BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Petition No. VI-2023-13

In the Matter of

Intercontinental Terminals Company LLC, Pasadena Terminal

Permit No. O3785

Issued by the Texas Commission on Environmental Quality

ORDER GRANTING IN PART AND DENYING IN PART A PETITION FOR OBJECTION TO A TITLE V OPERATING PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated September 6, 2023 (the Petition) from Air Alliance Houston, Sierra Club, Environment Texas, and Environmental Integrity Project (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 operating permit No. O3785 (the Permit) issued by the Texas Commission on Environmental Quality (TCEQ) to Intercontinental Terminals Company LLC, for its Pasadena Terminal (ITC Pasadena) 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 known 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 in Section IV of this Order, the EPA grants in part and denies in part the Petition requesting that the EPA Administrator object to the Permit. Specifically, the EPA grants part of the first subclaim in the Petition and denies the rest of the Petition.

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 full approval of Texas's title

V operating permit program in 1996. 66 Fed. Reg. 63318 (Dec. 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. 40 C.F.R. § 70.1(b); 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. 32250, 32251 (July 21, 1992). 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).

Each petition must identify the proposed permit on which the petition is based and identify the petition claims. 40 C.F.R. § 70.12(a). Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under part 70. 40 C.F.R. § 70.12(a)(2). Any arguments or claims the petitioner wishes the EPA to consider in support of each issue raised must generally be contained within the body of the petition.[1] *Id.*

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); *see also* 40 C.F.R. § 70.12(a)(2)(v).

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[1] If reference is made to an attached document, the body of the petition must provide a specific citation to the referenced information, along with a description of how that information supports the claim. In determining whether to object, the Administrator will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. *Id*.

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).[2] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[3] 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)).[4] 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.[5] Certain aspects of the petitioner's demonstration burden are discussed in the following paragraph. A more detailed discussion can be found in the preamble to the EPA's proposed petitions rule. *See* 81 Fed. Reg. 57822, 57829–31 (Aug. 24, 2016); *see also 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 a petitioner has provided the relevant analyses and citations to support its claims. For each claim, the petitioner must identify (1) the specific grounds for an objection, citing to a specific permit term or condition where applicable; (2) the applicable requirement as defined in 40 C.F.R. § 70.2, or requirement under part 70, that is not met; and (3) an explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under part 70. 40 C.F.R. § 70.12(a)(2)(i)–(iii). If a petitioner does not identify these elements, the EPA is left to work out the basis for the petitioner's objection, contrary to Congress's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and

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

[3] *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.

[4] *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)).

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

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 (Jan. 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]

Another factor the EPA examines is whether the petitioner has addressed the state or local permitting authority's decision and reasoning contained in the permit record. 81 Fed. Reg. at 57832; *see Voigt v. EPA*, 46 F.4th 895, 901–02 (8th Cir. 2022); *MacClarence*, 596 F.3d at 1132–33.[9] This includes a requirement that petitioners address the permitting authority's final decision and final reasoning (including the state's response to comments) where these documents were available during the timeframe for filing the petition. 40 C.F.R. § 70.12(a)(2)(vi). Specifically, the petition must identify where the permitting authority responded to the public comment and explain how the permitting authority's response is inadequate to address (or does not address) the issue raised in the public comment. *Id*.

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

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[6] *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (Sept. 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 (Apr. 20, 2007); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (Jan. 8, 2007) (*Georgia Power Plants Order*); *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (Mar. 15, 2005).

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

[9] *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 (Dec. 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); *Georgia Power Plants Order* at 9–13 (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).

during the agency's review of a petition on a proposed permit, those documents may also be considered when determining whether to grant or deny the petition. *Id*.

If the EPA grants a title V petition, a permitting authority may address the EPA's objection by, among other things, providing the EPA with a revised permit. 42 U.S.C. § 7661d(b)(3), (c); 40 C.F.R. § 70.8(d); *see id*. § 70.7(g)(4); 70.8(c)(4); *see generally* 81 Fed. Reg. at 57842 (describing post-petition procedures); *Nucor II Order* at 14–15 (same). In some cases, the permitting authority's response to an EPA objection may not involve a revision to the permit terms and conditions themselves, but may instead involve revisions to the permit record. For example, when the EPA has issued a title V objection on the ground that the permit record does not adequately support the permitting decision, it may be acceptable for the permitting authority to respond only by providing an additional rationale to support its permitting decision.

When the permitting authority revises a permit or permit record in order to resolve an EPA objection, it must go through the appropriate procedures for that revision. If a final permit has been issued prior to the EPA's objection, the permitting authority should determine whether its response to the EPA's objection requires 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 revision 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 (Sept. 14, 2016); *In the Matter of WPSC, Weston*, Order on Petition No. V-2006-4 at 5–6, 10 (Dec. 19, 2007).

C. New Source Review

The major New Source Review (NSR) program encompasses 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. § 52.2270(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.

Where the EPA has approved a state's title I permitting program (whether PSD, NNSR, or minor NSR), NSR permits issued following public notice and the opportunity for public comment and judicial review establish the NSR-related "applicable requirements" for the purposes of title V. As with "applicable requirements" established through other CAA authorities, the terms and conditions of those permits should be incorporated into a source's title V permit without a further round of substantive review as part of the title V process. *See generally* 89 Fed. Reg. 1150, 1160–84 (Jan. 9, 2024) (discussing the EPA's existing positions and rationale on this issue, and proposing clarifying amendments to the EPA's regulations); *In the Matter of Big River Steel, LLC*, Order on Petition No. VI-2013-10 at 8–20 (Oct. 31, 2017) (*Big River Steel Order*).[10] Accordingly, the EPA will generally not consider the merits of a permitting authority's NSR permitting decisions in a petition to object to a source's title V permit. *See Big River Steel Order* at 8–9, 14–20.[11] Rather, any such challenges should be raised through the appropriate title I permitting procedures or enforcement authorities.

[10] However, as the EPA noted in the *Big River Steel Order*, there may be circumstances that "warrant a different approach." *Big River Steel Order* at 11 n.20. The preamble to the proposed Applicable Requirements Rule includes a summary of the different fact patterns in which EPA has (or has not) applied this approach. *See* 89 Fed. Reg. at 1163–64, 1165–70.

[11] The EPA does view monitoring, recordkeeping, and reporting to be part of the title V permitting process and will therefore continue to review whether a title V permit contains monitoring, recordkeeping, and reporting provisions sufficient to assure compliance with the terms and conditions established in the preconstruction permit. *See, e.g.*, *In the Matter of South Louisiana Methanol, LP*, Order on Petition Nos. VI-2016-24 and VI -2017-14 at 10–11 (May 29, 2018) (*South Louisiana Methanol Order*); *Big River Steel Order* at 17, 17 n.30, 19 n.32, 20. Moreover, as the EPA has explained, "[A] decision by the EPA not to object to a title V permit that includes the terms and conditions of a title I permit does not

III. BACKGROUND

A. The ITC Pasadena Facility

ITC's Pasadena Terminal is a for-hire bulk liquid storage terminal located near Houston in Pasadena, Harris County, Texas. The facility receives, stores, and transfers chemicals and petroleum products. Emission points at the facility include various loading activities and storage tanks, along with other emission units. The facility is a major source of volatile organic compound (VOC) emissions.

The EPA used EJScreen[12] to review key demographic and environmental indicators within a five-kilometer radius of the ITC Pasadena facility. This review showed a total population of approximately 43,412 residents within a five-kilometer radius of the facility, of which approximately 86 percent are people of color and 47 percent are low income. In addition, the EPA reviewed the EJScreen Environmental Justice Indices, which combine certain demographic indicators with 13 environmental indicators. The following table identifies the Environmental Justice Indices for the five-kilometer radius surrounding the facility and their associated percentiles when compared to the rest of the State of Texas.

EJ Index	Percentile in State
Particulate Matter 2.5	86
Ozone	88
Diesel Particulate Matter	93
Air Toxics Cancer Risk	96
Air Toxics Respiratory Hazard	93
Toxic Releases to Air	95
Traffic Proximity	82
Lead Paint	85
Superfund Proximity	92
RMP Facility Proximity	94
Hazardous Waste Proximity	94
Underground Storage Tanks	85
Wastewater Discharge	75

B. Permitting History

ITC Pasadena first obtained a title V permit in 2016. On August 26, 2020, ITC Pasadena applied for a title V permit renewal. TCEQ published notice of a draft permit on November 3, 2021, subject to a public comment period that ran until December 9, 2021. On May 17, 2022, TCEQ submitted a proposed

indicate that the EPA has concluded that those terms and conditions comply with the applicable SIP or the CAA. However, until the terms and conditions of the title I permit are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through some other mechanism, such as a state court appeal, the 'applicable requirement' remains the terms and conditions of the issued preconstruction permit and they should be included in the source's title V permit." *Big River Steel Order* at 19.

