

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION NO. VI-2018-4
	)	
PREMCOB REFINING GROUP INC.	)	ORDER RESPONDING TO
VALERO PORT ARTHUR REFINERY	)	PETITION REQUESTING
JEFFERSON COUNTY, TEXAS	)	OBJECTION TO THE ISSUANCE OF
	)	TITLE V OPERATING PERMIT
PERMIT NO. O1498	)	
	)	
ISSUED BY THE TEXAS COMMISSION ON	)	
ENVIRONMENTAL QUALITY	)	

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

**I. INTRODUCTION**

The U.S. Environmental Protection Agency (EPA) received a petition dated February 20, 2018, (the Petition) from the Environmental Integrity Project, Sierra Club, and the Port Arthur Community Action Network (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to the proposed operating permit No. O1498 (the Permit) issued by the Texas Commission on Environmental Quality (TCEQ) to the Premcor Refining Group, Inc. (Premcor) for the Valero Port Arthur Refinery (Port Arthur or the facility) in Jefferson County, Texas. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and Title 30, Chapter 122 of the Texas Administrative Code (TAC). *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further below, the EPA grants in part and denies in part the Petition requesting that the EPA Administrator object to the Permit. Specifically, the EPA grants Claims B.1, B.3, and portions of Claims A and B.4. and denies Claim B.2 and portions of Claims A and B.4.

**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). This program, which became effective on November 30, 2001, is codified in 30 TAC Chapter 122.

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

## **B. Review of Issues in a Petition**

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

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

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

section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.<sup>2</sup>

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)).<sup>3</sup> 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.<sup>4</sup> Certain aspects of the petitioner's demonstration burden are discussed below. A more detailed discussion can be found in *In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the state's response to comments), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.<sup>5</sup> Another factor the EPA examines is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the

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<sup>2</sup> *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.

<sup>3</sup> *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)).

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

<sup>5</sup> *See also, e.g., Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. App'x \*11, \*15 (2d Cir. 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012) (denying a title V petition issue where petitioners did not respond to the state's explanation in response to comments or explain why the state erred or why the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007) (*Georgia Power Plants Order*) (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).

EPA is left to work out the basis for the petitioner’s objection, contrary to Congress’s express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 (“[T]he Administrator’s requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.”).<sup>6</sup> Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013).<sup>7</sup> 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).<sup>8</sup>

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

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

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<sup>6</sup> *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*).

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

<sup>8</sup> *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.

When the permitting authority revises a permit or permit record in order to resolve an EPA objection, it must go through the appropriate procedures for that revision. The permitting authority should determine whether its response is a minor modification or a significant modification to the title V permit, as described in 40 C.F.R. § 70.7(e)(2) and (4) or the corresponding regulations in the state's EPA-approved title V program. If the permitting authority determines that the modification is a significant modification, then the permitting authority must provide for notice and opportunity for public comment for the significant modification consistent with 40 C.F.R. § 70.7(h) or the state's corresponding regulations.

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

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

### **C. New Source Review**

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

While parts C and D of title I of the Act address the major NSR program for major sources, section 110(a)(2)(C) addresses the permitting program for new and modified minor sources and for minor modifications to major sources. The EPA commonly refers to the latter program as the “minor NSR” program. States must also develop minor NSR programs to, along with the major source programs, attain and maintain the NAAQS. The federal requirements for state minor NSR programs are outlined in 40 C.F.R §§ 51.160 through 51.164. These federal requirements for minor NSR programs are less prescriptive than those for major sources, and, as a result, there is a larger variation of requirements in EPA-approved state minor NSR programs than in major source programs.

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

### **III. BACKGROUND**

#### **A. The Valero Port Arthur Refinery Facility**

The Valero Port Arthur Refinery Facility, located in Jefferson County, Texas, is a petroleum refinery and is designed to process crude oil into a variety of motor vehicle fuels, hydrocarbon products, and derivatives. The principal products produced at the refinery are light gases, gasoline, kerosene, jet fuels, distillate fuels, coke and sulfur. The facility is a major source of volatile organic compounds (VOCs), sulfur dioxide, particulate matter, nitrogen oxides, hazardous air pollutants, and carbon monoxide, and is subject to title V of the CAA. 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).

EPA conducted a demographic analysis using EPA’s EJSCREEN<sup>9</sup> to assess key demographic indicators within approximately five kilometers of the eastern fence line of the facility. The Environmental Justice Index for four of the eleven EJSCREEN indicators in this five-kilometer area exceed the 80<sup>th</sup> percentile in the State of Texas, with two of the eleven indicators exceeding the 90<sup>th</sup> percentile. This analysis showed a total population of 10,725 residents within five kilometers East of Premcor, based on the 2010 Census of which approximately 94% are people of color and 57% are low income.

#### **B. Permitting History**

Premcor Refining Group Inc. (Premcor) first obtained a title V permit for the Valero Port Arthur Refinery Facility in 2007. On July 5, 2011, Premcor submitted an application for a renewal title V permit. TCEQ noticed the draft permit on December 16, 2015, subject to a public comment

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

period ending January 12, 2016. On November 3, 2017, TCEQ transmitted the Proposed Permit, along with its Response to Comments and Statement of Basis, to the EPA for its 45-day review. The EPA's 45-day review period ended on December 22, 2017, during which time the EPA did not object to the Proposed Permit. TCEQ issued the final title V permit for the Valero Port Arthur Refinery Facility on January 02, 2018. Since the submittal of the Petition, the Permit has been subsequently revised; the current version of the title V permit applicable to the Facility was issued on February 25, 2021 (2021 Revised Permit).

### **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 December 22, 2017. Thus, any petition seeking the EPA's objection to the Proposed Permit was due on or before February 20, 2018. The Petition was received February 20, 2018, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

## **IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS**

### **Claim A: The Petitioners Claim That “The Proposed Permit Fails to Incorporate and Assure Compliance with Permit By Rule (PBR) Requirements, Including Requirements in [Premcor’s] Certified PBR Registrations.”**

*Petitioners’ Claim:* The Petitioners raise multiple claims related to PBRs and Standard Exemptions that are incorporated into the Permit. The Petitioners claim:

The Proposed Permit is deficient because it omits information necessary for readers to determine: (1) how much pollution units authorized by PBR(s) and Standard Exemption(s) are authorized to emit; (2) which units are subject to PBR and Standard Exemption emission limits; and (3) which pollutants each emission units authorized by PBR(s) and/or Standard Exemption(s) are authorized to emit.

Petition at 5.

In support of their specific claims, the Petitioners note that the Permit states Premcor must “comply with the requirements of New Source Review authorizations issued or claimed by the permit holder for the permit area, including permits, permits by rule, standard permits... referenced in the New Source Review Authorization References attachment, and that these requirements are incorporated by reference into this permit as applicable requirements.” Petition at 5 (citing Permit, Special Condition No. 25). The Petitioners explain that while PBRs establish generic emission limits, 30 TAC § 106.6 allows operators to request source-specific PBR limits that are more stringent than these generic PBR limits. “These source-specific PBR limits are found in Certified PBR Registrations issued by the TCEQ.” Petition at 6. The Petitioners assert that the 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 generic PBR rules themselves, the certified registrations must be specifically identified in the proposed title V permit. *Id.* at 6.

The Petitioners claim that the Permit fails to incorporate the source-specific emission limits that are found in Premcor's certified PBR registrations. The Petitioners note that the New Source Review Authorization References attachment lists all the PBRs that are incorporated into the Permit but does not include the certified PBR registrations as applicable requirements. The Petitioners assert that "[t]his omission renders the Proposed Permit incomplete and undermines the enforceability of emission limits in [Premcor]'s source-specific Certified PBR Registrations." Petition at 7.

