

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	PETITION No. VI-2016-14
)	
EXXONMOBIL CORPORATION)	
BAYTOWN REFINERY)	ORDER RESPONDING TO
HARRIS COUNTY, TEXAS)	PETITION REQUESTING
)	OBJECTION TO THE ISSUANCE OF
PERMIT No. O1229)	A TITLE V OPERATING PERMIT
)	
ISSUED BY THE TEXAS COMMISSION ON)	
ENVIRONMENTAL QUALITY)	

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

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated September 26, 2016 (the Petition) from the Environmental Integrity Project, Sierra Club, and Air Alliance Houston (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661d(b)(2). The Petition requests that the EPA Administrator object to the proposed operating permit No. O1229 (the Proposed Permit or Permit) issued by the Texas Commission on Environmental Quality (TCEQ) to the ExxonMobil Corporation (ExxonMobil) Baytown Refinery (Baytown Refinery or the facility) in Harris County, Texas. The operating permit was proposed pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and Title 30, Chapter 122 of the Texas Administrative Code (TAC). *See also* 40 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 Proposed Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further below, the EPA denies in part and grants in part the Petition requesting that the EPA Administrator object to the Proposed Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA’s implementing regulations at 40 C.F.R. part 70. The state of Texas submitted a title V

program governing the issuance of operating permits on September 17, 1993. The EPA granted interim approval of Texas's title V operating permit program in 1996, and granted full approval in 2001. *See* 61 Fed. Reg. 32693 (June 25, 1996) (interim approval effective July 25, 1996); 66 Fed. Reg. 63318 (December 6, 2001) (full approval effective November 30, 2001). This program is codified in 30 TAC Chapter 122.

All major stationary sources of air pollution and certain other sources are required to apply for 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. CAA §§ 502(a), 504(a), 42 U.S.C. §§ 7661a(a), 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 source's compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* CAA § 504(c), 42 U.S.C. § 7661c(c). One purpose of the title V program is to "enable the source, States, the 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), 42 U.S.C. § 7661d(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. 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. CAA § 505(b)(1), 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. CAA § 505(b)(2), 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 agency (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). CAA § 505(b)(2), 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. CAA § 505(b)(2), 42 U.S.C.

§ 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).¹ Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.²

The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).³ When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g., MacClarence*, 596 F.3d at 1130–31.⁴ Certain aspects of the petitioner's demonstration burden are discussed below. A more detailed discussion can be found in *In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA has looked at 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, or RTC), 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 has examined is whether a

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); *c.f. NYPIRG*, 321 F.3d at 333 n.11.

³ *See also Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' . . . plainly mandates an objection *whenever* a petitioner demonstrates noncompliance." (emphasis added)).

⁴ *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

⁵ *See also, e.g., 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 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,

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

The information that the EPA considers in determining whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) on a proposed permit generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. 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 of basis for the draft and proposed permits; the permitting authority’s written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; relevant supporting materials made available to the public according to 40 C.F.R. § 70.7(h)(2); and all other 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). 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 as part of making a determination whether to grant or deny the petition.

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

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).

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 (Apr. 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.

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. CAA §§ 160–169, 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. CAA §§ 171–193, 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 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.

Where the EPA has approved a state’s title I permitting program (whether PSD, NNSR, or minor NSR), duly issued preconstruction permits will establish the NSR-related “applicable requirements,” and 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 In the Matter of PacifiCorp Energy, Hunter Power Plant*, Order on Petition No. VIII-2016-4 at 8–21 (October 16, 2017) (*PacifiCorp-Hunter Order*); *In the Matter of Big River Steel, LLC*, Order On Petition No. VI-2013-10 at 8–20 (October 31, 2017) (*Big River Steel Order*); 56 Fed. Reg. 21712, 21738–39 (May 10, 1991).⁹ The legality of a permitting authority’s decisions undertaken in the course of preconstruction permitting is not a subject the EPA will consider in a petition to object to a source’s title V permit. *See PacifiCorp-Hunter*

⁹ 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 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; *see PacifiCorp-Hunter Order* at 19; *id.* at 20 (“That the EPA views the incorporation of the terms and conditions of these preconstruction permits into the title V operating permit as proper for purposes of title V does not indicate that the EPA agrees that the state reached the proper decision when setting terms and conditions in the preconstruction permits. . . . The EPA’s lack of objection to the inclusion of that requirement in the title V permit does not indicate that the EPA agrees that it is legal or complies with the Act; it merely indicates that a title V permit is not the appropriate venue to correct any such flaws in the preconstruction permit.”).

Order at 8, 13–19; *Big River Steel Order* at 8–9, 14–20.¹⁰ Rather, any such challenges should be raised through the appropriate title I permitting procedures or enforcement authorities.

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.

III. BACKGROUND

A. The Baytown Refinery Facility

ExxonMobil’s Baytown Refinery is part of a large petrochemical complex operated by ExxonMobil in Baytown, Harris County, Texas. The Baytown Refinery has the capability to process up to 584,000 barrels of crude oil per day, and features numerous emission units related to its petroleum refining operations. The facility is a major source of particulate matter (PM), sulfur dioxide (SO₂), nitrogen oxides (NO_x), carbon monoxide (CO), volatile organic compounds (VOC), and HAPs, and is subject to the requirements of title V. Emission units within the facility are also subject to the PSD program, other preconstruction permitting requirements, and various New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP).

B. Permitting History

ExxonMobil first obtained a title V permit for the Baytown Refinery in 2005. On May 17, 2010, ExxonMobil submitted an application for a renewal title V permit. TCEQ issued a draft permit on December 27, 2012, subject to a public comment period from December 27, 2012 until January 26, 2013. On July 5, 2016, TCEQ submitted the Proposed Permit, along with its responses to public comments (RTC), to the EPA for its 45-day review. The EPA’s 45-day review period ended on August 19, 2016, during which time the EPA did not object to the Proposed Permit. TCEQ issued the final title V renewal permit for the Baytown Refinery on August 31, 2016.

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 August 19, 2016. Thus, any petition seeking the EPA’s objection to the Proposed Permit was due on or before October 18, 2016. The Petition was received September 26, 2016 and, therefore, the EPA finds that the Petitioners timely filed the Petition.

¹⁰ 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 PacifiCorp-Hunter Order* at 16, 17, 18, 18 n.33, 19; *Big River Steel Order* at 17, 17 n.30, 19 n.32, 20.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Claim A: The Petitioners Claim That “The Proposed Permit Incorporates Confidential Applicable Requirements.”

Petitioners’ Claim: The Petitioners claim that the Proposed Permit fails to include and assure compliance with confidential applicable requirements related to maintenance, startup, and shutdown (MSS). Petition at 7.

The Petitioners explain that the proposed title V permit incorporates the requirements of preconstruction Permit No. 18287/PSDTX730M4/PAL7 by reference. *Id.* (citing Proposed Permit, Special Condition (SC) 32 and the New Source Review Authorization References table). The Petitioners then reproduce Conditions 38 and 39 of Permit No.18287/PSDTX730M4/PAL7, which read:

[38.] This permit authorizes atmospheric emissions from the flares for maintenance, startup, and shutdown activities as represented in the confidential section of the permit amendment application dated March 2, 2004. . . . Any emissions from maintenance, start-up, or shutdown activities not contained in the listing provided in the confidential file are not authorized by this permit.

[39.] This permit authorizes atmospheric emissions from various sources for maintenance, startup, and shutdown activities as represented in the confidential section of the permit amendment application dated March 2, 2004. . . . Any emissions from maintenance, start-up, or shutdown activities not contained in the listing provided in the confidential file are not authorized by this permit.

Id. (quoting Permit No. 18287/PSDTX730M4/PAL7) (alteration in Petition).

The Petitioners assert that the referenced confidential portions of the Permit No. 18287/PSDTX730M4/PAL7 application are incorporated as enforceable conditions of that preconstruction permit, citing 30 TAC §116.116(a). *Id.* at 7; *see also id.* at 9 (quoting RTC at 2). Because Conditions 38 and 39 of Permit No. 18287/PSDTX730M4/PAL7 are enforceable conditions under which the site is operated, the Petitioners, therefore, claim that these provisions are “applicable requirements” that must be included in the title V permit. *Id.* at 9.

The Petitioners challenge these provisions on various grounds. First, the Petitioners claim that, pursuant to 42 U.S.C. §§ 7661(a) and 7661(c), the title V permit must include conditions that assure compliance with all applicable requirements, including limits and conditions contained in preconstruction permits. *Id.* at 8. Similarly, the Petitioners claim that all terms and conditions in a title V permit are enforceable by the EPA and by the public, and that “the Proposed Permit must provide sufficient information to allow members of the public to identify and determine ExxonMobil’s compliance with them.” *Id.* at 8, 9 (citing 42 U.S.C. § 7661c(a), (c); C.F.R. § 70.6(b)(1)). The Petitioners claim that the provisions at issue are not practicably enforceable by members of the public because it is impossible for members of the public to determine which

planned MSS activities are or are not authorized by the confidential sections of the permit application. *Id.* at 7–8.

The Petitioners also claim that “Title V provides that ‘[t]he contents of a permit shall not be entitled to protection’ as confidential business information or trade secrets.” *Id.* at 8 (quoting 42 U.S.C. § 7661b(e)). The Petitioners assert that, because the provisions at issue are applicable requirements, they may not be made confidential. *Id.* at 9.

