BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION NO. VI-2020-3
	)	
ETC TEXAS PIPELINE, LTD	)	ORDER RESPONDING TO
WAHA GAS PLANT	)	PETITION REQUESTING
PECOS COUNTY, TEXAS	)	OBJECTION TO THE ISSUANCE OF
	)	TITLE V OPERATING PERMIT
PERMIT NO. O2546	)	
	)	
ISSUED BY THE TEXAS COMMISSION ON	)	
ENVIRONMENTAL QUALITY	)	
	)	

ORDER GRANTING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated March 10, 2020, (the Petition) from the Environmental Integrity Project, Sierra Club, and Texas Campaign for the Environment (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to the proposed operating permit No. O2546 (the Proposed Permit) issued by the Texas commission on Environmental Quality (TCEQ) to the ETC Waha Gas Plant (ETC Waha or the facility) in Pecos County, Texas. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and Title 30, Chapter 122 of the Texas Administrative Code (TAC). *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further in the following paragraphs, the EPA grants the Petition requesting that the EPA Administrator object to the Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(l) of the CAA, 42 U.S.C. § 766la(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. The state of Texas submitted a title V program governing the issuance of operating permits on September 17, 1993. The EPA Granted interim approval of Texas's title V operating permit program in 1996, and granted full approval in 2001. *See* 61 Fed. Reg. 32693 (June 25, 1996) (interim approval effective July 25, 1996); 66

Fed. Reg. 63318 (December 6, 2001). This program, which became effective on November 30, 2001, is codified in 30 TAC Chapter 122.

All major stationary sources of air pollution and certain other sources are required to apply for and operate in accordance with title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. 42 U.S.C. §§ 7661a(a), 7661b, 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* 42 U.S.C. § 7661c(c). One purpose of the title V program is to "enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." 57 Fed. Reg. at 32251. Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the source's emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements.

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(a) and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. 42 U.S.C. § 7661d(a). Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of the EPA's 45-day review period, petition the Administrator to object to the permit. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(l).[1] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[2]

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

[2] *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *cf. NYPIRG*, 321 F.3d at 333 n.11.

The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).[3] When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g.*, *MacClarence*, 596 F.3d at 1130–31.[4] Certain aspects of the petitioner's demonstration burden are discussed below. A more detailed discussion can be found in *In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the state's response to comments), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.[5] Another factor the EPA examines is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for the petitioner's objection, contrary to Congress's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and

[3] *See also Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' . . . plainly mandates an objection *whenever* a petitioner demonstrates noncompliance." (emphasis added)).
[4] *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.
[5] *See also, e.g.*, *Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. App'x *11, *15 (2d Cir. 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012) (denying a title V petition issue where petitioners did not respond to the state's explanation in response to comments or explain why the state erred or why the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007) (*Georgia Power Plants Order*) (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).

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

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

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

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

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

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

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

corresponding regulations in the state's EPA-approved title V program. If the permitting authority determines that the modification is a significant modification, then the permitting authority must provide for notice and opportunity for public comment for the significant modification consistent with 40 C.F.R. § 70.7(h) or the state's corresponding regulations.

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

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

C. New Source Review

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

While parts C and D of title I of the Act address the major NSR program for major sources, section 110(a)(2)(C) addresses the permitting program for new and modified minor sources and for minor modifications to major sources. The EPA commonly refers to the latter program as the "minor NSR" program. States must also develop minor NSR programs to, along with the major source programs, attain and maintain the NAAQS. The federal requirements for state minor NSR

programs are outlined in 40 C.F.R §§ 51.160 through 51.164. These federal requirements for minor NSR programs are less prescriptive than those for major sources, and, as a result, there is a larger variation of requirements in EPA-approved state minor NSR programs than in major source programs.

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

III. BACKGROUND

A. The ETC Waha Gas Plant Facility

The ETC Waha Gas Plant Facility, located in Pecos County, Texas, separates condensate and other impurities from raw natural gas. The main products produced at the plant are methane and natural gas liquids. The facility is a major source of volatile organic compounds (VOCs), sulfur dioxide, nitrogen oxides, and carbon monoxide, and is subject to title V of the CAA. Emission units within the facility are also subject to preconstruction permitting requirements and various New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP).

The EPA conducted an analysis using EPA's EJSCREEN[9] to assess key demographic and environmental indicators within a five-kilometer radius of the ETC facility. This analysis showed a total population of approximately 183 residents within a five-kilometer radius of the facility, of which approximately 66 percent are people of color and 40 percent are low income. In addition, the EPA reviewed the EJSCREEN Environmental Justice Indices, which combine certain demographic indicators with eleven environmental indicators. None of the EJ indices in this five-kilometer area exceed the 80th percentile in the state of Texas.

B. Permitting History

ETC Texas Pipeline Ltd. first obtained a title V permit for the ETC Waha Gas Plant Facility in 2004. On October 17, 2018, ETC Texas Pipeline Ltd. submitted an application for renewal of title V permit O2546. TCEQ noticed the draft permit and Statement of Basis on May 16, 2019, subject to a public comment period ending June 17, 2019. On November 26, 2019, TCEQ transmitted the Proposed Permit, along with its Response to Comments (RTC), to the EPA for its 45-day review. The EPA's 45-day review period ended on January 10, 2020, during which time the EPA did not object to the Proposed Permit. TCEQ issued the final title V permit for the ETC Waha Gas Plant Facility on January 22, 2020 (Final Permit). The title V permit was subsequently revised on September 29, 2020 (2020 Revised Permit).

