

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	PETITION No. VI-2017-15
)	
KINDER MORGAN CRUDE & CONDENSATE LLC)	ORDER RESPONDING TO
GALENA PARK TERMINAL)	PETITION REQUESTING
HARRIS COUNTY, TEXAS)	OBJECTION TO THE ISSUANCE OF
)	TITLE V OPERATING PERMIT
PERMIT No. O3764)	
)	
ISSUED BY THE TEXAS COMMISSION ON)	
ENVIRONMENTAL QUALITY)	

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

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated August 29, 2017, (the Petition) from the Environmental Integrity Project, Texas Environmental Justice Advocacy Services, Sierra Club, Environment Texas, Air Alliance Houston, and Patricia Gonzales (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. O3764 (the Proposed Permit) issued by the Texas Commission on Environmental Quality (TCEQ) to Kinder Morgan’s Galena Park Terminal (Kinder Morgan or the facility) in Harris County, Texas. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and Title 30, Chapter 122 of the Texas Administrative Code (TAC). *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

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

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

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the state's response to comments), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.⁵ Another factor the EPA examines is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the

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

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

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 Kinder Morgan Facility

The Kinder Morgan Galena Park Splitter Facility,⁹ located in Harris County, Texas, consists of two trains which process hydrocarbon condensate material to obtain products suitable for commercial use. The process utilizes conventional distillate technology. The facility is a major source of volatile organic compounds (VOC) and is subject to title V of the CAA. Emission units within the facility are also subject to preconstruction permitting requirements and various New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP).

EPA conducted an analysis using EPA’s EJSCREEN¹⁰ to assess key demographic and environmental indicators within a five-kilometer radius of the Kinder Morgan facility. This analysis showed a total population of approximately 68,962 residents within a five-kilometer radius of the facility, of which approximately 92 percent are people of color and 56 percent are low income. In addition, the EPA reviewed the EJSCREEN Environmental Justice Indices, which combine certain demographic indicators with eleven environmental indicators. All eleven EJ indices in this five-kilometer area exceed the 80th percentile in the state of Texas, with eight of the eleven EJ indices exceeding the 90th percentile.

⁹ The Petition on the original permit was for the Kinder Morgan Galena Park Terminal. Kinder Morgan Crude Condensate LLC was assigned a separate Regulated Entity Reference Number (RN) for the Crude Condensate Splitter facility from the Kinder Morgan Liquids Terminal (KMLT) Galena Park Terminals (RN100237452) on July 31, 2019. The new number is RN108071325. *Permit Amendment Source Analysis and Technical Review for Nonattainment Permit No. 101199/N158* at 1.

¹⁰ EJSCREEN is an environmental justice mapping and screening tool that provides EPA with a nationally consistent dataset and approach for combining environmental and demographic indicators; *see* <https://www.epa.gov/ejscreen/what-ejscreen>.

B. Permitting History

Kinder Morgan submitted an application for a title V permit on November 12, 2014. TCEQ noticed the draft permit and Statement of Basis on October 29, 2015, subject to a public comment period from October 29, 2015 to December 1, 2015. On May 10, 2017, TCEQ transmitted 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 began on May 16, 2017 and ended on June 30, 2017, during which time the EPA did not object to the Proposed Permit. TCEQ issued the final title V permit for the Galena Park Terminal Facility on July 20, 2017. Since the submittal of the Petition, Nonattainment Permit No. 101199/N158 was amended and issued on March 31, 2020 (amended Nonattainment Permit), then subsequently incorporated into the revised title V permit that was issued on June 21, 2021 (2021 Revised Permit).¹¹

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 June 30, 2017. Thus, any petition seeking the EPA's objection to the Proposed Permit was due on or before August 29, 2017. The Petition was received August 29, 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 Fails to Assure Compliance with Applicable Requirements in Kinder Morgan’s Major Nonattainment New Source Review Permit (Monitoring).”

Petitioners’ Claim: The Petitioners claim that the proposed permit fails to specify monitoring and testing to assure compliance with requirements established by Nonattainment Permit No. 101199/N158. Petition at 6. The Petitioners indicate that the NSR Authorization References attachment identifies the Nonattainment Permit as an authorization incorporated by reference into the proposed permit.¹² *Id.* The Petitioners further contend that none of the periodic monitoring or CAM summaries in the proposed permit address requirements in the Nonattainment Permit, and the Statement of Basis does not provide a reasoned justification for the determination that the provisions in the Nonattainment Permit assure compliance with applicable requirements. *Id.* at 7.

