UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	§	PETITION FOR OBJECTION
	§	
Clean Air Act Title V Permit No. O1493	§	
	§	
Issued to Oxbow Calcining LLC	§	Permit No. O1493
	§	
Issued by the Texas Commission on Environmental Quality	§	
	§	
	§	

PETITION TO OBJECT TO RESPONSE TO OBJECTION FOR TITLE V PERMIT NO. O1493 ISSUED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Pursuant to section 42 U.S.C. § 7661d(b)(2), Port Arthur Community Action Network and Environmental Integrity Project ("Petitioners") hereby petition the Administrator of the U.S. Environmental Protection Agency ("Administrator" or "EPA") to object to Proposed Federal Operating Permit No. O1493 ("Proposed Permit") issued by the Texas Commission on Environmental Quality ("TCEQ" or "Commission") authorizing operation of the Oxbow Calcining Plant, located in Jefferson County, Texas.

The Proposed Permit was issued to address EPA's June 14, 2022 order objecting to the renewal of Oxbow's federal operating permit. EPA's regulations provide that "[i]f the permitting authority fails, within 90 days after the date of an objection … to revise and submit a proposed permit in response to the objection, the Administrator will issue or deny the permit in accordance with the requirements of the Federal program promulgated under title V of this Act." 40 C.F.R. § 70.8(c)(4). TCEQ failed to meet this deadline and the Proposed Permit fails to resolve EPA's objection. Accordingly, EPA should object to the Proposed Permit and then revise it to resolve the deficiencies TCEQ failed to correct.

I. PETITIONERS

The Port Arthur Community Action Network is a non-profit community organization formed by Port Arthur residents to advocate for solutions that will reduce or eliminate environmental and public health hazards and improve the quality of life in Port Arthur. Port Arthur Community Action Network members live in close proximity to the Oxbow Calcining Plant and are harmed by the pollution it emits.

The Environmental Integrity Project ("EIP") is a non-profit, non-partisan watchdog organization that advocates for effective enforcement of environmental laws. EIP has three goals: (1) to illustrate through objective facts and figures how the failure to enforce and implement environmental laws increases pollution and harms public health; (2) to hold federal and state agencies, as well as individual corporations accountable for failing to enforce or comply with environmental laws; and (3) to help communities obtain protections guaranteed by environmental laws. EIP has offices and programs in Austin, Texas and Washington, D.C.

II. PROCEDURAL BACKGROUND

This petition addresses TCEQ's Response to Objection regarding the renewal of Permit No. O1493, authorizing operation of the Oxbow Calcining Plant. The Oxbow Calcining Plant is a major source of criteria air pollutants located in Jefferson County, Texas.

Oxbow Calcining LLC ("Oxbow") filed its application to renew Permit No. O1493 on March 5, 2018. The Executive Director proposed to approve Oxbow's application and issued Draft Permit No. O1493, notice of which was published on June 18, 2019. Port Arthur Community Action Network and Lone Star Legal Aid timely-filed comments with the TCEQ identifying deficiencies in the Draft Permit. A public hearing on the permit was held on November 14, 2019, and additional oral and written comments were submitted at the hearing.

On July 10, 2020, the TCEQ's Executive Director issued notice of Proposed Permit No. O1493 along with his response to public comments on the Draft Permit. The Executive Director made limited revisions to the Draft Permit in response to the Public Comments that did not resolve the issues raised in Port Arthur Community Action Network's comments.

On October 28, 2020, Petitioners filed a Petition to Object to Oxbow's operating permit with EPA. Petition to Object to Title V Operating Permit No. O1493 Issued by the Texas Commission on Environmental Quality ("Renewal Petition").[1] On June 14, 2022, EPA granted the Renewal Petition on both issues, and directed TCEQ to resolve the objections. *In the Matter of Oxbow Calcining,* Order on Petition No. VI-2020-11 (June 14, 2022) ("Objection Order").[2]

On February 3, 2023, TCEQ filed its response to EPA's objections. (Exhibit A), Executive Director's Response to EPA Objection ("Response to Objection"). On March 9, 2023, Petitioners timely filed comments with the TCEQ demonstrating that TCEQ's response had failed to resolve the objections. Comments on the Executive Director's Response to EPA Objection to Operating Permit O1493 for Oxbow Calcining LLC's Oxbow Calcining Plant in Port Arthur, Texas.[3] TCEQ responded on April 21, 2023 but declined to make changes to Oxbow's operating permit to address Petitioners' comments. (Exhibit B), Notice of Proposed Final Action and Executive Director's Response to Public Comment ("Response to Comments").

