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May 19, 2014

Administrator Gina McCarthy  
U.S. Environmental Protection Agency  
Ariel Rios Building, Mail Code 1101A  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
Fax number (202) 501-1450

*via Federal Express*

**Re: Petition for Objection to Texas Title V Permit No. O1668 for the Operation of the Deer Park Chemical Plant in Harris County, Texas**

Dear Administrator McCarthy:

Enclosed is a petition requesting that the U.S. Environmental Protection Agency object to the TCEQ's renewal of Title V Permit No. O1668, issued to Shell Chemical LP for operation of the Deer Park Chemical Plant. This petition is timely submitted by the Environmental Integrity Project, Sierra Club, and Air Alliance Houston. As required by law, petitioners are filing this petition with the EPA Administrator, with copies to EPA Region VI, the Texas Commission on Environmental Quality, and Shell. The enclosed CD contains electronic copies of all petition exhibits.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Clark-Leach', written over a horizontal line.

Gabriel Clark-Leach  
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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF	§	PETITION FOR OBJECTION
	§	
Clean Air Act Title V Permit (Federal Operating Permit) No. O1668	§	
	§	
Issued to Shell Chemical LP, Deer Park Chemical Plant	§	Permit No. O1668
	§	
Issued by the Texas Commission on Environmental Quality	§	
	§	
	§	

**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO  
ISSUANCE OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE DEER  
PARK REFINERY, PERMIT NO. O1668**

Pursuant to section 42 U.S.C. § 7661d(b)(2), Environmental Integrity Project, Air Alliance Houston, and Sierra Club hereby petition the Administrator of the U.S. Environmental Protection Agency (“Administrator” or “EPA”) to object to Federal Operating Permit No. O1668 (“Proposed Permit”) renewed by the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) for the Deer Park Chemical Plant, operated by Shell Chemical LP (“Shell”).

**I. INTRODUCTION**

The Shell Deer Park Chemical Plant is part of an integrated industrial complex, located in Deer Park approximately fifteen miles southeast of Houston. It is a major source of so-called “criteria pollutants,” ozone-forming pollutants, and toxic air pollutants located in the Harris County ozone severe non-attainment area. The chemical plant manufactures base chemicals and produces approximately 8,000 tons of petrochemical and chemical products, like ethylene, propylene, butylene, isoprene, butadiene, benzene, toluene, xylene, phenol, acetone, and cumene

each day.<sup>1</sup> The plant has a long history of non-compliance with Clean Air Act requirements that has resulted in many administrative enforcement orders, and two federal court consent decrees.<sup>2</sup> While Petitioners are hopeful that the most recent consent decree, which requires Shell to install new pollution control and monitoring equipment, will reduce illegal emissions from the Deer Park Chemical Plant, we are also concerned that the Proposed Permit fails to assure compliance with applicable requirements established to limit public exposure to dangerous pollution emitted from the Plant.

The Administrator should object to the Proposed Permit because it fails to assure compliance with applicable requirements, it fails to provide a clear and complete accounting of the requirements that apply to the Shell Deer Park Chemical Plant, and it fails to address Shell's ongoing non-compliance with the Texas State Implementation Plan. The Administrator should also object because the Executive Director failed to sufficiently respond to Petitioners' comments identifying defects in the Draft Permit.<sup>3</sup>

## II. PETITIONERS

Environmental Integrity Project ("EIP") is a non-profit, non-partisan organization with offices in Austin, Texas and Washington, D.C. that promotes strict and effective enforcement of state and federal air quality laws.

Air Alliance Houston is a non-profit organization whose mission is to reduce air pollution in the Houston region and to protect public health and environmental integrity through research,

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<sup>1</sup> Shell Deer Park Settlement webpage, available electronically at <http://www2.epa.gov/enforcement/shell-deer-park-settlement#overview>

<sup>2</sup> *Id.*; Exhibit A, list of enforcement orders issued against Shell by the TCEQ; *see also* Exhibit B, a list of excess emission events at the Plant reported by Shell.

<sup>3</sup> While Air Alliance Houston did not sign onto public comments filed by Sierra Club and EIP, we will refer to the comments as "Petitioners' comments" for convenience. Even though Air Alliance Houston did not sign onto the public comments, they may still petition EPA to object to the Proposed Permit based on the comments filed by Sierra Club and EIP. 40 C.F.R. § 70.8(d) ("[I]f the Administrator does not object in writing . . . *any person* may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period to make such objection")(emphasis added).



education, and advocacy. Air Alliance Houston participates in regulatory and legislative processes, testifies at hearings, and comments on proposals. Air Alliance Houston is heavily involved in community outreach and works to educate those living in neighborhoods directly impacted by air pollution about local air pollution issues, as well as state and federal policy issues.

Sierra Club, founded in 1892 by John Muir, is the oldest and largest grassroots environmental organization in the country, with over 600,000 members nationwide. Sierra Club is a non-profit corporation with offices, programs and numerous members in Texas. Sierra Club has the specific goal of improving outdoor air quality.

### **III. PROCEDURAL BACKGROUND**

The TCEQ has issued seven separate Title V permits, including Permit No. O1668, which authorizes the operation of facilities at the Deer Park Chemical Plant. When Permit No. O1668 was first issued in 2004, it covered approximately 71 emissions units associated with the Plant's olefins production unit. In its 2009 renewal application, Shell asked the TCEQ to consolidate Permit No. O1668 with the six other Deer Park Chemical Plant Title V permits (O1943, O1945, O1946, O1947, O1948, and O2108). More than three years later, the Executive Director issued the Draft Consolidated Renewal Permit No. O1668 ("Draft Permit") on May 18, 2012. Notice of the Draft Permit was published on June 15, 2012 and Environmental Integrity Project and Sierra Club timely filed comments identifying several deficiencies in the Draft Permit on July 16, 2012.<sup>4</sup>

In response to these comments, the Executive Director made the following changes to the Draft Permit: (1) additional major New Source Review ("NSR") permits were included in Appendix B and the Major NSR Summary Table was revised to identify additional requirements;

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<sup>4</sup> A copy of these comments is included with this Petition as Exhibit C ("Comments").



(2) voided Permit Nos. 26368 and 70389 were removed from the New Source Review Authorization References table; and (3) several PBRs that had been incorporated into case-by-case NSR permits and voided were removed from the New Source Authorization References Table. The Draft Permit was also revised to indicate that Shell may move forward with its application to “de-flex” Permit No. 21262 or continue operating under Permit No. 21262 and 56496, “depending on whether the Flexible Permits Program becomes SIP approved.”<sup>5</sup> The revised permit and the Executive Director’s response to public comments were sent to EPA on February 4, 2014. EPA did not object to the Proposed Permit during its 45-day review period, which ended on March 21, 2014. Petitioners are satisfied that the Executive Director’s response to public comments and revisions to the Draft Permit resolve our concerns about the permit’s incorporation by reference of *major* NSR permit requirements and incorporation of Shell’s consent decree (Case No. H-01-0978). However, the Executive Director’s response to the remaining objections Petitioners raised during the comment period was not sufficient, and his decision to revise Shell’s obligation to “de-flex” Permit No. 21262 was improper. Accordingly, Petitioners timely file this Petition and we respectfully ask the Administrator to object to the Proposed Permit.

#### IV. LEGAL REQUIREMENTS

All major stationary sources of air pollution are required to apply for operating permits under Title V of the Clean Air Act.<sup>6</sup> Title V permits must include all federally enforceable emission limits and operating requirements that apply to a source as well as monitoring requirements sufficient to assure compliance with these limits and requirements in one legally

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<sup>5</sup> Exhibit D, Executive Director’s Response to Public Comments (“RTC”).

<sup>6</sup> 42 U.S.C. § 7661a(a).

enforceable document.<sup>7</sup> Title V permits issued by the TCEQ are federally enforceable and the Commission may only issue a permit if the permit conditions provide for compliance with all applicable requirements. Non-compliance by a source with any provision in a Title V permit constitutes a violation of the Clean Air Act and provides ground for an enforcement action against the source.<sup>8</sup>

Where a state permitting authority issues a Title V operating permit, EPA will object to the permit if it is not in compliance with applicable requirements under 40 C.F.R. Part 70.<sup>9</sup> If EPA does not object, “any person may petition the Administrator within 60 days after the expiration of the Administrator’s 45-day review period to make such objection.”<sup>10</sup> 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].”<sup>11</sup> The Administrator must grant or deny a petition to object within 60 days of its filing.<sup>12</sup> While the burden is on the petitioner to demonstrate to EPA that a Title V operating permit is deficient, once that burden is met, “EPA has no leeway to withhold an objection.”<sup>13</sup>

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<sup>7</sup> 42 U.S.C. §§ 7661a(a), 7661c(a); *see also* 40 C.F.R. § 70.6(a)(1).

<sup>8</sup> 42 U.S.C. § 7661(a).

<sup>9</sup> 40 C.F.R. § 70.8(c).

<sup>10</sup> 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); 30 Tex. Admin. Code § 122.360.

<sup>11</sup> 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(c)(1).

<sup>12</sup> 42 U.S.C. § 7661d(b)(2).

<sup>13</sup> *Sierra Club v. EPA*, 557 F.3d 401, 405 (6th Cir. 2009); *New York Public Interest Group v. Whitman*, 321 F.3d 316, 332-34, n12 (2nd Cir. 2003) (“Although there is no need in this case to resort to legislative history to divine Congress’ intent, the conference report accompanying the final version of the bill that became Title V emphatically confirms Congress’ intent that the EPA’s duty to object to non-compliant permits is nondiscretionary”).

## V. GROUNDS FOR OBJECTION

### A. The Proposed Permit's Incorporation by Reference of Case-by-Case and Standard Permit Minor NSR Authorizations Fails to Assure Compliance<sup>14</sup>

Texas Title V permits must include and assure compliance with emission limits and requirements contained in preconstruction permits issued under the Texas State Implementation Plan.<sup>15</sup> As a matter of policy, the TCEQ prefers to issue Title V permits that do not directly list preconstruction permit limits and requirements. Instead, the TCEQ incorporates preconstruction permits by reference into its Title V permits. To accomplish this, the TCEQ includes the following special condition in its Title V permits:

Permit holder shall comply with the requirements of New Source Review authorizations issued or claimed by the permit holder for the permitted area, including permits, permits by rule, standard permits, flexible permits, special permits, permits for existing facilities including Voluntary Emissions Reduction Permits and Electric Generating Facility Permits issued under 30 TAC Chapter 116, Subchapter I, or special exemptions referenced in the New Source Review Authorization References attachment. These requirements:

- A: Are incorporated by reference into this permit as applicable requirements
- B: Shall be located with this operating permit
- C: Are not eligible for a permit shield.<sup>16</sup>

As EPA explained to the TCEQ in a series of Title V permit objection letters, the TCEQ's practice of incorporating major preconstruction permits by reference is inconsistent with Title V requirements: It undermines the enforceability of major preconstruction permit requirements and it fails to provide members of the public, regulators, and regulated entities with a clear comprehensive list of federally enforceable requirements the Title V source must comply

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<sup>14</sup> Comments at 4-5.

