BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION NO. VI-2021-3
	)	
GULF COAST GROWTH VENTURES, LLC	)	ORDER RESPONDING TO
OLEFINS, DERIVATIVE, AND UTILITIES PLANT	)	PETITION REQUESTING
SAN PATRICIO COUNTY, TEXAS	)	OBJECTION TO THE ISSUANCE OF
PERMIT NO. O4169	)	TITLE V OPERATING PERMIT
	)	
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 24, 2021 (the Petition) from Coastal Alliance to Protect our Environment, Texas Campaign for the Environment, Sierra Club, and Environmental Integrity Project (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to the issuance of operating permit No. O4169 (the Permit) by the Texas Commission on Environmental Quality (TCEQ) to the Gulf Coast Growth Ventures, LLC Olefins, Derivative, and Utilities plant (GCGV or the facility) in San Patricio 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 in Section IV of this Order, the EPA grants in part and denies in part the Petition requesting that the EPA Administrator object to the Permit. Specifically, the EPA grants Section IV.C of the Petition (Claim 2) and denies Section IV.B of the Petition (Claim 1).

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(l) of the CAA, 42 U.S.C. § 766la(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. The state of Texas submitted a title V program governing the issuance of operating permits on September 17, 1993. The EPA granted

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

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

B. Review of Issues in a Petition

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

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

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such

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

objections within such period or unless the grounds for such objection arose after such period). 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); *see also* 40 C.F.R. § 70.12(a)(2)(v).

In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).[2] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[3] The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).[4] When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g.*, *MacClarence*, 596 F.3d at 1130–31.[5] Certain aspects of the petitioner's demonstration burden are discussed in the following paragraph. A more detailed discussion can be found in the preamble to the EPA's proposed petitions rule. *See* 81 Fed. Reg. 57822, 57829–31 (August 24, 2016); *see also In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether a petitioner has provided the relevant analyses and citations to support its claims. For each claim, the petitioner must identify (1) the specific grounds for an objection, citing to a specific permit term or condition where applicable; (2) the applicable requirement as defined in 40 C.F.R. § 70.2, or requirement under part 70, that is not met; and (3) an explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under part 70. 40 C.F.R. § 70.12(a)(2)(i)–(iii). If a petitioner does not identify these elements, the EPA is left to work out the basis for the petitioner's objection, contrary to Congress's express allocation of the

[2] *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (*NYPIRG*).
[3] *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *cf. NYPIRG*, 321 F.3d at 333 n.11.
[4] *See also Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' . . . plainly mandates an objection *whenever* a petitioner demonstrates noncompliance." (emphasis added)).
[5] *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.").[6] Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard. *See, e.g.*, *In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013).[7] Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g.*, *In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).[8]

Another factor the EPA examines is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. Petitioners are required to address the permitting authority's final decision and final reasoning (including the state's response to comments) where these documents were available during the timeframe for filing the petition. 40 C.F.R. § 70.12(a)(2)(vi); *see MacClarence*, 596 F.3d at 1132–33.[9] Specifically, the petition must identify where the permitting authority responded to the public comment and explain how the permitting authority's response is inadequate to address (or does not address) the issue raised in the public comment. *Id*.

The information that the EPA considers in 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

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

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

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

[9] *See also, e.g.*, *Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. App'x *11, *15 (2d Cir. 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (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).

decision and that the permitting authority made available to the public according to § 70.7(h)(2). *Id.* If a final permit and a statement of basis for the final permit are available during the agency's review of a petition on a proposed permit, those documents may also be considered when making a determination whether to grant or deny the petition. *Id.*

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

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

Where the EPA has approved a state's title I permitting program (whether PSD, NNSR, or minor NSR), duly issued preconstruction permits will establish the NSR-related "applicable requirements," and the terms and conditions of those permits should be incorporated into a source's title V permit without a further round of substantive review as part of the title V process. *See generally In the Matter of Big River Steel, LLC*, Order On Petition No. VI-2013-10 at 8–20 (October 31, 2017) (*Big River Steel Order*); 56 Fed. Reg. 21712, 21738–39 (May 10, 1991).[10] The legality of a permitting authority's decisions undertaken in the course of preconstruction permitting is not a subject the EPA will consider in a petition to object to a source's title V permit. *See Big River Steel Order* at 8–9, 14–20.[11] Rather, any such challenges should be raised through the appropriate title I permitting procedures or enforcement authorities.

[10] However, as the EPA noted in the *Big River Steel Order*, there may be circumstances that "warrant a different approach." *Big River Steel Order* at 11 n.20.

[11] The EPA does view monitoring, recordkeeping, and reporting to be part of the title V permitting process and will therefore continue to review whether a title V permit contains monitoring, recordkeeping, and reporting provisions sufficient to assure compliance with the terms and conditions established in the preconstruction permit. *See, e.g.*, *In the Matter of South Louisiana Methanol, LP*, Order on Petition Nos. VI-2016-24 and VI-2017-14 at 10–11 (May 29, 2018) (*South Louisiana Methanol Order*); *Big River Steel Order* at 17, 17 n.30, 19 n.32, 20. Moreover, as the EPA has explained, "[A] decision by the EPA not to object to a title V permit that includes the terms and conditions of a title I permit does not indicate that the EPA has concluded that those terms and conditions comply with the applicable SIP or the CAA. However, until the terms and conditions of the title I permit are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through some other mechanism, such as a state court appeal, the 'applicable requirement' remains the terms and conditions of the issued preconstruction permit and they should be included in the source's title V permit." *Big River Steel Order* at 19.