The Petitioners state that “each title V permit must contain monitoring, recordkeeping, and reporting conditions that assure compliance with all applicable requirements.” *Id.* (citing 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a)(3) and (c)(1); *In the Matter of Wheelabrator Baltimore, L.P.*, Order on Petition, Permit No. 24-510-01886 at 10 (April 14, 2010))

¹¹ The Petitioners did not submit comments on the 2021 Revised Permit.

¹² The Petitioners reference Special Condition 14 of the title V permit, which provides that the facility must comply with the requirements of NSR permits referenced in the NSR Authorization References attachment, and that the listed NSR permits are incorporated into the title V permit by reference.

(*Wheelabrator Order*)). The Petitioners further state that emission limits in NSR permits incorporated by reference are considered applicable requirements and that the rationale for selected monitoring must be clear and documented in the permit record. *Id.* at 7–8 (citing 40 C.F.R. §§ 70.2, 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) (*U.S. Steel I Order*)). The Petitioners specifically contend that the proposed permit’s Major NSR Summary table does not contain monitoring, testing, recordkeeping, or reporting requirements that assure compliance for emission caps for a site-wide benzene limit and two heaters. *Id.* at 8.

Site-Wide Emission Limits for Benzene

The Petitioners argue that despite TCEQ’s RTC specifying that Special Conditions 9 and 10 contain various requirements to demonstrate compliance with the site-wide benzene emission limits, the permit’s Major NSR Summary table does not require the facility to apply the methodologies identified in the cited conditions to determine compliance. *Id.* at 9–10. Additionally, the Petitioners claim that none of the benzene waste rules cited in the RTC are listed as applicable requirements in the Applicable Requirements Summary table, and that the monitoring and testing provisions cited in the RTC only apply to waste streams and do not include benzene emitted during condensate processing and storage.¹³ *Id.*

Emission Caps for Two Heaters

The Petitioners further argue that despite TCEQ’s RTC specifying that Special Conditions 8, 9, 10, and 11 of Nonattainment Permit No. 101199/N158 contain various requirements to demonstrate compliance with the annual emission caps for two heater units, these requirements are not listed as applicable compliance determination methods in the proposed permit’s Major NSR Summary Table. *Id.* at 10–11.¹⁴ The Petitioners also argue that despite the RTC specifying that Special Conditions 10 and 11 require a continuous emission monitoring system (CEMS) to monitor NO_x, CO, and ammonia emissions, none of the special conditions identify monitoring or testing requirements that assure compliance with emission caps for VOC, PM, PM₁₀, or PM_{2.5}. *Id.* at 11.

Lastly, the Petitioners note that TCEQ’s RTC states that the facility must periodically submit Permit Compliance Certification forms and deviation reports but does not explain how the compliance certification assures compliance with applicable requirements. *Id.* at 12. The Petitioners claim that while title V monitoring requirements and compliance certification requirements are related, that they must be independently met. *Id.* (citing 40 C.F.R. at § 70.6 (a)(3), (c)(1), (c)(5)). The Petitioners assert that the compliance certification requirement cannot assure compliance with the site-wide benzene limit or the heater emission caps because the permit lacks applicable monitoring or testing requirements for the limits. *Id.*

¹³ The Petitioners reference 40 C.F.R. § 61.340 and cite *In the Matter of Shell Chemical and Shell Oil Company, Deer Park Chemical Plant and Refinery*, Order on Petition Nos. VI-2014-04 and VI-2014-05 at 25 (Sept. 24, 2015) (*Deer Park Order*) (“If the TCEQ determines that elements of the monitoring already set forth in . . . [the] permit are capable of providing an adequate means to assure compliance with the title V . . . limits . . . originally in the underlying PSD permit, then the TCEQ should clearly identify this monitoring in the title V permit and explain the rationale for the selected monitoring.”).

¹⁴ The Petitioners reference the *Deer Park Order* at 25.

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.

The Petitioners' claim regarding the monitoring associated with the emission limits on the two heaters, while the Major NSR Summary table identifies emission limits for CO, NO_x, VOC, SO₂, PM, PM₁₀, PM_{2.5}, and ammonia for the two identified heaters (F-101 and F-201), is granted because the special conditions now present in the Major NSR summary only specify monitoring for each of these pollutants other than VOC. Thus, the Petitioners have demonstrated that the Permit fails to assure compliance with the emission limits set for VOC, because there is no indication of any monitoring requirements for these limits.

