

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF	§	PETITION FOR OBJECTION
	§	
Clean Air Act Title V Permit No. O3785	§	
	§	
Issued to Intercontinental Terminals Company LLC	§	Permit No. O3785
	§	
Issued by the Texas Commission on Environmental Quality	§	
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	§	

**PETITION TO OBJECT TO TITLE V PERMIT NO. O3785 ISSUED BY THE TEXAS
COMMISSION ON ENVIRONMENTAL QUALITY**

Pursuant to section 42 U.S.C. § 7661d(b)(2), Air Alliance Houston, Sierra Club, Environment Texas, and Environmental Integrity Project (“Petitioners”) hereby petition the Administrator of the U.S. Environmental Protection Agency (“Administrator” or “EPA”) to object to Proposed Federal Operating Permit No. O3785 (“Proposed Permit”) issued by the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) authorizing operations of Intercontinental Terminals Company LLC’s (“ITC”) Pasadena Terminal (“Terminal”), located in Harris County, Texas.

I. PETITIONERS

Air Alliance Houston is a Texas 501(c)(3) non-profit advocacy organization working to reduce public health impacts from air pollution and to advance environmental justice through applied research, education, and advocacy. Air Alliance Houston takes a strong stance against disproportionate exposure to air pollution by emphasizing an agenda centered on equity and environmental justice.

Sierra Club is the oldest and largest grassroots environmental group in the United States, with over 762,300 members nationally. Sierra Club’s members live, work, attend school, travel,

and recreate in and around areas affected by air pollution from ITC's Terminal. These members enjoy and are entitled to the benefits of natural resources, including air, water, and soil, parks, wilderness areas and other green spaces, and flora and fauna, all of which are harmed by air pollution emitted from ITC's Terminal.

Environment Texas is a nonprofit advocate for clean air, clean water, parks and wildlife, and a livable climate.

The Environmental Integrity Project is a nonpartisan, nonprofit watchdog organization that advocates for effective enforcement of environmental laws. Comprised of former EPA enforcement attorneys, public interest lawyers, analysts, investigators, and community organizers, EIP has three goals: (1) to illustrate through objective facts and figures how the failure to enforce or implement environmental laws increases pollution and harms public health; (2) to hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and (3) to help local communities obtain the protections of environmental laws.

II. PROCEDURAL BACKGROUND

This petition addresses the TCEQ's renewal of Permit No. O3785 authorizing operation of ITC's Pasadena Terminal. ITC filed its renewal application on August 26, 2020. The Executive Director concluded his technical review of ITC's application on June 30, 2021. The Executive Director proposed to approve ITC's application and issued Draft Permit No. O3785 ("Draft Permit"), notice of which was published on November 3, 2021. Bilingual notice of the Draft Permit was published on October 31, 2021. Petitioners and others timely-filed comments with the TCEQ identifying deficiencies in the Draft Permit. (Exhibit A), Public Comments on Draft Permit No. O3758 ("Public Comments"). On September 4, 2021, State Senator Carol

Alvarado requested a public hearing on the Draft Permit. This request was granted and a virtual public hearing was held on December 9, 2021. Testimony presented during this public hearing may be accessed electronically at:

https://www14.tceq.texas.gov/epic/eCID/index.cfm?fuseaction=main.download&doc_id=825523522021344&doc_name=2021%2D12%2D09%2Dintercontinental%2Dterminals%2Dco%2Do3785%2Dnch%2Dformal%2Emp3&requesttimeout=5000.

On May 13, 2022, the TCEQ’s Executive Director issued notice of the Proposed Permit along with his response to public comments on the Draft Permit. (Exhibit B), Notice of Proposed Permit and Executive Director’s Response to Public Comment (“Response to Comments”); (Exhibit C), Proposed Permit. The Executive Director declined to make any changes to the Draft Permit, despite receiving public comments and voluminous testimony describing its deficiency. On June 30, 2022, EPA objected to the Proposed Permit on several grounds raised by members of the public during the comment period. (Exhibit D), Objection to Title V Permit No. O3785 for the Intercontinental Terminals Company LLC Pasadena Terminal (“ITC Objection”), dated June 30, 2022. EPA, however, did not object to the Proposed Permit’s failure to include a schedule for ITC to comply with Nonattainment New Source Review (“NNSR”) preconstruction permitting requirements triggered by construction of the Terminal. Accordingly, Petitioners raise that issue in this petition.

Petitioners filed a previous version of this petition on August 30, 2022. Upon filing, Petitioners were notified by EPA that the petition was not timely-filed and that it would need to be refiled after the TCEQ responded to the ITC Objection.¹ According to EPA’s Operating Permit Timeline for Texas webpage, the TCEQ responded to the ITC Objection on July 17, 2023, EPA’s

¹ Petitioners do not concede that their prior filing on this petition was untimely and Petitioners did not withdraw the previous version of this petition filed on August 30, 2022.

45-day review period for this response ended on September 1, 2023 and post-objection petitions to object to ITC's Title V permit renewal are due on October 31, 2023.² Thus, this petition is timely filed.

III. LEGAL REQUIREMENTS

Title V permits are the primary method for enforcing and assuring compliance with the Clean Air Act's pollution control requirements for major sources of air pollution. Operating Permit Program, 57 Fed. Reg. 32,250, 32,258 (July 21, 1992). Prior to enactment of the Title V permitting program, regulators, operators, and members of the public had difficulty determining which requirements applied to each major source and whether sources were complying with applicable requirements. This was a problem because applicable requirements for each major source were spread across many different rules and orders, some of which did not make it clear how general requirements applied to specific sources.

The Title V permitting program was created to improve compliance with and to facilitate enforcement of Clean Air Act requirements by requiring each major source to obtain an operating permit that (1) lists all applicable federally-enforceable requirements, (2) contains enough information for readers to determine how applicable requirements apply to units at the permitted source, and (3) establishes monitoring requirements that assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a) and (c); *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996) ("The permit is crucial to implementation of the Act: it contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular source."); *Sierra Club v. EPA*, 536 F.3d 673, 674-75 (D.C. Cir. 2008) ("But Title V did more than require the compilation in a single document of existing applicable emission limits It also

² Available electronically at: <https://www.epa.gov/caa-permitting/operating-permit-timeline-texas>

mandated that each permit . . . shall set forth monitoring requirements to assure compliance with the permit terms and conditions”).

The Title V permitting program provides a process for stakeholders to resolve disputes about which requirements should apply to each major source of air pollution outside of the enforcement context. 57 Fed. Reg. 32,266 (“Under the [Title V] permit system, these disputes will no longer arise because any differences among the State, EPA, the permittee, and interested members of the public as to which of the Act’s requirements apply to the particular source will be resolved during the permit issuance and subsequent review process.”). Accordingly, federal courts do not generally second-guess Title V permitting decisions made by state permitting agencies and will not enforce otherwise-applicable requirements that have been omitted from or displaced by conditions in a Title V permit. *See*, 42 U.S.C. § 7607(b)(2); *Sierra Club v. Otter Tail*, 615 F.3d 1008 (8th Cir. 2008) (holding that enforcement of New Source Performance Standard omitted from a source’s Title V permit was barred by 42 U.S.C. § 7607(b)(2)). Because courts rely on Title V permits to determine which requirements may be enforced and which requirements may not be enforced against each major source, state-permitting agencies and EPA must exercise care to ensure that each Title V permit includes a clear, complete, and accurate account of the requirements that apply to the permitted source.

The Act requires the Administrator to object to a state-issued Title V permit if he determines that it fails to include and assure compliance with all applicable requirements. 42 U.S.C. § 7661d(b)(1); 40 C.F.R. § 70.8(c). If the Administrator does not object to a Title V permit, “any person may petition the Administrator within 60 days after the expiration of the Administrator’s 45-day review period to make such objection.” 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); 30 Tex. Admin. Code § 122.360. The Administrator “shall issue an objection . . . if the

petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of the . . . [Clean Air Act].” 42 U.S.C. § 7661d(b)(2); see also, 40 C.F.R. § 70.8(c)(1). The Administrator must grant or deny a petition to object within 60 days of its filing. 42 U.S.C. § 7661d(b)(2).