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 GCGV Facility

Gulf Coast Growth Ventures, LLC owns and operates a plastics (olefins and derivatives) manufacturing complex near Gregory in San Patricio County, Texas. The facility includes process units that produce olefins, polyethylene, and monoethylene glycol, as well as utilities and wastewater treatment operations. The facility is a major stationary source of multiple air pollutants and is subject to various CAA requirements, including title V, PSD, other preconstruction permitting requirements, and various New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants.

The EPA conducted an analysis using EPA's EJScreen[12] to assess key demographic and environmental indicators within a five-kilometer radius of the GCGV facility. This analysis showed a total population of approximately 9760 residents within a five-kilometer radius of the facility, of which approximately 58 percent are people of color and 29 percent are low income. In addition, the EPA reviewed the EJScreen Environmental Justice Indices, which combine certain demographic indicators with 12 environmental indicators. One of the 12 Environmental Justice Indices in this five-kilometer area exceed the 70th percentile in the State of Texas.

B. Permitting History

On August 21, 2019, GCGV submitted an application for an initial title V permit. Notice of TCEQ's decision to issue a draft permit was published March 15, 2020, and March 19, 2020, followed by a public comment period that ran until April 20, 2020. On November 3, 2020, TCEQ submitted a proposed permit (the Proposed Permit), along with its response to public comments (RTC), to the EPA for its 45-day review. The EPA's 45-day review period ended on December 18, 2020, during which time the EPA did not object to the Proposed Permit. TCEQ issued the final title V permit for the GCGV facility on December 30, 2020. Since the submittal of the Petition, the title V permit has been revised; the current version of the title V permit was issued on June 17, 2021.

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

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

on December 18, 2020. The EPA's website indicated that any petition seeking the EPA's objection to the Proposed Permit was due on or before February 17, 2020.

The Petitioners assert that they "were unable to meet this petition deadline due [to] unforeseeable emergency conditions caused by Winter Storm Uri," which caused a power outage that "made it impossible for Petitioners' attorney to access files related to this project, including the draft petition." Petition at 3. In light of the emergency circumstances, the Petitioners request that the EPA accept the Petition, filed on February 24, 2020, as timely filed. *Id*. at 4.[13] The Petitioners observe that TCEQ allowed members of the public to request extensions of public participation deadlines due to Winter Storm Uri. *Id*.

The EPA acknowledges that a storm known as Winter Storm Uri caused widespread, unanticipated impacts throughout Texas, and resulted in Texas Governor Abbott declaring a state of disaster on February 12, 2020, followed by President Biden declaring an emergency in the state of Texas on February 14, 2020. In the days that followed, the majority of the people of Texas lost power. The most disruptive impacts appear to have occurred in the days immediately surrounding the stated February 17, 2020, petition deadline.[14] Given these extraordinary circumstances, and representations by the Petitioners' counsel that these circumstances beyond his control prevented the timely filing of the Petition, the EPA will treat the Petition as if it had been timely filed.[15]

[13] As an alternative, the Petitioners request that the EPA treat the Petition as a petition to reopen the Permit.

[14] *See, e.g.*, National Weather Service, Valentine's Week Winter Outbreak 2021: Snow, Ice, & Record Cold, *https://www.weather.gov/hgx/2021ValentineStorm* (last accessed March 23, 2022).

[15] The U.S. District Court for the District of Columbia has found that the 60-day petition submittal deadline in CAA § 505(b)(2) is subject to equitable tolling in certain exceptional circumstances. *See Sierra Club v. Whitman*, No. 01-01991 (ESH), slip op. at 6–8, 18 (D.D.C. Jan. 30, 2002) (examining the face of of the statute and finding that "the plain language of § 7661d(b)(2) permits an exception for equitable tolling"). Equitable tolling, which is an extraordinary remedy, is "appropriate only in rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Jackson v. Modly*, 949 F.3d 763, 778 (D.C. Cir.), *cert. denied sub nom. Jackson v. Braithwaite*, 141 S. Ct. 875, 208 L. Ed. 2d 438 (2020) (citations and internal quotation marks omitted). Courts have found that natural disasters or "Acts of God" can constitute extraordinary circumstances that give rise to equitable tolling. *See Carlisle v. United States*, 517 U.S. 416, 436 (1996) (Ginsburg, J. concurring) (suggesting that equitable tolling doctrine may apply in the event of an "Act of God" to excuse the untimely filing of a meritorious motion); *see also Jefferson v. Haza Foods*, No. 3:17-CV-00359, 2018 WL 5268756, at *5 (S.D. Tex. Oct. 5, 2018), *report and recommendation adopted*, No. 3:17-CV-00359, 2018 WL 5264243 (S.D. Tex. Oct. 23, 2018) ("[T]he instant circumstances certainly merit application of the equitable tolling doctrine . . . if Hurricane Harvey and Jefferson's resulting displacement do not constitute extraordinary circumstances, then nothing does."); *Windland v. Dretke*, No. 3-05-CV-2438-K, 2006 WL 1391435, at *2 (N.D. Tex. May 18, 2006), *rev'd sub nom. on other grounds Windland v. Quarterman*, 578 F.3d 314 (5th Cir. 2009) ("The court agrees that equitable tolling may be warranted where a hurricane or other natural disaster prevents the timely filing of a federal habeas petition."). Alternatively, the EPA has the authority to reopen title V permits for cause in certain circumstances pursuant to CAA § 505(e) and 40 C.F.R. §70.7(f) and (g). To the extent the EPA lacks authority to object to the Permit due to the timeliness issue, the EPA directs TCEQ to reopen the permit for cause for reasons discussed with respect to Claim 2.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Section IV of the Petition is labeled "Grounds for Objection." Within Section IV, the Petitioners include three separate subsections, labeled IV.A, IV.B, and IV.C.