The Petitioners challenge TCEQ’s assertion that the provisions may be confidential because the information contained in the confidential section is not necessary to calculate emission rates and, therefore, does not constitute “emission data.” *Id.* at 10 (citing RTC at 2–3). First, the Petitioners claim that TCEQ’s contention is irrelevant because title V permit terms may not be confidential, as noted above. Second, the Petitioners claim that the confidential information at issue does constitute “emission data” and, therefore, may not be treated as confidential. *Id.* at 10.¹¹

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

TCEQ’s EPA-approved NSR rules provide that “representations with regard to construction plans and operation procedures in an application for a permit” . . . “are [among] the conditions upon which a permit, special permit, or special exemption are issued.” 30 TAC 116.116(a). As TCEQ has explained and the EPA acknowledged, “The permit application, and all the representations in it, is part of the permit when it is issued and as such is enforceable.” 79 Fed. Reg. 8368, 8385 (February 12, 2014). Additionally, TCEQ’s EPA-approved NSR rules acknowledge the fact that permit applications will, at times, include information claimed as confidential. *See, e.g.*, 30 TAC §116.128(c)(1)(E). When the requirements of an NSR permit—including, to the extent applicable, representations in the NSR permit application(s)—are incorporated into a title V permit, a potential tension arises between this regulatory scheme in Texas and the CAA § 503(e) mandate that “The contents of a [title V] permit shall not be entitled to protection [as confidential information] under section 7414(c) of this title.” 42 U.S.C. § 7661b(e).¹² However, this potential for conflict should be mitigated if no portions of the confidential section of a permit application establish what would otherwise be treated as binding, enforceable permit terms (e.g., emission limits, operating limits, work practice standards, etc.), or any other type of “emission data” (as defined in 40 C.F.R. § 2.301(a)(2)(i)(B)) necessary to assure compliance with an applicable requirement or permit term. So long as a permit specifies all binding emissions and operating limits, as well as all other conditions necessary to assure

¹¹ Specifically, the Petitioners claim that because units at the facility “are only authorized to emit pollution during routine MSS activities *as represented in ExxonMobil’s permit application*, the incorporated application representations are necessary to ‘determine the identity, amount, frequency, concentration, or other characteristics . . . of emissions’ authorized by the Proposed Permit.” *Id.* (quoting 40 C.F.R. § 2301(a)(2)(i)(B)).

¹² Section 114(c) of the Act provides protection of certain confidential trade secret information—but not emissions data—from disclosure. *See* 42 U.S.C. § 7414(c). The EPA’s regulations at 40 C.F.R. § 2.301(a)(2)(i)(B) define “emission data” to include “Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source).”

compliance with such limits (either on the face of the NSR permit or in the non-confidential portion of the application); these permits will generally not conflict with the EPA's title V requirements.

The EPA agrees that the permit terms that the Petitioners identify (as incorporated into the title V permit) appeared to indicate that certain confidential information might establish binding requirements (i.e., permit terms) governing Baytown Refinery's operations during MSS. However, on March 15, 2018, TCEQ finalized an amendment to Permit No. 18287/PSDTX730M4/PAL7.¹³ This updated permit no longer contains the conditions previously identified as Conditions 38 and 39,¹⁴ which referred to information contained in a confidential portion of a permit amendment application. Given that the permit terms that formed the basis for the Petitioners' claim have now been entirely removed from Permit No. 18287/PSDTX730M4/PAL7, the EPA finds that the Petitioners' claim is effectively moot.¹⁵

In responding to comments on the title V permit, TCEQ identified other permit conditions within Permit No. 18287/PSDTX730M4/PAL7 that established requirements applicable to planned MSS activities, and stated that the confidential section of the application "can be referenced as confidential because it is not necessary for calculating emission rates and therefore does not constitute 'emission data.'" RTC at 2-3. Additionally, in the course of removing these provisions from Permit No. 18287/PSDTX730M4/PAL7, TCEQ explained that ExxonMobil represented that "these conditions have been superseded in a subsequent amendment of the permit." TCEQ's Cover Letter to Permit Alteration to Permit No. 18287 (March 15, 2018). More specifically, in its application to remove these terms, ExxonMobil explained the following:

The requested alteration is to delete Special Conditions 40 and 41 because these conditions have been superseded in a subsequent amendment of the permit.

This alteration does not result in a change in the character of emissions, does not result in a change in a method of control of emissions, does not result in a significant increase in emissions, and does not include authorization of a new facility.

Special Conditions 40 and 41 were added to the permit on February 2, 2005 in response to an amendment application dated March 2, 2004 to authorize certain

¹³ The most recent version of this permit, along with prior versions of this permit, should be available on TCEQ's online database, at <https://records.tceq.texas.gov>. TCEQ has also provided guidance on how to access minor NSR permits that are incorporated into a title V permit:

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

¹⁴ The current title V permit incorporates (and attaches) the version of Permit No. 18287/PSDTX730M4/PAL7 that was last updated on August 15, 2012. This version of Permit No. 18287/PSDTX730M4/PAL7 contains the permit terms at issue as conditions 38 and 39. However, subsequent amendments to Permit No.

18287/PSDTX730M4/PAL7 contained these same provisions as Conditions 40 and 41. *See, e.g.*, Permit No. 18287/PSDTX730M4/PAL7 (as of November 15, 2017).

¹⁵ The EPA notes that on March 27, 2018, TCEQ posted public notice of a draft title V minor permit modification that, among other things, incorporates the most recent March 15, 2018, version of Permit No. 18287/PSDTX730M4/PAL7 into the title V permit. *See* March 27, 2018 draft permit at page 2236. The draft title V permit modification is subject to a comment period that closes on April 26, 2018. The draft permit, statement of basis, and announcement are available through the following website:

<https://www.tceq.texas.gov/permitting/air/titlev/announcements.html>.

maintenance activities. On January 5, 2007, a subsequent Maintenance, Startup, and Shutdown (MSS) amendment revising the previous maintenance activity representations was submitted. This later amendment was issued June 3, 2010. In the 2010 version of the permit, language regarding the MSS activities was added to Special Condition 1 and new Special Conditions currently numbered 43 through 60 were also added. The MSS permit amendment issued June 3, 2010 superseded the previous 2004 amendment representation and limits. Special Conditions 40 and 41 should have been removed at that time.

ExxonMobil's Permit Alteration Request for Permit 18287/PSD-TX-730M4/PAL7 (March 12, 2018).

Thus, not only have the NSR permit provisions at issue in this claim been removed, ExxonMobil has explained that these terms were redundant due to the other permit terms governing MSS operations at the flare and other sources, and should have been removed when Permit 18287/PSDTX730M4/PAL7 was amended in 2010. In other words, since 2010, the permit terms referencing the confidential material do not appear to have actually established binding requirements on the source relevant to MSS operations, as the Petitioners suggest. Rather, the other MSS permit terms that were added to the permit in 2010 (i.e., Conditions 1 and 41–58 as numbered the August 15, 2012 version of Permit 18287/PSDTX730M4/PAL7 referenced in the Petition),¹⁶ along with any additional representations contained in the 2007 permit amendment application, appear to establish all requirements applicable to relevant units during MSS.

Notably, these additional permit terms, as well as the non-confidential portion of the permit application, were publicly available at the time the Petition was filed. However, the Petitioners did not acknowledge or address these terms, which were clearly relevant to the MSS activities authorized by Permit 18287/PSDTX730M4/PAL7.¹⁷ Nor did the Petitioners address TCEQ's RTC, which identified these terms as relevant.¹⁸ The Petitioners have, therefore, not identified any applicable requirements that should have been included in the title V permit (either directly in Permit 18287/PSDTX730M4/PAL7 or in a non-confidential application representation) but that were omitted. Nor have the Petitioners identified any applicable requirement or permit term with which the Permit does not assure compliance. Therefore, although this claim has been effectively rendered moot by TCEQ's removal of the NSR permit terms at issue, even if it were not moot, the Petitioners have not demonstrated that the title V permit, by incorporating the confidential section of the application for Permit No. 18287/PSDTX730M4/PAL7, is missing any applicable requirements or does not assure compliance with any applicable requirements related to MSS emissions.

¹⁶ As ExxonMobil indicates in the material quoted above, these same conditions were contained in Conditions 1 and 43–60 of subsequent versions of Permit No. 18287/PSDTX730M4/PAL7, such as the November 15, 2017 version of Permit No. 18287/PSDTX730M4/PAL7. Following the removal of the permit terms at issue, the remaining MSS-related terms are now again contained in Conditions 1 and 41–58 of the latest March 15, 2018 version of Permit No. 18287/PSDTX730M4/PAL7.

¹⁷ See *supra* note 8 and accompanying text.

¹⁸ See *supra* note 5 and accompanying text.

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

Claim B: The Petitioners Claim That “The Proposed Permit’s Incorporation of State-Only Permit PAL7 Undermines the Enforceability of Major New Source Review Requirements.”

Petitioners’ Claim: The Petitioners claim that the Proposed Permit impermissibly incorporates a Plantwide Applicability Limit (PAL) permit that the Petitioners claim is not federally enforceable.

The Petitioners first explain that that the proposed title V permit incorporates by reference PAL7, which is part of Permit 18287/PSDTX730M4/PAL7. Petition at 11 (citing Proposed Permit, Condition 32 and the New Source Review Authorization References table). The Petitioners quote a portion of PAL7, which states:

This permit establishes Plant-Wide Applicability Limits (PALs) for VOC, [CO], [NO_x], [SO₂], [PM], H₂S, and H₂SO₄. The PALs are effective for ten years after this permit is issued. Physical changes and changes in method of operation at this site are exempt from federal New Source Review for VOC, CO, NO_x, SO₂, H₂S, H₂SO₄, and PM as long as site emissions do not exceed PAL caps.