The Petitioners next claim the Permit fails to adequately incorporate and assure compliance with emission limits in PBRs and standard exemptions claimed by Premcor. The Petitioners assert that two conditions must be met to properly incorporate by reference the PBRs and standard exemptions into the title V permit including that the information incorporated is readily available to the public and regulators and that the title V permits provide information that clearly and unambiguously explains how incorporated emission limits apply to emission units at the permitted source. Petition at 7 (citing *In the Matter Citgo Refining and Chemicals*, Order on Petition No. VI-2007-01 at 12, n5 (May 28, 2009) (*CITGO Order*); *In the Matter of Shell Chemical LP and Shell Oil Co., Deer Park Chemical Plant and Refinery*, Order on Petition Nos. IV-2014-04 and IV-2014-05 at 10-11 (September 24, 2015)). The Petitioners claim that the Permit fails to meet the second condition stating:

[T]he Proposed Permit omits information necessary for readers to determine (1) which emission units at the refinery are subject to requirements in each of the PBRs; (2) which pollutants [Premcor] may emit under the claimed PBRs and Standard Exemptions; and (3) how the emission limits in PBRs and Standard Exemptions claimed by [Premcor] apply to units at the Port Arthur Refinery.

Petition at 8

The Petitioners assert that the Permit is deficient because it does not identify what units are authorized or subject to the requirements of nine PBRs listed in the title V Permit: 106.183, 106.261, 106.262, 106.263, 106.371, 106.412, 106.472, 106.473, and 106.478. Petition at 8. Therefore, the Petitioners contend that the title V permit is unclear as to which units are subject to PBRs at the facility which undermines the enforceability of PBR requirements. *Id.* at 8 (citing *Objection to Title V Permit No. O2164*, Chevron Phillips Chemical Company, Philtex Plant (August 6, 2010) at ¶7).

The Petitioners next address their claims that the Permit omits information necessary for readers to determine which pollutants Premcor may emit under the claimed PBRs and Standard Exemption and how the emission limits in PBRs and Standard Exemptions apply to the units at the facility. As background, the Petitioners again note that where an applicable PBR does not list specific emission limits, facilities are subject to the general emission limits in 30 TAC § 106.4(a)(1). Petitioners also contend that Texas's rules provide that the general limits at §



106.4(a)(1) establish a cap on the amount of pollution that may be authorized by PBR for each facility and clarify that cumulative emissions from multiple facilities may exceed these emission limits so long as at least one facility at a source has been subject to public notification and comment. Petition at 9 (citing to 30 TAC § 106.4(a)(1), (4)). Texas rules also allow an operator to establish federally-enforceable emission rates below the general emission limits to avoid triggering PSD requirements. Petition at 9 (citing to 30 TAC § 106.6).

The Petitioners contend that the Permit includes a requirement to comply with certified PBR registrations. However, the Petitioners assert the Permit does not identify any emission limits originating in such certified registrations or indicate whether Premcor has certified federally enforceable emission limits for any unit or units at the facility.

The Petitioners next state that the Permit incorporates by reference PBRs in the New Source Review Authorization References table and requires Premcor to comply with the general emission limits in § 106.4. Petition at 9-10. However, the Petitioners assert three reasons why this information is not sufficient to explain how much any unit authorized by a PBR is allowed to emit. First the Petitioners assert that it is impossible to determine if the generic emission limits or source-specific limits in a certified PBR registration apply to a unit. Second, as described previously, the Permit does not identify any units subject to emission limits in nine PBRs it incorporates. Lastly, the Permit fails to identify units that must maintain emissions below the general emission limits to avoid triggering PSD netting requirements. Petition at 10.

***EPA's Response:*** For the following reasons, the EPA grants in part and denies in part the Petitioners' request for an objection on this claim, denying, as moot, all aspects of this claim except for the contention--for certain PBRs incorporated by reference in the Permit—that the Permit improperly fails to identify which units are subject to the emission limits in those PBRs.

Under title V of the CAA, the EPA's part 70 regulations, and Texas'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).<sup>10</sup> "Applicable requirements," as defined in the EPA's and TCEQ's rules, include the terms and conditions of preconstruction permits issued by TCEQ, including requirements contained in a PBR that is claimed by a source, as well as source-specific emission limits established through certified registrations associated with PBRs. *See* 40 C.F.R. § 70.2; 30 TAC § 122.10(2)(H).

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<sup>10</sup> 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."); *id.* § 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.").

The CAA requirement to include all applicable requirements in a title V permit can be satisfied through the use of 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 Number 2*) (explaining how IBR can satisfy CAA § 504 requirements).<sup>11</sup> 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 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.*” (emphases added)). This is also consistent with the EPA’s longstanding position that materials incorporated by reference must be clearly identified in the permit. *See, e.g.*, *White Paper Number 2* at 37 (“Referenced documents must also be specifically identified.”).

The Petitioners’ have asserted that the Permit is deficient because it omits information necessary for the readers to determine how much pollution units are authorized to emit, which units are subject to PBR and Standard Exemption emission limits, and which pollutants each emission unit authorized by PBRs and/or Standard Exemptions are authorized to emit. In support of their assertion, the Petitioners claim specifically that the Permit fails to include source-specific emission limits found in the certified PBRs, the Permit does not identify emission units for nine PBRs, and the Permit does not provide sufficient information to describe how much each unit is authorized to emit.

Regarding the claim that the Permit fails to include source-specific emission limits found in certified PBRs, the EPA has determined that this issue is moot. On February 25, 2021, subsequent to the EPA’s receipt of the Petition, TCEQ issued a significant modification of the title V permit to Premcor for the Valero Port Arthur Refinery Facility (2021 Revised Permit).<sup>12</sup> This modification included changes to permit conditions that are the subject of this claim. These revised provisions of the 2021 Revised Permit supersede the associated provisions for the Permit. Specific to this claim, TCEQ revised the NSR Authorization References by Emission Unit table to include certified registration numbers next to the emission units authorized by the registered PBRs. *See* 2021 Revised Permit at Pages 400-418. These registration numbers function like permit numbers, as they each 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 point directly to the specific requirements that are

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<sup>11</sup> 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).

<sup>12</sup> Petitioners did not submit comments or a Petition to Object on the 2021 Revised Permit.

applicable to the source. The registered PBR requirements themselves may be found either online, or in person at the TCEQ file room.<sup>13</sup> The inclusion of these registration numbers next to the emission units to which they apply conforms 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. The changes to the NSR Authorization table render the Petitioners' claim that the Permit fails to include source-specific emission limits found in certified PBRs moot.

The EPA has discussed the criteria for evaluating a potentially moot claim and stated that a title V petition may be rendered moot when the version of the permit on which it is based has been withdrawn or superseded, or otherwise is no longer operative. *See In the Matter of Consolidated Env't'l Mgmt., Inc. – Nucor Steel Louisiana et. al.*, Order on Petition Nos. 3086-V0 & 2560-00281-V1, at 13 (June 19, 2013) (*Nucor Order*); *In the Matter of Duke Energy Indiana Edwardsport Generating Station*, Order on Permit No. T083-27138-00003, at 11 (December 13, 2011). Where a superseding proposed permit, with a new rationale, has been put before the EPA, to the extent that the changes relate to the specific objection(s) raised in the petition, the petition is moot. *Nucor Order* at 13. It makes little sense for the EPA to review an issue that has been overtaken by later events. *Id.*

Regarding the assertion that the Permit does not identify any units subject to emission limits in nine PBRs it incorporates, the 2021 Revised Permit also updated the NSR Authorization References by Emission Unit table by identifying what emission units were authorized by PBRs 106.261, 106.262, 106.412, 106.472, 106.473, and 106.487. Accordingly, for those six PBRs, Petitioners' claim is denied as moot, as discussed above. However, PBRs 106.183, 106.263, and 106.371 continue to be listed as applicable to the source, but do not have any emission units associated with them. The Petitioners have demonstrated that the Permit does not establish to which emission units PBRs 106.183, 106.263, and 106.371 apply. The EPA therefore grants this portion of the Petitioners' claim with respect to PBRs 106.183, 106.263, and 106.371 and denies the portion of the claim with respect to the remaining PBRs.

