

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN THE MATTER OF)	
Dow Chemical Company)	
Brazoria County, Texas)	
)	PETITION FOR OBJECTION
Freeport Hydrocarbons & Energy)	
Title V Permit No. O2212)	
)	
Issued by Texas Commission on Environmental)	
Quality)	

**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE
OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE DOW CHEMICAL
COMPANY'S FREEPORT SALT DOME FACILITY, PERMIT NO. O2212**

Pursuant to Clean Air Act § 505(b)(2), 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d), Environmental Integrity Project, and Sierra Club ("Petitioners") petition the Administrator of the United States Environmental Protection Agency ("EPA") to object to Federal Operating Permit No. O2212 ("Proposed Permit") authorizing operation of the Dow Chemical Company's Freeport Salt Dome facilities, located in Brazoria County, Texas.¹

The Administrator should object to the Proposed Permit, because it incorporates by reference federally enforceable operational limits contained in confidential files that cannot be accessed by members of the public. Because the Clean Air Act expressly makes Title V permit terms public information and because confidential limits are not practicably enforceable, the Administrator should object to the Proposed Permit.

Background

On October 3, 2013, the Dow Chemical Company applied for a renewal of Title V Permit No. O2212, authorizing operation of Dow's Chemical Plant, located in Brazoria County, Texas. According to the Executive Director, notice of the renewal was published on June 12, 2014. However, the Commission's publicly available web page did not indicate that notice had been published until the comment period for the Draft Permit had closed. EIP filed comments on the Draft Permit on July 21, 2014.² The Executive Director accepted these comments and responded to them by letter, dated May 12, 2015.³

¹ The Proposed Permit is included as Exhibit 1.

² EIP's public comments on the Draft Permit are included as Exhibit 2.

³ The Executive Director's Response to Public Comments is included as Exhibit 3.

The Dow Freeport Complex

According to Texas's Emissions Inventory database, emission units at Dow's Freeport complex emitted nearly 4,000 tons of criteria pollutants and 156 tons of hazardous air pollutants in 2013. Congress created the Title V operating permit program to improve compliance with federal pollution control requirements by requiring major sources to obtain a single permit that lists all applicable federal requirements and establishes monitoring conditions that assure compliance with each requirement. Thus, a source's Title V permit should be a "source-specific bible for Clean Air Act compliance." *Environmental Integrity Project v. EPA*, 425 F.3d 992, 993-94 (D.C. Cir. 2005). Various aspects of Texas's implementation of its Title V program frustrate this goal. First, instead of issuing a single permit that contains all the requirements for Dow's Freeport complex, Texas has divided the requirements into 23 different Title V permits.⁴ Second, Dow's Freeport Title V permits do not actually list limits established by Dow's 500+ New Source Review permits, standard permits, permits, by rules, and standard exemptions.⁵ Instead, Texas incorporates those permits by reference and leaves it to members of the public and regulators to track Dow's permits down and to identify and reconcile the various limits on their own. Finally, and this is the problem directly addressed by this petition, even if one is able to track down all the NSR permits incorporated by reference into Dow's 23 different Title V permits, she will still have an incomplete list of the federal requirements that apply to Dow, because many of Dow's New Source Review permits contain "confidential" permit limits.⁶ In light of these various deficiencies, Texas's Title V permits for the Dow Freeport complex present an impenetrable maze of regulatory references and dead ends that undermines rather than facilitates enforcement of federal pollution control requirements.

Basis for Objection

The Proposed Permit is objectionable, because it improperly incorporates confidential operational limits. Specifically, Special Condition 14(A) of the Proposed Permit incorporates by reference all the requirements of New Source Review ("NSR") authorizations issued . . . for the permit area." One such NSR permit is Permit No. 22072.⁷ Proposed Permit at 77. While Permit No. 22072 establishes hourly and annual injection rates for liquefied petroleum gas, pyrolysis gasoline, propane, and naphtha, these limits are not directly listed in the permit. Instead, the permit indicates that injection rates shall be limited to the quantities specified on Table 2 of a "confidential application submitted October 18, 2006." Permit No. 22072, Special Condition 2. The injection rate limitations are federally enforceable permit terms that must be publicly available and listed in the Proposed Permit.

⁴ A list of Dow's Title V permits is included as Exhibit 4.

⁵ A list of Dow's NSR authorizations is included as Exhibit 5.

⁶ A list of Dow's NSR authorizations that include confidential limits and conditions is included as Exhibit 6.