Id. The Petitioners, therefore, assert that PAL7 “purports to establish the exclusive basis for determining whether projects at the Baytown Refinery are subject to major NSR preconstruction permitting requirements.” *Id.*

The Petitioners advance various arguments challenging PAL7, based on the Petitioners’ contention that PAL7 is a “state-only” permit that is not federally enforceable. *See id.* at 11–14. The Petitioners claim that at the time PAL7 was issued in 2006, Texas did not have EPA-approved SIP rules authorizing TCEQ to issue federally enforceable PAL permits. *Id.* at 12–13.¹⁹ The Petitioners claim that PAL7 is, therefore, a state-only permit that cannot modify ExxonMobil’s obligation to comply with the EPA-approved Texas SIP rules governing NSR applicability determinations. *Id.* at 13 (citing 30 TAC §§ 116.150(d); 116.160(c); 116.190).²⁰

The Petitioners assert that the incorporation of PAL7 as a federally enforceable authorization is improper because it purports to modify SIP requirements with respect to the Baytown Refinery, contrary to 42 U.S.C. § 7410(i). *Id.* at 12. The Petitioners claim that, because PAL7 “displaces the actual applicable netting requirements in the Texas SIP” for determining major NSR applicability, it, therefore, undermines the enforceability of the Texas SIP. *Id.* at 11 (citing 30 TAC §§ 116.150(c), (d), 116.160(b), (c)). The Petitioners also claim that because the title V

¹⁹ The Petitioners claim that PAL7 actually predated the promulgation of TCEQ’s initial PAL rules. *Id.* at 13. The Petitioners also claim that the EPA’s subsequent approval of the TCEQ PAL rules in 2014 did not convert state-only permits issued prior to approval into federally approved permits. *Id.*

²⁰ The Petitioners further claim that the “EPA has explained to ExxonMobil and the TCEQ [that] ExxonMobil’s PAL is a State-only authorization that does not affect ExxonMobil’s obligation to determine major NSR applicability for projects at the Baytown Refinery using the netting process established by the Texas SIP.” *Id.* at 11 (citing Letter from John Blevins, Director, Compliance Assurance and Enforcement Division, EPA Region 6, to Gary D. Robbins, Air Permitting Team Leader, ExxonMobil Corporation (March 6, 2012) (Blevins Letter)).

permit undermines the enforceability of the SIP requirements, it does not assure compliance with all applicable requirements. *Id.* at 13.

The Petitioners also challenge the adequacy of TCEQ’s RTC on this issue, claiming that TCEQ’s response—indicating that “ExxonMobil will amend the PAL when it comes in for renewal in October 2016,” and that the amended permit must comply with the current SIP-approved rules—has no bearing on whether it was appropriate for the Proposed Permit to incorporate the current PAL7 permit as federally enforceable. *Id.* at 14 (quoting RTC at 16).

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

As described above in Section II.B of this Order, the burden is on the Petitioners to identify a flaw in the title V permit such that it is not in compliance with the CAA. Thus, to the extent that the Petitioners are concerned with a defect related to an underlying applicable requirement (*e.g.*, preconstruction permit or PAL), the Petitioners must demonstrate why such a purported flaw would cause the title V permit to be deficient. Here, the Petitioners assert that PAL7 is a “state-only” permit because TCEQ did not have EPA-approved SIP rules governing PALs in 2006, at the time PAL7 was issued. However, as explained below, the title V permitting process is not the appropriate venue to resolve questions concerning whether PAL7 is federally enforceable. Additionally, the Petitioners have not demonstrated how any such deficiencies, even if true, resulted in a flaw in the current title V permit.

PAL7 was issued by a state with an approved preconstruction permitting program and was included as part of a set of related preconstruction permits issued pursuant to procedures approved by the EPA under title I of the CAA. As such, these preconstruction permits establish NSR-related “applicable requirements” that must be incorporated into the title V permit. *See PacifiCorp Hunter Order* at 8–11; *Big River Steel Order* at 9–11. Therefore, the task of TCEQ in issuing or modifying the title V permit is to incorporate the terms and conditions of the underlying title I permit (including PAL7), and to ensure that the title V permit contains adequate monitoring, recordkeeping, and reporting requirements to assure compliance with those terms and conditions. *See PacifiCorp-Hunter Order* at 8, 13–18; *Big River Steel Order* at 8–9, 14–20.²¹ The public notice for PAL7 clearly indicated that PAL7 would establish a PAL, and the draft permit further clarified the PAL would serve to determine federal NSR applicability.²² The public had the opportunity to comment (which the public took advantage of), and the opportunity to obtain administrative review and judicial review of this decision following issuance of PAL7 in

²¹ *See supra* note 9 and accompanying text.

²² Among other things, public notice of the draft PAL7 permit explained that ExxonMobil has applied “for amendment of State Air Quality Permit 18287 and [PSD] Air Quality Permit Number PSD-TX-740M4 which would authorize a Plantwide Applicability Limit (PAL) at the Baytown Refinery.” Public Notice, *The Baytown Sun*, page 4B (July 1, 2006). Additionally, the draft permit, available to the public, clearly stated “This permit establishes Plant-Wide Applicability Limits (PALs)” for various pollutants, and explained, “Physical changes and changes in method of operation at this site are exempt from federal New Source Review for [these pollutants] as long as site emissions do not exceed PAL caps.” Flexible Permit Numbers 18287 and PSD-TX-730M4/PAL Permit, Draft, Special Condition 40, page 20. These documents are available in the file on TCEQ’s public database titled “AIR_NSR_HG0232Q-18287_Permits_Public_20050101_Permits_531605_.pdf.”

2006.²³ Thus, any challenges to the validity of PAL7—including whether TCEQ had the authority at the time to create a federally enforceable PAL—should have been raised through the appropriate title I avenues in 2006. The Petitioners may not now attempt to challenge these issues before the EPA in a title V petition.²⁴ See *In the Matter of ExxonMobil Corporation, Baytown Olefins Plant*, Order on Petition No. VI-2016-12 at 9–12 (March 1, 2018) (*Baytown Olefins Order*).

Additionally, even if it were appropriate to consider the validity of PAL7 at this time, the Petitioners have not demonstrated that the title V permit is missing any applicable requirement or is otherwise flawed as a result of the alleged defects with PAL7. The Petitioners do not, for example, identify any projects that were authorized in reliance on PAL7. In other words, the Petitioners do not identify any projects that should have been evaluated under the SIP rules governing major NSR applicability that the Petitioners claim are applicable. Nor do the Petitioners allege, much less demonstrate, that any particular projects would have triggered major NSR requirements but for reliance on PAL7 and, therefore, that the title V permit is missing such applicable requirements (*i.e.*, major NSR requirements). Therefore, the Petitioners have not demonstrated that the title V permit is missing any applicable requirements as a result of any purported deficiencies in PAL7. See *PacifiCorp-Hunter Order* at 24–25.

The Petitioners repeatedly claim that because PAL7 purports to displace SIP requirements, it “undermines the enforceability of the Texas SIP.” Petition at 11–14. However, it is unclear what the phrase “undermines the enforceability of the SIP” means in the context of a title V permit.²⁵

²³ Among other things, the public notice for PAL7 clearly explained the public’s right to submit public comments and the opportunity to request a contested case hearing. See Public Notice, *The Baytown Sun*, page 4B (July 1, 2006). Notably, the Galveston-Houston Association for Smog Prevention (GHASP) submitted public comments raising concerns regarding the authority of TCEQ to issue PAL7 as a federally enforceable PAL permit. See GHASP Comments on ExxonMobil Flexible Permit No. 18287 and PSD-TX-730M4/PAL Permit at 2 (August 3, 2006). TCEQ responded to these comments in the PAL7 proceeding. See TCEQ’s Response to GHASP Comment 3 (October 30, 2006). Had the Petitioners or another member of the public requested a contested case hearing (and subsequently filed a motion for rehearing), they could have obtained judicial review of TCEQ’s final decision in state court. See 30 TAC 80.272(b), 80.275; Tex. Gov’t Code § 2001.171–178.

²⁴ While the title V process is not the appropriate vehicle to challenge the facial validity of PAL7, the public (and the EPA) still have the ability to challenge preconstruction permitting actions that rely on PAL7 through the appropriate avenues, including the title I permitting process as well as the enforcement authorities provided by the CAA, such as through CAA § 113. See *PacifiCorp-Hunter Order* at 20–21. In the present case, the appropriate avenue for such a challenge would be the issuance of any subsequent preconstruction permit purporting to rely on PAL7, or through an enforcement action challenging the reliance on PAL7 for PSD applicability. The EPA acknowledges that in 2012, EPA Region 6 submitted a letter to ExxonMobil indicating concerns with the federal enforceability of PAL7. See *supra* note 20; Blevins Letter. Notably, this letter emphasized that ExxonMobil was responsible for complying with all requirements contained in the EPA-approved Texas SIP, and that the EPA would assess its enforcement options on a case-by-case basis if the source did not comply with applicable federal requirements. The EPA notes that this regional letter did not express a final agency position. See, *e.g.*, *In the Matter of Superior Silica Sands and Wisconsin Proppants, LLC*, Order on Petition Nos. V-2016-18 & V-2017-2 at 10 n.21 (February 26, 2018). Moreover, the EPA need not make any determination as to the validity of PAL7 in order to respond to this title V petition, for the reasons discussed above. See *supra* notes 9, 21, and accompanying text.

²⁵ It appears that the Petitioners are concerned that under the title V permit, as currently written, ExxonMobil or TCEQ might rely on PAL7 in a future NSR applicability determination, rather than following the otherwise applicable NSR requirements in the Texas SIP. If that is the concern, it is about a potential future compliance issue that should be resolved through the appropriate title I channels if and when such a future NSR applicability

The Petitioners do not explain why a permit term that purportedly “undermines the enforceability of a SIP” would render the title V permit in noncompliance with any applicable requirements or the requirements of part 70. 40 C.F.R. § 70.8(c)(1); *see* 42 U.S.C. § 7661d(b)(2); *Baytown Olefins Order* at 13–14. The Petitioners suggest that because the title V permit undermines the enforceability of SIP requirements, the title V permit, therefore, fails to assure compliance with all applicable requirements. However, the requirement that title V permits “assure compliance with applicable requirements,” 42 U.S.C. § 7661c(a), must be considered in context. The EPA’s rules define “applicable requirement” to include requirements “*as they apply to emission units at a part 70 source.*” 40 C.F.R. § 70.2 (emphasis added). Here, as discussed in the preceding paragraph, the Petitioners have not identified that the title V permit does not assure compliance with any applicable requirements (such as substantive NSR requirements) that apply to, or should apply to, any particular emission unit.²⁶ Thus, the Petitioners have not demonstrated that the incorporation of PAL7 into the title V permit results in the title V permit not assuring compliance with any particular applicable requirement that applies or should apply to any emission units at the Baytown Refinery.