EPA's 45-day review period for the Proposed Permit began on April 22, 2023 and ended on June 8, 2023. Because the Administrator did not object to the Proposed Permit during his review period, members of the public have 60 days from the close of the review period to petition the

[1] Available electronically at: https://www.epa.gov/sites/production/files/2020-11/documents/oxbowcalciningpetition2020.pdf
[2] Available electronically at: https://www.epa.gov/system/files/documents/2022-07/Oxbow%20Order%206-14-22.pdf
[3] Available electronically at: https://www14.tceq.texas.gov/epic/eCID/index.cfm?fuseaction=main.download&doc_id=310586272023069&doc_name=TCEQ%20revised%201493%20Comments%2003%2E09%2E23%20FINAL%2Epdf

Administrator to object to the Proposed Permit. This petition for objection is timely filed through EPA's Central Data Exchange on August 8, 2023. Copies of the petition will be sent to the Executive Director and Oxbow.

Because TCEQ failed to submit a revision to Oxbow's federal operating permit within 90 days after EPA granted Petitioners' previous petition to object, it is now EPA's duty to revise the permit as necessary to comply with Clean Air Act (or to revoke the permit). 42 U.S.C. § 7661d(c); 40 C.F.R. § 70.8(c), (d).

III. LEGAL REQUIREMENTS

Federal operating permits are the primary method for enforcing and assuring compliance with the Clean Air Act's pollution control requirements for major sources of air pollution. Operating Permit Program, 57 Fed. Reg. 32,250, 32,258 (July 21, 1992). Prior to enactment of the federal operating permit program, regulators, operators, and members of the public had difficulty determining which requirements applied to each major source and whether sources were complying with applicable requirements. This was a problem because applicable requirements for each major source were spread across many different rules and orders, some of which did not make it clear how general requirements applied to specific sources.

The federal operating permit program was created to improve compliance with and to facilitate enforcement of Clean Air Act requirements by requiring each major source to obtain an operating permit that (1) lists all applicable federally-enforceable requirements, (2) contains enough information for readers to determine how applicable requirements apply to units at the permitted source, and (3) establishes monitoring requirements that assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a) and (c); *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996) ("The permit is crucial to implementation of the Act: it

contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular source."); *Sierra Club v. EPA*, 536 F.3d 673, 674-75 (D.C. Cir. 2008) ("But Title V did more than require the compilation in a single document of existing applicable emission limits . . . . It also mandated that each permit . . . shall set forth monitoring requirements to assure compliance with the permit terms and conditions").

The federal operating permit program provides a process for stakeholders to resolve disputes about which requirements should apply to each major source of air pollution outside of the enforcement context. 57 Fed. Reg. 32,266 ("Under the [Title V] permit system, these disputes will no longer arise because any differences among the State, EPA, the permittee, and interested members of the public as to which of the Act's requirements apply to the particular source will be resolved during the permit issuance and subsequent review process."). Accordingly, federal courts do not generally second-guess federal operating permit decisions made by state permitting agencies and will not enforce otherwise-applicable requirements that have been omitted from or displaced by conditions in a federal operating permit. *See*, 42 U.S.C. § 7607(b)(2); *see also, Sierra Club v. Otter Tail*, 615 F.3d 1008 (8th Cir. 2008) (holding that enforcement of New Source Performance Standard omitted from a source's federal operating permit was barred by 42 U.S.C. § 7607(b)(2)). Because courts rely on federal operating permits to determine which requirements may be enforced and which requirements may not be enforced against each major source, state-permitting agencies and EPA must exercise care to ensure that each federal operating permit includes a clear, complete, and accurate account of the requirements that apply to the permitted source.

The Act requires the Administrator to object to a state-issued federal operating permit if he determines that it fails to include and assure compliance with all applicable requirements. 42 U.S.C.

§ 7661d(b)(1); 40 C.F.R. § 70.8(c). If the Administrator does not object to a federal operating permit, "any person may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period to make such objection." 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); 30 Tex. Admin. Code § 122.360. The Administrator "shall issue an objection... if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of the... [Clean Air Act]." 42 U.S.C. § 7661d(b)(2); see also, 40 C.F.R. § 70.8(c)(1). The Administrator must grant or deny a petition to object within 60 days of its filing. 42 U.S.C. § 7661d(b)(2).

IV. GROUNDS FOR OBJECTION

A. The Proposed Permit Fails to Resolve EPA's Objection that the Permit Fails to Include Monitoring and Recordkeeping Provisions Sufficient to Ensure Compliance with Sulfur Dioxide National Ambient Air Quality Standards.