[12] EJScreen is an environmental justice mapping and screening tool that provides the EPA with a nationally consistent dataset and approach for combining environmental and demographic indicators. *See https://www.epa.gov/ejscreen/what-ejscreen*.

permit (the Initial Proposed Permit), along with its responses to public comments (RTC), to the EPA for its 45-day review. During this review period, on June 30, 2022, the EPA objected to the issuance of the Initial Proposed Permit (the June 2022 EPA Objection).[13] In response to the EPA's objection, TCEQ first revised the terms of an underlying NSR permit (NSR Permit No. 95754), which was finalized on June 8, 2023. TCEQ then incorporated that NSR permit into a revised version of the proposed title V permit, which TCEQ submitted to the EPA on July 17, 2023 (the Revised Proposed Permit). The EPA's 45-day review of the Revised Proposed Permit ended on September 1, 2023, during which time the EPA did not object. TCEQ issued a final title V renewal permit to ITC Pasadena on September 8, 2023.

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). Because the EPA objected to the Initial Proposed Permit, there was no opportunity for the public to petition the EPA to object to that particular version of the permit. *See id*.; 40 C.F.R. § 70.8(d).[14] Instead, the public petition opportunity was delayed until after the state transmitted the Revised Proposed Permit to the EPA in order to resolve the EPA's objection. *See, e.g.*, 40 C.F.R. § 70.8(c)(4). Specifically, the EPA's website indicated that the EPA's 45-day review period of the Revised Proposed Permit expired on September 1, 2023, and that any petition seeking the EPA's objection to the Revised Proposed Permit was due on or before October 31, 2023. The Petition was dated and received on September 6, 2023. Therefore, the EPA finds that the Petitioners timely filed the Petition. The petition opportunity associated with the Revised Proposed Permit includes all issues that could have been raised on the Initial Proposed Permit (including issues to which the EPA did not object), as well as changes reflected in the Revised Proposed Permit.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Two sections of the Petition request the EPA's objection. First, the Petitioners request that the EPA object to the permit within Section IV of the Petition, titled "Environmental Justice and Affected Community Concerns." Second, in Section V of the Petition, titled "Additional Grounds for Objection," the Petitioners request the EPA's objection because the title V permit allegedly fails to establish a schedule for ITC to comply with NNSR preconstruction permitting requirements. The Petitioners include three separate subclaims or arguments within the NNSR-focused claim, each of which are separately addressed in the analysis that follows.

A. The Petitioners' Discussion of "Environmental Justice and Affected Community Concerns"

Petition Claim: Section IV of the Petition is titled "Environmental Justice and Affected Community Concerns." This section includes background discussion about the demographics of communities that

[13] This June 30, 2022, objection was issued under authority delegated by the EPA Administrator to Region 6 to object during the EPA's 45-day review period. The objection letter is available at *https://www.epa.gov/system/files/documents/2022-07/EPA%20Objection%20ITC%20TV%20Renewal%2006302022%20%281%29.pdf*.

[14] The EPA previously explained this to the Petitioners in the context of a premature petition filed on ITC Pasadena's Initial Proposed Permit. *See* Letter from Cynthia J. Kaleri, EPA Region 6, to Gabriel Clark-Leach, Environmental Integrity Project, Re: Petition for Objection for Intercontinental Terminals Company (ITC) Permit O3785 (Sept. 8, 2022), available at *https://www.epa.gov/system/files/documents/2022-09/2022%20ITC%20Petition%20Response.pdf*.

live near the facility, other sources of pollution that impact these communities, and disasters occurring in this area. *See* Petition at 6–10. Within this section, the Petitioners assert that TCEQ has the authority under state statutes and regulations to consider cumulative impacts and disproportionate environmental harms to communities of color. *Id*. at 8 (citing Texas CAA §§ 382.002, 382.011). The Petitioners also discuss a federal CAA provision, applicable to projects subject to NNSR, that requires consideration of a project's benefits against social and environmental costs. *Id*. (citing 42 U.S.C. § 7503(a)(5); 30 TAC § 116.111(a)(2)); *see also id*. at 13. The Petitioners then request: "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," and "EPA should object to the Proposed Permit and require ITC to address community concerns regarding their safety and their health." *Id*. at 9, 10.

EPA Response: Although this section of the Petition twice requests the EPA's objection, the basis for this request is not clear. Again, the Petitioners request the EPA's objection "if the agency determines that the permit fails to adequately protect public health and safety" and to "require ITC to address community concerns regarding their safety and their health." Petition at 9, 10. However, the EPA's authority to object to a title V permit is limited to situations where a petitioner demonstrates that a title V permit does not comply with an applicable requirement of the CAA or a part 70 requirement. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. §§ 70.2 (definition of "applicable requirement"), 70.8(c)(1), 70.12(a)(2). Thus, to demonstrate a basis for the EPA's objection related to these issues, the Petitioners would need to identify and establish a connection between (i) the stated community concerns related to health and safety and (ii) the Permit's compliance with the CAA and the implementing regulations.

Within this section of the Petition, the Petitioners do not articulate any specific grounds for objection relating to the terms of ITC's Permit, nor do the Petitioners identify any applicable requirements of the CAA, or requirements of part 70, with which the Permit does not comply. 40 C.F.R. § 70.12(a)(2)(i)–(iii). In fact, the Petitioners do not directly allege that issuance of the Permit violated *any* requirements related to the community concerns presented in this section of the Petition.

For example, the Petitioners do not specifically claim that TCEQ failed to satisfy the Texas statutory provisions cited by the Petitioners (Texas CAA §§ 382.002 and 382.011), nor that any such failure would provide a basis for the EPA's objection. Instead, the Petitioners cite these provisions to support the proposition that TCEQ has the authority under state law to consider these issues.[15]

Similarly, the Petitioners do not specifically claim that TCEQ's failure to conduct an analysis under the federal and SIP-based NNSR authorities cited by the Petitioners (42 U.S.C. § 7503(a)(5) and 30 TAC § 116.111(a)(2)) would constitute a basis for the EPA to object to the title V Permit. Section 173(a)(5) of the Act, 42 U.S.C. § 7503(a)(5), requires that a permitting authority reviewing a NNSR permit determine whether "an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location,

[15] Even if the Petitioners had alleged that TCEQ violated these state laws, this would not present a basis for the EPA's objection. The cited state statutes are not part of the EPA-approved SIP or part 70 program and are not otherwise a federally enforceable "applicable requirement" or part 70 requirement. Therefore, whether TCEQ satisfied these state statutes is not an issue the EPA can address in the present petition response. *See* 42 U.S.C. § 7661d(b)(2); 40 C.F.R. §§ 70.2 (definition of "applicable requirement"), 70.8(c)(1), 70.12(a)(2).

construction, or modification." Notably, any analysis under CAA § 173(a)(5) would only apply *if* a source is required to obtain an NNSR permit. Additionally, as noted in Section II.C of this Order, questions regarding whether a source should have obtained an NNSR permit, or whether issuance of such a permit satisfied CAA § 173(a)(5), should generally be addressed through the NSR permitting (not title V permitting) process. Nonetheless, the EPA appreciates the potential link between the Petitioners' environmental justice, community, and health-based concerns and their NNSR applicability allegations discussed in Section IV.B of this Order, to the extent that such concerns are addressed as part of implementing Section 173(a)(5). While the EPA's regulations governing state NNSR programs do not establish criteria or procedures for conducting the analysis required by CAA § 173(a)(5) and while the EPA does not want to prejudge the utility of NNSR permitting to address such concerns, the EPA has stated previously that "[e]nvironmental justice issues can be raised and considered in a variety of actions carried out under the CAA, as for example when EPA or a delegated state issues a NSR permit," citing the alternative site analysis under Section 173(a)(5). *In the Matter of Marcal Paper Mills, Inc.*, Order on Petition No. II-2006-01 at 12 & 12 n.4 (Nov. 30, 2006). But again, any analysis under Section 173(a)(5) would only apply if ITC Pasadena was subject to NNSR—a conclusion that TCEQ did not reach, and that the EPA does not reach in this Order.