The state's suggestion that compliance certification might be enough to assure adequate monitoring is incorrect. As the Petitioners correctly note, the requirement that a title V permit contain sufficient monitoring and the requirement that sources submit compliance certifications are independent (albeit related) obligations. Thus, even if the monitoring, recordkeeping, or reporting conducted by the facility is specified in a compliance certification, that does not remedy the fact that the title V permit itself does not "set forth" the required monitoring, recordkeeping, or reporting. 42 U.S.C. § 7661(c); *see also* 40 C.F.R. § 70.6(a)(3)(i)(A)–(B), (c)(1); 30 TAC § 122.142(c). Moreover, 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 determining if the chosen monitoring satisfies CAA requirements. *See* 42 U.S.C. § 7661(c); *see also* 40 C.F.R. § 70.6(a)(3).

The Petitioners' claim regarding the site-wide benzene limit is moot. The site-wide benzene annual emission limit was removed from the maximum allowable emission rate table (MAERT) in the amended Nonattainment Permit (No. 101199/N158) that was incorporated into the title V permit issued on June 21, 2021.

The Petitioners' claim regarding the special conditions associated with emission caps for CO, NO_x, VOC, SO₂, PM, PM₁₀, PM_{2.5}, and ammonia for the two heater units is also moot. The Major NSR Summary Table in the 2021 Revised Permit now contains the special conditions that include the requirements to demonstrate compliance with the annual emission caps for two heater units. As a result, there is no further basis identified in the Petition for EPA objection on this issue. *See, e.g., In the Matter EME Homer City Generation - Homer City Coal Fired Electric Generating Facility* (July 30, 2014) at 33.

Direction to TCEQ: As many of the sub-claims within this claim are now moot, the only remaining direction to TCEQ is in respect to the CEMS monitoring for the two heaters. TCEQ must amend either Permit No. 101199/N158 or the title V permit to add or identify monitoring necessary to assure compliance with limits on VOC emissions from the two identified heater units. TCEQ should also add a reference to such terms in the Major NSR Summary table.

Claim B: The Petitioners Claim That “The Proposed Permit Fails to Assure Compliance with Emission Limits and Operating Requirements Established by Permits by Rule Claimed by Kinder Morgan.”

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), (c); 40 C.F.R. § 70.6(a)(3), (c)(1). Petition at 13–17. Specifically, the Petitioners claim that when a PBR does not contain specific monitoring in the rule, the only monitoring, recordkeeping, and reporting that applies is contained in special conditions 15 and 16 of the title V permit, which is a “non-exhaustive menu of options that Kinder Morgan may pick at choose from at its discretion to demonstrate compliance with PBR emission limits and operating requirements.” *Id.* at 14–17. The Petitioners contend that special conditions 15 and 16 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 16–17 (citing *Wheelabrator Order* at 10).

The Petitioners contend that the title V permit incorporates the following PBRs to which special condition 15 and 16 apply: PBRs 30 TAC §§ 106.261, 106.263, 106.454, and 106.472. Petition at 13–14. Specifically, the Petitioners claim that PBRs 30 TAC §§ 106.261 and 106.472 “do not specify any monitoring or testing requirements that operators must apply to demonstrate compliance with emission limits and operating requirements for projects authorized under those PBRs.” *Id.* at 13. Next, the Petitioners assert that PBR 30 TAC § 106.263 “establishes general recordkeeping requirements consistent with [special condition 16] but does not identify any specific monitoring or testing.” *Id.* at 14. Finally, the Petitioners contend that PBR 30 TAC § 106.454 incorporates testing methods required for degreasers under 30 TAC § 115.415 but does not specify which of the several test methods under 30 TAC § 115.415 the source must actually use. *Id.*

For all of these PBRs, the Petitioners claim that neither the title V permit nor the Statement of Basis identifies monitoring that assures compliance with PBR requirements. *Id.* at 17. The Petitioners contend that the only monitoring or recordkeeping that does apply would be special conditions 15 and 16, which are so vague that the EPA and the public cannot evaluate “whether the monitoring methods—if any—that Kinder Morgan actually uses to determine compliance with PBR requirements are consistent with Title V.” *Id.*

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

Relevant Permit Terms and Conditions

Special Condition 15 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 8.

Special Condition 16 states:

The permit holder shall maintain records to demonstrate compliance with any emission limitation or standard that is specified in a permit by rule (PBR) or Standard Permit listed in the New Source Review Authorizations attachment. The records shall yield reliable data from the relevant time period that are representative of the emission unit's compliance with the PBR or Standard Permit. These records may include, but are not limited to, production capacity and throughput, hours of operation, safety data sheets (SDS), chemical composition of raw materials, speciation of air contaminant data, engineering calculations, maintenance records, fugitive data, performance tests, capture/control device efficiencies, direct pollutant monitoring (CEMS, COMS, or PEMS), or control device parametric monitoring. These records shall be made readily accessible and available as required by 30 TAC § 122.144. Any monitoring or recordkeeping data indicating noncompliance with the PBR or Standard Permit shall be considered and reported as a deviation according to 30 TAC § 122.145 (Reporting Terms and Conditions).

