**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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| ENVIRONMENTAL INTEGRITY PROJECT and SIERRA CLUB, | ) | |
| *Petitioners,* | ) | |
| *v.* | ) | Case No. _____ |
| U.S. ENVIRONMENTAL PROTECTION AGENCY and SCOTT PRUITT, Administrator, U.S. Environmental Protection Agency | ) | |
| *Respondents.* | ) | |

**PETITION FOR REVIEW**

Pursuant to Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1), Federal Rule of Appellate Procedure 15, Environmental Integrity Project and Sierra Club hereby petition this Court for review of the final action taken by Respondents U.S. Environmental Protection Agency and Administrator Scott Pruitt in *In the Matter of ExxonMobil Corporation—Baytown Olefins Plant, Harris County, Texas*, Order on Petition No. VI-2016-12 (March 1, 2018) (Attachment 1) (the "Order"), notice of which was published in the Federal Register at 83 Fed. Reg. 12753 (March 23, 2018).

DATED: May 22, 2018

Respectfully submitted,

/s/ Gabriel Clark-Leach
Gabriel Clark-Leach
Environmental Integrity Project
1206 San Antonio St.
Austin, Texas 78701
Telephone: (512) 637-9478
gclark-leach@environmentalintegrity.org

*Counsel for Petitioners Environmental Integrity Project and Sierra Club*

# Attachment 1

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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| IN THE MATTER OF<br><br>EXXONMOBIL CORPORATION<br>BAYTOWN OLEFINS PLANT<br>HARRIS COUNTY, TEXAS<br><br>PERMIT NO. O1553<br><br>ISSUED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY | PETITION NO. VI-2016-12<br><br>ORDER RESPONDING TO PETITION REQUESTING OBJECTION TO THE ISSUANCE OF A TITLE V OPERATING PERMIT |

**ORDER DENYING PETITION FOR OBJECTION TO PERMIT**

## I. INTRODUCTION

The U.S. Environmental Protection Agency (the EPA) received a petition dated August 8, 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 object to the proposed modification to operating permit no. O1553 (the Proposed Permit) issued by the Texas Commission on Environmental Quality (TCEQ) to the ExxonMobil Corporation (ExxonMobil) Baytown Olefins Plant (Baytown Olefins 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 the Petition requesting that the EPA object to the Proposed Permit.

## II. STATUTORY AND REGULATORY FRAMEWORK

### A. Title V Permits

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

Fed. Reg. 63318 (December 6, 2001) (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 sources' 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 facility'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 petition the Administrator, within 60 days of the expiration of the EPA's 45-day review period, 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 authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). 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)(l).[1] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[2]

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

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

The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," to determine whether a petition demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty 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; however, 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 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,

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[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, 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

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

The information that the EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) 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 pollutants for which an area is designated as attainment or unclassifiable for the national ambient air quality standards (NAAQS) and 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

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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.

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 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 prescribed than those for major sources, and, as a result, there is a larger variation of requirements in EPA-approved state minor NSR 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 further review. *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 issuing duly issued preconstruction permits is not a subject the EPA will consider in a petition to object to a source's title V permit. *See PacifiCorp-Hunter 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 approved by the EPA into Texas's SIP, are contained in portions of 30 TAC Chapters 116 and 106.

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[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.").

[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.

## III. BACKGROUND

### A. The Baytown Olefins Facility

ExxonMobil's Baytown Olefins Plant is part of a large petrochemical complex operated by ExxonMobil in Baytown, Harris County, Texas. The Baytown Olefins Plant features numerous emission units related to its ethylene production processes. The facility is a major source of particulate matter (PM), sulfur dioxide ($SO_2$), nitrogen oxides (NOx), carbon monoxide, (CO), volatile organic compounds (VOC), and hazardous air pollutants (HAPs), and is subject to the requirements of title V. The construction of some emission units at the facility was subject to the major NSR program, while the construction of others was subject to minor source preconstruction permitting requirements. Many units are also subject to various New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP).

The current title V permit action involves title V permit revisions related to an expansion project at the facility, referred to as the "ethylene expansion project." ExxonMobil received authorization to construct a new ethylene production unit at the Baytown Olefins site in 2014. The production unit processes ethane to produce ethylene and other products. The new equipment consists of eight new steam cracking furnaces and associated recovery equipment, all of which cause additional emissions of various air pollutants.