IV. ENVIRONMENTAL JUSTICE AND AFFECTED COMMUNITY CONCERNS

A. Environmental Justice Communities in Pasadena are Overburdened by Pollution.

ITC’s Pasadena Terminal is located less than one mile from residences in the city of Pasadena and less than two miles from residences in the city of Deer Park. EPA Region 6 has recognized that each of these predominantly minority cities face disproportionately high health risks created by exposure to industrial pollution. EPA Region 6, Texas Environmental Justice Collaborative Action Plan at 4 (August 3, 2016).³

There are 239 residences located within one mile of the ITC Pasadena Terminal, and 4,346 within two miles. According to the EPA’s EJ Screen ACS Summary Report of the community within two miles of the Terminal, 30% of residents are children under the age of 18, and 10% are seniors aged 65 and older.⁴ Additionally, 28% of residents have no high school diploma. Per capita income is \$24,168 with many residents falling below the poverty line. Also, 30% of the population lacks access to health insurance. Residents of color comprise 76% of Pasadena’s population with 71% alone being Hispanic/Latino. Forty-six percent (46%) of residents speak a language other than English at home, with an overwhelming percentage being Spanish.

The industrial burden in the city if Pasadena is significant. Pasadena is surrounded by seventeen Hazardous Waste Treatment, Storage, and Disposal Facilities such as water dischargers,

³ Available electronically at: https://www.epa.gov/sites/production/files/2016-12/documents/texas_ej_plan_8-3-16_final.pdf.

⁴ Available electronically at: <https://ejscreen.epa.gov/mapper/>

toxic waste releasing facilities, Superfund sites, and various sources of air pollution (including the freeway). Over 20 of the largest industrial sources of pollution in Harris County are located in East Houston near the Terminal. *A Closer Look at Air Pollution in Houston: Identifying Priority Health Risks, A Summary of the Report of the Mayor's Task Force on the Health Effects of Air Pollution* at 8.⁵ The Port of Houston, and the Ship Channel that feeds it, pass through this area generating a variety of hazardous pollutants, adding to those emitted from the nearby industrial sources. *Id.* The community of Pasadena has been overburdened by pollution for decades.

The TCEQ's renewal of ITC's Title V permit raises significant Environmental Justice concerns:

On multiple occasions, TCEQ has stated that air permits evaluated by the agency are reviewed without reference to the socioeconomic or racial status of the surrounding community. Under Title VI of the Civil Rights Act, the TCEQ must determine whether the adverse effect of the policy or practice disproportionately affects members of a group identified by race, color, or national origin. Here, there is an abundance of data showing that communities of color disproportionately bear the burden of pollution. In Pasadena, the residents are largely Hispanic or Black. The TCEQ has a legal obligation to prevent disparate impacts whether they are intentional or not.

The TCEQ must approach this permit renewal with an equity-centered lens. The Pasadena community and those north of the Pasadena facility such as Cloverleaf, Galena Park, and Jacinto City are burdened by multiple sources of pollution from facilities that diminish the quality of life and health of Texas communities. TCEQ must consider the disproportionate pollution burdens already occurring in these communities from multiple industrial sources and incorporate enhanced mitigative actions in the permitting process which address the cumulative impacts to these communities and provide greater protective measures for public health and safety.

Response to Comments at 3-4 (summarizing public comments).

But the TCEQ incorrectly contends that it lacks the authority or the obligation to consider whether its permitting practices are disproportionately harming communities of color and other marginalized populations. *Id.* at 4 ("The statutes governing TCEQ's review of air permits do not

⁵Available electronically at: <https://www3.epa.gov/ttnchie1/conference/ei16/session6/bethel.pdf>

allow the agency to consider where a facility is located—only the effect of the proposed emissions on human health and the environment.”). The TCEQ’s obligation to ensure that industrial development is protective of the health and property of the public authorize the Commission to consider cumulative impacts and disproportionate environmental harms to communities of color. 30 Tex. Admin. Code § 116.111(a)(2). Likewise, Texas Clean Air Act § 382.002 requires the commission to vigorously safeguard air quality by protecting public health and welfare, and § 382.011 gives the commission general powers to administer the Texas Clean Air Act through all practical and economically feasible methods. In the past, the TCEQ has cited these statutes as the basis for its authority to resolve Environmental Justice issues and to consider cumulative risks and impacts. *See, e.g. Interoffice Memorandum Re: Permit by Rule and Standard Permit Incorporation Into Permits at 1*, dated December 9, 2005.⁶

Finally, the federal Clean Air Act requires applicants for permits authorizing the construction of a major source or a major modification to an existing major source in a nonattainment area to demonstrate that the benefits of the proposed project significantly outweigh its social and environmental costs. 42 U.S.C. § 7503(a)(5). This requirement obligates the TCEQ to consider core Environmental Justice issues. As we explain below, the TCEQ’s failure to require ITC to comply with applicable major New Source Review preconstruction permitting requirements has allowed ITC (and the TCEQ) to avoid their obligations to consider Environmental Justice issues arising from the operation of ITC’s Terminal.

Texas resolutely refuses the possibility that it can and should rectify its policies and practices that have disproportionately harmed Environmental Justice communities. People living

⁶ Available electronically at: https://www.tceq.texas.gov/assets/public/permitting/air/memos/pbr_rollin_12_05.pdf While this guidance document was not cited in any public comment, Petitioners include it here for the sole purpose of rebutting the Executive Director’s response to comments.

near the Terminal are already overburdened by pollution, vulnerable to health concerns due to age, isolated due to language barriers, and facing more serious barriers to upward mobility than most people living in Texas. Given the State's unfounded denialism and evidence that people living near the Terminal are already overburdened by industrial pollution, EPA must carefully weigh the concerns voiced by the public during the comment period and object to the Proposed Permit if the agency determines that the permit fails to adequately protect public health and safety.

B. Unique Issues of Community Concern

Residents living near the Terminal are not only concerned about air pollution released during its routine operation. They are also justifiably concerned about fallout from disasters, like the fire that occurred at ITC's nearby Deer Park terminal. As described in detail in an investigation by the U.S. Chemical Safety and Hazard Investigation Board, the ITC Deer Park facility had a series of chemical fires at multiple tanks that lasted for five days in March 2019. U.S. Chemical Safety and Hazard Investigation Board, Storage Tank Fire at Intercontinental Terminals Company, LLC (ITC) Terminal Deer Park, Texas, *Incident Date: March 17, 2019*, No. 2019-01-I-TX, Factual Update dated October 30, 2019.⁷ This disaster shook those living in communities near ITC's terminals and continues to diminish their sense of security to this day. The fire prompted shelter-in-place orders, multi-school district closures, freeway closures, multiple park and waterfront closures, water contamination, and an inter-agency response by several local municipalities. Damaging amounts of Volatile Organic Compounds ("VOCs"), including benzene, were released into surrounding communities throughout the fire's duration and its aftermath.

ITC has yet to share details about this incident, about similar risks at the Pasadena Terminal, or the steps it has taken or plans to take to prevent similar incidents any of its Texas

⁷ Available electronically at: https://www.csb.gov/assets/1/20/itc_factual_update_2019-10-30.pdf?16522

facilities. The TCEQ was fully aware of these continuing problems when it approved the ITC Pasadena Title V permit renewal. Those living in communities on the fence line of the Pasadena Terminal have a right to feel safe and it is the TCEQ's job to protect communities from industrial sources of pollution, like the Pasadena Terminal. EPA should object to the Proposed Permit and require ITC to address community concerns regarding their safety and their health.

V. ADDITIONAL GROUNDS FOR OBJECTION

1. Specific Grounds for Objection, Including Citation to Permit Term

A. Relevant Permit Terms

The Proposed Permit incorporates Permit No. 95754. Proposed Permit at Special Condition No. 19 and page 134. Special Condition No. 2 of Permit No. 95754 establishes the following three synthetic minor emission limits for various units and activities at the Terminal:

In addition to the emission limitations of Special Condition No. 1, the permit holder shall limit emissions of Volatile Organic Compound (VOC) from each of the following Group ID A, B and C facilities and emission points to the totals respectively specified for each Group. Compliance shall be determined consistent with the monitoring and recordkeeping requirements of Special Condition No. 46

Group ID	FIN	EPN	VOC (tpy)
A	P100-001, P100-002, P100-003, P100-004, P100-005, P100-006, P100-007, P100-008, P100-009, P100-010, P12-001, P12-002, P12-003, P80-001, EFWPTK-1, EFWPTK-2, EFWPTK-3, DOCK1, DOCK-2, DOCK-3, DOCK-4, RACK-1, RACK-3, RACK-5, HOSEVENT-A, HOSEDRAIN-A, FUG-A, EFWP-1, EFWP-2, EFWP-3, EGEN-1, EGEN-2, EGEN-3, MSS-CONT-	P100-001, P100-002, P100-003, P100-004, P100-005, P100-006, P100-007, P100-008, P100-009, P100-010, P12-001, P12-002, P12-003, P80-001, EFWPTK-1, EFWPTK-2, EFWPTK-3, DOCK-1, DOCK-2, DOCK-3, DOCK-4, RACK1, RACK-3, RACK-5, TK-LAND-A, HOSEVENT-A, HOSEDRAIN-A, MSS-CONT-A, MSSATM-A, EFWP-1, EFWP-2, EFWP-3,	24.9 tpy (total for all sources)