<sup>15</sup> 42 U.S.C. § 7661c(a) ("*Each permit issued*" under Title V must include conditions "necessary to assure compliance with applicable requirements")(emphasis added).

<sup>16</sup> Proposed Permit at 20-21, Special Condition 22.



with.<sup>17</sup> In response to these objection letters, the TCEQ revised its policy and now issues Title V permits that directly include major preconstruction permit limits and requirements.<sup>18</sup>

In many cases, the TCEQ's use of incorporation by reference ("IBR") for *minor* preconstruction permit limits and requirements is also a problem. While EPA has expressed concern that the TCEQ's use of IBR for minor preconstruction permits *may* be contributing to ambiguous and unenforceable permits, EPA has not formally objected to any Texas Title V permit for that reason.<sup>19</sup> As Petitioners' public comments explain, EPA's concerns about Texas's use of incorporation by reference for minor preconstruction permits are well-founded and the Draft Permit's incorporation by reference of minor preconstruction permits is inconsistent with Title V requirements.

EPA must object to the Proposed Permit's incorporation by reference of minor preconstruction permits for the same reasons it has objected to incorporation by reference of major preconstruction permits. Emissions units authorized under Shell's minor preconstruction permits have the potential to emit air pollution at levels that far exceed applicable major source significance thresholds. Indeed, as we explain below, Shell's minor preconstruction permits authorize Shell to emit far more pollution than several of the major preconstruction permits incorporated by reference into Title V permits that drew EPA's objection. Air pollution emitted by emissions units authorized under a minor permit is no less dangerous because it is authorized

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<sup>17</sup> Objection to Title V Permit No. O1420, CITGO Refining and Chemicals Company, Corpus Christi Refinery, West Plant (October 29, 2010) at 3-4. Available electronically at:

<http://www.tceq.state.tx.us/assets/public/permitting/air/Announcements/epa-objection-O1420.pdf>

<sup>18</sup> Letter from Carl Edlund, Director Multimedia Planning and Permitting Division, EPA Region 6 to Steve Hagle, Deputy Director, Office of Air, TCEQ (March 21, 2012), Regarding Title V Pilot Permits to Remove Incorporation by Reference. Available Electronically: <http://www.tceq.state.tx.us/assets/public/permitting/air/Announcements/3-21-12-ltrtotceq-pilot.pdf>; see also, follow up correspondence available electronically at

<http://www.tceq.state.tx.us/assets/public/permitting/air/Announcements/toepa-07-27-12.pdf> and

<http://www.tceq.state.tx.us/assets/public/permitting/air/Announcements/8-22-12-epa-ltr-totceq.pdf>

<sup>19</sup> Letter from Al Armendariz, Regional Administrator, EPA, Region 6, to Mark R. Vickery, Executive Director, TCEQ, Re: Incorporation by Reference in Texas Title V Permits (June 10, 2010) available electronically at:

[http://www.tceq.texas.gov/assets/public/permitting/air/Announcements/from\\_epa\\_6\\_10\\_10.pdf](http://www.tceq.texas.gov/assets/public/permitting/air/Announcements/from_epa_6_10_10.pdf)

by a minor permit. To assure that air pollution emitted from the Deer Park Chemical Plant will not harm the public or further diminish air quality in the Harris County non-attainment area, the Proposed Permit must assure compliance with minor preconstruction permit limits and requirements. The Proposed Permit falls short of this mark for the same reasons that Title V permits incorporating major preconstruction permits fall short of the mark: It fails to put members of the public, regulators, and Shell on notice as to which requirements and limits apply to significant emissions units at the Deer Park Chemical Plant and it fails to assure compliance with those requirements and limits.

Indeed, the Proposed Permit's incorporation by reference of minor preconstruction permits poses a *much* greater obstacle to enforcement than the incorporation of major preconstruction permits that EPA has objected to. This is so because: (1) limits and requirements established by Shell's minor preconstruction permits are spread across *many different permits* and *different kinds of permits*, (2) these various permits are frequently revised to reflect changes at the Refinery, and (3) changes to one permit can affect requirements established by another.

**1. The Proposed Permit's Incorporation by Reference of Minor NSR Permits is Objectionable for the Same Reason that the TCEQ's Practice of Incorporation by Reference of Major NSR Permits is Objectionable<sup>20</sup>**

While the Proposed Permit only incorporates by reference three major NSR permits, it incorporates by reference 19 Chapter 116, Subchapter B minor New Source Review ("NSR") permits, one Subchapter G flexible permit, and one Subchapter F standard permit.<sup>21</sup> Shell's minor NSR permits authorize the Plant to emit more than 1,390 tons of VOC, 1,970 tons of SO<sub>2</sub>/SO<sub>x</sub>, 2,643 tons of NO<sub>x</sub>, 1,570 tons of CO, 290 tons of PM, and 50 tons of benzene each

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<sup>20</sup> Comments at 5.

<sup>21</sup> Proposed Permit at 555-556.



year.<sup>22</sup> These significant emissions dwarf the quantity of air pollution authorized by major NSR permits at many of the facilities where IBR of major NSR permits has drawn an EPA objection. For example, EPA objected to TCEQ's proposed renewal of Title V Permit No. O17 for the City of Garland Power and Light's Ray Olinger Plant because it incorporated by reference Permit No. PSDTX935.<sup>23</sup> PSDTX935 authorizes the Ray Olinger Plant to emit 134.40 tons of NOx, 227.33 tons of CO, 21.99 tons of VOC, 52.3 tons of SO2, and 36.62 tons of PM each year.<sup>24</sup> EPA also objected to a proposed minor revision to Title V Permit No. O2013 for Ticona Polymer's Co-Gen facility, because it incorporated by reference Permit No. PSDTX725.<sup>25</sup> PSDTX935 authorizes Ticona Polymer's Co-Gen facility to emit 531.4 tons of NOx, 285.2 tons of CO, 47.5 tons of VOC, 35.8 tons of PM10, and 18.5 tons of SO2 each year.<sup>26</sup> EPA also objected to a proposed revision to Title V Permit No. O2032 for Union Carbide's Polyethylene and Catalyst Units in Calhoun County because it incorporated by reference Permit No. PSDTX118M4.<sup>27</sup> PSDTX118M4 authorizes Union Carbide to emit 26.93 tons of NOx, 93.26 tons of CO, 197.75 tons of VOC, and 0.19 tons of SO2 each year.<sup>28</sup>

Taken together, emissions authorized by these three major NSR permits are a fraction of the emissions authorized by minor NSR permits incorporated by reference into the Proposed Permit. If IBR of these major NSR permits is objectionable because it fails to assure compliance

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<sup>22</sup> Exhibit E. The totals in this table were calculated by summing annual limits listed in the MAERTs for non-PBR minor NSR permits listed in the Proposed Permit's New Source Review Authorization References table. Proposed Permit at 555-556. These totals do not include emissions authorized by Permit Nos. 21262, 3219, and 37206, which are associated with the three major NSR permits incorporated by the Proposed Permit (PSDTX896, PSDTX928, and PSDTX974).

<sup>23</sup> *Objection to Federal Operating Permit No. O17, City of Garland Power and Light, Ray Olinger Plant* (January 22, 2010) at ¶ 1 ("Pursuant to 40 CFR 70.8(c)(1), EPA object to the issuance of the Title V permit because it incorporates by reference the major New Source Review permit PSD-TX-935 and fails to include emission limitations and standards as necessary to assure compliance with all applicable requirements.").

<sup>24</sup> Exhibit F, PSDTX935 Maximum Allowable Emission Rate Table.

<sup>25</sup> *Objection to Federal Operating Permit No. O2013, Ticona Polymers, Co-Gen* (November 2009) at ¶ 1.

<sup>26</sup> Exhibit G, PSDTX725 Maximum Allowable Emission Rate Table.

<sup>27</sup> *Objection to Federal Operating Permit No. O2032, Union Carbide Corporation, Polyethylene and Catalyst Units* (November 25, 2009) at ¶ 1.

<sup>28</sup> Exhibit H, PSDTX118M4, Maximum Allowable Emission Rate Table.



with major NSR limits and requirements; and if the benefits of transparency and improved enforceability accomplished through the direct inclusion of limits and requirements established by these major NSR permits outweighs the administrative burden of preparing detailed Title V permits, then the Proposed Permit's IBR of Shell's minor NSR permits is also objectionable.

**2. The Proposed Permit's use of IBR Presents a More Significant Burden on Enforcement of Minor NSR Permit Requirements than the TCEQ's Impermissible Practice of Incorporating Major NSR Permit Limits by Reference**

In response to Petitioners' comments regarding the Draft Permit's use of IBR for minor NSR permits, the Executive Director explained that:

All NSR permits for this site are easily found by accessing TCEQ's permit database. These authorizations, emission limits, terms and conditions, and monitoring requirements are all enforceable terms of the operating permit to which they are incorporated. Unlike many other states, this technique is particularly appropriate in Texas where the preconstruction permits are a separate authorization from the operating permit. The procedures for issuance, amendment and renewal of preconstruction permits are also separate and distinct from the operating permits program; and these larger facilities frequently make changes at their sites requiring changes to NSR permits. The health effects review and NAAQS analysis is conducted as part of the preconstruction permit review and not part of the TV application review so the concerns about potential to harm public health and interference with the attainment of health based ambient air quality standards would have already been addressed during the review of those initial or amendment applications. Cutting and pasting emission limit tables or monitoring terms from the NSR to the operating permit creates potential inaccuracies as to what specific requirement the site is subject to at a given point in time. Keeping these limits and terms in one document rather than two (and referencing by permit number in the operating permit) better ensures both the TCEQ and permit holder which requirements must be followed.<sup>29</sup>

This response does not justify the TCEQ's reliance on IBR in the Proposed Permit. Instead, the Executive Director's response illustrates why the Proposed Permit should directly include all permit limits and requirements established by Shell's major and minor NSR permits.

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<sup>29</sup> RTC at Response 2.

If it is unreasonable to expect the state agency charged with overseeing Texas's permitting programs to maintain a Title V permit for the Deer Park Chemical Plant that directly lists and reconciles all the current limits and requirements established by incorporated minor NSR permits, it is even more unreasonable to expect members of the public—who, more often than not, will be unfamiliar with the TCEQ's complicated permitting procedures—to accomplish this same feat. While it may be reasonable in some cases to expect members of the public and federal regulators to obtain copies of minor NSR permits incorporated by a Title V permit—for example when only a few, relatively simple minor NSR permits are incorporated, or where emissions authorized by minor NSR permits are cumulatively insignificant—it is not reasonable in this case. Members of the public and federal regulators should not need to obtain copies of the 20+ minor NSR permits incorporated into the Proposed Permit, ensure that their copies of each permit are current, and then reconcile various limits and requirements contained in multiple permits that apply to the same emissions unit or units to derive a correct understanding regarding which federally enforceable NSR permit requirements apply to the Plant. That is what Shell's Title V Permit is for.<sup>30</sup>

Obtaining copies of the many different permits incorporated by the Proposed Permit is not the only obstacle that a member of the public or a federal regulator must overcome to make sense of the Proposed Permit. Even if a reader manages to obtain copies of all the incorporated permits, she must ensure that she has current copies of each and every incorporated permit. This is no easy task, as the Executive Director's response to public comments emphasizes, because

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<sup>30</sup>*Sierra Club v. Georgia Power Co.*, 443 F.3d 1346, 1348 (11th Cir. 2006) "The intent of Title V is to consolidate into a single document (the operating permit) all of the clean air requirements applicable to a source of pollution. The Title V permit program generally does not impose new substantive air quality control requirements. Rather, a Title V permit enables 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."(internal citations omitted)(emphasis added).