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

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The EPA's 45-day review period expired on January 10, 2020. Thus, any petition seeking the EPA's objection to the Proposed Permit was due on or before March 10, 2020. The Petition was received March 10, 2020, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Claim A: The Petitioners Claim That "The Proposed Permit Must Include a Schedule Addressing Noncompliance at the Waha Gas Plant."

Petitioners' Claim: The Petitioners claim that emission events[10] resulting in unauthorized emissions of SO_2 constitute a violation of the Texas Clean Air Act (citing Texas Clean Air Act § § 382.0215[11]), which the Petitioners assert is part of the Texas SIP, and thus the Title V permit must include a compliance schedule. The Petitioners point to Special Condition 7(C) of NSR Permit No. 74857 which contains limits on "activities" at the facility's acid gas flare on a hours-per-year basis. They also point to the Maximum Allowable Emission Rate Table (MAERT) contained in the NSR Permit No. 74857, which limits annual SO_2 emissions from the acid gas flare to 174.92 tons. Petition at 7.

The Petitioners present a summary table of data from the TCEQ State of Texas Emission Event Reporting System (STEERS) exhibiting unauthorized SO_2 emissions from 2012 to 2019 that purportedly violate the SO_2 limit mentioned in the MAERT. *Id.* The Petitioners also contend that in 2018, the facility operated the acid gas flare for 1,235 hours and in 2019, operated the acid gas flare for 551 hours during emission events and unauthorized maintenance, violating Special Condition 7(C) in NSR permit No. 74857. *Id.* at 8. The Petitioners claim that a title V permit must establish a compliance schedule to address ongoing non-compliance with applicable requirements at the time a permit is issued (citing 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(c)(3); 20 Tex. Admin. Code § 122.142(d)). *Id.*

The Petitioners assert that the RTC does not contest the Petitioners' demonstration that ETC Waha is not in compliance with applicable requirements and does not refute the Petitioners' claim that ETC Waha has regularly and repeatedly violated the Texas SIP and Permit terms. *Id.* at 9. Additionally, the Petitioners state that reliance on a certification of compliance and a Compliance History (CH) rating does not refute their claim of noncompliance, and is an addition, not a replacement, for requirements in a title V permit. *Id.* at 11.

[10] The Petitioners cite the Texas Health and Safety Code at § 382.0215(a)(1) defining an "emission event" as "an upset event, or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in the unauthorized emissions of air contaminants from one or more emissions points at a regulated entity." The Petitioners mention that this definition is similar to one found in Texas Admin. Code § 101.1(28).

[11] It appears that the citation to Texas Clean Air Act § 382.0215 is an error as the language cited in the petition is from Texas Clean Air Act § 382.085.

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

The Petitioners have demonstrated that the permit record is not clear as to whether the source is or is not in compliance with applicable requirements relevant to its annual SO_2 emissions from its acid gas flare and, thus, whether the title V permit must include a compliance schedule. The emission data presented by the Petitioners suggest that ETC Waha has repeatedly violated Texas Clean Air Act § 382.085 and NSR Permit No. 74857 (specifically limits established in Special Condition 7(C) and limits found in the MAERT), and accordingly that a compliance schedule may be necessary. In response, TCEQ stated:

> Per 30 TAC § 122.142(d) (Permit Content Requirements), for any emission units not in compliance with the applicable requirements at the time of renewal application, the permit holder is required to submit a compliance schedule consistent with §122.132(d)(4)(C). An OP-ACPS (Application Compliance Plan and Schedule) form contained in a renewal application received by TCEQ on 10/17/2018 indicated that all units were in compliance with the applicable requirements.
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> The permit holder must file a permit compliance certification (PCC) report to certify on an annual basis that it complies with all terms and conditions contained in 30 TAC § 122.143 (General Terms and Conditions), 30 TAC § 122.144 (Recordkeeping Terms and Conditions), 30 TAC § 122.145 (Reporting Terms and Conditions), and 30 TAC § 122.146 (Compliance Certification Terms and Conditions). The PCC reports include deviation reporting and reporting of unauthorized emissions. Deviations, defined as any indications of noncompliance with permit terms and conditions, are required to be submitted once every six months to the TCEQ Regional Office in accordance with 30 TAC § 122.145(2)(A). Any unauthorized emissions from upsets, unscheduled maintenance, shutdowns, and startups that result in unauthorized emissions from an emission point are required to be reported to the regional office if they exceed the reportable quantity as specified in 30 TAC Chapter 101, Subchapter F. Should it be found that emissions reported under "emissions events" did not qualify as this type of event, the source could be found in violation of 30 TAC Chapter 101 and be subject to enforcement action. Subchapter F provides for different levels of enforcement available depending upon the type of event, and whether it meets certain criteria.
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> Current information provided by TCEQ's Office of Compliance and Enforcement (OCE) office web site indicates 5 notices of violation (NOVs) were issued during the period 9/1/2013 to 8/31/2018 resulting from investigations of ETC Texas Pipeline, Ltd.'s Waha Gas Plant based on reported events. Issuance of a NOV is not a final enforcement action, nor proof that a violation has actually occurred. OCE administers issuance of any corrective actions for actual instances of non-compliance. OCE also generates Compliance History (CH) ratings and classification for each site. Renewal period of Title V permits issued by TCEQ is based on CH ratings and classification for the site. Based on the CH data reported

> for the September 1, 2013, through August 31, 2018 time period, the site has a "satisfactory" classification.

RTC at 9.

