BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF: CITGO REFINING AND CHEMICALS COMPANY L.P. WEST PLANT, CORPUS CHRISTI, TEXAS Permit Number O1420 ISSUED BY TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ON FEBRUARY 2, 2007	ORDER RESPONDING TO PETITIONERS' REQUEST THAT THE ADMINISTRATOR OBJECT TO THE ISSUANCE OF A TITLE V OPERATING PERMIT Petition Number VI-2007-01

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

I. INTRODUCTION

On March 30, 2007, the United States Environmental Protection Agency (EPA) received a petition from Environmental Integrity Project, Refinery Reform Campaign, Citizens of Environmental Justice, and Suzie Canales (Petitioners) pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661d(b)(2). The petition requests that EPA object to the title V operating permit issued by the Texas Commission on Environmental Quality (TCEQ) on February 2, 2007, to CITGO Refining and Chemicals L.P (CITGO) for the West Plant refinery operations in Corpus Christi, Nueces County, Texas.

Petitioners have requested that the Administrator object to the CITGO permit because Petitioner alleges that the permit does not comply with the CAA and implementing regulations at 40 C.F.R. part 70 in that the title V operating permit: (1) fails to include monitoring requirements adequate to ensure compliance with all emission limitations and other substantive Clean Air Act requirements, (2) improperly uses incorporation by reference for emission limitations and standards without any guidance as to where the referenced regulations and permits may be found, and (3) does not adequately address the requirements of a state-issued administrative order and a Consent Decree that CITGO entered into with EPA.

In considering the allegations made by the Petitioners, EPA reviewed several documents, including the title V operating permit (Permit 01420), the statement of basis,

public comments on the draft permit, the TCEQ Executive Director's response to public comments (TCEQ Response to Comments) dated December 19, 2006, certain new source review (NSR) permits that are incorporated by reference into the title V permit for this facility,[1] and CITGO's Comments Concerning Petitioners' Petition For Objection to U.S. Environmental Protection Agency (May 8, 2007). Based on a review of all of the information before me, and for reasons detailed in this order, I grant in part and deny in part the issues raised by Petitioners.

II. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act, 42 U.S.C. § 7661a(d)(1), calls upon each state to develop and submit to EPA an operating permit program intended to meet the requirements of CAA title V. EPA granted interim approval to Texas for the title V (part 70) operating program on June 25, 1996, 61 Fed. Reg. 32693. EPA granted full approval to Texas' operating permit program on December 6, 2001. 66 Fed. Reg. 66318. The program is now incorporated into Texas' Administrative Code at Chapter 122.

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable State Implementation Plan (SIP). *See* CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a). The title V operating permit program does not generally impose new substantive air quality control requirements (referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other requirements to assure compliance by sources with existing applicable emission control requirements. 57 Fed. Reg. 32,250, 32,251 (July 21, 1992) (EPA final action promulgating Part 70 rule). One purpose of the title V program is to "enable the source, states, EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under section 505(a), 42 U.S.C. § 7661d(a), of the CAA and the relevant implementing regulations (40 C.F.R. § 70.8(a)), states are required to submit each proposed title V operating permit to EPA for review. Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit if it is determined not to be in compliance with applicable requirements or the requirements under title V. 40 C.F.R. § 70.8(c). If EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act provides that any person may petition the Administrator, within 60 days of expiration of EPA's 45-day review period, to object to the permit. 42 U.S.C. § 7661d(b)(2), *see also* 40 C.F.R. § 70.8(d). The petition must "be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the

[1] 8778A and PSD-TX-408M3, dated December 2, 2004; 7741A and PSD-TX-337M-1, dated June 29, 2001.

Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)." Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2). In response to such a petition, the CAA requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the CAA. 42 U.S.C. § 7661d(b)(2). *See also* 40 C.F.R. § 70.8(c)(1); *New York Public Interest Research Group (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2003). Under section 505(b)(2), the burden is on the petitioner to make the required demonstration to EPA. *Sierra Club v. Johnson*, 541 F.3d. 1257, 1266-1267 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677-678 (7th Cir. 2008); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) (discussing the burden of proof in title V petitions); *see also NYPIRG*, 321 F.3d at 333 n.11. If, in responding to a petition, EPA objects to a permit that has already been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures set forth in 40 C.F.R. §§ 70.7(g)(4) and (5)(i) – (ii), and 40 C.F.R. § 70.8(d).

