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. O1229	§	
	§	
Issued to ExxonMobil Corporation	§	Permit No. O1229
	§	
Issued by the Texas Commission on Environmental Quality	§	
	§	
	§	

PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF PROPOSED TITLE V OPERATING PERMIT NO. O1229 FOR EXXONMOBIL'S BAYTOWN REFINERY

Pursuant to section 42 U.S.C. § 7661d(b)(2), Environmental Integrity Project and Sierra Club, and Air Alliance Houston ("Petitioners") hereby petition the Administrator of the U.S. Environmental Protection Agency ("Administrator" or "EPA") to object to Federal Operating Permit No. O1229 ("Proposed Permit") issued by the Texas Commission on Environmental Quality ("TCEQ" or "Commission") for the Baytown Refinery, operated by the ExxonMobil Corporation ("ExxonMobil").

I. INTRODUCTION

ExxonMobil's Baytown Refinery is the second largest petroleum refinery in the United States and is part of the Country's largest integrated refining and petrochemical complex. The ExxonMobil Baytown complex is located in Baytown, Texas; approximately 30 miles east of Houston. The Baytown Refinery is a major source of criteria pollutants—including NO_x and VOC, which interact with sunlight to form ozone—that contributes to air pollution in the Harris County ozone non-attainment area. The Baytown Refinery is also a major source of Hazardous Air Pollutants (or "HAPs").

For nearly two decades, the primary New Source Review ("NSR") authorization for the Baytown Refinery has been State-only Flexible Permit No. 18287.[1] Flexible Permit No. 18287 was first issued on March 31, 2000. At the time the TCEQ issued ExxonMobil's flexible permit, EPA had not approved Texas's minor source flexible permit program as part of the Texas State Implementation Plan ("SIP") and Texas routinely issued State-only flexible permits to major sources. To address potential confusion created by Texas's implementation of its non-approved program, EPA sent all flexible permit holders—including ExxonMobil—a letter in 2007 clarifying that Texas's flexible permit rules did not displace existing preconstruction permitting requirements in the Texas SIP.[2]

In 2006, the TCEQ amended ExxonMobil's State-only flexible permit to include a Plantwide Applicability Limit ("PAL"), which purports to establish multi-unit emission caps that ExxonMobil may use to determine whether projects at the Baytown Refinery trigger major NSR preconstruction permitting requirements. This permit predates the TCEQ's initial PAL rules, which were eventually disapproved by EPA. Accordingly, EPA sent ExxonMobil a letter explaining that PAL7 is a State-only permit that does not fulfil or modify any requirement in the Texas SIP. (Exhibit 1) Petitioners' Comments on Draft Renewal Permit No. O1229 ("Public Comments"), Attachment 18, Letter from John Blevins, Director, Compliance Assurance and Enforcement Division, U.S. EPA Region 6, to Gary D. Robbins, Air Permitting Team Leader, ExxonMobil Corporation, Re: Baytown Refinery Permit Number PAL7 (March 6, 2012).

[1] While this State-only flexible permit is listed in the Proposed Permit as Permit No. 18287/PSDTX730M4/PAL7, these numbers do not actually refer to different permits. ExxonMobil's various PSD permits were consolidated into a single permit with limits and conditions established consistent with Texas's State-only flexible permit rules. A State-only PAL condition was added to this permit in 2006.

[2] A copy of the letter sent to all Texas flexible permit holders and a list of recipients is available electronically at: http://www.tceq.state.tx.us/assets/public/permitting/air/NewSourceReview/notices/FlexPermitLetterFAQandRecipients.pdf

ExxonMobil's State-only permits purport to create exemptions to federally-enforceable requirements in the Texas SIP and the Company has relied on them to circumvent otherwise-applicable minor and major SIP preconstruction permitting requirements. Though EPA has notified ExxonMobil and the TCEQ that ExxonMobil's State-only permits do not modify SIP obligations, EPA has not yet required TCEQ to remove these permits from ExxonMobil's Title V permit or identify them as State-only authorizations.

II. PETITIONERS

Environmental Integrity Project ("EIP") is a non-profit, non-partisan organization with offices in Austin, Texas and Washington, D.C. that seeks to improve implementation, enforcement, and compliance with federal environmental statutes.

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.

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, 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 affected by air pollution about local air pollution issues, as well as state and federal policy issues.

III. PROCEDURAL BACKGROUND

This Petition addresses the TCEQ's renewal of Permit No. O1229, which was first issued on November 21, 2005 and expired on November 21, 2010. ExxonMobil filed its application to renew the permit on May 17, 2010. The Executive Director completed his technical review of ExxonMobil's renewal application on November 31, 2012. Notice of the Draft Renewal Permit was published on December 27, 2012. Environmental Integrity Project, Sierra Club, and Air Alliance Houston filed their Public Comments before ExxonMobil published notice of the Draft Permit and then resubmitted those comments on January 18, 2013, after the 30-day comment period had begun.

Upon receiving these comments, the Executive Director placed ExxonMobil's renewal application on a management delay for three and a half years; from December 19, 2012 until June 28, 2016. On June 28, 2016, the Executive Director finally issued his response to public comments and notice of the Proposed Permit. (Exhibit 2), Notice of Proposed Permit and Executive Director's Response to Public Comment on Permit No. O1229 ("Response to Comments"). The Executive Director declined to make any changes to the Draft Permit in response to Petitioners' Public Comments.

The Executive Director forwarded the Proposed Permit and his Response to Comments for EPA to review. EPA's 45-day review period ran from July 5, 2016 until August 19, 2016. EPA did not object to the Proposed Permit. Accordingly, members of the public have 60-days from the end of EPA's review period to petition EPA to object to the Proposed Permit. This

Petition is timely filed and requests that the Administrator object to the Proposed Permit based on deficiencies that were raised with reasonable specificity during the public comment period.[3]