Shell frequently revises its preconstruction permits to reflect changes at the plant. And because the limits and requirements in one permit may be revised through changes to another permit, the reader must make sure she has current copies of all the incorporated permits.<sup>31</sup> Even after the reader has obtained current copies of all the incorporated permits, she is still not finished. Because various permits may establish limits and requirements that modify or affect limits and requirements in other permits, the reader must work through the incorporated permits to reconcile—for each emissions unit—the various and potentially conflicting limits and requirements contained in each of the permits that apply to the unit.

It is already too much to expect each member of the public affected by emissions from the Deer Park Chemical Plant to obtain and reconcile all the limits and requirements established by the 20+ minor NSR permits incorporated into the Proposed Permit. To expect them to accomplish this feat and ensure that each copy of each incorporated minor NSR permit is final and current is more than wishful thinking; it demonstrates the agency's disregard for the goals that Title V was established to advance. The Proposed Permit's incorporation by reference of Shell's minor preconstruction permits impedes rather than facilitates the enforceability of applicable requirements. The Proposed Permit does not clearly identify the particular NSR requirements and limits it incorporates and it will not help members of the public and federal regulators determine how well Shell is complying with those requirements over time. Instead, it ensures that anyone attempting to assess Shell's ongoing compliance with applicable requirements and limits will be unable to even ascertain with certainty what those requirements are.

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<sup>31</sup> For example, an operator may use a PBR or a standard permit in lieu of a permit amendment or alteration to authorize changes to an emission unit or units covered by a minor or major NSR permit. 30 Tex. Admin. Code §§ 116.116(d); 116.615(3). Also, an operator may obtain a Subchapter B permit that establishes limits that apply to units also covered by other Subchapter B permits.



Petitioners, who have more than a little experience with Texas's permitting procedures, are unable to make sense of the Proposed Permit. We don't believe EPA can make sense of it either. EPA should not require the general public to accomplish what it cannot. Unless the Administrator and her staff can read the Proposed Permit, easily obtain and reconcile the many different minor NSR permits incorporated by it, and identify the emission limits that apply to each significant emissions unit covered by the permit, the Administrator must object.

**3. It is untrue that "All NSR permits for. . . [the Shell Deer Park Chemical Plant] are easily found by accessing TCEQ's permit database"**

The Executive Director contends that public access to reliable and current copies of the many minor NSR permits incorporated by reference into the Proposed Permit is not a problem after all, because "[a]ll NSR permits for this site are easily found by accessing TCEQ's permit database."<sup>32</sup> As EPA's regional staff must know, this is not true. Petitioners tried to find the TCEQ's permit database online and failed. Petitioners then sent an email to the Executive Director's permit engineer, asking her where to find it. The permit engineer directed Petitioners to the TCEQ's Remote Document Server, at <https://webmail.tceq.state.tx.us/gw/webpub>.<sup>33</sup> The TCEQ's remote document server is not a "permit database" where "all NSR permits" incorporated by reference into the Proposed Permit are "easily" found.

The TCEQ's Remote Document Server, which is not identified anywhere in the Proposed Permit or Statement of Basis, does not contain a search field that allows one to search for documents by permit number. Nor does the page contain instructions on how to use it or a link to search instructions. Instead, it contains a single search field into which the user may enter any words or numbers. Petitioners' search for "1119," (the first minor NSR permit number listed on

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<sup>32</sup> RTC at Response 2.

<sup>33</sup> Exhibit I, Email from Camilla Widenhofer to Gabriel Clark-Leach, dated April 23, 2014.

the Proposed Permit's New Source Review Authorization References table) returned 388 documents.<sup>34</sup> These documents were not organized by date and the website did not provide any summary information for the listed documents. Instead, the documents were simply listed by file name. The file names were often comprised of or contained acronyms, abbreviations, and/or TCEQ form names (e.g., X1, C5, TRV, ATT, CND, MERA, RFC) that mean nothing to people who do not work at the TCEQ. None of the documents returned were clearly identified as the final effective version of Permit No. 1119. Indeed, many of the documents had *nothing to do* with the Shell Deer Park Chemical Plant. Of the documents that appeared to be copies or partial copies of Permit No. 1119 or some other permit incorporated by reference into the Proposed Permit, many were undated and Petitioners were unable to determine whether each such document contained final permit terms or draft permit terms.

Contrary to the Executive Director's response to public comments, the TCEQ's Remote Document Server is not a "permit database" that provides members of the public "easy" access to reliable information about the minor NSR permits incorporated by reference into the Proposed Permit. Members of the public attempting to find current, final copies of all the minor NSR permits incorporated by reference into the Proposed Permit are unlikely to succeed. Indeed, because there are so many different permits incorporated by reference into the Proposed Permit, and because a search for each permit will return a slew of irrelevant, draft, and/or outdated documents, members of the public attempting to use it will very likely become confused, be misled, or simply give up. Because this is so, the Proposed Permit's incorporation by reference of 20+ minor NSR permits is objectionable and the Executive Director's response to Petitioners' comments on this issue is misleading and insufficient.

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<sup>34</sup> Exhibit J shows the documents that Petitioners' search returned.



**4. The fact that Texas has separate rules and administrative processes for preconstruction permits and Title V operating permits does not justify the TCEQ's reliance on IBR in this case**

The Executive Director contends that IBR of minor NSR permit requirements is “particularly appropriate” in states, like Texas, where preconstruction permits and operating permits are separate documents. This argument is silly. *Of course* incorporation by reference is inappropriate where a source’s NSR authorizations are already part of its Title V permit. Why would an agency incorporate by reference permit requirements established by the same permit? What could that even mean? That IBR of NSR permit requirements serves no purpose where agencies issue joint Title V/NSR permits does not suggest that Texas’s use of IBR in this case is appropriate.

The Executive Director also suggests that the TCEQ would have trouble revising Texas Title V permits to reflect frequent changes to incorporated NSR authorizations, because the Commission’s rules establish different processes and rules for changing NSR permits and Title V permits. This argument is misleading, because the TCEQ’s Title V rules *already* require operators to revise their Title V permits whenever an applicable requirement in an underlying NSR permit is changed. Thus, under the TCEQ’s *existing* rules, Shell must submit an application to revise its Title V permit each time a requirement or limit in one of its NSR permits changes.<sup>35</sup> These applications must include a description of changes to underlying permit terms and identify emissions units affected by the changes and the Executive Director must approve or

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<sup>35</sup> 30 Tex. Admin. Code § 122.10(a) (“The permit holder shall submit an application to the executive director for a revision to a permit for those activities at a site which change, add, or remove one or more permit terms and conditions.”). All minor and major NSR permit limits and operating requirements for emission units at a Title V site are also Title V permit terms. *See, e.g.*, Proposed Permit at 20, Special Condition 22 (“Permit holder shall comply with the requirements of New Source Review authorizations issued or claimed by the permit holder for the permitted area . . . . These requirements . . . [a]re incorporated by reference into this permit as applicable requirements[.]”).



deny each application.<sup>36</sup> The TCEQ does not need to fundamentally change its Title V program or develop new rules in order to maintain a current Title V permit for the Deer Park Chemical Plant that directly includes limits and requirements established by Shell's minor preconstruction permits. All the agency needs to do is take information Shell is already required to provide and physically put it into Shell's Title V permit.

Petitioners acknowledge that this process will not be costless and that it will require the TCEQ to do more work than it does now. However, this added administrative burden does not outweigh the burden that the agency's current practice imposes on those attempting to make sense of the Proposed Permit. While it may be difficult for the TCEQ to maintain a current Title V permit for Shell's Deer Park Chemical Plant, the agency is in the best position to accomplish this task. It is unreasonable to expect members of the public and federal regulators who do not have direct access to the TCEQ's permitting files, and who lack technical expertise in tracking and reading Texas permits, to maintain complete and current files for the many minor permits incorporated by reference into the Proposed Permit.

Petitioners also understand the Executive Director's concern that requiring the TCEQ to update Shell's Title V permit each time a requirement in an underlying permit is changed increases the risk that incorrect information will be entered into the Title V permit. However, this increased risk does not outweigh the near certainty that members of the public and federal regulators attempting to maintain a complete, current, and accurate list of the requirements and limits contained in Shell's NSR permits will make serious mistakes or simply give up.

Thus, Petitioners do not agree with the Executive Director that the administrative difficulty of maintaining a current and complete Title V permit for the Deer Park Chemical Plant

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<sup>36</sup> 30 Tex. Admin. Code §§ 122.216(1) and (2) (Applications for Minor Permit Revisions); 30 Tex. Admin. Code §§ 122.220(1)-(3) (Applications for Significant Permit Revisions).

justifies the Proposed Permit's reliance on IBR for minor NSR permits. *It is because* federally enforceable limits and requirements are spread across many different minor and major NSR permits—which are constantly revised to reflect changes at the plant—that the Proposed Permit must compile, reconcile, and list all federally enforceable major and minor NSR permit requirements in a single, easily accessible document.

#### **5. EPA has not Approved any Texas Title V Rule Concerning Incorporation by Reference**

Putting to one side the practical concerns discussed above, the Executive Director also contends that the Proposed Permit's IBR of minor preconstruction permit requirements is proper, because (1) EPA approved the Texas Title V program with knowledge that the TCEQ frequently relied on IBR to incorporate minor NSR permits, and (2) that approval was upheld by the 5<sup>th</sup> Circuit Court of Appeals.<sup>37</sup> The Executive Director's conclusion is not carried by these facts. Texas's federally approved Title V rules do not contain *any* provision specifically addressing whether and when IBR of NSR permit limits and requirements is appropriate. Thus, EPA's approval of Texas's Title V rules, which are *silent* with respect to the practice of IBR for minor NSR requirements, does not amount to a binding or final approval of the TCEQ's informal policy judgment that IBR may be used to include minor NSR permits in Texas Title V permit, nor does it diminish EPA's duty to object where IBR results in ambiguous and unenforceable Title V permits.

Because Texas's federally approved Title V program rules are silent with respect to factors the agency must consider to determine whether or when IBR may be used to include requirements in Texas Title V permits, EPA must independently evaluate Texas's use of IBR

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<sup>37</sup> RTC at Response 2 (“Inclusion of minor New Source Review (NSR) permit requirements in Title V permits through incorporation by reference was approved by EPA when granting Texas' operating permits program full approval in 2001”).



against federal statutory and regulatory requirements. As EPA has noted, Sections 504(a) and (c) of the Clean Air Act and corresponding provisions at 40 C.F.R. §§ 70.6(a)(1) and (3) create a presumption “that Title V permits will explicitly state all emission limitations and operational requirements for all applicability emission units at a facility.”<sup>38</sup> EPA should scrutinize departures from this presumption on a case-by-case basis for consistency with Title V program objectives.