The changes made to the permit record associated with the 2021 Revised Permit also affect the final part of this claim, that the Permit is deficient for failing to explain the quantity of emissions each unit authorized by PBR is allowed to emit. Beyond identifying which emission units are subject to source-specific emission limits, TCEQ included clarifying language to the 2021 Revised Permit Statement of Basis for how the emission limits under 30 TAC § 106.4(a)(1) apply. This clarifying language was added after the EPA granted similar claims in previous Orders. *See In the Matter of Motiva Enterprises, LLC, Port Arthur Refinery*, Order on Petition No. VI-2016-23 (May 31, 2018) (*Motiva Order*); *In the Matter of Pasadena Refining System, Pasadena Refinery*, Order on Petition No. VI-2016-20 (May 1, 2018) (*Pasadena Order*). *See also, Executive Director's Response to EPA Objections Regarding Permits by rule* (June 13, 2018 letter from TCEQ to EPA Region 6). Specifically, within the Statement of Basis for the 2021 Revised Permit, TCEQ explained, in relevant part:

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<sup>13</sup> See [https://www.tceq.texas.gov/permitting/air/nav/air\\_status\\_permits.html](https://www.tceq.texas.gov/permitting/air/nav/air_status_permits.html).

The TCEQ has interpreted the emission limits prescribed in 30 TAC §106.4(a) as both emission thresholds and default emission limits. The emission limits in 30 TAC §106.4(a) are all considered applicable to each facility<sup>14</sup> as a threshold matter to ensure that the owner/operator qualifies for the PBR authorization. Those same emission limits are also the default emission limits if the specific PBR does not further limit emissions or there is no lower, certified emission limit claimed by the owner/operator.

2021 Revised Permit Statement of Basis at 136. Thus, as clarified by the Statement of Basis related to the 2021 Revised Permit, the Permit adequately explains the quantity of emissions each unit authorized by a PBR is allowed to emit. Accordingly, EPA denies as moot, this portion of Claim A.

**Direction to TCEQ.** TCEQ must explain to which emission units PBRs 106.183, 106.263, and 106.371 apply. If TCEQ believes that some or all of these PBRs only apply to insignificant units, then TCEQ should provide such explanation in the permit record and include a list of those PBRs in the statement of basis. For any remaining PBRs that do not apply to insignificant units, TCEQ should update the title V permit and list these PBRs next to the applicable emission units in the “New Source Review Authorization References by Emission Unit” table.

**Claim B: The Petitioners Claim That “The Proposed Permit Fails to Include Monitoring, Testing, and Recordkeeping Provisions that Assure Compliance with Applicable Requirements”**

**Petitioner’s Claim:** The Petitioners assert:

The Proposed Permit is deficient because (1) it fails to establish monitoring, testing, and recordkeeping conditions that assure compliance with emission limits in [Premcor]’s NSR permits—including PBRs, Standard Exemptions, and Standard Permits—that it incorporates by reference and (2) the permit record does not contain a reasoned explanation supporting the Executive Director’s determination that monitoring, testing, and recordkeeping conditions in the Proposed Permit assure compliance with these requirements.

Petition at 15-16.

Before presenting specific claims, the Petitioners provide background on the requirements of title V related to monitoring. Petition at 17-18. The Petitioners assert that title V permits must contain monitoring, recordkeeping, and reporting conditions that assure compliance with all applicable requirements, including emission limits in NSR permits, PBRs, Standard Permits, and Standard Exemptions that are incorporated by reference into a title V permit. *Id.* (citing to 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a)(3), (c)(1); *In the Matter of Wheelabrator Baltimore, L.P.*, Order on Petition, Permit No. 24-510-01886 at 10 (April 14, 2010) (*Wheelabrator Baltimore Order*)). Moreover, the Petitioners contend that the “rationale for the selected monitoring requirements must be clear and documented in the permit record.” *Id.* (citing 40 C.F.R. §

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<sup>14</sup> The EPA notes that TCEQ’s regulations define “facility” as an individual emission unit. *See* 30 TAC § 116.10(4); 79 Fed. Reg. 40666, 40668 n.3 (July 14, 2014).

70.7(a)(5); *In the Matter of United States Steel, Granite City Works*, Order on Petition No. V-2009-03 at 7-8 (January 31, 2011) (*Granite City I Order*)).

Claim B includes multiple distinguishable subclaims that EPA has rearranged in an order that provides a more effective response. The EPA's response to Claim B addresses each of the Petitioners' allegations according to the following numbering system (not supplied in the Petition):

- Claim B.1 addresses monitoring associated with PBRs, Standard Exemptions, and Standard Permits (Petition pages 18-22, 28);
- Claim B.2 addresses monitoring of VOC emissions from flares authorized by Premcor's NSR Permit No. 6825A/PSDTX49/N65 (NSR Permit) (Petition pages 22-24, 28-30);
- Claim B.3 addresses stack testing requirements included in the title V Permit and associated with the NSR Permit (Petition pages 24-25, 30-32);
- Claim B.4 addresses the use, in connection with the NSR Permit, of emission factors to calculate emissions (Petition pages 25-27, 33-37).

Claims B.2 through B.4 relate to monitoring and Special Conditions found in the NSR Permit. The Permit incorporates by reference the NSR Permit and also appends the NSR Permit to the end of the Permit.

#### **Claim B.1: Monitoring Associated with PBRs, Standard Exemptions, and Standard Permits**

***Petitioners' Claim:*** The Petitioners assert that the Permit is deficient because neither the Permit, itself, nor the applicable rules specify the monitoring methods that Premcor must use to assure compliance with applicable PBR and Standard Exemption requirements. Petition at 21. The Petitioners claim that facilities authorized by PBRs and Standard Exemptions must comply with the general PBR requirements from Texas's rules, the Standard Exemption requirements in effect at the time each exemption was claimed, and any requirements listed in the specific claimed PBR and Standard Exemption. Petition at 18 (citing to Permit Special Condition Nos. 25 and 26). The Petitioners identified several PBRs and Standard Exemptions that contain emission limits and standards that are incorporated into the Permit (PBRs 106.183, 106.261, 106.263, and 106.512, and Standard Exemptions 61, 68 and 124). *Id.* The Petitioners acknowledge that the Permit and Texas's rules require that Premcor maintain records demonstrating compliance with applicable PBR and Standard Exemption requirements but assert that neither the applicable rules nor the Permit specify what monitoring must be used to assure compliance. The Petitioners claim that the Permit instead establishes a non-exhaustive list of data that Premcor may consider, at its discretion, to determine compliance with PBR and Standard Exemption requirements. Petition at 21 (citing to Permit Special Condition 27). The Petitioners assert that this renders the Permit deficient because it fails to specify monitoring to assure compliance with each applicable requirement. Petitioners also assert that the permit record does not explain how the Permit assures compliance with requirements. Petitioners contend that these deficiencies prevent the public from evaluating if title V monitoring requirements have been met. Petition at 21.

The Petitioners make a similar claim regarding monitoring for Standard Permits incorporated into the title V Permit. Specifically, the Petitioners note that the Permit incorporates Standard Permit No. 91911 which establishes emission limits and operating requirements for the emission units to which it applies. The Petitioners assert that the Permit fails to specify monitoring methods that assure compliance with the Standard Permit limits. Petition at 22 (citing to 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a); *Wheelabrator Baltimore Order* at 10).