III. BACKGROUND

A. The Facility

The CITGO complex in Corpus Christi includes a refinery that has several title V permits. At issue in this case is the title V permit for the West Plant. The West Plant processes intermediate products of the refinery from the East Plant into diesel fuel blending components, coke sales products, and feed streams for gasoline and petrochemical processing units located at the East Plant. Intermediate products are transported to the West Plant via an interconnecting pipeline and barge docks used for the unloading of Coker Unit feed.

B. The Permit

CITGO submitted a title V permit application for the West plant to TCEQ on August 16, 2005, to revise its existing title V operating permit (permit number O1420), which had been issued on June 16, 2005. The revisions were intended to incorporate several regulatory applicability changes and the conditions in a revised Prevention of Significant Deterioration (PSD) permit (PSD-TX-408M3). Texas published a notice of the proposed title V permit on November 16, 2005, and held a hearing on the permit on June 8, 2006, which ended the public comment period. Petitioners submitted comments during the public comment period on the draft operating permit. TCEQ proposed the permit to EPA on December 19, 2006; EPA did not object to the permit. On February 2, 2007, TCEQ issued the permit to CITGO pursuant to state regulatory provisions implementing the Act, 42 U.S.C. §§ 7401, *et seq.*

The permit incorporates applicable requirements of PSD permits and other minor NSR permits for CITGO's West plant. In addition, the title V permit revises the applicability and monitoring requirements of several vents in the plant to reflect regulatory requirements promulgated after the previous permit was issued; incorporates

the terms and conditions of the Alternative Monitoring Plan (AMP) approved by EPA for two combustion units; and includes a compliance schedule for implementing requirements of a TCEQ administrative enforcement order and a federal Consent Decree.

IV. THRESHOLD REQUIREMENTS

A. Timeliness of Petition

Section 505(b)(2) of the Act provides that a person may petition the Administrator of the EPA, within sixty days after expiration of EPA's 45-day review period, to object to the issuance of a proposed permit. TCEQ proposed the permit to EPA on December 19, 2006. EPA's 45-day review period for the CITGO title V permit expired on February 2, 2007. Thus, the sixty-day petition period ended on April 3, 2007. The subject petition is dated March 30, 2007. EPA finds that Petitioners timely filed their petition.

V. ISSUES RAISED BY THE PETITIONERS

A. Inadequate Monitoring

Petitioners assert that "[t]he Permit's monitoring requirements are not adequate to ensure compliance with all emission limitations and other substantive CAA requirements." Petition at 4. In support of this assertion, Petitioners make three arguments. First, Petitioners argue, in essence, that the frequency of the monitoring requirements should be greater than required by the permit. Petitioners cite as an example "opacity limitations that are continuous, six minute averages" for which the permit requires "only an annual observation of stationary vents to determine compliance with opacity standards, and requires only a quarterly observation for buildings, enclosed facilities, and other structures."[2] Citing a previous EPA title V order, Petitioners argue that a "once-per-year observation is not sufficient monitoring to assure compliance for any unit." Petition at 5. Moreover, Petitioners argue, "the permit should require that the company videotape the coking unit, which would provide on-going, detailed information about visual emissions." Petition at 5. (Claim A.1.)

Second, Petitioners argue that the monitoring requirements are not adequate to assure compliance because the permit does not require the monitoring for opacity to occur at particular times – specifically, when "violations are most likely to occur, such as during 'decoking' operations." Petition at 5; see also Petition at 2. Instead, Petitioners argue: "[t]he permit should tie opacity monitoring to conditions that cause violations" and provide as an example, a permit requirement for "Method 9 readings when CITGO observes visual emissions." Petition at 5. (Claim A.2.)

[2] In making this argument, Petitioners note that it is "not clear to which units these requirements apply" because "the permit's Applicable Requirements Summary does not reference any units subject to Chapter 111 opacity requirements." Petition at 5, note 1. Petitioners' concerns regarding the permit's use of incorporation by reference are addressed in Section II below.

Third, Petitioners argue that the "compliance certification form should require that the specific monitoring method used to determine compliance be identified, and to the extent that compliance is based on credible evidence, the form should require this evidence to be identified." Petition at 2. More specifically, Petitioners argue that the proposed permit does not comply with the requirement for an annual compliance certification "which must define the specific emission limits and monitoring methods upon which the compliance determination is based, citing 40 C.F.R. § 70.6(c)(5)(iii)(A) and (B) or TAC 122.146(5)(A)." Petition at 5. According to Petitioners, the permit incorporates those federal and state requirements by reference, but the certification form "allows the facilities to certify compliance with all other applicable requirements based on reference methods and 'any other credible evidence or information.'" Petition at 6. (Claim A.3.)