IV. LEGAL REQUIREMENTS

The Clean Air Act requires each major stationary source of air pollution to apply for and comply with the terms of a federal operating permit issued under Title V of the Act. 42 U.S.C. § 7661a(a). Congress created the Title V permit program to "enable . . . source[s], States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." *Operating Permit Program*, 57 Fed. Reg. 32250, 32251 (July 21, 1992). Title V permits accomplish this goal by compiling, in a single document, all the applicable requirements for each major source. 42 U.S.C. § 7661c(a); *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996) ("The permit is crucial to implementation of the Act: it contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular source."). Additionally, Title V permits must include monitoring, recordkeeping, and reporting methods that assure ongoing compliance with each requirement and may not restrict the right of regulators or the public to rely on any credible evidence to demonstrate non-compliance with applicable requirements. *Sierra Club v. EPA*, 536 F.3d 673, 674-75 (D.C. Cir. 2008) ("But Title V did more than require the compilation in a single document of existing applicable emission limits . . . . It also mandated that each permit . . . shall set forth monitoring requirements to assure compliance with the permit terms and conditions."); *In the Matter of Southwestern Electric Power Company* ("Pirkey Order"), Order on Petition No. VI-2014-01 at 13 (February 3, 2016) ("[A] title V permit may not preclude any entity, including the EPA,

[3] To the extent that Petitioners rely on information that was not presented in its public comments, that information was either not available during the public comment period or is presented for the sole purpose of rebutting arguments made by the TCEQ in response to public comments.

citizens or the state, from using any credible evidence to enforce emissions standards, limitations, conditions, or any other provision of a title V permit.").

Title V permits are the primary method for enforcing and assuring compliance with State Implementation Plan requirements for major sources. 57 Fed. Reg. 32,258. Because federal courts are often unwilling to enforce otherwise applicable requirements that have been omitted from or displaced by conditions in a Title V permit, state-permitting agencies and EPA must ensure that Title V permits accurately and clearly explain what each major source must do to comply with the law. *See, e.g., Sierra Club v. Otter Tail*, 615 F.3d 1008 (8th Cir. 2008 (holding that enforcement of New Source Performance Standard omitted from a source's Title V permit was barred by 42 U.S.C. § 7607(b)(2)).

Where a state permitting authority issues a Title V operating permit, EPA must object to the permit if it is not in compliance with applicable requirements under 40 C.F.R. Part 70. 40 C.F.R. § 70.8(c). 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." 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); 30 Tex. Admin. Code § 122.360. The Administrator "shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of the . . . [Clean Air Act]." 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(c)(1). The Administrator must grant or deny a petition to object within 60 days of its filing. 42 U.S.C. § 7661d(b)(2).

V. GROUNDS FOR OBJECTION

A. The Proposed Permit Incorporates Confidential Applicable Requirements

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

The Proposed Permit fails to include and assure compliance with confidential applicable requirements in Permit No. 18287/PSDTX730M4/PAL7, which are incorporated by reference into the Proposed Permit. Proposed Permit, Special Condition No. 32 and New Source Review Authorization References Table.

Permit No. 18287/PSDTX730M4/PAL7, Special Condition No. 38 states:

> This permit authorizes emissions from the flares for maintenance, start-up, and shutdown ["MSS"] activities as represented in the confidential section of the permit amendment application dated March 2, 2004. . . . Any emissions from maintenance, start-up, or shutdown activities not contained in the listing provided in the confidential file are not authorized by this permit.

Special Condition 39 of the same permit states:

> This permit authorizes atmospheric emissions from various sources for maintenance, startup, and shutdown activities as represented in the confidential section of the permit amendment application dated March 2, 2004. . . . Any emissions from maintenance, start-up, or shutdown activities not contained in the listing provided in the confidential file are not authorized by this permit.

Thus, just as the Proposed Permit incorporates requirements in Permit No. 18287/PSDTX730M4/PAL7 by reference, ExxonMobil's NSR permit incorporates specific application representations as enforceable conditions of the permit. These representations are just as much a part of ExxonMobil's permit as the special conditions printed on its face. 30 Tex. Admin. Code § 116.116(a) (establishing that application representations, no less than a permit's special conditions, are enforceable conditions of the authorization to construct).

Because it is impossible for members of the public to determine which planned MSS activities are authorized and which are not without access to information in confidential files, it

is also impossible for the public to properly assess ExxonMobil's compliance with Permit No. 18287/PSDTX730M4/PAL7, Special Condition Nos. 38 and 39. The Administrator must object to the Proposed Permit because its inclusion of confidential permit terms is contrary to the Act and fails to assure compliance with applicable requirements.

2. Applicable Requirement or Part 70 Requirement Not Met

42 U.S.C. § 7661c(a) and (c) require that each Title V permit include conditions that assure compliance with all applicable requirements. Applicable requirements include emission limits and conditions in New Source Review ("NSR") permits issued for the Title V source. 40 C.F.R. § 70.2; 30 Tex. Admin. Code § 122.10(2)(H). All terms and conditions in a Title V permit are enforceable by the Administrator and the public. 40 C.F.R. § 70.6(b)(1).

Consistent with the Act's enforceability requirement, Title V provides that "[t]he contents of a permit shall not be entitled to protection" as confidential business information or trade secrets. 42 U.S.C. § 7661b(e). This makes good sense, because members of the public cannot effectively enforce confidential requirements.

The Proposed Permit does not meet the requirements of 42 U.S.C. §§ 7661b(e) and 7661c(a) as explained in the following analysis.

3. Inadequacy of the Permit Term

The Proposed Permit's incorporation by reference of requirements in Permit No. 18287/PSDTX730M4/PAL7, Special Condition Nos. 38 and 39 violates the Act, because these conditions establish confidential requirements that are not practicably enforceable by members of the public. 42 U.S.C. §§ 7661b(e) and 7661c(a).

4. Public Participation Procedure Not Provided

Petitioners' Public Comments did not specifically allege that the Proposed Permit's improper incorporation of confidential permit terms violated public participation requirements in Title V of the Clean Air Act.

5. Issues Raised in Public Comments

Petitioners raised this issue on pages 2-3 of their Public Comments.

6. Analysis of State's Response

The Executive Director's Response to Comments fails to rebut Petitioners' demonstration that the Proposed Permit's incorporation of confidential permit terms violates 42 U.S.C. §§ 7661b(e) and 7661c(a). While the Executive Director claims that "[t]here is no requirement in 30 TAC Chapter 122 to list MSS application representations in the draft permit," he also concedes that the representations directly incorporated by Permit No. 18287/PSDTX730M4/PAL7 "are enforceable in accordance with 30 TAC § 122.140(3) and are the conditions under which the site is operated." Response to Comments at 2. Because the representations are enforceable conditions under which the site is operated—or in other words, because the representations are applicable requirements—they must be included in the permit and permit terms may not be made confidential. 42 U.S.C. §§ 7661b(e) and 7661c(a).