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

Special Condition 26 of the Permit<sup>15</sup> states:

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

Special Condition 27 of the Permit<sup>16</sup> states:

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

*Id.*; 2021 Revised Permit

The requirements in these Special Conditions, standing alone, are insufficient monitoring, recordkeeping or reporting requirements. The Petitioners have demonstrated that the "general requirements" referenced in Special Condition 26 and the lengthy, non-exhaustive list of monitoring, recordkeeping, and reporting options referred to under Special Condition 27 are not adequate for all PBRs, Standard Exemptions, and Standard Permits. In addition, Petitioners have

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<sup>15</sup> This Special Condition persists, unchanged, in the 2021 Revised Permit, although it is identified, in the 2021 Revised Permit, as Special Condition 24.

<sup>16</sup> This Special Condition is also found, unchanged, in the 2021 Revised Permit, although it is identified, in the 2021 Revised Permit, as Special Condition 26.

demonstrated that the monitoring, recordkeeping, and reporting requirements for the cited PBRs, Standard Exemptions, and Standard Permits do not assure compliance with the CAA, part 70, and Texas's approved title V program. Specifically, the Petitioners have demonstrated that PBRs, Standard Exemptions and Standard Permits incorporated by reference into the title V permit do not contain any additional specific monitoring, recordkeeping, and reporting and appear to rely solely on the general requirements in Special Conditions 26 and 27.

It is TCEQ's responsibility, as the title V permitting authority, to ensure that the title V permit "set[s] forth" monitoring sufficient to assure compliance with all applicable requirements. 42 U.S.C. § 7661c(c); *see also* 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a), (a)(3), (c); 30 TAC 122.142(c).<sup>17</sup> Special Condition 26 incorporates the general requirements for PBRs found in 30 TAC Chapter 106, Subchapter A. These requirements do not specify any monitoring methods for demonstrating compliance with the emission limits and standards set forth in the PBRs, Standard Permits, and Standard Exemptions or for the general emission limits found in 30 TAC Chapter 106, Subchapter A. Likewise, Special Condition 27 does not specify any particular monitoring requirements and instead allows Premcor to select (from a non-exhaustive list) the monitoring, recordkeeping, or reporting it will use to assure compliance. Because neither these generic permit terms nor the PBRs, Standard Exemptions, or Standard Permits themselves require Premcor to follow a particular monitoring or recordkeeping methodology, the title V permit cannot be said to "set forth" monitoring sufficient to assure compliance. 42 U.S.C. § 7661c(c). The Petitioners have demonstrated that the generic Special Conditions 26 and 27 also do not assure that the monitoring or recordkeeping selected by the source will, as a technical and legal matter, be sufficient to ensure compliance. Because the Permit does not specify any particular monitoring or recordkeeping requirement, it cannot be ascertained from the Permit what monitoring or recordkeeping methodology the source has must use, or whether this methodology is sufficient to assure compliance with all applicable requirements. This effectively prevents both the public and the EPA from determining if the chosen monitoring satisfies CAA requirements. *See* 42 U.S.C. § 7661(c); *see also* 40 C.F.R. § 70.6(a)(3). Even if the monitoring, recordkeeping, or reporting is eventually specified in a compliance certification, the Permit, itself, still does not include the monitoring, recordkeeping, or reporting. Therefore, the Petitioners have demonstrated that for PBRs, Standard Exemptions, and Standard Permits, Special Conditions 26 and 27 do not contain adequate monitoring, recordkeeping, and reporting requirements that assures compliance with the requirements in each PBR, Standard Exemption, and Standard Permit.<sup>18</sup>

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<sup>17</sup> 42 U.S.C. § 7661c(a) ("Each permit issued under [title V of the CAA] shall *include* . . . such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan."), 7661c(c) ("Each permit issued under [title V of the CAA] shall *set forth* . . . monitoring and reporting requirements to assure compliance with the permit terms and conditions."); 40 C.F.R. § 70.6(a) ("Each permit issued under this part shall *include* . . ."), 70.6(a)(3)(i) ("Each permit shall *contain* the following requirements with respect to monitoring: . . ."); 70.6(c) ("All part 70 permits shall *contain* the following with respect to compliance: . . . testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit."); 30 TAC § 122.142(c) ("Each permit shall *contain* periodic monitoring requirements that are sufficient to yield reliable data from the relevant time period that are representative of the emission unit's compliance with the applicable requirement, and testing, monitoring, reporting, or recordkeeping sufficient to assure compliance with the applicable requirement.") (all emphasis added).

<sup>18</sup> A streamlined approach to monitoring, such as in Special Conditions 26 and 27, may be appropriate for generally applicable requirements for insignificant units. *Motiva Order* at 26 (citing *White Paper Number 2* at 32). However,

***Direction to TCEQ:*** In responding to this order, TCEQ should specify the monitoring, recordkeeping, and reporting that assures compliance with the requirements of the PBRs, Standard Exemptions, and Standard Permits that apply to non-insignificant units in the Premcor title V permit. If the underlying PBR, Standard Exemption, or Standard Permit contains monitoring, recordkeeping, and reporting, TCEQ should identify those in the permit record and determine if the monitoring in those PBRs, Standard Exemptions, and Standard Permits is adequate. On the other hand, if the PBRs, Standard Exemptions and Standard Permits do not contain any underlying monitoring, recordkeeping, or reporting, like PBR 30 TAC 106.261 and 106.263, then TCEQ should specify what monitoring, recordkeeping, or reporting will assure compliance with the requirements of those PBRs and the emission limits in 30 TAC 106.4(a)(1) as they apply to units authorized by those PBRs. If the Permit, Chapter 116 NSR permits, NSPS, NESHAP, or enforceable representations in an application already contain adequate terms to assure compliance with PBRs, Standard Exemptions, or Standard Permits, then TCEQ should amend the Permit to identify such terms and explain how these requirements assure compliance with the requirements and emission limits for each PBR that applies to significant units.<sup>19</sup> However, if the Permit and all enforceable, properly incorporated documents do not contain adequate monitoring, recordkeeping, and reporting that assures compliance with the PBR requirements, then TCEQ should add such terms to the Permit.

The EPA notes that TCEQ is already planning to begin specifying the monitoring for certain PBRs in a PBR Supplemental Table provided by applicants. *See* Letter from Tonya Baer, Deputy Director of Air, TCEQ, to David Garcia, Director, Air and Radiation Division, Region 6, U.S. EPA, *Permits by Rule Programmatic Changes*, at 2 (May 11, 2020). Specifically, the EPA understands that TCEQ is now requiring title V applicants to fill out the PBR Supplemental Table, which TCEQ will then incorporate into the title V permit through a general condition in the title V permit itself.

It is important to also explain what is required for something to be properly incorporated by reference such that the title V permit actually includes all applicable requirements. As the EPA has explained:

Information that would be . . . incorporated by reference into the issued permit must first be currently applicable and available to the permitting authority and public. . . . Referenced documents must also be specifically identified. Descriptive information such as the title or number of the document and the date of the document must be included so that there is no ambiguity as to which version of which document is being referenced. Citations, cross references, and incorporations by reference must be detailed enough that the manner in which any referenced material applies to a facility is clear and is not reasonably subject to misinterpretation. Where only a

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the EPA cannot determine if any of the PBRs, Standard Exemptions, or Standard Permits in the title V permit apply only to insignificant units.

<sup>19</sup> The EPA understands that certain emission units subject to PBRs may also be subject to other requirements, including monitoring requirements contained in an NSR permit. However, nowhere does the Permit connect such NSR monitoring provisions with the limitations and other requirements of the relevant PBRs, nor does the permit record explain why such monitoring is sufficient to assure compliance with PBR requirements.



portion of the referenced document applies, applications and permits must specify the relevant section of the document. Any information cited, cross referenced, or incorporated by reference must be accompanied by a description or identification of the current activities, requirements, or equipment for which the information is referenced.

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

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

*Id.* at 38.