To illustrate the alleged inadequacy of the permit's monitoring requirements, the petition includes a description of a video (DVD) presented by one of the Petitioners at a public hearing on the permit. According to Petitioners, the DVD shows the "CITGO's coking unit emitting a large cloud of uncontrolled coke dust into the air on April 1, 2006." Petitioners describe the TCEQ Executive Director's response to the video, which includes an acknowledgement that the plume of smoke and particulates depicted in the video "may be characterized as an upset . . . [and] [u]pset emissions are required to be reported as outlined in [30 TAC 101.201]." Petition at 6 (quoting the TCEQ Executive Director's Response to Comments). Petitioners claim that "the April 1, 2006 upset event has not, in fact, been reported as required by 30 TAC 101.201," Petition at 6-7, and argue that "this is precisely the danger of inadequate monitoring" previously described by EPA in its brief in *Appalachian Power Co. v EPA*, No. 98-1512 (D.C. Cir. Oct. 25, 1999) quoted at 71 Fed. Reg. 75422, 75425 (Dec. 15, 2006).

EPA's Response. For the reasons described below, the Petition is granted with respect Claim A.1 and Claim A.2, and denied with respect to Claim A.3.

Claims A.1 and 2. Frequency and timing of monitoring.

In response to Petitioners' claims that the frequency of the monitoring requirements should be greater and that the monitoring for opacity should occur when "violations are most likely to occur, such as during 'decoking' operations," TCEQ concluded that the monitoring requirements in the permit "demonstrate[] compliance with the applicable state and federal requirements." The bases for this conclusion, however, are unsupported statements that the monitoring requirements are "sufficient to yield reliable data from the relevant time period that is representative of compliance with the permit; and . . . sufficient to assure compliance with the terms and conditions of the permit." TCEQ Response to Comments, Response 6.

TCEQ also explained that the permit requires an observation of the stationary vents on a quarterly basis.[3] While the permit includes monitoring requirements for

[3] Petitioners incorrectly characterize the frequency for opacity monitoring for stationary vents as "annual" whereas the Permit requires "an observation of stationary vents from emission units in operation . . . at least

opacity at stationary vents, there is no indication in the permit record that TCEQ evaluated whether the frequency and timing requirements of the monitoring for opacity at all stationary vents are sufficient to assure compliance with the terms and conditions in the permit as required by section 504(c) of the CAA. Similarly, the permit record does not include an explanation as to how the monitoring requirements for opacity that are included in the permit are "sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." 40 C.F.R. §§ 70.6(a)(3)(i)(B).

Before turning to these specific claims, it is important to provide a summary of the current state of the law on monitoring requirements under title V of the Act in light of a recent court decision. In August 2008, the United States Court of Appeals for the District of Columbia Circuit emphasized that section 504(c) of the Act requires *all* title V permits to contain monitoring requirements to assure compliance with permit terms and conditions. *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008); see also 40 C.F.R. §§ 70.6(a)(3)(i)(B) and 70.6(c)(1)). This decision overturned EPA's interpretative rule, signed December 15, 2006, which had taken the position that permitting authorities were prohibited from adding monitoring requirements to title V permits where the applicable requirements contained some periodic monitoring, even if that periodic monitoring was not sufficient to assure compliance with permit terms and conditions. 71 Fed. Reg. 75422 (Dec. 15, 2006).[4] The Court held that EPA's interpretative rule violated the statutory directive in Section 504(c) of the Act that each permit must include monitoring requirements to assure compliance with the permit terms and conditions. *Sierra Club*, 536 F.3d at 678. If an applicable requirement contains a periodic monitoring requirement that is inadequate to assure compliance with a term or condition of the title V permit, the Court concluded, title V of the Act requires that "somebody must fix these inadequate monitoring requirements." *Id.* at 678. The Court overturned EPA's interpretative rule, but found that EPA's current regulation at 40 C.F.R. § 70.6(c)(1) – requiring that each permit contain monitoring requirements sufficient to assure compliance with permit terms and conditions – may, and must, be interpreted consistent with the Act. *Id.* at 680.

To summarize, EPA's part 70 monitoring rules (40 C.F.R. §§ 70.6(a)(3)(i)(A) and (B) and 70.6(c)(1)) are designed to satisfy the statutory requirement that "[e]ach permit issued under [title V] shall set forth . . . monitoring . . . requirements to assure compliance

---

once during each calendar quarter unless the emission unit is not operating for the entire quarter." *See* Special Condition 3.A (iv)(1) of the Permit.