### B. Permitting History

ExxonMobil first obtained a title V permit for Baytown Olefins in 2004 (Permit No. O1553), which was last renewed on December 28, 2010.[11] On August 29, 2014, ExxonMobil submitted an application to modify its title V permit; this permit modification action is the subject of the Petition. The TCEQ issued a draft permit modification on July 7, 2015, subject to a public comment period from July 7, 2015 until August 6, 2015. On April 26, 2016, the 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 June 9, 2016, during which time the EPA did not object to the Proposed Permit. The TCEQ issued the final title V permit modification for the Baytown Olefins Plant on June 23, 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 June 9, 2016. Thus, any petition seeking the EPA's objection to the Proposed Permit was due on or before August 8, 2016. The Petition was received August 8, 2016, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

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[11] The EPA notes that the title V permit renewed December 28, 2010, was set to expire on December 28, 2015. The source appears to have timely submitted a renewal application on June 26, 2015. *See http://www2.tceq.texas.gov/airperm/index.cfm?fuseaction=tv.project_report&proj_num=23071&status_txt=ACTIVE.*

## IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

The current title V permit modification action incorporates the terms of two preconstruction permits: Permit PAL6 (issued in 2005 and amended in 2014) and Permit 102982 (issued in 2014). Permit PAL6 established plantwide applicability limits (PAL), designed to provide ExxonMobil with the ability to manage facility-wide emissions without triggering major NSR review.[12] Permit 102982 is a preconstruction permit authorizing the ethylene expansion project at the facility. TCEQ issued Permit 102982 as a minor NSR permit, based on its determination that the ethylene expansion project would not constitute a major modification for major source NSR purposes. This determination was based on the premise that the facility's current and post-project emissions would not exceed the limits established in PAL6. *See* Construction Permit Source Analysis & Technical Review for Permit No. 102982 at 1, 3. As described further below, the majority of the Petition involves three basic arguments as to why PAL6 is defective and should not have been relied upon in the Permit 102982 proceeding. The Petitioners assert that these alleged deficiencies with PAL6 led to flaws with Permit 102982, as well as flaws in the current title V permit. The issues raised in the Petition are closely related, and, as such, the EPA is responding to them together. The following paragraphs first describe the three alleged deficiencies with PAL6, and then explain the Petitioners' claims regarding how the alleged issues with PAL6 affect Permit 102982 and the current title V permit.

***Petitioners' Claims:*** Regarding the alleged defects with PAL6, the Petitioners first claim that TCEQ did not have the authority to create a federally enforceable PAL permit at the time PAL6 was issued. *See* Petition at 7–9 (Claims A.1 and A.2). The Petitioners claim that at the time PAL6 was initially issued (2005), TCEQ did not have EPA-approved SIP rules (nor even state rules) specifically authorizing the issuance of PAL permits. The Petitioners, therefore, conclude that PAL6 is not a federally enforceable permit. The Petitioners instead characterize PAL6 a state-only permit. *Id.* at 7. The Petitioners claim that, as a state-only permit, PAL6 cannot displace requirements in the Texas SIP required for PSD applicability determinations. *Id.* at 8. For support, the Petitioners cite 42 U.S.C. § 7410(i), as well as a letter sent from EPA Region 6 to the facility in 2012. *Id.* at 7–8. The Petitioners assert that because PAL6 purports to displace SIP requirements that would otherwise govern major NSR applicability determinations, it is inconsistent with the CAA and it undermines the enforceability of SIP requirements. *Id.* at 9.

Second, the Petitioners claim that PAL6 is not federally enforceable because of alleged defects with how TCEQ calculated the facility's baseline emissions (which affect the numerical emissions caps established by PAL6). *See id.* at 9–10 (Claim A.3). The Petitioners claim that the CAA requires major modification determinations to be based on a comparison of post-project actual or potential emissions to baseline actual emissions. Here, the Petitioners claim that some of the PAL6 limits were based on potential baseline emissions, which the Petitioners assert was inappropriate. *Id.* at 9 (citing *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 580–81 (2007); *New York v. EPA*, 413 F.3d 3, 39–40 (D.C. Cir. 2005)). Because of this alleged

[12] *See* 67 Fed. Reg. 80186, 80189 (December 31, 2002). The public notice for PAL6 indicated, "A plantwide applicability limit is a federally enforceable emission limitation established for stationary sources such that subsequent physical or operational changes resulting in emissions that remain less than the limit are excluded from federal preconstruction review." Public Notice, The Baytown Sun (July 8, 2005).

defect, the Petitioners assert that PAL6 may not be relied upon for PSD applicability determinations. *Id.* at 10.

Third, as an alternative argument, the Petitioners claim that even if PAL6 were federally enforceable, PAL6 does not establish a PAL for $PM_{2.5}$, but rather only establishes a PAL for PM. *See id.* at 16–18 (Claim C.2). The Petitioners claim that each PAL may cover emissions of only one pollutant, and that $PM_{2.5}$ is considered a separate pollutant from PM. *Id.* at 16–17. Also, the Petitioners claim that the PM PAL may not be considered a $PM_{2.5}$ PAL based on the EPA's surrogate policy. *Id.* at 17. Accordingly, the Petitioners claim that PAL6 cannot be relied on for PSD applicability determinations involving $PM_{2.5}$. *See id.* at 17.

