8, 331. (June 25, 2021). To the extent that any PBRs apply solely to insignificant units, TCEQ should make

²⁹ 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).

³⁰ *See* RTC at 14. The requirement that a title V permit contain sufficient monitoring and the requirement that sources submit compliance certifications are independent (albeit related) obligations.

those clarifications in the Permit and permit record, as necessary, and evaluate whether the general monitoring conditions are sufficient to assure compliance for these insignificant units.³¹

For PBRs that apply to non-insignificant units, TCEQ should specify the monitoring, recordkeeping, and reporting that assures compliance with the requirements of the PBRs in the Blanchard title V permit. If any underlying PBRs contain monitoring, recordkeeping, and reporting, TCEQ should identify those PBRs in the permit record and determine if the monitoring in those PBRs is adequate. On the other hand, if any PBRs do not contain any underlying monitoring, recordkeeping, or reporting, like PBR 30 TAC 106.472 (9/4/2000), then TCEQ should specify what monitoring, recordkeeping, or reporting will assure compliance with the requirements of those PBRs and the emission limits in 30 TAC § 106.4(a)(1) as they apply to units authorized by those PBRs. If the title V permit, Chapter 116 NSR permits, NSPS, NESHAP, or enforceable representations in an application already contain adequate terms to assure compliance with PBRs, then TCEQ should amend the Permit to identify such terms and explain how these requirements assure compliance with the requirements and emission limits for each PBR. However, if the title V permit and all enforceable, properly incorporated documents do not contain monitoring, recordkeeping, and reporting requirements sufficient to assure compliance with the PBR requirements, then TCEQ must add such terms to the Permit.

The EPA notes that TCEQ is planning to specify the monitoring for certain PBRs in a PBR Supplemental Table provided by applicants. *See* Letter from Tonya Baer, Deputy Director of Air, TCEQ, to David Garcia, Director, Air and Radiation Division, Region 6, U.S. EPA, *Permits by Rule Programmatic Changes*, at 2 (May 11, 2020) (the May 11, 2020 Baer Letter). Specifically, the EPA understands that TCEQ is now requiring title V applicants to fill out the PBR Supplemental Table, which TCEQ will then incorporate into the title V permit through a general condition in the title V permit. TCEQ has proposed a similar approach for the Blanchard title V permit. *See* Draft Minor Revision to Permit No. O1541 at 17 (June 29, 2021); *see also* Statement of Basis for Draft Permit No. O1541 at 331 (June 25, 2021).

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

Information that would be . . . incorporated by reference into the issued permit must first be currently applicable and available to the permitting authority and public. . . . Referenced documents must also be specifically identified. Descriptive information such as the title or number of the document and the date of the document must be included so that there is no ambiguity as to which version of which document is being referenced. Citations, cross references, and incorporations by reference must be detailed enough that the manner in which any referenced material applies to a facility is clear and is not reasonably subject to misinterpretation. Where only a portion of the referenced document applies, applications and permits must specify

³¹ The EPA has explained that if a regular program of monitoring, recordkeeping, and reporting for insignificant units would not significantly enhance the ability of the permit to assure compliance with the applicable requirements, general monitoring requirements or even no monitoring can sometimes satisfy title V and 40 C.F.R. § 70.6(a)(3)(i). *See White Paper Number 2* at 32.

the relevant section of the document. Any information cited, cross referenced, or incorporated by reference must be accompanied by a description or identification of the current activities, requirements, or equipment for which the information is referenced.

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

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

Id. at 38.

Title V applications can be hundreds of (if not over a thousand) pages long, and a search of the TCEQ online database will usually return multiple title V applications for a specific facility that has had multiple revisions and renewals. Thus, a general statement in the title V permit incorporating the PBR Supplemental Table without providing additional information detailing where the table is located is not specific enough to effectively incorporate these requirements by reference. In order to satisfy the requirement in title V that the Permit “set forth,” “include,” or “contain” monitoring to assure compliance with all applicable requirements, a special condition incorporating the PBR Supplemental Table would need to include, at minimum, the date of the application and specific location of the table, for example by providing a page number from the application. Alternatively, a more straightforward approach that would obviate these IBR-related concerns would be for TCEQ to directly include (*i.e.*, attach) this PBR Supplemental Table as an enforceable part of the title V permit itself.

Additionally, although the PBR Supplemental Table requires the applicant to specify monitoring, recordkeeping, and reporting for “claimed (not registered)” PBRs, the table does not appear to address monitoring for registered PBRs. For registered PBRs, the EPA understands that TCEQ intends to start having applicants include monitoring in the registration form.³² However, TCEQ has not indicated how it will appropriately incorporate that monitoring into an enforceable part of the title V permit. The EPA understands that TCEQ’s EPA-approved regulations state: “All representations with regard to construction plans, operating procedures, and maximum emission rates in any certified registration under this section become conditions upon which the facility permitted by rule shall be constructed and operated.” 30 TAC § 106.6(b). However, the fact that the PBR regulations state that information in the application will be conditions upon which the facility permitted by rule shall be constructed and operated has little to no bearing on whether

³² TCEQ has stated that it will require applicants to “[u]pdate PBR application representations with monitoring that is sufficient to demonstrate compliance.” May 11, 2020 Baer Letter.

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).³³ 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).³⁴ 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.³⁵ 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.

Claim D.2: Monitoring of Emission Limits in Flexible Permit No. 47256

Petitioners’ Claim: The Petitioners claim that neither the title V permit nor Flexible Permit No. 47256 (which is incorporated into the title V permit) identify calculation methodologies for emissions from all unit types at the facility. Petition at 32. The Petitioners assert that TCEQ’s flexible permit program requires the permit to “specify methods for calculating annual and short term emissions for each pollutant for a given type of facility.” *Id.* (quoting 30 TAC § 116.715(c)(B)). The Petitioners contend that while Special Condition 56 in Flexible Permit No. 47256/PSDTX402M3 lists calculations methodologies for some units, that permit does not specify calculation methodologies for all unit types. *Id.* at 32–33. The Petitioners then state: “For facility types that are not listed, like Blanchard’s flares, the permit provides ‘the permit holder shall use the methodology which was used in the permit application.’” *Id.* at 33. The Petitioners

³³ *See supra* note 29.