[4] The effective date of the interpretive rule was January 16, 2007. The CITGO permit was proposed to EPA on December 19, 2006, and issued as a final permit on February 2, 2007. In its statement of basis for the permit, the State summarized what it believed to be its monitoring obligations as follows:

> The Federal Clean Air Act requires that each federal operating permit include monitoring sufficient to assure compliance with the terms and conditions of the permit. Most of the emission limits and standards applicable to emission units at Title V sources include adequate monitoring to show that the units meet the limits and standards. For those requirements that do not include monitoring, or where the monitoring is not sufficient to assure compliance, the federal operating permit must include such monitoring for the emission units affected.

Statement of Basis at 15.

with the permit terms and conditions." CAA § 504(c). As a general matter, permitting authorities must take three steps to satisfy the monitoring requirements in EPA's part 70 regulations. First, under 40 C.F.R. § 70.6(a)(3)(i)(A), permitting authorities must ensure that monitoring requirements contained in applicable requirements are properly incorporated into the title V permit. Second, if the applicable requirement contains no periodic monitoring, permitting authorities must add "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." 40 C.F.R. § 70.6(a)(3)(i)(B). Third, if there is some periodic monitoring in the applicable requirement, but that monitoring is not sufficient to assure compliance with permit terms and conditions, permitting authorities must supplement monitoring to assure such compliance. 40 C.F.R. § 70.6(c)(1). EPA notes that periodic monitoring that meets the requirements of 40 C.F.R. § 70.6(a)(3)(i)(B) will be sufficient to satisfy the requirements of 40 C.F.R. § 70.6(c)(1) (i.e., will be sufficient to assure compliance with permit terms and conditions). In addition, in many cases, monitoring from applicable requirements will be sufficient to assure compliance with permit terms and conditions. For example monitoring established consistent with EPA's Compliance Assurance Monitoring (CAM) rule (40 C.F.R. Part 64) will be sufficient to assure compliance with permit terms and conditions, thus meeting the requirements of 40 C.F.R. § 70.6(c)(1).

In all cases, the rationale for the selected monitoring requirements must be clear and documented in the permit record. 40 C.F.R. § 70.7(a)(5). Further, permitting authorities have a responsibility to respond to significant comments. *See, e.g., In the Matter of Onyx Environmental Services,* Petition V-2005-1 (February 1, 2006), cited in *In the Matter of Kerr-McGee, LLC, Frederick Gathering Station,* Petition-VIII-2007 (February 7, 2008) *(Kerr-McGee Final Order)* ("it is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments"). This principle applies to significant comments on the adequacy of monitoring.

Several rules and guidelines may prove helpful to States in establishing monitoring for compliance assurance purposes in title V permits. Examples include the monitoring design criteria (appropriate data representativeness, frequency, and measures of quality assurance) outlined in the CAM rule, monitoring under several Maximum Achievable Control Technology (MACT) standards (40 C.F.R. Part 63), and certain monitoring provided by acid rain rules (40 C.F.R. Parts 72-78).

The determination of whether the monitoring is adequate in a particular circumstance generally will be a context-specific determination. The monitoring analysis should begin by assessing whether the monitoring required in the applicable requirement is sufficient to assure compliance with permit terms and conditions. In many cases, such as with monitoring developed pursuant to the CAM rule, monitoring from the applicable requirement will be sufficient. Some factors that permitting authorities may consider in determining appropriate monitoring are (1) the variability of emissions from the unit in question; (2) the likelihood of a violation of the requirements; (3) whether add-on controls are being used for the unit to meet the emission limit; (4) the type of monitoring,

process, maintenance, or control equipment data already available for the emission unit; and (5) the type and frequency of the monitoring requirements for similar emission units at other facilities. The preceding list of factors is only intended to provide the permitting authority with a starting point for their analysis of the adequacy of the monitoring. As stated above, such a determination generally will be made on a case-by-case basis and other site-specific factors may be considered.

Here, however, TCEQ did not articulate a rationale for its conclusions that the monitoring requirements for opacity are sufficient to assure compliance with the emissions limitations for opacity, or are sufficient to yield reliable data from the relevant time period that is representative of compliance with the permit. In light of TCEQ's silence on its rationale, EPA grants the petition with respect to Petitioners' claims that the monitoring requirements for opacity are inadequate to assure compliance with the terms and conditions in the permit. (Claims A.1 and 2.).