The Petitioners present these three alleged defects in PAL6 in order to support the claim that Permit 102982 was not properly issued. The Petitioners claim that, "As a matter of law, state-only PAL6 is not a proper basis for determining that projects at the Baytown Olefins Plant do not trigger the Act's PSD and/or NNSR preconstruction permitting requirements for any pollutant." Petition at 15 (citing 42 U.S.C. § 7410(i)). Therefore, the Petitioners claim that that reliance on PAL6 in the Permit 102982 action "[v]iolated the Act and the Texas SIP." *Id.* at 14. The Petitioners claim that TCEQ should have instead evaluated the project under its existing SIP rules. *See id.* at 14–16 (citing various provisions in 30 TAC Chapter 116). The Petitioners assert that because the ethylene expansion project had the potential to result in new emissions that exceed applicable significance thresholds, ExxonMobil "was required to conduct a netting demonstration to determine whether the project authorized by Permit No. 102982 was a major modification." *Id.* at 16. Based on these alleged flaws with the Permit 102982 applicability determination, the Petitioners also briefly claim that Permit No. 102982 "should be considered enforceable, if at all, as a state-only permit that does not change ExxonMobil's ongoing obligation to comply with federal requirements." *Id.* at 16.

The Petitioners raise multiple arguments related to the interaction between PAL6, Permit 102982, and the facility's current title V permit. The Petitioners repeatedly assert that because PAL6 purports to displace SIP requirements associated with NSR applicability determinations, the incorporation of PAL6 into the title V permit "undermines the enforceability of" preconstruction permitting requirements in the CAA and the Texas SIP. *Id.* at 6, 7, 8, 9, 10, 12, 14. Based on this argument, the Petitioners claim generally that the "incorporation of PAL6 as a federally-enforceable permit is therefore contrary to title V requirements." *Id.* at 9 (citing 42 U.S.C. § 7661c(a)). The Petitioners make similar allegations regarding Permit 102982, claiming that the incorporation of Permit 102982 into the title V permit "undermines the enforceability of and violates" preconstruction permitting requirements in the CAA and the Texas SIP. *Id.* at 7, 16, 18, 20.

Based on the premise that TCEQ did not have the authority to issue PAL6 in 2005 and the conclusion that PAL6 is not a federally enforceable permit, the Petitioners assert that PAL6 should not be incorporated into the title V permit as federally enforceable. Rather, the Petitioners claim that this permit should be listed as a state-only permit. *Id.* at 8 (citing 40 C.F.R. § 70.6(b); Objection to Federal Part 70 Operating Permit, Valero Refining Texas, Permit No. 01253 (October 30, 2009)).

Finally, the Petitioners claim that TCEQ did not adequately respond to comments raised concerning each of the issues described above. *See* Petition at 11–14, 18–20 (Claims B and D). Based on this "insufficient" RTC as well as the alleged deficiencies discussed above, the Petitioners request that the EPA Administrator object to the Permit.

***EPA's Response:*** For the following reasons, the EPA denies the Petitioners' request for an objection on these claims.

The flaws in the title V permit that are alleged in the Petition are all ultimately predicated on alleged defects with either Permit PAL6 or Permit 102982. Moreover, all alleged defects with Permit 102982 are predicated on defects with PAL6. Both of these preconstruction permits were issued pursuant to procedures approved by the EPA under title I of the CAA. As explained above in Part II.C of this Order, these preconstruction permits define the "applicable requirements" for purposes of title V permitting. *See PacifiCorp-Hunter Order* at 8–11; *Big River Steel Order* at 9–11. Thus, the EPA does not consider the types of challenges raised by the Petition to the terms and conditions of duly issued preconstruction permits in a title V petition.[13] Therefore, as explained further below, the EPA denies the Petition.

The EPA's determination that a source-specific preconstruction permitting decision under regulations approved pursuant to title I of the CAA "define certain applicable SIP requirements for the title V source," 57 Fed. Reg. 32250, 32259 (July 21, 1992), was based on a variety of factors. First, while section 504 of the CAA requires title V permits to "include enforceable emissions limits and standards . . . to assure compliance with applicable requirements of this chapter," 42 U.S.C. § 7661c(a), the term "applicable requirements" is not defined in the Act and the Act does not specify how to determine what the "applicable requirements" are for a particular title V permit. The EPA's regulations do define the "applicable requirements" under title V. However, in *PacifiCorp-Hunter*, the EPA noted that there is an ambiguity in the regulation when a source has already obtained a preconstruction permit. To resolve this ambiguity and avoid an incongruous result of requiring permitting agencies or the EPA to use the title V permit or petition process to reconsider whether a validly issued preconstruction permit was the appropriate type of permit, the EPA interpreted its regulations such that a duly issued preconstruction permit defines the applicable requirements for the title V permit as the terms and conditions of that preconstruction permit. This interpretation of the EPA's regulations and the rationale supporting the interpretation are more fully explained in the *PacifiCorp-Hunter* and *Big River Steel* Orders.