TCEQ has not supported its suggestion that the data provided by the petitioners does *not* qualify as a violation. TCEQ's RTC appears to rely on ETC Waha's permit compliance certification and/or a 'satisfactory' classification as ETC Waha's Compliance History rating. Neither of these explanations refute the Petitioners' assertion that ETC Waha was out of compliance at the time the permit was issued. Whether the excess emission events identified by the Petitioners are violations (as opposed to mere deviations or exceedances) appears to be in dispute and is a matter that should be clarified by TCEQ. The permit record is inadequate for the EPA to determine if the "emission event" defense described by TCEQ is relevant to whether these apparent exceedances resulted in violations of (i.e., noncompliance with) Texas Clean Air Act § 382.085 and NSR Permit No. 74857. In its RTC, TCEQ states that certain emissions reported under "emission events" that do not qualify as this type of event could be in violation of 30 TAC Chapter 101. However, this does not clarify whether the "activities" with unauthorized emissions that the petitioners have identified qualify as such event and, if so, whether emissions that *do* qualify as "emission events" do or do not violate the applicable permit terms (specifically limits established in Special Condition 7(C) and limits found in the MAERT), and so trigger the requirement for a compliance schedule. TCEQ's RTC does not mention NSR Permit No. 74857, so the relationship between the "emission event" reporting requirement and compliance with the permit terms is unclear.

Direction to TCEQ: TCEQ should amend the permit record to clarify whether the source was in violation of any applicable requirements at the time the permit was issued, and accordingly whether a compliance schedule is necessary. Specifically, TCEQ should clarify whether and how the "emission event" defense applies in the context of noncompliance with the permit limits. A schedule of compliance will be required if the source was not in compliance with all applicable requirements at the time of permit issuance.

> **Claim B: The Petitioners Claim That "The Proposed Permit Fails to Identify Any Emission Unit(s) Authorized by One PBR and Three Standard Exemptions Incorporated as Applicable Requirements."**

Petitioners' Claim: The Petitioners claim that despite the Permit's New Source Review Authorization References attachment identifying the permit by rule (PBR) at 30 Tex. Admin. Code § 106.492 (9/4/2000) and Standard Exemptions 66 (11/5/1986), 66 (8/30/1998), and 66 (7/20/1992) as applicable requirements for the ETC Waha Gas Plant, the Permit does not identify any units subject to those requirements. Petition at 12 (citing *Objection to Title V Permit No. O2164, Chevron Phillips Chemical Company, Philtex Plant* at ¶ 7 (August 6, 2010);[12] *In the Matter of Shell Chemical LP and Shell Oil Co*, Order on Petition Nos. VI-2014-04 and VI-2014-

[12] This August 6, 2010, objection was issued under authority delegated by the EPA Administrator to Region 6 to object during the EPA's 45-day review period. The objection letter is available at *https://www.tceq.texas.gov/assets/public/permitting/air/Announcements/epa-chevron-2164.pdf*.

05, at 11–15 (September 24, 2015) (*Shell Deer Park Order*)). The Petitioners note that while the RTC generally acknowledges the issue at hand, the RTC still does not explain why the permit does not identify units subject to the PBRs and SEs identified by the Petitioners. *Id.* at 14.

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

The Petitioners allege violation of CAA section 504(a), 42 U.S.C. § 7661c(a) because neither the Permit nor permit record identifies the emissions units to which PBR at 30 Tex. Admin. Code § 106.492 (9/4/2000) and Standard Exemptions 66 (11/5/1986), 66 (8/30/1998), and 66 (7/20/1992) apply and therefore cannot assure compliance of these applicable requirements. While the "New Source Review Authorization References by Emission Unit" table identifies emission units for most of the PBRs in the title V permit, neither this table nor any other portion of the permit identifies the specific emission units to which the aforementioned PBRs apply. *See In the Matter of Blanchard Refining Company, Galveston Bay Refinery,* Order on Petition No. VI-2017-7 at 15 (August 9, 2021) (citing 30 TAC § 122.142(b)(2)(B)(i) that "Each permit shall also contain specific terms and conditions for each emission unit regarding the following: . . . the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards." The EPA notes that TCEQ's RTC for the ETC Waha title V permit alludes to PBRs that may apply to insignificant units. RTC at 12. It is the EPA's long-standing position that for insignificant units, permitting authorities have broad discretion to "utilize standard permit conditions with minimal or no reference to any specific emissions unit or activity, provided that the scope of the requirement and its enforcement are clear." *White Paper Number 2* at 3–4, 30–31. However, it is not clear, and the TCEQ did not assert, that the aforementioned PBRs apply only to insignificant units.

Direction to TCEQ: TCEQ should explain to which emission units the PBR and Standard Exemptions identified in the Petition apply. If TCEQ believes that the PBRs identified in the Petition only apply to insignificant units, then TCEQ should provide such explanation on the record and determine if any further information is required in the title V permit. Otherwise, TCEQ should update the title V permit and list these PBRs next to their applicable emission units in the "New Source Review Authorization References by Emission Unit" table.

Claim C: The Petitioners Claim That "The Permit Fails to Establish Monitoring, Testing, and Recordkeeping Provisions that Assure Compliance with PBR and Standard Exemption Requirements."

Petitioners' Claim: The Petitioners claim that the title V permit does not assure compliance with applicable PBRs and standard exemption emission limits because it does not include specific monitoring for these requirements as required by 42 U.S.C. § 7661c(a) and (c) and 40 C.F.R. § 70.6(a)(3) and (c)(1). Petition at 15–17. In particular, the Petitioners point to the following PBRs and standard exemptions:

PBR 106.183 authorizes boilers, heaters, drying or curing ovens, furnaces, and/or other combustion units. It also establishes total sulfur content limits and provides that "[a]ll gas fired heaters and boilers with a heat input greater than ten million Btu per hour … shall be designed

such that the emissions of nitrogen oxides shall not exceed 0.1 pounds per million Btu heat input." *Id.* at 17. The Petitioners contend that this PBR fails to establish monitoring or testing requirements to ensure compliance with the limits and operating requirements it establishes or the emission limits established by the Texas general PBR rule at 30 Tex. Admin. Code 106.4. *Id.*

PBR 106.359 authorizes planned MSS activities. The Petitioners claim that while the PBR covers storage tank maintenance, it does not establish any monitoring or testing requirements to ensure compliance with the general PBR rule emission limits. *Id.* at 18.