Overall, to the extent this section of the Petition could be considered a claim requesting the EPA's objection, it is denied because it does not articulate a basis for the EPA's objection.

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

Section V of the Petition, titled "Additional Grounds for Objection," includes a single claim requesting the EPA's objection to the Permit. This claim involves the interaction between the title V Permit being petitioned and NSR permits used to authorize construction of the facility, including NSR Permit No. 95754 and Permit by Rule (PBR) Registration No. 166799.

The Petitioner's overarching claim is as follows: "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." Petition at 13; *see id*. at 32.

Within this claim, the Petitioners identify three separate bases for determining that construction of ITC's Pasadena Terminal triggered NNSR. *Id*. at 13. In summary, the Petitioners claim: (i) limitations taken to ensure that construction projects would not trigger NNSR are not enforceable as a practical matter; (ii) a minor NSR permit issued to authorize construction is a "sham permit"; and (iii) emission increases authorized by a PBR triggered NNSR. *Id*. at 13–14. Each of these three subclaims is treated separately in the following subsections.[16]

[16] Note that the Petition does not ascribe labels to the three subclaims, which are first introduced in Petition Sections V.B.i, V.B.ii, and V.B.iii. *See Petition* at 15–31. The remainder of Petition Section V includes some arguments that are common to all subclaims, as well as additional arguments unique to individual subclaims. The EPA's Order does not follow the same organization, but instead addresses all arguments relevant to each subclaim before addressing the next subclaim. This Order refers to these three subclaims as Subclaim (i), Subclaim (ii), and Subclaim (iii).

The Petitioners argue that these NSR-related issues are properly raised through title V for various reasons (and challenge TCEQ's suggestion to the contrary). As relevant to all three subclaims, the Petitioners assert that their request for a compliance schedule, which would be established as part of the title V permitting process, is within the scope of issues in the present title V renewal permit action. *Id*. at 33 (citing 40 C.F.R. §§ 70.5(c)(8)(iii)(C); 70.6(c)(3)).[17] Additional arguments relevant to the EPA's review of the specific NSR issues raised in individual subclaims are presented in the following subsections.

Subclaim (i): The Petitioners Claim That "ITC's Pasadena Terminal is a major source of VOC because synthetic minor emission caps in Permit No. 95754 are not practicably enforceable."

Petition Claim: The Petitioners assert that three VOC emission limits established by NSR Permit No. 95754 (which are incorporated into the title V permit)—described as "synthetic minor" limits—are insufficient to restrict the facility's potential to emit (PTE) below NNSR applicability thresholds because these limits are not enforceable as a practical matter. *See* Petition at 14, 15–21, 33–34.

The Petitioners assert that "an emission limit 'can be relied upon to restrict a source's PTE only if it is legally and practicably enforceable.'" *Id*. at 15 (quoting *In the Matter of Cash Creek Generation*, Order on Petition No. IV-2010-4 at 15 (June 22, 2012); citing 1990 Draft NSR Workshop Manual). To be practicably enforceable, the Petitioners assert that "synthetic minor emission limits must be technically accurate and subject to reliable methods for accurately determining compliance with those limits." *Id*. (citing 1990 Draft NSR Workshop Manual at A.5).

The Petitioners assert that "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." *Id*. at 33 (citing June 2022 EPA Objection at 5). The Petitioners further assert that the source would have triggered NNSR but for the restrictions ostensibly established by these synthetic minor emission limits. *Id*. Thus, the Petitioners assert that the question of NNSR applicability "may be resolved" by concluding that these limits are not practicably enforceable. *Id*. at 33–34. The Petitioners supply four reasons why the synthetic minor limits are not practicably enforceable.

First, the Petitioners claim that all three VOC emission limits are not practicably enforceable because they rely on an equation for calculating emissions from loading losses that includes a 30 percent margin of error. Petition at 15–17. The Petitioners observe that the three synthetic minor limits in Special Condition No. 2 of NSR Permit No. 95754 include controlled and uncontrolled emissions from marine loading losses. *Id*. at 16. The Petitioners further observe that Special Condition 46.A.2 of NSR Permit No. 95754 requires ITC to calculate emissions from loading using "the uncontrolled loading loss factor, L_L . . . defined by AP-42, Sec. 5.2, Eqn. 1 (July 2008)." *Id*. The problem, according to the Petitioners, is that "[t]his 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

[17] Later in the Petition, the Petitioners also contend that NNSR preconstruction permitting requirements are "applicable requirements" for title V purposes. *Id*. at 31–32 (citing 40 C.F.R. § 70.2; 30 TAC § 116.150(b), (d)(1–4); 40 C.F.R. § 51.2270(c)). The Petitioners do not elaborate on whether or how this concept relates to the reviewability of the NNSR applicability issues raised in the Petition. *See id*.

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.'" *Id*. at 17 (quoting AP-42, Sec. 5.2 at 5.2-4 (July 2008)). The Petitioners contend that increases within this margin of error would result in undetected violations of the synthetic minor emission limits, which the Petitioners assert are set at 99.9 and 97.71 percent of the applicable NNSR major source thresholds. *Id*. Specifically, the Petitioners compare the Group A and B limits (set at 24.9 tons per year) to the then-applicable threshold of 25 tons per year, and the Group C limit (set at 97.71 tons per year) to the then-applicable threshold of 100 tons per year. *Id*. at 10, 11, 17 n.12. The Petitioners conclude that this unreliable method of calculating VOC emissions from loading renders the VOC emission limits not practicably enforceable. *Id*. at 17.

Second, the Petitioners claim that the VOC emission limits are not practicably enforceable because the Permit does not specify a methodology for calculating VOC emissions "in situations where ITC's failure to comply with permit requirements renders compliance methods established by the permit inapplicable." Petition at 18–19. The Petitioners explain that Special Condition No. 46.A.5 of NSR Permit No. 95754 identifies VOC capture and control efficiencies used to calculate emissions from certain loading activities. *Id*. at 17. Further, the Petitioners indicate that this condition, as well as Special Condition 46.C, state that use of these control efficiencies is contingent upon ITC's compliance with various other monitoring and compliance demonstration requirements in that permit. *Id*. at 17–18. The Petitioners interpret these qualifications to mean that, if the source does not comply with the specified monitoring preconditions, it cannot use the control efficiencies listed in Special Condition 46.C. *Id*. at 18. The problem, according to the Petitioners, is that the Permit does not specify how the source will then calculate its VOC emissions if the source does not comply with those preconditions. *Id*. at 18–19.[18] Similarly, the Petitioners claim that the Permit is deficient because it does not provide that noncompliance with those preconditions would also establish a violation of the Permit's synthetic minor VOC emission limits. *Id*. at 19.

Third, the Petitioners claim that the Permit "improperly limits [the] circumstances under which exceedances of its synthetic minor emissions caps trigger [NNSR] preconstruction permitting requirements." Petition at 19. Put another way, the Petitioners claim that the Permit "is ambiguous as to whether and which violations of its special conditions trigger NNSR . . . ." *Id*. at 20. Specifically, the Petitioners indicate that Special Condition 3 of Permit No. 95754 provides:

> 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.

Id. The Petitioners contend that "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." *Id*. The Petitioners argue that this condition is not

[18] The Petitioners also assert that ITC has violated these conditions at least once. *Id*. at 18 n.13.; *id*. at 19.

enough. *Id*. The Petitioners argue that the Permit must also "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." *Id*. at 19–20. The Petitioners suggest that, so long as violations of these requirements "do not trigger ITC's obligation to obtain an NNSR permit[,] those requirements fail to limit" the facility's PTE. *Id*. at 20.

Fourth, the Petitioners claim that the "EPA's ITC Objection order identifies additional monitoring, testing, recordkeeping, and reporting deficiencies." Petition at 20; *see also id*. at 15, 34. The Petitioners summarize five issues that formed the basis of the June 2022 EPA Objection to an earlier version of the Permit. *See id*. at 20–21. The Petitioners therefore request the EPA's objection to the current Permit because "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." *Id*. at 21.