³⁴ *See supra* note 22.

³⁵ *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] NSR permits so incorporated are fully enforceable under the full approved title V program that we are approving in this action.”).

contend, however, that the Permit does not identify or effectively incorporate the permit applications that contain the relevant information. *Id.* Accordingly, the Petitioners conclude that the Permit violates the flexible permit program rules and also fails to assure compliance with the emission limits established by the flexible permit. *Id.*

In addition, the Petitioners claim that TCEQ did not address public comments related to Special Condition 56 and 30 TAC § 116.715(c)(B), and that the state “failed to address how emissions from various kinds of units, including flares, should be calculated . . .” *Id.* at 43.

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

The Petitioners’ general allegation that Flexible Permit No. 47256/PSDTX402M3 only “lists calculation methods for some, but not all types of facilities at the Galveston Bay Refinery,” Petition at 32, does not demonstrate a flaw in the permit. Other than a brief mention of flares,³⁶ the Petitioners do not identify any emission units or emission limits for which the permit lacks sufficient monitoring, recordkeeping or reporting. That is, the Petitioners have not identified any specific emission limits or emission units that rely exclusively on Special Condition 56 in Flexible Permit No. 47256/PSDTX402M3 to establish a monitoring or calculation methodology. Thus, although the EPA agrees with some of the Petitioners’ general concerns with the permit’s reference to unidentified permit applications (as discussed with respect to Claims D.1, D.5, and D.7), the Petitioners have not presented sufficient information, citation, or analysis within Claim D.2 to demonstrate how this general concern is relevant to whether the title V permit assures compliance with any specific permit terms.³⁷ Accordingly, the Petitioners have not demonstrated a basis for an EPA objection on this issue.³⁸

Claim D.3. Monitoring of Planned MSS Activities

Petitioners’ Claim: The Petitioners claim that neither the title V permit nor Flexible Permit No. 47256/PSDTX402M3 specify monitoring and emission calculation methods to assure compliance with emission limits during planned MSS. Petition at 33. Instead, the Petitioners assert that Special Condition 68 in Flexible Permit No. 47256/PSDTX402M3 only requires that “[e]missions shall be estimated using good engineering practice and methods to provide reasonably accurate representations for emissions.” *Id.* at 33 (quoting Permit No. 47256/PSDTX402M3, Special Condition 68). The Petitioners claim that this condition is too vague and that the title V permit “must identify the specific reasonable measures the operator must take to assure compliance with the applicable requirement.” *Id.* (citing *In the Matter of*

³⁶ The only example provided by the Petitioners is a reference to “flares.” Although Special Condition 56 does not specifically describe a calculation methodology with respect to flares, other portions of Permit No. 47256/PSDTX402M3 (such as Special Condition 14) do establish various monitoring and recordkeeping requirements for flares, which the EPA’s response separately addresses with respect to Claim D.4.

³⁷ See *supra* notes 6 and 7 and accompanying text.

³⁸ To the extent that the Petitioners assert that TCEQ did not respond to public comments raising these issues, it is difficult to understand precisely what the Petitioners expected TCEQ to address, given the general nature of these comments and the lack of reference to specific permit terms. With some exceptions discussed with respect to Claim D.7, it appears that TCEQ responded to most comments challenging monitoring terms associated with specific emission units or limits.

Scherer Steam Electric Generating Plant, Order on Petition Nos. IV-2012-1, IV2012-2, IV-2012-3, IV-2012-4, and IV-2012-5, at 18-20 (April 14, 2014)). In addition, the Petitioners claim that TCEQ did not address their comments on this issue. *Id.* at 43.

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

Similar to Claim D.2, the Petitioners' general allegations in Claim D.3 are insufficient to demonstrate that the Permit does not contain sufficient monitoring to assure compliance with any particular emission limits or permit terms. The Petitioners mention "applicable emission limits" in passing, but do not identify any such limits nor other MSS requirements that lack sufficient monitoring. In fact, Special Conditions 57–67 in Permit No. 47256/PSDTX402M3 establish numerous requirements applicable to multiple types of emission units during MSS, including specific monitoring, recordkeeping, and reporting requirements designed to assure compliance with these requirements. The Petitioners neither acknowledge those conditions³⁹ nor identify any emission units or emission limits that are not sufficiently supported by these specific conditions. That is, the Petitioners have not identified any specific emission limits or emission units that rely exclusively on Special Condition 68 to establish a monitoring or calculation methodology. Thus, although the EPA shares the Petitioners' concerns with the enforceability of the vague provisions of Special Condition 68, the Petitioners have not presented sufficient information, citation, or analysis within Claim D.3 to demonstrate how these general concerns are relevant to whether the title V permit assures compliance with any specific permit terms.⁴⁰ Accordingly, the Petitioners have not demonstrated a basis for an EPA objection on this issue.⁴¹

Claim D.4: Monitoring of VOC Emissions from Flares

Petitioners' Claim: The Petitioners claim that the monitoring associated with VOC emissions from multiple flares (Refinery Flare No. 2, Refinery Flare No. 3, Refinery Flare No. 4, ULC Flare, SRU A/B Flare, SRU C/D Flare, Flare 8, and CFHU Flare 1) is insufficient to assure compliance with multi-unit emission caps established by Flexible Permit No. 47256/PSDTX402M3. Petition at 34. Specifically, the Petitioners note that Flexible Permit No. 47256/PSDTX402M3 establishes VOC emission limits of 1,446.27 lbs./hour and 1,567.73 tons per year, which apply to the previously referenced flares as well as other units. *Id.* The Petitioners assert that the permit fails to assure compliance with these VOC emission limits because the permit allows the source to presume a 98 percent destruction efficiency for flare

³⁹ See *supra* note 8 and accompanying text.