	A, MSS-ATM-A, WWT TKS-101, - 201, -301 & -401, LOAD- UNC-A	EGEN-1, EGEN-2, EGEN-3, WWT TKS- 101,-201, -301 & -401, [VC-001, VC-002, VC- 003, FL-001], LOADUNC-A	
B	P100-12, P100-13, P165-001, P165-002, P165-003, P165-004, P165-005, P165-006, P110-001, P110-002, P110-003, P110-004, P120-001, P120-002, P120-003, P120-004, DOCK-1, DOCK-2, DOCK-3, DOCK-4, RACK-1, RACK-3, RACK-5, FUG-B, HOSEVENT-B, HOSEDRAIN-B, EGEN-4, EGEN-5, EGEN-6, MSS-CONT- B, & MSS-ATM-B, LOAD-UNC-B	P100-12, P100-13, P165-001, P165-002, P165-003, P165-004, P165-005, P165-006, P110-001, P110-002, P110-003, P110-004, P120-001, P120-002, P120-003, P120-004, DOCK-1, DOCK-2, DOCK3, DOCK-4, RACK-1, RACK-3, RACK-5, TKLAND-B, HOSEVENT-B, HOSEDRAIN-B, EGEN-4, EGEN-5, EGEN-6, MSS-CONT- B, MSS-ATM-B, [VC- 001, VCU-002, VC003, FL-001], LOAD-UNC- B	24.9 tpy (total for all sources)
C	P060-001, P060-002, P100-014, P100-015, P100-016, P100-017, P100-018, P100-019, P120-005, P120-006, P120-007, P120-008, P120-009, P120-010, P120-011, P120-012, P120-013, P120-014, P120-015, P120-016, P120-017, P120-018, P120-019, P120-020, P120-021, P120-022, P120-023, P120-024, P120-025, P120-026, P120-027, P120-028, P120-029, P120-030, P165-007, P165-008, P165-009, P165-010, P165-011, P165-012, DOCK-1, DOCK-2, DOCK-3, DOCK-4, RACK-1, RACK-3, RACK-5, FUG-C, HOSEVENT-C,	P060-001, P060-002, P100-014, P100-015, P100-016, P100-017, P100-018, P100-019, P120-005, P120-006, P120-007, P120-008, P120-009, P120-010, P120-011, P120-012, P120-013, P120-014, P120-015, P120-016, P120-017, P120-018, P120-019, P120-020, P120-021, P120-022, P120-023, P120-024, P120-025, P120-026, P120-027, P120-028, P120-029, P120-030, P165-007, P165-008, P165-009, P165-010, P165-011, P165-012, DOCK-1, DOCK-2, DOCK3, DOCK-4, RACK-1, RACK-3, RACK-5, TKLAND-C, FUG-C, HOSEVENT-	97.71 tpy (total for all sources)

	HOSEDRAIN-C, EGEN-7, EGEN-8, EGEN-9, EGEN-10, MSS-CONT-C, MSSATM-C, LOAD- CONT-C, LOADUNC- C	C, HOSEDRAIN-C, EGEN-7, EGEN-8, EGEN-9, EGEN-10, MSS-CONT-C, MSS- ATMC, [VC-001, VCU-002, VC-003, FL001], LOAD-UNC- C	
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Permit No. 95754, Special Condition No. 3 states:

At such time Special Condition No. 2, Group ID A or Group ID B defined projects becomes a major stationary source or major modification (30 TAC §§ 116.12(19)-(20)) solely by virtue of a relaxation in any enforceable limitation established in this permit, on the capacity of the source or modification otherwise to emit VOC, such as a restriction on hours of operation, the Nonattainment New Source Review requirements shall apply to the source or modification as though construction had not yet commenced on the source or modification.

Permit No. 95754, Special Condition No. 45 limits ITC's ability to claim PBRs for projects at the Terminal:

The following facilities and activities shall not be authorized under Permit by Rule, 30 TAC Chap. 106, or Standard Permit, 30 TAC Chap. 116, Subchapter F, included in Special Condition No. 2, Group A or B, except with written approval of the TCEQ Executive Director:

- A. Construction of storage tanks planned for storage of products with vapor pressures in excess of 0.5 psia at 95°F.
- B. Change of service for storage tanks to products with vapor pressures in excess of 0.5 psia at 95°F.
- C. Additional ship or barge loading facilities, or vapor collection and control systems supporting ship or barge loading activities.
- D. Additional loading throughput for any tank.
- E. Transfers of products from Special Condition No. 2, Group A or Group B tanks to tanks not belonging to Group A or Group B.

B. The Proposed Permit is Deficient Because it Fails to Establish a Schedule for ITC to Comply with NNSR Preconstruction Permitting Requirements.

The Clean Air Act's most stringent preconstruction permitting program, Nonattainment NSR, applies to major sources and major modifications constructed in areas where air quality fails to meet health and welfare-based National Ambient Air Quality Standards ("NAAQS"). Sources subject to NNSR preconstruction permitting requirements must demonstrate compliance with strict Lowest Available Emission Rate ("LAER") requirements and offset pollution increases with decreases in pollution from existing sources in the nonattainment area at a ratio of greater than 1:1. 30 Tex. Admin. Code § 116.150(d)(1) and (3). Additionally, an applicant for an NNSR preconstruction permit must show that the benefits of the proposed project significantly outweigh its social and environmental costs. *Id.* at § 116.150(d)(2), (4). This last requirement clearly encompasses concerns about cumulative impacts and Environmental Justice issues the TCEQ incorrectly claims it lacks jurisdiction to consider.

The Terminal is a major source of VOC, which contributes to the formation of ozone, located in the Houston, Brazoria, Galveston severe ozone nonattainment area. Minor NSR permits incorporated by reference into the Proposed Permit authorize ITC to emit at least 147.51 tons per year of VOC from its Terminal. The currently applicable major source threshold for VOC in Harris County is 25 tons per year.⁸ The Proposed Permit is deficient because it fails to establish a schedule for ITC to comply with NNSR preconstruction permitting requirements triggered by the Company's construction of equipment with the potential to emit air pollution in quantities that exceed the applicable major source threshold for VOC. The TCEQ's failure to require to ITC to comply with NNSR preconstruction permitting requirements has allowed ITC to avoid its

⁸ The major source threshold was 50 tons per year at the time EPA issued the ITC Objection. Since that time, Harris County was redesignated from a serious to a severe ozone nonattainment area.

obligation to comply with strict LAER pollution requirements, to offset new VOC pollution from its Terminal, and to demonstrate that the Terminal's benefits significantly outweigh its social and environmental costs.

There are at least three bases for determining that construction of ITC's Terminal has triggered NNSR preconstruction permitting requirements:

First, the Proposed Permit fails to make the three synthetic minor VOC emission caps established by Permit No. 95754, Special Condition No. 2 practicably enforceable. These emission caps were established to artificially constrain operation of the Terminal such that emissions from equipment covered by each cap would remain just below the applicable major source thresholds for VOC. However, these synthetic minor emission caps are not practicably enforceable and therefore do not effectively limit the Terminal's potential to emit. Accordingly, equipment and activities covered by each of the synthetic minor emission caps have the potential to emit VOC at rates that exceed the applicable major source thresholds and trigger NNSR preconstruction permitting requirements.

Second, Permit No. 95754 is a sham permit. A sham permit is a minor source NSR permit obtained by an operator who never intended to operate the permitted source as a minor source for the purpose of circumventing major NSR preconstruction permitting requirements. As EPA has explained, sham permits should be considered void and do not shield a source from major NSR preconstruction permitting requirements.

Third, ITC triggered NNSR preconstruction permitting requirements by using a Permit by Rule ("PBR") registration to relax operational limits and to increase actual emissions from units covered by synthetic minor emission caps in Permit No. 95754, Special Condition No. 2. VOC increases authorized by this PBR registration are sufficient to make projects subject to these

synthetic minor emission caps subject to NNSR preconstruction permitting review under Permit No. 95754, Special Condition No. 3.

- i. ITC's Pasadena Terminal is a major source of VOC because synthetic minor emission caps in Permit No. 95754 are not practicably enforceable.*

An emission limit “can be relied upon to restrict a source’s PTE only if it is legally and practicably enforceable.” *In the Matter of Cash Creek Generation*, Order on Petition No. IV-2010-4, dated June 22, 2012 at 15; *see also* EPA, *New Source Review Workshop Manual* (“Workshop Manual”), draft October 1990 at A.5 (“For any limit or condition to be a legitimate restriction on potential to emit, that limit or condition must be federally-enforceable, which in turn requires practical enforceability.”). To be practicably enforceable, synthetic minor emission limits must be technically accurate, *i.e.* limits based on the most representative data available, and subject to reliable methods for accurately determining compliance with those limits. Workshop Manual at A.5.