PBR 106.492 authorizes the use of one or more flares, and the Petitioners contend while the PBR establishes various design and operating requirements, it also does not include any monitoring or testing requirements to assure compliance with the general PBR rule emission limits. *Id.*

Standard Exemption 66 establishes limits for NO_x, SO_2, CO, and other sulfur compounds. Again, the Petitioners identify several version of Exemption 66 as applicable requirements and contend that these rules do not include monitoring or testing requirements to assure compliance with the emission limits established therein. *Id.*

The Petitioners claim that the only monitoring, recordkeeping, or reporting requirements that apply are contained in Special Conditions 11 and 12 of the title V permit, which provide a "non-exhaustive menu of options that ETC Waha may pick and choose from at its discretion to demonstrate compliance." *Id*. The Petitioners conclude that the permit is deficient because the incorporated PBRs and standard exemptions lack the monitoring and testing required to assure compliance with the applicable emission limits and operating requirements.[13]
Id. at 19. Moreover, the Petitioners contend that the provisions in Special Condition 12 are so vague that it "prevents EPA and the public from effectively evaluating whether the monitoring or testing methods—if any—that ETC uses to assure compliance with PBR and standard exemption requirements are consistent with Title V." *Id*.

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

As the Petitioners observe, the permit appears to rely solely on Special Conditions 11 and 12 to assure compliance with PBRs 106.4, 106.183, 106.359 and 106.492 and Standard Exemption 66, as these provisions themselves do not contain specific monitoring, recordkeeping, and reporting requirements.

Special Condition 11 of the ETC Waha title V permit states:

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

[13] The Petitioners cite *In the Matter of Motiva Enterprises LLC, Port Arthur Refinery* ("Motiva Order"), Order on Petition No. VI-2016-23 at 24-25 (May 31, 2018) and *In the Matter of Wheelabrator Baltimore, L.P.*, Permit No. 24-510- 01886, at 10 (April 14, 2010).

Final Permit at 9.

Special Condition 12 of the ETC Waha title V permit states:

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

Id.

For the reasons explained below, the Petitioners have demonstrated that the above monitoring, recordkeeping, and reporting requirements are not adequate to assure compliance with the applicable emission limits and operational requirements in PBRs 106.4, 106.183, 106.359 and 106.492 and the various versions of Exemption 66, as required by CAA, part 70, and Texas's approved title V program. Specifically, like the petitioners, the EPA similarly observes that these PBRs/SEs do not themselves contain any specific monitoring, recordkeeping, and reporting and appear to rely solely on the general requirements in Special Conditions 11 and 12. The EPA acknowledged that a streamlined approach of providing a general, large list of monitoring, recordkeeping, and reporting options, such as that in Special Condition 12, can be appropriate for generally applicable requirements for insignificant units. *Motiva Order* at 26 (citing White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program, 32 (March 5, 1996) (*White Paper Number 2*)). However, TCEQ has not identified if any PBRs in the title V permit apply only to insignificant units.

It is TCEQ's responsibility, as the title V permitting authority, to ensure that the title V permit "set[s] forth" monitoring sufficient to assure compliance with all applicable requirements. 42 U.S.C. § 7661c(c); *see id*. § 7661c(a); 40 C.F.R. § 70.6(a), (a)(3), (c); 30 TAC § 122.142(c).[14]

[14] 42 U.S.C. § 7661c(a) ("Each permit issued under [title V of the CAA] shall *include* . . . such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan."), 7661c(c) ("Each permit issued under [title V of the CAA] shall *set forth* . . . monitoring and reporting requirements to assure compliance with the permit terms and conditions."); 40 C.F.R. § 70.6(a) ("Each permit issued under this part shall *include* . . ."), 70.6(a)(3)(i) ("Each permit shall *contain* the following requirements with respect to monitoring: . . . ."); 70.6(c) ("All part 70 permits shall *contain* the following with respect to compliance: . . . testing, monitoring, reporting, and recordkeeping requirements sufficient to assure

Special Condition 11 incorporates the general requirements for PBRs found in 30 TAC Chapter 106, Subchapter A. These requirements do not specify any monitoring methods for demonstrating compliance with the emission limits and standards set forth in the PBRs/SEs (Standard Exemptions) at issue. Likewise, Special Condition 12 does not specify any particular monitoring requirements and instead allows ETC Waha to select the monitoring, recordkeeping, or reporting it will use to assure compliance. Because neither these generic permit terms nor the PBRs/SEs themselves require ETC Waha to follow a particular monitoring or recordkeeping methodology, the title V permit cannot be said to "set forth" monitoring sufficient to assure compliance. 42 U.S.C. § 7661c(c). Further, Special Condition 12 contains no assurance that the monitoring or recordkeeping selected by the source will, as a technical and legal matter, be sufficient to ensure compliance. Because the Permit does not specify any particular monitoring or recordkeeping requirement selected by the source, neither the public nor the EPA can ascertain from the Permit what monitoring or recordkeeping methodology the source has elected to use, or whether this methodology is sufficient to assure compliance with all applicable requirements. This effectively prevents both the public and the EPA from exercising the participatory and oversight roles provided by the CAA. *See* 42 U.S.C. §§ 7661a(b)(6), 7661d(a), (b); *see also* 40 C.F.R. §§ 70.7(h), 70.8(a), (c), (d). Even if monitoring, recordkeeping, or reporting is eventually specified in a compliance certification, that does not remedy the fact that the title V permit itself does not require appropriate monitoring, recordkeeping, or reporting. For the reasons stated above, the Petitioners have demonstrated that Special Conditions 11 and 12 do not contain monitoring, recordkeeping, and reporting requirements sufficient to assure compliance with the requirements in each PBR and Exemption 66 at issue in this claim.