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

Reviewability

As an initial matter, it is important to clarify the issues that are properly within the scope of the EPA's review of this title V permit renewal proceeding. The Petitioners suggest that all of their allegations concerning NNSR applicability are within the scope of review because they are framed as a request for a compliance schedule, which is something that can be imposed using legal authorities under title V. *See* Petition at 34 (citing 40 C.F.R. §§ 70.5(c)(8)(iii)(C); 70.6(c)(3)). The Petitioners are correct that the title V permitting process can be used to impose "[a] schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance." 40 C.F.R. § 70.5(c)(8)(iii)(C). However, determining *whether* a source is "in compliance with all applicable requirements" related to NSR is another matter entirely. Importantly, as introduced in Section II.C of this Order, when an NSR permit is issued under EPA-approved SIP regulations, following public notice and the opportunity for comment and judicial review, that NSR permit establishes the NSR-related "applicable requirements" of the SIP for title V purposes. *See Env't Integrity Project v. EPA*, 960 F.3d 236 (5th Cir. 2020); 89 Fed. Reg. 1150, 1160–84 (Jan. 9, 2024); *see also, e.g.*, *Big River Steel Order* at 8–20. Thus, for example, if a minor NSR permit is issued, the EPA would not use title V to reconsider whether the source should have instead obtained a major NSR permit containing different requirements. The Petitioners cannot sidestep this by merely presenting challenges to substantive NSR issues within a broader claim requesting a title V compliance schedule.[19]

Accordingly, the EPA's treatment of the Petitioners' NSR-related claim is not based on the fact that this claim was framed as a request for a title V compliance schedule. Instead, the EPA's decision depends on other factors. As relevant to Subclaim (i), the Petitioners argue that "the question of whether

[19] In other words, merely invoking a title V-based authority is not enough to subject underlying title I preconstruction permitting decisions to further review through title V. For example, the Petitioners' claim could have invoked other title V-based authorities related to title V permit content, such as by framing their claim as an allegation that the title V permit does not include all applicable requirements related to NNSR. *See* 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a)(1). Such a claim would yield the same result; the EPA would not consider *whether* NNSR requirements were applicable to the source.

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." Petition at 33. This is true, but not in the exact sense envisioned by the Petitioners. As the EPA explained in the *Yuhuang II Order*:

> The Petitioners may not use the title V petition process to raise concerns over those PSD applicability decisions. Accordingly, to the extent that the August 2017 Petition claims that the Yuhuang facility is incorrectly characterized as a minor source for PSD purposes (including claims related to the calculation of PTE), it is denied.
>
> However, the majority of the individual claims raised by the Petitioners challenge the enforceability of emission limits contained within the Permit, through specific allegations regarding the adequacy of monitoring requirements associated with these limits. Inquiries concerning whether a title V permit contains enforceable permit terms, supported by monitoring sufficient to assure compliance with an applicable requirement or permit term (such as an emission limit established in a minor NSR permit), are properly reviewed during title V permitting. The statutory obligations to ensure that each title V permit contains "enforceable emission limitations and standards" supported by "monitoring . . . requirements to assure compliance with the permit terms and conditions," 42 U.S.C. § 7661c(a) and (c), apply independently from and in addition to the underlying regulations and permit actions that give rise to the emission limits and standards that are included in a title V permit. Therefore, the EPA will address those portions of the August 2017 Petition that challenge the enforceability of emission limits and the sufficiency of monitoring conditions in the Permit.

In the Matter of Yuhuang Chemical Inc. Methanol Plant, Order on Petition Nos. VI-2017-5 & VI-2017-13 at 8 (Apr. 2, 2018) (*Yuhuang II Order*).

Similarly, here, the EPA will review the Petitioners' Subclaim (i) concerns related to the enforceability of—and the monitoring, recordkeeping, and reporting supporting—ITC Pasadena's synthetic minor VOC emission limits, since these concerns relate to core title V requirements. *See* 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(1), (c)(1). However, this Order does not directly address how any such title V-based deficiencies would impact the validity of the "applicable requirements" established in the underlying minor NSR permit actions, including whether NNSR was or is applicable to the projects authorized by those permits. In other words, the EPA disagrees with the Petitioners that questions of NNSR applicability "may be resolved" in this title V proceeding by concluding that these limits are not supported by sufficient monitoring or are not practicably enforceable. Petition at 34. The answers to such questions may logically follow from the results of this title V petition Order, but they must be resolved outside of the title V process. See the EPA's response to Subclaim (ii) for more information.

Margin of Error in Loading Loss Equation

Turning to the Petitioners' first substantive allegation in Subclaim (i), the Petitioners have demonstrated that the record is unclear as to whether the loading loss equation from AP-42 Chapter 5.2 is sufficient to demonstrate compliance with all three synthetic minor VOC emission limits.

The title V permit, as revised by TCEQ in response to the June 2022 EPA Objection, incorporates by reference the June 8, 2023, version of NSR Permit No. 95754. Permit at 140. That NSR permit, in turn, includes three limits on VOC emissions, each of which were established to restrict ITC Pasadena's emissions below the NNSR threshold that applied at the time the facility constructed various emission units. A collection of emission units described as "Group A" are subject to a 24.9 ton per year VOC limit; "Group B" units are subject to a 24.9 ton per year VOC limit; and "Group C" units are subject to a 94.75 ton per year VOC limit. NSR Permit No. 95754, Special Condition 2.[20] This NSR permit further specifies that, in order to demonstrate compliance with each of these limits, "Emissions from loading activities shall be calculated using the EPA Publication Compilation of Emission Factors (AP-42), Chapter 5, consistent with good engineering practice and the following specifications. . . . (2) The uncontrolled loading loss factor, L_L is defined by AP-42, Sec. 5.2, Eqn. 1 (Jul. 2008) edition." *Id*., Special Condition 46.A. This AP-42 equation for determining L_L states: "Emissions from loading petroleum liquid can be estimated (with a probable error of ±30 percent) using the following expression." AP-42, Sec. 5.2 at 5.2-4 (July 2008).

The issue, then, is whether this compliance demonstration methodology, which relies on an AP-42 equation or emission factor with a built-in probable error of ±30 percent, is sufficient to assure compliance with synthetic minor limits that were established just under the relevant NNSR applicability thresholds.[21]

The EPA acknowledges that AP-42 emission factors may be used to demonstrate compliance with emission limits in certain circumstances. The Petitioners do not contest the use of AP-42 here as a general matter. Whether and how a permit must account for uncertainty in AP-42 emission factors (including the AP-42 emission factor at issue here) is a fact-specific decision, as with essentially all other decisions concerning compliance assurance in title V permits.

In the analogous context of Plantwide Applicability Limits (PAL)—a specialized type of limit that functions to limit emissions in order to restrict major NSR applicability for future modifications—the EPA's regulations expressly provide: "All emission factors shall be adjusted, if appropriate, to account for the degree of uncertainty or limitations in the factors' development." *E.g.*, 40 C.F.R. § 51.165(f)(12)(vi)(A); *see also* 30 TAC 116.186(c)(3)(D)(i) (same language in the PAL provisions of the Texas SIP). Although this requirement is not expressly codified elsewhere, the same principle is similarly relevant to other types of synthetic minor limits that are relied upon to restrict the applicability of CAA requirements.

[20] The NSR permit further clarifies that compliance with these limits "shall be based on a 12-month rolling basis." NSR Permit No. 95754, Special Condition 46. Note also that a prior version of this NSR permit, cited by the Petitioners, limited Group C emissions to 97.71 tons per year of VOC.

[21] The major source threshold for VOC was 25 tons per year when the Group A and Group B limits were established in 2012 and 2015 (because Harris County was designated a severe nonattainment area for the 1997 eight-hour ozone NAAQS), and 100 tons per year when the Group C limit was established in 2017 (because Harris County was designated a moderate ozone nonattainment area for the 2008 eight-hour ozone NAAQS). *See* 42 U.S.C. § 7511a(b), (d); 30 TAC 116.12(20), Table 1 (major source emission thresholds); 74 Fed. Reg. 56983 (Oct. 1, 2008); 81 Fed. Reg. 90207 (Dec. 14, 2016); *see also* Houston-Galveston-Brazoria: Ozone History (accessed Nov. 22, 2023), available at *https://www.tceq.texas.gov/airquality/sip/hgb/hgb-ozone-history*.

In the circumstances present here, where a limitation is designed to restrict a source's emissions (*i.e.*, where a source would naturally have the potential for greater emissions), where the limitation is established very close to the relevant major source thresholds, and where uncertainty associated with the emission factor is known, quantifiable, and significant, it is particularly important to account for this uncertainty. If not, the source could comply with its emission limits on paper but in reality emit significantly more than the relevant major source threshold.