Section IV.A does not include any specific "grounds for objection" relating to the terms of the Permit issued to GCGV. 40 C.F.R. § 70.12(a)(2)(i); *see* Petition at 6–10.[16] Instead, this section of the Petition requests that the EPA expressly abandon the agency's interpretation concerning the relationship between title V permits and NSR permits, as first described in the EPA's *PacifiCorp Hunter I*,[17] *Big River Steel*, and *ExxonMobil Baytown Olefins Orders*.[18] Petition at 6, 9. The Petitioners suggest the EPA's disavowal is necessary, in part, to correct TCEQ's misapplication of the EPA's interpretation and "to discourage Texas's abuses of its NSR permitting authority." *Id*. at 9.

Section IV.B of the Petition contains the first specific basis for objection (the first claim) and Section IV.C. of the Petition contains the second specific basis for objection (the second claim). Accordingly, for ease of reference, this Order addresses Petition Section IV.B as "Claim 1" and Section IV.C as "Claim 2."

Claim 1: The Petitioners Claim That "The Proposed Permit is Deficient Because it was Issued Before GCGV Complied with Applicable Public Participation Requirements."

Petitioners' Claim: The Petitioners claim that the Permit was issued before satisfying all applicable public participation requirements related to public notice.

The Petitioners cite 30 TAC § 122.201(a)(3), which provides that a title V permit may only be issued if "the requirements . . . for public notice, affected state review, notice and comment hearing, and EPA review have been satisfied." The Petitioners also cite 30 TAC § 122.320(b)(6), which provides that a permit applicant must publish a public notice that identifies the location and availability of the complete permit application, the draft permit, the statement of basis, and all other relevant supporting materials in the public files of the agency. Additionally, the Petitioners cite 30 TAC § 122.320(g), which provides that TCEQ "shall make available for public inspection the draft permit and the complete application throughout the comment period during business hours at the commission's central office and at the commission's regional office where the site is located." The Petitioners assert that TCEQ's issuance of the Permit did not satisfy these regulatory requirements. Petition at 10.

According to the Petitioners, the public notice published on March 19, 2020, identified three locations where the permit materials would be available for viewing: TCEQ's main office in Austin, Texas; TCEQ's Corpus Christi Regional Office, and the Bell/Whittington Public Library.

[16] To the extent the general concerns and requests within Petition Section IV.A could be considered grounds for EPA's objection to the Permit, it would be in relation to the claim asserted in Petition Section IV.C (Claim 2), which is separately addressed in this Order.
[17] *In the Matter of PacifiCorp Energy, Hunter Power Plant*, Order on Petition No. VIII-2016-4 (October 16, 2017).
[18] *In the Matter of ExxonMobil Corp., Baytown Olefins Plant*, Order on Petition No. VI-2016-12 (March 1, 2018).

Id. at 10–11. The Petitioners assert that, due to the COVID-19 outbreak, the two identified TCEQ offices were closed since March 23, 2020, and the Bell/Whittington Library was closed since March 18, 2020. *Id*. at 11.

The Petitioners claim that, because all three physical locations identified in the public notice were "closed for the entirety of the public comment period," the public notice statement that the relevant permit documents "will be available for viewing and copying at" the three locations "beginning the first day of publication of this notice" was "not true." *Id*. at 13 (quoting Notice of Draft Federal Operating Permit No. O4169 (Petition Ex. A, Att. B) (Public Notice)). The Petitioners therefore conclude that the public notice failed to satisfy the requirement in 30 TAC § 122.320(b)(6) that public notices provide accurate information about where to obtain the permit application and other relevant information. *Id*. at 13. The Petitioners also assert that the EPA must object "because the complete application file was not available for public inspection throughout the comment period." *Id*. at 10. Additionally, the Petitioners claim that "the published notice did not provide identify [sic] viable alternative methods to view and copy project materials." *Id*. at 11.

The Petitioners address TCEQ's RTC and claim that the posting of permit documents in online locations "did not cure the violation of black letter requirements established by its public notice rule." *Id*. at 13. The Petitioners ultimately fault TCEQ for not requiring GCGV to republish a new public notice with updated information about how to obtain application files, citing other instances where TCEQ did provide a new public notice. *Id*. at 13.

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

The CAA requires that state programs include "[a]dequate, streamlined, and reasonable procedures . . . for public notice, including offering an opportunity for public comment and a hearing . . . ." 42 U.S.C. § 7661a(b)(6). The EPA's implementing regulations state that a title V permit may be issued only if relevant public participation requirements have been satisfied. 40 C.F.R. § 70.7(a)(1)(ii). Regarding public notice, the EPA's regulations require, in relevant part, that public notice include "the name, address, and telephone number of a person (or an email or website address) from whom interested persons may obtain additional information, including copies of the permit draft" and other relevant permit documents. *Id*. § 70.7(h)(2).