Direction to TCEQ:

For PBRs 106.4, 106.183, 106.359 and 106.492 and Exemption 66, which appear to apply to non-insignificant units,[15] TCEQ must specify the monitoring, recordkeeping, and reporting that assures compliance with the requirements of these PBRs/SEs in ETC Waha's title V permit. As mentioned above, none of these PBRs/SEs contain monitoring, recordkeeping, and reporting requirements. Although not relevant to the claims at issue in the Petition, EPA also advises that, for any underlying PBR/SEs applicable to non-insignificant units that contain monitoring, recordkeeping, and reporting requirements, 40 C.F.R. § 70.6(a)(3)(i)(A) requires that permitting authorities must ensure that monitoring requirements contained in applicable requirements are properly incorporated into the title V permit. If the applicable requirements contain no periodic monitoring (as is the case for the PBRs/SEs at issue here), permitting authorities are required to add "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." 40 C.F.R. § 70.6(a)(3)(i)(B). And, if

compliance with the terms and conditions of the permit."); 30 TAC § 122.142(c) ("Each permit shall *contain* periodic monitoring requirements that are sufficient to yield reliable data from the relevant time period that are representative of the emission unit's compliance with the applicable requirement, and testing, monitoring, reporting, or recordkeeping sufficient to assure compliance with the applicable requirement.") (all emphasis added).

[15] The EPA notes that TCEQ has begun including a list of PBRs that only apply to insignificant units in the statement of basis for title V permits. *See e.g.,* Statement of Basis for Draft Revised Title V Permit for ETC Waha at 67 (November 21September 29, 2020). The EPA has explained that if a regular program of monitoring, recordkeeping, and reporting for insignificant units would not significantly enhance the ability of the permit to assure compliance with the applicable requirements, general monitoring requirements or even no monitoring can sometimes satisfy title V and 40 C.F.R. § 70.6(a)(3)(i). *See White Paper Number 2* at 32

there is some periodic monitoring in the applicable requirement, but that monitoring is not sufficient to assure compliance with permit terms and conditions, permitting authorities must supplement monitoring to assure such compliance. 40 C.F.R. § 70.6(c)(1). If the title V permit, Chapter 116 NSR permits, NSPSs, NESHAPs, or enforceable representations in an application already contain adequate terms to assure compliance with PBRs, then TCEQ would be required to amend the permit to identify such terms and explain in the permit record how these requirements assure compliance with the requirements and emission limits for each PBR that applies to significant units.

The EPA notes that TCEQ's intention is to specify the monitoring for certain PBRs in a PBR Supplemental Table provided by applicants.[16] Specifically, the EPA understands that TCEQ is now requiring title V applicants to fill out the PBR Supplemental Table, which TCEQ will then incorporate into the title V permit through a general condition in the title V permit itself.

The EPA has long provided guidance on how to incorporate by reference necessary documents such that the title V permit actually includes all applicable requirements. As the EPA has explained:

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

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

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

[16] *See* Letter from Tonya Baer, Deputy Director of Air, TCEQ, to David Garcia, Director, Air and Radiation Division, Region 6, U.S. EPA, *Permits by Rule Programmatic Changes*, at 2 (May 11, 2020). Additionally, the EPA acknowledges that ETC Waha included a PBR Supplemental Table as a part of its application for the September 29, 2020 revised title V permit.

Id. at 38.

Title V applications can be hundreds of (if not over a thousand) pages long, and a search of the TCEQ online database will usually return multiple title V applications for a specific facility that has had multiple revisions and renewals. Thus, a general statement in the title V permit incorporating the PBR Supplemental Table without providing additional information detailing where the table is located is not specific enough to meet the standards described above. In order to satisfy the requirement in title V that the permit "set forth," "include," or "contain" monitoring to assure compliance with all applicable requirements, a special condition incorporating the PBR Supplemental Table would need to include, at minimum, the date of the application and specific location of the supplemental table.[17] Alternatively, a more straightforward approach that would obviate these incorporation by reference (IBR)-related concerns would be for TCEQ to directly include (i.e., attach) this PBR Supplemental Table as an enforceable part of the title V permit itself.

Although the PBR Supplemental Table requires the applicant to specify monitoring, recordkeeping, and reporting for "claimed (not registered)" PBRs, the table does not appear to address monitoring for registered PBRs.[18] For registered PBRs, the EPA understands that TCEQ intends to start having applicants include monitoring in the registration form for registered PBRs.[19] However, TCEQ has not indicated how it will appropriately incorporate that monitoring into an enforceable part of the title V permit.[20] The EPA understands that TCEQ's EPA-approved regulations state: "All representations with regard to construction plans, operating procedures, and maximum emission rates in any certified registration under this section become conditions upon which the facility permitted by rule shall be constructed and operated." 30 TAC § 106.6(b).[21] However, the fact that the PBR regulations state that information in the application will be conditions upon which the facility permitted by rule shall be constructed and operated does not mean that those provisions are necessarily "included," or "contained" in a title V permit, as required by the Act, the EPA's regulations, and TCEQ's EPA-approved regulations. *E.g.*, 42 U.S.C. § 7661c(c).[22] For a requirement to be included in a title V permit, the Permit must include it (or properly incorporate it by reference).