Final Permit at 8–9.

TCEQ's Response

In responding to comments regarding the issues raised in these claims, TCEQ stated, in part:

The ED disagrees that specific monitoring has to be included for every PBR held at the site to assure compliance. Specifically, the ED disagrees with the Commenter's assertion that the Draft Permit is deficient because it fails to specify monitoring methods that assure compliance with applicable PBR requirements listed under PBRs in §§ 106.261 (11/01/2003), 106.263 (11/01/2001), 106.454 (11/01/2001), and 106.472 (09/04/2000). The ED has revised the New Source Review Authorization References table (Proposed Permit at page 68), to delete permit by rules (PBRs) in §§ 106.262, 106.263 (09/04/2000) and 106.511 since units authorized by these PBRs were not installed. Consistent with 40 CFR Part 70, the ED notes that a combination of monitoring, recordkeeping, and reporting requirements (and not monitoring requirements by themselves) are often used to assure compliance with applicable state and federal regulations and terms and conditions of the permit.

RTC at 12.

EPA Analysis

The Petitioners have demonstrated that with regard to the monitoring, recordkeeping, and reporting requirements for PBRs, the title V permit does not assure compliance with the CAA, part 70, and Texas's approved title V program. Specifically, the Petitioners have demonstrated that the title V permit does not specify any monitoring specifically designed to assure

compliance with certain PBRs, including 30 TAC §§ 106.261, 106.263 and 106.472, which appear to solely rely on the general requirements in Special Conditions 15 and 16.¹⁵ Further, the Petitioners have demonstrated that the general, large list of monitoring, recordkeeping, and reporting options under Special Condition 16 may not be adequate for all PBRs. As explained in the EPA’s *Motiva Order*,¹⁶ a streamlined approach to monitoring, such as in Special Conditions 15 and 16, can be appropriate for generally applicable requirements for insignificant units. *See Motiva Order* at 26 (citing White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program, 40 (March 5, 1996) at 32 (*White Paper Number 2*)). However, the EPA cannot determine if any PBRs in the title V permit apply only to insignificant units.

With regard to PBR 30 TAC § 106.454, the Petitioners have demonstrated that the record is inadequate to determine what monitoring, recordkeeping, and reporting is used to assure compliance. While the Petitioners explain that this PBR references testing methods in 30 TAC § 115.415, the EPA cannot determine from the information in the permit and permit record which testing method or methods apply to the units at Kinder Morgan. Specifically, TCEQ’s RTC only mentions Special Conditions 15 and 16 and does not even acknowledge that 30 TAC § 106.454 (through incorporation of 30 TAC § 115.415) contains different monitoring, recordkeeping, and reporting besides Special Condition 15 and 16. *See RTC* at 12–14. Therefore, TCEQ has failed to provide a justification for or explanation of which monitoring, recordkeeping, and reporting requirements in 30 TAC § 106.454 assure compliance and how those requirements interact with Special Conditions 15 and 16.

It is TCEQ’s responsibility, as the title V permitting authority, to ensure that the title V permit “set[s] forth” monitoring sufficient to assure compliance with all applicable requirements. 42 U.S.C. § 7661c(c); *see id.* § 7661c(a); 40 C.F.R. § 70.6(a), (a)(3), (c); 30 TAC 122.142(c).¹⁷ Special Condition 15 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 16 does not specify any particular monitoring requirements and instead allows Kinder Morgan to select the monitoring, recordkeeping, or reporting it will use to assure compliance. Because neither these generic permit terms nor the PBRs themselves require Kinder Morgan to follow a particular monitoring or recordkeeping methodology, the title V permit cannot be said to “set forth”

¹⁵ While 30 TAC §§ 106.263 does include recordkeeping requirements, the requirements are more open and less prescriptive than those found in Special Condition 16.

¹⁶ *In the Matter of Motiva, Port Arthur Refinery*, Order on Petition No. VI-2016-23, at 26 (May 31, 2018) (*Motiva Order*).

¹⁷ 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).

monitoring sufficient to assure compliance. 42 U.S.C. § 7661c(c). The Petitioners have also demonstrated that Special Condition 16 also contains no assurance that the monitoring or recordkeeping selected by the source will, as a technical and legal matter, be sufficient to ensure compliance. Because the Permit does not specify any particular monitoring or recordkeeping requirement, neither the public nor the EPA can ascertain from the permit what monitoring or recordkeeping methodology the source has elected to use, or whether this methodology is sufficient to assure compliance with all applicable requirements. This effectively prevents both the public and the EPA from determining if the chosen monitoring satisfies CAA requirements. *See* 42 U.S.C. § 7661(c); *see also* 40 C.F.R. § 70.6(a)(3).