Historically, EPA’s evaluation of IBR in Title V permits has balanced benefits in administrative efficiency arising from the streamlined IBR process against the increased transparency and enforceability of more detailed Title V permits.<sup>39</sup> While, “incorporation by reference may be useful in many instances,” EPA directs agencies 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.”<sup>40</sup> When states fail to heed this directive and use IBR to include preconstruction permit requirements in Title V permits without weighing the relevant factors, EPA should object. When the TCEQ fails to justify its use of IBR in a particular case or the permit record does not demonstrate that the agency’s reliance on IBR is consistent with Title V objectives, EPA should object. In cases like this one, where the benefits of increased enforceability and transparency that would result from a more complete permit clearly outweigh the administrative benefit of streamlined incorporation by reference; where IBR undermines the enforceability of applicable requirements; where the permit fails to put members of the public, regulators, and the operator

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<sup>38</sup> *Order Denying in Part and Granting in Part a Petition for Objection, In the Matter of Tesoro Refining and Marketing*, Petition No. IX-2004-6 at 8 (March 15, 2005).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*; See also, White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program (March 5, 1996).

on notice as to which federally enforceable limits and requirements that must be met, EPA must object.

**Requested Revision to the Proposed Permit:**

The Administrator should require the TCEQ to revise the Proposed Permit to directly list NSR permit requirements and limits for significant emissions units at the Deer Park Chemical Plant.

**B. The Proposed Permit's Defective Method of Incorporating Permit by Rule Requirements Fails to Assure Compliance<sup>41</sup>**

The Proposed Permit incorporates by reference many PBR limits and requirements.<sup>42</sup> EPA must “ensure that Title V permits [issued by the TCEQ] are clear and unambiguous as to how emission limits [established by PBRs] apply to particular emissions units.”<sup>43</sup> Though IBR of PBRs may be proper in some cases, Title V permits that incorporate PBRs by reference must provide enough information about the projects authorized by incorporated PBRs to allow readers to answer the following basic questions regarding how incorporated PBRs apply to Title V sources: (1) how much pollution a source may emit under each claimed PBR, (2) which pollutants may a source emit under each PBR, (3) how do PBRs affect requirements and limits contained in case-by-case NSR permits, and (4) which units are authorized under each PBR? The Proposed Permit is deficient—not because it fails to directly include the text of the incorporated PBRs—but because it does not include information a reader needs to answer these basic questions.

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<sup>41</sup> Comments at 5-9.

<sup>42</sup> Proposed Permit at 556-557 (listing PBRs incorporated by reference into the Proposed Permit) and 558-582 (identifying emissions units subject to incorporated PBRs).

<sup>43</sup> *Order Partially Granting and Partially Denying Petition for Objection to Permit O1498*, Petition VI-2007-2 (May 28, 2009) at 4. Available electronically at: <http://www.tceq.state.tx.us/assets/public/permitting/air/Announcements/epa-premcororder-O1498.pdf>



**1. How much pollution can Shell emit under claimed PBRs?<sup>44</sup>**

When a project is authorized by a PBR, emissions from units that are part of the project are subject to the emission limits established by the PBR. If a particular claimed PBR does not establish specific emission limits, then emissions from units that are part of the project are subject to the emission limits at 30 Tex. Admin. Code § 106.4(a)(1).<sup>45</sup> Because multiple projects at the Shell Deer Park Chemical Plant have been authorized under the same PBR and because each such project is separately authorized, one must know how many projects have been authorized under each incorporated PBR to know how much pollution Shell is authorized to emit under each claimed PBR.

For example, imagine that “PBR X” may be used to authorize projects that emit no more than 3 tons per year of NOx. If Shell claims PBR X to authorize one project at the Deer Park Chemical Plant, the emission unit(s) subject to the PBR requirements may not emit more than 3 tons of NOx each year. If Shell claims PBR X for two different projects at the Deer Park Chemical Plant, the emissions unit(s) authorized under PBR X may emit up to 6 tons of NOx each year. If ten different projects at the Plant are authorized under PBR X, the emissions unit(s) authorized under this PBR may emit 30 tons of NOx each year. In order to determine how many tons of NOx emissions units covered by PBR X may emit each year, one must know how many projects have been authorized under PBR X.

Texas Title V permits incorporating authorizations under PBR X will list PBR X as an applicable permit in the New Source Review Authorizations table, and will identify specific emissions units authorized under PBR X. This however, is not enough information to allow the reader to determine how many projects have been authorized under PBR X. There is no way to

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<sup>44</sup> Comments at 7-8.

<sup>45</sup> RTC at Response 2.B.

tell, based on this information, if all the emissions units authorized under PBR X were part of a single project, two projects, or thirty projects. Moreover, there is no way to tell for any particular emissions unit authorized under PBR X whether PBR X was used to authorize one project affecting the unit's emissions or many.

And so it is for each of the PBRs incorporated by reference into the Proposed Permit: Unless the TCEQ revises the Proposed Permit to specify how many projects have been authorized under each claimed PBR, neither the public nor federal regulators will be able to determine how much pollution Shell may emit under any of the incorporated PBRs. While Petitioners acknowledge that a different method of incorporating PBRs into the Proposed Permit—one which provides additional information about how many projects have been authorized under each PBR and which resolves ambiguities about how each PBR applies to affected emissions units—may be permissible, the Proposed Permit fails to identify and assure compliance with applicable PBR requirements and the Administrator should object to it.

- If EPA contends that the Proposed Permit's method of incorporating PBR requirements assures compliance, Petitioners respectfully request that the Administrator identify, based on information in the Proposed Permit, the Statement of Basis, and the text of the incorporated PBRs, the cumulative total emissions authorized for all projects under each incorporated PBR.

## **2. Which Pollutants may Shell emit under claimed PBRs?<sup>46</sup>**

Several PBRs claimed by Shell may be used to authorize emissions of many different pollutants. For example, 30 Tex. Admin. Code § 106.261 (2003) may be used to authorize emissions of almost any pollutant. However, claiming a 106.261 PBR for a project does not authorize emissions of all such pollutants up to the limit identified in the rule. Rather, only

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<sup>46</sup> Comments at 7.



emissions related to the particular project for which the PBR is claimed are authorized. Thus, one cannot determine based solely on the text of this rule—and others similar—which pollutants Shell is authorized to emit. Because the Proposed Permit does not include information necessary to determine which pollutants Shell is authorized to emit under each claimed PBR, the incorporated permit limits and operating requirements established by incorporated PBRs are not enforceable. Because incorporated PBR emission limits and requirements are not enforceable, the Proposed Permit is deficient.

- If EPA contends that the Proposed Permit’s method of incorporating PBR requirements assures compliance, Petitioners respectfully request that the Administrator identify which pollutants Shell is authorized to emit from each emission unit covered by a 106.261 or 106.262 PBR or identify the provisions in the Proposed Permit that explain how a member of the public may obtain this information.

**3. How do PBR authorizations impact emission limits and requirements in other NSR permits?<sup>47</sup>**

More than 50 emissions units or unit groups identified in the Proposed Permit’s New Source Review Authorization References by Emissions Unit table are subject to PBR limits and requirements as well as case-by-case permit limits and requirements.<sup>48</sup> Petitioners cannot determine, based on information included in the Proposed Permit and Statement of Basis, how PBRs affect requirements and limits contained in the other permits that apply to these Emissions Units. Given this ambiguity, Petitioners chose a specific unit listed in the Draft Permit and asked the Executive Director to explain “[h]ow is a member of the public (or even a state or federal

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<sup>47</sup> Comments at 8.

<sup>48</sup> Exhibit K lists each of these units and the associated New Source Review authorizations.

regulator) to sort through this list of authorizations and figure out the applicable requirements merely on information in the Draft Permit and the Statement of Basis?”<sup>49</sup> Petitioners also asked the Executive Director to “identify the language in the Draft Permit that unambiguously describes the emission limits established by each of the listed PBR authorizations for this [unit] . . . , and how each PBR applies.”<sup>50</sup> In response to a different comment, the Executive Director revealed that the PBRs listed in the Draft Permit for the unit selected by the Petitioners were void and removed them from the Proposed Permit. While this revision addresses Petitioners’ concern about *this particular unit*, the Executive Director did not address our concern about the other 50+ units at the Deer Park Chemical Plant where PBRs may affect or modify requirements and limits contained in other permits that apply to the units. Because the Proposed Permit does not contain information explaining how each PBR claimed for a unit or unit group that is also authorized under a case-by-case permit (or multiple case-by-case permits) affects, strengthens, or relaxes requirements and/or limits established by the other permit(s), the Proposed Permit fails to sufficiently specify the applicable requirements for these units and undermines the enforceability of those requirements. For this reason, the Administrator should object to the Proposed Permit.

#### 4. Which emission units are subject to PBR limits and requirements?<sup>51</sup>

While the Proposed Permit incorporates the following PBRs and Standard Exemptions, it does not identify any emissions unit or unit group authorized by these permits: 051 (9/12/1989), 051 (10/4/1995), 080 (6/7/1996), 086 (11/05/1986), 106 (9/20/1993), 106 (10/4/1995), 106 (6/7/1996), 106.263 (9/4/2000), 106.355 (11/1/2001), 106.477 (9/4/2000), 106.532 (9/4/2000), and 118 (9/20/1993).<sup>52</sup> Because the Proposed Permit does not even identify the unit or units

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<sup>49</sup> Comments at 8.

<sup>50</sup> *Id.*

<sup>51</sup> Comments at 9.

<sup>52</sup> *Id.*



authorized by and subject to the requirements of these PBRs and Standard Exemptions, it fails to unambiguously describe how these permits apply to individual emission units at the Deer Park Chemical Plant. Without this information, members of the public and federal regulators will not be able to determine which units must comply with these permits.<sup>53</sup> Moreover, even if an interested party is able to determine which emissions units should be subject to PBR or Standard Exemption requirements, a court is unlikely to enforce these requirements, because the Proposed Permit fails to identify them as applicable for any specific unit or units at the Plant.<sup>54</sup> Because this is so, the Proposed Permit fails to identify and assure compliance with all applicable requirements.

- If EPA contends that the Proposed Permit's method of incorporating PBR requirements assures compliance, Petitioners respectfully request that the Administrator identify the emission units covered by each of the PBRs and Standard Exemptions listed in the first paragraph of this section.