⁴⁰ See *supra* notes 6 and 7 and accompanying text.

⁴¹ To the extent that the Petitioners assert that TCEQ did not respond to public comments raising these issues, it is difficult to understand precisely what the Petitioners expected TCEQ to address, given the general nature of these comments and the lack of reference to specific permit terms. With some exceptions discussed with respect to Claim D.7, it appears that TCEQ responded to most comments challenging monitoring terms associated with specific emission units or limits.

VOC emissions so long as Blanchard complies with general provisions for flares found at 40 C.F.R. § 60.18. *Id.*⁴²

The Petitioners challenge the 98 percent VOC destruction efficiency presumption and assert that the Permit does not contain requirements that ensure this 98 percent destruction efficiency will be achieved. *Id.* For support, the Petitioners cite an EPA study that, according to the Petitioners, found that flares complying with requirements equivalent to those in Blanchard’s permit only achieved an average destruction efficiency of 93.9 percent. *Id.* (citing Petroleum Refinery Sector Rule: Flare Impact Estimates, EPA-HQ-OAR-2010-0682-0209 at 9 (January 16, 2014)). Moreover, the Petitioners contend that “TCEQ conducted an analysis and reached the same conclusion: ‘operating an assisted flare in compliance with 40 C.F.R. § 60.18 does not ensure that the flare will achieve [a] 98% [VOC destruction efficiency].’” *Id.* at 34–35 (quoting TCEQ, 2015 Emission Inventory Guidelines, RG-360/15 at A-43 (January 2016) (alterations in Petition)).

The Petitioners challenge TCEQ’s contention that there are no currently available EPA-approved mechanisms for testing or monitoring emissions from a flare, and assert that the EPA has “developed a method for monitoring and controlling emissions from an operating refinery flare that assures the flare will continuously achieve a VOC destruction efficiency of 98%” *Id.* at 44. The Petitioners refer to their explanation in public comments, which explored these issues in greater depth. *Id.* (citing Supplementary Public Comments from Environmental Integrity Project on the Blanchard Draft Permit, Permit No. O1541 at 14–15 (January 19, 2016)).

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

The Petitioners have demonstrated that the title V permit does not contain the necessary monitoring to assure that Blanchard’s steam-assisted flares achieve a 98 percent VOC destruction efficiency. As the Petitioners point out, both the EPA and TCEQ have determined that air- and steam-assisted flares at refineries cannot be guaranteed to achieve a 98 percent VOC destruction efficiency based on compliance with the EPA’s General Provisions in 40 C.F.R. § 60.18 alone. *E.g.*, 79 Fed. Reg. 36879, 36905 (August 29, 2014); TCEQ, 2015 Emission Inventory Guidelines, RG-360/15 at A-43 (January 2016). Accordingly, in 2015, the EPA finalized additional requirements in the part 63, subpart CC NESHAP specifically designed to assure that assisted flares at refineries actually achieve a 98 percent VOC destruction efficiency. *See* 40 C.F.R. § 63.670; 80 Fed. Reg. 75178, 75211 (December 1, 2015).⁴³ Because the title V

⁴² For support, the Petitioners cite Flexible Permit No. 47256, Special Conditions 14 and 56, which allow Blanchard to calculate emissions from flares using the method described in an unspecified permit application. The Petitioners then cite a permit application (Petition Ex. 9) that indicates that Blanchard’s flares continuously achieve at least 98 percent VOC destruction efficiency.

⁴³ The EPA explained in its final rule: “Based on the results of all of our analyses, the EPA is finalizing a single minimum NHVcz operating limit for flares subject to the Petroleum Refinery MACT standards of 270 BTU/scf during any 15-minute period. The agency believes, given the results from the various data analyses conducted, that this operating limit is appropriate, reasonable and will ensure that refinery flares meet 98-percent destruction efficiency at all times when operated in concert with the other suite of requirements refinery flares need to achieve (*e.g.*, flare tip velocity requirements, visible emissions requirements, and continuously lit pilot flame requirements).” 80 Fed. Reg. at 75211.

permit does not appear to include or incorporate these or similar requirements,⁴⁴ it does not ensure that Blanchard's flares achieve a 98 percent VOC destruction efficiency, and accordingly it does not assure compliance with the VOC emission limits in Flexible Permit No. 47256/PSDTX402M3 that are based on this presumed destruction efficiency.

Notably, Blanchard's Galveston Bay Refinery became subject to the new subpart CC NESHAP requirements on January 30, 2019 (subsequent to the filing of the Petition). 40 C.F.R. § 63.640(s). Therefore, as a practical matter, so long as Blanchard complies with these requirements, it should be able to presume a 98 percent VOC destruction efficiency. *See* 80 Fed. Reg. at 75211. Once the title V permit is updated to include the applicable requirements of the refinery NESHAP (including 40 C.F.R. § 63.670), the title V permit will further assure this result, and the Petitioners' concerns should be resolved. However, the most recent January 15, 2020 version of the title V permit, which incorporates the July 8, 2019 version of Flexible Permit No. 47256/PSDTX402M3, does not appear to contain these new requirements, hence the EPA's present objection. *E.g.*, 42 U.S.C. § 7661c(a); 40 C.F.R. §§ 70.6(a)(1), 70.7(f)(1)(i); 30 TAC § 122.142(b)(2)(B).

Direction to TCEQ: TCEQ must revise the title V permit to include the updated subpart CC refinery NESHAP standards applicable to Blanchard's flares, including the requirements in 40 C.F.R. § 63.670. TCEQ could accomplish this by specifying the applicable requirements in the Applicable Requirements Summary table. To the extent that these requirements will be used to demonstrate compliance with emission limits in Flexible Permit No. 47256/PSDTX402M3, either that permit, or the title V permit, must indicate this connection. *See* the EPA's discussion with respect to Claim D.7.