EPA directs TCEQ to address these monitoring issues, and issue a new draft permit for public review and comment. With regard to these monitoring issues and other monitoring requirements in the permit, TCEQ must ensure it has done the following: (1) satisfied the monitoring requirements of 40 C.F.R. §§ 70.6(a)(3)(i)(A) and (B) and 70.6(c)(1); (2) provided a rationale for the monitoring requirements placed in the permit, see 40 C.F.R. § 70.7(a)(5); and (3) responded to significant comments.

Claim A.3. Compliance certification form.

EPA denies Petitioners' claim with respect to the compliance certification form because it was not raised with sufficient specificity during the public comment period. EPA's review of title V permits in response to a petition for review is limited to only those "objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period." CAA Section 505(b)(2); see also 40 C.F.R. § 70.8(d).

Petitioners argue in their petition that the permit does not comply with the requirement for an annual compliance certification that identifies the specific emission limits and monitoring methods upon which the compliance determination is based (citing 40 C.F.R. § 70.6(c)(5)(iii)(a) and (B) or TAC 122.146(5)(A)), "but allows facilities to certify compliance . . . based on reference methods and 'any other credible evidence or information'" without specifying the monitoring method that was used or the credible evidence that was relied upon. Petition at 5-6.

Petitioners state that they submitted written comments to TCEQ on December 16, 2005 and that Petitioner Suzie Canales submitted additional comments to TCEQ during the notice and comment hearing on June 8, 2006. Petitioners attach copies of their comments and a video presented by Petitioner Suzie Canales at the hearing. Petitioners assert that they "raised all issues in this Petition in their comments to TCEQ." Petition at

3. EPA disagrees. Neither the Petitioners nor any other commenter raised this issue regarding the compliance certification form with sufficient specificity during the comment period.

Petitioners raised concerns related to the reporting of deviations (which are reported on the compliance certification form) in their written comments, and Petitioner Suzie Canales presented a video recording of emissions from the coker unit and health effects to the community as a result of the emissions. In EPA's view, those comments did not raise the specific claim in the petition that the compliance certification form should require the inclusion of certain information related to the type of monitoring or credible evidence relied upon in certifying compliance. In its Response to Comments, TCEQ explained that "the plume of smoke and particulates presented on the DVD may be characterized as an upset." Petitioners do not assert or otherwise make any effort to demonstrate that it was impracticable for them to raise their concerns with respect to the compliance certification form during the public comment period. Accordingly, this claim does not qualify for EPA review, and therefore the claim is denied. CAA Section 505(b)(2); see also 40 C.F.R. § 70.8(d).

B. Incorporation by Reference (IBR)

Petitioners argue generally that the permit "thwarts the goals of Title V" and violates the requirements of 40 C.F.R. § 70.6 (a)(1), and the requirement of CAA § 504(a) that "each permit shall include. . . such other conditions as are necessary to assure compliance with the applicable requirements." Petition at 8 (note 3) and 9. TCEQ's use of incorporation by reference, according to Petitioners "renders the permit practically unenforceable" (Petition at 8, note 3) and therefore, does not "assure compliance" with the permit terms and conditions (Petition at 9). In the same vein, Petitioners also argue that the use of IBR "poses a significant barrier to members of the public who wish to discover and/or comment on whether the permit assures compliance." Petition at 9. In conclusion, Petitioners argue, the "extensive use of incorporation by reference" instead of a single document that sets forth the applicable requirements "makes it difficult, if not impossible, for the public to know the precise requirements of the permit from its face, thus defeating the central purpose of the . . . program to improve accountability and enforcement." Petition at 12.

In support of its general claim, Petitioners make three specific points. First, Petitioners claim that the title V permit impermissibly uses incorporation by reference for emissions limitations, such as the maximum allowable emission rate tables (MAERT) from the underlying Prevention of Significant Deterioration ("PSD") permits. Without obtaining the PSD permits, Petitioners argue, "it is impossible to know whether the appropriate limits are included [in the Title V permit], and whether the permit includes monitoring sufficient to assure compliance with the requirements." Petition at 10. (Claim B.1.).

Second, Petitioners' attack the use of incorporation by reference for the "limitations and monitoring requirements found in a Consent Agreement with TCEQ

[(TCEQ Order)]." Petition at 10. More specifically, Petitioners argue that the Compliance Schedule references "TCEQ Docket No. 2001-1469-AIR-E" but that the TCEQ Order is not referenced in the Applicable Requirements Summary. Petitioners also argue that the TCEQ Order will terminate and if the terms are not explicitly part of the Permit, "the impact of the Order and its incorporation by reference is at best uncertain." Petition at 10. Accordingly, Petitioners conclude that "the Applicable Requirements Summary must reference the TCEQ Order contained in TCEQ Docket No. 2001-1469-AIR-E", and the permit should explicitly state the provisions of the Order as terms of the permit." Petition at 10. (Claim B.2.)