Title V applications can be hundreds of (if not over a thousand) pages long, and a search of the TCEQ online database will usually return multiple title V applications for a specific facility that has had multiple revisions and renewals. Thus, a general statement in the title V permit incorporating the PBR Supplemental Table, which is found only in the permit application, without providing additional information detailing where the table is located is not specific enough to meet the standards described above. In order to satisfy the requirement in title V that the Permit “set forth,” “include,” or “contain” monitoring to assure compliance with all applicable requirements, a special condition incorporating the PBR Supplemental Table would need to include, at minimum, the date of the application and specific location of the table.<sup>20</sup> Alternatively, a more straightforward approach that would obviate these IBR-related concerns would be for TCEQ to directly include (i.e., attach) this PBR Supplemental Table as an enforceable part of the title V permit itself.

Additionally, although this table requires the applicant to specify monitoring, recordkeeping, and reporting for “claimed (not registered)” PBRs, the table does not appear to address monitoring for registered PBRs. For registered PBRs, the EPA understands that TCEQ intends to start having applicants include monitoring in the registration form.<sup>21</sup> However, TCEQ has not

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<sup>20</sup> The EPA recently provided feedback to TCEQ regarding how to effectively incorporate the PBR Supplemental Table into the title V permit through the use of a general permit term. *See* email from Jeffrey Robinson, EPA, to Samuel Short, Jesse Chacon, and Kim Strong, TCEQ, Re: EPA Comments on Sandy Creek Power Station (October 1, 2021) (found at <https://www.epa.gov/system/files/documents/2021-10/epa-comments-on-sandy-creek-power-station.pdf>).

<sup>21</sup> TCEQ has stated that it will require applicants to “[u]pdate PBR application representations with monitoring that is sufficient to demonstrate compliance.” Letter from Tonya Baer, Deputy Director of Air, TCEQ, to David Garcia, Director, Air and Radiation Division, Region 6, U.S. EPA, *Permits by Rule Programmatic Changes* at 3 (May 11, 2020).

indicated how it will appropriately incorporate that monitoring into an enforceable part of the title V permit. The EPA understands that TCEQ's EPA-approved regulations state: "All representations with regard to construction plans, operating procedures, and maximum emission rates in any certified registration under this section become conditions upon which the facility permitted by rule shall be constructed and operated." 30 TAC § 106.6(b). However, the mere fact that the PBR regulations state that information in the application will be conditions upon which the facility permitted by rule shall be constructed and operated is not sufficient to "include" or "contain" those provisions in a title V permit, as required by the Act, the EPA's regulations, and TCEQ's EPA-approved regulations. *E.g.*, 42 U.S.C. § 7661c(c).<sup>22</sup> For a requirement to be included, the Permit must specifically, expressly include it (or properly incorporate it by reference).

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

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

If TCEQ instead wishes to establish the monitoring requirements within the underlying PBR registration first and then incorporate those terms into the Permit, TCEQ should ensure that the underlying PBR registration is formally updated, and that those terms are clearly and unambiguously incorporated into the title V permit. To do this, TCEQ could issue a new final

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<sup>22</sup> *See supra* note 17.

<sup>23</sup> *See supra* note 11.

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

approval letter for the PBR registration that includes both the certified emission limits and monitoring requirements. Then, to adequately incorporate these requirements (by reference) into the Permit, TCEQ could continue the practice of only listing the registration number within the Permit's NSR Authorization References tables (and the PBR Supplemental Table). However, as PBR registrations are updated, TCEQ would need to update the registration date listed within PBR Supplemental Table A to ensure that the latest version of the registration is easily identifiable. This approach would not require additional Permit terms (e.g., listing each monitoring requirement), since reference to the registration number points to the specific final approval document that includes the limits (and now monitoring).

EPA acknowledges that there may be other methods to prescribe and incorporate monitoring for PBR registrations into the Permit beyond what is listed above. However, to the extent TCEQ chooses such an alternative method to establish additional monitoring for registered PBRs, it is critical that TCEQ clearly and unambiguously incorporate such monitoring (i.e., the document containing such monitoring) into the title V permit.

### ***Claim B.2: Monitoring of VOC Emissions from Flares***

***Petitioners' Claim:*** The Petitioners claim that the NSR Permit requires that all flares at the facility achieve a 98% VOC destruction efficiency and meet hourly and annual VOC limits. However, the Petitioners assert that the NSR Permit's monitoring requirements fail to assure compliance with these requirements. Petition at 23. The Petitioners contend that the amount of VOC pollution that the flares emit is a function of 1) the volume of gas flared, 2) the VOC content of the gas flared, and 3) the destruction efficiency of the flare. Petition at 23 (citing to *Emissions Estimation Protocol for Petroleum Refineries*, U.S. EPA at 6-1 – 6.2). The Petitioners maintain that the NSR Permit allows a presumption of compliance with the 98% destruction efficiency so long as Premcor complies with minimum heat value requirements found in 40 CFR §§ 60.18 and 63.11. The Petitioners contend that relying on the heat value does not assure compliance with the 98% VOC destruction efficiency. For support, the Petitioners cite to an EPA study that, according to the Petitioners, found that flares complying with requirements equivalent to those in Premcor's NSR Permit only achieved an average destruction efficiency of 93%. *Id.* (citing to Petroleum Refinery Sector Rule: Flare Impact Estimates, EPA-HQ-OAR-2010-0682-0209 at 9 (January 16, 2014)).

The Petitioners acknowledge TCEQ's response which states that 40 CFR § 63.11(b) was the applicable flare monitoring provision at the time the draft permit was approved for public notice. Petition at 29 (citing to TCEQ Response to Comments at 4). TCEQ noted that flare vent gas composition monitoring is required under 40 CFR § 63.670(j) and will be applicable as of January 30, 2019. TCEQ states that "it is appropriate to include 40 CFR § 63.11(b) as an applicable related standard for the flares since compliance with 40 CFR § 63.670 is not required until January 30, 2019." TCEQ advised that it modified the Permit to include 40 CFR Part 63, Subpart CC applicability for all flares authorized by the Permit. Petitioners challenge this response stating that when the flare monitoring provisions become enforceable has no bearing on the issue and that TCEQ does not have the discretion to allow Premcor to continue operating its flares without adequate monitoring until the applicability date of January 30, 2019. Petition at 29. The Petitioners further assert that TCEQ is incorrect that there is no need to revise the Permit

to identify 40 CFR § 63.670 as an applicable requirement until the January 2019 compliance date. The Petitioners contend that “applicable requirements” includes requirements “that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates.” Petition at 30 (citing to 40 C.F.R. § 70.2). Finally, the Petitioners assert that the Permit “improperly omit[s] currently effective fenceline monitoring requirements established by 40 C.F.R. § 63.658” and that this omission is an additional basis for the Administrator to object to the Permit. Petition at 30. This claim was not raised during the public comment period, however, the Petitioners assert they may raise new deficiencies based on TCEQ’s revision of the permit to include 40 CFR Part 63, Subpart CC, *citing Granite City I Order* at 4-5.

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

The Petitioners have asked the EPA to object to the Permit for relying on the 40 CFR §§ 60.18 and 63.11 to ensure compliance with the 98% destruction efficiency requirement. Instead, the Petitioners assert that the Permit should require Premcor to monitor the VOC content of the flared gas and require monitoring to ensure that the flares continuously achieve the presumed destruction efficiency.