As Petitioners explained in their Comments and as EPA determined in its objection to the Proposed Permit, the Proposed Permit fails to specify monitoring, testing, and recordkeeping requirements sufficient to make the synthetic minor emission caps established by Permit No. 95754, Special Condition No. 2 practicably enforceable. Comments at 16-20; ITC Objection at 3-5. Accordingly, the synthetic minor emission caps do not constrain the Terminal’s potential to emit and ITC is subject to NNSR preconstruction permitting requirements.

Petitioners demonstrated that provisions for determining compliance with the synthetic minor emission caps established by Permit No. 95754, Special Condition No. 2 are deficient in the following respects:

- a. The loading loss equation Permit No. 95754 directs ITC to use to determine compliance with synthetic minor emission caps has a built-in 30% margin of error.*

Each of the synthetic minor VOC emission caps established by Special Condition No. 2 includes uncontrolled emissions from marine loading losses (EPNs: DOCK-1, DOCK-2, DOCK-3, and DOCK-4) and controlled emissions from marine loading losses (EPNs: VCU-001, VCU-002, VC-003, and FL-001). Application for Amendment to Permit No. 95754, filed December 18, 2018 at 5-4.⁹ Emissions from the uncontrolled marine loading EPNs, along with uncontrolled loading losses from truck and railcar loading at EPNs Rack-1, Rack-3, Rack-5 are combined to calculate a total annual VOC emission rate from uncontrolled loading losses of 23.81 tons per year. *Id.* at Table 1(a). Controlled loading losses from marine loading and truck and railcar loading are combined in the application with controlled emissions for hose venting, wastewater system, and routine storage tank landing to calculate a total annual VOC emission rate from the devices used to control these emissions of 10.45 tons per year. *Id.*

According to Permit No. 95754, Special Condition No. 46.A.2, ITC is to calculate emissions from loading activities at the Pasadena Terminal using “the uncontrolled loading loss factor, L_L ... defined by AP-42, Sec. 5.2, Eqn. 1 (July 2008).” The same process is used to calculate VOC emissions from hose disconnects at the Pasadena Terminal. Response to Comments, Permit No. 95754 at Response 21 (explaining that L_L equation 1 from AP-42, Sec. 5.2 is used to determine uncontrolled emissions from hose disconnects).¹⁰ Loading losses calculated using this factor are then multiplied by applicable capture efficiencies listed at Special Condition No. 46.A.5 to determine how much VOC is emitted directly to the atmosphere and how much is routed to pollution controls at the Pasadena Terminal. Controlled VOC emissions from captured loading

⁹ Available electronically at:

https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=6188231&Rendition=Web

¹⁰ Available electronically at:

https://www14.tceq.texas.gov/epic/eCID/index.cfm?fuseaction=main.download&doc_id=779609642021098&doc_name=RTC%5F95754%2Epdf&requesttimeout=5000

losses are then determined by multiplying the amount of captured VOC routed to controls by the control efficiencies listed by Special Condition No. 46.A.5. In this way, controlled and uncontrolled emissions are calculated using the L_L factor defined by AP-42, Sec. 5.2, Eqn. 1.

This method of calculating VOC emissions from controlled and uncaptured marine loading losses at the Pasadena Terminal fails to assure compliance with synthetic minor emission caps established by Permit No. 95754, because the equation for determining L_L used to demonstrate compliance with the emission caps has a built-in rate of “probable error of ± 30 percent.” AP-42, Sec. 5.2 at 5.2-4 (July 2008).¹¹ Increases within this large margin of error would be sufficient to cause undetected violations of the synthetic emissions caps, which are set at 99.9% of the applicable major source threshold for Groups A and B and 97.71% of the applicable major source threshold for Group C.¹² Accordingly, this method of determining compliance with synthetic minor emission caps established by Permit No. 95754, Special Condition No. 2 is unreliable and renders those emission caps not-practicably-enforceable.

- b. Permit No. 95754 fails to explain how ITC should calculate controlled loading loss emissions and MSS emissions if ITC fails to comply with criteria specified by the permit.*

Permit No. 95754, Special Condition No. 46.A.5 provides that use of capture and control efficiencies listed by that condition to calculate emissions from loading activities “is contingent upon satisfactory compliance demonstration and monitoring requirements at Special Conditions Nos. 1, 16-20, 29-31, [and] 44 of this permit.” Similarly, Special Condition No. 46.C provides that

¹¹ Available electronically at: <https://www3.epa.gov/ttn/chief/ap42/ch05/final/c05s02.pdf>

¹² Emission caps for Groups A and B were established when Harris County was designated a severe ozone nonattainment area and the major source threshold for VOC was 25 tons per year. When the emission cap for Group C was established, Harris County was designated as a moderate nonattainment area for ozone and the major source threshold was 100 tons per year. Harris County is currently designated as a serious ozone nonattainment area and the major source threshold for VOC is 50 tons per year. EPA has proposed to redesignate Harris County as a severe ozone nonattainment area. 87 Fed. Reg. 21825 (April 13, 2022). If this proposal is finalized, the major source threshold for VOC in Harris County will become 25 tons per year.

“MSS emissions shall be calculated and summed as required by Special Condition No. 34” and that “control of MSS emissions by the use of an authorized control device is contingent upon satisfactory compliance with the compliance demonstration and monitoring requirements at Special Condition No. 40.A-C.”

Special Condition No. 1 provides that the permit only authorizes emissions from points listed by the permit and that emissions from these points are only authorized at emission rates listed by the permit and that are subject to operating requirements specified in the permit’s special conditions. Thus, according to the plain meaning of the permit, the operation of any unit covered by Permit No. 95754 in a way that is inconsistent with the permit’s requirements renders the capture and control efficiencies listed by Special Condition No. 46.A.5 inapplicable. Special Condition Nos. 16-20 establish various requirements related to the marine loading process, Special Condition Nos. 29-31 establish requirements for the operation of control equipment, Special Condition No. 40 establishes various requirements for portable control devices associated with routine and planned MSS activities, and Special Condition No. 44 establishes testing requirements for ITC’s VCUs. Any violations of the applicable requirements established by these special conditions render the capture and control efficiencies listed by Special Condition No.46.A.5 and presumed control efficiency of portable control devices used to demonstrate compliance with the synthetic minor VOC emission caps established by Special Condition No. 2 inapplicable.¹³

The Proposed Permit is deficient because it fails to establish conditions for calculating loading loss VOC emissions for purposes of demonstrating compliance with the synthetic minor VOC emission caps established by Permit No. 95754, Special Condition No. 2 in situations where

¹³ ITC has violated these conditions at least once. On August 28, 2019, the TCEQ issued a Notice of Violation to ITC for failing to calibrate the temperature monitor for VCU-001 and VUC-002 annually, as required by Permit No. 95754, Special Condition No. 29. This information is available electronically at: https://www15.tceq.texas.gov/crpub/index.cfm?fuseaction=iwr.novdetail&addn_id=227542822016068&re_id=5293

ITC's failure to comply with permit requirements renders compliance methods established by the permit inapplicable. The Proposed Permit also fails to provide that ITC's failure to operate the Pasadena Terminal consistent with the preconditions for relying on the collection and control efficiency requirements establishes a violation of the permit's synthetic minor emission caps.

Because the Proposed Permit provides that compliance determination methods for the VOC synthetic minor emission caps established by Permit No. 95754, Special Condition No. 2 are inapplicable under certain conditions, because it fails to specify how compliance with the emission caps should be determined under those conditions, and because such conditions have been documented as occurring at the Pasadena Terminal, the synthetic emission caps incorporated by reference into the Proposed Permit are not practically enforceable and they do not effectively limit the Terminal's potential to emit below applicable major source thresholds.

- c. Permit No. 95754, Special Condition No. 3 improperly limits circumstances under which exceedances of its synthetic minor emissions caps trigger Nonattainment NSR preconstruction permitting requirements.*

According to Permit No. 95754, Special Condition No. 3:

At such time Special Condition No. 2, Group ID A or Group ID B defined projects becomes a major stationary source or modification (30 TAC §§ 116.12(19)-(20)) solely by virtue of relaxation in any enforceable emission limitation established in this permit, on the capacity of the source or modification otherwise to emit VOC, such as a restriction on hours of operation, then Nonattainment New Source Review requirements shall apply to the source or modification as though construction had not yet commenced on the source of modification.