The Petitioners do not allege that TCEQ's issuance of the Permit failed to satisfy these federal statutory or regulatory requirements. Instead, the Petitioners allege that issuance of the Permit failed to satisfy the regulations in TCEQ's EPA-approved part 70 program. Petition at 10.

TCEQ's regulations—like the EPA's—state that a title V permit may be issued only if relevant public participation procedures have been met. 30 TAC § 122.201(a)(3). With respect to public notice, TCEQ's regulations are generally more detailed than the EPA's. First, 30 TAC § 122.320(b)(6) requires that the public notice identify "the location and availability of the following: (A) the complete permit application; (B) the draft permit; (C) the statement of basis; and (D) all other relevant supporting materials in the public files of the agency." Second, 30 TAC § 122.320(g) requires that TCEQ "make available for public inspection the draft permit and

the complete application throughout the comment period during business hours at the commission's central office and at the commission's regional office where the site is located."[19]

Here, the public notice, which the Petitioners allege was deficient, stated:

> The permit application, statement of basis, and draft permit will be available for viewing and copying at the TCEQ Central Office, 12100 Park 35 Circle, Building E, First Floor, Austin, Texas 78753; the TCEQ Corpus Christi Regional Office, NRC Bldg Ste 1200, 6300 Ocean Dr, Unit 5839, Corpus Christi, Texas 78412-5839; and the Bell Whittington Public Library, 2400 Memorial Pkwy, Portland, Texas 78374-3208, beginning the first day of publication of this notice. The draft permit and statement of basis are available at the TCEQ Website: *www.tceq.texas.gov/goto/tvnotice*
>
> At the TCEQ central and regional offices, relevant supporting materials for the draft permit, as well as the New Source Review permits which have been incorporated by reference, may be reviewed and copied. Any person with difficulties obtaining these materials due to travel constraints may contact the TCEQ central office file room at (512) 239-2900.
>
> ***
>
> For additional information about this permit application or the permitting process, please contact the Texas Commission on Environmental Quality, Public Education Program, MC-108, P.O. Box 13087, Austin, Texas 78711-3087 or toll free at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040.
>
> Further information may also be obtained for Gulf Coast Growth Ventures LLC by calling Mr. Kashif Malik at (832) 624-6392.

Public Notice, Petition Ex. A, Att. B.

With respect to the facility closures necessitated by the COVID-19 pandemic, TCEQ explains:

> The ED notes that Texas Governor Abbott declared a State of Disaster in Texas due to COVID-19 on March 13, 2020 (see https://gov.texas.gov/news/post/governor-abbottdeclares-state-of-disaster-in-texas-due-to-covid-19). In response to the Governor's declaration, many public places including government entities, schools and libraries were closed effective the same day.
>
> Although the timing of the public notice requirements for the Draft Permit coincided with the declaration of the COVID-19 pandemic emergency, applicant and TCEQ made sure that all public notice related information including the

[19] Additionally, 30 TAC § 122.320(b) requires that TCEQ direct "the applicant to make a copy of the application, draft permit, and statement of basis available for review and copying at a public place in the county in which the site is located or proposed to be located." The Petitioners do not cite this provision or assert that it was not satisfied.

> complete application, Draft Permit and statement of basis (SOB) was available to the public online for the duration of the comment period.
>
> Public participation requirements and all requirements under 30 TAC 122.320 were met by the following actions taken by the applicant and TCEQ. The public comment period began on March 15, 2020 with the publication of the public notice in the Tejano y Grupero News followed by the publication in English on March 19, 2020; however, by March 13, 2020, the applicant had already posted the notice signs at the GCGV site and provided the Bell/Whittington Library with both hard copies and electronic versions of the complete application, draft permit, and statement of basis. Applicant recognized that after the public comment period began, the City of Portland Mayor issued a Declaration of Local Disaster and Public Health Emergency and gave the City Manager the authority to close the Bell/Whittington Public Library to help prevent the spread and impact of COVID-19 in Portland, Texas. The Bell/Whittington Public Library was the public place to view the Title V application and was listed on the newspaper notice.
>
> Applicant made a copy of the application, Draft Permit, and SOB available for review and copying at a public place in the county, and the applicant also worked with the Bell/Whittington Public Library Director on March 20, 2020 to post a sign at the library entrance, and the library website at *https://www.portlandtx.com/181/Library* was updated to include information for the public to have access to view the complete application, SOB, and the Draft Permit electronically or by contacting the applicant's representative by phone or email.

RTC at Response 1. TCEQ's RTC also identifies various other TCEQ-hosted locations where permit record documents were made available online. *Id*.

The Petitioners assert that these measures were insufficient, and that the public notice violated the "black letter requirements" of TCEQ's public notice regulations. Petition at 13. The Petitioners focus primarily on 30 TAC § 122.320(b)(6). *See id*. As previously explained, 30 TAC 122.320(b)(6) requires that each public notice identify "the location and availability" of all relevant documents. The March 15, 2020, and March 19, 2020 notices identified three physical locations at which documents could initially be obtained. One of the three locations closed between publication of the March 15, 2020, and March 19, 2020 notices, and the remaining two

locations closed roughly a week later.[20] At issue is whether outdated information in the March 19, 2020 public notice, combined with the additional facility closures that closely followed publication of notice, resulted in noncompliance with the requirements of 30 TAC § 122.320. Put another way, the question is: Was GCGV required to republish an updated notice after the exigencies of the COVID-19 pandemic resulted in changes to the locations where the public could access the relevant permit documents?