As noted by the Petitioners, the EPA has recognized that the requirements contained in part 60 and 63 General Provisions for flares (specifically, 40 C.F.R. §60.18 and 63.11(b)) may not be sufficient to assure a 98 percent VOC destruction efficiency. In order to remedy this, the EPA promulgated regulations for petroleum refineries (regulated under 40 C.F.R. part 64, subpart CC) designed to assure that steam-and air-assisted flares actually achieve a 98 percent VOC destruction efficiency. These regulations require that flares meet a minimum operating limit of 270 BTU/scf on a 15-minute block period basis. 40 C.F.R. § 63.670(e).<sup>25</sup> Importantly, and unlike prior sector-specific rules and the General Provisions, this heating value reflects the net heating value in the combustion zone (NHVcz) (that is, the flare tip), *after* the addition of any assist gas (steam or air) and supplemental fuel. *See id.* § 63.670(m) (calculation methods for NHVcz). This better accounts for any degradation in combustion efficiency that might be caused by dilution of the BTU value by the assist gas. To support this operation limit, the refinery regulations require, for steam- and air-assisted flares, that “the owner of operator shall install, operate, calibrate, and maintain a monitoring system capable of continuously measuring, calculating, and recording the volumetric flow rate of assist air and/or assist steam used with the flare,” or certain alternative options. *Id.* § 63.670(i). The requirements of 40 C.F.R. § 63.670 became applicable to Premcor on January 30, 2019. As such, TCEQ included these requirements directly in the 2021 Revised Permit. *See* 2021 Revised Permit Applicable Summary Table. The 2021 Revised Permit also requires Premcor to comply with fenceline monitoring required 40 CFR § 63.658. *See* 2021 Revised Permit, Condition 19.

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<sup>25</sup> The EPA explained in its final rule: “Based on the results of all of our analyses, the EPA is finalizing a single minimum NHVcz operating limit for flares subject to the Petroleum Refinery MACT standards of 270 BTU/scf during any 15-minute period. The agency believes, given the results from the various data analyses conducted, that this operating limit is appropriate, reasonable and will ensure that refinery flares meet 98-percent destruction efficiency at all times when operated in concert with the other suite of requirements refinery flares need to achieve (*e.g.*, flare tip velocity requirements, visible emissions requirements, and continuously lit pilot flame requirements).” 80 Fed. Reg. 75178, 75211 (December 1, 2015).

The applicability of 40 C.F.R. § 63.670 to the facility and the inclusion of those requirements into the 2021 Revised Permit should remedy the Petitioners' claim. Because Premcor is now required to comply with the additional flare monitoring requirements of subpart CC, even if the Petitioners demonstrated a flaw in the 2017 Permit, the changes the Petitioners sought has already occurred.

### **Claim B.3: Stack Testing Requirements**

***Petitioners' Claim:*** The Petitioners assert that the NSR Permit contains language that allows TCEQ discretion to allow off-permit waivers or exemptions from stack test procedures in the PSD permits. The Petitioners further assert that EPA objected to this permit language in a previous title V Petition on the initial issuance of title V Permit No. O1498.<sup>26</sup> The Petitioners commented on the title V Permit that was the subject of the *Premcor I Order* stating:

The permit empowers [TCEQ] to allow deviations from specified stack sampling procedures and to waive testing for any pollutant. Any off-permit authorizations of deviations or exemptions from the permit requirement would constitute an illegal modification of the PSD permit without required public participation. Further, such conditions would render the permit requirement unenforceable and should be eliminated from the Title V Permit.

*Premcor I Order* at 19

The Petitioners cite to the *Premcor I Order* in which the EPA granted the *Premcor I Order* Petitioners' claim stating that "TCEQ will need to either provide a citation to proper authority for granting the deviation or exemption, or remove or modify the reference to the deviation or exemption as appropriate." Petition at 24 (citing to the *Premcor I Order* at 19). The Petitioners assert that TCEQ has not complied with the EPA's instructions. Instead, "[i]n its response letter to the EPA, the TCEQ explained that Premcor's Major Permit requires Texas to obtain EPA approval before authorizing non-minor deviations from required [NSPS] and claimed that the TCEQ was delegated the authority to waive testing when appropriate by EPA in 1982." Petition at 24 (citing to TCEQ's Response to EPA Order, at 24 (October 21, 2010)). The Petitioners assert that this response did not address the issues raised in the initial petition that off-permit deviations from stack test requirements would constitute an illegal modification of the PSD permit without required public participation and the permit condition undermines the enforceability of permit limits. Petition at 24-25.

The Petitioners characterize TCEQ's response as stating that "exemptions from PSD permit terms do not actually 'modify' an operator's obligations under the permit, so long as the exemption does not amount to a major modification." Petition at 31 (citing to TCEQ Response to

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<sup>26</sup> The Petitioners reference EPA's response which was presented *In the Matter of Premcor Refining Group*, Order on Petition No. VI-2007-02 (May 28, 2009) (*Premcor I Order*). This Order responded to a petition from the following Petitioners: the Environmental Integrity Project, Community In-Power and Development Association, Inc., Public Citizen's Texas Office, and the Refinery Reform Campaign.

Comments at 5). The Petitioners contend that TCEQ is incorrect in its response that TCEQ must obtain EPA approval before making significant changes to stack testing requirements.

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

*Relevant Permit Language*

The holder of this Permit shall perform stack sampling and other testing, as required, to establish the actual pattern and quantities of air contaminants being emitted into the atmosphere from the following sources:

- The FCCU Wet Gas Scrubber Stack (EPN E-01-WGS);
- The TGI Stacks of the SRUs 543, 544, 545, and 546 (EPNs E-01-SCOT, E-02-SCOT, E-03-SCOT, and E-04 SCOT, respectively);
- All boilers, heaters, etc., with firing rates of 40 MMBtu/hr or greater; and
- The Gasoline Hydrotreater (EPN E-01-245); one-time stack test.

The holder of this permit is responsible for providing sampling and testing facilities and conducting the sampling and testing operations at his expense.

Sampling shall be conducted in accordance with the appropriate procedures of the TCEQ Sampling Procedures Manual and the EPA Reference Methods.

Requests to waive testing for any pollutant specified in this condition shall be submitted to the TCEQ Office of Permitting and Registration, Air Permits Division. Test waivers and alternate/equivalent procedure proposals for 40 CFR Part 60 testing which must have EPA approval shall be submitted to the TCEQ Beaumont Regional Director.

- A. The TCEQ Beaumont Regional Office shall be contacted as soon as testing is scheduled, but not less than 45 days prior to sampling to schedule a pretest meeting. The notice shall include:
- (1) Date for pretest meeting.
  - (2) Date sampling will occur.
  - (3) Name of firm conducting sampling.
  - (4) Type of sampling equipment to be used.
  - (5) Method or procedure to be used in sampling.

The purpose of the pretest meeting is to review the necessary sampling and testing procedures, to provide the proper data forms for recording pertinent data, and to review the format procedures for the test reports. The TCEQ Beaumont Regional Director must approve any deviation from specified sampling procedures.

NSR Permit No. 6825A, PSDTX49, and N65, Special Condition 40.

*EPA Analysis*

The EPA notes that the Special Condition with which the Petitioners have raised concern has been modified since the EPA originally evaluated it as part of the *Premcor I Order*. Specifically, the prior language included the sentence, “[a] written proposed description of any deviation from sampling procedures specified in permit conditions or the TCEQ or the EPA sampling procedures shall be made available to the TCEQ prior to the pretest meeting.” Additionally, the prior language allowed TCEQ Compliance Support Services to approve or disapprove of any deviation from specified sampling procedures. *See* TCEQ Response to EPA Order, at 22-24 (October 21, 2010). However, the Permit condition maintains language allowing requests to waive testing to be submitted to TCEQ. The EPA in the *Premcor I Order* stated that TCEQ was required to either provide a citation to proper authority for granting the deviation or exemption, or remove or modify the reference to the deviation or exemption as appropriate. *See Premcor I Order*, at 19.

TCEQ has argued that allowing minor changes from specified stack sampling procedures is not a modification of the PSD Permit and that these changes may be desired for a variety of reasons including physical characteristics of the sampling environment, necessary sampling equipment, or safety of personnel. TCEQ Response to Comments, Response 5. TCEQ states that:

“[t]his is authorized by 30 TAC § 116.115(b)(2)(C), Sampling Requirements and 30 TAC § 116.115(b)(2)(D), Equivalency of Methods, which are incorporated into NSR Permit 6825A/PSDTX49/N65 as General Conditions 5 and 6 respectively. Therefore, NSR Permit 6825A/PSDTX49/N65 authorizes specific TCEQ personnel the ability to approve, with justification, minor changes to specified sampling methodologies preventing unnecessary delays in completing performance testing and improving the reliability of the testing results.”