Additionally, because the Executive Director concedes the representations are enforceable requirements, the Proposed Permit must provide sufficient information to allow members of the public to identify and determine ExxonMobil's compliance with them. 42 U.S.C. §§ 7661c(a) and (c); 40 C.F.R. § 70.6(b)(1). Because the terms of ExxonMobil's authorization to conduct planned MSS activities at the Baytown Refinery are confidential, they are not adequately described by the Proposed Permit.

The Executive Director also contends that application information about MSS activities incorporated into Permit No. 18287/PSDTX730M4/PAL7 may be kept confidential because this information is not necessary to calculate emission rates and therefore does not constitute 'emission data." Response to Comments at 2-3. While this contention is irrelevant, because Title V permit terms may not be confidential, it is also incorrect. Emission data, which is public information as a matter of law, includes:

> Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source[.]

40 C.F.R. § 2.301(a)(2)(i)(B).

Because units at the Baytown Olefins Plant are only authorized to emit pollution during routine MSS activities *as represented in ExxonMobil's permit application*, the incorporated application representations are necessary to "determine the identity, amount, frequency, concentration, or other characteristics . . . of emissions" authorized by the Proposed Permit. *Id.* Because this is so, the incorporated application representations are emission data and may not be treated as confidential information.

Petitioners demonstrated that the Proposed Permit improperly contains confidential permit terms that undermine the enforceability of applicable requirements. The Executive Director's Response to Comments failed to rebut this demonstration and, in fact, contained information strengthening Petitioners' argument. Accordingly, the Administrator must object to the Proposed Permit and require the TCEQ to make the terms of ExxonMobil's authorization to conduct planned MSS activities at the Baytown Refinery public information.

B. The Proposed Permit's Incorporation of State-Only Permit PAL7 Undermines the Enforceability of Major New Source Review Requirements

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

The Proposed Permit incorporates by reference PAL7, which is part of State-only Permit No. 18287/PSDTX730M4/PAL7. Proposed Permit, Special Condition No. 32 and New Source Review Authorization References Attachment. As EPA has explained to ExxonMobil and the TCEQ, ExxonMobil's PAL is a State-only authorization that does not affect ExxonMobil's obligation to determine major NSR applicability for projects at the Baytown Refinery using the netting process established by the Texas SIP. Public Comments, Attachment 18. ExxonMobil's PAL, however, is incorporated into the Proposed Permit as a federally-enforceable authorization that purports to establish an alternative to the netting requirements in the Texas SIP. According to PAL7:

> This permit establishes Plant-Wide Applicability Limits (PALs) for VOC, carbon monoxide (CO), nitrogen oxide (NO_x), sulfur dioxide (SO_2), particulate matter (PM), H_2S, and H_2SO_4. The PALs are effective for ten years after this permit is issued. Physical changes and changes in method of operation at this site are exempt from federal New Source Review for VOC, CO, NO_x, SO_2, H_2S, H_2SO_4, and PM as long as site emissions do not exceed PAL caps.

Because PAL7 purports to establish the exclusive basis for determining whether projects at the Baytown Refinery are subject to major NSR preconstruction permitting requirements and because the permit displaces the actual applicable netting requirements in the Texas SIP, *see* 30 Tex. Admin. Code §§ 116.150(c) and (d); 116.160(b) and (c), it undermines the enforceability of the Texas SIP.

2. Applicable Requirement or Part 70 Requirement Not Met

Title V permits must include and assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a) and (c). Applicable requirements include "[a]ny standard or other

requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act[.]" 40 C.F.R. § 70.2. The Act prohibits states and EPA from issuing orders that purport to modify SIP requirements with respect to any stationary source. 42 U.S.C. § 7410(i). At the time that ExxonMobil's PAL7 was issued, Texas's federally-approved SIP did not authorize the TCEQ to issue federally-enforceable PAL permits and required operators to apply case-by-case netting procedures described at 30 Tex. Admin. Code §§ 116.12, 116.150, and 116.160 to determine whether proposed modifications to major sources triggered major NSR preconstruction permitting requirements. ExxonMobil has not obtained a PAL authorization under Texas's subsequently approved PAL rules.

As explained below, the Proposed Permit's incorporation of PAL7 as a federally-enforceable authorization undermines the enforceability of Texas's SIP-approved netting rules.

3. Inadequacy of the Permit Term

The Proposed Permit's incorporation of State-only PAL7 as a federally-enforceable authorization is improper because it undermines the enforceability of Texas SIP requirements and improperly purports to modify SIP requirements with respect to ExxonMobil's Baytown Refinery.

As EPA has explained to ExxonMobil and the TCEQ, ExxonMobil's PAL permit is a State-only authorization that does not affect ExxonMobil's obligation to determine major NSR applicability for projects at the Baytown Refinery using the netting process established by the Texas SIP. While EPA approved Texas's PAL permitting rules at 30 Tex. Admin. Code, Chapter 116, Subchapter C rules in 2012, *Approval Texas Major NSR Reform Program*, 77 Fed. Reg. 65119 (October 25, 2012), ExxonMobil's PAL7 permit was not issued under those rules.

In fact, ExxonMobil's PAL7 was issued in 2006 and predates even the TCEQ's initial PAL rules, which were *disapproved* by EPA. *Disapproval of Texas PAL and Qualified Facilities Program Rules*, 75 Fed. Reg. 56424 (September 15, 2010). Because PAL7 was not issued under Texas's SIP-approved rules, it is a State-only permit that does not modify ExxonMobil's obligation to comply with Texas SIP netting requirements that apply to all major sources not covered by a federally-enforceable PAL permit.[4] 42 U.S.C. § 7410(i); *see also, Approval of Texas Flexible Permit Program*, 79 Fed. Reg. 40666, 40667-68 (July 14, 2014) (explaining that approval of Texas program does not convert State-only permits issued prior to approval into federally-approved permits).

Because PAL7 purports to displace Texas SIP netting requirements, it undermines the enforceability of those applicable requirements. Because this is so, the Proposed Permit fails to assure compliance with applicable requirements and the Administrator must object to it.

4. Public Participation Procedure Not Provided

Petitioners' Public Comments did not specifically allege that the Proposed Permit's improper incorporation of Permit No. PAL7 violated public participation requirements in Title V of the Clean Air Act.

5. Issue Raised in Public Comments

Petitioners raised this issue on pages 13-14 of their Public Comments.

6. Analysis of State's Response

The Executive Director's Response to Comments does not address Petitioners' demonstration that PAL7 is a State-only authorization that may not be incorporated into the Proposed Permit without undermining the enforceability of major NSR requirements in the

[4] The relevant Texas SIP rules regarding major NSR applicability determinations are found at: 30 Tex. Admin. Code §§ 116.150(d); 116.160(c); and 116.190.