When the three physical locations closed, each location apparently provided information instructing the public about where and how to access the relevant documents that could no longer be accessed in person.[21] The EPA appreciates that this redirection may have made public access somewhat more complicated. However, any interested party seeking documents from one of the listed locations—whether in person, by phone, or over the internet—would have been directed to another means of accessing the documents. The Petitioners have not addressed these measures or explained why they were not sufficient.

Moreover, the initial public notices identified additional internet locations and phone contacts through which the relevant documents could be located in the event that travel to the physical locations was constrained:

> The draft permit and statement of basis are available at the TCEQ Website: www.tceq.texas.gov/goto/tvnotice[.] . . . Any person with difficulties obtaining [relevant supporting materials for the draft permit] due to travel constraints may contact the TCEQ central office file room at (512) 239-2900. . . . For additional information about this permit application or the permitting process, please contact the Texas Commission on Environmental Quality, Public Education Program . . . toll free at 1-800-687-4040. . . . Further information may also be obtained for Gulf Coast Growth Ventures LLC by calling Mr. Kashif Malik at (832) 624-6392.").

[20] The EPA observes that some of the Petitioners' factual allegations are not entirely correct. TCEQ explains that the first public notice (in Spanish) was published on March 15, 2020, and a second notice (in English) was published on March 19, 2020. RTC at Response 1. According to the Petitioners, the Bell/Whittington Public Library closed on March 18, 2020, and the two TCEQ offices closed on March 23, 2020. The Petitioners are therefore incorrect to assert that the three relevant physical locations "were all closed for the entirety of the public comment period." Petition at 13. Rather, the three relevant locations were all closed for the majority of the public comment period. Additionally, the Petitioners' assertion that the public notice erred in stating that the relevant documents would be available at the three relevant locations "beginning the first day of publication of" the notice(s) is only accurate with respect to the March 19, 2020 notice as it related to the Bell/Whittington Public Library. The relevant documents were available at all three locations as of publication of the March 15, 2020 notice, and at two of the three locations as of publication of the March 19, 2020 notice.

[21] *See* RTC at Response 1.

Public Notice, Petition Ex. A, Att. B.[22] The Petitioners largely ignore this additional language in the public notice[23] and accordingly have not demonstrated that these measures were collectively insufficient to satisfy the "location and availability" requirements of 30 TAC 122.320(b)(6).

The Petitioners also briefly cite 30 TAC 122.320(g), which requires that TCEQ "make available for public inspection the draft permit and the complete application throughout the comment period during business hours at the commission's central office and at the commission's regional office where the site is located." Apparently referring to this requirement, the Petitioners allege that "the complete application file was not available for public inspection throughout the comment period." Petition at 10. This allegation is directly at odds with TCEQ's statement that the "applicant and TCEQ made sure that all public notice related information including the complete application, Draft Permit and [SOB] was available to the public online for the duration of the comment period." RTC at Response 1. The Petitioners do not directly rebut TCEQ's statement, nor do the Petitioners offer any other support for their allegation. And, again, the Petitioners largely ignore the alternative means of accessing the documents, including the internet and telephone mechanisms listed in the public notice as well as the follow-up postings at the physical and electronic locations referenced in the public notice. Accordingly, the Petitioners have failed to demonstrate that TCEQ did not satisfy 30 TAC 122.320(g).

The EPA acknowledges that TCEQ and GCGV might have done more to improve public access, such as providing an updated public notice directing the public to the most up-to-date means of obtaining relevant documents (as TCEQ later did for other facilities), had they anticipated the duration of the restrictions due to COVID-19. However, the Petitioners have not demonstrated that TCEQ was prohibited from issuing the Permit without taking this additional step. That is, the Petitioners have not demonstrated that the public notice(s) failed to satisfy the requirements of 30 TAC 122.320. Accordingly, the Petitioners have not demonstrated that that issuance of the Permit contravened 40 C.F.R. § 70.7(a)(1)(ii) or 30 TAC 122.201(a)(3). The EPA, therefore, denies Claim 1.

It is also worth noting that the Petitioners have not alleged that the procedural concerns discussed in this claim in fact impeded their ability (or the ability of the public at large) to access relevant information. Thus, as a practical matter, it does not appear that the public was in any way prevented from meaningfully participating in the GCGV permitting process.

[22] Notably, these additional means of obtaining information are consistent with the EPA's regulations governing public notice, which require that public notice include "the name, address, and telephone number of a person (or an email or website address) from whom interested persons may obtain additional information, including copies of the permit draft" and other relevant permit documents. *Id.* § 70.7(h)(2).

[23] Although the Petitioners correctly observe that the internet location listed in the public notice contained only the draft permit and statement of basis (and not other documents), Petition at 11 n.6, the Petitioners ignore the other alternative mechanisms listed in the notice, through which the public could have gained access to other relevant documents. Instead of explaining why these measures were insufficient, the Petitioners assert, without support, that "the published notice did not provide identify [sic] viable alternative methods to view and copy project materials." Petition at 11. It is difficult to credit this assertion without further explanation about the viability of these alternatives.

Claim 2: The Petitioners Claim That "The Proposed Permit Fails to Include and Assure Compliance with All Applicable Requirements."

Petitioners' Claim: The Petitioners assert that the title V permit does not assure compliance with applicable requirements in Permit No. PSDTX1518/146425 (as included and incorporated into the title V permit) because the Permit does not adequately incorporate relevant monitoring requirements. Petition at 18.