Third, Petitioners make similar arguments with respect to a Consent Decree CITGO entered into with EPA in 2004 (available at http://cfpub.epa.gov/compliance/cases). In Petitioners' view, the title V permit "must . . . explicitly incorporate the emission limitations and monitoring requirements established in the EPA Consent Decree;" and, more specifically, the Consent Decree provisions should be listed as permit terms in the Applicable Requirements and Periodic Monitoring Summaries. Petition at 11. Petitioners also state that "according to the compliance schedule, Units 527-H2 and 573 did not have required continuous monitoring, and CITGO was required to submit an alternative monitoring plan and install a flare" yet these Consent Decree terms were not included or even referenced in the "Periodic Monitoring Summary." Petition at 10. Last, Petitioners argue that the Consent Decree will expire "but the limitations and monitoring requirements are intended to be incorporated into federal operating permits" and if they are not, "the impact of the Consent Decree is at best uncertain." Petition at 11. (Claim B.3.)

In response to comments on incorporation by reference, TCEQ stated that it "does not agree that incorporation by reference is improper or makes the permit unenforceable" and that the "inclusion of minor NSR permit requirements and permits by rule in the Title V permits through incorporation by reference was approved by EPA when granting Texas' operating permits program full approval in 2001," the practice was defended by EPA in litigation over EPA's approval of Texas' program, and that the U.S. Court of Appeals for the Fifth Circuit agreed that IBR is permissible. TCEQ Response to Comments, Response 5. To obtain the documents incorporated by reference, TCEQ stated that "it is only necessary to contact the permit reviewer" and the "executive director is confident that the necessary information to assess compliance is available." *Id.* Finally, TCEQ addressed petitioners comments on the incorporation by reference of the TCEQ Agreed Order and the EPA Consent Decree generally, and units 527-H2 and 573 specifically, as follows:

> As the compliance schedule attachment references an agreed order (2001-1469-AIR-E) and an alternative monitoring plan, it is redundant to list these requirements elsewhere in the permit. See above comment regarding incorporation by reference.

Id.

EPA's Response. For the reasons described below, the Petition is granted in part and denied in part.

Claim B.1. Use of incorporation by reference for emissions limitations

EPA has discussed the issue of incorporation by reference in *White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program* (March 5, 1996)(*White Paper 2*). As EPA explained in *White Paper 2*, incorporation by reference may be useful in many instances, though it is important to exercise care to balance the use of incorporation by reference with the obligation to issue permits that are clear and meaningful to all affected parties, including those who must comply with or enforce their conditions. *Id.* at 34-38. *See also In the Matter of Tesoro Refining and Marketing*, Petition No. IX-2004-6 at 8 (March 15, 2005)(*Tesoro Order*). Further, as EPA noted in the *Tesoro Order*, EPA's expectations for what requirements may be referenced and for the necessary level of detail are guided by sections 504(a) and (c) of the CAA and corresponding provisions at 40 C.F.R. § 70.6(a)(1) and (3). *Id.* Generally, EPA expects that title V permits will explicitly state all emission limitations and operational requirements for all applicable emission units at a facility. *Id.*

As TCEQ notes in its response to comments, EPA has approved TCEQ's use of incorporation by reference for minor NSR permits and Permits by Rule. 66 Fed. Reg. 63318, 63324 (Dec. 6, 2001); *see also, Public Citizen v. EPA,* 343 F.3d 449, 460-61(5th Cir. 2003)(upholding EPA's approval of TCEQ's use of incorporation by reference for minor NSR permits and Permits by Rule). In approving Texas' limited use of incorporation by reference of emissions limitations from minor NSR permits and Permits by Rule, EPA balanced the streamlining benefits of incorporation by reference against the value of a more detailed title V permit and found Texas' approach for minor NSR permits and Permits by Rule acceptable. *See Public Citizen*, 343 F.3d at 460-61. EPA's decision approving this use of IBR in Texas' program was limited to, and specific to, minor NSR permits and Permits by Rule in Texas. EPA noted the unique challenge Texas faced in integrating requirements from these permits into title V permits. *See, e.g.*, 66 Fed. Reg. at 63,326; 60 Fed. Reg. at 30,039; 59 Fed. Reg. at 44,574. EPA did not approve (and does not approve of) Texas' use of incorporation by reference of emissions limitations for other requirements.