IBR is a prominent feature of TCEQ's title V program. When the EPA approved the Texas title V program, the EPA balanced the streamlining benefits of IBR against the value of a more detailed title V permit and approved TCEQ's use of IBR for PBRs, provided the program was

[17] The EPA recently provided feedback to TCEQ regarding how to effectively incorporate the PBR Supplemental Table into the title V permit through the use of a general permit term. *See* email from Jeffrey Robinson, EPA, to Samuel Short, Jesse Chacon, and Kim Strong, TCEQ, Re: EPA Comments on Sandy Creek Power Station (October 1, 2021).
[18] Some PBRs can simply be claimed by a source, others must first be registered to be approved by TCEQ.
[19] With respect to registered PBRs, TCEQ has stated that it will require applicants to "[u]pdate PBR application representations with monitoring that is sufficient to demonstrate compliance." May 11, 2020 Baer Letter at 3.
[20] The EPA recently provided feedback to TCEQ outlining similar concerns and suggesting solutions similar to those described in this Order. *See* email from Jeffrey Robinson, EPA, to Samuel Short, Jesse Chacon, and Kim Strong, TCEQ, Re: EPA Comments on Sandy Creek Power Station (October 1, 2021).
[21] When registering a PBR, permit applicants may certify emission limits lower than those contained in the PBR rules. This is known as a certified registration. 30 TAC 106.6(a).
[22] *See supra* note 14.

implemented correctly. *See* 66 Fed Reg. 63318, 63321–32 (December 6, 2001).[23] In its approval of the Texas title V program, the EPA indicated that monitoring specified in the *terms and conditions* of a minor NSR permit or PBR establishing monitoring must be incorporated into the title V permit.[24] The EPA did not suggest that unidentified application representations for minor NSR permits or PBRs would be considered to be incorporated by reference into a title V permit as adequate monitoring, recordkeeping, and reporting. Rather, as far as application representations are concerned, TCEQ's EPA-approved title V regulations expressly require that such representations be identified in the Permit itself. *See* 30 TAC § 122.140 ("The only representations in a permit application that become conditions under which a permit holder shall operate are the following: . . . (3) any representation in an application *which is specified in the permit* as being a condition under which the permit holder shall operate." (emphasis added)).

Therefore, the Agency anticipates that one of the most straightforward ways to resolve the EPA's objection would be for TCEQ to include or identify within the PBR Supplemental Table the monitoring, recordkeeping, and reporting from the application forms for registered PBRs (in addition to the claimed but not registered PBRs). With these changes, and provided the PBR Supplemental Table is either included or sufficiently incorporated by reference into the title V permit, the title V permit should include identifiable monitoring, recordkeeping, and reporting necessary to assure compliance with the emission limits and standards in the PBRs.

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

EPA acknowledges that there may be other methods to prescribe and incorporate monitoring for PBR registrations into the title V permit beyond what is listed above. However, to the extent TCEQ chooses such an alternative method to establish additional monitoring for registered

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[23] *See also Public Citizen v. EPA*, 343 F.3d 449, 460 (5th Cir. 2003) (upholding the EPA's approval of incorporation by reference in Texas; stating "Nothing in the CAA or its regulations prohibits incorporation of applicable requirements by reference. The Title V and Part 70 provisions specify what Title V permits 'shall include' but do not state how the items must be included.").

[24] 66 Fed. Reg. at 63324 ("[A]ll the title V permits will incorporate the necessary [monitoring, recordkeeping, and reporting] which will assure compliance with the title V permit, including [minor] NSR and PBR requirements. . . . [U]nder the incorporation by reference process, Texas must incorporate all terms and conditions of the [minor] NSR permits and PBR, which would include emission limits, operational and production limits, and monitoring requirements. We therefore believe that the terms and conditions of the [minor] MNSR permits so incorporated are fully enforceable under the full approved title V program that we are approving in this action.").

PBRs, it is critical that TCEQ clearly and unambiguously incorporate such monitoring (i.e., the document containing such monitoring) into the title V permit.

Claim D: The Petitioners Claim That "The Proposed Permit Fails to Include Specific Enforceable Terms and Conditions for Applicable NSPS Requirements."

Petitioners' Claim: The Petitioners claim that the Permit's Applicable Requirements Summary table contains language incorporating applicable requirements in New Source Performance Standards (NSPS), 40 C.F.R. Subparts Dc and OOOOa. Petition at 20. The Petitioners contend that the Permit does not specify the detailed applicability determinations for NSPS Subparts Dc and OOOOa, thus it is inconsistent with Texas' federally-approved regulations.[25] *Id.* at 21. Specifically, the Petitioners claim that the Permit does not identify which potentially applicable Subpart Dc provisions establish applicable emission limitations, standards and/or equipment specifications. The Petitioners additionally claim that the incorporation of OOOOa requirements is also deficient for the same reason and because the Permit fails to identify which of the various potentially applicable OOOOa monitoring, testing, and recordkeeping requirements apply to the facility. *Id.* The Petitioners contend that the Permit's high-level citations to NSPS subparts undermines the enforceability of applicable requirements and violates 40 C.F.R. § 70.6(a).[26] *Id.* at 21–22.