The Petitioners explain that the CAA requires that each title V permit include all applicable requirements and conditions necessary to assure compliance with those requirements. *Id*. at 16 (citing 42 U.S.C. 7661c(a) and 40 C.F.R. § 70.6(a)). Terms of a preconstruction permit like Permit No. PSDTX1518/146425 are "applicable requirements." *Id*. (citing 40 C.F.R. § 70.2).

The Petitioners observe that numerous conditions within Permit No. PSDTX1518/146425 identify emission calculation methods specified in, *e.g.*, "the permit application, PI-1 dated April 19, 2017, as updated." *Id*. at 14–15 (quoting six Special Conditions of the cited permit). The Petitioners take issue with this attempt to incorporate by reference emission calculation methods contained in the application. *See id*. at 18–20.

First, the Petitioners recount certain concerns raised in public comments, which the Petitioners concede have been resolved in the Proposed Permit. Specifically, the Petitioners explain that although the referenced emission calculation methods were initially kept confidential, these calculation methods were later made publicly available. *See* Petition at 15–18, 20–21.

Second, the Petitioners address the means by which Permit No. PSDTX1518/146425 incorporates the now-public emission calculation methods. Quoting prior EPA statements, the Petitioners assert that incorporation by reference in title V is only permissible when:

> [R]eferenced documents [must] 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 a document is being referenced[,] . . . and 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 is not reasonably subject to misinterpretation.

Id. at 18 (quoting *In the Matter of United States Steel—Granite City Works*, Order on Petition No V-2009-03 at 43 (January 31, 2011) (*US Steel I Order*) (alterations in Petition)).

The Petitioners assert that the references in Permit No. PSDTX1518/146425 to the permit application, "as updated," fail to meet this test, because these references fail to identify the specific application that contains the relevant emission calculation methods. *Id*. at 19. The Petitioners explain that the initial permit application files contain at least 15 separate updates, in addition to files associated with subsequent permit revision applications. *Id*. Moreover, the Petitioners assert that the specific application file identified in TCEQ's RTC does not contain the relevant information. *Id*. (citing RTC at Response 2). Instead, the Petitioners observe that the

relevant application representations are contained in a file associated with a different revision of Permit No. PSDTX1518/146425. *Id*. But again, the Petitioners claim that neither the title V permit, Permit No. PSDTX1518/146425, nor the Statement of Basis for the Permit, identifies the location of the emission calculation methods. *Id*. at 19–20.

In summary, the Petitioners claim that the "Permit is deficient because it incorporates by reference Permit No. PSDTX1518/146425, which in turn incorporates by reference [emission calculation requirements], without providing information necessary for a reader to determine where to find the incorporated requirements." *Id*. at 20. The Petitioners contend that the incorporated requirements are not practically enforceable and that the Permit therefore fails to assure compliance with all applicable requirements. *Id*. (citing 42 U.S.C. § 7661c(a), (c), *US Steel I Order*).

The Petitioners also address TCEQ's RTC, in which the state asserted that challenges to the validity or terms of an NSR permit like Permit No. PSDTX1518/146425 are beyond the scope of issues that can be raised in a title V permitting action. The Petitioners assert that TCEQ misapplies and "abuse[s]" the EPA policy on which the state relies (*i.e.*, the policy explained in the *PacifiCorp Hunter I*, *Big River Steel*, and *ExxonMobil Baytown Olefins Orders*) to avoid addressing the issues raised by the Petitioners. *Id*. at 21–24.[24] The Petitioners assert that their challenges to the way in which the title V permit incorporates the relevant emission calculation methodologies are ripe for review as part of the title V permitting process. *Id*. at 23 (citing EPA's Objection to Federal Operating Permit No. O2269, ExxonMobil Corporation, Baytown Chemical Plant (January 23, 2020) (*Baytown Chemical Objection Letter*)).[25]

Within Claim 2, the Petitioners also separately assert that the EPA must object to the Permit because TCEQ did not provide a second round of public notice on the Draft Permit after revising the Permit to incorporate publicly accessible (non-confidential) application representations related to monitoring. *Id*. at 20. The Petitioners claim that because the relevant emission calculation methods were confidential during the public comment period, members of the public did not have an opportunity to review and comment on the sufficiency of those conditions. *Id*. (citing 30 TAC §§ 122.201(a)(3), 122.320(b)(6)(D)). The Petitioners claim that the EPA "should require the TCEQ to re-issue and re-notice a draft permit that contains reasonable instructions about where incorporated representations may be found and explains how members of the public may obtain the representations during the public comment period." *Id*. at 21.

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

The Petitioners have demonstrated that the Permit does not assure compliance with the requirements of Permit No. PSDTX1518/146425 because the latter permit's references to

[24] Within Claim 2 (Section IV.C of the Petition), the Petitioners reiterate their request that the EPA expressly disavow this policy. Id. at 23–24.

[25] The EPA notes that this January 23, 2020, objection was issued under authority delegated by the EPA Administrator to Region 6 to object during the EPA's 45-day review period. The objection letter is available at *https://www.epa.gov/system/files/documents/2022-01/exxonmobil-objection-letter-o2269-signed.pdf*.

calculation methods are not sufficiently clear to incorporate by reference those calculation methods into the Permit.