There may be various ways to account for this uncertainty. Here, it is not clear that the Permit contains any provisions that would account for the probable error that is built into the loading loss equation in AP-42 Section 5.2. In responding to public comments, TCEQ brushed off these concerns without engaging with the issues raised. TCEQ's response first suggests that this issue is beyond the scope of this title V permitting action. RTC at 12. This is plainly incorrect. As the EPA has repeatedly told TCEQ, questions concerning whether a title V permit contains sufficient monitoring and other conditions necessary to assure compliance with all emission limits—including limits first established in an NSR permit—must be addressed through title V. *E.g.*, June 2022 EPA Objection; *In the Matter of Gulf Coast Growth Ventures LLC*, Order on Petition No. VI-2021-3 at 17–19 (May 12, 2022); *In the Matter of ExxonMobil Corp., Baytown Chemical Plant*, Order on Petition No. VI-2020-9 at 20–21 (March 18, 2022). TCEQ's response then refers the public to its responses to similar comments received on a prior version of NSR Permit No. 95754. RTC at 12. However, TCEQ's response to those prior comments does not speak to the 30 percent probable error issue.[22] Thus, the permit record is inadequate to determine whether and to what extent TCEQ accounted for this probable error and, accordingly, whether the Permit assures compliance with the three synthetic minor VOC limits. The EPA therefore grants this part of Subclaim (i).

Alternative Control Efficiencies in Cases of Noncompliance

As relevant to the second argument within Subclaim (i), Special Condition 46.A.5 of NSR Permit No. 94754, as incorporated into the title V Permit, identifies various capture and control efficiencies to be used when calculating VOC emissions from different types of loading activities. The condition further states: "The use of values for $\eta_{capture}$ and $\eta_{control}$ depicted in this paragraph is contingent upon satisfactory compliance with the compliance demonstration and monitoring requirements at Special Conditions Nos. 1, 16-20, 30-31, 44 of this permit." Special Condition 46.C addresses emissions from maintenance, startups, and shutdowns (MSS), and similarly states: "MSS emissions shall be calculated and summed as required by Special Condition No. 34. The 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."

The Petitioners argue that the Permit must specify an alternative calculation methodology in cases where the source does not comply with the listed preconditions, and that the Permit must specify that noncompliance with those preconditions equates to noncompliance with the synthetic minor VOC emission limits. *See* Petition at 17–19. However, the Petitioners do not demonstrate that this is required by the CAA or otherwise necessary to assure compliance.

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[22] *See* TCEQ, Executive Director's Response to Public Comment on Permit No. 95754 at 29 (Apr. 5, 2021), available at *https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=6067763*.

As the EPA has previously explained:

> Finally, regarding the Petitioner's brief claim that the Permit must specify the consequences of violating the rolling 12-month emission limits, the Petitioner provides no citation to, or analysis of, any legal authority that would require a title V permit to contain such a provision. In general, title V permits are written to assure compliance with the terms of the permit and need not anticipate all possible results of noncompliance with permit terms. The consequences of any future noncompliance with existing permit terms are more properly handled through the enforcement process. Accordingly, this portion of the Petition is denied.

In the Matter of Salt River Project Agricultural Improvement and Power District, Agua Fria Generating Station, Order on Petition No. IX-2022-4 at 19 (July 28, 2022) (*SRP Agua Fria I Order*) (internal citation omitted).

Here, similar principles apply. The Permit is clear that, if ITC Pasadena does not comply with certain preconditions for using the listed control efficiency assumptions, then ITC Pasadena cannot use those control efficiencies when calculating VOC emissions. The Permit does not specify backup control efficiency assumptions in the case of such noncompliance. Presumably, this is because the proper control efficiency assumptions could vary depending on the nature of the source's noncompliance with those preconditions. It may not be practicable to anticipate all possible causes of noncompliance, or all necessary control efficiency adjustments, through the permitting process. In other words, it may not be practicable to design a permit with backup calculation methods for every single contingency involving noncompliance with permit terms. In any case, the Petitioners have not demonstrated that the Permit must attempt to do so.

Instead, given that those preconditions are also independently enforceable permit terms, the source would have to report any noncompliance with those preconditions, which could lead to further permit proceedings or enforcement action. Such an enforcement action would be an appropriate venue to define the adjusted control efficiencies to use when the default control efficiencies are no longer applicable. Again, this will likely depend on the nature of the noncompliance, and this type of fact-specific inquiry could be explored and defined through the enforcement process. Moreover, such an enforcement action would be an appropriate venue to determine whether noncompliance with these preconditions also resulted in noncompliance with the relevant VOC emission limit(s).

Overall, because the Petitioners have not demonstrated that the Permit must specify the consequences of noncompliance, the EPA denies this part of the Petition.

Situations that Would Trigger NNSR

The Petitioners' third argument in Subclaim (i)—that the Permit limits the circumstances under which the facility will trigger NNSR and should include explicit permit language regarding the consequences of noncompliance with the Permit's synthetic minor emission limits on VOC—is misguided.

First, the Permit does not "limit [the] circumstances under which" the source would trigger NNSR. Petition at 19. The Permit simply identifies one such situation. More specifically, Special Condition 3 of NSR Permit No. 95754 provides:

> 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 condition does not purport to identify the *only* situation under which the source could trigger NNSR, nor does it otherwise limit the situations under which the source could trigger NNSR. Similarly, nothing in the Permit could (or should) be read to suggest that violations of limitations taken to restrict PTE "do not trigger ITC's obligation to obtain an NNSR permit." Petition at 20. To the contrary, the title V Permit expressly states "This permit does not relieve the permit holder from the responsibility of obtaining New Source Review authorization for new, modified, or existing facilities in accordance with 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification," and "The permit holder shall comply with 30 TAC Chapter 116 by obtaining a New Source Review authorization prior to new construction or modification of emission units located in the area covered by this permit." Permit at i, 1.[23] The Petitioners do not acknowledge these provisions.[24] Overall, the Petitioners are simply incorrect to suggest that the Permit restricts the ability of the EPA, TCEQ, or the public to enforce any alleged violations of the requirement to obtain an NSR permit.

Second, the Petitioners have not cited any authority to support their claim that the Permit must identify all possible situations under which the source would be required to obtain an NNSR permit, or (as explained previously) that the Permit must identify the consequences of noncompliance with permit limits. *See SRP Agua Fria I Order* at 19. Accordingly, the EPA denies this part of the Petition.

Additional Monitoring, Testing, Recordkeeping, and Reporting Issues

Regarding the Petitioners' fourth argument within Subclaim (i), the Petitioners are correct that the EPA objected to an earlier version of the proposed renewal permit (the Initial Proposed Permit) due to a number of concerns with monitoring and other conditions necessary to assure compliance with the synthetic minor VOC emission limits. *See* June 2022 EPA Objection at 3–4. However, in response to the June 2022 EPA Objection, on July 17, 2023, TCEQ revised the Permit and permit record and submitted to the EPA a new version of the proposed permit (the Revised Proposed Permit).[25]

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[23] *See also* 42 U.S.C. §7661a(a) ("Nothing in this subsection [of title V] shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.").

[24] *See supra* note 8 and accompanying text.

[25] More specifically, TCEQ revised NSR Permit No. 95754 on June 8, 2023, in order to address the underlying permit terms that gave rise to the EPA's objection. TCEQ then updated the proposed title V permit to incorporate this most recent version of NSR Permit No. 95754.

The Petitioners do not allege, much less demonstrate, that TCEQ failed to resolve the issues that the EPA previously identified, or that any of the issues raised in the June 2022 EPA Objection (five of which are briefly summarized in the Petition) remain problems that warrant the EPA's objection to the version of the Permit challenged by the present Petition (*i.e.*, the Revised Proposed Permit). In fact, the Petitioners do not acknowledge or address any of the changes that TCEQ made to the Revised Proposed Permit and permit record in response to the EPA's earlier objection.[26] Accordingly, the EPA denies this part of the Petition.

Direction to TCEQ: TCEQ must ensure that the Permit contains sufficient conditions to assure compliance with the three synthetic minor emission limits on VOC. More specifically, TCEQ must ensure that the Permit sufficiently accounts for the "probable error of ±30 percent" associated with the AP-42 equation for calculating loading loss emissions. TCEQ may be able to amend the permit record to explain why the Permit, as written, already accounts for this probable error from all relevant emission units. For example, stack test results from certain emission units might confirm that the AP-42 equation for calculating loading loss emissions from certain emission units is sufficiently accurate and/or conservative for all operating scenarios at those units. To the extent TCEQ relies on such a rationale, it must explain the basis for this decision within the permit record and include quantitative support, where relevant and available. Moreover, it is important that any such rationale addresses all sources of emissions that rely on this equation.