1. Specific Grounds for Objection, Including Citation to Permit Term

The Proposed Permit fails to assure compliance with the Sulfur Dioxide ("SO_2") National Ambient Air Quality Standard ("NAAQS"), including conditions of the Texas State Implementation Plan ("SIP") at 30 Tex. Admin. Code §§ 101.3, 101.21, 116.115(b)(2)(H)(i), federal regulations at 40 Code of Federal Regulations § 50.17(a), and Tex. Health & Safety Code § 382.085. These provisions are applicable requirements of Oxbow's Title federal operating permit through incorporated NSR Permit No. 45622, General Condition No. 13 and Special Condition No. 24.

NSR Permit No. 45622, General Condition No. 13 prohibits Oxbow from causing "air pollution," mirroring requirements in Texas Health & Safety Code § 382.085:

> 13. Emissions from this facility must not cause or contribute to "air pollution" as defined in Texas Health and Safety Code (THSC) § 382.003(3) or violate THSC § 382.085. If the executive director determines that such a condition or violation

> occurs, the holder shall implement additional abatement measures as necessary to control or prevent the condition or violation.

NSR Permit No. 45622, Special Condition No. 24 prohibits violations of allowable emission rates or other standards, such as the NAAQS, and includes a non-exhaustive list of corrective measures to be taken in the event of a violation:

> 24. If this permitted facility or any portion of it exceeds any of the applicable allowable emission rates or other standards, the holder of this permit must take immediate corrective action to comply with the applicable standards and record the event. These actions may include (but are not limited to) reducing operating temperature, reducing throughput, and the installation of additional control equipment. These corrective actions shall not be considered complete until compliance with the allowable emission rates and/or other standards has been demonstrated. Demonstration may include testing.[4]

The Texas Health & Safety Code § 382.003(3) defines "air pollution" as:

> the presence in the atmosphere of one or more air contaminants or combination of air contaminants in such concentration and of such duration that: (A) are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property; or (B) interfere with the normal use or enjoyment of animal life, vegetation, or property.

Exceedances of the health-based SO_2 NAAQS are by definition "air pollution," because the NAAQS is specifically created to prevent injurious or adverse effects from SO_2 exposure to human health and welfare, including sensitive populations including children, the elderly, and people with asthma, with a margin for error. Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35520 (June 22, 2010). SO_2 is a potent air pollutant that can cause adverse respiratory symptoms from even brief exposures. To protect human health and welfare from these effects, EPA set the SO_2 NAAQS at 75 parts per billion ("ppb") of SO_2 averaged over a one-hour period. *Id.*

[4] The relevant special condition was numbered 25 when EPA objected to Oxbow's federal operating permit.

SO_2 levels in excess of the NAAQS are "air pollution" because they are or may tend to be injurious to or to adversely affect human health or welfare. Tex. Health & Safety Code § 382.003(3). Further, EPA views the SO_2 NAAQS as "source-oriented" rather than "regional," with strategies for attaining the NAAQS to be focused on key point sources of SO_2 emissions, including refineries, electric utilities, and other industrial facilities. *Data Requirements Rule for the 1-Hour Sulfur Dioxide Primary National Ambient Air Quality Standard*, 79 Fed. Reg. 92 at 27446, 27448 (May 13, 2014).

NSR Permit No. 45622 General Condition No. 13 incorporates the SO_2 NAAQS as an applicable requirement for purposes of Oxbow's federal operating permit. The SO_2 NAAQS and related SIP and federal regulations are critical to Oxbow's federal operating permit because Oxbow has repeatedly caused exceedances of the SO_2 NAAQS, resulting in "air pollution" in violation of those requirements. The Executive Director recently concluded an enforcement action against Oxbow for violating Permit No. 45622, General Condition No. 13 and Special Condition No. 24. *In the Matter of and Enforcement Action Concerning Oxbow Calcining LLC, Agreed Order*, Docket No. 2018-1687-AIR (Aug. 14, 2019) ("Agreed Order").[5] The Executive Director concluded that these permit conditions were violated when Oxbow caused multiple exceedances of the SO_2 NAAQS.