The alleged defects in PAL6 are largely presented as support for the Petitioners' claims that Permit 102982 was not properly issued (*i.e.*, the claim that in issuing Permit 102982, TCEQ should not have relied on PAL6, but should have instead followed SIP provisions governing NSR applicability determinations). Thus, while much of the Petition dwells on specific alleged defects with PAL6, the Petition focuses on whether it was appropriate for TCEQ to rely on PAL6

[13] As noted above, the EPA will 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 supra* note 10; *PacifiCorp-Hunter Order* at 16, 17, 18, 18 n.33, 19; *Big River Steel Order* at 17, 17 n.30, 19 n.32, 20. However, the Petitioners do not raise any claims regarding the sufficiency of such provisions in the current Petition.

in the Permit 102982 proceeding. Permit 102982 was issued as a minor NSR permit pursuant to regulations approved by the EPA under title I of the CAA. As such, Permit 102982 establishes the 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 (Permit 102982), and to ensure that there are 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. Any challenges to the validity of decisions made during the Permit 102982 proceeding—including the determination that the ethylene expansion project should be considered a minor modification, as well as the basis for this determination—should have been raised through the appropriate title I avenues or through an enforcement action.[14] In fact, the Petitioners took advantage of an opportunity to challenge these determinations in 2013, submitting comments on Permit 102982 and subsequently challenging Permit 102982 at the State Office of Administrative Hearings (SOAH). The latter proceeding culminated in a lengthy recommendation from two administrative law judges, which was adopted by TCEQ. The Petitioners also had the opportunity to obtain judicial review of this decision before a Texas state court, but it does not appear that they pursued it. *See* 30 TAC 80.275 (providing that final decisions or orders by TCEQ may be appealed by filing a petition for judicial review within 30 days after the decision is final or appealable, and that such appeals are governed by the Administrative Procedures Act); Tex. Gov't Code § 2001.171–178 (Texas Administrative Procedures Act provisions governing judicial review). The Petitioners may not now attempt to re-litigate these issues before the EPA in a title V petition in the hopes of obtaining a different result.

Regarding the Petitioners' claims concerning the specific alleged defects in PAL6 and how these defects affect the validity of PAL6 in its own right, the same logic described above applies: such concerns should have been raised in the appropriate title I proceeding establishing PAL6. As with Permit 102982, PAL6 was issued as part of a set of related preconstruction permits issued pursuant to procedures approved by the EPA under title I of the CAA. The public notice for PAL6 clearly indicated that PAL6 would be established as a federally enforceable PAL permit.[15]

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[14] 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.").

[15] Public notice of the draft PAL6 permit was published in the Baytown Sun on July 8, 2005. Among other things, the public notice explained that ExxonMobil "has applied to the Texas Commission on Environmental Quality for issuance of Air Quality Flexible Permit Numbers 3452 and PSD-TX-302M2 which would establish plantwide applicability limits for an Olefins Plant in Baytown, Harris County, Texas. A plantwide applicability limit is a federally enforceable emission limitation established for stationary sources such that subsequent physical or

The public had the opportunity to comment on this permitting decision, to obtain administrative review, and to obtain judicial review of this decision when PAL6 was first issued in 2005.[16] Therefore, any challenges to the validity of Permit PAL6 (including whether TCEQ had the authority to create a federally enforceable PAL permit, or whether the PAL emission limits were correctly established) should have been raised in 2005.[17] The title V permitting process is not the appropriate venue to address these substantive challenges to PAL6.[18]

In sum, the Petitioners challenge the underlying terms and conditions of preconstruction permits issued to the facility. The Petitioners' claims concerning how these purported defects affect the facial validity of PAL6 should have been raised and adjudicated when PAL6 was issued. The Petitioners' challenges concerning how these alleged defects in PAL6 affected the Permit 102982 applicability determination should have been raised and adjudicated during the Permit 102982 proceeding. The title V permitting process—including the current petition opportunity—is not an appropriate venue to re-evaluate the Petitioners' specific claims regarding alleged deficiencies in PAL6, how these alleged defects affected the validity of PAL6, or how these defects affected the validity of the Permit 102982 action. The Petitioners had two separate opportunities to address these issues through both an administrative review process and a judicial review process. Unless and until these NSR permits are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through another available mechanism, the title V permit for the facility properly incorporates the terms and conditions of current preconstruction

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operational changes resulting in emissions that remain less than the limit are excluded from federal preconstruction review." Public Notice, The Baytown Sun (July 8, 2005).