Alternatively, it may be necessary for TCEQ to amend the Permit to account for the probable error in this AP-42 loading loss equation. There could be various ways to accomplish this. For example, TCEQ could add a safety factor to the equation for calculating loading loss emissions. Or, TCEQ could amend the Permit to ensure that other inputs to the loading loss equation compensate for this probable error, such that the equation remains conservative for all operating scenarios at all affected emission units. Or, for certain emission units, other permit terms (*e.g.*, stack testing requirements) may provide a more accurate means of quantifying monthly VOC emission without the need for the AP-42 equation at issue. To the extent that TCEQ will require ITC Pasadena to rely on such other permit terms to demonstrate compliance with the VOC emission limits at issue, the Permit must clearly state this connection.

TCEQ could make any necessary additions or changes directly within ITC Pasadena's title V Permit, or it could make such changes to the Special Conditions of NSR Permit No. 95754 and then promptly revise the title V Permit to incorporate the updated version of NSR Permit No. 95754. In either case, the title V Permit must ultimately contain the necessary monitoring in order to resolve the EPA's objection.

Subclaim (ii): The Petitioners Claim That "Permit No. 95754 is a sham permit that does not limit the Terminal's potential to emit below major source thresholds."

Petition Claim: The Petitioners' second subclaim asserts that NSR Permit No. 95754 is a "sham permit" that was issued in "bits and pieces" in order to circumvent NNSR review. *Id*. at 21, 23; *see id*. at 14, 21–28, 35–39.

[26] Instead, this part of the Petition appears to be a word-for-word reproduction of the petition that the Petitioners prematurely filed on the Initial Proposed Permit (which predated TCEQ's response to the EPA's objection).

The Petitioners first rely on the EPA's statements in a 1990 Draft NSR Workshop Manual, where the EPA explained: "[I]f 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." *Id*. at 22 (quoting 1990 Draft NSR Workshop Manual at c.6). The Petitioners assert that when TCEQ issued NSR Permit No. 95754 in 2012 to authorize the initial construction of the facility, the state permit engineer acknowledged: "*Although the site will ultimately be major*, this initial construction will be limited to VOC emissions less than 25 [tons per year] so the site is minor." *Id*. (quoting Technical Review Document for Permit No. 95754, Project No. 164990) (emphasis in Petition). The Petitioners contend that a "permit issued under these circumstances 'is considered a sham.'" *Id*. at 23 (quoting NSR Workshop Manual at c.6.).

Additionally, the Petitioners claim: "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." *Id*. The Petitioners explain how, after receiving its initial construction authorization in 2012, the source subsequently applied for and received amendments to NSR Permit No. 95754 between 2014 and 2017 to authorize subsequent expansions to the facility. *See id*. at 23–28.[27] The Petitioners state that these sequential authorizations—processed under the minor NSR program—have collectively authorized the source to emit at least 147.51 tons per year of VOC, far exceeding the relevant NNSR major source threshold. *Id*. at 23. The Petitioners argue that "ITC has improperly broken a single construction project into separate phases based on the applicable or anticipated major source threshold in Harris County." *Id*. at 27. The Petitioners further criticize TCEQ's justification for its decision not to aggregate the construction activities authorized under NSR Permit No. 95754 into a single project. *See id*. at 36–39. In addition to addressing the timing associated with the separately authorized projects, *id*. at 24–27, 37–38, the Petitioners assert that the projects utilize much of the same equipment and that none of the three projects would be economically viable on its own, *id*. at 27–28, 39.

The Petitioners acknowledge the EPA's position that the EPA will not second-guess NSR permitting decisions for projects that have been subject to notice and comment requirements. *Id*. at 35. However, the Petitioners contend that this position is not applicable here. *Id*.[28] Notwithstanding the fact that "members of the public may have received public notice and an opportunity to comment on Permit No. 95754 and its subsequent amendments," the Petitioners contend that "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." *Id*. This is because, according to the Petitioners, the "the question considered by the TCEQ in each of these cases is whether ITC's application complied with the requirements at 30 [TAC] § 116.111, and none of the requirements at § 116.111 clearly require the TCEQ to determine whether an applicant has requested a sham permit." *Id*. The Petitioners contend that the title V permitting process is better designed to address this issue, based on a more comprehensive evaluation than would be possible when evaluating an "allegedly-discrete NSR permitting project." *Id*. at 35–36.

[27] The Petitioners further assert that a permit term designed to prevent the source from artificially splitting up construction into separate permit actions and thereby circumventing NNSR was not successful. *See id*. at 23–24.

[28] In addition to arguing that this position does not apply to the facts here, the Petitioners also suggest that the EPA should abandon this position. Petition at 35 n.29.

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

As noted in Section II.C of this Order, where a permitting authority authorizes construction by issuing an NSR permit that was subject to public notice and the opportunity for public comment and judicial review, the terms and conditions of that NSR permit define the "applicable requirements" of the SIP for purposes of title V permitting, and the terms and conditions of that NSR permit should be incorporated into the source's title V permit without further review. This interpretation is explained more fully in the proposed Applicable Requirements Rule, 89 Fed. Reg. at 1160–84, the *Big River Steel Order*, and subsequent orders, and was upheld by the U.S. Court of Appeals for the Fifth Circuit. *See Env't Integrity Project*, 960 F.3d 236.

The issues raised within Subclaim (ii) concern whether TCEQ properly authorized construction at ITC Pasadena through three minor NSR permits, or whether construction should have instead been authorized under one (or more) major NNSR permit(s).[29] The three authorizations at issue are all associated with NSR Permit No. 95754, but each separate permit action has its own project number: (i) Project No. 164990 authorized construction of "Group A" units and was finalized in 2012; (ii) Project No. 219916 authorized construction of "Group B" units and was finalized in 2015; and (iii) Project No. 243313 authorized construction of "Group C" units and was finalized in 2017. As the Petitioners acknowledge, the public was given notice of, and the opportunity to comment on, each of these three minor NSR permit actions. *See* Petition at 35.[30] These permitting actions would also have been subject to judicial review through the state court system. *See* 30 TAC 80.275; Tex. Gov't Code § 2001.171–178. Thus, for purposes of ITC Pasadena's title V renewal permit, those individual minor NSR permit actions defined the applicable requirements associated with the 2012, 2015, and 2017 construction activities. This is precisely the type of situation in which it would be inappropriate to re-evaluate those NSR permitting decisions through the present title V renewal permit process.[31]

Here, the Petitioners acknowledge the EPA's position but argue that is inapplicable to the facts at hand. The Petitioners claim that "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." Petition at 35. The Petitioners' arguments are unconvincing. As a practical matter, the public had a clear opportunity to challenge TCEQ's decision to issue separate minor NSR permits—as opposed to one (or more) major NNSR permit(s)—when these minor NSR permits were issued.

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[29] The Petitioners do not specifically ground their arguments in the SIP provisions that dictate the situations in which a source must obtain a major NSR permit, as opposed to a minor NSR permit, to authorize the construction of a new or modified source in Texas. Instead, the Petitioners repeatedly refer to a concept discussed in EPA guidance as a "sham permit," and the Petitioners occasionally reference TCEQ's decisions regarding what is known as "project aggregation." Regardless of the nomenclature used and the Petition's lack of regulatory citations, it is clear that the Petitioners' central allegation is that TCEQ erred in authorizing the three projects through minor NSR—as opposed to major NSR—permits.

[30] The Technical Review documents accompanying each of these three minor NSR permits—each of which are cited by the Petitioners (for other reasons)—identify the relevant public notice dates and whether public comments were received. *See* Technical Review for Project No. 164990 (cited by Petition at 22 n.14); Technical Review for Project No. 219916 (cited by Petition at 24–25 n.15); Technical Review for Project No. 243313 (cited by Petition at 26 n.20).

[31] Consistent with the EPA's approach, TCEQ's response to comments does not substantively engage with the issues raised in Subclaim (ii), instead referring the public to explanations provided during the NSR permitting process. *See* RTC at 8.

For example, if the Petitioners—or any other members of the public—were concerned that the "Group B" emission units authorized in 2015 should have been evaluated as part of the same new source as the "Group A" emission units authorized in 2012, they could have raised those concerns during the 2015 permit action (if not the 2012 permit action). Or, they could have pursued enforcement if information from the 2015 permit action indicated that ITC Pasadena should have obtained a NNSR permit for the construction authorized in 2012. Likewise, if the Petitioners were concerned that the "Group C" emission units authorized in 2017 should have been evaluated alongside the "Group B" emission units authorized in 2015, they could have raised those concerns during the 2017 permit action. Or, again, they could have pursued enforcement. But TCEQ did not receive any public comments on the 2015 or 2017 NSR permits,[32] and the EPA is not aware of any public enforcement actions relevant to those construction activities.