The Petitioners assert generally that “[t]he Proposed Permit’s incorporation of State-only PAL7 as a federally-enforceable authorization is improper” Petition at 12, based on the reasons discussed above. However, the Petitioners do not support this assertion with any citation indicating why the title V permit should not incorporate PAL7 as it currently does. To the extent that the Petitioners intended to argue that PAL7 should be listed in the title V permit as a state-only authorization, as would be necessary for requirements determined to be state-only, per 40 C.F.R. § 70.6(b)(2), the Petitioners have not directly raised this claim in Claim B (nor do they cite to this regulatory provision in Claim B). However, to the extent that the Petition could be read to implicate this issue with respect to PAL7, this claim was not raised with reasonable specificity in public comments. The CAA requires that all petition claims “shall be based on objections to the permit that were raised with reasonable specificity during the public comment period.” 42 U.S.C. § 7661d(b)(2). As the EPA has explained:

determination is made for a particular project. *See supra* note 24; *Baytown Olefins Order* at 13–14 n.24. The EPA observes that ExxonMobil has submitted a request to renew PAL7. The EPA expects that this renewal permit will be issued according to, and must necessarily comply with, the regulations governing PAL permits that the EPA has approved as part of the Texas SIP. *See* 77 Fed. Reg. 65119 (October 25, 2012) (EPA SIP approval of the TCEQ PAL Program, among other things). These rules require that the public will have the opportunity to participate in this future PAL permit proceeding, including the opportunity to comment on any relevant outstanding concerns with PAL7. *See* 30 TAC 116.194 (Public Notice and Comment), 116.196 (Renewal of a PAL Permit). In its RTC, TCEQ acknowledged this upcoming renewal. *See* RTC at 16.

²⁶ Rather, the Petitioners refer broadly to the Texas SIP rules governing the procedures by which major NSR applicability questions are to be determined. Thus, the only purported “applicable requirements” contemplated by the Petitioners are the requirements to conduct hypothetical applicability determinations for unknown future projects according to non-PAL SIP rules. However, unlike substantive NSR requirements (e.g. BACT limits) that might “apply to emission units,” 40 C.F.R. § 70.2, these applicability determination mechanisms are not themselves “applicable requirements” that would be incorporated into a title V permit, or with which a title V permit must assure compliance. Similarly, regarding the Petitioners’ claim that title V permits cannot modify existing SIP requirements, per 42 U.S.C. § 7410(i), to the extent that the Petitioners are arguing CAA section 110(i) is a requirement with which the current title V permit does not assure compliance, this provision is not an “applicable requirement” as defined in the EPA’s part 70 regulations. Although the Petitioners cite 40 C.F.R. § 70.2, which states that an “applicable requirement” includes “[a]ny standard or other requirement provided for in the applicable implementation plan,” the Petitioners have not demonstrated that CAA section 110(i) is part of an applicable implementation plan.

The EPA believes that Congress did not intend for Petitioners to be allowed to create an entirely new record before the Administrator that the State has had no opportunity to address. Accordingly, the Agency believes that the requirement to raise issues “with reasonable specificity” places a burden on the Petitioner, absent unusual circumstances, to adduce before the State the evidence that would support a finding of noncompliance with the Act.

56 Fed. Reg. 21712, 21750 (May 10, 1991); *see, e.g., Luminant Sandow Order* at 5–6. Here, in public comments on the Baytown Refinery title V permit, the Petitioners claimed that “the PAL should not be incorporated as part of the Draft permit,” and that PAL7 “should be voided.” Neither of these comments specifically claimed that PAL7 should be considered a “state-only” or “non-federally enforceable” permit, nor did the comments suggest that PAL7 should be listed as such in the title V permit, nor do the comments contain any citation to § 70.6(b)(2). The Petitioners have not demonstrated that it was impracticable to raise these claims at that time, and there is no basis for finding that grounds for such objection arose later. 42 U.S.C. § 7661d(b)(2). Therefore, this portion of the Petitioners’ claim is denied.

Additionally, even had this issue been properly raised (in the public comments or, more importantly, the Petition), this claim is based on the premise that PAL7 was not federally-enforceable. As discussed above, that question was not properly before Texas in processing this title V permit renewal, nor is it properly before the EPA in this title V petition.²⁷ Rather, the title V permit for the facility incorporates the terms and conditions of current preconstruction permits as applicable requirements. The proper scope of a title V petition and the EPA’s review of and ruling on that petition, in this context, is whether the title V permit properly incorporates those terms and conditions, and include adequate monitoring, recordkeeping, and reporting to assure compliance with those terms and conditions. *Baytown Olefins Order* at 14.

For the foregoing reasons, the EPA denies the Petitioners’ request for an objection on this claim.

Claim C: The Petitioners Claim That “The Proposed Permit Fails to Require ExxonMobil to Obtain SIP-Compliant Authorizations for Flexible Permit Projects at the Baytown Refinery.”

Petitioners’ Claim: The Petitioners claim that the Texas SIP requires major sources of air pollution to authorize modified construction plans or operating procedures consistent with the requirements in Texas’s Changes to Facilities Rule at 30 TAC § 116, Subchapter B. Petition at 15 (citing 30 TAC §§ 116.110, 116.111, 116.116, 116.150, 116.160). The Petitioners claim that the facility did not obtain the required Subchapter B authorizations for multiple projects at the Baytown Refinery, thereby violating the SIP. *Id.* at 16.²⁸

²⁷ *See supra* notes 9, 21, 24, and accompanying text.

²⁸ The Petitioners briefly reference a table submitted in public comments that includes 16 entries representing NSR actions related to NSR Permit No. 18287, occurring from 2001 through 2012. *See id.* at 14 (citing Attachment 22 to EIP Comments, Exhibit 1-22 of the Petition).

The Petitioners claim that, instead of obtaining the required Subchapter B authorizations, the facility relied on Texas’s “less stringent” flexible permit revision process (contained in 30 TAC § 116, Subchapter G) to make these changes to the facility, without any substantive review by TCEQ and without establishing Best Available Control Technology (BACT) requirements. *Id.* at 15–16 (citing 30 TAC §§ 116.718, 116.721). The Petitioners contend that reliance on the Subchapter G flexible permit rules was inappropriate because TCEQ’s flexible permit rules were not part of Texas’s EPA-approved SIP at the time the facility changes at issue were conducted. *Id.* at 16.²⁹ The Petitioners contend that the EPA’s subsequent approval of the TCEQ flexible permit rules did not automatically convert prior state-only flexible permits into federal permits. *Id.* at 18 (citing 79 Fed. Reg. 40666, 40667–68 (July 14, 2014)). The Petitioners also assert generally that flexible permits may not be used to authorize projects at major sources like the Baytown Refinery, and, thus, that it would be inappropriate to convert the Baytown Refinery flexible permit into a SIP-compliant permit when it is renewed. *Id.* at 19.

Additionally, the Petitioners address TCEQ’s suggestion that the flexible permit does not contradict SIP requirements but rather assures that EPA-approved Chapter 116 Subchapter B requirements were met. The Petitioners claim that TCEQ’s argument is irrelevant because it focuses on flexible permit program elements that were not triggered by the projects at issue. *Id.* at 19.³⁰

The Petitioners ultimately contend that, because ExxonMobil did not obtain Subchapter B authorizations for the changes at issue, the facility “violated the SIP,” *id.* at 14, 15, “is in violation of the Texas SIP,” *id.* at 17, and “has failed to comply with 30 [TAC] § 116.116 at the time the Proposed Permit was issued,” *id.* at 20. Accordingly, the Petitioners conclude that the title V permit must include a compliance schedule, and that the Proposed Permit is deficient because it does not include such a schedule. *Id.* at 15 (citing 42 U.S.C §§ 7661b(b), 7661c(a); 40 C.F.R. §§ 70.5(c)(8)(iii)(C), 70.6(c)(3); 30 TAC § 122.142(e)).

Addressing TCEQ’s RTC, the Petitioners also claim that the requirement in 30 TAC §§ 122.10(2)(h) and 122.142 to include the terms and conditions of any Chapter 116 preconstruction permit in a source’s title V permit does not outweigh TCEQ’s “obligation to identify Title V permit requirements that are not-federally enforceable as ‘State-only’ requirements, and to assure compliance with applicable requirements in the SIP.” *Id.* at 17 (citing 40 C.F.R. § 70.6(b)(2); 42 U.S.C. § 7661c(a), (c)).³¹

²⁹ The Petitioners claim that the EPA “explained to ExxonMobil and the TCEQ [that] ExxonMobil’s flexible permit is a State-only permit that does not displace ExxonMobil’s obligation to comply with preconstruction permitting requirements in the Texas SIP. *Id.* at 16 (citing what Petitioners assert to be a letter apparently sent from EPA to all holders of flexible permit holders, identified only by a hyperlink that no longer works).

³⁰ The Petitioners explain that the projects at issue “were not subject to the application requirements at 30 Tex. Admin. Code § 116.711, which was the basis for [TCEQ]’s determination that the flexible permit—when first issued—complied with the [Subchapter B] requirements of 30 Tex. Admin. Code § 116.111.” *Id.* at 20.

³¹ The Petitioners further claim that title V permits must clarify that state-only terms are ineffective to modify federal requirements. *Id.* at 18 (citing 42 U.S.C. § 7410(i); *In the Matter of Southwestern Electric Power Company, H.W. Pirkey Power Plant*, Order on Petition No. VI-2014-01 at 11–12 (February 3, 2016)).

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

The Petitioners have not demonstrated that the facility's prior reliance on the flexible permitting process to make various modifications to its preconstruction permits resulted in a flaw in the facility's title V permit. More specifically, the Petitioners have not demonstrated that reliance on the flexible permitting process led to substantive deficiencies in any preconstruction permit authorizations, such that the title V permit (which incorporates these preconstruction permits) is now deficient with respect to any applicable requirements.³²

As an initial matter, it is unclear whether the Petitioners are concerned with the construction of new units at the Baytown Refinery facility that may have triggered additional applicable requirements through the preconstruction authorization process, or whether the Petitioners are concerned with potentially improper modifications to existing, previously-authorized units. The Petitioners do not discuss or describe any specific changes to the facility. Instead, they simply reference a list of projects that the Petitioners claim were authorized through the flexible permitting process.³³ This list, pulled from TCEQ's website, contains no information regarding the nature of the projects at issue other than a short project name, and the Petitioners have provided no further information regarding these projects. Because the Petitioners failed to provide any description of the emission units at issue, the projects themselves, any emissions increases associated with these projects, or any relevant regulatory requirements associated with these specific projects, the Petitioners have not demonstrated that any particular units lack preconstruction requirements that should have been applicable.