With regard to TCEQ's statements in the RTC that federal enforceability is assured by Kinder Morgan's registration and certification¹⁸ of emissions for PBRs 106.261 (11/01/2003) and 106.263 (11/01/2001), such registration and certification does not clearly indicate in this operating permit that adequate monitoring will be done to assure compliance with the PBRs. While federal enforceability is a necessity for NSR permits and title V, requiring sources to register PBRs or certify emission limits lower than 30 TAC 106.4(a)(1) does not inherently establish monitoring, recordkeeping, or reporting.

Therefore, the Petitioners have demonstrated that for PBRs authorizing non-insignificant units, the title V permit does not contain adequate monitoring, recordkeeping, and reporting sufficient to assure compliance with the requirements in each PBR.

Direction to TCEQ: The EPA notes that TCEQ has begun including a list of PBRs that only apply to insignificant units in the statement of basis for title V permits. *See e.g.*, Statement of Basis for Draft Title V Permit for Kinder Morgan at 7–8 (April 16, 2021).¹⁹

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 Kinder Morgan's title V permit. If any underlying PBRs contain adequate 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 specific, identifiable monitoring, recordkeeping, or reporting, like 30 TAC §§ 106.261, 106.263, 106.454, and 106.472, then TCEQ should specify what monitoring, recordkeeping, or reporting assures 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, NSPSs, NESHAPs, or enforceable representations in an application already contain adequate terms to assure compliance with PBRs, then TCEQ should amend the permit to identify such terms and explain in the permit record how these requirements assure compliance with the requirements and emission limits for each PBR that

¹⁸ *See* 30 TAC § 106.6(a) (“An owner or operator may certify and register the maximum emission rates from facilities permitted by rule under this chapter in order to establish federally-enforceable allowable emission rates which are below the emission limitations in §106.4 of this title (relating to Requirements for Permitting by Rule).”).

¹⁹ 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.

applies to significant units.²⁰ However, if the title V permit and all enforceable, properly incorporated documents do not contain adequate monitoring, recordkeeping, and reporting that assures compliance with the requirements and limits identified, then TCEQ should add such terms to the permit.

The EPA notes that TCEQ's intention is to specify the monitoring for certain PBRs in a PBR Supplemental Table provided by applicants.²¹ 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 itself.

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

Referenced documents must also be specifically identified. Descriptive information such as the title or number of the document and the date of the document must be included so that there is no ambiguity as to which version of which document is being referenced. Citations, cross references, and incorporations by reference must 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.

²⁰ The EPA understands that certain emission units subject to PBRs may also be subject to other requirements, including monitoring requirements contained in an NSR permit. However, nowhere does the Permit connect such NSR monitoring provisions with the limitations and other requirements of the relevant PBRs, nor does the permit record explain why such monitoring is sufficient to assure compliance with PBR requirements.

²¹ 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). Additionally, the EPA acknowledges that Kinder Morgan included a PBR Supplemental Table as a part of its application for the June 21, 2021 revised title V permit.

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, which is found only in the permit application, without providing additional information detailing where the table is located is not specific enough to meet the standards described above. 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 supplemental table.²² Alternatively, a more straightforward approach that would obviate these IBR-related concerns would be for TCEQ to directly include (i.e., attach) this PBR Supplemental Table as an enforceable part of the title V permit itself.

Additionally, although this table requires the applicant to specify monitoring, recordkeeping, and reporting for “claimed (not registered)” PBRs, the table does not appear to address monitoring for registered PBRs. For registered PBRs, the EPA understands that TCEQ intends to start having applicants include monitoring in the registration form for registered PBRs.²³ However, TCEQ has not indicated how it will appropriately incorporate that monitoring into an enforceable part of the title V permit.²⁴ 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 does not mean that those provisions are necessarily “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).²⁵ For a requirement to be included in a title V permit, the Permit must include it (or properly incorporate it by reference).

The Agency anticipates that one of the most straightforward ways to resolve the EPA’s objection would be for TCEQ to include or identify within the PBR Supplemental Table 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.

²² The EPA recently provided feedback to TCEQ regarding how to effectively incorporate the PBR Supplemental Table into the title V permit through the use of a general permit term. *See* email from Jeffrey Robinson, EPA, to Samuel Short, Jesse Chacon, and Kim Strong, TCEQ, Re: EPA Comments on Sandy Creek Power Station (October 1, 2021).

²³ TCEQ has stated that it will require applicants to “[u]pdate PBR application representations with [monitoring that is sufficient to demonstrate compliance.]” May 11, 2020 Baer Letter at 3.