As the EPA has explained in numerous petition orders on Texas title V permits,[26] it is TCEQ's responsibility, as the title V permitting authority, to ensure that the title V permit "set[s] forth" monitoring sufficient to assure compliance with all applicable requirements. 42 U.S.C. § 7661c(c); *see id.* § 7661c(a); 40 C.F.R. § 70.6(a), (a)(3), (c); 30 TAC § 122.142(c).[27]

In addressing comments challenging the title V permit's incorporation of permit application representations related to monitoring or emission calculation methodologies, TCEQ's response, in part, was the following:

> As stated earlier, any challenges to the validity of an NSR permit, such as asserted deficiencies in NSR Permit 146425, PSDTX1518 including whether it . . . has missing emission calculations or emission factors, use of confidential business information or any other comment regarding the completeness or content of the NSR permit; should have been raised or should be raised through the appropriate NSR permit process. It is not appropriate for Commenters to attempt to challenge these issues in a Title V permit action. The ED notes such issues regarding NSR permits were not properly presented before the TCEQ in processing this Title V application and thus it is not appropriate for Commenters to attempt to challenge these issues in a Title V permit action.

RTC at Response 2 (citing *PacifiCorp Hunter I*, *Big River Steel*, and *ExxonMobil Baytown Olefins Orders*).[28]

TCEQ's response reflects a fundamental misunderstanding of the relationship between NSR permits and title V permits. The EPA has explained that in certain circumstances, a duly-issued

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[26] *See, e.g.*, *In the Matter of Sandy Creek Services, LLC, Sandy Creek Energy Station*, Order on Petition No. III-2018-1 at 12–13 (June 30, 2021); *Waha Order* at 12. The EPA has addressed similar issues in six additional orders between the *Sandy Creek* and *Waha Orders*.

[27] 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).

[28] The *PacifiCorp-Hunter I Order* was vacated by the U.S. Court of Appeals for the Tenth Circuit. *Sierra Club v. EPA*, 964 F.3d 882 (10th Cir. 2020). However, the ultimate disposition of that case is not directly relevant to this Order, as judicial review of this Order is not within the Tenth Circuit's jurisdiction. The *Big River Steel Order* was not reviewed by the courts. However, the U.S. Court of Appeals for the Fifth Circuit, in whose jurisdiction the present action resides, upheld the *ExxonMobil Baytown Olefins Order*, which expressed similar principles to the *PacifiCorp-Hunter I* and *Big River Steel Orders*. *Environmental Integrity Project v. EPA*, 960 F.3d 236 (5th Cir. 2020).

NSR permit that has been subject to public notice and comment and for which judicial review was available establishes the "applicable requirements" of the SIP for title V purposes, such that decisions made in issuing that NSR permit should not be subject to collateral challenges through the title V permitting process. *E.g.*, *Big River Steel Order* at 8–20. However, this principle is not a *carte blanche* for title V permitting authorities to avoid addressing all issues that implicate NSR permitting. As a general matter, the EPA is concerned by TCEQ's repeated attempts to apply the principles set forth in the *Big River Steel Order* (and other orders) to situations in which those principles do not properly apply.

Here, those principles do not apply. As the Petitioners correctly explain, the "Petitioners' claim rests entirely on the way that requirements established by Permit No. PSDTX1518/146425 are incorporated into the Proposed Permit." Petition at 23. More specifically, the Petitioners' claim concerns whether the title V permit contains (*i.e.*, adequately incorporates) monitoring sufficient to assure compliance with all applicable requirements, pursuant to CAA § 504(c). Questions concerning whether a title V permit contains sufficient monitoring—or, more precisely, whether monitoring or emission calculation methodologies contained in another document (*e.g.*, a permit application) are properly incorporated by reference into a title V permit—are core title V issues. Notably, on January 23, 2020, well before the GCGV Permit was issued, the EPA objected to an identical line of reasoning as applied to the sufficiency of monitoring for another TCEQ-issued permit.As the Petitioners observe, the EPA explained:

> This is a misinterpretation by TCEQ of the [*Hunter I Order*]. As the EPA has previously explained, "claims concerning whether a title V permit contains enforceable permit terms, supported by monitoring [recordkeeping, and reporting] sufficient to assure compliance with an applicable requirement or permit term (such as an emission limit established in a [NSR] permit), *are* properly reviewed during title V permitting. The statutory obligations to ensure that each title V permit contains 'enforceable emission limitations and standards' supported by 'monitoring . . . requirements to assure compliance with the permit terms and conditions,' 42 U.S.C. § 7661c(a), (c), apply independently from and in addition to the underlying regulations and permit actions that give rise to the emission limits and standards that are included in a title V permit." *See South Louisiana Methanol Order*[29] at 10; *Yuhuang II Order*[30] at 7–8; *[Hunter I] Order* at 16, 17, 18, 18 n.33, 19; *Big River Steel Order* at 17, 17 n.30, 19 n.32, 20. Therefore, regardless of the monitoring, recordkeeping, and reporting initially associated with a minor NSR permit or PBR, TCEQ has a statutory obligation independent of the process of issuing those permits to evaluate monitoring, recordkeeping, and reporting in the title V permitting process to ensure that these terms are sufficient to assure compliance with all applicable requirements and title V permit terms. *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008); *see Motiva Order*[31] at 25–26.

[29] *In the Matter of South Louisiana Methanol, LP*, Order on Petition Nos. VI-2016-24 & VI-2017-14 (May 29, 2018).
[30] *In the Matter of Yuhuang Chemical Inc. Methanol Plant*, Order on Petition Nos. VI-2017-5 & VI-2017-13 (April 2, 2018).
[31] *In the Matter of Motiva Enterprises LLC, Port Arthur Refinery*, Order on Petition No. VI-2016-23 (May 13, 2018).