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

Under title V of the CAA, the EPA's part 70 regulations, and TCEQ's EPA-approved title V program rules, every title V permit must include all applicable requirements that apply to a source, as well as any permit terms necessary to assure compliance with these requirements. *E.g.*, 42 U.S.C. § 7661c(a).[27] The CAA requirement to include all applicable requirements (including NSPS regulations) in a title V permit can be satisfied using IBR in certain circumstances. *See, e.g.*, White Paper Number 2 at 40 (explaining how IBR can satisfy the requirements of CAA § 504).[28] The Title V permit should contain references that are detailed enough that the manner in which the referenced material applies to the facility is clear and is not reasonably subject to misinterpretation. *See In the Matter of Tesoro Refining*, Order on Petition No. IX-2004-06

[25] The Petitioners point to 30 Tex. Admin. Code § 122.142(b)(2)(B), which requires Title V permits to include "the specific regulatory citations in each applicable requirement … identifying the emission limitations and standards; and … the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards … sufficient to ensure compliance with the permit."

[26] The Petitioners cite *In the Matter of Tesoro Refining and Marketing Co.,* Order on Petition No. IX-2004-6 at 9 (March 15, 2005) ("[I]t is impossible to determine how the regulation applies to the facility by referring to the section-level citations that are currently provided in the permit. This ambiguity and the applicability questions it creates render the Permit unenforceable as a practical matter. In addition, the lack of detail detracts from the usefulness of the Permit as a compliance tool for the facility.").

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

[28] *See supra* note 22.

(March 15, 2005) at 8; *see also* White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program, 34-38 (March 5, 1996).

Text from TCEQ's EPA-approved title V regulations is arguably more specific than language found in 40 CFR 70.6(a)(1); however, the underlying principle is the same and explicitly requires citation to the appropriate applicable requirements. 30 Tex. Admin. Code § 122.142(b)(2)(B), cited by the Petitioners, requires Title V permits to include "the specific regulatory citations in each applicable requirement … identifying the emission limitations and standards; and … the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards … sufficient to ensure compliance with the permit."

The Petitioners have demonstrated that the Permit is deficient because it fails to identify by specific regulatory citations which provisions in Subpart Dc establish emission limitations, standards and/or equipment specifications for which emission sources at the ETC Waha facility. Currently, 40 CFR § 60.40c(a) is listed in the Applicable Requirements Summary Table. § 60.40c(a) simply describes applicability of the subpart and does not establish any emission limitations, standards, and/or equipment specifications. Similarly, the Petitioners have demonstrated that the Permit is deficient because it fails to identify which potentially applicable provisions in Subpart OOOOa establish applicable emission limitations, standards and/or equipment specifications and which of the various potentially applicable monitoring, testing, and recordkeeping requirements apply to the ETC Waha facility. Currently, 40 CFR § 60.5365(a) is listed in the Applicable Requirements Summary Table, which also simply describes applicability of the subpart and does not establish any emission limitations, standards, and/or equipment specifications. Additionally, for emission limitation, standard or equipment specification; monitoring and testing; recordkeeping, and reporting requirements, the table solely states, "The permit holder shall comply with the… requirements of 40 CFR Part 60, Subpart OOOOa" Final Permit at 25. In both of these cases, the permit does not contain enough information or detailed enough citations to determine how the specific requirements of NSPS and NESHAP requirements apply to the facility.

This deficiency in the permit is highlighted by the fact that TCEQ's RTC suggests that even the state is not aware which specific requirements from these subparts are applicable to the facility. In responding to comments regarding the issues raised in these claims, TCEQ stated:

> It has been a long-standing practice for TCEQ to list high level applicable requirements in the Title V permit's Applicable Requirement Summary when the TCEQ has not developed the Decision Support System (DSS) for certain state and federal applicable requirements. The DSS consists of Requirement Reference Tables (RRT), unit attribute forms and regulatory flowcharts that assist in making applicability determinations which include monitoring/testing, recordkeeping, and reporting requirements. After these documents are developed, detailed citations will be included in the permit with the first permit project submitted that addresses the subject units. ETC is required to keep appropriate records of monitoring/testing and other requirements to certify compliance with 40 CFR Part 60, Subparts Dc and OOOOa [TCEQ assumes that Commenter intended to state that unit STABFUG is subject to 40 CFR Part 60, Subpart OOOOa and not Subpart OOOa]. TCEQ's position is that high level requirements are enforceable as

the records will indicate the compliance options and monitoring data that were used to certify compliance with the emission limitations and standards.

The EPA appreciates the complexity of some of the EPA's regulations, and is willing to offer assistance to permitting authorities seeking to understand how these regulations apply to individual facilities. However, it is ultimately the permitting authority's responsibility to issue title V permits that include (that is, identify with sufficient detail and clarity) all applicable requirements. This responsibility cannot be deferred to some later date by including high-level placeholder citations and waiting for a source to identify more specific requirements in a compliance certification. Further, the submission of compliance records and certifications from the source is not relevant to whether the permit itself includes, effectively IBRs, or assures compliance with the applicable requirements.

Direction to TCEQ: TCEQ must revise the Permit to ensure that it is unambiguous as to which requirements of NSPS subparts Dc and OOOOa are applicable to emission units at ETC Waha. Specifically, TCEQ must revise the ETC Waha Title V permit to include the specific emission limitations and standards applicable to each emission unit subject to 40 CFR Part 60 Subparts Dc and OOOOa, as well as the specific monitoring and testing, recordkeeping, and reporting requirements applicable to each emission unit subject to 40 CFR Part 60 Subpart OOOOa.

Claim E: The Petitioners Claim That "The Proposed Permit's Incorporation of ETC's PBR Registrations is Deficient."

Petitioners' Claim: The Petitioners note that Special Condition 10 of the Permit provides that:

> "Permit holder shall comply with the requirements of New Source Review authorizations issued or claimed by the permit holder for the permitted area, including permits, permits by rule (including the permits by rule identified in the PBR Supplemental Tables in the application), [and other types of permits] . . . referenced in the New Source Review Authorization References attachment. These requirements:
>
> A. Are incorporated by reference into this permit as applicable requirements . . ."