²⁴ The EPA recently provided feedback to TCEQ outlining similar concerns and suggesting solutions similar to those described in this Order. *See* email from Jeffrey Robinson, EPA, to Samuel Short, Jesse Chacon, and Kim Strong, TCEQ, Re: EPA Comments on Sandy Creek Power Station (October 1, 2021).

²⁵ *See supra* note 14.

If TCEQ instead wishes to establish the monitoring requirements within the underlying PBR registration first and then incorporate those terms into the title V permit, TCEQ should ensure that the underlying PBR registration is formally updated, and that those terms are clearly and unambiguously incorporated into the title V permit. To do this, TCEQ could issue a new final approval letter for the PBR registration that includes both the certified emission limits and monitoring requirements. Then, to adequately incorporate these requirements (by reference) into the title V permit, TCEQ could continue the practice of only listing the registration number within the title V permit's NSR Authorization References tables (and the PBR Supplemental Table). However, as PBR registrations are updated, TCEQ would need to update the registration date listed within PBR Supplemental Table A to ensure that the latest version of the registration is easily identifiable. This approach would not require additional title V permit terms (e.g., listing each monitoring requirement), since reference to the registration number points to the specific final approval document that includes the limits (and now monitoring).

EPA acknowledges that there may be other methods to prescribe and incorporate monitoring for PBR registrations into the title V permit beyond what is listed above. However, to the extent TCEQ chooses such an alternative method to establish additional monitoring for registered PBRs, it is critical that TCEQ clearly and unambiguously incorporate such monitoring (i.e., the document containing such monitoring) into the title V permit.

Claim C: The Petitioners Claim That “The Proposed Permit Fails to Specify How Kinder Morgan Should Quantify Emissions from Various Units at the Galena Park Terminal to Assure Compliance with Emission Limits in the Nonattainment Permit.”

Petitioners' Claim: The Petitioners claim that the proposed permit is deficient because it fails to sufficiently identify the methods for calculating emissions from various units that assure compliance with hourly and annual emission limits established by Nonattainment Permit No.101199/N158. Petition at 21. The Petitioners state that monitoring and analysis procedures established by the Nonattainment Permit should be included in the source's title V permit when the permitting authority relies on those procedures to assure compliance.²⁶ *Id.* The Petitioners claim that the identified special conditions do not assure compliance with emission limits and conditions because they do not identify the methods used to calculate emissions in the application(s), do “not identify the application(s) that contain the relevant information,” and do “not describe how this information should be applied to determine actual emissions.” *Id.* at 22–25. The Petitioners also claim that TCEQ has not explained how emission calculation methods described in the application or the recordkeeping requirements in the identified special conditions assure compliance with applicable conditions and limits. *Id.*

Regarding tank emissions, the Petitioners contend that Special Condition 18 does not assure compliance with hourly and annual VOC emission limits listed in the Nonattainment Permit's Maximum Allowable Emission Rate Table (MAERT) because it does not identify the methods used to calculate tank emissions in its applications. *Id.* at 22.

²⁶ The Petitioners cite 40 C.F.R. § 70.6(a)(3)(A). The Petitioners also cite 40 C.F.R. § 70.7(a)(5) and claim that the permit record must explain how monitoring and testing procedures assure compliance with applicable emission limits.

Regarding loading emissions, the Petitioners claim that while Special Conditions 25(G) and 28 require the facility to maintain records calculating emissions and tracking operational parameters, they do not explain how the facility calculates loading emissions or how the parametric information is used to assure compliance with hourly and annual emission limits. *Id.* at 23.

Regarding tank landing emissions, the Petitioners contend that while Special Condition 37(G) requires the facility to maintain records for tank landings and to estimate emissions from these activities, it does not assure compliance with emission limits and conditions because it does not identify the method used to calculate tank landing emissions. *Id.* at 23–24. The Petitioners specify that the emissions from tank landings must be calculated to determine compliance with limits in the MAERT as well as the 5 tons per year limit on tank transfer emissions established by Special Condition No. 20. *Id.* at 24. The Petitioners cite a portion of Special Condition 37(G) that states the emission calculations should be done with methods described in AP-42, but the special condition does not describe how application information should be used with the identified AP-42 Method. *Id.*

Regarding tank transfer emissions, the Petitioners contend that while Special Condition 20 establishes tank transfer emissions and Special Conditions 18, 37, and 28 require the facility to quantify emissions associated with working losses from filling, refilling, and loading, the provisions fail to assure compliance because the proposed permit does not identify the method for calculating tank transfer emissions. *Id.* at 24–25.