This is the only condition in Permit No. 95754 explaining how projects authorized by that permit and subject to synthetic minor emission caps established by Special Condition No. 2 may become subject to NNSR preconstruction permitting requirements. But it is not enough to tie nonattainment NSR applicability to ITC's decision to request changes to its current permit conditions. Instead, the Proposed Permit must clarify whether and when ITC's failure to comply

with emissions limits, restrictions on hours of operations, and other requirements established to artificially limit the Pasadena Terminal's potential to emit below applicable major source thresholds triggers ITC's obligation to obtain a permit that assures compliance with applicable NNSR preconstruction permitting requirements. So long as violations of requirements established by Permit No. 95754, including enforceable representations in ITC's various applications related to the permit, *see* 30 Tex. Admin. Code § 116.116(a)(1), taken to artificially limit its potential to emit below major source thresholds do not trigger ITC's obligation to obtain an NNSR permit; those requirements fail to effectively limit the Pasadena Terminal's potential to emit. This is so because the permit is ambiguous as to whether and which violations of its special conditions trigger NNSR preconstruction permitting requirements.

d. EPA's ITC Objection order identifies additional monitoring, testing, recordkeeping, and reporting deficiencies.

EPA's objection to the Proposed Permit noted additional deficiencies establishing that the synthetic minor emission caps established by Permit No. 95754, Special Condition No. 2 are not practicably enforceable and do not limit the Terminal's potential to emit. First, certain pieces of equipment, including ITC's three vapor combustors, are included in all three of ITC's synthetic minor emission caps, but the Proposed Permit fails to explain how emissions from this common equipment should be divided to demonstrate compliance with the synthetic minor emission caps. ITC Objection at 3. Second, rather than limiting product throughputs, Permit No. 95754 provides ITC "operational flexibility to respond to market changes and customer demands" and allowing ITC "to manage the facilities ...such that the permitted emission limits are not exceeded." Application, PI-1 Dated December 21, 2018 (incorporated by reference at Permit No. 95754, Special Condition No. 11). The Proposed Permit, however, fails to specify *how* ITC is to manage its facilities to meet the emission caps and fails to include sufficient detail about applicable

monitoring and recordkeeping requirements to assure compliance with the synthetic minor emission caps. ITC Objection at 3-4. Third, Permit No. 95754, Special Condition No. 20 provides that ship collection efficiency tests conducted between November 13, 2015 and April 7, 2016 satisfy ship collection efficiency representations and that additional ship collection efficiency testing is not required. Three tests conducted on different ships over six years ago are not a reliable basis for determining compliance with loading capture efficiency representations used to determine compliance with Permit No. 95754's synthetic minor emission caps. *Id.* at 4. Fourth, Permit No. 95754, Special Condition Nos. 46.A.3 and 4 reference equations for calculating emissions associated with the transfer of a product but fail to actually specify the relevant equations or identify the EPNs the conditions apply to. *Id.* Fifth, Permit No. 95754, Special Condition No. 46.G fails to identify monitoring for waste gas flow to the flare and does not specify how monitoring data should be used to calculate flare emissions to determine compliance with the synthetic minor emission caps.

Given that EPA has already determined that the Proposed Permit fails to assure compliance with synthetic minor emission caps established by Permit No. 95754, Special Condition No. 2, and given EPA's position that synthetic minor emission limits that are not-practicably enforceable do not effectively constrain a source's potential to emit, EPA should object to the Proposed Permit's failure to establish a schedule for ITC to comply with NNSR preconstruction permitting requirements.

- ii. *Permit No. 95754 is a sham permit that does not limit the Terminal's potential to emit below major source thresholds.*

EPA has long been concerned that major sources of pollution would attempt to circumvent the Clean Air Act's requirements for major sources because they are so stringent and because the process for determining whether a project should be subject to major NSR preconstruction

permitting requirements is complicated, technical, and subject to manipulation by applicants. Thus, EPA's most important NSR guidance document alerts state permitting authorities to the risks of sham permitting:

A sham permit is a federally enforceable permit with operating restrictions limiting a source's potential to emit such that potential emissions do not exceed the major or de minimis levels for the purpose of allowing construction to commence prior to applying for a major source permit. Permit with conditions that do not reflect a source's planned mode of operation may be considered void and cannot shield the source from the requirement to undergo major source preconstruction review. In other words, if a source accepts operational limits to obtain a minor source construction permit but intends to operate the source in excess of those limitations once the unit is built, the permit is considered a sham. Additionally, a permit may be considered a sham permit if it is issued for a number of pollution-emitting modules that keep the source minor, but within a short period of time, an application is submitted for additional modules which will make the total source major.

Workshop Manual at c.6.

This definition of a sham permit aptly describes Permit No. 95754. Permit No. 95754 was issued as a "federally enforceable permit with operating restrictions limiting a source's potential to emit such that potential emissions do not exceed the major or de minimis levels for the purpose of allowing construction to commence prior to applying for a major source permit." We know that this permit did "not reflect a source's planned mode of operation," because the TCEQ's permit engineer said so in his technical review document for the initial issuance of Permit No. 95754: "*[a]lthough the site will ultimately be major, this initial construction will be limited to VOC emissions less than 25 tpy so the site is minor.*" Technical Review Document, Permit No. 95754, Project No. 164990 (emphasis added).¹⁴ Thus, it was clear to the TCEQ at the time Permit No. 95754 was issued that ITC was "accept[ing] operational limits to obtain a minor source construction permit but intend[ed] to operate the source in excess of those limitations once the unit

¹⁴ Available electronically at:

https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=5412420&Rendition=Web

[was] build.” A permit issued under these circumstances “is considered a sham.” Workshop Manual at c.6.

Unlike the scenario described in the Workshop Manual, ITC did not just intend to obtain a minor NSR permit to allow construction to commence prior to applying for a major source permit. ITC’s plan was to parse construction of its major source into a series of minor projects, none of which involved an emission increase sufficient to trigger NNSR preconstruction permitting requirements, but which cumulatively resulted in construction of a major source. Accordingly, ITC’s current permits—Permit No. 95754 and Certified PBR Registration No. 166799—have only been subject to minor NSR preconstruction requirements, even though the Terminal is now authorized to emit at least 147.51 tons per year of VOC, nearly six-times the currently-applicable major source threshold of 25 tons per year.

Not only did the TCEQ anticipate that the Terminal would be operated as a major source, the TCEQ also anticipated that ITC would attempt to authorize subsequent phases of the Terminal’s construction in bits and pieces to circumvent NNSR preconstruction permitting requirements. But instead of denying ITC’s sham minor NSR permit applications, the agency included language in the permit to make circumvention of major NSR preconstruction permitting requirements slightly more difficult. Specifically, Special Condition No. 26 of Permit No. 95754 (2012) provided that:

If additional facilities (beyond those authorized by this permit) are to be authorized at this site or any facilities authorized by this permit are modified within 18 months of the issuance of this permit, the following requirements apply.

A. If the proposed construction/modification will increase the site VOC potential to emit to greater than 25.0 tpy, they must be authorized through an amendment to this permit. That construction/modification shall be subject to nonattainment NSR for VOC. The facilities currently authorized by this permit shall also be subject to a retrospective nonattainment review with that amendment application.

This requirement does not preclude any potential compliance action related to the circumvention of federal NSR.

B. If not subject to part A of this condition, the construction/modification shall be authorized through an amendment to this permit or a permit by rule (PBR) (30 TAC Chapter 106). If authorized through PBR, the PBR must be registered and this permit altered to reflect the construction/modification. The permit alteration must be approved prior to the start of construction.

Any PBRs used to authorize construction of new or modification of existing facilities at this site after 18 months but within 60 months of the issuance of this permit must be registered with the TCEQ. All permit applications and PBR registrations submitted shall identify the facilities and emissions authorized in this permit and explain why the proposed project should not be aggregated with the facilities authorized in this permit when determining whether the VOC emissions from these facilities are subject to nonattainment review.