Petition at 23.

The Petitioners note that the PBR Supplemental Table referenced by Special Condition 10 in the Permit provides that ETC has registered source-specific PBR and standard exemption emission limits, which are reflected in Registration Nos. 53463, 31232, and 25624. *Id.* The Petitioners contend that TCEQ's RTC indicates that the PBR Supplemental Table also lists the following PBRs as applicable requirements for the ETC Waha Gas Plant: 106.262 (9/4/2000), 106.262 (11/1/2003), 106.371 (3/14/1997), 106.454 (11/1/2001), 106.472 (3/14/1997), and 106.473 (9/4/2000). *Id., citing* RTC Response to Comments 2, 3A and 3B. The Petitioners claim that the PBR Supplemental Table, however, does not actually list any of these PBRs as applicable requirements. The Petitioners add that "neither the PBR registrations listed in the PBR Supplemental Table, nor the PBRs listed in the Executive Director's RTC are referenced in the New Source Review Authorization Reference attachment." *Id.* at 24. Further, the Petitioners

claim that the Permit itself must identify the specific permits it incorporates and may not simply IBR an application document (like the supplemental table) that, in turn, IBR the applicable permit numbers. *Id.* at 24–25.

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

Under title V of the CAA, the EPA's part 70 regulations, and TCEQ's EPA-approved title V program rules, every title V permit must include all applicable requirements that apply to a source, as well as any permit terms necessary to assure compliance with these requirements. *E.g.*, 42 U.S.C. § 7661c(a).[29] "Applicable requirements," as defined in the EPA's and TCEQ's rules, include the terms and conditions of preconstruction permits issued by TCEQ, including requirements contained in a PBR that is claimed by a source, as well as source-specific emission limits established through certified registrations associated with PBRs. *See* 40 C.F.R. § 70.2; 30 TAC § 122.10(2)(H).

The CAA requirement to include all applicable requirements in a title V permit can be satisfied using incorporation by reference (IBR) in certain circumstances. *See, e.g.*, White Paper Number 2 at 40 (explaining how IBR can satisfy the requirements of CAA § 504).[30] When the EPA approved the Texas title V program, the Agency balanced the streamlining benefits of IBR against the value of a more detailed title V permit and approved TCEQ's use of IBR for minor NSR requirements (including PBRs), provided the program was implemented correctly. *See* 66 Fed. Reg. 63318, 63321–32 (December 6, 2001). The EPA stated as a condition of program approval that "PBR are incorporated by reference into the title V permit by identifying . . . the PBR by its section number." *Id*. at 63324. Notably, the EPA and TCEQ also agreed as part of the approval process that "PBRs will be cited to the lowest level of citation necessary to make clear what requirements apply to the facility." *Id*. at 63322 n.4. This agreement is consistent with TCEQ's regulations approved by the EPA. *See* 30 TAC § 122.142(2)(B)(i) ("Each permit shall also contain specific terms and conditions for each emission unit regarding the following: . . . the *specific regulatory citations* in each applicable requirement or state-only requirement *identifying the emission limitations and standards*." (emphasis added)). This is also consistent with the EPA's longstanding position that materials incorporated by reference must be clearly identified in the permit. *See, e.g.*, *White Paper Number 2* at 37 ("Referenced documents must also be specifically identified.").

Because the Final Permit and the PBR Supplemental Table contain no direct reference to PBRs listed in the Response to Comment—which TCEQ suggests are applicable requirements—the Permit does not currently include or incorporate all requirements that are applicable to the facility, as required by the CAA, the EPA's regulations, TCEQ's regulations, the agreements underlying the EPA's approval of IBR in Texas, and the EPA's longstanding position concerning

[29] *See supra* note 25; § 70.3(c)(1) ("For major sources, the permitting authority shall include in the permit all applicable requirements for all relevant emissions units in the major source."); 30 TAC § 122.142(2)(B)(i) ("Each permit shall also contain specific terms and conditions for each emission unit regarding the following: . . . the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards.").

[30] *See supra* note 22.

IBR. Therefore, the EPA is granting the Petition with respect to this claim. As discussed further in the following paragraphs, however, the EPA believes that this issue can, and most likely will, be resolved expeditiously by a straightforward solution that the Agency understands TCEQ to be in the process of implementing.

Direction to TCEQ: In order to resolve the EPA's objection on this claim, the EPA directs TCEQ to modify the title V permit to incorporate the PBRs listed in the RTC (provided these are, in fact, applicable to ETC Waha) in a manner that clearly identifies each applicable PBR and the emission unit(s) to which it applies.

Incorporating the listed PBRs could be accomplished in various ways. The EPA understands that TCEQ intends to require permit applicants to fill out a PBR Supplemental Table[31], which will include registration numbers for all registered PBRs in all title V applications submitted after August 1, 2020.[32] Further, TCEQ will include the registration numbers for PBRs in the New Source Review Authorization References by Emissions Unit table with the unit/group/process ID number to which they apply. The EPA expects that this practice would conform with TCEQ's EPA-approved regulations, 30 TAC § 122.142(2)(B)(i), as well as the agreements underpinning the EPA's approval of the IBR of PBRs—namely that "PBRs will be cited to the lowest level of citation necessary to make clear what requirements apply to the facility." 66 Fed. Reg. at 63322 n.4.

V. CONCLUSION

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

Dated: JAN 2 8 2022

Michael S. Regan
Administrator

[31] The EPA acknowledges that ETC Waha included a PBR Supplemental Table as a part of its application for the June 21, 2021, revised title V permit.
[32] *See* May 11, 2020 Baer Letter.