Texas SIP. Instead, the Executive Director states that "ExxonMobil will amend the PAL when it comes in for renewal in October 2016. The amended permit must comply with the SIP-approved rules." Response to Comments at 16. That sentence is the entirety of the Executive Director's response on this issue. That ExxonMobil will apply for and, perhaps, receive a federally-enforceable PAL permit at some point in the future has no bearing on the question of whether the Proposed Permit can incorporate ExxonMobil's current State-only PAL permit as a federally-enforceable authorization without violating Title V requirements.

Because Petitioners have demonstrated that the Proposed Permit's incorporation of PAL7 undermines the enforceability of SIP requirements and because the Executive Director failed to make a substantive response to this demonstration, the Administrator must object to the Proposed Permit.

C. The Proposed Permit Fails to Require ExxonMobil to Obtain SIP-Compliant Authorizations for Flexible Permit Projects at the Baytown Refinery

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

The Proposed Permit is deficient because it fails to include a schedule for ExxonMobil to address its non-compliance with Texas SIP preconstruction permitting requirements. ExxonMobil violated the SIP by making changes to the Baytown Refinery without obtaining authorizations required by Texas's federally-approved Changes to Facilities rule at 30 Tex. Admin. Code § 116.116. The projects at issue are listed in Public Comments, Attachment 22. ExxonMobil relied on Texas's unapproved flexible permit alteration process instead of Texas's federally-approved Changes to Facilities rule at 116.116 to authorize these projects as flexible without any substantive preconstruction review by the TCEQ and without establishing Best Available Control Technology requirements. *See,* 30 Tex. Admin. Code § 116.721(b) (providing that alterations may be constructed without prior review and that alterations are not subject to

BACT). Though Texas's flexible permitting program has since been approved, the approved program does not apply to major sources—like the Baytown Refinery—and the minor source flexible permit rules were not applicable at the time the projects identified in Petitioners' Public Comments were undertaken.

ExxonMobil violated the Texas SIP by failing to obtain preconstruction authorizations required by 30 Tex. Admin. Code § 116.116 for flexible permit projects at the Baytown Refinery. The Proposed Permit must include a schedule for ExxonMobil to correct this non-compliance.

2. Applicable Requirement or Part 70 Requirement Not Met

If a source has failed to comply with applicable requirements at the time its Title V permit is issued, its Title V permit must include a schedule for the source to correct its non-compliance. 42 U.S.C. §§ 7661b(b), 7661c(a); 40 C.F.R. §§ 70.5(c)(8)(iii)(C), 70.6(c)(3); 30 Tex. Admin. Code § 122.142(e). Applicable requirements include "[a]ny standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act[.]" 40 C.F.R. § 70.2. The Texas SIP requires major sources of pollution, like the Baytown Refinery, to authorize modified representations with regard to construction plans and operation procedures—including, but not limited to construction of new or modified facilities—consistent with the requirements in 30 Texas Administrative Code, Chapter 116, Subchapter B. *See,* 30 Tex. Admin. Code §§ 116.110, 116.111, 116.116; *see also, Id.* at §§ 116.150 and 116.160. While Texas also has separate, less stringent program rules for permitting changes to minor sources authorized by a previously-issued federally-approved flexible permit, these rules do not

apply to major sources—like the Baytown Refinery—and were not federally-approved at the time the projects listed in Petitioners' Public Comments were undertaken.[5]

3. Inadequacy of the Permit Term—Omission of Compliance Schedule

As EPA has explained to ExxonMobil and the TCEQ, ExxonMobil's flexible permit is a State-only permit that does not displace ExxonMobil's obligation to comply with preconstruction permitting requirements in the Texas SIP. *See*, *supra* n2**.** At the time each of the projects listed in Public Comments, Attachment 22 were undertaken, the Texas SIP did not include Texas's flexible permit program rules at 30 Tex. Admin. Code § 116, Subchapter G. Instead, any changes to representations regarding construction or operation of the refinery—including, but not limited to physical and operational changes that increased actual emissions—were subject to the requirements in Texas's Changes to Facilities rule at 30 Tex. Admin. Code § 116.116.

This requirement was not obviated or changed by EPA's subsequent approval of Texas's minor source flexible permit rules, because ExxonMobil has not obtained a federally-enforceable flexible permit and because the flexible permit program may not be used to authorize projects at major sources of air pollution, like the Baytown Refinery.

ExxonMobil did not obtain the required 116.116 authorizations for the projects listed in Petitioners' Public Comments. Instead, ExxonMobil constructed the changes without preconstruction approval in reliance on Texas's unapproved flexible permit rules at 30 Tex. Admin. Code §§ 116.718 and 116.721, which provide that an operator who has obtained a flexible permit may make physical and operational changes to existing facilities without prior authorization or review by the TCEQ—even if such changes increase the amount of pollution actually emitted by the source—so long as plant-wide emissions remain below the source's existing emission caps and limits. These State-only rules did not exempt ExxonMobil from its

[5] Support for these contentions is provided below in Petitioners' analysis of the State's response.

obligation to obtain authorization for each of the projects listed in Petitioners' Public Comments under Texas's federally-approved rule at 30 Tex. Admin. Code § 116.116. Because ExxonMobil failed to obtain these necessary authorizations, ExxonMobil is in violation of the Texas SIP and the Proposed Permit must establish a schedule for ExxonMobil to correct this non-compliance.

4. Public Participation Procedure Not Provided

Petitioners' Public Comments did not specifically allege that the Proposed Permit's failure to establish a compliance schedule violated public participation requirements in Title V of the Clean Air Act.

5. Issue Raised in Public Comments

Petitioners raised this issue on pages 16-17 of their Public Comments.

6. Analysis of State's Response

In response to Petitioners' comments, the Executive Director makes three points, each of which is irrelevant and fails to rebut Petitioners' demonstration that the Proposed Permit must include a schedule for ExxonMobil to correct its non-compliance with the Texas SIP.