Baytown Chemical Objection Letter at 11; *see* Petition at 23.

Although TCEQ's RTC did ultimately address GCGV's "voluntary" action to make previously confidential emission calculation information publicly available, TCEQ did not address the public comments relating to the manner by which these emission calculations were incorporated into the title V permit. As such, TCEQ's RTC effectively did not respond to the significant public comments raising this issue. 40 C.F.R. §§ 70.7(h)(6), 70.8(a)(1)(i)–(ii), 70.8(c)(iii).

Additionally, the EPA agrees with the Petitioners that the manner in which the emission calculation methodologies are incorporated into the Permit is not sufficient to assure compliance with all applicable requirements.

The CAA requirement to "set forth," "include," or "contain" sufficient monitoring may, in certain circumstances, be accomplished by incorporating requirements like application representations into a title V permit by reference (or even by incorporating them into an NSR permit that is then incorporated by reference into the title V permit). 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 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 for Improved Implementation of The Part 70 Operating Permits Program, 37 (March 5, 1996); *see id*. at 36–41 (explaining how incorporation by reference can satisfy the requirements of CA § 504).

Here, as the Petitioners observe, Permit No. PSDTX1518/146425 is included and incorporated into the title V permit.[32] At least six Special Conditions in Permit No. PSDTX1518/146425

[32] The Proposed Permit and corresponding December 30, 2020, final title V permit incorporate the June 26, 2020, version of Permit No. PSDTX1518/146425. The most recent title V permit, as revised on June 17, 2021, incorporates the September 25, 2020, version of Permit No. PSDTX1518/146425, which, in relevant part, contains identical conditions to those described in the Petition. This Order addresses these versions of Permit No. PSDTX1518/146425 that have been incorporated into the title V permit. Additional title V permit revisions which are currently pending would incorporate further updates to Permit No. PSDTX1518/146425. The same issues persist in those pending permit actions.

mandate that that GCGV calculate emissions[33] from various units or processes based on calculation methods specified, *e.g.*, "in the permit application, PI-1 dated April 19, 2017, *as updated*." *E.g.*, Permit No. PSDTX1418/146425, Special Condition 40(B) (emphasis added); *see also* Special Conditions 25, 36(K), 40(A)(4), 40(C), 48. Thus, Permit No. PSDTX1518/146425 incorporates by reference emission calculation methodologies that may be contained in some unspecified "update" to the initial permit application. This vague reference is insufficient to effectively incorporate the relevant calculations, particularly given the number of different applications associated with this facility and the fact that some earlier versions of the application withheld the emissions calculations as confidential. Because the emission calculation methods used to demonstrate compliance with the limits in Permit No. PSDTX1418/146425 have not been effectively incorporated into the title V permit, that Permit cannot be said to assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a), (c); 40 C.F.R. 70.6(a), (c), 30 TAC § 122.142(c). Accordingly, the EPA grants Claim 2.

With respect to the Petitioners' suggestion that the public needs an opportunity to review and comment on the emission calculation methodologies incorporated by reference, the EPA agrees. The calculation methodologies (1) were withheld as confidential during the public comment period and (2) were not clearly incorporated by reference by Permit No. PSDTX1518/146425 in either the proposed or final title V permits (upon which the Petition was based). Because of these problems, neither the public nor the Petitioners have had an opportunity to assess the sufficiency of these monitoring conditions. The EPA expects that this problem will be addressed when TCEQ provides a comment period on the revisions to the Permit in response to this Order.

Direction to TCEQ: TCEQ must amend the Permit to clearly include or incorporate the monitoring or emission calculation methods necessary to assure compliance with the applicable requirements of Permit No. PSDTX1418/146425. To the extent TCEQ incorporates such requirements by reference, it must identify the specific document incorporated by reference and the specific location within such document that contains the relevant calculation methods. Permit terms referring to a permit application using the "as updated" language (or similar language) discussed in the preceding paragraphs do not meet this standard.

TCEQ could add additional monitoring requirements directly to GCGV's title V permit, or it could more clearly incorporate such requirements into the Special Conditions of Permit No. PSDTX1418/146425 and then promptly revise the title V permit to incorporate the updated version of Permit No. 1176/PSDTX782. In either case, the title V permit must ultimately contain the necessary monitoring in order to resolve the EPA's objection.[34]

TCEQ must also provide the public with an opportunity to review and comment on these changes to the title V permit.

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[33] Although the referenced permit terms do not expressly state that these emission calculations will be used to demonstrate compliance with any specific emission limits, the EPA understands that to be their intended purpose.

[34] As TCEQ incorporates NSR permit terms into the title V permit, it should be mindful that any title V permit terms establishing (or incorporating) required monitoring or emission calculation methods cannot be confidential, and nor can any "emissions data." 42 U.S.C. §§ 7414(c), 7661b(e); 40 C.F.R. § 2.301(a)(2)(i).This general principle applies not only to the revisions TCEQ is required to make in response to the present Order, but also to any other permit terms establishing monitoring that are included or incorporated into the title V permit (including all such provisions in Permit No. PSDTX1418/146425 and other NSR permit authorizations).

V. CONCLUSION

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

Dated: MAY 12 2022

Michael S. Regan
Administrator