Unfortunately, the 18-month window established by this special condition was not sufficient to prevent ITC from circumventing NNSR preconstruction permitting requirements. This is so because construction of the first group of facilities authorized by Permit No. 95754 was still under construction when the 18-month mandatory aggregation period ended. On May 30, 2014, just three months after the 18-month period had run and while construction activities for equipment authorized by Permit No. 95754 were still ongoing, ITC submitted an application to authorize additional storage tanks, loading activities, and associated equipment. ITC asked that emissions from this equipment not be aggregated with the project authorized by the existing version of Permit No. 95754 and that a second synthetic minor VOC emission cap of 24.9 tons per year be added to the permit. With this second synthetic minor cap, ITC was authorized to emit 49.8 tons per year of VOC—nearly twice the 25 ton per year major source threshold—without complying with stringent pollution control requirements and pollution offset requirements that apply to major sources of pollution in nonattainment areas.¹⁵

¹⁵ Neither the application nor the final permit issued for this project (Project No. 211610) are available through the TCEQ's Records Online system. A draft copy of the permit engineer's technical review document is available electronically at:

Then, on July 3, 2014, while the TCEQ was still reviewing ITC's application to authorize construction of facilities and activities subject to the second synthetic minor VOC emissions cap in Permit No. 95754, ITC submitted an application to remove that permit's restriction on the use of PBRs to authorize additional construction and emissions at the Terminal. Technical Review Document for Permit No. 95754, Project No. 213724.¹⁶ Four days later, on July 7, 2014, ITC filed an application for a certified PBR registration that would have authorized the construction of 19 new storage tanks, fugitive components, as well as increased throughput at existing loading docks, loading racks, and vapor control devices.¹⁷ If approved, the certified PBR registration would have authorized VOC emissions from new, modified, and affected units totaling 23.47 tons per year. However, ITC withdrew its application after the TCEQ rejected justification for non-aggregation of this project with other equipment authorized by Permit No. 95754 as "false." ITC also withdrew its application to remove restrictions on the use of PBRs from Permit No. 95754.

https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=5334735&Rendition=Web Additionally, a memorandum listing the TCEQ's concerns about potential NNSR circumvention, but not information submitted by ITC supporting non-aggregation of its projects is available electronically at: https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=5343031&Rendition=Web

¹⁶ Available electronically at:

https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=5348152&Rendition=Web

¹⁷ TPC's application for Certified PBR Registration No. 121761 is available electronically at:

https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=1302226&Rendition=Web

Figure 1: TCEQ Permit Engineer's Note Concerning ITC's Non-Aggregation Case for Certification PBR Registration No. 121761¹⁸

<p><i>The permit amendment is a distinct project from the first project for several reasons, including the physical separateness. Project 1 will be completed in 2015. Project 2 will be completed in 2016. (2) Both projects had separate customers and neither project was approved by the other's. (4) ITC has not made any statements to TCEQ or other regulatory agencies binding these projects together for any purposes.</i></p>	<p><i>false</i></p>	<p><i>Project 1 was approved on January 29, 2014. Project 2 was approved on January 24, 2014. The fact that the two projects are being aggregated with the 'as-built' amendment for Project 1 with operation expected in early 2015 and Project 2 with operation planned for mid-2016, indicates that the two projects are not separate. (3) Each project has separate regulatory limitations which will be influenced by the regulatory limitations of the other project.</i></p>
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On August 18, 2015, after the TCEQ amended Permit No. 95754 to authorize construction of equipment authorized by the second synthetic minor VOC emission cap of 25 tons per year, Texas submitted to EPA a redesignation substitute report for the Houston-Galveston-Brazoria Area 1997 eight-hour ozone National Ambient Air Quality Standard.¹⁹ This report asked EPA to lift Harris County's designation as a severe ozone nonattainment area. After Texas requested the change to Harris County's designation as a severe ozone nonattainment area, ITC filed an application for a NNSR preconstruction permit, which would authorize construction of new equipment and activities that could emit up to 79.15 tons per year of VOC (in addition to the 49.8 tons per year previously authorized by Permit No. 95754). Technical Review Document for Permit No. 95754, Project No. 243313.²⁰ In response to Texas's report, while ITC's application was still under review, EPA published notice of a redesignation substitute for the 1997-8-hour ozone standard with an effective date of December 8, 2016. Following the effective date, Harris County was a moderate ozone nonattainment area under the 2008 8-hour ozone NAAQS and the applicable

¹⁸ Excerpt from project file for Permit No. 95754, Project No. 219916, available electronically at: https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=572534&Rendition=Web

¹⁹ Available electronically at: <https://downloads.regulations.gov/EPA-R06-OAR-2015-0609-0003/content.pdf>

²⁰ Available electronically at: https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=5275063&Rendition=Web

major source threshold in Harris County became 100 tons per year of VOC. ITC subsequently submitted an application for an as-built amendment to this permit, which authorized 97.71 tons per year of pollution, just under the new major source threshold for VOC of 100 tons per year. Because this project was still under review when Harris County's nonattainment designation changed, ITC did not need to demonstrate compliance with NNSR preconstruction permitting requirements, its application for a major source NNSR permit was canceled, and the 97.71 tons per year VOC emissions increase was authorized as a minor modification. *Id.*

The timing of ITC's request for approval of a project resulting in a VOC emissions increase well-above the 25 tons per year threshold *shortly after* Texas asked EPA to revise Harris County's nonattainment status and *shortly after* ITC had authorized two projects in quick succession right below the 25 tons per year major source threshold suggests that ITC has improperly broken a single construction project into separate phases based on the applicable or anticipated major source threshold in Harris County. This evidence confirms the TCEQ's determination in 2012, that ITC always intended to operate the Terminal as a major source of pollution, as well as the TCEQ's concern that ITC would attempt to circumvent NNSR preconstruction permitting requirements by artificially parsing construction of its major source into separate projects that did not trigger NNSR preconstruction permitting requirements.

The Pasadena Terminal is a bulk for-hire terminal. It is a collection of storage tanks, docks, and loading equipment for moving various chemicals onto and off trucks, railcars, and boats. All three of the "projects" authorized by Permit No. 95754 utilize the same docks and racks for marine, railcar, and truck loading and unloading. All three projects utilize the same wastewater treatment equipment. All three projects utilize the same vapor combustors. And all three projects utilize many of the same pipes and transport systems. Any one of the projects authorized by Permit No.

95754 considered in isolation makes little economic or technical sense. For example, the loading capacity of the multiple railcar and truck racks and docks far exceeds that of the dozen main tanks in project one, or the 16 tanks in project 2. Considered together, however, that loading capacity is justified for the 64 total tanks authorized by the three separate projects authorized by Permit No. 95754. Permit No. 95754 is a sham and the Terminal is a major source of air pollution subject to NNSR preconstruction permitting requirements.

iii. Emissions increases authorized by PBR Registration No. 166799 trigger NNSR preconstruction permitting requirements.

The TCEQ realized when it issued Permit No. 95754 that ITC intended to operate the Terminal as a major source of pollution and that ITC would likely attempt to circumvent NNSR preconstruction permitting requirements by obtaining piecemeal amendments to that permit. The TCEQ also recognized that ITC might circumvent NNSR preconstruction permitting requirements by using a Permit by Rule to authorize additional equipment and activities at the Terminal or to relax emission limits and enforceable representations about the Terminal's utilization included in ITC's air permit applications for Permit No. 95754. Yet, instead of denying ITC's application for a sham minor NSR preconstruction permit, the TCEQ included special conditions in Permit No. 95754 intended to make this kind of circumvention slightly more difficult. *See* Permit No. 95754, Special Condition Nos. 3 and 45.²¹ Special Condition No. 3 provided that relaxation of constraints on ITC's potential to emit could trigger NNSR preconstruction permitting requirements. Special Condition No. 45 prohibited ITC from using PBRs to authorize certain kinds of changes to the Terminal without the Executive Director's permission.

These special conditions did not prevent ITC from using a PBR to circumvent NNSR preconstruction permitting requirements because ITC simply ignored them. ITC applied for a PBR

²¹ *See* pages 11-12 above.

to authorize just exactly the kinds of facilities and activities prohibited by Special Condition No. 45 and falsely represented that ITC was not subject to permit terms prohibiting or restricting the use of PBRs to authorize emissions at the Terminal.²²

Figure 2, Excerpt from ITC’s Application for Certified PBR Registration No. 166799

5. 30 TAC § 106.4(a)(7): PBR Prohibition Check	
• Are there any air permits at the site containing conditions which prohibit or restrict the use of PBRs?	<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO

This false representation appears to be intentional. ITC had filed several applications asking the TCEQ to remove terms limiting the use of PBRs at the Pasadena Terminal from Permit No. 95754, including Special Condition No. 45. Most recently, ITC’s 2018 application to amend Permit No. 95754 asked the TCEQ to revise that specific special condition. Application for Amendment to Permit No. 95754, filed December 18, 2018 at 1-4.²³ ITC explained to the permit engineer for this project that “ITC maintains that the requirements of 30 TAC 106.4(a)(2) sufficiently address Federal NSR applicability and adding SCs which are duplicative in nature are not warranted.” Email from Neal Nygaard to Kevin Tang, dated February 20, 2020, Re: Permit No. 95754 ITC Conference Call Follow Up.²⁴ The permit engineer, however, disagreed and explained that “these restrictions on the use of PBRs/Standard Permits were added to prevent increases in VOC which could cause the site to become subject to nonattainment review” and the

²² ITC’s PBR application is available electronically at:
https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=6400319&Rendition=Web

²³ This application refers to Special Condition No. 47, which has been renumbered as Special Condition No. 45 in the most recently-issued version of Permit No. 95754. This application and other material related to the project is available electronically at:
https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=6188231&Rendition=Web

²⁴ This email and additional correspondence related to Permit No. 95754, Project No. 294773 is available electronically at:
https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=6165263&Rendition=Web

“restrictions are imposed consistent with the [provisions] of 30 TAC § 116.115(c)(2),” and could not be removed. Email from Kevin Tang to Neal Nygaard, dated February 18, 2020, Re: Permit No. 95754 ITC Conference Call Follow Up.²⁵

Nonetheless, ITC’s application for Certified PBR Registration No. 166799 filed the following year ignores the TCEQ’s decision to retain the PBR prohibition in Permit No. 95754 and falsely indicates that no such prohibition exists. This is so, even though the same consulting firm prepared all of ITC’s applications to have the PBR prohibition removed from Permit No. 95754 as well as the application for Certified PBR Registration No. 166799.