[16] Among other things, the public notice for PAL6 clearly explained the public's right to submit public comments and the opportunity to request a contested case hearing. *See id.* Had the petitioners 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.

[17] The EPA observes that ExxonMobil has submitted a request to renew PAL6. 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. 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 PAL6. *See* 30 TAC 116.194 (Public Notice and Comment), 116.196 (Renewal of a PAL Permit).

[18] While the title V process is not the appropriate vehicle to challenge the facial validity of PAL6, the public (and the EPA) still have the ability to challenge preconstruction permitting actions that rely on PAL6 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 place for such a challenge was during the issuance of Permit 102982, during the issuance of any subsequent preconstruction permit purporting to rely on PAL6, or through an enforcement action challenging the reliance on PAL6 for PSD applicability. The EPA acknowledges that in 2012, EPA Region 6 submitted a letter to ExxonMobil indicating concerns with the federal enforceability of PAL6. *See* Letter from John Blevins, Director, Compliance Assurance and Enforcement Division, EPA Region 6, to Evelyn R. Ponton, Environmental Coordinator, ExxonMobil Corporation (March 6, 2012). 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. *Id.* The EPA notes that this regional letter was not a final agency position, and the EPA need not make any determination as to the validity of PAL6 in order to respond to this title V petition, for the reasons discussed above. *See In the Matter of Appleton Coated, LLC*, Order on Petition Nos. V-2013-12 and V-2013-15 at 12 n.6 (October 14, 2016); *In the Matter of Chevron USA Inc. – 7Z Steam Plant*, Order on Petition No. IX-2016-8 at 8–9 (April 24, 2017).

permits as applicable requirements. These terms are not properly subject to review through the title V petition process.[19]

Even if the EPA were to reconsider and re-evaluate the terms and conditions of the issued title I preconstruction permits and the preconstruction permitting decisions that led to those terms and conditions, the Petitioners have not demonstrated that the title V permit is missing any applicable requirement or otherwise flawed as a result of the alleged defects with PAL6 and Permit 102982. First, regarding PAL6, the Petitioners have failed to demonstrate that TCEQ lacked the legal authority to create a federally enforceable PAL permit at the time PAL6 was issued. The Petitioners argue that PAL6 is not federally enforceable based solely on the premise that "ExxonMobil's PAL6 permit was issued in 2005 and predates Texas's initial PAL rules (which were disapproved by EPA)," and the bare assertion that TCEQ did not have the authority to issue permits that displaced otherwise applicable SIP requirements. Petition at 8 (citing 42 U.S.C. § 7410(i)). However, the Petitioners have not provided any analysis to support their conclusion that the TCEQ SIP rules applicable in 2005 did not provide TX with the flexibility to create a PAL permit in 2005, nor have they otherwise demonstrated how the PAL permit would run afoul of the then-existing requirements. The EPA notes that these issues were squarely addressed in the SOAH proceeding concerning the 2014 issuance of Permit 102982 discussed above, and that the Petitioners mounted a substantially more detailed attack on TCEQ's authority at that time.[20] This reinforces two important points. First, as discussed above, the SOAH proceeding provides a good example of the appropriate venue in which challenges to the reliance on PAL6 should be raised.[21] The Petitioners cannot now use the title V process to collaterally attack the results of the SOAH proceeding. Second, the SOAH proceeding suggests that the question of whether TCEQ had the authority to issue federally enforceable PALs in 2005 demands a more thorough assessment beyond a simple statement that the EPA had not approved PAL-specific rules as of 2005.[22] The Petitioners' detailed arguments in the SOAH proceeding shows they were clearly

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[19] TCEQ, as the title I permitting authority, consistent with its regulatory authority, may have the discretion to take action concurrent with the title V permitting to modify, correct, or revoke any title I preconstruction permits they have issued and the EPA retains its authority to enforce violations of the CAA. *See PacifiCorp-Hunter Order* at 16.