The Petitioners include a one-sentence allegation that reliance on the flexible permit rules led to the authorization of the referenced projects "without any substantive preconstruction review by TCEQ and without establishing [BACT] requirements." Petition at 14 (citing 30 TAC 116.721(b)). However, the Petitioners do not explain why BACT requirements should have

³² In concluding that the Petitioners have not met their burden to demonstrate a flaw in the title V permit, the EPA is not making any judgment regarding the propriety of ExxonMobil's reliance on the flexible permitting process with respect to any past or future modifications to the facility, or the overall validity of any particular flexible permit (e.g., Permit No. 18287, which the Petitioners do not identify in this claim, but which was identified in the Petitioners' public comments). Similar to the issue discussed in Claim B above, *see supra* note 25, it appears that the Petitioners are concerned that under the title V permit, as currently written, ExxonMobil or TCEQ might rely on flexible permitting procedures to authorize preconstruction projects, rather than following the otherwise applicable NSR requirements in the Texas SIP. This is primarily a compliance issue that should be resolved through the appropriate title I permitting channels or enforcement actions if and when such decisions are made for a future project. Also, as with the PAL permit discussed in Claim B, the EPA observes that ExxonMobil has submitted a request to renew flexible permit No. 18287 (which is discussed in Claim C). The EPA expects that this renewal permit will be issued according to, and must necessarily comply with, the regulations governing flexible permits that the EPA has approved as part of the Texas SIP. *See* 79 Fed. Reg. 40666, (July 14, 2014) (EPA SIP approval of the TCEQ Flexible Permit Program). In its RTC, TCEQ acknowledged this upcoming renewal. *See* RTC at 18–19. The upcoming renewal of Permit No. 18287 (and its subsequent incorporation into the title V permit) should effectively resolve any future compliance-based concerns. Additionally, contrary to the Petitioners' claim, the EPA has made clear that flexible permits *are* available to authorize minor modifications at existing major sources. *See* 79 Fed. Reg. 8368, 8380 (Feb. 12, 2014) ("[T]he Flexible Permit program can be used for both true minor sources and for minor modifications at existing major sources.").

³³ *See* Petition at 14 (citing Attachment 22 to EIP Comments, Exhibit 1-22 of the Petition).

applied to any of the particular projects at issue, nor do the Petitioners explain what these requirements (*i.e.*, BACT requirements) would have entailed for any of the particular projects or permit modifications at issue. Thus, the Petitioners have failed to provide the requisite citation and analysis to demonstrate how the reliance on the flexible permitting process resulted in substantively deficient permitting actions or permit terms with respect to any particular project or emissions unit.³⁴

The Petitioners request that the title V permit include a schedule for ExxonMobil to comply with the Subchapter B requirements. The EPA's regulations and TCEQ's EPA-approved regulations provide that a compliance schedule is required "for sources that are not in compliance with all applicable requirements at the time of permit issuance." 40 C.F.R. § 70.5(c)(8); *see also id.* § 70.6(c); 30 TAC §§ 122.132(d)(iii), 122.142(d)(1). However, the EPA will not object to a permit where the Petitioners have provided no specific evidence to demonstrate that the facility is not in compliance with applicable requirements under the Act. *In the Matter of Bunge North American, Inc.*, Order on Petition No. VI-2016-02 at 6–7 (June 7, 2017) (citing *Georgia Power Plants Order* at 9–10). The demonstration requirement is particularly important with respect to the inclusion of a compliance schedule, in light of the interplay of such a requirement with the Agency's enforcement prerogatives.³⁵

Here, the Petitioners have failed to demonstrate that there are applicable requirements with which the facility was not in compliance at the time of permit issuance. The Petitioners claim that ExxonMobil received the wrong type of preconstruction authorizations at various times in the past. The Petitioners have not demonstrated how any of these alleged prior procedural deficiencies resulted in substantive deficiencies with the NSR authorizations for any given emission unit. The Petitioners accordingly have not demonstrated that the title V permit currently lacks any particular applicable requirement, or that the source is not in compliance with any particular applicable requirement that should have applied to a particular emission unit. *See* 40 C.F.R. § 70.2 (defining "applicable requirement[s]" "as they apply to emission units"). Finally, the Petitioners do not explain what the requested compliance schedule would accomplish or require of the source. This underscores the fact that the Petitioners have not identified specific applicable requirements, as applied to particular emission units, with which the facility is currently not in compliance.³⁶

³⁴ *See supra* note 6 and accompanying text.

³⁵ *See Sierra Club v. EPA*, 557 F.3d 401, 411–412 (6th Cir. 2009) (upholding EPA's denial of petition for compliance schedule where enforcement action had been commenced and settled without admission of liability). Even where there is evidence in the record that an enforcement action is underway (which the Petitioners have not presented here), the EPA has in the past applied a multi-factored analysis to determine whether a compliance schedule is warranted: (1) the kind and quality of information underlying the agency's original finding that a prior violation occurred, (2) the information the petitioner puts forward in addition to the agency's enforcement actions, (3) the types of factual and legal issues that remain in dispute, (4) the amount of time that has lapsed between the original decision and the current one and (5) the likelihood that a pending enforcement case could resolve some of those issues. *See id.* at 406–407 (upholding these factors as a reasonable interpretation of 42 U.S.C. § 7661d(b)(2)); *accord Sierra Club v. Johnson*, 541 F.3d 1257, 1267–69 (11th Cir. 2008) (initiation of enforcement action for PSD violation not in itself sufficient to demonstrate that compliance schedule is warranted).

³⁶ In other words, the Petitioners do not explain what substantive deficiencies would actually be resolved by a compliance schedule. For example, would such a compliance schedule require the imposition of additional permit terms (*e.g.*, requiring the imposition of emission controls or limits on specific units) pursuant to SIP-based

Regarding the Petitioners' brief allegation that TCEQ was obligated to identify non-federally enforceable requirements in the title V permit as "state-only" per 40 C.F.R. § 70.6(b)(2), this claim was not raised with reasonable specificity in public comments. As discussed above with respect to Claim B, the CAA requires that all petition claims "shall be based on objections to the permit that were raised with reasonable specificity during the public comment period." 42 U.S.C. § 7661d(b)(2). Here, no public comments on the Baytown Refinery title V permit raised the claim that 40 C.F.R. § 70.6(b)(2) obligates TCEQ to list any particular permit (*e.g.*, Flexible Permit No. 18287) as "state-only" in the title V permit. While public comments submitted by the Petitioners claimed generally that Permit No. 18287 was issued under TCEQ's unapproved flexible permit rules, nowhere in their comments did the Petitioners claim that Permit No. 18287 was a "state-only" or "non-federally-enforceable" permit. The comments also did not suggest that Permit No. 18287 should be incorporated into the title V permit differently than it is currently incorporated, and did not cite to § 70.6(b)(2). The Petitioners have not demonstrated that it was impracticable to raise these claims in their comments, and there is no basis for finding that grounds for such objection arose later. 42 U.S.C. § 7661d(b)(2). Therefore, this portion of the Petitioners' claim is denied.

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

Claim D: The Petitioners Claim That "The Proposed Permit Fails to Identify Permit By Rule Certified Registrations as Applicable Requirements."

Petitioners' Claim: The Petitioners claim that the Proposed Permit fails to identify certain applicable requirements associated with Permits by Rule (PBRs), and, therefore, fails to include and assure compliance with all applicable requirements. Petition at 21-22.

The Petitioners first explain that PBRs can be used to authorize the construction or modification of emission units. *Id.* at 21. The Petitioners state that PBRs often establish generic emission limits and operating requirements that can be identified by reading TCEQ's PBR rules in 30 TAC Chapter 106. *Id.* The Petitioners also note that sources may also certify source-specific emission rates for PBRs that are lower than the generic limits established in TCEQ's PBR rules. *Id.* (citing 30 TAC § 106.6).³⁷ The Petitioners assert that the maximum emission rates and other representations within these "certified registrations" become federally enforceable permit limits and conditions. *Id.* The Petitioners claim that, because the source-specific requirements contained in certified registrations are not contained in the PBR rules themselves, the certified registrations must be specifically identified in the proposed title V permit. *Id.*

The Petitioners allege that ExxonMobil has claimed various PBRs to authorize construction and modification of units at the Baytown Refinery. *Id.* at 21. The Petitioners also claim that ExxonMobil certified source-specific emission limits under 30 TAC § 106.6 for several projects, which the Petitioners assert "establish federally-enforceable emission limits that are significantly

regulatory requirements (*e.g.*, minor source BACT requirements)? The Petitioners provide no such examples, much less a demonstration of why this would be necessary.

³⁷ Note that the Petition cites 30 TAC § 116.6, but this appears to be a typographical error; the correct cite is § 106.6.

lower than the general PBR limits established by 30 [TAC] § 106.4 and the generic limits contained in the claimed PBRs.” *Id.* (referencing four Certified Registration Approval Letters, Petition Exhibits 3–6).³⁸

The Petitioners acknowledge that the Proposed Permit incorporates by reference various PBR authorizations. *Id.* at 21 (citing Proposed Permit at 1767–68). However, the Petitioners assert that in doing so, the Permit only references the PBR rules that establish generic requirements, and that the Permit contains no reference to any certified registrations that establish source-specific limits and operating requirements. *Id.* at 22.³⁹ The Petitioners additionally note that the Proposed permit requires that ExxonMobil “shall comply with the general requirements of 30 TAC 106, Subchapter A or the general requirements, if any, in effect at the time of the claim of any PBR.” *Id.* (quoting Proposed Permit, Condition 33). However, the Petitioners claim, addressing TCEQ’s RTC, that the “[m]ere incorporation by reference of the general rule at § 106.6 allowing ExxonMobil to certify source-specific PBR emission limits is not sufficient to identify ExxonMobil’s obligations under the SIP, because it does not explain how the rule and orders issued pursuant to it apply to units at the Baytown Refinery.” *Id.* at 23.⁴⁰ The Petitioners conclude that the Proposed Permit fails to identify and assure compliance with applicable requirements in ExxonMobil’s certified PBR registrations, warranting an EPA objection. *Id.* at 22, 24.