First, the Executive Director explains that the TCEQ's rules at 30 Tex. Admin. Code §§ 122.10(2)(h) and 122.142 require the TCEQ to include the terms and conditions of any preconstruction permit issued under 30 Tex. Admin. Code, Chapter 116 in a source's Title V permit. Response to Comments at 18. This contention is irrelevant because it does not address Petitioners' claim that the Proposed Permit must include a compliance schedule for ExxonMobil to correct its non-compliance with the Texas SIP. Additionally, whatever § 122.142 might require, it does not trump the Executive Director's obligation to identify Title V permit requirements that are not-federally enforceable as "State-only" requirements, 40 C.F.R. § 70.6(b)(2), and to assure compliance with applicable requirements in the SIP. 42 U.S.C. §

7661c(a) and (c). To the extent that State-only permits incorporated into a Title V permit purport to modify federally-enforceable applicable requirements, Title V permits must contain conditions clarifying that State-only terms purporting to modify federal requirements are ineffective. 42 U.S.C. § 7410(i); *Pirkey Order* at 11-12 (requiring the TCEQ to clarify that permit terms purporting to modify SIP requirements do not effectively modify the requirement).

Second, the Executive Director explains that Texas's flexible permit program rules were approved by EPA after the close of the public comment period and that ExxonMobil will convert Permit No. 18287 into a SIP-approved flexible permit when the permit comes up for renewal in October, 2016. Response to Comments at 19. This response is irrelevant and incorrect.

At the time the projects listed in Petitioners' public comments were undertaken, Texas's minor source flexible permit program rules were not federally-approved and did not displace ExxonMobil's obligation to authorize changes to the Baytown Refinery through the SIP-approved process established by 30 Tex. Admin. Code § 116.116. Accordingly, EPA's subsequent approval of Texas's program rules has no bearing on the question of whether ExxonMobil's failure to obtain SIP-compliant authorizations for projects at the Baytown Refinery is a violation of the Texas SIP. Moreover, the preamble to EPA's approval of Texas's flexible permit program is absolutely clear that EPA's program approval did not convert State-only flexible permits issued prior to the approval into federal permits. 79 Fed. Reg. 40666, 40667-68 (July 14, 2014) ("In sum, the commenters appear to be implying that this approval will transform State-only flexible permits issued since 1994 into federally approved permits upon the effective date of this rule. *This is not the case and the EPA strongly rejects any suggestion to the contrary*.") (emphasis added). Thus, ExxonMobil's flexible permit is a State-only permit that does not satisfy or displace ExxonMobil's obligation to obtain SIP-compliant authorizations for

projects at the Baytown Refinery. Finally, putting aside the fact that EPA's approval of the flexible permit program cannot convert ExxonMobil's State-only flexible permit authorizations into federal authorizations, the Executive Director's response is irrelevant, because Texas's flexible permit program—as a matter of law—may not be used to authorize projects at major sources. EPA's approval of the program, consistent with the State's representations, was upheld by the Fifth Circuit Court of Appeals based upon the Court's holding that the flexible permit program could not be used to authorize major sources. *Environmental Integrity Project v. EPA*, 610 Fed.Appx. 409, 410 (5th Cir. 2015) (unpublished) (hereafter, "Flex II") ("Under the [flexible permit] plan, an entity may obtain a flexible permit for emissions up to a specified aggregate limit *below the major source threshold*.") (emphasis added). ExxonMobil's Baytown Refinery is a major source and the Fifth Circuit Court of Appeals decision affirming EPA's approval of the flexible permit program limits the applicability of the program to minor sources. *Flex II* at 1.[6]

In his third argument, the Executive Director purports to dispute Petitioners' claim that flexible permit program review procedures and requirements conflict with the SIP, because

> the technical review summary of the flexible permit No. 18287/PSDTX730M4/PAL7 application provides information regarding how Subchapter B requirements in § 116.111 are met, including compliance with the SIP approved Subchapter B rules and review requirements, unit-specific limits based on BACT review at the time of the permit issuance, and demonstrations that each emission unit and the facility covered by Permit No. 18287/PSDTX730M4/PAL7 meets all applicable NSPS, NESHAP requirements, and air dispersion modeling conducted by the applicant.

Response to Comments at 19.

This response is irrelevant, because it focusses on flexible permit program requirements that were not triggered by the projects listed in Petitioners' Public Comments. Under Texas's

[6] The Executive Director's contention that ExxonMobil may convert its State-only flexible permit into a SIP-compliant flexible permit when the permit is renewed is therefore incorrect. **Petitioners request that the Administrator make this clear in her response to this Petition.**

flexible permit rules, changes to increase actual emissions from existing facilities at a source that has obtained a flexible permit do not require preconstruction approval, so long as increases remain below the existing emission caps in the flexible permit. *Flex II* at 1 (after an operator obtains a flexible permit, "the flexible permit holder may modify its facilities without further regulatory review provided emissions remain below the aggregate permit limit."); *see also,* 30 Tex. Admin. Code §§ 116.721(a) (requiring preconstruction authorization for projects that result in a "significant increase in emissions") and 116.718 (providing that "[a]n increase in emissions from operational or physical changes at an existing facility authorized by a flexible permit is insignificant, for the purposes of minor new source review under this subchapter, if the increase does not exceed either the emission cap or individual emission limitation.").[7] ExxonMobil claimed this exemption for each of the projects listed in Petitioners' Public Comments, Attachment 22. Thus, these projects were not subject to the application requirement at 30 Tex. Admin. Code § 116.711, which was the basis for the Executive Director's determination that the flexible permit—when first issued—complied with the requirements of 30 Tex. Admin. Code § 116.111.

Because ExxonMobil has not obtained preconstruction authorizations required by the Texas SIP for projects identified in Public Comments, Attachment 22, and because the Executive Director failed to rebut Petitioners' demonstration that ExxonMobil has failed to comply with 30 Tex. Admin. Code § 116.116 at the time the Proposed Permit was issued, the Administrator must object to the Proposed Permit and require the TCEQ to establish a schedule for ExxonMobil to comply with preconstruction permitting requirements at 30 Tex. Admin. Code § 116.116.

[7] *Compare* with the Changes to Facilities rule at 30 Tex. Admin. Code § 116.116(b)(1)(C), which requires preconstruction authorization for changes that increase actual emissions, even if the increases do not exceed previously-established permit limits.

D. The Proposed Permit Fails to Identify Permit by Rule Certified Registrations as Applicable Requirements

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

The Proposed Permit incorporates by reference various Permits by Rule ("PBRs") claimed by ExxonMobil to authorize construction of or modifications to units at the Baytown Refinery. Proposed Permit at 1767-68. The Proposed Permit provides that ExxonMobil "shall comply with the general requirements of 30 TAC 106, Subchapter A or the general requirements, if any, in effect at the time of the claim of any PBR." *Id.* at Special Condition No. 33. While claimed PBRs often establish generic emission limits and operating requirements that may be identified by reading the TCEQ's PBR rules, operators may also choose to certify source-specific emission rates for PBRs that are lower than the generic limits. 30 Tex. Admin. Code § 116.6.