Additionally, one of the Petitioners' arguments for why the three projects should have been aggregated (*i.e.*, considered together for NNSR applicability purposes) undermines their position that the public lacked a clear opportunity to challenge those decisions at the time. Specifically, the Petitioners allege that these construction activities began within a relatively short time of one another. *See* Petition at 24–27, 37–38. But to the extent the timing of these projects raises concerns, this should have been readily apparent to the public when the minor NSR permits were issued, because public notice of these projects was published within a similar time period.

The fact that these issues were redressable at the time of those individual NSR permit actions is further evidenced by the fact that TCEQ considered these exact same issues when it issued the 2012, 2015, and 2017 minor NSR permits. In fact, TCEQ specifically discussed its conclusions about why the projects were permitted separately during those actions.[33]

The Petitioners also suggest that this issue could not have been raised during the individual minor NSR permit actions because "the question considered by the TCEQ in each of these cases is whether ITC's application complied with the requirements at 30 [TAC] § 116.111, and none of the requirements at § 116.111 clearly require the TCEQ to determine whether an applicant has requested a sham permit." Petition at 35. The Petitioners are incorrect. As relevant here, 30 TAC 116.111(a)(2)(H) requires NSR permit applicants to demonstrate that, "If the proposed facility is located in a nonattainment area, it shall comply with all applicable requirements in this chapter concerning nonattainment review." This would necessarily include the requirement to obtain an NNSR permit for construction of new or modified facilities that exceed the relevant major source or major modification thresholds. Questions about the scope of construction activities authorized by one (or more) NSR permits, viewed in the context of determining NNSR applicability, would fall within this requirement. Thus, nothing in the regulation cited by the Petitioners would have prevented them from raising their concerns during the prior NSR permitting actions.

Overall, when TCEQ authorized the construction of the ITC Pasadena facility by issuing minor NSR permits in 2012, 2015, and 2017, following public notice and the opportunity for public comment and judicial review, those permits established the NSR-related "applicable requirements" of the SIP for purposes of title V. The EPA will not revisit those decisions in the current title V renewal permit

[32] *See* Technical Review for Project No. 219916; Technical Review for Project No. 243313 .

[33] *See* Technical Review for Project No. 164990; Technical Review for Project No. 219916; Technical Review for Project No. 243313.

proceeding. Thus, the EPA denies Subclaim (ii). This does not mean that the EPA agrees with TCEQ's decisions when it issued those minor NSR permits. It simply means that the present petition challenging the facility's title V renewal permit is not the correct venue to address those problems.

Subclaim (iii): The Petitioners Claim That "Emissions increases authorized by PBR Registration No. 166799 trigger NNSR preconstruction permitting requirements."

Petition Claim: The Petitioners assert that emission increases authorized by a PBR triggered NNSR. *See* Petition at 14–15, 28–31, 34–35, 39.

This part of the Petition concerns two restrictions incorporated into the title V Permit: Special Conditions 3 and 45 of NSR Permit No. 95754. As the Petitioners recount, "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." *Id*. at 28.

The Petitioners contend that these conditions did not prevent ITC from using a PBR to circumvent NNSR because ITC simply ignored them. *Id*. The Petitioners accuse ITC of intentionally making a false representation on its permit application for a PBR, where ITC answered "no" to the question: "Are there any air permits at the site containing conditions which prohibit or restrict the use of PBRs?" *Id*. at 29 (quoting ITC's application for Certified PBR Registration No. 166799). The Petitioners assert that, "based on ITC's misrepresentation," TCEQ approved ITC's application and issued Certified PBR Registration No. 166799 on November 29, 2021. *Id*. at 30. The Petitioners request a compliance schedule that requires ITC to correct this misrepresentation. *Id*.

The Petitioners also request a compliance schedule that requires ITC to re-apply for a major NNSR permit authorizing emissions currently authorized by that PBR. *Id*. at 28; *see also id*. at 32. The Petitioners claim that the equipment and emissions authorized by PBR Registration No. 166799 should be aggregated with projects authorized by NSR Permit No. 95754. *Id*. at 30. For support, the Petitioners allege that the PBR authorizes additional emissions from the same units covered by the existing synthetic minor limits. *Id*. Specifically, the Petitioners allege that "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 to load chemicals stored in ITC's existing tanks." *Id*. The Petitioners further allege that 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 in Permit No. 95754. *Id*. The Petitioners conclude that "[t]he 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,'" thus triggering NNSR. *Id*. at 31 (quoting NSR Permit No. 95754, Special Condition 3).

The Petitioners contest TCEQ's refusal to explain whether PBR Registration No. 166799 triggered NNSR on two grounds. First, the Petitioners assert that these NSR-related issues are properly subject to review through the current title V action because the underlying PBR registration did not involve public notice and comment. *Id*. at 34. The Petitioners discuss the EPA's statements indicating that 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. *Id*. at 34 (citing *Big River Steel Order* at 11 n.20). Here, the Petitioners assert that neither ITC's PBR registration application nor TCEQ's decision to approve this registration were subject to public notice or comment. *Id*. at 34–35. Thus, the Petitioners suggest that issues related to that PBR are subject to review in this title V renewal. *See id*.

Second, the Petitioners address TCEQ's suggestion that it need not address PBR Registration No. 166799 because that registration was not yet incorporated into the title V permit. *Id*. at 39 (citing RTC at 9). The Petitioners assert that this is incorrect. The Petitioners state that title V permits must include a compliance schedule addressing non-compliance with requirements at the time of permit issuance. *Id*. (citing 40 C.F.R. §§ 70.5(c)(8), 70.6(c)(3)). Additionally, the Petitioners observe that PBR Registration No. 166799 was finalized before the title V permit was issued. *Id*. Thus, the Petitioners claim that if the PBR authorization resulted in the facility's non-compliance with NNSR at the time of title V permit issuance, the title V permit must include a compliance schedule, even if the PBR authorization was not yet incorporated into the title V permit. *Id*.

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

As the EPA has previously explained, only NSR permits that are issued following public notice and the opportunity for comment and judicial review establish the NSR-related "applicable requirements" of the SIP in a manner insulated from further review through title V. *See, e.g.*, *Big River Steel Order* at 11 n.20. By contrast, when construction activities are authorized without public notice and the opportunity for public comment, the EPA has used the title V permitting and petition process to ensure that the title V permit includes and assures compliance with all applicable requirements of the SIP. *See* 89 Fed. Reg. at 1163–64, 1169–70; *In the Matter of Suncor Energy (U.S.A.), Inc., Commerce City Refinery, Plant 2 (East)*, Order on Petition Nos. VIII-2022-13 & VIII-2022-14 at 48 (July 31, 2023); *In the Matter of Coyote Station Power Plant*, Order on Petition Nos. VIII2019-1 & VIII-2020-8 at 12–13 (Jan. 15, 2021).

Here, the construction activities at issue were authorized by PBR Registration No. 166799 in 2021 without public notice or the opportunity for comment. Thus, unlike the NNSR applicability issues raised in Subclaim (ii), the issues raised in Subclaim (iii) concerning whether emission increases authorized by this PBR triggered NNSR were within the scope of issues TCEQ should have considered when responding to public comments on this title V permit action.

TCEQ's suggestions to the contrary are unavailing. TCEQ's RTC states, in part:

> The ED also notes the draft permit went to public notice on July 28, 2021, and PBR registration 166799 was issued on November 29, 2021. Therefore, the registered PBR is not included in the draft permit and will be addressed in a subsequent SOP revision application. As stated above, this is a Title V permitting action and therefore any challenge related to PBR registration 166799 is beyond the scope of this Title V review.

RTC at 9.

But the public comments did more than simply challenge PBR Registration No. 166799 itself. Rather, they claimed that increased emissions from that PBR authorization resulted in the source triggering NNSR, giving rise to the need for a compliance schedule in the current title V permit. The fact that PBR Registration No. 166799 was not yet incorporated into the source's title V Permit is irrelevant to the issue of whether any emission increases authorized by the PBR (which was final and effective as of 2021) triggered NNSR, and consequently whether the draft title V permit should have included a compliance schedule directing the source to obtain an NNSR permit.