[20] Specifically, in the SOAH proceeding, ExxonMobil contended, "The SIP-approved regulations under 30 Texas Administrative Code chapter 116, subchapter B regarding 'actual emissions' and 'significant levels' provided the state with the discretion to establish a PAL limit consistent with the 2002 Final PAL Rule." SOAH Docket No. 582-13-4611, TCEQ Docket No. 2013-0657-AIR, Proposal for Decision at 37 (December 18, 2013). The state administrative law judges hearing the case relied heavily upon EPA language reproduced below, *infra* note __, in finding that TCEQ had the authority to issue PAL6 and recommending that the Petitioners' claims be rejected. *See id.* at 43–45. In challenging this recommendation, the Petitioners presented arguments purporting to show that the SIP rules that existed in 2005 did not provide TCEQ with the authority to create federally enforceable PAL permits. *See* SOAH Docket No. 582-13-4611, TCEQ Docket No. 2013-0657-AIR, Protestants Exceptions to the Administrative Judges' Proposal for Decision at 22–27 (January 7, 2014). However, the TCEQ concluded that PAL6 established "the federal applicability limit for the facility through the term of the 10-year PAL." SOAH Docket No. 582-13-4611, TCEQ Docket No. 2013-0657-AIR, TCEQ's Order Concerning the Application of ExxonMobil for Issuance of Air Quality Permit No. 102982 for the Construction of a New Ethylene Production Unit at ExxonMobil's Baytown Olefins Plant, Located in Harris County, Texas at 13–14 (February 18, 2014).

[21] *See supra* note 18.

[22] When the EPA proposed the federal PAL rules, the agency explained, "EPA understands that other States (and sources) have experimented with the issuance of permits with emissions caps under EPA's existing regulations. . . . [A] source-by-source PAL approach may be implemented in many situations under the current regulations . . . ." 61 Fed. Reg. 38250, 38264 (July 23, 1996). When the EPA finalized its PAL rules in 2002, it discussed the freedom

aware of the complexity of this issue. Yet in this title V petition, the Petitioners have not provided the requisite citation and analysis to demonstrate that TCEQ lacked the authority to create PAL6 as a federally enforceable PAL permit.[23] In sum, the EPA will not use the title V petition process to review the SOAH proceeding, and the EPA is not, in this action, making a determination as to whether TCEQ had the authority in 2005 to issue federally enforceable PALs prior to the EPA's approval of its PAL-specific SIP rules. However, even if it were proper for the EPA to evaluate this question in this action, the Petitioners have not demonstrated in this title V Petition that it was improper for TCEQ to issue PAL6 in 2005.

Second, regarding Permit 102982, the Petitioners claim that in issuing Permit 102982, TCEQ failed to follow the correct SIP provisions governing NSR applicability determinations for modifications. *See* Petition at 14–16. However, this generalized, conclusory statement of purported error (not using the correct applicability test) is the extent of the Petitioners' allegation. The Petitioners never claim that TCEQ erred in issuing a minor NSR permit to authorize the ethylene expansion project; in other words, the Petitioners never claim that the ethylene expansion project should have been considered a major modification that triggered PSD requirements. The Petitioners have not attempted to demonstrate that the project would have resulted in a significant net emissions increase triggering PSD. As such, even if the Petitioners' concerns regarding PAL6 were accepted as true, and even if the EPA were to review and reconsider the Permit 102982 decisions in this title V petition, the Petitioners have not demonstrated that it was inappropriate for TCEQ to issue Permit 102982 as a minor NSR permit. Therefore, the Petitioners have not demonstrated that the title V permit is missing any applicable requirements (*i.e.*, major NSR requirements). *See In the Matter of Appleton Coated, LLC, Combined Locks Mill*, Order On Petition Nos. V-2013-12 and V-2013-15 at 14–15 (October 14, 2016); *In the Matter of Georgia Pacific, Consumer Products LP Plant*, Order On Petition No. V-2011-1 at 10 (July 23, 2012); *In the Matter of Public Service Company of Colorado, dba Xcel Energy, Pawnee* Station, Order On Petition No. VIII-2010-XX at 7–9 (June 30, 2011).

In addition to their facial challenges to PAL6 and Permit 102982, the Petitioners also attempt to explain how these purported defects affected the validity of the title V permit, such that an EPA objection is warranted. First, the Petitioners repeatedly claim that the incorporation of PAL6 and Permit 102982 into the title V permit "undermines the enforceability of SIP requirements" and the CAA. Petition at 6, 7, 8, 9, 10, 12, 14, 16, 18, 20. However, it is unclear what the phrase "undermines the enforceability of the SIP"—*i.e.*, of the *title I* regime—means in the context of a title V permit.[24] The Petitioners do not explain why a permit term that purportedly "undermines

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that states have to customize their NSR programs, and acknowledged that several states had programs under their existing SIPs that could accommodate PALs. *See* 67 Fed. Reg. 80186, 80241 (December 31, 2002). In the technical support document accompanying this final rule, the EPA stated, "Nothing in the final rules specifically precludes reviewing authorities from issuing PAL like permits under the existing regulations during the period prior to the adoption of any new PAL provisions into the State major NSR program." Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area New Source Review Regulations, page 1-7-33 (December 2012).

[23] *See supra* note 6 and accompanying text.