Where an operator certifies maximum emission rates under 106.6, all representations with regard to construction plans, operating procedures, and maximum emission rates contained in the certified registration become federally-enforceable permit conditions and limits. *Id*. Because these source-specific requirements are not contained in the claimed rules, they must be identified with specificity by the Proposed Permit.

After the public comment period for the Draft Permit had closed, ExxonMobil certified emission limits under 30 Tex. Admin. Code § 106.6 for several projects at the Baytown Refinery. *See,* (Exhibit 3) Certified Registration Approval Letter, Registration No. 137342 (December 21, 2015); (Exhibit 4) Certified Registration Approval Letter, Registration No. 136500 (November 16, 2015); (Exhibit 5) Certified Registration Approval Letter, Registration No. 115627 (February 21, 2014); (Exhibit 6) Certified Registration Approval Letter, Registration No. 107643 (February 8, 2013). Each of these registrations establish federally-enforceable emission limits that are significantly lower than the general PBR limits established by 30 Tex.

Admin. Code § 106.4 and the generic limits contained in the claimed PBRs. Because the Proposed Permit fails to identify certified PBR limits as applicable requirements, it is incomplete and fails to assure compliance with applicable requirements.

2. Applicable Requirement or Part 70 Requirement Not Met

Title V permits must include and assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a) and (c). "Applicable requirements" include requirements in 30 Texas Administrative Code, Chapter 106 PBR certified registrations. 30 Tex. Admin. Code § 122.10(2)(H).

3. Inadequacy of the Permit Term

While the Proposed Permit incorporates by reference the rules establishing generic requirements with respect to PBRs claimed by ExxonMobil, it does not indicate that ExxonMobil has certified emission rates that are lower than those allowed by Texas's PBR rules, identify the applicable source-specific emission limits established by these certified registrations, explain which units are subject to the source-specific limits, or specify how compliance with the limits should be determined. Because the Proposed Permit and Statement of Basis fail to indicate that ExxonMobil has established source-specific emission limits and operating requirements through the 30 Tex. Admin. Code § 106.6 certification process or even explain what a PBR certified registration is, the Proposed Permit fails to identify and assure compliance with applicable requirements in ExxonMobil's certified PBR registrations.

4. Public Participation Procedure Not Provided

Petitioners' Public Comments did not specifically allege that the Proposed Permit's failure to include information about ExxonMobil's certified PBR registrations violated public participation requirements established by Title V of the Clean Air Act.

5. Issue Raised in Public Comments

Petitioners raised this issue on pages 7-11 of their Public Comments. Petitioners' Public Comments, however, did not identify the specific certified PBR registrations attached to this Petition. *See*, Exhibits 3-6. These registrations may be raised for the first time in this Petition, because they were not issued until after the public comment period had ended. 42 U.S.C. § 766d(b)(2) ("The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (*unless the petitioner demonstrates in the petition . . that it was impracticable to raise such objections within such period or unless the ground for such objection arose after such period*)") (emphasis added).

6. Analysis of State's Response

In his Response to Comments, the Executive Director explains that:

> The permit holder may certify and register emissions limits below the levels specified in 30 TAC § 106.4(a)(1) through a certified registration that is issued in accordance with 30 TAC § 106.6. The certified registration letter with the maximum permitted allowables and the technical review are available on the TCEQ remote document server (RDS) at https://webmail.tceq.state.tx.us/gw/webpub. Additional requirements for PBRs are found in the Special Terms and Conditions under New Source Review Authorization Requirements. In the Exxon Mobil draft Title V permit, these requirements are found in Special Terms and Conditions 32 and 33, relating to PBRs.

Response to Comments at 6.

While all this is true, the Proposed Permit is still deficient because it fails to indicate that ExxonMobil has obtained certified registration approvals and that source-specific certified PBR limits are applicable requirements. Mere incorporation by reference of the general rule at § 106.6 allowing ExxonMobil to certify source-specific PBR emission limits is not sufficient to identify ExxonMobil's obligations under the SIP, because it does not explain how the rule and orders issued pursuant to it apply to units at the Baytown Refinery. Because the Proposed Permit

fails to identify ExxonMobil's certified registrations as applicable requirements, they are likely unenforceable under the prevailing doctrine of collateral attack. *See, e.g., Sierra Club v. Otter Tail,* 615 F.3d 1008 (8th Cir. 2008 (holding that enforcement of New Source Performance Standard omitted from a source's Title V permit was barred by 42 U.S.C. § 7607(b)(2)). Because the Proposed Permit fails to properly identify ExxonMobil's certified PBR registrations as applicable requirements and because the Executive Director's Response to Comments did not explain how the Proposed Permit assures compliance with these registrations, the Administrator must object.

E. The Proposed Permit Fails to Specify Applicable Monitoring Requirements that Assure Compliance with Emission Limits for Units Authorized by Permit No. 18287/PSDTX730M4/PAL7

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

Permit No. 18287/PSDTX730M4/PAL7, Special Condition Nos. 20-22 explain how ExxonMobil is to calculate emissions from units at the Baytown Refinery to determine compliance with the permit's emission limits and caps. These Special Conditions, however, fail to assure compliance with the limits and caps, because they omit key information necessary to understand and evaluate how emissions are to be calculated. Specifically, the special conditions incorporate by reference various emission factors, provisions in TCEQ guidance documents, application representations, and vendor data without identifying the relevant emission factors or data. Because the Proposed Permit is unclear about how ExxonMobil is to calculate emissions from units at the Baytown Refinery to determine compliance with applicable limits and caps and because the permit record fails to demonstrate that the methods ExxonMobil must use to calculate emissions from its units---whatever those methods may be—assures compliance with applicable requirements.

2. Applicable Requirement of Part 70 Requirement Not Met

The Clean Air Act and EPA's implementing regulations require all Title V permits to contain monitoring requirements that assure compliance with applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(c)(1) and 70.6(a)(3). The Proposed Permit does not meet this requirement as explained in the following analysis.