Claim D.5: Monitoring of VOC Emissions from Tanks

Petitioners' Claim: The Petitioners claim that the title V permit does not establish any monitoring, recordkeeping, and reporting to assure compliance with a prohibition against venting VOC emissions from pressure tanks. Petition at 35 (citing Flexible Permit No. 47256/PSDTX402M3, Special Condition 6). The Petitioners address TCEQ's assertion that additional monitoring is not required because tank operating pressure and relief value set pressures can be found in permit application representations. *Id.* at 45. The Petitioners conclude that even if these application representations are enforceable, the title V permit is deficient because it does not include or appropriately incorporate those requirements in order to assure compliance with Special Condition 6. *Id.* at 45–46.

⁴⁴ The EPA's General Provisions from 40 C.F.R. § 60.18, as reflected in the November 2, 2015 version of Permit No. 47256/PSDTX402M3 and incorporated into the February 22, 2017 version of the title V permit upon which the Petition was based, are not enough to account for issues related to over-steaming that are known to reduce flare destruction efficiency. To TCEQ's credit, Flexible Permit No. 47256/PSDTX402M3 does impose requirements beyond those required by the EPA's General Provisions—specifically, requirements for a continuous flow monitor and periodic analyses of the composition of vent gas heading to the flare. *See* Special Condition 14.D. However, Flexible Permit No. 47256/PSDTX402M3 lacks other essential elements of the EPA's refinery rule, such as the monitoring of assist steam flow rates (among other things) and the calculation of the net heating value of gas in the combustion zone. 40 C.F.R. § 63.670(e), (i), (m). Monitoring of assist steam is critical to accurately calculating the heating values of the gas combusted at the flare tip, in order to ensure that over-steaming is not reducing flare performance (*i.e.*, VOC destruction efficiency).

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

The Petitioners have demonstrated that the title V permit does not contain adequate monitoring to assure compliance with the prohibition against venting VOC from pressure tanks under Flexible Permit No. 47256/PSDTX402M3. Special Condition 6 of that permit requires that “Pressure tanks shall be maintained such that there are no emissions of VOC to the atmosphere during normal operating conditions (including filling operations),” but does not contain any provisions identifying how the source will monitor or demonstrate compliance with this requirement.⁴⁵

Instead, in response to public comments on this issue, TCEQ suggests that compliance with this prohibition is ensured so long as tank operating pressures remaining below a set pressure for the tank relief valve. RTC at 22. TCEQ then explains that these values only exist in application representations, which TCEQ claims are enforceable. *Id.* However, TCEQ does not identify any condition in any permit that incorporates these operating pressures or requires Blanchard to monitor the tank operating pressure in comparison to the representations made in the application.

The EPA understands that TCEQ’s EPA-approved regulations provide that sources in Texas are bound by representations made in their applications for NSR permits, such that these application representations can become legally enforceable.⁴⁶ However, the fact that application representations may be legally enforceable in Texas has little to no bearing on whether these representations are properly “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).⁴⁷ That is, a source’s obligation to independently comply with a requirement to which it is subject—whether it be contained in a NSPS, NESHAP, SIP, court-approved Consent Decree, NSR permit, or NSR permit application representation—does not inherently or automatically result in that requirement being included in a title V permit. For a requirement to be included in a title V permit, the permit must include it.

To be sure, this “setting forth,” “including,” or “containing” may, in certain circumstances, be accomplished by incorporating requirements like application representations into the title V permit by reference (or even by incorporating them into a NSR permit that is then incorporated by reference into the title V permit).⁴⁸ However, to incorporate something by reference, one must first *reference* it. As the EPA has explained:

⁴⁵ The July 8, 2019 version of Flexible Permit No. 47256/PSDTX402M4/N258/GHGPSDTX166, as incorporated into the January 15, 2020 version of the title V permit, contains an identical condition to that contained in the November 2, 2015 version of Permit No. 47256/PSDTX402M3, as incorporated into the February 22, 2017 version of the title V permit, on which the Petition is based.

⁴⁶ See 30 TAC § 116.116(a) (“The following are the conditions upon which a permit, special permit, or special exemption are issued: (1) representations with regard to construction plans and operation procedures in an application for a permit, special permit, or special exemption; and (2) any general and special conditions attached to the permit, special permit, or special exemption itself.”).

⁴⁷ See *supra* note 29.

⁴⁸ See generally *White Paper Number 2* at 36–41 (explaining how IBR can satisfy the requirements of CAA § 504).

Information that would be . . . incorporated by reference into the issued permit must first be currently applicable and available to the permitting authority and public. . . . Referenced documents must also be specifically identified. Descriptive information such as the title or number of the document and the date of the document must be included so that there is no ambiguity as to which version of which document is being referenced. Citations, cross references, and incorporations by reference must be detailed enough that the manner in which any referenced material applies to a facility is clear and is not reasonably subject to misinterpretation. Where only a portion of the referenced document applies, applications and permits must specify the relevant section of the document. Any information cited, cross referenced, or incorporated by reference must be accompanied by a description or identification of the current activities, requirements, or equipment for which the information is referenced.

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

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

Id. at 38.

As explained with respect to Claim D.1, 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 minor NSR requirements, provided the program was implemented correctly. *See* 66 Fed. Reg. 63318, 63321–32 (December 6, 2001).⁴⁹ In its program approval, the EPA indicated that monitoring specified in the *terms and conditions* of a minor NSR permit establishing monitoring would be incorporated into the title V permit.⁵⁰ Nowhere during this approval process did the EPA suggest that unidentified application representations would be considered to be incorporated by reference into a title V permit. Rather, as far as application representations are concerned, TCEQ's EPA-approved title V regulations expressly require that such representations be identified. *See* 30 TAC § 122.140 (“The only representations in a permit application that

⁴⁹ *See supra* note 22.

⁵⁰ *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] NSR permits so incorporated are fully enforceable under the full approved title V program that we are approving in this action.”).

become conditions under which a permit holder shall operate are the following: . . . (3) any representation in an application *which is specified in the permit* as being a condition under which the permit holder shall operate.” (emphasis added)).