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).⁴¹ “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

³⁸ The Petitioners claim that it was impractical to identify these specific certified registrations during the public comment period because they were not issued until after the conclusion of the public comment period. *Id.* at 23. The Petitioners otherwise assert that their claim was raised with reasonable specificity in public comments. *Id.*

³⁹ The Petitioners also claim that because the certified registrations are not identified as applicable requirements in the title V permit, they are likely unenforceable under the prevailing doctrine of collateral attack. *Id.* at 23–24 (citing *Sierra Club v. Otter Tail*, 615 F.3d 1008 (8th Cir. 2008)).

⁴⁰ Section 106.6 is contained within Subchapter A of Chapter 116.

⁴¹ 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.”); § 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.”).

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 through the use of incorporation by reference (IBR) in certain circumstances. *See, e.g.,* White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program, 40 (March 5, 1996) (White Paper 2) (explaining how IBR can satisfy CAA § 504 requirements).⁴² When the EPA approved the Texas title V program, the EPA balanced the streamlining benefits of IBR against the value of a more detailed title V permit and approved TCEQ’s use of IBR for minor NSR requirements (including PBRs), provided the program was implemented correctly. *See* 66 Fed Reg. 63318, 63321–32 (December 6, 2001). The EPA stated as a condition of 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 the 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 2 at 37 (“Referenced documents must also be specifically identified.”).

Turning to the issues raised in the Petition, Condition 32 of the Baytown Refinery title V permit indicates the following:

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, [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

. . .

Thus, the title V permit clearly incorporates those NSR authorizations, including PBRs, that are referenced in the New Source Review Authorization References attachment. In the title V permit, the New Source Review Authorization References table and the New Source Review Authorization References by Emissions Unit table (both part of the aforementioned attachment) include references to PBRs by citing various PBR rule numbers and the effective date of each PBR rule. Therefore, it is clear that the requirements contained within the PBR rules cited in these two tables are incorporated by reference into the title V permit.

⁴² In upholding the EPA’s approval of IBR in Texas, the U.S. Court of Appeals for the Fifth Circuit noted: “Nothing in the CAA or its regulations prohibits incorporation of applicable requirements by reference. The Title V and Part 70 provisions specify *what* Title V permits ‘shall include’ but do not state *how* the items must be included.” *Public Citizen, Inc. v. U.S. E.P.A.*, 343 F.3d 449, 460 (5th Cir. 2003).

However, the title V permit does not appear to incorporate other requirements associated with PBR authorizations that are not directly referenced in the New Source Review Authorization References attachment or elsewhere in the title V permit. For example, as the Petitioners point out, the New Source Review Authorization References attachment contains no reference to registered PBRs that contain requirements (including certified source-specific emission limits) that differ from those contained in the PBR rules that the title V permit does directly reference.⁴³ Although TCEQ explains that the registered PBRs containing source-specific emission limits are available online, *see* RTC at 6, that does not resolve the question of whether the title V permit itself currently includes or incorporates these requirements.

In sum, because the Permit contains no direct reference to certain source-specific requirements (e.g., certified emission limits) derived from registered PBRs, it is not clear that the Permit currently includes or incorporates 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 guidance concerning IBR (citations provided above). Therefore, the EPA is granting the Petition with respect to this claim. As discussed further below, however, the EPA believes that this issue can, and most likely will, be resolved expeditiously by a straightforward solution that TCEQ is in the process of implementing.

Direction to TCEQ: The EPA understands that TCEQ intends, through a currently pending title V minor modification action, to update the New Source Review Authorization References attachment to include a reference to the registration numbers associated with registered PBRs.⁴⁴ These registration numbers function like permit numbers, as they each uniquely identify a specific document that contains the specific requirements that apply to the source, including any certified source-specific emission limits taken per 30 TAC 106.6. Thus, the registration numbers that TCEQ has proposed to include in the title V permit (i.e., those currently included in the draft title V permit modification) point directly to the specific requirements that are applicable to the source. The registered PBR requirements themselves may be found either online, or in person at the TCEQ file room. The EPA understands that TCEQ recently updated its online file

⁴³ As the Petitioners point out, this is problematic given that, by their nature, the certified source-specific emission limits contained in registered PBRs are necessarily different than the contained in the PBR rules they are associated with. *See* 40 C.F.R. § 70.6(a)(1)(i) (“The permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.”).

⁴⁴ On March 27, 2018, TCEQ posted public notice of a draft minor permit modification that, among other things, adds PBR registrations to the New Source Review Authorization References by Emissions Unit table. *See* March 27, 2018, draft permit at pages 2238, 2288, 2300; *see also* March 27, 2018, Statement of at 2 (explaining that the revised permit “list[s] active PBR registrations held at the site for emissions units in the New Source Review Authorization References by Emissions Unit table (the PBR registrations are listed next to the PBRs in parentheses for emission units BTRFCHEMFG, BTRFREFFG, TK0844, WTP6ICE4, and WTP6ICE5)”). The draft title V permit modification is subject to a comment period that closes on April 26, 2018. The draft permit, statement of basis, and announcement are available through the following website: <https://www.tceq.texas.gov/permitting/air/titlev/announcements.html>. The EPA's discussion here is based on the content of the draft permit modification, which remains subject to change based on TCEQ's considerations of public comments and any further input by the EPA.

management system and has provided guidance regarding how to access permit documents (including PBR registrations) on this online database.⁴⁵

The EPA anticipates that TCEQ's proposed approach to incorporate all relevant registration numbers into the New Source Review Authorization References by Emission Unit table would satisfy the requirements of CAA § 504(a) as an appropriate use of IBR with respect to registered PBRs.⁴⁶ The EPA expects that this practice similarly would conform with TCEQ's EPA-approved regulations, 30 TAC 122.142(2)(B)(i), as well as with 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. Therefore, the EPA believes that if TCEQ finalizes the currently pending permit modification action as described above, this should resolve the Petitioners' claims and the EPA's objection.

Claim E: The Petitioners Claim That “The Proposed Permit Fails to Specify Applicable Monitoring Requirements that Assure Compliance with Emission Limits for units Authorized by Permit No. 18287/PSDTX730M4/PAL7.”

Petitioners' Claim: The Petitioners claim that Conditions 20–22 of Permit No. 18287/PSDTX730M4/PAL7, incorporated by reference into the title V permit, fail to assure compliance with various emission limits and caps established by that preconstruction permit. Petition at 24. The Petitioners claim that these conditions “incorporate by reference various emission factors, provisions in TCEQ guidance documents, application representations, and vendor data.” *Id.* at 24. The Petitioners first claim that these conditions do not identify the relevant emission factors or data to be used to calculate emissions, and that the Proposed Permit is, therefore, unclear about how the source is required to demonstrate compliance. *Id.* at 24, 26. The Petitioners also assert that the conditions fail to explain how parametric monitoring information, vendor data, and recordkeeping requirements should be used to determine compliance. *Id.* at 26. Finally, the Petitioners claim that the permit record does not demonstrate that the methods used to calculate emissions are adequate to assure compliance with applicable requirements. *Id.* at 24, 26. For support, the Petitioners cite 42 U.S.C. § 7661c(a) and (c), 40 C.F.R. § 70.6(c)(1) and (a)(3), and EPA statements made in prior title V petition orders. *See* Petition at 25–26.

In addressing TCEQ's RTC, the Petitioners claim that regardless of ExxonMobil's obligation to maintain records sufficient to establish compliance, the Proposed Permit “must identify the specific monitoring and emission calculation methods that assure compliance with applicable requirements.” *Id.* at 27.

⁴⁵ See https://www.tceq.texas.gov/permitting/air/nav/air_status_permits.html.

⁴⁶ In other words, the EPA believes that including a citation to the registration number in the New Source Review Authorization References by Emission Unit table would be sufficient to incorporate any specific requirements contained in such a registered PBR into the title V permit. While the EPA approves of the general approach that TCEQ appears willing to undertake, the EPA offers no judgement at the present time regarding whether, in the pending minor modification for the Baytown Refinery, TCEQ will accurately and correctly incorporate all requirements that are applicable to the facility.

The Petitioners also address TCEQ's contention that representations from permit applications that describe emission calculation methodologies are not required to be listed on the face of either the NSR permit or the title V permit. The Petitioners first contend that TCEQ is incorrect, and that the title V permit "must contain all monitoring requirements established by Permit No. 18287/PSDTX730M4/PAL7 and any other conditions necessary to assure compliance with that permit's emission limits and caps." *Id.* at 28. Alternatively, the Petitioners assert that "the permit record must still describe the incorporated application representations and explain how they assure compliance with applicable limits." *Id.*

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

The permit terms that the Petitioners take issue with span more than two full pages of Permit No. 18287/PSDTX730M4/PAL7, and provide the compliance demonstration methodologies for a wide range of emission limits on different pollutants from different emission units. The Petitioners cite broadly to Conditions 20–22, but do not evaluate any of the individual requirements included in these conditions. Rather, the Petitioners make generalized allegations that apparently apply in the abstract to all of the conditions referenced by the Petitioners. The Petitioners claim that the permit terms at issue "omit key information necessary to understand and evaluate how emissions are to be calculated" and "fail to specify relevant monitoring requirements," Petition at 26, but do not identify any particular information that is missing from a particular permit term, or explain why such information would be necessary for compliance demonstrations. These generalized allegations are insufficient to demonstrate a flaw in the Permit; the Petitioners have failed to provide the requisite citation and analysis to demonstrate that the Permit does not assure compliance with specific applicable requirements or permit terms.⁴⁷

Moreover, a closer evaluation of the specific permit terms implicated by the Petition shows that many of the Petitioners' allegations are simply incorrect. For example, although the Petitioners claim broadly that the permit terms do not identify the relevant emission factors or data associated with compliance demonstrations, most of the requirements in Conditions 20–22 clearly specify that the emission factors to be used are those specified in the permit application.⁴⁸ The Petitioners argue generally that the title V permit must actually contain (as opposed to incorporate) these emission factors. However, the Petitioners fail to consider that TCEQ's EPA-approved NSR rules provide that representations in permit applications become conditions upon which a facility operates. *See, e.g.*, 30 TAC 116.116(a)(1); *see also* 79 Fed. Reg. 8368, 8385 (February 12, 2014) (proposed rule accepting TCEQ's policy that "[t]he permit application, and all the representations in it, is part of the permit when it is issued and as such is enforceable."). Similarly, TCEQ's EPA-approved title V rules provide that "representations in an application that are specified in the permit as a condition under which the permit holder shall operate" become part of the permit. 30 TAC § 122.140. Here, Permit No. 18287 (and the title V permit, by extension) clearly indicates that certain application representations (emission factors) are incorporated into the Permit. The Petitioners have failed to demonstrate that this incorporation by

⁴⁷ *See supra* notes 6, 7, and accompanying text.