3. Inadequacy of the Permit Term

Title V permits must include monitoring, recordkeeping, and reporting conditions that assure compliance with all applicable requirements, including emission limits established by NSR permits. 42 U.S.C. §§ 7661c(a) and (c); 40 C.F.R. § 70.6(a)(3) and (c). To comply with this requirement, a Title V permit must specify the monitoring method that assures compliance with each applicable requirement. *In the Matter of Wheelabrator Baltimore*, Permit No. 24-510-01886 at 10 (April 14, 2010) ("EPA agrees that . . . [the permitting agency] does not have the discretion to issue a permit without specifying the monitoring methodology needed to assure compliance with applicable requirements in the title V permit."). Where a Title V permit allows an operator to determine compliance with emission limits by monitoring and maintaining records for various operating parameters, the permit and the permit record must explain how the permittee is to use this information to determine compliance. *In the Matter of Shell Deer Park Chemical Plant and Shell Deer Park Refinery* ("Deer Park Order"), Order Responding to Petition Nos. VI-2014-04 and VI-2014-05 at 22 (September 24, 2015) (objecting to Title V permit that failed to explain how tank emissions were to be determined "despite the numerous monitored parameters and recordkeeping requirements," because it rendered "compliance assurance for purposes of title V . . . unclear."). Finally, where a Title V allows an operator to rely on emission factors to determine compliance with applicable requirements, the permit record must

(1) identify the applicable emission factor(s), (2) explain the basis for the agency's determination that the factors assure compliance, and (3) provide evidence that operations at the source will not vary by a degree that would cause an exceedance of standards. *See, In the Matter of United States Steel, Granite City Works* ("Granite City I Order"), Order on Petition No. V-2009-03 at 13-14 (January 31, 2011) ("IEPA has failed to provide an explanation why use of the emission factors is adequate to assure compliance. With a few exceptions, EPA does not recommend the use of emission factors to develop source-specific permit limits or to determine compliance with permit requirements . . . . IEPA either must justify in the record why these emission factors are representative of . . . operations . . . and provide sufficient evidence to demonstrate that the emissions will not vary by a degree that would cause an exceedance of the standards, or IEPA must determine and adequately support another mechanism to assure compliance with the applicable emission limits"); *In the Matter of United States Steel, Granite City* Works ("Granite City II Order"), Order on Petition No. V-2011-2 at 9-12 (December 3, 2012) (granting claim, because permit failed to specify which emission factors operator was required to use to demonstrate compliance with applicable requirements).

Permit No. 18287/PSDTX730M4/PAL7, Special Condition Nos. 20-22 fail to assure compliance with applicable emission limits and caps, because they fail to specify relevant monitoring requirements, fail to explain how parametric monitoring information, vendor data and recordkeeping requirements should be used to determine compliance with applicable requirements, fail to identify applicable emission factors, and because the permit record fails to demonstrate that the monitoring methods—including unspecified emission factors—established by the permit are appropriate to determine compliance with applicable emission limits and caps.

4. Public Participation Procedure Not Provided

Petitioners' Public Comments did not specifically allege that the Proposed Permit's failure to include information improperly omitted from Permit No. 18287/PSDTX730M4/PAL7, Special Condition Nos. 20-22 violated public participation requirements established by Title V of the Clean Air Act

5. Issue Raised in Public Comments

This issue was raised on pages 8-9 of Petitioners' Public Comments.

6. Analysis of State's Response

The Executive Director contends that Petitioners' concerns about Permit No. 18287/PSDTX730M4/PAL, Special Condition Nos. 20-22 are misplaced, because (1) Special Condition Nos. 28-30 of the same permit still require ExxonMobil to maintain records sufficient to establish compliance with permit limits and (2) "[t]he application representations that describe the calculation methodology for the emissions are not required to be listed in the NSR permit or FOP O1229." Response to Comments at 10.

The Executive Director's first claim fails to rebut Petitioners' demonstration, because—regardless of whether ExxonMobil's actual records contain information that demonstrates compliance with the applicable limits—the Proposed Permit must establish specific requirements that assure compliance with applicable emission limits. It must identify the specific monitoring and emissions calculation methods that assure compliance with applicable requirements, which are to be reflected in the records ExxonMobil maintains pursuant to Permit No. 18287/PSDTX730M4/PAL7, Special Conditions No. 28-30. *Granite City II Order* at 9-12; *Deer Park Order* at 22. Because, the special conditions in Permit Nos. 18287/PSDTX730M4/PAL7 that purport to establish such methods fail to contain information necessary to identify and

evaluate the monitoring methods and calculation procedures that assure compliance with applicable limits and caps, the Proposed Permit is deficient.

The Executive Director's second argument—that the Proposed Permit needn't contain the specific application representations that describe the calculation methodology that assure compliance with applicable requirements—is incorrect. The Proposed Permit must contain all monitoring requirements established by Permit No. 18287/PSDTX730M4/PAL7 and any other conditions necessary to assure compliance with that permit's emission limits and caps. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a)(3)(i)(A). Moreover, even if the Executive Director was correct that the Proposed Permit needn't include this information, the permit record must still describe the incorporated application representations and explain how they assure compliance with applicable limits. *Deer Park Order* at 22 (objecting to permit because "the Petitioners demonstrated that the record, including the permit and the RTC, does not explain what monitoring methods assure compliance with VOC emission limits for storage tanks as required by 42 U.S.C. § 7661c(c)."). Because the Proposed Permit and the permit record, including the Proposed Permit, its Statement of Basis, and the Executive Director's Response to Comments fail to identify the specific monitoring and emission determination methods that assure compliance with applicable limits and emission caps, the Administrator must object.

F. The Proposed Permit Fails to Require Monitoring That Assures Compliance with Emission Limits and Caps for Tanks and Wastewater Treatment Plants at the Baytown Refinery

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

Permit No. 18287/PSDTX730M4/PAL7, Special Condition Nos. 14(F) and 22(B) direct ExxonMobil to use AP-42 emission factors in conjunction with an undisclosed methodology contained in TCEQ guidance to calculate emissions from storage tanks and wastewater treatment

plants at the Baytown Refinery for the purpose of determining compliance with applicable emission limits and caps. These special conditions fail to assure compliance with applicable emission limits and caps, because the permit record does not demonstrate that the AP-42 emission factors the Proposed Permit instructs ExxonMobil to use reliably estimate actual emissions from units at the Baytown Refinery. Petitioners' Public Comments identified studies showing that these emission factors have significantly underestimated actual emissions from petroleum refineries in Texas. The Executive Director failed to address these studies or explain how he determined that the applicable AP-42 emission factors, along with TCEQ's guidance document—which is not part of the permit record or readily accessible online—provide a reliable basis for calculating emissions from ExxonMobil's tanks and wastewater treatment facilities.