2. Applicable Requirement of Part 70 Requirement Not Met

Each federal operating permit must contain monitoring, recordkeeping, and reporting conditions that assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a)(3) and (c)(1). Conditions in NSR permits incorporated by reference into the

[5] Available electronically at: https://www14.tceq.texas.gov/epic/eCID/index.cfm?fuseaction=main.download&doc_id=504374822019232&doc_name=Order%202018%2D1687%2DAIR%2DE%2Epdf&docket_num=2018-1687-AIR-E&requesttimeout=5000

Proposed Permit are applicable requirements. 40 C.F.R. § 70.2; Proposed Permit, Special Condition No. 8. The rationale for the selected monitoring requirements must be clear and documented in the permit record. 40 C.F.R. § 70.5(a)(5); *In the Matter of United States Steel, Granite City Works* ("Granite City I Order"), Order on Petition No. V-2009-03 at 7-8 (January 31, 2011).

As explained below, the Proposed Permit is deficient because (1) it fails to specify monitoring, testing, and recordkeeping requirements that assure compliance with emission limits and operating requirements in NSR Permit No. 45622 and the above listed regulations; and (2) the permit record does not contain a reasoned justification for the Executive Director's determination that monitoring, testing, and recordkeeping requirements in the Proposed Permit assure compliance with the SO_2 NAAQS.

3. Inadequacy of the Permit Term

EPA granted our Renewal Petition and objected to TCEQ's failure to include monitoring sufficient to ensure compliance with the health-based NAAQS for sulfur dioxide when it renewed Oxbow's federal operating permit. We have written about this issue at length in these and other proceedings. To summarize, in the 2019 Agreed Order, TCEQ finalized an enforcement action against Oxbow for causing levels of sulfur dioxide to exceed the NAAQS at an off-site monitor. TCEQ claimed that Oxbow violated General Condition No. 13 and Special Condition No. 24 of NSR Permit No. 45622 when Oxbow repeatedly caused levels of sulfur dioxide to exceed the NAAQS at that monitor. We commented on Oxbow's federal operating, informing TCEQ that the permit was legally deficient because it lacked any permit terms sufficient to ensure that Oxbow would not cause further exceedances of the NAAQS at off-site monitors in violation of General Condition No. 13 and Special Condition No. 24. TCEQ responded that those permit conditions did not place any additional requirements on Oxbow and that NAAQS exceedances could not be

enforced through Oxbow's permit. Because this response was inconsistent with TCEQ's own actions enforcing NAAQS exceedances through Oxbow's permit, we petitioned EPA to object to Oxbow's federal operating permit on this point.

EPA granted our petition on this issue because the TCEQ had failed to explain its contradictory positions:

> While [TCEQ's] permit record states that no monitoring, recordkeeping, and reporting is necessary to assure that the facility does not violate General Condition 13 and Special Condition 25, the 2019 Agreed Order assessed penalties against Oxbow for violating General Condition 13 and Special Condition 25 because Monitoring Station 1071 showed multiple exceedances of the NAAQS. Based on this information, the Petitioners have demonstrated that General Condition 13 and Special Condition 25 appear to be permit conditions that can be violated by Oxbow if an off-site air monitor records an exceedance. Because General Condition 13 and Special Condition 25 are applicable requirements of the title V permit, the permit should include sufficient monitoring, recordkeeping, and reporting. Therefore, EPA is granting the Petitioners' claim.

Objection Order at 12.

EPA's Objection Order provided the following instructions to TCEQ:

> TCEQ should explain how the title V permit assures compliance with General Condition 13 and Special Condition 25 of NSR Permit 45622.While EPA agrees with TCEQ that the SO2 NAAQS is not an applicable requirement for individual facilities, TCEQ appears to have determined that Oxbow has previously violated General Condition 13 and Special Condition 25 by causing an exceedance of the NAAQS at an off-site monitoring location. TCEQ should explain the apparent inconsistency between its interpretation of these conditions in the RTC and the basis of its alleged violation of these conditions in the 2019 Agreed Order with Oxbow. If TCEQ interprets General Condition 13 and Special Condition 25such that TCEQ and the public may bring an enforcement action against a source for causing an exceedance of the NAAQS (as done in the 2019Agreed Order), then one would generally expect that the title V permit must contain adequate monitoring, recordkeeping, and reporting to assure compliance with General Condition 13 and Special Condition 25 as applicable requirements. On the other hand, if the 2019 Agreed Order is not consistent with TCEQ's interpretation of these provisions, TCEQ should provide the interpretation on the record and explain the discrepancy.

Id.