Although the EPA is troubled by TCEQ's refusal to engage with these issues when responding to comments on the draft title V permit in May 2022, TCEQ has since remedied that error, effectively rendering this claim—as raised in the Petition—moot. Specifically, after the EPA objected to the Initial Proposed Permit in June 2022, TCEQ undertook various changes to NSR Permit No. 95754. In addition to changes responding to the June 2022 EPA Objection, TCEQ made other changes to this NSR permit, including the consolidation of PBR Registration No. 166799 into NSR Permit No. 95754. The public was provided notice of these changes, including the consolidation of PBRs into the NSR permit.[34] As part of this NSR permitting process, TCEQ specifically required ITC Pasadena to address whether the changes authorized by PBR Registration No. 166799 should be aggregated with construction projects previously authorized by NSR Permit No. 95754 and, if so, whether this would impact NNSR applicability for those projects.[35] In response, ITC Pasadena agreed to aggregate the changes authorized by this PBR with the "Group C" changes authorized in 2017. ITC retroactively evaluated whether the combined set of changes triggered NNSR, concluding that they did not.[36]

As explained earlier, after this NSR permitting process concluded with the issuance of a final NSR permit on June 8, 2023, TCEQ incorporated that final NSR permit into the source's title V permit. Then, on July 17, 2023, TCEQ provided the EPA with the revised title V permit (the Revised Proposed Permit). The Petition now ostensibly challenges the Revised Proposed Permit.

The developments that occurred in the years leading up to the Petition render the Petitioners' third subclaim moot because the EPA can no longer address the issues in this subclaim through title V. Questions about whether the changes authorized by PBR Registration No. 166799 should have triggered NNSR—rendering ITC Pasadena out of compliance and necessitating a compliance schedule in the title V permit—were once ripe for review through title V because the underlying PBR registration was issued without public notice or the opportunity for comment. However, now that this issue has been considered by TCEQ in a title I permitting process that involved public notice and the opportunity for public comment and judicial review, that NSR permitting process established the NSR-related "applicable requirements" for purposes of title V. In other words, the proper venue to raise any concerns with the source's retrospective NNSR applicability analysis related to PBR Registration No.

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[34] *See* Notice of Receipt of Application and Intent to Obtain Air Permit (NORI) Amendment and Renewal, Permit No. 95754 (first published Aug. 24, 2022) ("In addition to the amendment and renewal, this permitting action includes the incorporation of permits by rule and changes in emission factors related to this permit.")

[35] *See* Letter from Harry Xue, TCEQ, to Mike J. Gaudet, ITC, Re: Permit Application, Permit No. 95754 at 1 (Nov. 8, 2022), available on page 1235 of the file found at *https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=7529943*.

[36] *See* Letter from Neal A. Nygaard, Trinity Consultants, to Harry Xue, TCEQ, Re: Permit No. 95754 Renewal/Amendment, TCEQ Additional Information Request Response at 1 (Dec. 2, 2022), available on page 1196 of the file found at https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=7529943; Permit Renewal & Amendment, Source Analysis & Technical Review, Permit No. 95754, Project No. 345739 at 3, 5, 7 (May 23, 2023).

166799 was during the most recent NSR permitting process.[37] The title V process is no longer the correct venue to challenge those NSR permitting decisions.[38]

Additionally, even if these NNSR applicability issues were still within the scope of issues that the EPA could address in the present title V permit action (which they are not), the Petitioners' arguments are insufficient to demonstrate that the changes authorized by PBR Registration No. 166799 triggered NNSR because they are either outdated, incorrect, or otherwise fail to identify a basis for the EPA's objection.

First, the Petitioners' arguments are outdated. The Petition appears to repeat verbatim the arguments that the Petitioners first raised in their preemptive petition on the Initial Draft Permit, submitted *before* the latest NSR permitting process unfolded. The Petitioners do not acknowledge the latest NSR permitting process or the updates to the Revised Proposed Permit to incorporate the results of that NSR process. The Petitioners offer no arguments challenging the retrospective NNSR analysis developed in that process, much less demonstrate that this analysis was inconsistent with the SIP rules governing NNSR applicability. Overall, the cursory and outdated arguments within the Petition are insufficient to demonstrate that the changes authorized by PBR Registration No. 166799 triggered NNSR.[39]

Second, some of the Petitioners' arguments are factually incorrect. The Petitioners repeatedly assert that PBR Registration No. 166799 "authorized" an increase in emissions from existing units covered by the existing synthetic minor VOC limits, amounting to "a relaxation of any enforceable limitation established by this permit" sufficient to trigger NNSR pursuant to Special Condition 3. Petition at 31; *see id*. at 14, 28. However, this PBR did neither of these things. The PBR did not "authorize" an increase in emissions from existing emission units, nor did it relax the Permit's existing emission limits. Instead, the PBR authorized the construction of new equipment, and the technical support document associated with the PBR explained that construction of this new equipment could cause an increase in actual emissions—not permitted or allowable emissions—from existing units. *See* Technical Review: Air Permit by Rule, Permit No. 166799, Project No. 334414 at 1–2 (Nov. 29, 2021). This discussion of increased actual emissions was provided to support the position that these projected actual emission increases would not, in and of themselves, constitute a major modification subject to NNSR. Again, the PBR did not itself "authorize" increased emissions from existing units, nor did it alter the existing emission limits to which those units were subject. Thus, the Petitioners are incorrect to suggest that this PBR could have triggered NNSR by virtue of Special Condition 3.

Notably, the Petition only includes several sentences addressing these substantive NNSR applicability issues. *See* Petition at 14–15, 30–31. Most of the Petitioners' discussion within this subclaim concerns the alleged misrepresentations in ITC's application for PBR Registration No. 166799. *See id*. at 28–30.

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[37] The Petitioners did not participate in that NSR permitting process. The Petitioners do not acknowledge this NSR permitting process at all, nor do the Petitioners allege that they lacked the opportunity to participate in that process.

[38] Again, this does not mean that the EPA agrees with TCEQ's decisions when it issued those minor NSR permits. See Section II.C and the EPA's response to Subclaim (ii).

[39] The only aspects of the Petitioners' claim that might have led the EPA to object to the Permit are their arguments that that TCEQ should have addressed the relevant public comments and explained its position regarding project aggregation and NNSR applicability. But TCEQ has now addressed these project aggregation and NNSR applicability issues via the NSR permit action that culminated in the June 8, 2023, version of NSR Permit No. 95754. Thus, again, the only portion of the Petitioners' claim for which the EPA could have offered relief through the present title V process has been rendered moot.

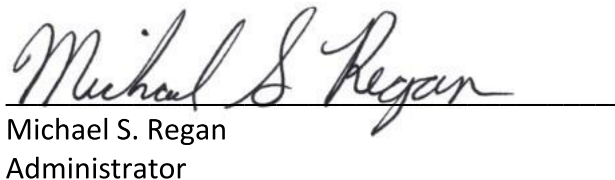
Although the EPA appreciates that statements in ITC Pasadena's application for PBR Registration No. 166799 may have contributed to initial confusion about whether and how this PBR impacted NNSR applicability, the Petitioners have not articulated how any such "misrepresentations" would present a basis for the EPA to object to the source's title V permit.[40]

In summary, questions about whether the changes authorized by PBR Registration No. 166799 should have been aggregated with other NSR permit authorizations, and whether these changes triggered NNSR, were properly before TCEQ when it considered public comments on the draft title V renewal permit that requested a title V compliance schedule. However, TCEQ subsequently addressed such issues through a formal NSR permitting process, which culminated in an NSR permit that has now been incorporated into the updated title V permit. Thus, the concerns re-raised in the Petition are no longer within the scope of issues subject to the EPA's review in the present Petition and have effectively been rendered moot. To the extent any portions of this subclaim remain subject to the EPA's review in the present title V Order and were not rendered moot, the Petitioners' arguments fail to demonstrate a basis for the EPA's objection. Accordingly, the EPA denies Subclaim (iii).

V. CONCLUSION

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

Dated: February 7, 2024



Michael S. Regan
Administrator

[40] The Petitioners' discussion about these alleged misrepresentations may be related to their later assertion that the PBR authorized additional emissions "through a permitting mechanism specifically prohibited by Permit No. 95754," per Special Condition 45. Petition at 31. If so, the Petitioners are incorrect. Special Condition 45 does not prohibit the use of PBRs to authorize construction or increased emissions; it simply requires TCEQ's written approval before doing so.