Lastly, regarding planned maintenance, startup, and shutdown (MSS), the Petitioners claim that while Special Conditions 34–40 establish emission requirements and require the facility to calculate emissions from MMS, the Nonattainment Permit does not explain how the facility must calculate these emissions and only refers to methods and information contained in the application. *Id.* at 25.

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.

Relevant Permit Terms and Conditions

Special Condition 18 of Permit No.101199/N158 details the emission records the facility must maintain, which includes calculated emissions of VOC from all storage tanks for the previous month and on a 12-month rolling basis. The condition also provides:

Emissions for tanks shall be calculated using the methods used to determine the MAERT limits in the permit application for the facilities authorized by this permit. Sample calculations from the application shall be attached to a copy of this permit at the terminal.

Special Condition 29(G)²⁷ provides the requirements for maintenance of records regarding tank landings and the emissions associated with roof landing activities. Specifically, the condition includes that “the occurrence of each roof landing and the associated emissions shall be recorded and the rolling 12-month tank roof landing emissions shall be updated on a monthly basis.” Additionally, the condition provides:

The emissions associated with roof landing activities shall be calculated using the methods described in Section 7.1.3.2 of AP-42 “Compilation of Air Pollution Emission Factors, Chapter 7 - Storage of Organic Liquids” dated November 2006 and the permit application.

Special Conditions 26–29, 32, 33, and 35²⁸ establish requirements for emissions related to MSS activities, providing “All MSS emissions shall be summed monthly and the rolling 12-month emissions shall be updated on a monthly basis.” The conditions also provide the emissions should be estimated using methods identified in the permit application.

TCEQ’s Response

In responding to comments regarding the issues raised in these claims, TCEQ stated, in part:

The Proposed Permit including Permit No. 101199/N158 provides operational flexibility to the Applicant while ensuring compliance with applicable emission limits. General Condition 6 in Permit No. 101199/N158 requires “The permit holder must demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the conditions of the permit”. In addition, Part 3 of the PCC form submittal requires the Applicant to list the selected Monitoring Option for each emission unit. These requirements assure compliance with the applicable requirements of the Proposed Permit and Permit No. 101199/N158.

RTC at 13–14.

EPA Analysis

The Petitioners have demonstrated that the Permit does not specify what methods Kinder Morgan must use to calculate tank emissions, tank landing emissions, and emissions from planned MSS.

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

²⁷ Note that in the previously issued permit, Special Condition 37(G) contains the requirements for tank landing emissions, that special condition still exists but is now Special Condition 29(G).

²⁸ Note that in the previously issued permit, Special Conditions 34–37, 40, 41, and 43 contain the requirements for MSS emissions, those special condition still exists but are now Special Condition 26–29, 32, 33, and 35.

representations can become legally enforceable.²⁹ However, the fact that application representations may be legally enforceable 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).³⁰ 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.

A permit may “set forth,” “include,” or “contain,” requirements, in certain circumstances, by incorporating requirements like application representations into the title V permit by reference (or even by incorporating them into an NSR permit that is then incorporated by reference into the title V permit).³¹

Here, there can be no doubt that Kinder Morgan’s title V permit incorporates Nonattainment Permit No. 101199/N158 and all the terms and conditions therein.³² 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. Although Special Conditions 18, 20, 25(G), 28, 37(G), and 34–40 indicate that calculation methods can be found in the permit applications, nowhere do these conditions indicate which permit application contains the relevant monitoring, nor where within that application such information can be found. 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.

While Special Condition 29(G) does specify the use of methods described in AP-42 ‘Compilation of Air Pollution Emission Factors, Chapter 7—Storage of Organic Liquids’ for calculating emissions, it also references methods described in the permit application. It is unclear how any methods described in the permit application interact with the methods in AP-42, such as whether the application contains additional or alternative methods or further clarifications.

²⁹ 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.”).

³⁰ See *supra* note 17.

³¹ See generally White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program, 36–41 (March 5, 1996) (*White Paper Number 2*) (explaining how incorporation by reference can satisfy the requirements of CAA § 504).

³² Specifically, Special Condition 14 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 7. Nonattainment Permit No. 101199/N158 is listed in the New Source Review Authorization References attachment. Final Permit at 73.

Because it is unclear what methods for calculating emissions are present in the applications, the EPA is unable to determine the sufficiency of these methods in determining compliance with applicable conditions and emission limits. The EPA is, therefore, granting these claims.

The Petitioners' claims regarding marine loading emissions and tank transfer emissions are moot. The marine loading and tank transfer requirements are now found in a different permit, and no longer appear in this one.³³ In the amended Nonattainment Permit No. 1011199/N158, the Major NSR Summary Table no longer contains a specific emission point or special conditions for monitoring, recordkeeping, and reporting for marine loading. The special conditions for marine loading emissions have also been removed from the Nonattainment permit, as well as the special conditions for monitoring, recordkeeping, and reporting for tank transfers. As a result, there is no further basis identified in the Petition for EPA objection on this issue. *See, e.g., In the Matter EME Homer City Generation - Homer City Coal Fired Electric Generating Facility* (July 30, 2014) at 33.