#### **5. The Executive Director Dismissed Petitioners' Concerns about PBRs**

The Executive Director failed to squarely address any of these arguments regarding problems arising from the TCEQ's method of incorporating PBRs by reference into the Draft Permit. Instead, he inexplicably dismissed these arguments as "beyond the scope of this FOP action, because they are arguments concerning the PBR authorization and not the FOP authorization."<sup>55</sup> The Executive Director is wrong. Petitioners' public comments squarely raised

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<sup>53</sup> *Objection to Title V Permit No. OI420, CITGO Refining and Chemicals Company, Corpus Christi Refinery—West Plant* (October 29, 2010) at ¶ B.1 (draft permit is deficient because it fails to list any emissions units subject to incorporated PBRs); *Objection to Title V Permit No. O2164, Chevron Phillips Chemical Company, Philtex Plant* (August 6, 2010) at ¶ 7 (draft permit fails to meet 40 C.F.R. § 70.6(a)(1), because it does not list any emission units to be authorized under specified PBRs).

<sup>54</sup> *United States v. EME Homer City Generation*, 727 F.3d 274, 300(3rd Cir. 2013) (explaining that the Court lacks jurisdiction to enforce a requirement omitted from a Title V permit).

<sup>55</sup> RTC and Response 2.B.

proper Title V issues, which echo concerns already expressed by EPA.<sup>56</sup> The Administrator should object to the Proposed Permit, because the Executive Director failed to respond to our comments and the Proposed Permit fails to include information necessary to assure compliance with incorporated PBRs.

**Requested Revision to the Proposed Permit:**

The Administrator should require the TCEQ to revise the Proposed Permit to include information necessary to determine how much pollution emission units at the Plant may emit under each incorporated PBR, which pollutants emissions units at the Plant may emit under each incorporated PBR, which emission units are subject to requirements of each incorporated PBR; and how each PBR that applies to an emission unit covered by another permit affects, modifies, or changes limits and requirements in the other permit.

**C. The Proposed Permit Fails to Require Monitoring Sufficient to Assure Compliance with Applicable Requirements<sup>57</sup>**

**1. The Proposed Permit does not Specify Monitoring Requirements for PBR limits<sup>58</sup>**

The Proposed Permit must include monitoring requirements that assure compliance with all applicable requirements, including requirements established by incorporated PBRs. Where monitoring in an applicable requirement is not sufficient to assure compliance with the requirement, the Proposed Permit must establish supplemental monitoring.<sup>59</sup> Neither the Proposed Permit nor the PBR rules listed in the Proposed Permit's New Source Authorization References table identify any specific monitoring method to assure compliance with applicable PBR requirements. While the Proposed Permit does identify the TCEQ's PBR recordkeeping

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<sup>56</sup> See Comments at 6, n14 & 16.

<sup>57</sup> Comments at 16-19.

<sup>58</sup> *Id.* at 18.

<sup>59</sup> 42 U.S.C. § 7661c(c); *Sierra Club v. EPA*, 536 F.3d 673, 677 (D.C. Cir. 2008) ("Fundamental to . . . [the Title V permitting] scheme is the mandate that each permit shall set forth monitoring requirements to assure compliance with the permit terms and conditions. By its terms, this mandate means that a monitoring requirement insufficient to assure compliance with emission limits has no place in a permit unless and until it is supplemented by more rigorous standards")(internal citations omitted).



rule at 30 Tex. Admin. Code § 106.8 as an applicable requirement and includes Special Conditions 23 and 24 related to PBR recordkeeping, these provisions do not specify which monitoring methods—*if any*—are necessary to assure compliance with applicable PBR requirements. Rather, they merely provide a non-exclusive menu of options that Shell may pick and choose from at its discretion to demonstrate compliance.<sup>60</sup> This broad, non-exclusive list does not assure compliance with PBR requirements.<sup>61</sup> In fact, the laundry list of options for monitoring compliance with PBR standards is so vague that it is virtually meaningless:

The permit holder shall maintain records to demonstrate compliance with any emission limitation or standard that is specified in a permit by rule (PBR) or Standard Permit listed in the New Source Review Authorizations attachment. The records shall yield reliable data from the relevant time period that are representative of the emission unit's compliance with the PBR or Standard Permit. These records may include, but are not limited to, production capacity and throughput, hours of operation, material safety data sheets . . . , chemical composition of raw materials, speciation of air contaminants data, engineering calculations, maintenance records, fugitive data, performance tests, capture/control device efficiencies, direct pollutant monitoring . . . , or control device parametric monitoring.<sup>62</sup>

The PBR requirements allow each permit holder to determine which records will provide sufficiently “reliable data,” effectively “outsourcing” the Title V permit obligation to specify the monitoring method that will assure compliance with each emission limit or standard. This vagueness also prevents EPA and the public from effectively evaluating whether applicable monitoring requirements have been met. For example, Petitioners would likely review and/or

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<sup>60</sup> Proposed Permit at 21.

<sup>61</sup> 40 C.F.R. §§ 70.6(a)(1) and (c); *Objection to Federal Operating Permit No. O17, City of Garland Power and Light, Ray Olinger Plant* (January 22, 2010) at ¶ 4 (“Pursuant to 40 CFR § 70.8(c)(1), EPA objects to issuance of the Title V permit because the *Applicable Requirements Summary* table fails to identify the specific emission limitations and standards, include those operational requirements that assure compliance with 40 CFR Part 60, Subpart GG, as required by 40 CFR § 70.6(a)(1). In response to this objection, the draft Title V permit must reference the specific compliance option and associated monitoring selected by the permit holder that will be used to ensure compliance with the emission limitations governing standards of performance for stationary gas turbines regulated under 40 CFR Part 60, Subpart GG.”); *Objection to Title V Permit No. O1420, CITGO Refining and Chemicals Company, Corpus Christi Refinery—West Plant* (October 29, 2010) at ¶ B.1 (Title V permit that fails to include monitoring, recordkeeping, and reporting requirements for emissions units is objectionable).

<sup>62</sup> 30 Tex. Admin. Code § 106.8(c).

challenge monitoring relying upon undefined “engineering calculations” to determine compliance without more information about how those calculations were to be made and whether they reflect current operating conditions or industry standards.

Neither the Proposed Permit, nor the accompanying Statement of Basis, nor the TCEQ’s response to public comments provide a rationale for the TCEQ’s determination that the Proposed Permit includes monitoring provisions sufficient to assure compliance with applicable PBR requirements.<sup>63</sup> Because the Proposed Permit does not specify monitoring methods sufficient to assure compliance with any of the PBRs it incorporates by reference, the Proposed Permit is deficient and the Administrator should object to it.

The Administrator should also object to the Proposed Permit because the Executive Director failed to respond to our significant comments on this issue. During the public comment period, Petitioners commented that the Draft Permit was deficient because it did not specify monitoring requirements to assure compliance with incorporated PBR limits.<sup>64</sup> These comments were significant comments, because they called into question whether the Draft Permit assures compliance with all applicable requirements.<sup>65</sup> The Executive Director’s response failed altogether to address these comments. The Administrator should object to the Proposed Permit because the TCEQ failed to respond to a significant comment and that failure may have resulted in one or more deficiencies in the Proposed Permit.

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<sup>63</sup> Order Partially Granting and Partially Denying the Petition for Objection, *In the Matter of the Premcor Refining Group, Inc.*, Petition VI-2007-02 (May 28, 2009) at 27 (granting petition for objection to renewal of a Texas Title V permit on the ground that TCEQ failed to provide a rationale to demonstrate that the monitoring requirements in the permit are sufficient to assure compliance).

<sup>64</sup> Comments at 18-19 (“The Draft Permit fails to assure compliance with many incorporated NSR permit limits, . . . because neither the Draft Permit nor the incorporated NSR permit specifies any monitoring to determine compliance with the limit. . . . Also, many of the PBRs incorporated by the Draft Permit fail to establish specific monitoring requirements. If an NSR permit—including minor NSR permits and PBRs—establishes an emission limit, but fails to specify any monitoring for that limit, or if the required monitoring is insufficient to assure compliance with the limit, the Executive Director must supplement the Draft Permit to require additional monitoring (citing 42 U.S.C. § 7661c(c)).”)

<sup>65</sup> See, e.g., Order Granting Petition for Objection to Permit, *In the Matter of Wisconsin Public Service Corporation’s JP Pulliam Power Plant*, Petition V-2009-01 at 5 (June 21, 1010).



**Requested Revision to the Proposed Permit:**

*To assure that incorporated PBR limits and requirements are practicably enforceable, the Administrator should object to the Proposed Permit and require the TCEQ to specify the monitoring method that will assure compliance with each applicable PBR limit or standard, and provide a reasoned basis for each determination.*

**2. The Proposed Permit Fails to Assure Compliance with Permit Limits on PM10 Emissions from Pyrolysis Furnaces Authorized by Permit No. 3215/PSDTX974<sup>66</sup>**

The Proposed Permit incorporates by reference all limits and conditions established by Permit No. 3215/PSDTX974. Permit No. 3215/PSDTX974 establishes an annual PM10 limit of 13.20 tons for each of Shell's ten pyrolysis furnaces.<sup>67</sup> Cumulatively, these furnaces are authorized to emit 132 tons of PM10 each year. Neither Permit No. 3219/PSDTX974 nor the Proposed Permit establish any specific monitoring, recordkeeping, or reporting requirements to assure compliance with these limits.<sup>68</sup> Though Petitioners raised this issue with specificity in their public comments, the Executive Director did not respond to it. The Administrator should object to the Proposed Permit, because it fails to include monitoring, recordkeeping, and reporting requirements sufficient to assure compliance with the PM10 limits it incorporates by reference and because the Executive Director failed to respond to Petitioners' significant comments on this issue.

**Requested Revision to the Proposed Permit:**

*The Administrator should require the TCEQ to revise the Proposed Permit to include information necessary to determine how much pollution emission units at the Plant may emit under each incorporated PBR, which pollutants emissions units at the Plant may emit under each incorporated PBR, which emission units are subject to requirements of each incorporated*

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<sup>66</sup> Comments at 18, n57.

<sup>67</sup> Proposed Permit at 587-589.

<sup>68</sup> *Id.*; See also *Id.* at Appendix B, Permit No. 3219/PSDTX974 at 11-12 (Special Condition 17 of Permit No. 3219/PSDTX974 requires CEMS to be used to monitor CO and NOx emissions from the pyrolysis furnaces, but nothing in the permit indicates whether or how PM10 emissions from the furnaces should be monitored or how Shell must determine compliance with the PM10 furnace limits).

PBR; and how each PBR that applies to an emission unit covered by another permit affects, modifies, or changes limits and requirements in the other permit.

**3. The Proposed Permit does not Assure Compliance with NSR Emission Limits for Tanks and Flares<sup>69</sup>**

a. *Storage Tanks*<sup>70</sup>

The Proposed Permit incorporates by reference NSR permit hourly and annual emission limits for storage tanks at the Deer Park Chemical Plant. Petitioners commented that recent DIAL studies, including one conducted at the Shell Deer Park complex, indicate that emission factors and calculation protocols often used to estimate storage tank emissions at facilities like the Deer Park Chemical Plant are unreliable and likely drastically underestimate actual tank emissions.<sup>71</sup> The Executive Director responded that:

The calculation methodology used to determine VOC emissions from storage tanks is not a general emission factor. The equation currently accepted for use by the TCEQ and the Environmental Protection Agency was developed from rigorous testing following an approved protocol and requires the use of data specific to the storage tank and the material stored in the tank.<sup>72</sup>

According to the Executive Director, this methodology is mandated by Special Condition 18 of Permit 3219/PSDTX974 and that Special Condition is sufficient to assure compliance with storage tank emission limits.<sup>73</sup> In relevant part, Special Condition 18 provides that:

For purposes of assuring compliance with VOC emission limitations for storage vessels, the holder of this permit shall maintain an annual record of tank identification number, name of the material stored or loaded, VOC annual average temperature in degrees Fahrenheit, VOC vapor pressure at the annual average material temperature in psia and VOC throughput on a rolling 12-month basis.