Based on ITC’s misrepresentation, the TCEQ approved ITC’s application for Certified PBR Registration No. 166799 on November 29, 2021. The Proposed Permit must include a schedule for ITC to correct this misrepresentation and to re-apply for a permit authorizing emissions improperly authorized by Certified PBR Registration No. 166799. Additionally, the facilities, activities, and emissions authorized by the certified PBR registration should be aggregated with the projects authorized by Permit No. 95754 and ITC should be required to obtain a NNSR permit authorizing equipment and activities at the Pasadena Terminal, as required by Permit No. 95754, Special Condition No. 3.

The 4.35 tons per year VOC emissions increase authorized by PBR Registration No. 166799 more than accounts for the margin between the applicable major source threshold and the three synthetic minor VOC emissions caps established by Permit No. 95754, Special Condition No. 2. Moreover, the PBR authorization affects units and activities covered by each of those caps. For example, the PBR authorizes 2 tons per year VOC from existing tanks, 2 more tons per year VOC from existing docks, and construction of a new barge dock that will presumably be used

²⁵ This email is accessible using the link provided in the previous footnote.

to load chemicals stored in ITC's existing tanks. Technical Review Document for Certified PBR Registration No. 166799, Project No. 334414.²⁶ The authorization of these additional emissions from units covered by Group ID A and B through a permitting mechanism specifically prohibited by Permit No. 95754 is "a relaxation of any enforceable limitation established by this permit" sufficient to cause the Terminal to become a major stationary source.

2. Applicable Requirement or Part 70 Requirement Not Met

Each Title V permit must include the following elements:

Emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance. Such requirements and limitations may include ARMs identified by the source in its part 70 permit application as approved by the permitting authority, provided that no ARM shall contravene any terms needed to comply with any otherwise applicable requirement or requirement of this part or circumvent any applicable requirement that would apply as a result of implementing the ARM.

40 C.F.R. § 70.6(a)(1)

If a source has failed to comply with an applicable requirement, the source's Title V permit must include a schedule for the operator to come into compliance. *Id.* at § 70.6(c)(3); *see also id.* at § 70.5(c)(8).

NNSR preconstruction permitting requirements are applicable requirements for purposes of Title V. *Id.* at § 70.2 (defining term "applicable requirement" to include "[a]ny standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter" and "[any] term or condition of any preconstruction permits issued

²⁶ Available electronically at: https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=6399967&Rendition=Web

pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act.”); 30 Tex. Admin. Code § 116.150(b) (providing that construction of a new major source or major modification of an existing major source of NOx and/or VOC pollution is subject to NNSR preconstruction permitting requirements at § 116.150(d)(1)-(4)); 40 C.F.R. § 51.2270(c) (incorporating 30 Tex. Admin. Code § 116.150 into the Texas SIP).

3. Inadequacy of the Permit Term

The Proposed Permit is deficient, because it fails to establish a schedule for ITC to comply with NNSR preconstruction permitting requirements triggered by its construction of a major source of air pollution and to correct misrepresentations made in its application for PBR Registration No. 1699799.

4. Issues Raised in Public Comments

These issues were raised on pages 7-13 and 15-20 of the Public Comments.

5. Analysis of State’s Response

The Executive Director’s Response to Public Comments offers three arguments that fail to rebut Petitioners’ demonstration that the Proposed Permit must include a schedule for ITC to comply with NNSR preconstruction permitting requirements.

A. The Establishment of a Compliance Schedule is not beyond the Scope of a Title V Review.

First the Executive Director relies on Texas’s implementation of separate NSR and Title V permitting programs to argue that this issue is beyond the scope of ITC’s Title V permit renewal:

The ED notes under the two-permit system in Texas, only new source review (NSR) permits authorize air emissions under 30 TAC Chapter 116. The Proposed Permit issued under 30 TAC Chapter 122 (or Title V program) does not authorize any emission limits or changes to emission limits for various emission sources. The establishment of authorized air emissions limit for each pollutant, determination of

non-attainment status, evaluation of best available control technology (BACT) and health impact analysis of air emissions occurs during an NSR permit project review and not during a Title V permit review.

Response to Comments at 8.

This response fails to address Petitioners' demonstrations for several reasons. First, we do not claim that the Proposed Permit must be revised through the Title V process to establish new emission limits or that an NNSR preconstruction permitting review should be undertaken as part of this Title V permitting project. Instead, Petitioners contend that the Proposed Permit must include a compliance schedule for ITC to comply with NSR preconstruction permitting requirements through the preconstruction permitting process. Clearly, such a compliance schedule may be established as part of the Title V permitting process. *See*, 40 C.F.R. §§ 70.5(c)(8)(iii)(C); 70.6(c)(3) (requiring Title V permits to include a "schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance.").

Second, the question of whether monitoring, testing, recordkeeping, and reporting requirements established by Permit No. 95754 and incorporated by reference into the Proposed Permit are sufficient to make the three synthetic minor emission caps established by that permit practicably enforceable is squarely a Title V issue. *See, e.g.*, ITC Objection at 5 ("*The EPA does view monitoring, recordkeeping, and reporting adequacy to be part of the title V permitting process and will therefore continue to review whether a title V permit contains adequate monitoring, recordkeeping, and reporting provisions sufficient to assure compliance with the terms and conditions established in the preconstruction permit.*") (emphasis in original). There is no dispute that equipment and activities subject to the synthetic minor emission caps in Permit No. 95754 have the physical potential to emit VOC at a rate that triggers NNSR preconstruction permitting requirements. Accordingly, the question of whether potential emissions from equipment and activities authorized by Permit No. 95754 and subject to the synthetic minor

emission caps established by that permit trigger NNSR preconstruction permitting requirements may be resolved on the basis of the sufficiency of monitoring, testing, recordkeeping, and reporting requirements established to make artificial limits on ITC's potential to emit practicably enforceable. As EPA has already determined and as we further demonstrate in this petition, the synthetic minor emission caps established by Permit No. 95754, Special Condition No. 2 are not practicably enforceable. ITC Objection at 3-5. Therefore, the synthetic minor emission caps do not constrain the Terminal's potential to emit and the Proposed Permit must establish a schedule for ITC to comply with NNSR preconstruction permitting requirements.

Third, the Executive Director fails to identify any regulation or guidance suggesting that the question of whether emissions authorized by PBR Registration No. 166799 triggered NNSR preconstruction permitting requirements per Special Condition No. 3 or Permit No. 95754 is beyond the scope of this Title V project. It is true that EPA has issued Title V petition orders indicating that state permitting authorities need not re-evaluate their preconstruction permitting decisions as part of the Title V review process, *so long as those decisions were subject to public notice and comment procedures*.²⁷ *In the Matter of Big River Steel*, Order Responding to Petition No. VI-2013-10, dated October 31, 2017 at n20 ("This interpretation applies ... where a permitting authority issued a source-specific title I preconstruction permit subject to public notice and comment and for which judicial review was available. The EPA is not considering at this time whether other circumstances may warrant a different approach.").²⁸ Neither ITC's PBR registration application, which falsely indicated that the TCEQ had not established any prohibitions on the use of PBRs to authorize equipment and activities at the Terminal, nor the

²⁷ The ITC Objection at 3-5 also makes clear these orders do not suggest that states may decline to consider the sufficiency of monitoring requirements established by preconstruction permits as part of a Title V review.

²⁸ Available electronically at: https://www.epa.gov/sites/default/files/2017-10/documents/big_river_steel_response2013.pdf

TCEQ's decision to grant this application were subject to public notice and comment requirements. Thus, the Executive Director has failed to show that the question of whether ITC's PBR Registration triggered NNSR preconstruction permitting requirements is beyond the scope of this Title V renewal project.