⁴⁸ As an alternative to using emission factors specified in the permit applications, Condition 20 specifies that if stack test data are available, emission factors should be based on the most recent stack test.

reference does not satisfy the requirements of title V to assure compliance with all applicable requirements.

The Petitioners also argue that the Permit and permit record fail to demonstrate that the monitoring methods included in Permit 18287 are adequate to assure compliance with applicable emission limits. See Petition at 26. In so doing, the Petitioners have effectively attempted to shift the burden to TCEQ to demonstrate the adequacy of the monitoring, rather than demonstrating themselves why the specific monitoring requirements included in the Permit are not sufficient. However, the CAA places the burden on petitioners to demonstrate to the EPA that the title V permit does not comply with the Act. 42 U.S.C. § 7661d(b)(2). Here, the Petitioners' generalized claims, unsupported by any analysis of specific permit terms, have failed to satisfy this burden.⁴⁹

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

Claim F: The Petitioners Claim That “The Proposed Permit Fails to Require Monitoring That Assures Compliance with Emission Limits and Caps for Tanks and Wastewater Treatment Plants at the Baytown Refinery.”

Petitioners' Claim: The Petitioners claim that monitoring associated with tanks and wastewater treatment plants authorized by Permit 18287/PSDTX730M4/PAL7 (and incorporated into the title V permit) is inadequate to assure compliance with applicable emission limits. See Petition at 28–31.

The Petitioners explain that Conditions 14(F) and 22(B) of Permit 18287/PSDTX730M4/PAL7 direct the facility to use AP-42 emission factors in conjunction with an undisclosed methodology contained in TCEQ guidance⁵⁰ to calculate emissions from storage tanks and wastewater treatment plants. *Id.* at 28. The Petitioners claim that these conditions fail to assure compliance with applicable emission limits, contrary to 42 U.S.C. § 7661c(a) and (c) and 40 C.F.R. § 70.6(c)(1) and (a)(3). The Petitioners' claim relies largely on challenges to the use of AP-42 emission factors. The Petitioners claim generally that AP-42 emission factors “do not reliably predict emissions from individual sources under all operating conditions, and for that reason, are rarely an acceptable method for operations to determine compliance with applicable emission limits.” *Id.* at 29 (citing *In the Matter of Tesoro Refining and Marketing Co.*, Order on Petition No. IX-2004-6 at 32 (March 15, 2005)). The Petitioners also refer to studies, apparently identified in public comments, that purportedly “show[] that these emission factors have significantly underestimated actual emissions from petroleum refineries in Texas.” *Id.* at 29.

The Petitioners assert that the permit conditions “fail to assure compliance with applicable emission limits and caps, because the permit record does not demonstrate that the AP-42 emission factors that the Proposed Permit instructs ExxonMobil to use reliably estimate[d] actual emissions from units at the Baytown Refinery.” *Id.* at 29. The Petitioners claim that nothing in the permit record explains how Conditions 14(F) and 28 “relate to the TCEQ’s assertion that VOC emissions are calculated using an ‘approved protocol and requires the use of data specific

⁴⁹ See *supra* notes 6, 7, and accompanying text.

⁵⁰ The Petitioners briefly assert that this guidance document is not part of the permit record or readily accessible online. *Id.* at 29.

to the storage tank and the material stored in the tank.” *Id.* at 31 (quoting *In the Matter of Shell Chemical LP and Shell Oil Company, Shell Deer Park Chemical Plant and Shell Deer Park Refinery*, Order on Petition Nos. VI-2014-04 & VI-2014-05 at 24 (September 24, 2015)).

The Petitioners also address TCEQ’s discussion of the Permit’s recordkeeping provisions, claiming that it is not sufficient to require ExxonMobil to demonstrate compliance with applicable requirements through recordkeeping. *Id.* at 31. The Petitioners assert that the “Proposed Permit may not leave it to ExxonMobil’s discretion to decide on a case-by-case basis what kind of demonstration is appropriate” and that “the Proposed Permit must actually specify monitoring methods that are sufficient to assure compliance.” *Id.* at 31.

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

The Petitioners cite to two permit terms governing emissions from storage tanks and wastewater treatment: Conditions 14(F) and 22(B) of Permit 18287/PSDTX730M4/PAL7. These conditions contain similar requirements:

Annual emissions for tanks and loading operations shall be calculated consistent with the methodology outlined in: (a) AP-42 “Compilation of Air Pollution Emission Factors, Chapter 12 – Storage of Organic Liquids” and (b) the TCEQ publication titled “Technical Guidance Package for Chemical Sources – Storage Tanks.”

Permit No. 18287/PSDTX730M4/PAL7, Condition 14(F).⁵¹ Moreover, other conditions in this preconstruction permit are relevant to calculating tank emissions. Specifically, Condition 14(E) further specifies:

For purposes of assuring compliance with VOC emission limitations, the holder of this permit shall monitor daily tank throughput for comparison with the total maximum throughput used in the emission cap calculations in the permit application. A summary of short-term compliance will be based on the throughput of the 156 tanks calculated in the permit application to have the highest short-term emission rates. A list of these tanks will be kept on-site. A monthly record shall be maintained which includes tank or loading point identification number, control method used, tank or vessel capacity in gallons, name of the material stored or loaded, VOC molecular weight, VOC monthly average temperature in degrees Fahrenheit, VOC vapor pressure at the maximum monthly material temperature in psia, and VOC throughput for the previous month and year to-date. Records of VOC monthly average temperature are not required to be kept for unheated tanks that receive liquids that are at or below ambient temperatures. These records shall be maintained at the plant site for two years and be made available to representatives of the TCEQ upon request.

⁵¹ Condition 22(B) similarly states: “Tanks – emissions are to be estimated using: (a) AP-42 ‘Compilation of Air Pollution Emission Factors’ and (b) requirements outlined in SC No. 14.” Thus, the EPA’s response below, as it relates to Condition 14, also applies to Condition 22(B).

Calculating tank emissions in accordance with either AP-42 or the TCEQ technical guidance document referenced in this preconstruction permit would require the use of source-specific inputs concerning various tank design characteristics, characteristics of the material stored, temperature and pressure values, and throughput (*i.e.*, the variables discussed in Condition 14(E)). Thus, the conditions in Permit 18287/PSDTX730M4/PAL7, in conjunction with the methodology outlined in AP-42 and the TCEQ guidance document, require that ExxonMobil monitor and record numerous site-specific inputs that will be used in AP-42 equations to estimate tank emissions.⁵²

The Petitioners assert that this monitoring methodology does not assure compliance with applicable emission limits at the facility, “because the permit record does not demonstrate” that this methodology reliably estimates emissions. Petition at 29. In so claiming, the Petitioners have attempted to shift the demonstration burden to TCEQ to justify the adequacy of this methodology, rather than themselves demonstrating that the monitoring methodology in the Permit is currently inadequate as a technical or legal matter. As explained above, the CAA places this burden on the Petitioners, and as discussed below, the Petitioners have failed to carry this burden.

First, the Petitioners claim generally that AP-42 emission factors should not be used to demonstrate compliance with permit limits because they represent an average range of facilities and emission rates. Petition at 29. This assertion is misplaced; as a general matter, emission factors are often used in compliance demonstration calculations, and this may be appropriate in certain situations. The Petitioners have not demonstrated why, in this case, the AP-42 equations and associated emission factors used to estimate tank emissions are insufficient. The AP-42 equations concerning tank emissions do not represent a single “emission factor,” but rather a methodology for calculating emissions that takes into account numerous source-specific variables. The Petitioners do not substantively address the contents of this methodology, or identify any specific component within the methodology that they believe underestimates emissions. Nor do the Petitioners suggest an alternate methodology that they believe would be preferable to that required by the Permit. Rather, the only specific argument in the Petition challenging these emission factors is the conclusory claim that the “Petitioners’ Public Comments identified studies showing that these emission factors have significantly underestimated actual emissions from petroleum refineries in Texas.” Petition at 29. However, the Petitioners do not, in the Petition, identify these studies, evaluate these studies, or explain why these studies are directly relevant to the tanks at the Baytown Refinery.⁵³ This generic, unsupported reference to unidentified studies is insufficient to demonstrate that the widely-used monitoring methodology currently in the Permit is inadequate to assure compliance.⁵⁴

Moreover, the Petitioners fail to acknowledge Condition 14(E), which requires the monitoring and/or recordkeeping of a number of site-specific variables (*e.g.*, throughput, control method, tank capacity, type of material stored, VOC molecular weight, average monthly temperature, and

⁵² Conditions 14(A) through (D) also specify emissions control, inspection, and design requirements for the tanks.

⁵³ The EPA notes that the Petitioners’ public comments, which do identify several studies, similarly contain no analysis of the studies themselves beyond the conclusory allegation quoted above.

⁵⁴ See *supra* notes, 6, 7, and accompanying text.

vapor pressure at the maximum monthly temperature) that are used in estimating the facility's emissions.⁵⁵ This condition, in conjunction with the AP-42 methodology (and TCEQ guidance⁵⁶) referenced by Conditions 14(F) and 22(B), clearly establish the means by which the Baytown Refinery must determine compliance with relevant emission limits.⁵⁷ As TCEQ explained, this method is based on an "approved protocol" that "requires the use of data specific to the storage tank and the material stored in the tank." RTC at 10–11. The Petitioners have not demonstrated that this methodology is inadequate to assure compliance with relevant emission limits.