Here, there can be no doubt that Blanchard’s title V permit incorporates by reference Flexible Permit No. 47256/PSDTX402M3 and all the terms and conditions therein.⁵¹ However, it does not follow that all potentially relevant representations from unidentified permit applications underlying various iterations of this NSR permit—some of which may have been superseded by, or conflict with, subsequent permit terms or application representations—are also effectively incorporated by reference into the title V permit. Nothing within the title V permit or Flexible Permit No. 47256/PSDTX402M3 references any application representations related to VOC emissions from the pressure tanks; application representations are first mentioned in TCEQ’s RTC, and there only obliquely. This is not sufficient to satisfy CAA § 504(c) and 40 C.F.R. § 70.6(c)(1). If TCEQ wishes to rely on a source’s application representations to satisfy the monitoring requirements of title V, the application representations must be specifically identified in an enforceable permit document.

Additionally, TCEQ suggests that “any exceedance of the operating pressure that resulted in a release would be reported as an emission event under 30 TAC Chapter 101.” RTC at 22. To be sure, any exceedance of this prohibition must be reported. But without monitoring or recordkeeping to determine *whether* an exceedance has occurred, this reporting provision has little practical value.

Direction to TCEQ: TCEQ must ensure that the title V permit includes monitoring, recordkeeping, and reporting sufficient to assure compliance with the prohibition on VOC emissions from the pressure tanks under Flexible Permit No. 47256/PSDTX402M3. If part of this monitoring protocol is based on representations in a permit application, TCEQ must appropriately incorporate those into a permit document (either the underlying NSR permit or the title V permit) by specifying the version or date of the application and the specific location of the representations. TCEQ should also consider whether some form of monitoring or recordkeeping (*e.g.*, of operating pressure) is necessary to ensure that the pressure tanks do not exceed the pressure values stated in the application representations. To the extent that some more direct indicator of venting could be monitored, this could be added to the permit in lieu of incorporating the pressure-related application representations. TCEQ could either make these revisions directly to Blanchard’s title V permit, or it could add any necessary monitoring to Flexible Permit No. 47256/PSDTX402M3 and then promptly revise the title V permit to incorporate the updated version of Flexible Permit No. 47256/PSDTX402M3. In either case, the *title V permit* must ultimately contain the necessary monitoring in order to resolve the EPA’s objection.

⁵¹ Specifically, Special Condition 28 of the title V permit states: “Permit holder shall comply with the requirements of New Source Review authorizations issued or claimed by the permit holder for the permitted area, including permits, permits by rule, standard permits, flexible permits, . . . referenced in the New Source Review Authorization References attachment. These requirements: A. Are incorporated by reference into this permit as applicable requirements.” Final Permit at 12. Permit No. 47256 is listed in the New Source Review Authorization References attachment. Final Permit at 777.

Claim D.6: Monitoring of VOC from Material Transfer Operations

Petitioners' Claim: The Petitioners claim that the title V permit does not assure compliance with a requirement to demonstrate a 99.9 percent VOC collection efficiency for the transfer of materials from inerted ocean-going marine vessels because the permit does not identify or include the test protocol used to determine compliance. Petition at 35 (citing Flexible Permit No. 47256/PSDTX402M3, Special Condition 8.B; *In the Matter of WE Energies Oak Creek Power Plant*, Order on Petition, Permit No. 241007690-P10 at 25–26 (June 12, 2009)). The Petitioners acknowledge TCEQ's assertion that the test protocol can be found in the permit record for Flexible Permit No. 47256/PSDTX402M3, and argue that TCEQ's preference to include such information in files accompanying an underlying NSR permit has no bearing on TCEQ's obligation to issue title V permits that assure compliance with all applicable requirements. *Id.* at 46 (citing 42 U.S.C. § 7661c(a) and (c)). Because the Permit does not identify or properly incorporate the test protocol, the Petitioners assert it is deficient. *Id.* at 47 (citing *US Steel I Order* at 43).⁵²

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

Special Condition 8.B of Flexible Permit No. 47256/PSDTX402M3⁵³ provides the following (among other requirements):

VOC collection efficiency tests of inerted ocean-going marine vessels shall be conducted as follows to demonstrate a collection efficiency of 99.9% as represented in the permit application.

(1) Testing shall be conducted using the protocol agreed to by the Executive Director. Any revision to the approved testing protocol shall require approval from the Executive Director prior to implementation. The permittee shall maintain a copy of the approved protocol on site.

The Petitioners have demonstrated that the title V permit does not assure compliance with the 99.9 percent VOC collection efficiency requirement in Special Condition 8.B of Flexible Permit No. 47256/PSDTX402M3 because the permit does not effectively incorporate the relevant test protocol.

In response to public comments on this issue, TCEQ explained that the relevant test protocol was "approved by TCEQ on September 4, 2015, and can be found in the permit record for Permit No. 47256." RTC at 22–23. However, as TCEQ's response effectively concedes, neither Flexible

⁵² The Petitioners also claim that TCEQ cannot incorporate by reference the test method because it is a major NSR requirement. *Id.*

⁵³ The July 8, 2019 version of Permit No. 47256/PSDTX402M4/N258/GHGPSDTX166, as incorporated into the January 15, 2020 version of the title V permit, contains an identical condition to that contained in the November 2, 2015 version of Permit No. 47256/PSDTX402M3, as incorporated into the February 22, 2017 version of the title V permit, on which the Petition is based.

Permit No. 47256/PSDTX402M3 nor the title V permit identifies the test protocol, and neither permit incorporates the test protocol by reference.