Direction to TCEQ: While the EPA recognizes that TCEQ is taking steps to provide more information for monitoring provisions in its title V permits—in this case referencing special conditions in their RTC that further reference calculation methods for various emission limits—further clarifications are necessary to ensure the transparency and accessibility of these documents and to ensure that they are effectively “set forth” in each title V permit. The EPA directs TCEQ to identify, within an enforceable permit document, the specific permit applications (e.g., by number and date) and the location within the applications where the emission calculation methods for tank emissions, tank landing emissions, and planned Maintenance, Startup, and Shutdown emissions can be found. TCEQ must also ensure that these applications are readily available and must provide a justification of the sufficiency of such monitoring when challenged in public comments.

Claim D: The Petitioners Claim That “The Proposed Permit Fails to Identify and Incorporate Certified PBR Registrations as Applicable Requirements.”

Petitioners' Claim: The Petitioners claim that the title V permit fails to identify certain applicable requirements associated with PBRs, and, therefore, fails to include and assure compliance with all applicable requirements. Petition at 27–33.

The Petitioners assert that PBRs often establish generic emission limits and operating requirements that can be identified by reading TCEQ's PBR rules in 30 TAC Chapter 106. *Id.* at 27. The Petitioners also note that sources may also certify source-specific emission rates for PBRs that are lower than the generic limits established in TCEQ's PBR rules. *Id.* (citing 30 TAC § 106.6). The Petitioners assert that the emission rates and other representations within these “certified registrations” become federally enforceable permit limits and conditions. *Id.* The Petitioners claim that, because the source-specific requirements contained in certified

³³ *See Permit Amendment Source Analysis and Technical Review* for Nonattainment Permit No. 1011199/N158 at 3 (“Reference to Marine Loading Vapor Combustion Unit removed from the condition because marine loading is under a different permit.”); *Id.* at 4 (“Special condition 20 is removed and updated as reserved. The condition was removed because tank transfer activities between the splitter and the KMLT facility occur across separate sites.”).

registrations are not contained in the PBR rules themselves, the certified registrations must be specifically identified in the proposed title V permit. *Id.* at 31.

The Petitioners allege that Kinder Morgan has claimed various PBRs to authorize construction and modification of units at the facility. *Id.* at 27. The Petitioners also claim that Kinder Morgan certified source-specific emission limits under 30 TAC § 106.6 for several projects with the following certification numbers:

- 105434 for PBRs 30 TAC 106.261, 106.263, and 106.478,
- 118052 for PBRs 30 TAC 106.261 and 106.262,
- 114179 for PBRs 30 TAC 106.261, 106.262, 106.472,
- 130986 for PBR 30 TAC 106.261,
- 112072 for PBR 30 TAC 106.262,
- 131940 for PBR 30 TAC 106.261,
- 101674 for PBRs 30 TAC 106.261, 106.262, 106.263, and 106.478,
- 103829 for PBRs 30 TAC 106.261, 106.263, and 106.478, and
- 136126 for PBRs 30 TAC 106.261. *Id.* at 27–30.

The Petitioners acknowledge that the title V permit incorporates by reference various PBR authorizations. *Id.* at 31. However, the Petitioners assert that in doing so, the permit only references the PBR rules that establish generic requirements, and that the permit contains no reference to any certified registrations that establish source-specific limits and operating requirements. *Id.* The Petitioners conclude that the title V permit fails to identify and assure compliance with applicable requirements in Kinder Morgan’s certified PBR registrations, warranting an EPA objection. *Id.*

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

The Petitioners’ claim regarding the failure to identify certain applicable requirements associated with PBRs is moot. Every registration number cited by the petition has either been cancelled or is associated with a separate permit for Terminal O988, with the exception of PBR registration 136126 which is accounted for in the updated PBR supplemental table and New Source Review Authorization References by Emissions Unit table associated with the 2021 Revised Permit O3764.³⁴ As a result, there is no further basis identified in the Petition for EPA objection on this issue. *See, e.g., In the Matter EME Homer City Generation - Homer City Coal Fired Electric Generating Facility* (July 30, 2014) at 33.

V. CONCLUSION

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

³⁴ *See supra* note 9

Dated: DEC 16 2021

A handwritten signature in black ink that reads "Michael S. Regan". The signature is written in a cursive style with a horizontal line underneath it.

Michael S. Regan
Administrator