*Id.*

The CAA requires that the title V permit contain monitoring to assure compliance with permit terms and conditions. *See* 42 U.S.C. § 7661c(c); *See also* 40 CFR 70.6(c)(1). TCEQ has failed to demonstrate how waiving stack testing requirements is consistent with the requirement that there is adequate monitoring for the specified units. Additionally, title V regulations require that title V permits shall specify and reference the origin of and authority for each term or condition. 40 CFR § 70.6(a)(1)(i). TCEQ has provided the regulatory authority that allows minor deviations from the sampling procedures; however, the language within the relevant Permit condition speaks to “requests to *wave* testing for any pollutant” and thus is not limited to allowing minor deviations. (emphasis added) TCEQ has not presented regulatory authority or criteria for when waiving of testing would be allowed. TCEQ also argues that EPA approval is required for changes to NSPS testing requirements which is specified in Special Condition 40; however, EPA approval is not extended to the provision that reads, “[r]equests to waive testing for any pollutant specified in this condition shall be submitted to the TCEQ Office of Permitting and Registration, Air Permits Division.”

***Direction to TCEQ:*** In responding to this Order, TCEQ should provide the regulatory authority that would allow “waivers” of testing requirements and include this within the permit record. If such authority exists, TCEQ should provide an explanation or analysis for how waiving testing

ensures that there is adequate monitoring to assure compliance with permit terms and conditions. Alternatively, TCEQ should remove the language that allows waivers of testing or provide edits to the language to only include references to minor changes from stack sampling procedures that can be pre-approved under 40 CFR part 60.

#### **Claim B.4: Emission Factors**

***Petitioners' Claim:*** The Petitioners note that the NSR Permit requires that Premcor use various emission factors to calculate emissions from various units at the facility to demonstrate compliance with applicable multi-unit emission caps. Petition at 25 (citing to NSR Permit 6825A Special Condition Nos. 52(A), (C), (D), (E), (G), and 57(E)(5)). The Petitioners cite to previous EPA orders to support their contention that EPA's position is that emission factors should not be used to develop source-specific permit limits or to determine compliance with permit requirements. Petition at 25 (*citing In the Matter of Tesoro Refining and Marketing Co, Martinez, California Facility, Order on Petition No. IX-2004-6 at 32 (March 15, 2005) (Tesoro Order); Granite City I Order*). The Petitioners assert that the "Permit's reliance on emission factors fails to assure compliance with applicable requirements in [the NSR Permit] because: (1) the [NSR] Permit fails to specify the relevant emission factors; and (2) the permit record does not demonstrate that the relevant emission factors are indicative of emissions at the [facility]." Petition at 25. The Petitioners further assert that "[the NSR Permit] is deficient because it only requires [Premcor] to determine compliance with short-term limits (lbs/hr) if a demonstration is required by the TCEQ." *Id.*

The Petitioners identified three ways that emission factors have been incorporated by reference with which they have concerns. The first of these is NSR Permit Special Conditions 52(A), (C), and (E), which directs Premcor to use various guidance documents to calculate emissions. The Petitioners assert that neither the "Permit nor the Statement of Basis identify the calculation methods contained in these guidance documents or explain why these methods are reliable indicators of actual emission from the Port Arthur Refinery." Petition at 25-26.<sup>27</sup>

The second method of incorporation is found in NSR Permit Special Conditions 52(D) and (G), which directs Premcor to use "unspecified" emission factors from permit applications or other permit activity to calculate emissions from heaters, boilers, and tail gas incinerators not equipped with Continuous Emission Monitoring Systems. The Petitioners contend that this "double incorporation by reference" where the Permit incorporates the PSD Permit which in turn incorporates emission factors from other documents by reference places an unreasonable burden on members of the public and regulators attempting to evaluate the sufficiency of the title V permit or to determine whether Premcor is complying with applicable requirements. The Petitioners find NSR Permit Special Condition 52(D) particularly objectionable because it directs Premcor to calculate emissions using "the emission factors represented in the most recent permit

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<sup>27</sup> Further, the Petitioners claim that they were unable to locate the guidance documents on the TCEQ website. The Petitioners note TCEQ's response that the guidance documents may not be on the TCEQ website but are available by request. The Petitioners maintain that the location of the documents should be included in the Statement of Basis to ensure affected members of the public will know how to find the relevant materials. Additionally, the Petitioners assert that this response fails to explain how the guidance calculations assure compliance with the emission limits.



activity for each source and the recorded firing rate for the period.” Petition at 27. This is in contrast with NSR Permit Special Condition 52(G) which identifies a specific permit application that contains the relevant emission factor. The Petitioners assert that NSR Permit Special Condition 52(D) “allows [Premcor] to change the applicable compliance method by submitting an application for a permit alteration or PBR without any public review and without any assurance that the represented emission factor accurately reflects actual emissions and operating conditions at the [facility].” Petition at 27. The Petitioners explain that if using emission factors, the Permit must at least identify the relevant emission factors and the permit record must demonstrate those emission factors accurately determine actual emissions from the permitted units. *Id.*

Lastly, the Petitioners claim that NSR Permit Special Condition 57 fails to identify relevant calculation methods to demonstrate compliance with emission limits for flares and instead incorporates “methods” in various permit applications Premcor has submitted. Petition at 27. The Petitioners assert that the Permit is deficient because it fails to identify the relevant calculations methods and because the permit record fails to demonstrate that these methods accurately reflect actual emissions from units at the facility.

The Petitioners state that TCEQ’s response that emission limits in the permit were calculated by multiplying an emission factor times a measure of activity does not rebut the Petitioner’s demonstration that the Permit is deficient because it fails to specify which documents contain the relevant emission factors. Petition at 35. The Petitioners assert that the “vague references to ‘emission factors represented’ in recent ‘permit activity’ is not sufficient to identify the applicable factors in a way that is reasonably easy to understand and not subject to misinterpretation.” Petition at 36. Further, the Petitioners assert that TCEQ failed to explain how the guidance calculation methodologies and emission factors assure compliance with the emission limits. The Petitioners refute TCEQ’s response that using the same emission factors that established the limit to demonstrate compliance accurately determines actual emissions from equipment at the facility. *Id.* As support for their position, the Petitioners cite to the *Tesoro Order* which states, “EPA does not recommend the use of emission factors to develop source-specific permit limits or to determine compliance with permit requirements.” Petition at 36 (citing *Tesoro Order*, at 32). The Petitioners assert that TCEQ “was required to ‘justify in the record why these emission factors’ are representative of [Premcor’s] operations ‘and provide sufficient evidence to demonstrate that the emission will not vary by a degree that would cause an exceedance of the standards.’” Petition at 36 (citing *Granite City I Order*, at 14).

The Petitioners summarize TCEQ’s response regarding short term emission limits as the “Permit needn’t require [Premcor] to determine and demonstrate compliance with short term emission limits, because short term limits reflect ‘reasonable worst case’ operating scenarios...”. The Petitioners respond stating that the short-term emission limits establish requirements necessary to assure compliance with BACT and it is not enough to require that Premcor maintain records that might support a determination of compliance; instead the Permit must require Premcor to use these records to determine compliance with short-term limits and to report noncompliance with the limits when discovered. Petition at 33-34.