Conditions necessary to assure compliance with a permit term must either be included, or properly incorporated by reference, into a title V permit in order for the title V permit to assure compliance with all applicable requirements. *E.g.*, 42 U.S.C. § 7661c(a) and (c). Compliance assurance provisions as detailed as a test protocol need not always be included on the face of a permit, and are reasonable candidates for the use of IBR.⁵⁴ Importantly, once a test protocol has been approved⁵⁵ and is relied on to assure compliance with a permit term—as is the case here—it must be incorporated by reference with enough specificity to be readily identifiable. *E.g.*, *White Paper Number 2* at 38. Because neither the title V permit nor the underlying Flexible Permit No. 47256/PSDTX402M3 satisfies this basic requirement, the EPA grants this claim.

Direction to TCEQ: TCEQ must ensure that the title V permit properly includes or incorporates by reference the approved testing protocol used to assure compliance with the 99.9 percent VOC collection efficiency requirement in Special Condition 8.B of Flexible Permit No. 47256. If TCEQ wishes to effectively incorporate this test protocol by reference, an enforceable permit document must identify the specific document where the test protocol can be found, consistent with EPA’s longstanding guidance concerning IBR. *See, e.g.*, *White Paper Number 2* at 36–41. TCEQ could either make these revisions directly to Blanchard’s title V permit, or it could add any necessary monitoring to Flexible Permit No. 47256/PSDTX402M3 and then promptly revise the title V permit to incorporate the updated version of that permit. In either case, the *title V permit* must ultimately contain or reference the necessary monitoring in order to resolve the EPA’s objection.

Claim D.7: Monitoring of Emission Limits for a Pipe Still Permit No. 19599/PSDTX023

Petitioners’ Claim: The Petitioners claim that the permit does not contain adequate monitoring, recordkeeping, and reporting to assure compliance with hourly and annual CO, NO_x, PM₁₀, and VOC emission limits for a pipe still and associated heaters and oil water separators (EPNs 41, 42, 43A, 46, 47, 51, 53, 55, and 56) authorized under Permit No. 19599/PSDTX023. Petition at 36.

The Petitioners initially address three requirements purportedly designed to assure compliance with the emission limits applicable to each of these units. The Petitioners first claim that a permit term requiring compliance with the subpart CC NESHAP cannot assure compliance with these emission limits because no 40 C.F.R. part 63, subpart CC requirements apply to these units. *Id.* at 37 (citing Permit No. 19599/PSDTX023, Special Condition 7). Next, the Petitioners assert that a

⁵⁴ The EPA disagrees with the Petitioners’ suggestion that the performance test protocol at issue here cannot be incorporated by reference simply because it is associated with a major NSR permit. The full details of performance testing protocols need not always be included on the face of a permit, so long as they are clearly incorporated by reference. *See, e.g.*, *White Paper Number 2* at 38 (“Appropriate use of incorporation by reference in permits includes referencing of test method procedures, inspection and maintenance plans, and calculation methods for determining compliance.”).

⁵⁵ Until such a protocol is developed and approved, it may not be possible to specifically IBR such a protocol in a manner consistent with the EPA’s guidance on IBR.

condition requiring compliance with 40 C.F.R. part 60, subparts A and J cannot assure compliance with these emission limits because the only applicable requirements from 40 C.F.R. part 60, subparts A and J relate to H₂S and SO₂, and do not address CO, NO_x, PM₁₀, or VOC. *Id.* (citing Permit No. 19599, Special Condition 6). Thus, the Petitioners claim that two of the three listed permit terms do not establish any monitoring that assures compliance with the emission limits they purportedly support. *Id.* at 38. The Petitioners claim that the third cited condition, which establishes a feed rate limit and recordkeeping requirements, is also insufficient “because variables unrelated or only indirectly related to feed rate affect the amount of pollution emitted by the units in question” and the permit does not require monitoring of these additional variables. *Id.* (citing Permit No. 19599/PSDTX023, Special Condition 2). The Petitioners assert that the permit must include parametric monitoring at a minimum to ensure that the control technology is functioning properly for the feed rate recordkeeping to assure compliance. *Id.*

The Petitioners note that two of these emission units (PS3B Heater 402BE, a part of EPN 43A, as well as EPN 55) are subject to a fourth monitoring provision that allows, but does not require, TCEQ to request stack testing for PM and CO. *Id.* at 39 (citing Permit No. 19599/PSDTX023, Special Condition 8). The Petitioners contend that this condition fails to assure compliance because the stack testing is discretionary and does not address VOC or NO_x at all.

Finally, the Petitioners note that one of these emission units (EPN 55) is subject to a fifth requirement: a daily heat input (firing rate) limit of 185.2 MMBtu/hr. *Id.* at 40 (citing Permit No. 19599/PSDTX023, Special Condition 3). The Petitioners claim that requirement is not sufficient to assure compliance with the hourly and annual emission limits for CO, NO_x, PM₁₀, or VOC for this unit, “because the amount of pollution emitted by Blanchard’s combustion units is a function of various different operating parameters unrelated or only indirectly related to heat input.” *Id.* Moreover, the Petitioners claim that neither the permit nor permit record explains how this firing rate is used to assure compliance with these limits.

The Petitioners address TCEQ’s RTC, in which the state suggested that Blanchard’s oil water separators (EPNs 46, 47, and 56) are subject to additional requirements in 30 TAC Chapter 115 and the subpart QQQ NSPS, that Blanchard’s permit applications calculate emissions using an AP-42 emission factor, and that Blanchard performs other monitoring activities related to rules in 40 C.F.R. part 61, subpart FF. *Id.* at 48 (citing RTC at 21). The Petitioners assert that none of these things assure compliance with the relevant emission limits because the Permit (specifically, the Major NSR Summary Table) does not identify these as mandatory monitoring methods. *Id.* at 49. The Petitioners also claim that “representations in a pending application for a permit action that has not been completed or incorporated into the Proposed Permit are not enforceable requirements” and have no bearing on whether the monitoring in the Permit assures compliance with applicable emission limits. *Id.*

The Petitioners also address TCEQ’s response that General Condition 7 of Permit No. 19599/PSDTX023 assures compliance because it requires that Blanchard maintain records containing the information and data sufficient to demonstrate compliance with the permit. *Id.* (citing RTC at 21). The Petitioners contend that this term is not itself a monitoring protocol and only assures compliance if the source’s chosen monitoring is based on reliable information. *Id.* at 49–50 (citing *US Steel I Order* at 7–8).