Consistent with EPA's previous statements on the use of incorporation by reference, I agree that the applicable emissions limits (MAERT) should be explicitly identified in CITGO's title V permit. It is especially important here where the title V permit incorporates requirements from several permits (including two PSD permits, several federal regulations, and other requirements). Moreover, the title V permit cross-references the PSD permits in their entirety. Thus, EPA grants the petition on this issue with regard to TCEQ's use of incorporation by reference for emissions limitations, with the exception of those emissions limitations from minor NSR permits and permits by rule. EPA directs TCEQ to reopen the permit and ensure that all such emissions limitations are included on the face of the title V permit.[5]

[5] As to Texas' use of incorporation by reference for emissions limitations in minor NSR permits and

Claims B.2 and B.3. Treatment of TCEQ Agreed Order and EPA Consent Decree

EPA grants Petitioners' claims regarding the incorporation by reference of the terms in the TCEQ Agreed Order (AO) and the EPA Consent Decree (CD), to the extent the terms of those documents are related to compliance with the CAA and implementing regulations (i.e., CAA-related requirements). EPA notes that EPA's part 70 regulations do not expressly include terms of CDs or AOs in the definition of "applicable requirements." See 40 C.F.R. § 70.2. As a general matter, CDs and AOs resulting from the enforcement of "applicable requirements" under the CAA typically will address the underlying "applicable requirements" in a range of ways.[6] Sometimes the CD or AO will contain particular findings that the underlying "applicable requirements" apply to the source. *See, e.g.*, CITGO CD paragraph 64 (relating to NSPS applicability to heaters, boilers and other fuel gas combustion devices (other than flares)). In other instances, the CD or AO will require the source to adopt or implement measures related to the underlying applicable requirement, but the CD or AO will not expressly find that the underlying "applicable requirement" applies to the source. *See, e.g.*, CITGO CD Section V.F (relating to NOx emissions reductions from heaters and boilers). In yet other instances, the CD or AO may require the source to adopt or implement measures that do not relate to the enforcement of an "applicable requirement" under the CAA. *See, e.g.*, TCEQ AO paragraph II.f. (relating to wastewater and storm water collection systems).

EPA believes that, because CDs and AOs reflect the conclusion of a judicial or administrative process resulting from the enforcement of "applicable requirements" under the Act, all CAA-related requirements in such CDs and AOs are appropriately treated as "applicable requirements" and must be included in title V permits, regardless of whether the applicability issues have been resolved in the CD. This view is consistent with: (1) EPA's part 70 regulations, *see, e.g.*, 40 C.F.R. § 70.5(c)(8) (compliance schedules "shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject"); (2) statements EPA made at the time these regulations were issued, *see, e.g.*, 57 Fed. Reg. 32250, 32255 (July 21, 1992) (preamble to the 1992 final part 70 rule) ("[s]ources seeking to obtain or renew a part 70 permit cannot be shielded from enforcement actions alleging violations of any applicable requirements (including orders and consent decrees) that occurred before, or at the time of, permit issuance."); and (3) EPA's practice implementing title V. *See, e.g., In the Matter of East Kentucky Power Cooperative, Inc. Hugh L. Spurlock Generating Station Maysville, Kentucky*, Petition IV-2006-4, at 17 (August 30, 2007) (title V Order noting

---

permits by rule, EPA will be evaluating this practice to determine how well it is working. Further, while EPA approved of the incorporation by reference approach for these types of permits, as discussed in a separate title V order issued today (*In the Matter of the Premcor Refining Group, Inc. Port Arthur, Texas*, Petition VI-2007-02 (May 28, 2009)) it is important that that TCEQ ensure that referenced permits are part of the public docket or otherwise readily available, and currently applicable, and that the title V permit is clear and unambiguous as to how the emissions limits apply to particular emissions units.

[6] CDs and AOs also often contain "whereas" clauses under which the government describes the "applicable requirements" it is enforcing, and the source denies that it is or has been in violation of those requirements. *See, e.g.*, CITGO CD, the second and seventh whereas clauses.

that "should the proposed consent decree be entered by the court in the related enforcement action, [the State and the source] would need to appropriately respond by incorporating the compliance schedule(s) required by the consent decree into the title V permit."); *In the Matter of Dynergy Northeast Energy Generation*, Petition No. II-2001-06, at 29-30 (title V Order noting that "conditions from [a] 1987 Consent Decree are applicable requirements that must be included in [the source's] title V permit."); *see also Sierra Club v. EPA*, 557 F.3d 401, 411 (6th Cir. 2008) (noting EPA's view that once a CD is final, it will be incorporated into the source's title V permit).