Fourth, while EPA's Big River Steel order indicates that EPA will not second-guess NSR permitting decisions for projects that have been subject to notice and comment requirements, that policy is not clearly applicable in cases like this one, where an operator's conduct across multiple permitting projects triggers NNSR preconstruction permitting requirements.²⁹ Moreover, the TCEQ did not rely upon this policy in its Response to Comments. While members of the public may have received public notice and an opportunity to comment on the issuance of Permit No. 95754 and its subsequent amendments, none of these projects provided a clear opportunity for members of the public to challenge ITC's artificial division of the construction of its Terminal into separate minor NSR permitting projects. Rather, the question considered by the TCEQ in each of these cases is whether ITC's application complied with the requirements at 30 Tex. Admin. Code § 116.111, and none of the requirements at § 116.111 clearly require the TCEQ to determine whether an applicant has requested a sham permit. The Title V permitting process is better designed to address this kind of question, because Title V renewal reviews are intended to comprehensively evaluate a source's compliance with applicable requirements during the Title V permit's term and are not limited in scope to an applicant's representations concerning a particular NSR permitting project. As in this case, an operator's attempts to modify permit terms, the operator's conduct in light of changes to nonattainment designations, as well as the permitting

²⁹ Additionally, EPA should abandon the policy articulated by the Big River Steel Order for the reasons discussed in Petition for Objection, *In the Matter of Clean Air Act Title V Permit No. 04169* at 6-10. Available electronically at: https://www.epa.gov/sites/production/files/2021-02/documents/gulf_coast_growth_ventures_petition_2-24-21.pdf

authority's remarks about its review of particular projects cohere to provide more comprehensive evidence of an operator's efforts to circumvent applicable requirements than would be available to those challenging a specific allegedly-discrete NSR permitting project.

B. The Executive Director's Response to Comments for the Recent Amendment of Permit No. 95754 do not Rebut Petitioners' Demonstration that the Terminal Must Comply with NNSR Preconstruction Permitting Requirements.

In addition to his argument that NSR-related issues are not ripe for review as part of the Title V process, the Executive Director claims that his response to comments issued on April 5, 2021 concerning an amendment to Permit No. 95754 rebuts Petitioners' allegation that construction at the Terminal has triggered NNSR preconstruction permitting requirements. Response to Comments at 8.

This April 5, 2021 document provides the following explanation of the Executive Director's decision not to aggregate projects covered by synthetic minor emission caps A and B from Permit No. 95754, Special Condition No. 2:

A project aggregation review was conducted for Projects 211610 and 219916 (issued January 2015) for possible nonattainment circumvention due to requested authorization of Group Facility ID B as a distinct project from Group Facility ID A. In the review, a 2009 EPA action of Project Aggregation was used as a source in combination with information supplied by the Applicant—specifically, construction of Group A Facilities had commenced during the time Group B Facilities were proposed, the nature of customer contracts for for-hire bulk marine terminals, the overall project scope, and it was concluded that project aggregation was unwarranted.

As noted by the EPA – “When activities are undertaken three or more years apart, there is less of a basis that they have a substantial technical or economic relationship because the activities are typically part of entirely different planning and capital funding cycles. The fact that the earlier activities were constructed and operated independently for such a long period of time tends to support a determination that the latter activities are technically and economically unrelated and independent from the other earlier constructed activities. Even if activities are related, once three years have passed, it is difficult to argue that they are substantially related and constitute a single project. We note that the selection of a 3-year timeframe is long enough to ensure a reasonable likelihood that the

presumption of independence will be valid but is short enough to maintain a useful separation between relevant construction cycles, consistent with industry practice.”

Permit No. 95754 Response to Comments at 15-16.³⁰

This response does not rebut Petitioners’ demonstrations. While EPA may have determined that a three-year period was an appropriate timeframe to support non-aggregation in its 2009 review, the TCEQ did not reach this same conclusion when it first issued Permit No. 95754. Instead, Permit No. 95754, Special Condition No. 26 included language establishing a five-year (or 60 month) window for heightened review requirements to prevent circumvention of NNSR preconstruction permitting requirements:

Any PBRs used to authorize construction of new or modification of existing facilities at this site after 18 months but within 60 months of the issuance of this permit must be registered with the TCEQ. All permit applications and PBR registrations submitted shall identify the facilities and emissions authorized in this permit and explain why the proposed project should not be aggregated with the facilities authorized in this permit when determining whether the VOC emissions from these facilities are subject to nonattainment review.

This language must also be considered in conjunction with the permit reviewer’s determination that the Terminal would eventually be operated as a major source of VOC. The permit engineer’s 2012 statement that the Terminal would be operated as a major source was unequivocal.

The facts of EPA’s 2009 review also differed materially from those addressed by the Executive Director. Specifically, EPA found it material that “earlier activities” it considered “were constructed and operated independently for ... a long period of time.” In this case, equipment authorized by the initial issuance of Permit No. 95754 was still being built when ITC applied for

³⁰ Available electronically at: https://www14.tceq.texas.gov/epic/eCID/index.cfm?fuseaction=main.download&doc_id=779609642021098&doc_name=RTC%5F95754%2Epdf&requesttimeout=5000 Petitioners note that the WCC content ID 5596361 the Executive Director provided to help the public find this April 5, 2021 document, Response to Comments at 7, is incorrect.

an amendment to establish a second synthetic minor emission cap. Permit No. 95754 Response to Comments at 16 (“specifically, construction of Group A Facilities had commenced during the time Group B Facilities were proposed[.]”). Thus, the timeline of projects for Group A and Group B facilities does not establish that ITC ever intended to operate the Group A facilities alone.

The 95754 Response to Comments provides the following explanation regarding the non-aggregation of emissions authorized by Permit 95754, Special Condition No. 2 for Group C:

A Project Aggregation review was conducted for Project 243313 (Issued July 11, 2017) due to possible nonattainment circumvention in regard to project increases of VOC emissions from the proposed amendment. In Project 243313, the Applicant proposed to authorize an expansion of storage capacity, including new storage tanks and associated piping and fugitive emissions (Known as Group Facility C).

A case-by-case aggregation review was conducted due to possible nonattainment circumvention concerns. The TCEQ permit reviewers used information provided by the Applicant to determine technical and economical relatedness of the projects.

The permit reviewers reviewed contemporaneous documentation provided by ITC on the two projects (Group Facility B and C), which was generated during the 2013-2016 time period, including: agreements with terminal customers, engineering firms and insurance underwriters; transactions of ITC’s board of directors; construction progress and start-up notifications provided to the TCEQ; and ITC’s prior statements to TCEQ concerning its plans for operations. Considering the overall timespan of a construction project (from initial “open season” discussions with customers through start of operations of new facilities), there was no indication that ITC had improperly avoided major NSR review through non-aggregation. All Group B facilities having been authorized in January 2015 will have started operation before any actual construction work began on the Group C facilities.

Permit No. 95754 Response to Comments at 16-17.

While this response suggests that the Executive Director reviewed a lot of information as part of his aggregation review, the Executive Director does not explain the relevance of this information or provide any characterization of the relevant facts established during his review. Despite the wealth of information the Executive Director had at his disposal, the only thing that seems to have mattered was “the overall timespan of a construction project[.]” And the Executive Director even fails to explain what this timespan was or how it supports his non-aggregation

determination. Thus, the Executive Director's description of his non-aggregation determination with respect to Group C does not provide support for that determination and it does not rebut Petitioners' demonstrations in this matter. In particular, this response fails to address the TCEQ's previous determination that ITC intended to operate the Terminal as a major source, the division of permit amendments for the Terminal divided into projects with increases just below the major NSR trigger, and evidence that none of these projects was economically viable of its own.

C. The Proposed Permit Must Include a Schedule for ITC to Comply with NNSR Preconstruction Permit Requirements Even if it does not Incorporate PBR Registration No. 166799.

Finally, the Executive Director contends that he needn't consider whether PBR Registration No. 166799 triggered NNSR preconstruction permitting requirements because that PBR registration has not been incorporated into the Proposed Permit. Response to Comments at 9. This response is incorrect. Title V permits must include a schedule addressing non-compliance with applicable requirements at the time a permit is issued. 40 C.F.R. §§ 70.5(c)(8), 70.6(c)(3). PBR Registration No. 166799 was issued before the Proposed Permit was issued. Accordingly, the fact that PBR Registration No. 166799 is not incorporated into the Proposed Permit is irrelevant, so long as non-compliance resulting from ITC's application for the registration and the registration's issuance occurred before the Proposed Permit was issued.

VI. CONCLUSION

For the foregoing reasons, and explained in timely-filed Public Comments, the Proposed Permit is deficient. The Executive Director's Response to Comments failed to address commenters' significant concerns. Accordingly, the Clean Air Act requires the Administrator to object to the Proposed Permit.

Sincerely,

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