TCEQ offered the following response to EPA's Objection:

> Order Docket No. 2018-1687-AIR-E, effective August 14,2019 (2019 Agreed Order) was a unique situation. It was determined by TCEQ that the short-term exceedances at the TCEQ monitor were coming from Oxbow. These were individual occurrences. However, to determine compliance with the NAAQS it is based on a three-year average of data above the NAAQS. The 2019 Agreed Order states that Oxbow generally denied this allegation. However, Oxbow agreed to pay the assessed penalties and agreed to certain technical and operational corrective actions and certifications of compliance. As the present Title V Order acknowledges, the NAAQS are not applicable requirements under Title V. NSR Permit No. 45622 General Condition No. 13 and Special Condition No. 25 do not impose additional requirements on a permitted source. These are catch-all conditions that prohibit operation in excess of permitted limits or standards that may cause or contribute to air pollution. These conditions are not distinct applicable requirements that in and of themselves would require monitoring, recordkeeping, or reporting to determine compliance with the underlying and more specific requirements and limits in its NSR permit. Oxbow took the necessary corrective actions required by the 2019 Agreed Order and the order is now closed.

Response to Objection at Response to EPA Objection A.

TCEQ's response is inadequate because it ignores the inconsistency that gave rise to EPA's objection. TCEQ simply refuses to explain the contradiction at the heart of this issue: TCEQ states that General Condition No. 13 and Special Condition No. 24 do not impose additional requirements on a permitted source and yet TCEQ relied on these very permit conditions to impose penalties upon Oxbow for causing repeated exceedances of the SO_2 NAAQS. Thus, either these permit conditions do impose applicable requirements or TCEQ's enforcement action against Oxbow was without any legal basis. Presumably, TCEQ does not engage in baseless enforcement actions. So, we must presume that the permit conditions do establish federally enforceable applicable requirements. But if that is the case, the Proposed Permit must establish monitoring, testing, and recordkeeping requirements sufficient to ensure compliance with these requirements.

TCEQ's Agreed Order and the clear language of Oxbow's permit conditions establish that causing an exceedance of the NAAQS is a violation of an applicable requirement. Texas law

requires Oxbow to comply with both the general conditions and special conditions of its permits. 30 Tex. Admin. Code § 116.115(b) and (c). These conditions are applicable requirements under Texas's federal operating permit regulations, which define "applicable requirement" to include "any term or condition of any preconstruction permit." 30 Tex. Admin. Code § 122.10(2)(H). Because the general and special conditions are applicable requirements, Oxbow's federal operating permit must assure compliance with them. 42 U.S.C. § 7661c(a), (c). And because TCEQ used these permit conditions to enforce exceedances of the NAAQS at an off-site monitoring location, Oxbow's federal operating permit must include terms that ensure that Oxbow will not cause additional exceedances.

TCEQ begins its response by stating that this is a "unique situation," but this does not explain its inconsistent application of its own rules. Response to Objection at Response to EPA Objection A. Oxbow may be unique—it is one of the largest emitters of sulfur dioxide in the state and one of just a few plants of its size that have yet to install pollution controls to reduce sulfur dioxide—but this uniqueness does not explain why TCEQ continues to insist that Oxbow's permit conditions cannot do what TCEQ itself used the permit conditions to do: enforce exceedances of the NAAQS. This unique situation necessitates a unique permit, one that includes conditions adequate to ensure that Oxbow does not cause further exceedances of health-based air quality standards for sulfur dioxide.

TCEQ goes on to state that General Condition No. 13 and Special Condition No. 24 are "catch-all conditions that prohibit operation in excess of permitted limits or standards that may cause or contribute to air pollution." *Id.* But TCEQ's Agreed Order does not allege that Oxbow had operated in excess of permitted limits or standards. Rather, the Agreed Order is based entirely

on Oxbow causing exceedances of the NAAQS at an off-site monitor. These are TCEQ's allegations in the Agreed Order:

> During a record review conducted on October 24, 2018 through October 25, 2018, an investigator documented that the Respondent failed to comply with the national primary one-hour annual ambient air quality standard for SO2, in violation of 30 TEX. ADMIN. CODE §§ 101.21, 116.115(b)(2)(H)(i) and (c), and 122.143(4), 40 CODE OF FEDERAL REGULATIONS § 50.17(a), New Source Review ("NSR") Permit No. 45622, General Conditions No. 13 and Special Conditions No. 25, Federal Operating Permit No. 01493, General Terms and Conditions and Special Terms and Conditions No. 8, and TEX. HEALTH & SAFETY CODE § 382.085(b). Specifically, the Respondent exceeded the national primary one-hour annual ambient air quality standard for SO2 of 75 ppb at the TCEQ Continuous Ambient Monitoring Station 1071 by an average of 16.16 ppb for two hours on January 10,2017, one hour on February 11, 2017, one hour on March 7, 2017, one hour on April 2, 2017, two hours on May 3, 2017, and one hour on May 26, 2017.