⁷ Permit No. 22072 is included as Exhibit 7.

Each Title V permit must include all “[e]mission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements[.]” 40 C.F.R. § 70.6(a)(1); *see also*, 42 U.S.C. § 7661c(a). “All terms and conditions in” a Title V permit “including any provisions designed to limit a source’s potential to emit, are enforceable by the Administrator and citizens under the Act.” 40 C.F.R. § 70.6(b)(1). Confidential operating limits are not practicably enforceable.

Additionally, Title V permit applications, compliance plans, compliance monitoring reports, certifications, and the permits themselves must be “available to the public.” 40 U.S.C. § 7661b(e). While the Act provides that certain Title V permit application information may be protected from disclosure under 42 U.S.C. § 7414(c), the Act says this protection is not available for the above listed-information, specifying that “[t]he contents of a permit shall not be entitled to protection under section 7414(c) of this title.” *Id.*

Thus, the Proposed Permit is deficient because it improperly includes confidential permit terms and because confidential permit terms are not practicably enforceable. 42 U.S.C. §§ 7661b(e) and 7661c(a).

The Executive Director’s Response to Public Comments Fails to Rebut Allegation of Deficiency

EIP identified this deficiency in its comments on Dow’s Draft Permit. The Executive Director responded:

This table can be referenced as confidential because the referenced injection rates are not emission limits and the information is not necessary for calculating emission rates. Accordingly, it does not constitute “emission data”. As stated in 40 C.F.R. § 2.301(a)(2)(i), emission data is defined as information necessary to determine the identity, amount, frequency, concentration, or other characteristics of emissions. Emissions from this type of facility are based upon withdrawal rates from the storage wells, not the injection rates. The material balance table was submitted as confidential information. According to Texas Health and Safety Code § 382.041, an agent of the Commission “may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted.” The TCEQ interprets this data as a secret process or methods of manufacture or production that is identified as confidential when submitted.”

This response is insufficient because it fails to address our actual objection. EIP did not rely on the definition of emission data at 40 C.F.R. § 2.301(a)(2)(i) to argue that the injection rate limits referenced in the permit must be made publicly available. Rather, we rely on 42 U.S.C. § 7661b(e), which provides that Title V permit terms “shall be available to the public” and that “[t]he contents of a permit shall not be entitled to protection [as trade secrets] under §

7414(c) of this title.” The injection rate limits in Permit No. 22072 are federally enforceable “permit terms” that must be publicly available and may not be designated “confidential,” regardless of whether they are “emission data” as defined at 40 C.F.R. § 2.301(a)(2)(i).⁸ Because the Proposed Permit improperly incorporates confidential permit terms and because confidential permit terms are not practicably enforceable, the Administrator should object to the Proposed Permit.

The Executive Director is also mistaken that the injection rate limits in Permit No. 20272 are not emission data, as defined at 40 C.F.R. § 2.301(a)(2)(i), because short-term emission limits in Permit No. 22072 are based on injection rates rather than unloading rates:

An alteration request letter . . . was received from Dow asking that the limitations on unloading rates be removed since short-term emissions are determined by injection rates . . . and injection rates are independent of unloading rates (VOC from displaced brine going to flare), and injection rates are independent of unloading rates (pipeline export can occur simultaneously with amrine unloading and injection). Limitations on injection rates will remain in effect. . . . No emission rates are dependent upon unloading rates.⁹

- **Requested Revision to the Proposed Permit**

The Administrator should object and require the Executive Director to revise the Proposed Permit to make all federally enforceable permit terms, including enforceable representations in Dow’s permit applications, publicly available.

Because the Proposed Permit improperly contains confidential permit terms, the Administrator should object to it.

⁸ The Texas Attorney General has acknowledged, information designated as public under a federal statute “may not be treated as confidential under any provision of the Texas Clean Air Act or the Open Records Act.” *See, e.g.,* Tex. A.G. Opinion No. H-539 (February 26, 1975)., available online at:

<https://www.texasattorneygeneral.gov/opinions/opinions/45hill/op/1975/pdf/jh0539.pdf>

⁹ Exhibit 8.

Sincerely,



Gabriel Clark-Leach

ENVIRONMENTAL INTEGRITY PROJECT

707 Rio Grande, Suite 200

Austin, TX 78701

(512) 637-9478 (phone)

(512) 584-8019 (fax)

gclark-leach@environmentalintegrity.org

ATTORNEY FOR PETITIONERS