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<sup>69</sup> Comments at 17-19.

<sup>70</sup> *Id.* at 17-18.

<sup>71</sup> Comments at 17-18, n52, 53. See also Raun and Richner, *Study of the Accuracy of Emission Factors and Emission Estimating Methods Using the DIAL System, What does DIAL tell us about benzene and VOC emissions from Refineries?* at 36-47 (Summarizing Shell DIAL study results for storage tanks). Available electronically at: <http://www.epa.gov/ttnamti1/files/ambient/airtox/webinars/dial10152012.pdf> (“Shell Study Summary”).

<sup>72</sup> RTC at Response 6.

<sup>73</sup> *Id.*



Records of VOC annual temperature is not required to be kept for unheated tanks which receive liquids that are at or below ambient temperature.<sup>74</sup>

The Executive Director's response fails to adequately address Petitioners' comments because the referenced permit condition does not actually specify how tank emissions must be calculated, and the Executive Director's response does not identify the "approved" protocol that he claims Shell must use to determine compliance with tank emission limits. Petitioners suspect that the protocol referenced by the Executive Director is EPA's Tanks 4.0.<sup>75</sup> This is the same emission factor-based protocol that the Shell DIAL study cited in Petitioners' public comments calls into question. Based on this study and other similar studies, Petitioners contend that emissions calculations based on general emission factors or modeled by EPA's Tanks 4.0 likely underestimate actual tank emissions and that these monitoring methods do not assure compliance with applicable requirements and limits.<sup>76</sup>

Because the Proposed Permit fails to specify how Shell must calculate tank emissions to demonstrate compliance with NSR permit tank emission limits and because—based on the limited information contained in the Executive Director's response to public comments—it appears that the emission factors that Shell uses to calculate emissions from its tanks are the very factors that Petitioners' public comments identified as unreliable, the Proposed Permit fails to assure compliance with storage tank emission limits and the Executive Director's response fails to address Petitioners' comments. For these reasons, the Administrator should object to the Proposed Permit.

**Requested Revision to the Proposed Permit:**

**The Administrator should require the TCEQ to revise the Proposed Permit to specify a method for monitoring tank emissions sufficient to assure compliance with applicable limits.**

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<sup>74</sup> Proposed Permit at Appendix B, Permit No. 3219/PSDTX974 at 13 (Special Condition 18G).

<sup>75</sup> Shell Study Summary at 47.

<sup>76</sup> Comments at 17.

b. *Flares*<sup>77</sup>

Flares at the Deer Park Chemical Plant must achieve 98% destruction efficiency and emissions from the flares must be maintained below hourly and annual emission limits contained in NSR permits incorporated by reference into the Proposed Permit. The Proposed Permit is deficient because it fails to assure compliance with the destruction efficiency requirements. Moreover, because Shell's NSR permit limit compliance demonstrations presume that its Deer Park flares consistently achieve 98% destruction efficiency, the Proposed Permit fails to assure compliance with these limits.

Petitioners cited various studies, including a study undertaken at the Shell Deer Park complex, that show additional monitoring is required to assure that Shell's flares continuously achieve the required destruction efficiency.<sup>78</sup> EPA neatly summarized these studies in the preamble for its Proposed Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards:

In general, flares used as APCD [or air pollution control devices] were expected to achieve 98-percent HAP destruction efficiencies when designed and operated according to the requirements in the General Provisions. Recent studies on flare performance, however, indicate that these General Provisions requirements are inadequate to ensure proper performance of refinery flares, particularly when assist steam or assist air is used. Over the last decade, flare minimization efforts at petroleum refineries have led to an increasing number of flares operating at well below their design capacity, and while this effort has resulted in reduced flaring of gases at refineries, situations of overassisting with steam or air have become exacerbated, leading to the degradation of flare combustion efficiency.<sup>79</sup>

To address problems identified by recent studies, Petitioners commented that the Proposed Permit must be revised to require Shell to measure the flow and chemical composition of flare

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<sup>77</sup> *Id.* at 18-19.

<sup>78</sup> Comments at 18, n54.

<sup>79</sup> Exhibit L, Proposed Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards (May 15, 2014) ("Proposed Rule") at 130.



gas and install precision steam controls necessary to avoid over-steaming and other conditions that reduce flare destruction efficiency.<sup>80</sup>

The Executive Director responded that the Proposed Permit, including its incorporation by reference of NSR limits and requirements, is sufficient to assure compliance with applicable requirements for Shell's flares. To support this contention, the Executive Director explained:

- "As required in the General Terms and Conditions, Shell maintains a copy of the permit along with records containing the information and data (gathered through monitoring) sufficient to demonstrate compliance with the permit, including the flare gas heat value, composition, and steam input rates. The monitored fuel flow rate, with the heating value of the fuel and the factor that was used to calculate the maximum allowable emission rate, is used to calculate the actual emission rate to demonstrate compliance, unless a continuous emissions monitoring system is utilized."
- The flares are subject to 40 C.F.R. § 60.18 New Source Performance Standard requirements ("NSPS"); and
- Special Condition 8 of NSR Permit No. 3219 requires that "Monitoring shall be used to maintain waste gas above the minimum heating value."<sup>81</sup>

The Executive Director did not address the studies cited by Petitioners. Nor did he explain how the monitoring requirements listed in his response to public comments would

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<sup>80</sup> Comments at 18 ("The existing monitoring requirements for flares covered by the Draft Permit, identified in Attachment J, are not sufficient to assure compliance with the VOC emission limits established by Permit Nos. 3219 and PSDTX974. While the Draft Permit requires the covered flares to achieve 98% destruction efficiency, there are no requirements in the permit for the instrumentation necessary to reasonably ensure this level of performance. To achieve 98% destruction efficiency, a flare cannot be oversteamed, a common problem at many refineries. Avoiding this problem, requires careful monitoring of the heat value and chemical makeup of the flare to determine the minimum amount of steam needed. The proposed permit must be amended to require the necessary instrumentation to: (1) measure the flow and chemical composition of the flare gas; and (2) precise steam controls to achieve 98% combustion efficiency.")

<sup>81</sup> RTC at Response 6.

prevent over-steaming. For this reason, the Executive Director's response is deficient. It is also deficient for other reasons. First, it is simply untrue that the TCEQ's Title V General Terms and Conditions (found at 30 Tex. Admin. Code § 122.143) require Shell to monitor or record flare gas heat value, composition, and steam input rates.<sup>82</sup> Second, while NSPS rule at 60.18 requires proper design and operation of flares, it does not include monitoring requirements sufficient to prevent over-steaming. Indeed, many of the flares where over-steaming has been observed—including Shell's flares—are subject to 60.18 requirements. Third, the incorporated permit condition that states “[m]onitoring shall be used to maintain waste gas above the minimum heating value” does not indicate how the waste gas will be monitored or how monitoring should be used to maintain the minimum heating value.<sup>83</sup> Fourth, monitoring the heating value of the flare waste gas “does not adequately address instances when the flare may be over-assisted since it only considers the gas being combusted in the flare and nothing else (e.g., no assist media).”<sup>84</sup>

Finally, that Shell's Flares are subject to 60.18 requirements is not sufficient to assure compliance with flare destruction efficiency requirements because Shell has failed to comply with 60.18 requirements. Shell recently entered into a consent decree to resolve violations at the Refinery alleged in EPA's July 10, 2013 federal court complaint.<sup>85</sup> One of the violations identified by EIP is Shell's “fail[ure] to have sufficient controls on steam flow to maintain Steam-to-Vent-Gas ratios within design parameters” necessary to assure compliance with 40

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<sup>82</sup> Petitioners suspect that the Executive Director may have intended to cite the TCEQ's General Terms and Conditions for Compliance Assurance Monitoring at 30 Tex. Admin. Code § 122.147, but this rule does not specifically require Shell to maintain the records the Executive Director describes in his response to public comments.

<sup>83</sup> 3219 and PSDTX974, Special Condition 8D.

<sup>84</sup> Proposed Rule at 142.

<sup>85</sup> Exhibit M, Consent Decree, *United States of America v. Shell*, No. 4:13-cv-2009 (S.D. Tex. 2013) (“Consent Decree”).



C.F.R. § 60.18 and other applicable regulations.<sup>86</sup> Under the consent decree, Shell must install the following monitoring systems and equipment to assure compliance with applicable regulatory standards:

- Vent Gas Flow Meter;
- Steam Flow Meter;
- Steam Control Equipment;
- Gas Chromatograph or a Net Heating Value Analyzer; and
- Meteorological Station

Shell must also automate control of the supplemental gas and steam addition in order to achieve the required high destruction efficiency. Using this equipment, Shell must maintain a steam-to-vent gas ratio of  $S/VG \leq 3.0$  and add supplemental gas when wind effect makes the flare unstable.<sup>87</sup> This equipment and these operational requirements are consistent with monitoring Petitioners identified in their public comments, and which the studies Petitioners cited indicate are necessary to ensure flares achieve a high level of destruction efficiency. The Administrator should object to the Proposed Permit and require the TCEQ to update it to include flare monitoring requirements consistent with those Shell has agreed to implement. These measures are necessary to assure compliance with emission limits and requirements that apply to the Deer Park Chemical Plant flares.

**Requested Revision to the Proposed Permit:**

**The Administrator should require the TCEQ to revise the Proposed Permit to include flare monitoring requirements consistent with the Shell Consent Decree to prevent over-steaming and assure compliance with applicable requirements and limits.**

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<sup>86</sup> Exhibit N, Compliant, *United States of America v. Shell*, No. 4:13-cv-2009 (S.D. Tex. 2013) at 50, Paragraphs 201-204.

<sup>87</sup> See Consent Decree and <http://www2.epa.gov/enforcement/shell-deer-park-settlement#overview>

**D. The Proposed Permit Fails to Require Shell to Obtain SIP-Approved Authorizations for Qualified Facilities Changes at the Deer Park Chemical Plant<sup>88</sup>**

Shell has used Texas's disapproved Qualified Facilities program to circumvent Texas SIP permitting requirements triggered by changes to the Deer Park Chemical Plant.<sup>89</sup> While Texas's Qualified Facilities rules may provide a state law instrument for authorizing changes at the Plant, they do not relieve Shell of its duty to comply with all permitting requirements contained in Texas's federally approved SIP. The Texas SIP establishes the permitting process owners and operators in Texas must follow to authorize minor and major modifications to existing sources. Shell's failure to obtain SIP approved permit changes authorizing projects at the Deer Park Chemical Plant is an ongoing violation of the SIP, even if none of the changes triggered major NSR permitting requirements. To assure compliance with the Texas SIP and to address Shell's SIP violations, the Proposed Permit must establish a schedule for Shell to obtain SIP-approved permits for its Qualified Facilities changes. Because the Proposed Permit does not contain a compliance schedule, it is deficient and the Administrator should object to it.