Contrary to TCEQ's description of General Condition No. 13 and Special Condition No. 24 as "catch-all conditions" in its Response, TCEQ's Agreed Order treats exceedances of the NAAQS as explicit violations of these conditions. TCEQ did not base the Agreed Order on violations of any permitted limits or standards that TCEQ now claims are the purview of these conditions.

Along the same lines, TCEQ states that General Condition No. 13 and Special Condition No. 24 "are not distinct applicable requirements that in and of themselves would require monitoring, recordkeeping, or reporting to determine compliance with the underlying and more specific requirements and limits in its NSR permit." Response to Objection at Response to EPA Objection A. However, the Agreed Order alleges no violations of any "specific requirements or limits in [Oxbow's] NSR permit." *Id.*

It therefore appears that Oxbow was in compliance with those specific requirements and limits when it caused exceedances of the NAAQS at the off-site monitor. If Oxbow was complying with all the requirements and limits TCEQ now considers applicable and Oxbow's operation still

caused NAAQS exceedances, then those specific requirements are demonstrably not sufficient to prevent NAAQS exceedances. In light of this, TCEQ cannot dismiss General Condition No. 13 and Special Condition No. 24 as surplus catch-all requirements. Additional requirements—like the General and Special Conditions TCEQ referenced in the Agreed Order but now claims are not applicable requirements—are necessary to ensure that Oxbow does not cause NAAQS exceedances.

The plain language of Oxbow's permit conditions coupled with TCEQ's past practice using that language to enforce NAAQS exceedances demonstrate that these conditions are applicable requirements as they relate to NAAQS exceedances. As such, Oxbow's federal operating permit must include monitoring, testing, and recordkeeping terms that ensure Oxbow does not cause sulfur dioxide NAAQS exceedances. These terms are necessary to ensure that this massive under-controlled source of sulfur dioxide does not continue to cause or contribute to a condition of air pollution.

Finally, TCEQ makes multiple statements regarding Oxbow's obligations under the Agreed Order. But these statements do not explain or resolve TCEQ's contradictory actions. TCEQ states that "Oxbow agreed to pay the assessed penalties and agreed to certain technical and operational corrective actions and certifications of compliance." *Id*. And "Oxbow took the necessary corrective actions required by the 2019 Agreed Order and the order is now closed." *Id*. It is clear from TCEQ's response and the Agreed Order that TCEQ imposed "technical and operational corrective actions" for Oxbow's violations of General Condition No. 13 and Special Condition No. 24. *Id*. Nevertheless, TCEQ now opposes permit terms sufficient to ensure compliance with those very conditions.

TCEQ also states that Oxbow denied the allegations in the Agreed Order, but Oxbow's general denial is irrelevant because Oxbow's denial fails to explain TCEQ's contradictory positions. As TCEQ states, "It was determined by TCEQ that the short-term exceedances at the TCEQ monitor were coming from Oxbow." *Id*. Whether Oxbow denies TCEQ's determination or not, this was in fact TCEQ's determination. Oxbow's denial is not evidence that TCEQ had no basis to bring the enforcement action in the first place, which is what TCEQ's current interpretation suggests. And Oxbow's denial does not reconcile TCEQ's statement that General Condition No. 13 and Special Condition No. 24 do not impose applicable requirements on Oxbow with the fact that TCEQ did in fact use General Condition No. 13 and Special Condition No. 24 to determine that exceedances of the SO_2 NAAQS caused by Oxbow constituted violations of applicable requirements.

TCEQ's recitation of its contradictory positions does not resolve the contradiction. TCEQ's response thus fails to resolve EPA's objection. The new Proposed Permit still fails to include monitoring, testing, and recordkeeping sufficient to ensure compliance with the sulfur dioxide NAAQS, which are applicable requirements established by Permit No. 45622, General Condition No. 13 and Special Condition No. 24.

4. Issues Raised in Public Comments

This issue was raised on pages 2 through 8 of the Public Comments.

5. Analysis of State's Response

TCEQ's response to comments repeats the same incoherent position that the agency took in response to EPA's objection order—which is addressed above—with the following addition:

> In its objection letter, EPA agreed with TCEQ that the SO_2 NAAQS is not an applicable requirement for individual facilities and NSR Permit No. 45622 General Condition No. 13 and Special Condition No. 25 do not impose additional requirements on a permitted source. Therefore, FOP O1493 and NSR Permit

> Number 45622 include sufficient monitoring, recordkeeping, or reporting to determine compliance with all applicable requirements under state and federal regulations.