In this CITGO permit, the applicable requirements (including monitoring requirements) are listed in the form of an "Applicable Requirements Summary" and a "Periodic Monitoring Summary." As Petitioners note, the summaries do not include any reference to the CAA-related requirements contained in the AO or the CD, and therefore, they are incomplete.

In addition, EPA's regulations at 40 C.F.R. § 70.6(c)(3) require title V permits to contain "[a] schedule of compliance consistent with § 70.5(c)(8)." In turn, § 70.5(c)(8) requires, among other things, that compliance schedules "shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject." 40 C.F.R. § 70.5(c)(8)(iii)(C). The compliance schedule in this permit is deficient because it is over-inclusive with respect to the requirements contained in the AO and under-inclusive with respect to the requirements contained in the CD.[7] The AO is incorporated in its entirety into the compliance schedule without any specificity, yet the AO covers both the West Plant and the East Plant of the Corpus Christi Refinery as well as a petroleum terminal facility (Deep Sea Terminal). Moreover, there are provisions in the AO that are unrelated to the CAA, such as corrective actions related to wastewater treatment, that do not belong in a title V permit because they do not relate to "applicable requirements" under the Act and EPA's implementing regulations. On the other hand, only a few provisions from the CD containing CAA-related requirements are referenced in this permit's compliance schedule. These provisions relate to one heater at the facility (Unit No. 527-H2) and one flare (Unit No. 573-ME1). There are several other provisions in the CD that apply to the facility and are CAA-related requirements, but they are not included in this permit. For example, paragraphs 131 and 132 of the Consent Decree require (and include a schedule for) CITGO to apply for and seek air permits for certain emission limits and standards and then apply to incorporate those requirements into title V permits, yet there is no mention of those provisions in the permit's compliance schedule.[8]

---

[7] TCEQ's response to comments on these issues does not elucidate TCEQ's reasoning for its treatment of the AO and CD. TCEQ stated:

> "As the compliance schedule attachment references an agreed order (2001-1469-AIR-E) and an alternative monitoring plan, it is redundant to list these requirements elsewhere in the permit. See above comment regarding incorporation by reference."

[8] In its response, CITGO points to these paragraphs to argue that no further incorporation of the CD is necessary in the title V permit. CITGO Response at 6. EPA notes, however, that the requirements of these paragraphs are not currently included in the compliance schedule in the title V permit issued by TCEQ.

To remedy these defects, TCEQ must (1) include a reference to the CD and AO in the applicable requirements summary and specifically include any emissions limitations and (2) revise the compliance schedule to meet the requirements of 40 C.F.R. § 70.6(c)(3) and 40 C.F.R. § 70.5(c)(8)(iii)(C). In making these revisions, TCEQ does not need to explicitly identify all of the specific provisions of the CD or AO that apply to the particular activities of the source if it is otherwise clear from the CD, the AO, or the permit itself, and the CD and AO are readily available for public review.[9]

VI. CONCLUSION

For the reasons set forth above, and pursuant to Section 505(b) of the Act, 42 U.S.C. § 7661d (b), and 40 C.F.R. § 70.8(d), I partially deny and partially grant the petition and remand the permit to TCEQ for revisions consistent with this Order.

Lisa P. Jackson
Administrator

Dated: MAY 28 2009

Further, the inclusion of these paragraphs in the CD does not obviate the need to place all CAA-related requirements resulting from enforcement of "applicable requirements" into this title V permit now. In particular cases, government negotiators sometimes choose to include provisions in CDs that direct the source to apply to incorporate CD terms into state-issued permits and then apply for title V permits. That practice can serve various purposes, including, for example, placing the direct obligation on the source to apply for title V permits even before a permit is renewed or reopened by the permitting authority. See 40 C.F.R. 70.7(f).

[9] EPA expressed a position consistent with this view in its response to the following comment on the proposed part 70 regulation implementing title V:

> Commenter IV-D-274 requested that the compliance schedule be able to incorporate by reference any existing judicial consent decree, administrative order, or like agreement.

EPA responded as follows:

> Requirements of judicial consent decrees, administrative orders and other similar agreements, such as compliance plans or schedules of compliance, could be incorporated by reference in the Part 70 application or permit. However, if the application or permit contains compliance plans with schedules of compliance, these plans or schedules should not be less stringent than the requirements contained in the decrees or orders.

EPA's response to comment on the final part 70 rule implementing title V at 5-13 to 5-14.