[24] It appears that the Petitioners are concerned that under the title V permit, as currently written, ExxonMobil or TCEQ might rely on PAL6 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

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). Although the Petitioners provide a single citation to CAA § 504(a) in support of this oft-repeated contention, *id.* at 9, the Petitioners do not explain which requirements of title V (whether in section 504(a) or elsewhere) are violated, nor do they provide any analysis that would support the Petitioners' vague and general claim.[25]

Second, regarding the Petitioners' claim that PAL6 should be designated in the title V permit as "state-only," this allegation is based on the premise that PAL6 is not a federally enforceable permit. However, as discussed above, the question of whether PAL6 established federally-enforceable PALs was not properly before Texas in processing this title V permit modification, nor is it properly before the EPA in this title V petition. Consequently, the question of whether it is appropriate for the title V permit to incorporate PAL6 as federally enforceable is not properly before the EPA. Rather, the title V permit for the facility incorporates the terms and conditions of current preconstruction permits as applicable requirements.[26] Additionally, as discussed above, even if the EPA were to review this underlying issue, the Petitioners have not demonstrated that TCEQ lacked the authority to issue PAL6 as a federally enforceable permit.[27] The Petitioners have therefore not demonstrated that the incorporation of PAL6 into the title V permit was flawed.[28]

Finally, regarding the claim that TCEQ did not adequately respond to comments, in response to public comments raising the issues discussed above, TCEQ explained: "These comments were addressed during the technical review of Permit 102982 [*i.e.* the title I mechanism employed in 2014] and the issue is not part of the review of this minor revision for Title V Permit O1553." RTC at 3. This is consistent with the EPA's interpretation of the requirement of part 70 to incorporate the terms and conditions of preconstruction permits issued pursuant to title I and to include adequate monitoring, recordkeeping, and reporting requirements. Therefore, TCEQ's RTC provides no grounds for the EPA to object to the Permit. *See PacifiCorp-Hunter Order* at 36.

For the foregoing reasons, the EPA denies the Petitioners' request for an objection on these claims.

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that should be resolved through the appropriate title I channels if and when such a future NSR applicability determination is made. *See supra* note 18. The EPA also notes that it appears there is a pending PAL6 renewal application before TCEQ. *See supra* note 17.

[25] *See supra* notes 6,7, and accompanying text.

[26] *See supra* note 19 and accompanying text.

[27] *See supra* text accompanying notes 20–23.

[28] Regarding the Petitioners' claim that Permit 102982 should be considered a state-only permit, Petition at 16, the Petitioners present no explanation for why the alleged defects associated with the issuance of Permit 102982 (i.e., reliance on a PAL rather than SIP netting rules) would result in that permit not being federally enforceable. To the extent that the Petitioners intended to argue that Permit 102982 should not be incorporated into the title V permit as federally enforceable, the question of whether Permit 102982 was appropriately issued (including any questions regarding whether Permit 102982 is federally enforceable) is not before the EPA in this title V action, as discussed above. The title I proceeding established the terms of Permit 102982, which are the applicable requirements that should be incorporated into the title V permit. The EPA will not re-evaluate the propriety of those preconstruction permitting decisions in the title V context.

## 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 the Petition as described above.

Dated: MAR 01 2018

E. Scott Pruitt
Administrator

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

| | | |
|---|---|---|
| ENVIRONMENTAL INTEGRITY PROJECT and SIERRA CLUB, | ) | |
| *Petitioners,* | ) | |
| *v.* | ) | Case No. _____ |
| U.S. ENVIRONMENTAL PROTECTION AGENCY and SCOTT PRUITT, Administrator, U.S. Environmental Protection Agency | ) | |
| *Respondents.* | ) | |

**RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedures 26.1, Environmental Integrity Project and Sierra Club make the following disclosures:

**Environmental Integrity Project**

Non-Governmental Corporate Party to this Action: Environmental Integrity Project ("EIP").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: EIP, a corporation organized and existing under the laws of the District of Columbia, is a national nonprofit organization that advocates for more effective enforcement and implementation of environmental laws.