Response to Comments at Response 1.

This response mischaracterizes EPA's objection order and fails to rebut Petitioners' demonstration of deficiency. Petitioners concede that NAAQS are not applicable requirements for purposes of Texas's federal operating permit program, *unless* they are made applicable to individual sources through SIP provisions, or as here, the terms and conditions of a permit issued pursuant to the Texas SIP. Likewise, EPA's objection order acknowledges that promulgation of a NAAQS does not directly establish a federal operating permit applicable requirement that automatically applies to specific sources, but questions whether General Condition No. 13 and Special Condition No. 24 in Permit No. 46522 incorporate the SO_2 NAAQS as an applicable requirement. EPA did not agree with TCEQ that these conditions do not impose additional requirements on Oxbow. Instead, EPA asked TCEQ to "explain the apparent inconsistency between its interpretation of these conditions in the RTC and the basis of its alleged violation of these conditions in the 2019 Agreed Order with Oxbow." Objection Order at 12. TCEQ has not explained this inconsistency and, therefore, the Proposed Permit fails to resolve EPA's objection.

B. The Proposed Permit Fails to Resolve EPA's Objection that the Permit Fails to Establish Monitoring, Testing, and Recordkeeping Provisions that Assure Compliance with Lead and Volatile Organic Compound Limits from Kiln Stacks 2,3, 4, and 5 in NSR Permit No. 45622.

1. Specific Grounds for Objection, Including Citation to Permit Term

Proposed Permit, Special Condition No. 8 provides that NSR permits listed in the New Source Authorization References attachment are incorporated by reference into the Proposed Permit as applicable requirements. The Proposed Permit's New Source Review Authorization References attachment incorporates NSR Permit No. 45622 by reference. NSR Permit No. 45622

authorizes emissions of lead and volatile organic compounds ("VOC"), among numerous other pollutants, from Process Kiln Stacks 2, 3, 4, and 5 (EPN's KS2, KS3, KS4, and KS5). Emissions of lead and VOC from these process kiln stacks are subject to the following hourly and annual limits listed in Permit No. 45622's Maximum Allowable Emission Rate Table ("MAERT"):

Unit	Lead (lbs/hr)	Lead (TPY)	VOC (lbs/hr)	VOC (TPY)
Kiln No. 2 Stack	0.13	0.55	0.29	1.13
Kiln No. 3 Stack	0.22	0.95	0.50	1.94
Kiln No. 4 Stack	0.22	0.95	0.50	1.94
Kiln No. 5 Stack	0.31	1.37	0.50	2.50

Permit No. 45622, Special Condition No. 38 includes the following language explaining how Oxbow should determine compliance with these emission limits:

> 38. Records shall be maintained at this facility site and made available at the request of personnel from the TCEQ or any other air pollution control program having jurisdiction to demonstrate compliance with permit limitations. These records shall be totaled for each calendar month, retained for a rolling 60-month period, and include the following:
> ….
> B. Monthly record of the rolling 12-month petroleum coke usage rates (including blended sulfur content) in tons;
>
> C. Monthly records of hourly and rolling 12-month emission rates for lead (Pb) which shall be calculated by multiplying the hourly and 12-month rolling petroleum coke usage rates by the lead emission factor as set forth in Oxbow submittal dated November 3, 2022, in order to demonstrate compliance with the MAERT and the throughput limitations in Special Condition 9. The required data shall be kept with examples of the method for calculated the rates including units, conversion factors, assumptions, and the basis of the assumptions;
>
> D. Monthly records of hourly and rolling 12-month emission rates for Volatile Organic Compounds (VOC) which shall be calculated by multiplying the hourly and 12-month rolling petroleum coke usage rates by the VOC emission factor as set forth in Oxbow submittal dated November 3, 2022, in order to demonstrate compliance with the MAERT and the throughput limitations in Special Condition 9. The required data shall be kept with examples of the method for calculating the

rates including units, conversion and control factors, assumptions, and the basis of the assumptions[.]

2. Applicable Requirement of Part 70 Requirement Not Met

Each federal operating permit must contain monitoring, recordkeeping, and reporting conditions that assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a)(3) and (c)(1). Emission limits in NSR permits incorporated by reference into the Proposed Permit are applicable requirements. 40 C.F.R. § 70.2; Proposed Permit, Special Condition No. 8. The rationale for the selected monitoring requirements must be clear and documented in the permit record. 40 C.F.R. § 70.5(a)(5); *In the Matter of United States Steel, Granite City Works* ("Granite City I Order"), Order on Petition No. V-2009-03 at 7-8 (January 31, 2011).