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

The CAA requires, "Each permit issued under [title V] shall set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions." 42 U.S.C. § 7661c(c); *see also* 40 C.F.R. § 70.6(a)(3)(i)(A)–(B), (c)(1); 30 TAC § 122.142(c). With respect to monitoring provisions associated with major NSR permits like Permit No. 19599/PSDTX023, the EPA and TCEQ have agreed to a mechanism by which monitoring provisions may be adequately incorporated by reference into a title V permit in order to satisfy these statutory and regulatory requirements. Specifically, in a 2012 letter, TCEQ agreed to certain commitments in order to resolve the EPA's objections related to the IBR of major NSR requirements in title V permits. One of those commitments was to include a Major NSR Summary Table in the appendix of each title V permit, which would include "Three additional columns containing the special condition number(s) for the monitoring and testing, recordkeeping, and reporting requirements from the appended PSD/NNSR permit."⁵⁶

The Major NSR Summary Table attached to the Blanchard title V permit identifies certain Special Conditions within Permit No. 19599/PSDTX023 that purportedly assure compliance with the hourly and annual emission limits at issue in this claim. Final Permit at 851.⁵⁷ The Petitioners have demonstrated that neither those cited conditions, nor other portions of Permit No. 19599/PSDTX023 and the title V permit, contain monitoring sufficient to assure compliance with the relevant emission limits.

In public comments, the Petitioners raised multiple concerns with the permit terms discussed in this claim, including: that the feed rate and firing rate limits in Special Conditions 2 and 3 of Permit No. 19599/PSDTX023 are insufficient to assure compliance because they do not account for other relevant variables that impact emission rates; that the applicable requirements of 40 C.F.R. part 60 subparts A and J and 40 C.F.R. part 63 subpart CC, as incorporated in Special Conditions 6 and 7, do not address or assure compliance with NO_x, CO, PM, or VOC emissions; and that the stack testing provision in Special Condition 8 is insufficient because it is not required, but rather discretionary, and because it does not address NO_x or VOC. These arguments, re-raised in the Petition, demonstrate that the Permit does not assure compliance with the relevant emission limits.

⁵⁶ Letter from Steve Hagle, P.E., Deputy Director of Air, TCEQ, to Carl Edlund, Director, Multimedia Planning and Permitting Division, Region 6, U.S. EPA, *Changing Incorporation by Reference (IBR) in TCEQ Title V Permits* (July 27, 2012).

⁵⁷ Since the filing of the Petition, some of the emission units at issue in this claim—specifically, EPNs 41, 42, and 43A, among others—have been decommissioned and removed from both Permit No. 19599/PSDTX023 and the title V permit. However, the Petitioners' claims also applied equally well to EPNs 46, 47, 51, 53, 55, and 56, which are still included in both permits. With respect to these units, the Major NSR Summary Table has not changed between the February 22, 2017 Final Permit and the current January 15, 2020 version of the title V permit. *See* Permit No. O1541 at 924 (January 15, 2020). Two of the referenced conditions contained within Permit No. 19599/PSDTX023 (Special Conditions 2 and 8) have been revised, but not in a manner that impacts the issues raised in the Petition.

TCEQ did not substantively address the comments raising these issues.⁵⁸ See RTC at 20–22. That is, TCEQ provided no justification for how the cited Special Conditions (2, 3, 6, 7, and 8) assure compliance with the relevant emission limits. TCEQ also did not identify any other specific permit terms that establish monitoring requirements sufficient to assure compliance with these limits. Instead, TCEQ presented the following arguments:

First, TCEQ provided high-level references to requirements applicable to the combustion units and oil water separators at issue in this claim, including those contained in 40 C.F.R. part 60, subpart J, 40 C.F.R. part 61, subpart FF, 40 C.F.R. part 63, subpart QQQ, and 30 TAC Chapter 115. Although TCEQ suggested that the monitoring provisions in these regulations may be sufficient to assure compliance with other requirements, TCEQ nonetheless acknowledged that this high-level list of other requirements “is not intended to be an all-inclusive list, nor is it included to be used for specific compliance *or as monitoring for facilities contained in the NSR permit.*” RTC at 21 (emphasis added). This represents the fundamental flaw: neither Permit No. 19599/PSDTX023 (on its face) nor the title V permit (in the Major NSR Summary Table) specify which specific monitoring requirements assure compliance with the emission limits established by NSR Permit No. 19599/PSDTX023. If TCEQ wishes to rely on applicable provisions contained in a NSPS or NESHAP subpart or its SIP rules to assure compliance with these NSR permit limits, it must specifically identify the relevant provisions in an enforceable permit document (as opposed to merely the RTC). Similarly, TCEQ later states that monitoring relevant to oil water separators is contained in a different NSR permit: Flexible Permit No. 47256/PSDTX402M3. RTC at 21. To the extent that these provisions assure compliance with the emission limits in Permit No. 19599/PSDTX023, this connection needs to be included in an enforceable permit document. Otherwise, the title V permit cannot be said to “set forth” the necessary monitoring, recordkeeping, and reporting provisions to assure compliance with the incorporated Permit No. 19599/PSDTX023.