**Sierra Club**

Non-Governmental Corporate Party to this Action: Sierra Club.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

DATED: May 22, 2018

/s/ Gabriel Clark-Leach
Gabriel Clark-Leach
Environmental Integrity Project
1206 San Antonio St.
Austin, Texas 78701
Telephone: (512) 637-9478
gclark-leach@environmentalintegrity.org

*Counsel for Petitioners Environmental Integrity Project and Sierra Club*

## CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **Petition for Review** and **Rule 26.1 Disclosure Statement** on Respondents by sending a copy via First Class Mail to each of the following addresses on this 22nd day of May, 2018:

Administrator Scott Pruitt
Office of the Administrator
EPA Headquarters 1101A
United States Environmental Protection Agency
William Jefferson Clinton Federal Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Correspondence Control Unit
Office of General Counsel (2311)
United States Environmental Protection Agency
William Jefferson Clinton Federal Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

The Hon. Jefferson Sessions, III
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

/s/ Gabriel Clark-Leach
Gabriel Clark-Leach

# *United States Court of Appeals*

**FIFTH CIRCUIT**
**OFFICE OF THE CLERK**

**LYLE W. CAYCE**
**CLERK**

**TEL. 504-310-7700**
**600 S. MAESTRI PLACE**
**NEW ORLEANS, LA 70130**

May 22, 2018

Mr. Avi S. Garbow
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
William Jefferson Clinton Building
Washington, DC 20460

Mr. Scott Pruitt
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
William Jefferson Clinton Building
Mail Code 1101A
Washington, DC 20460-0000

No. 18-60384 Environmental Integrity Proj, et al v. EPA, et al
Agency No. 83 Fed. Reg. 12753

Dear Mr. Garbow, Mr. Pruitt,

You are served with the following document(s) under FED. R. APP. P. 15:

Petition for Review.

**Special Guidance for Filing the Administrative Record**: Pursuant to 5th Cir. R. 25.2, Electronic Case Filing (ECF) is mandatory for all counsel. Agencies responsible for filing the administrative record with this court are requested to electronically file the record via CM/ECF using one or more of the following events as appropriate:

Electronic Administrative Record Filed;
Supplemental Electronic Administrative Record Filed;
Sealed Electronic Administrative Record Filed; or
Sealed Supplemental Electronic Administrative Record Filed.

Electronic records must meet the requirements listed below. Records that do not comply with these requirements will be rejected.

- Max file size 20 megabytes per upload.

- Where multiple uploads are needed, describe subsequent files as "Volume 2", "Volume 3", etc.
- Individual documents should remain intact within the same file/upload, when possible.
- Supplemental records must contain the supplemental documents only. No documents contained within the original record should be duplicated.

Electronic records are automatically paginated for the benefit of counsel and the court and provide an accurate means of citing to the record in briefs. A copy of the paginated electronic record is provided to all counsel at the time of filing via a Notice of Docket Activity (NDA). Upon receipt, counsel should save a copy of the paginated record to their local computer.

Agencies unable to provide the administrative record via docketing in CM/ECF may instead provide a copy of the record on a flash drive or CD which we will use to upload and paginate the record.

If the agency intends to file a certified list in lieu of the administrative record, it is *required* to be filed electronically. Paper filings will not be accepted. See FED. R. APP. P. 16 and 17 as to the composition and time for the filing of the record.

ATTENTION ATTORNEYS: Attorneys are required to be a member of the Fifth Circuit Bar and to register for Electronic Case Filing. The "Application and Oath for Admission" form can be printed or downloaded from the Fifth Circuit's website, www.ca5.uscourts.gov. Information on Electronic Case Filing is available at www.ca5.uscourts.gov/cmecf/.

We recommend that you visit the Fifth Circuit's website, www.ca5.uscourts.gov and review material that will assist you during the appeal process. We especially call to your attention the Practitioner's Guide and the 5th Circuit Appeal Flow Chart, located in the Forms, Fees, and Guides tab.

Counsel who desire to appear in this case must electronically file a "Form for Appearance of Counsel" within 14 days from this date. You must name each party you represent, see FED. R. APP. P. and 5TH CIR. R. 12. The form is available from the Fifth Circuit's website, www.ca5.uscourts.gov. If you fail to electronically file the form, we will remove your name from our docket.

**Sealing Documents on Appeal:** Our court has a strong presumption of public access to our court's records, and the court scrutinizes any request by a party to seal pleadings, record excerpts, or other documents on our court docket. Counsel moving to seal matters must explain in particularity the necessity for sealing in our court. Counsel do not satisfy this burden by simply stating that the originating court sealed the matter, as the circumstances that justified sealing in the originating court may have changed or may not apply in an appellate proceeding. It is the obligation of counsel to justify a request to file under seal, just as it is their obligation to notify the court whenever sealing is no longer necessary. An unopposed motion to seal does not obviate a counsel's obligation to justify the motion to seal.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Connie Brown, Deputy Clerk
504-310-7671

Enclosure(s)

cc w/encl:
Mr. Gabriel Paul Clark-Leach

Provided below is the court's official caption. Please review the parties listed and advise the court immediately of any discrepancies. If you are required to file an appearance form, a complete list of the parties should be listed on the form exactly as they are listed on the caption.

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Case No. 18-60384

ENVIRONMENTAL INTEGRITY PROJECT; SIERRA CLUB,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; SCOTT PRUITT,

Respondents