The Executive Directors response to public comments fails to address this argument altogether. While the Executive Director offers a lengthy discussion of certain aspects of the TCEQ's Qualified Facilities program, this discussion never manages to acknowledge or address the concern we actually raised in our public comments: The Executive Director does not admit or deny that Shell has violated the Texas SIP, does not provide any information showing that Shell has received SIP-approved authorizations for qualified facilities changes at the Deer Park Chemical Plant, does not question the sufficiency of evidence provided in Petitioners' comments,

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<sup>88</sup> Comments at 19-20.

<sup>89</sup> Exhibit O, list of Qualified Facilities projects at the Shell Deer Park Chemical Plant.



and does not provide information demonstrating that the changes at the Deer Park Chemical Plant did not trigger minor NSR SIP permitting requirements.<sup>90</sup>

Instead of addressing our comments, the Executive Director is content to describe the history of its negotiations with EPA regarding the Qualified Facilities program. The bottom line of this discussion, which is *irrelevant* to Petitioners' comments, seems to be that EPA should approve Texas's Qualified Facilities program as part of the Texas SIP. The Executive Director's opinions regarding the approvability of the TCEQ's Qualified Facilities program is outside the scope of this FOP action because these are opinions about the SIP approval process and not the Proposed Permit.

In addition to these irrelevant remarks, the Executive Director also blames EPA for Shell's failure to comply with Texas SIP permitting requirements:

EPA's delay in acting on the Qualified Facility rules, the approval of the state's federal operating permit program and confusion regarding whether the approved federal operating permit program provided federal enforceability for Qualified Facility changes, resulted in a very long period of detrimental reliance on this permit mechanism by regulated entities and the TCEQ.<sup>91</sup>

This portion of the Executive Director's response is not only irrelevant, it is disingenuous. Even though the Executive Director's remarks are irrelevant, we offer the following response out of concern that the Administrator may be reluctant to grant our petition on this issue if she believes that EPA is culpable for the violations Petitioners identify.

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<sup>90</sup> And while the Executive Director made clear his opinion that circumvention of major NSR permitting requirements is not allowed under the TCEQ's Qualified Facilities rules, he did not specifically state that Qualified Facilities projects at the Deer Park Chemical Plant have not triggered NNSR permitting requirements. RTC at Response 7. Specifically, with respect to a Qualified Facilities project that involved a 95.4 tpy increase in VOC emissions, the Executive Director claims that the "[n]et increases and decreases did not trigger PSD." Net increases in VOC emissions from the Shell Deer Park Chemical Plant cannot trigger PSD, because the Plant is located in the Harris County non-attainment region. PSD requirements do not apply to modifications increasing emissions of a non-attainment pollutant. Instead, VOC increases in Harris County must be evaluated against much lower non-attainment NSR significance thresholds to determine whether a project triggers NNSR permitting requirements. If, as the Executive Director's response indicates, project increases were measured against PSD significance thresholds and not NNSR significance threshold, Shell did not conduct a proper netting demonstration and the TCEQ's major NSR applicability determination applied the wrong criteria.

<sup>91</sup> RTC at Response 7.

The Executive Director's response is irrelevant because it does not matter whether EPA is partially responsible for the situation that led to Shell's non-compliance. If Shell has violated the SIP, its Title V permit must include a compliance schedule to correct this non-compliance. If Shell has not violated the SIP, the Executive Director should have explained that in his response to public comments. In either case, the Executive Director's attempt to blame EPA for the TCEQ's failure to properly implement and enforce its SIP has no bearing on the issue we raised.

While the Clean Air Act affords states broad discretion to develop their own SIPs, it also provides that EPA must approve state SIPs and SIP revisions before they may be implemented. Just as the Clean Air Act limits EPA's authority to dictate SIP particulars to the states, it also restricts states' authority to unilaterally change federally-approved SIP requirements. These particular roles and limitations must be respected if the Clean Air Act's system of "cooperative federalism" is to work. Thus, EPA must approve SIP revisions that meet Clean Air Act requirements and the TCEQ must live within the limits of its federally approved SIP. This is so even if Texas has submitted an application to revise its SIP and EPA has failed or refused to timely act on it. SIP revisions are not effective until approved.<sup>92</sup>

Where EPA fails to timely act on a SIP revision, the Clean Air Act provides a remedy: The state may obtain a federal court order compelling EPA to act.<sup>93</sup> The TCEQ must accept the remedy the law provides and may not use EPA's failure to timely act on a SIP revision as a pretext to act beyond its authority. Because Texas's Qualified Facilities program modifies SIP obligations, the TCEQ may not implement it until it is approved by EPA.<sup>94</sup> The TCEQ's implementation of this unapproved program violates both the spirit and the letter of the Clean Air Act. Where the TCEQ acts beyond its authority and allows applicants to rely on state-only

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<sup>92</sup> 40 C.F.R. § 51.105.

<sup>93</sup> 42 U.S.C. § 7604(a)(2).

<sup>94</sup> 42 U.S.C. § 7410(i).



rules to circumvent SIP requirements, the TCEQ bears responsibility for the unfortunate consequences that result.

The Executive Director's attempt to foist the blame for Texas's improper implementation of its permitting authority and Shell's failure to obtain permits required by federal law is not only baseless, *it is also disingenuous*. The TCEQ's cavalier disregard for the SIP approval process is *not a product of EPA's delay, but arises from the agency's radical position that the SIP approval process is itself unconstitutional*. As the TCEQ explained in its 2009 report to the Texas State Legislature's Sunset Commission:

The TCEQ does not delay rule effectiveness until EPA SIP approval. To do so might arguably be an unconstitutional delegation of state authority to the federal government. If the EPA did not approve the changes, then the state would continue to be obligated to enforce the federal requirements and would be required to change the rules to make them acceptable under federal law.<sup>95</sup>

So, the TCEQ's implementation of unapproved programs has nothing to do with EPA's failure to act on its SIP revisions. Indeed, the TCEQ does not even wait for EPA to miss its deadlines before implementing unapproved programs. If Texas believes that the Clean Air Act's scheme of cooperative federalism—which accords different but complementary duties and powers to federal and state agencies—is unconstitutional, Texas should challenge that scheme in court. If Texas believes that it is not bound by the Clean Air Act, Texas should not blame EPA for its failure to comply with the Act's requirements. If Texas believes that EPA does not have the authority to disapprove Texas regulations and laws that modify SIP obligations in the first place, and it does not wait for approval before implementing these programs, it cannot credibly claim that EPA's failure to timely approve a particular program has any bearing on the agency's decision to implement that program.

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<sup>95</sup> Texas Commission on Environmental Quality Self-Evaluation Report, (October, 2009) at 474. Available electronically at: [https://www.tceq.texas.gov/assets/public/comm\\_exec/pubs/sfr/089/089.pdf](https://www.tceq.texas.gov/assets/public/comm_exec/pubs/sfr/089/089.pdf)

Regardless of Texas's position with respect to the constitutionality of the Clean Air Act's cooperative federalism, when the TCEQ violates the SIP or issues permits that do not comply with federal requirements, EPA must act to correct that non-compliance. Here, the Administrator must act to require the TCEQ to establish a schedule for Shell to obtain SIP approved permits authorizing modifications to the Deer Park Chemical Plant made pursuant to the TCEQ's disapproved Qualified Facilities program.

**Requested Revision to the Proposed Permit:**

**The Administrator should require the TCEQ to revise the Proposed Permit to include a schedule for Shell to obtain SIP-approved permit authorizations for Qualified Facilities projects at the Deer Park Chemical Plant.**

**E. The Proposed Permit Fails to Address Shell's Non-Compliance with 30 Tex. Admin. Code § 116.116(d), which Requires PBRs for Previously Permitted Facilities to be Incorporated into Existing Permits on Renewal or Amendment<sup>96</sup>**

Texas's preconstruction permitting program allows major sources to take advantage of streamlined minor NSR permitting instruments, like PBRs and Standard Permits. Shell may claim PBRs and Standard Permits to authorize construction of a new facility or in lieu of a permit amendment to modify existing facilities covered by a Subchapter B permit. As we explain above, the Commission's permitting program—which allows preconstruction authorizations for emissions units at a large major source to be spread across many different permits and many different kinds of permits—makes it very difficult for members of the public and federal regulators (and probably the TCEQ) to identify and track all the federally enforceable requirements that apply to a particular major source, like the Deer Park Chemical Plant. While a certain degree of unnecessary complexity is built into the TCEQ's preconstruction permitting rules, Texas Title V permits are often more complicated than they need to be. This is so because

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<sup>96</sup> Comments at 12-15.



the TCEQ does not diligently enforce its permitting rule requiring sources to consolidate PBRs and Standard Permits for emissions units covered by another permit to be incorporated into that permit on renewal or amendment. As Commenters explained in their public comments, this rule is important for two reasons:

First, incorporating PBR requirements and emission limits into existing permits clarifies applicable unit-specific requirements and limits for affected units. Including unit-specific information in case-by-case permits makes applicable requirements easier to identify and enforce, and provides greater clarity to the public and industry alike.

Second, PBRs should only be used to authorize insignificant increases in emissions.<sup>97</sup> When one or more PBRs are used to increase emissions at previously permitted sites, the cumulative impact of PBR emissions and emissions from previously permitted activities will often be significant. This may be so even if the previously authorized emissions and the emissions increases authorized by PBR are each insignificant when considered in isolation. Because emissions from facilities authorized by PBRs and case-by-case permits may present a threat to public health and interfere with attainment of the NAAQS, the TCEQ must evaluate the impact of emissions authorized by PBRs at previously permitted facilities, as required by Tex. Health & Safety Code § 382.002. The process of incorporation required by 30 Tex. Admin. Code § 116.116(d)(2) provides the specific mechanism for conducting these evaluations.<sup>98</sup>

Petitioners provided the Executive Director with a list of examples of Shell's failure to comply with this rule.<sup>99</sup> In response, the Executive Director determined that many of the PBRs we identified should not have been included in the Draft Permit, because they had been incorporated into Shell's case-by-case permits and voided, consistent with 116.116(d). Petitioners are encouraged that Shell's failure to comply with 116.116(d) is not as significant as

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<sup>97</sup> 30 Tex. Admin. Code § 106.1; 68 Fed. Reg. 64,543, 64,545 (November 14, 2003) (EPA's approval of 30 Tex. Admin. Code Chapter 106, Subchapter A, General Requirements: "Section 106.1 provides that only certain types of facilities or changes within facilities which do not make a significant contribution of air contaminants to the atmosphere are eligible for a PBR. This satisfies the requirements of 40 CFR 51.160(a) which provides that the SIP must include procedures that enable the permitting authority to determine whether the construction or modification will result in a violation of applicable portions of the control strategy or interfere with attainment or maintenance of a national ambient air quality standard").