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

Section 504(c) of the CAA requires all title V permits to contain monitoring requirements to assure compliance with permit terms and conditions. 42 U.S.C. § 7661c(c). EPA's Part 70 monitoring rules (40 C.F.R. § 70.6(a)(3)(i)(A) and (B) and 70.6(c)(1)) must be interpreted to carry out section 504(c) of the Act's directive. *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008). In order to satisfy the monitoring requirements in EPA's Part 70 regulations, permitting authorities must ensure that monitoring requirements contained in applicable requirements are properly incorporated in the title V permit. 40 C.F.R. § 70.6(a)(3)(i)(A). Additionally, the rationale for monitoring requirements selected by a permitting authority must be clear and documented in the permit record. *See* 40 C.F.R. § 70.7(a)(5); *CITGO Order* at 7. Furthermore, permitting authorities do not have the discretion to issue a permit without specifying the monitoring methodology needed to assure compliance with applicable requirements in the title V permit. *In the Matter of Wheelabrator Baltimore, L.P., Permit No. 24-510-01886* (Order on Petition) at 10 (April 14, 2010).

The EPA has spoken to properly incorporating monitoring requirements into the title V permit in previous orders. The *Granite City I Order* articulates the EPA's position on incorporation by reference.

EPA has discussed incorporation by reference in several guidance documents and title V orders. *See e.g., White Paper 2; [Tesoro Order]*, at 9; *[Premcor I Order]*, at 29. Incorporation by reference may be appropriate where the cited requirement is part of the public docket or is otherwise readily available, clear and unambiguous, and currently applicable. *Tesoro* at 9. As EPA explained in *White Paper 2*, it is important to exercise care to balance the use of incorporation by reference with the need to issue permits that are clear and meaningful to all affected parties, including those who must comply with or enforce their conditions. *White Paper 2*, at 34-38. *See also Tesoro* at 8. In order for IBR to be used in a way that fosters public participation and results in a title V permit that assures compliance with the Act, it is important that (1) referenced documents be specifically identified; (2) descriptive information such as the title or number of the document and the date of the document be included so that there is no ambiguity as to which version of the document is being referenced; and (3) citations, cross references, and incorporations by reference are detailed enough that the manner in which any referenced material applies to a facility is clear and not reasonably subject to misinterpretation. *See White Paper 2* at 37.

*Granite City I Order* at 43

The Petitioners present three claims associated with the permit requirements to use emission factors. These claims are that the Permit fails to specify the relevant emission factors, the permit record does not demonstrate that the relevant emission factors are indicative of emissions at the facility, and that the Permit only requires Premcor to determine compliance with short-term limits if a demonstration is required by the TCEQ. The Petitioners have identified three types of documents that TCEQ used to incorporate emission factors into the Permit.

To begin, the NSR Permit requires Premcor to calculate emissions in accordance with three specific TCEQ guidance documents.<sup>28</sup> *See* NSR Permit Special Conditions 52(A), (C), and (E). The NSR Permit specifically identifies these guidance documents and provides descriptive information including the title and date of publication. However, the NSR Permit does not provide sufficient detail to determine which sections of the guidance document apply to the facility. *See White Paper 2*, at 37 (stating that where only a portion of the referenced document applies, applications and permits must specify the relevant section of the document). For instance, in the “Technical Guidance Package for Chemical Sources – Equipment Leak Fugitives” the fugitive emission factor (FEF) is defined as an average leak factor determined from data collected during industry case studies. The guidance then provides criteria for choosing the correct FEF, but the PSD Permit does not specify how this applies to Premcor.

The next document relied upon in the NSR Permit to identify the emission factors are permit documents. *See* NSR Permit Special Conditions 52(D) and (G). Special Condition 52(D) requires Premcor to use emission factors represented in the most recent permit activity. It does not specifically identify the permit document or the version date. In contrast, NSR Permit Special Condition 52(G) does identify the permit application including its date. As the EPA noted in its direction to TCEQ in response to Claim B.1., permit applications can be hundreds of pages long. Therefore, a general statement incorporating the permit application without more details of the location of the emission factor may not be specific enough to satisfy the requirements in title V for the permit to “set forth,” “include,” or “contain” monitoring to assure compliance with all applicable requirements.

Because each of the incorporation methods fails to provide enough detailed information specifying the emission factor that Premcor is to use to demonstrate compliance, the EPA is granting the claim that the Permit fails to specify the relevant emission factors.

The next portion of the Petitioners claim is that TCEQ did not demonstrate that the relevant emission factors are indicative of emissions at the facility. In response TCEQ noted that the emission limits in the permit were calculated by multiplying an emission factor times a measure of activity and that these same emission factors are being used to determine compliance. For combustions sources such as heaters, boilers, and tail gas incinerators, TCEQ notes that the measure of activity is the quantity of fuel burned. TCEQ Response to Comments at 26. TCEQ also notes that the sources for which using emission factors applies are those with “relatively lower emission rates and small contributions to the emission caps.” *Id.* The Petitioners assert that “because the same emission factors were used to establish the emission limits does not demonstrate that the relevant emission factors accurately determine actual emissions from equipment at the [facility] across the full range of activity authorized by the Major Permit.” Petition at 36. However, the Petitioners have provided no further evidence or analysis to support

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<sup>28</sup> These TCEQ publications are titled, “Technical Guidance Package for Chemical Sources – Equipment Leak Fugitives,” dated October 2000 (updated to June 2018 in the 2021 Revised Permit); “Technical Guidance Package for Chemical Sources – Storage Tanks,” dated February 2001; and “Technical Guidance Package for Chemical Sources – Loading Operations,” dated October 2000.

their assertion nor identified the specific equipment with which they are concerned. EPA is therefore denying this portion of the claim.<sup>29</sup>

The final part of this claim is that the Permit is deficient since it only requires Premcor to determine compliance with short-term limits if a demonstration is required by the TCEQ. In response, TCEQ stated that “[s]hort term emissions are set based on the maximum potential emission that could occur under a reasonable worst case... Annual limits are based on the average emissions expected to occur over the course of a year ... For this reason, annual limits are subject to more stringent requirements, such as periodic calculations for demonstrating compliance, than short term limits.” TCEQ Response to Comments at 26. TCEQ further states that the NSR Permit requires that Premcor maintain all records necessary to demonstrate compliance with short term emission limits, and that recordkeeping is an EPA-approved means of demonstrating compliance. *Id.*

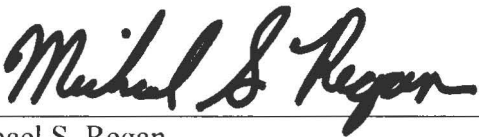
All title V permits must contain sufficient monitoring, including periodic monitoring, to assure compliance with the applicable requirements in the permit. The title V regulations state that recordkeeping provisions may, in some circumstances, be sufficient to satisfy title V monitoring requirements. *See* 40 C.F.R. § 70.6(a)(3)(i)(B). The Petitioners have provided a general assertion that the Permit must require Premcor to assess and demonstrate compliance with short-term limits but has not provided any analysis for why recordkeeping is not sufficient. Additionally, the Petitioners have not evaluated any specific emission units or pollutants to determine if the monitoring is sufficient. Therefore, the EPA has determined that the Petitioners failed to meet their burden on this portion of the claim.<sup>30</sup>

***Direction to TCEQ:*** In responding to this Order, TCEQ should update the Permit to more clearly identify the location of the emission factors upon which the Permit relies. Similar to the discussion in response to Claim B.1 above, in order to satisfy the requirement in title V that the Permit “set forth,” “include,” or “contain” monitoring to assure compliance with all applicable requirements, a special condition would need to include, at a minimum, the date of the application and specific location of the incorporated information, for example, by providing a page number from the application. Alternatively, a more straightforward approach that would obviate these IBR-related concerns would be for TCEQ to directly include the emission factors being used to demonstrate compliance within these Special Conditions.

## V. CONCLUSION

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

Dated: NOV 30 2021

  
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Michael S. Regan  
Administrator

<sup>29</sup> *See supra* note 7 and accompanying text.

<sup>30</sup> *See supra* note 7 and accompanying text.