Second, TCEQ discussed General Condition 7 of Permit No. 19599/PSDTX023, which requires Blanchard to “maintain a copy of the permit along with records containing the information and data sufficient to demonstrate compliance with the permit.” The open-ended recordkeeping requirement in General Condition 7 does not specify any particular protocol that Blanchard is required to follow, but instead leaves the decision about what recordkeeping will be sufficient entirely to the source’s discretion. Because this general permit term does not require Blanchard to follow a particular monitoring or recordkeeping methodology, the title V permit cannot be said to “set forth” monitoring sufficient to assure compliance.⁵⁹ Moreover, the Petitioners have

⁵⁸ Instead, TCEQ’s RTC discussed other issues raised in public comments that were not re-raised in the Petition, along with more general responses, discussed in the following paragraphs. Well-established principles of administrative law provide that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments. See, e.g., *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (“[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”). Following TCEQ’s issuance of the Final Permit to Blanchard and the filing of the Petition, the EPA finalized regulations codifying this long-standing principle. See 40 C.F.R. § 70.8(a)(1); see also 85 Fed. Reg. 6431, 6439–40 (February 5, 2020) (discussing the EPA’s historical implementation of this principle, its new regulations codifying this requirement, and providing guidance on what constitutes a “significant comment”).

⁵⁹ As discussed with respect to Claim D.1, there may be circumstances where a more permissive approach to monitoring and recordkeeping is appropriate, such as for insignificant emission units subject to general requirements.

demonstrated that this permit term contains no assurance that the monitoring or recordkeeping selected by the source will, as a technical and legal matter, be sufficient to assure 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).

Third, TCEQ referenced emission calculation methodologies for the oil water separators that have historically been included in various permit applications. *See* RTC at 21. This reference suggests that the relevant monitoring may be contained within a permit application. As explained with respect to Claims D.1 and D.5, although application representations may be legally enforceable in Texas, this has little to no bearing on whether these representations are properly “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). For a requirement to be included in a title V permit, the permit must either include it, or properly incorporate it by reference. Here, nothing within the title V permit or Permit No. 19599/PSDTX023 references any application representations related to the emission limits at issue in this claim; application representations are first mentioned in TCEQ’s RTC, and there only obliquely. This is not sufficient to satisfy CAA § 504(c) and 40 C.F.R. § 70.6(c)(1). If TCEQ wishes to rely on a source’s application representations to satisfy the monitoring requirements of title V, the application representations must be specifically identified in an enforceable permit document.

Fourth, TCEQ discussed a then-pending application for NSR Permit No. 47256, which contains additional information regarding Blanchard’s plans for monitoring the oil water separators. *See* RTC at 21–22. In addition to the reasons discussed in the preceding paragraph, a *pending* NSR permit application cannot be relied upon to establish monitoring in a title V permit, as such an unapproved document has no legal impact on a source’s monitoring obligations.⁶⁰

It appears that TCEQ’s broader point in referencing a then-pending NSR permit application was to emphasize that, “As a part of the renewal application review [for NSR Permit No. 47256], NSR staff will determine whether any changes to the applicant’s representations are needed.” RTC at 22. That is, TCEQ suggested that it would assess the sufficiency of monitoring for the oil water separators within a future NSR permit action, as opposed to the title V renewal permit that was before the state agency at the time.

TCEQ’s general preference to update underlying NSR permits first before incorporating these permits into a source’s title V permit is not inherently problematic. For example, if TCEQ determines in the course of issuing, modifying, or renewing a NSR permit that monitoring within

⁶⁰Application representations are only binding to the extent they are associated with a permit that has been issued. *See* 30 TAC § 116.116(a) (“The following are the conditions upon which a permit, special permit, or special exemption *are issued*: (1) representations with regard to construction plans and operation procedures in an application for a permit, special permit, or special exemption; and (2) any general and special conditions attached to the permit, special permit, or special exemption itself.” (emphasis added)).

that permit needs to be supplemented, it may certainly make any necessary adjustments in that NSR permit in the first instance. The source's title V permit would then need to be updated to reflect the new or revised terms of the NSR permit in due course (either within 18 months, or at renewal for permits with a remaining term of less than three years). 42 U.S.C. § 7661a(b)(8); 40 C.F.R. § 70.7(f)(1)(i); 30 TAC § 122.231(a)(1)(C). However, when commenters identify deficiencies in a title V permit that is before TCEQ for review, the state cannot refuse to engage with these issues until a later time. That is, TCEQ's current practice of adding supplemental monitoring first to an underlying permit cannot supplant its obligation to ensure that a title V permit contains sufficient monitoring to assure compliance with all applicable requirements and permit terms *at the time it is issued*. *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008); 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(a), (c); 30 TAC § 122.142(c).

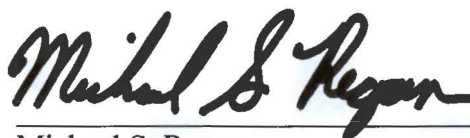
Because neither Permit No. 19599/PSDTX023 nor the title V permit identify monitoring sufficient to assure compliance with the emission limits implicated in Claim D.7, the EPA grants the Petition on this claim.

Direction to TCEQ: TCEQ must ensure that the title V permit includes monitoring, recordkeeping, and reporting sufficient to assure compliance with the CO, NO_x, PM₁₀, and VOC emission limits for the pipe still and associated heaters and oil water separators authorized under Permit No. 19599/PSDTX023. If part of this monitoring protocol is based on other requirements to which Blanchard is subject (whether in EPA regulations, the Texas SIP, or a different permit issued by TCEQ), the title V permit must specifically identify these requirements as the means by which Blanchard will demonstrate compliance with the emission limits in Permit No. 19599/PSDTX023. If part of this monitoring protocol is based on representations in a permit application, TCEQ must appropriately incorporate those into a permit document by specifying the version or date of the application and the specific location of the representations. TCEQ could either make these revisions directly to Blanchard's title V permit, or it could add any necessary monitoring to Permit No. 19599/PSDTX023 and then promptly revise the title V permit to incorporate the updated version of that permit. In either case, the *title V permit* must ultimately contain the necessary monitoring in order to resolve the EPA's objection. Additionally, pursuant to EPA's agreement with TCEQ, any such monitoring requirements assuring compliance with emission limits in a major NSR permit should also be reflected in the Major NSR Summary Table.

V. CONCLUSION

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

Dated: AUG - 9 2021



Michael S. Regan
Administrator