<sup>98</sup> Comments at 13.

<sup>99</sup> *Id.* at 13-15.

the Draft Permit suggested. However, we are also concerned and surprised that the Executive Director was unaware that the Draft Permit incorporated so many voided PBRs.

Petitioners are also disappointed that the Executive Director failed to address the substance of our comments with respect to the following PBRs that have not been incorporated into a case-by-case permit:

1. Permit No. 3179

- PAUFE—PBR authorizations 106.262 (9/4/2000) and 106.478 (9/4/2000).
- D398—PBR authorizations 106.262 (9/4/2000) and 106.478 (9/4/2000).
- FUGPAU3—PBR authorization 106.262 (9/4/2000).

2. Permit No. 3214

- TOL912—PBR authorization 106.472.<sup>100</sup>

The Executive Director neither confirms nor denies that Shell's failure to incorporate these PBRs into its case-by-case permits is a violation of 116.116(d). Petitioners' public comments allege facts sufficient to demonstrate that Shell has violated this rule, which is part of the SIP. The Executive Director does not dispute the accuracy of these facts or argue that the facts are insufficient to demonstrate a violation of 116.116(d). Thus, either Shell has violated the Texas SIP or the Executive Director failed to respond to our comments. In either case, the Administrator should object to the Proposed Permit.

**Requested Revision to the Proposed Permit:**

The Administrator should require the TCEQ to revise the Proposed Permit to include a schedule for Shell to incorporate the PBRs identified above into existing permits. Because Shell failed to incorporate these PBRs into existing permits when the existing permits were last amended or renewed, the schedule should not allow Shell to delay incorporation until the next amendment or renewal.

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<sup>100</sup> RTC at Response 5.



**F. The Executive Director's Revision to Draft Permit, Special Condition 28 is Improper<sup>101</sup>**

The Draft Permit contained the following Special Condition:

The permit holder shall use a SIP approved permit amendment process to convert the Shell Oil Company flexible permit Nos. 21262 and 56496 into permits issued under 30 Tex. Admin. Code Chapter 116, Subchapter B. The permit holder shall submit to TCEQ NSR SIP permit amendment applications in accordance with 30 TAC Chapter 116 Subchapter B no later than January 20, 2102.<sup>102</sup>

After the close of the public comment period, the Executive Director added the following text to this Special Condition:

If the Texas Flexible Permits Program becomes SIP-approved prior to the conversion to 30 TAC 116 Subchapter B permits, the permit holder may choose to continue the permit conversions or to continue to operate under the existing flexible permits, with or without revisions.<sup>103</sup>

Though the Executive Director identified this revision in his response to public comments, he did not explain why the revision was necessary or demonstrate that it was proper.<sup>104</sup> Special Condition 28 addresses Shell's failure to obtain SIP-approved preconstruction authorizations for projects at the Deer Park Refinery carried out under Shell's non-SIP-approved flexible permits. The Administrator should object to the revised condition because it does not address Shell's failure to comply with Texas SIP permitting requirements and it fails to assure compliance with the SIP.

Petitioners suspect that the Executive Director revised the Draft Permit because he believes that the condition requiring Shell to obtain SIP-approved permits will become moot if

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<sup>101</sup> This issue was not raised in Petitioners' public comments, because the issue did not arise until after the close of the comment period.

<sup>102</sup> Draft Permit at 21, Special Condition 28.

<sup>103</sup> Proposed Permit at 22, Special Condition 28.

<sup>104</sup> RTC at Modifications Made from the Draft to the Proposed Permit ("Term and condition 28 was updated to allow the applicant to proceed with the Subchapter B permit application or continue operating under the existing flexible permits 21262 and 56496, depending on whether the Flexible Permits Program becomes SIP approved.").

EPA finalizes its proposed conditional approval of Texas's Flexible Permit program SIP revision.<sup>105</sup> If so, he is incorrect. Texas's Flexible Permit program was not a part of the Texas SIP when Shell carried out its flexible permit modifications.<sup>106</sup> Shell did not obtain SIP-approved authorizations for those projects. EPA's approval of Texas's Flexible Permit program cannot provide federal authorization for projects carried out under flexible permits prior to the program's approval.<sup>107</sup> Thus, EPA's approval of Texas's Flexible Permit program cannot remedy Shell's failure to obtain a SIP-approved authorization for its flexible permit projects. Whether or not EPA finalizes its proposed approval of the program, Shell must still submit an application and obtain a SIP-approved permit authorizing projects at the Deer Park Chemical Plant. Thus, the Executive Director's revision of Draft Permit Special Condition 28 fails to assure compliance with Texas SIP permitting requirements. The Proposed Permit is deficient and the Administrator should object to it.

**Requested Revision to the Proposed Permit:**

**The Administrator should require the TCEQ to remove the language added to Proposed Permit, Special Condition 28 after the close of the public comment period.**

**G. Credible Evidence<sup>108</sup>**

In 1997, EPA promulgated revisions to 40 C.F.R. Parts 51, 52, 60, and 61 to clarify that nothing shall preclude the use of any credible evidence or information in demonstrating

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<sup>105</sup> *Approval and Promulgation of Implementation Plans; Texas; Revisions to the New Source Review State Implementation Plan; Flexible Permit Program*, 79 Fed. Reg. 8368 (February 12, 2014).

<sup>106</sup> 40 C.F.R. § 51.105 ("Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part").

<sup>107</sup> 42 U.S.C. § 7410(i); 40 C.F.R. § 51.05; *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 92 (1975); *United States v. Ford Motor Co.*, 914 F.2d 1099, 1102-03 (6th Cir. 1987); *Sierra Club v. Tennessee Valley Authority*, 430 F.3d 1337, 1347 (11th Cir. 2005); *See also* 79 Fed. Reg. 18183, 18185 (citing similar authority, EPA explains that its approval of Texas's Pollution Control Project Standard Permit SIP revision cannot provide federal authorizations for projects registered before EPA approved the program).

<sup>108</sup> The United States District Court Order giving rise to this basis for objection was issued after the close of the Draft Permit public comment period.



compliance or noncompliance with federal emission limits.<sup>109</sup> The purpose of this rule is to allow any credible evidence to be used in demonstrating compliance or noncompliance.<sup>110</sup> EPA explained that the “revisions do not call for the creation or submission of any new emissions or parametric data, but rather address the role of existing data in enforcement actions and compliance certifications” and that EPA “in no way intends to alter the underlying emission standards.”<sup>111</sup>

The Credible Evidence rule also prohibits states from barring the use of any credible evidence for demonstrating compliance:

For the purpose of submitting compliance certifications or establishing whether or not a person has violated or is in violation of any standard in this part, the plan *must not preclude the use*, including the exclusive use, *of any credible evidence or information*, relevant to whether the source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed.<sup>112</sup>

EPA has emphasized that Title V permits may not be written to limit the types of evidence that may be used to prove violations of emissions standards and that Title V provisions that purport to establish such limits are “null and void.”<sup>113</sup> Because these rules clearly indicate that credible evidence may be used to demonstrate violations of Title V permit requirements, and because Texas permits do not contain any language indicating that credible evidence may not be used by citizens or the EPA to demonstrate violations, Petitioners did not argue during the public comment period that the Draft Permit must affirmatively include a condition stating that credible evidence may be used in this way. However, after the Draft Permit public comment period

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<sup>109</sup> 62 Fed. Reg. 8314 (February 24, 1997); 40 C.F.R. §§ 52.12(c), 60.11(g) and 61.12(e); *Natural Res. Def. Council*, 194 F.3d 130 at 134 (D.C. Cir. 1999).

<sup>110</sup> *Natural Res. Def. Council*, 194 at 134.

<sup>111</sup> *Id.*, citing 62 Fed. Reg. 8314-16.

<sup>112</sup> 40 C.F.R. § 51.212(c)(emphasis added).

<sup>113</sup> 62 Fed. Reg. 54900, 54907-8 (October 22, 1997).

closed, the United States District Court for the Western District of Texas issued an order interpreting a Texas Title V permit. According to the Court, “the Credible Evidence Rule does not apply to citizen lawsuits” and that “a concerned citizen is limited to the compliance requirements, as defined in the Title V permit, when pursuing a civil lawsuit for CAA violations.”<sup>114</sup> While Petitioners believe that the Court erred in its decision, in order to assure that applicable requirements are enforceable and consistent with the Credible Evidence Rule and EPA’s assurances in the preamble to the CAM rule, the Administrator must object to the Proposed Permit and require the TCEQ to clarify that credible evidence may be used to enforce the terms and conditions of the Proposed Permit in any enforcement action, including those actions brought pursuant to the Clean Air Act’s citizen suit provisions at 42 U.S.C. § 7604.

**Requested Revision to the Proposed Permit:**

To assure that applicable requirements in the Proposed Permit are practicably enforceable, the Administrator should require the TCEQ to revise the Proposed Permit to include the following condition: “Nothing in this permit shall be interpreted to preclude the use of any credible evidence to demonstrate non-compliance with any term of this permit.”

**VI. CONCLUSION**

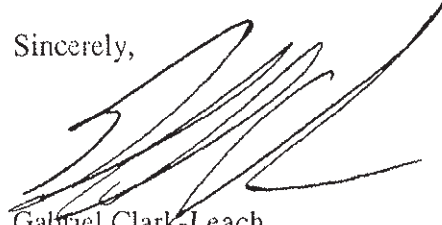
For the foregoing reasons, and as explained in Petitioners’ timely-filed public comments, the Proposed Permit is deficient. The Executive Director’s response to Petitioners’ public comments was also insufficient. Accordingly, Petitioners respectfully request that the Administrator object to the Proposed Permit.

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<sup>114</sup> Exhibit P, Order Granting Motion for Partial Summary Judgment, *Sierra Club v. Energy Future Holdings Corp.*, No. W-12-CV-108 (W.D. Tex. February 10, 2014) at 15-16.



Sincerely,

A handwritten signature in black ink, appearing to read 'GCL', with a long horizontal flourish extending to the right.

Gabriel Clark-Leach  
Environmental Integrity Project  
1002 West Avenue, Suite 305  
Austin, TX 78701  
(512) 637-9477 (phone)  
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CERTIFICATE OF SERVICE

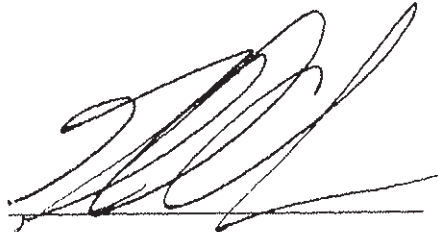
I declare under penalty of perjury under the laws of the United States that I have provided copies of the foregoing Petition to persons or entities below via Federal Express, U.S. Mail, or hand delivery.

Texas Commission on Environmental Quality  
Office of Permitting & Registration  
Air Permits Division  
Technical Program Support Section, MC-163  
P.O. Box 13087  
Austin, Texas 78711-3087

U.S Environmental Protection Agency  
Attn: Air Permit Section Chief  
Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, Texas 75202-2733

U.S. Environmental Protection Agency  
Administrator Gina McCarthy  
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