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

Claim G: The Petitioners Claim That "The Proposed Permit Fails to Including [sic] Monitoring Requirements That Assure Compliance with VOC and Benzene Emission Limits and Caps for Flares at the Baytown Refinery."

Petitioners' Claim: The Petitioners note that Condition 21 of Permit 18287/PSDTX730M4/PAL7 directs the facility to presume, for purposes of calculating emissions, that the Baytown Refinery flares achieve at least a 98 percent destruction efficiency. Petition at 32. The Petitioners also note that this 98 percent combustion efficiency assumption is used "to determine compliance with applicable VOC and benzene emission limits and caps." *Id.*

The Petitioners challenge the 98 percent destruction efficiency presumption in Condition 21. The Petitioners assert that current operational standards—specifically, the Petitioners mention the presence of a pilot light—are not enough to ensure that the Baytown Refinery flares will continuously achieve the presumed destruction efficiency. *Id.* at 32. For support, the Petitioners cite an EPA study, which found that flares complying with requirements allegedly equivalent to those in the Proposed Permit only achieved an average destruction efficiency of 93 percent. *Id.* at 33 (citing Petroleum Refinery Sector Rule: Flare Impact Estimates, EPA-HQ-OAR-2010-0682-0209 at 9 (January 16, 2014)).

The Petitioners claim that "additional monitoring requirements" are necessary to address

⁵⁵ As the EPA has explained, the failure to address a key element of a particular issue (*e.g.*, a relevant permit term) presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the Permit. *See supra* note 8 and accompanying text. Petitioners evaluated and challenged Condition 14(F), which immediately follows Condition 14(E), so presumably the Petitioners were aware of the requirements in Condition 14(E) as well. Additionally, given that representations in NSR permit applications can establish enforceable requirements, 30 TAC 116.116(a), there may be application representations relevant to this claim. However, the Petitioners do not appear to have examined these application provisions, nor have they demonstrated that the application representations, in conjunction with the permit terms, are inadequate.

⁵⁶ The EPA notes that none of the Petitioners' challenges regarding the availability of this guidance document were raised with reasonable specificity during the public comment period, and the Petitioners have not demonstrated that it was impracticable to do so. 42 U.S.C. § 7661d(b)(2). Therefore, these claims are denied. However, even if the EPA were to address these claims, contrary to the Petitioners' suggestions, this TCEQ guidance document is not "undisclosed"; Permit No. 18287/PSDTX730M4/PAL7 clearly identifies this document by name. Without citing any authority, the Petitioners briefly assert that this document is not readily available online or in permit record. The EPA was able to obtain the document from TCEQ upon request.

⁵⁷ Thus, the Petitioners' suggestion that "[t]he Proposed Permit may not leave it to ExxonMobil's discretion to decide on a case-by-case basis what kind of demonstration is appropriate . . . [but instead] must actually specify monitoring methods that are sufficient to assure compliance" is misplaced. Petition at 31.

problems like over-steaming, excess aeration, high winds, and flame liftoff, which the Petitioners assert can impair flare performance. *Id.* at 32–33. The Petitioners challenge TCEQ’s contention that there are no currently-available EPA-approved mechanisms for testing or monitoring emissions from a flare, and assert that the “EPA has approved monitoring requirements that ‘ensure that refinery flares meet 98-percent destruction efficiency at all times.’” *Id.* at 34 (quoting Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards, 80 Fed. Reg. 75178, 75211 (December 1, 2015)).

The Petitioners also challenge TCEQ’s argument that the Permit’s requirements are sufficient because they incorporate the requirements established by applicable EPA rules, and claim that “[i]f monitoring methods established by applicable requirements are not sufficient to assure compliance, TCEQ must establish additional monitoring provisions that do assure compliance.” *Id.* at 35 (citing 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a)(3)(i)(B)).

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

The Petitioners challenge the 98 percent destruction efficiency assumption embodied in Condition 21 of Permit 18287/PSDTX730M4/PAL7, and allege that the Permit’s “monitoring requirements do not ensure ongoing compliance with the presumed level of destruction efficiency.” Petition at 32. However, as discussed further below, the Petitioners arguments are general, conclusory, and unsupported, and the Petitioners accordingly have not met their burden of demonstrating noncompliance with the CAA.⁵⁸

Specifically, the Petitioners provide no analysis explaining why the Permit’s requirements may be inadequate, beyond a brief reference to an EPA study.⁵⁹ Although the Petitioners briefly mention over-steaming, excess aeration, high winds, and flame liftoff, they do not explain why these concerns would necessarily be applicable to the Baytown Refinery. Moreover, the Petitioners do not provide any discussion of the EPA study they cite, including the variables and considerations underlying the EPA’s conclusions in this study, and whether and how the same concerns (and, thus, the EPA’s conclusions in that study) would necessarily apply to any of the flares at the Baytown Refinery. The Petitioners assert equivalency between the monitoring requirements in Permit 18287/PSDTX730M4/PAL7 and those at issue in the cited EPA study, but provide no analysis to demonstrate such equivalency. For example, the Petitioners do not acknowledge or evaluate any of the specific permit terms currently contained in the Permit that are relevant to flare performance.⁶⁰ *See* Permit 18287/PSDTX730M4/PAL7 Condition 11 (establishing various operating limits and monitoring requirements for the flares). In failing to evaluate the current permit terms, the Petitioners do not support their assertion that this study involved “flares complying with monitoring requirements equivalent to those in the Proposed

⁵⁸ *See supra* notes 6, 7, and accompanying text. The EPA’s determination that the Petitioners have not demonstrated a flaw in the Permit should not be interpreted as a judgment regarding the adequacy of the permit terms at issue here (i.e., whether the current permit terms or the requirements in 40 C.F.R § 60.18 are sufficient to assure that the flares at the Baytown Refinery in fact achieve a 98 percent destruction efficiency).

⁵⁹ *See supra* notes 6, 7, and accompanying text.

⁶⁰ *See supra* note 8 and accompanying text.

Permit.” Petition at 33. Such conclusory allegations do not demonstrate that the Permit does not contain monitoring sufficient to assure this destruction efficiency.

Although the Petitioners do not suggest any specific monitoring methodology to resolve their concerns, they do allege that the “EPA has approved monitoring requirements that ‘ensure that refinery flares meet 98-percent destruction efficiency at all times.’” Petition at 34 (citing 40 C.F.R. § 63,670; 80 Fed. Reg. 75178, 75211 (December 1, 2015)). These new standards establish a suite of requirements (including operating limits and monitoring requirements) designed to ensure that flares achieve a 98 percent destruction efficiency. *See* 80 Fed. Reg. at 75211. These standards become effective for affected sources on January 30, 2019. 40 C.F.R. §§ 63.670, 63.640(s). The concerns raised in the Petition regarding the ability of the facility to achieve a 98 percent flare destruction efficiency should, therefore, be remedied when the requirements of 40 C.F.R. § 63.670 become applicable to individual flares at the Baytown Refinery. The EPA also observes that Permit 18287/PSDTX730M4/PAL7 has been amended subsequent to the filing of the Petition to include permit terms requiring various flares at the Baytown Refinery to comply with the requirements of 40 C.F.R. § 63.670 by January 30, 2019.⁶¹ Therefore, the additional flare requirements that the Petitioners allude to have already been added to the underlying NSR permit that the Petitioners challenge and will become applicable on January 30, 2019. These additional terms are arguably more prescriptive than the monitoring that the Petitioners seek through title V authorities.⁶² Additionally, even if the Petition had demonstrated a flaw in the Permit, the relief that the Petitioners seek—an EPA objection to the source’s title V permit, potentially followed by an additional permit action by TCEQ to supplement the title V permit with additional flare monitoring requirements—is unlikely to occur before these new standards and permit terms become applicable.⁶³ An EPA objection would, therefore, have no practical effect. Therefore, in addition to the fact that the Petitioners have failed to demonstrate that the current permit fails to satisfy the CAA (thus, presenting no grounds for an EPA objection), the EPA also believes that the Petitioners’ concerns have been sufficiently resolved as a practical matter.

⁶¹ *See* Condition 12 of Permit No. 18287/PSDTX730M4/PAL7 (version finalized November 15, 2017, and subsequent versions). As noted above, *supra* notes 15, the Baytown Refinery title V permit is currently being updated to, among other things, incorporate the most recent March 15, 2018, version of Permit No. 18287/PSDTX730M4/PAL7 into the title V permit. *See* March 27, 2018, draft permit at page 2236. The draft title V permit modification is subject to a comment period that closes on April 26, 2018. The draft permit, statement of basis, and announcement are available through the following website:

<https://www.tceq.texas.gov/permitting/air/titlev/announcements.html>.

⁶² The Petitioners correctly assert that title V provides the authority to supplement monitoring that is inadequate or nonexistent, 42 U.S.C. § 7661c(c), 40 C.F.R. §§ 70.6(a)(3)(i)(B) & 70.6(c)(1). However, the title V permitting process generally cannot be used to establish substantive requirements, such as operating limits (or to advance the applicability date of these additional substantive requirements established by the EPA through rulemaking). *See, e.g.*, 57 Fed. Reg. 32250, 32284 (July 21, 1992). Thus, while an EPA title V objection could result in additional monitoring requirements being added to the title V permit, the updated terms in Permit No. 18287/PSDTX730M4/PAL7 already require both monitoring requirements as well as enforceable operating limits based on 40 C.F.R. § 63.670, effective January 30, 2019.


⁶³ Even if an EPA objection and subsequent TCEQ permit action were to be completed before January 30, 2019, it is unlikely that ExxonMobil would be able to begin implementing these additional monitoring requirements immediately. The EPA, through rulemaking, and TCEQ, through issuing Permit No. 18287/PSDTX730M4/PAL7, both previously determined that January 30, 2019, would be a reasonable applicability date by which refinery flares should become subject to the new flare requirements.

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

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 deny in part and grant in part the Petition as described above.

Dated: APR 02 2018



E. Scott Pruitt
Administrator