As explained below, the Proposed Permit is deficient because (1) monitoring, testing, and recordkeeping requirements incorporated by reference into the Proposed Permit fail to assure compliance with lead and VOC emission limits established by Permit No. 45622 for Kilns 2 through 5; and (2) the permit record does not contain a reasoned justification for the Executive Director's determination that monitoring, testing, and recordkeeping requirements in the Proposed Permit assure compliance with these emission limits.

3. Inadequacy of the Permit Term

EPA granted our Renewal Petition and objected to TCEQ's failure to specify monitoring, testing, and recordkeeping requirements sufficient to assure ongoing compliance with hourly and annual emission limits for lead and VOC in Oxbow's federal operating permit.

In response, TCEQ revised the Proposed Permit by adding special conditions to Permit No. 45622 explaining how Oxbow should determine compliance with MAERT limits for lead and

VOC. While these new permit terms are an improvement over the complete absence of monitoring in the original draft permit, they remain insufficient to ensure compliance with Oxbow's hourly and annual limits for lead and VOC.

TCEQ's proposed terms direct Oxbow to calculate hourly and annual emissions of lead and VOC based on emission factors originally supplied in application documents in 1992 and 2007. Without additional monitoring, this requirement is akin to a demonstration of initial compliance because it is based on decades-old assumptions. Emission testing from 1992 or 2007 is not sufficient to determine Oxbow's actual emissions in 2023. Additional monitoring of actual emissions is needed to ensure ongoing compliance with lead and volatile organic compounds limits.

TCEQ should add testing for lead and VOC to existing stack testing protocols established by Permit No. 45622, Special Condition No. 28 to ensure that its emission factors are accurate. Oxbow currently performs stack tests for other pollutants only once every three years, and only tests one of its four kiln stacks. Adding lead and volatile organic compounds to these stack tests will supply additional information to ensure that the emission factors Oxbow proposes to use are accurate on an ongoing basis. And because stack tests are infrequent, adding lead and volatile organic compounds to the existing protocol will not be overly burdensome on Oxbow.

4. Issues Raised in Public Comments

This issue was raised on pages 7 through 8 of the Public Comments.

5. Analysis of State's Response

TCEQ contends that calculations using emission factors derived from emissions testing conducted decades ago are still sufficient to assure compliance with lead and VOC emission limits that apply to Oxbow's kilns and will remain sufficient unless those kilns are modified or the kilns cause a condition of air pollution. Response to Comments at Response 2. As a matter of policy,

TCEQ states that "[o]nce the permit is granted, it is assumed that the original demonstration is valid unless the commission concludes a condition of air pollution exists." *Id*. But this statement of policy conflicts with the permit's requirement that Oxbow conduct testing at its kilns at least every three years to assure compliance with emission limits and control requirements for other pollutants. Permit No. 45622, Special Condition No. 28. And the absence of a condition of air pollution related to lead or VOC is not an indication of compliance with hourly and annual emission limits established by Permit No. 45622. Emission factors derived from a single stack test (or two stack tests taken more than a decade ago) are not sufficient to assure ongoing compliance with hourly and annual emission limits across all operating scenarios authorized by the Proposed Permit over the entire lifetime of this major source. TCEQ's revision to Oxbow's federal operating permit fails to include monitoring, testing, and recordkeeping requirements that assure ongoing compliance with hourly and annual lead and VOC emission limits established by Permit No. 45622 and TCEQ's rationale for the sufficiency of these new requirements falls short. Oxbow should be required to test for lead and VOC emission rates when it conducts stack testing required by Permit No. 45622, Special Condition No. 28. This solution is reasonable because it does not require Oxbow to test more frequently than already required and TCEQ does not contend that testing for these pollutants would be excessively burdensome or expensive.

V. CONCLUSION

For the foregoing reasons, and as explained the Public Comments, the Proposed Permit is deficient. Accordingly, the Clean Air Act requires the Administrator to object to the Proposed Permit. Because the TCEQ failed to timely revise Oxbow's federal operating permit in response to EPA's Objection Order, EPA must revise or revoke the permit itself.

Respectfully,

/s/ Gabriel Clark-Leach

Colin Cox
Gabriel Clark-Leach
ENVIRONMENTAL INTEGRITY PROJECT
1206 San Antonio Street
Austin, TX 78701
Phone: (832) 316-0580
colincox@environmentalintegrity.org