2. Applicable Requirement or Part 70 Requirement Not Met

The Clean Air Act and EPA's implementing regulations require all Title V permits to contain monitoring requirements that assure compliance with applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(c)(1) and 70.6(a)(3). The Proposed Permit does not meet this requirement as explained in the following analysis.

3. Inadequacy of the Permit Term

AP-42 emission factors are generic rules of thumb that represent an average range of facilities and emission rates. They do not reliably predict emissions from individual sources under all operating conditions, and for that reason, are rarely an acceptable method for operators to determine compliance with applicable emission limits. *In the Matter of Tesoro Refining and Marketing Co*, Order on Petition No. IX-2004-6 at 32 (March 15, 2005). Because this is so, and because recent studies identified in Petitioners' Public Comments show that AP-42 emission

factors for storage tanks and wastewater treatment plants at petroleum refineries may drastically underestimate actual emissions, the Proposed Permit's unsupported reliance on AP-42 emission factors to calculate emissions from these kinds of units at the Baytown Refinery is unjustified and fails to assure compliance with applicable emission limits and caps. *See*, Public Comments, Attachments 5-14.

Because the Proposed Permit fails to establish monitoring requirements that assure compliance with limits on emissions from ExxonMobil's tanks and wastewater treatment plants, and because the permit record fails to support the Executive Director's determination that AP-42 emission factors for these kinds of units reliably predicts emissions from the Baytown Refinery, the Administrator must object.

4. Public Participation Procedure Not Provided

Petitioners' Public Comments did not specifically allege that the Proposed Permit's failure to include monitoring requirements that assure compliance with applicable emission limits and caps violated public participation requirements established by Title V of the Clean Air Act.

5. Issue Raised in Public Comments

This issue was raised on pages 9-11 of Petitioners' Public Comments.

6. Analysis of State's Response

The Executive Director makes two arguments in response to Petitioners' Public Comments on this issue. First, he contends that the Proposed Permit's compliance determination method for storage tank and wastewater treatment plant emissions "is not a general emission factor," and that 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 material stored in the tank." Response to Comments at 10-11. Second, he contends that the permit's recordkeeping provisions at Special Condition Nos. 14(F) and 28 "require[] sufficient records to demonstrate compliance with the hourly and annual TPY emission limits[.]" *Id*.

The Executive Director's first argument is unsuccessful, because nothing in the permit record—including the Proposed Permit, the Statement of Basis, or the Response to Comments—explains how the special conditions the Executive Director mentions "relate to the TCEQ's assertion that VOC emissions are calculated using an 'approved protocol and requires the use of data specific to the storage tank and the material stored in the tank.'" *Deer Park Order* at 24; *see also, In the Matter of Wheelabrator Baltimore*, Permit No. 24-510-01886 at 10 (April 14, 2010).[8]

The Executive Director's second response is deficient because it is not enough that the Proposed Permit require ExxonMobil to demonstrate compliance with applicable requirements. The Proposed Permit may not leave it to ExxonMobil's discretion to decide on a case-by-case basis what kind of demonstration is appropriate. Instead, the Proposed Permit must actually specify monitoring methods that are sufficient to assure compliance.

Because the permit record fails to demonstrate that AP-42 emission factors that recent studies have called into question are appropriate methods for determining compliance with applicable requirements and because the Executive Director's Response to Comments fails to address Petitioners' demonstration that the Proposed Permit's monitoring provisions are deficient, the Administrator must object.

[8] The language in the Response to Comments is actually identical to language in the Deer Park record that drew the Administrator's objection.

G. The Proposed Permit Fails to Including Monitoring Requirements That Assure Compliance with VOC and Benzene Emission Limits and Caps for Flares at the Baytown Refinery

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

Permit No. 18287/PSDTX730M4/PAL7, Special Condition No. 21 directs ExxonMobil to presume that its flares continuously achieve at least a 98% VOC destruction efficiency to calculate flare emissions to determine compliance with applicable VOC and benzene emission limits and caps. Recent studies have shown that this method of monitoring emissions from petroleum refinery flares does not accurately predict actual emissions. The Proposed Permit is deficient, because its monitoring requirements do not ensure ongoing compliance with the presumed level of destruction efficiency and because the permitting record does not include information showing that the Executive Director's contention that the monitoring will assure compliance with applicable emission limits and caps is justified.

2. Applicable Requirement or Part 70 Requirement Not Met

The Clean Air Act and EPA's implementing regulations require all Title V permits to contain monitoring requirements that assure compliance with applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(c)(1) and 70.6(a)(3). The Proposed Permit does not meet this requirement as explained in the following analysis.

3. Inadequacy of the Permit Term

Petitioners' Public Comments identified studies showing that the presence of a pilot light is not enough to ensure that ExxonMobil's flares will continuously achieve the presumed level of performance and asked the Executive Director to establish additional monitoring requirements addressing problems, like over-steaming, excess aeration, high winds, and flame liftoff that are

known to impair the performance of refinery flares. Public Comments at 10-11 and Attachments 9-14.

After the Draft Permit public comment period closed, EPA released additional information supporting Petitioners' contention that the Proposed Permit's flare monitoring requirements fail to assure compliance with applicable VOC and benzene emission limits and caps.[9] Specifically, based on its extensive review of data provided by industry, EPA found that flares complying with monitoring requirements equivalent to those in the Proposed Permit only achieved an average destruction efficiency of 93 percent. *Petroleum Refinery Sector Rule: Flare Impact Estimates*, U.S. EPA, EPA-HQ-OAR-2010-0682-0209 at 9 (January 16, 2014).[10] Because available information demonstrates that flares implementing monitoring methods equivalent to those in the Proposed Permit do not perform at the level that the permit presumes, the Proposed Permit's monitoring requirements fail to assure compliance with applicable emission limits and caps. Accordingly, the Administrator must object to the Proposed Permit.

4. Public Participation Procedure Not Provided

Petitioners' Public Comments did not specifically allege that the Proposed Permit's failure to include monitoring requirements that assure compliance with applicable emission limits and caps violated public participation requirements established by Title V of the Clean Air Act.

5. Issue Raised in Public Comments

Petitioners raised this issue on pages 9-11 of their Public Comments.

[9] This information is properly raised for the first time in this Petition, because it was not available during the public comment period. 42 U.S.C. § 7661d(b)(2).
[10] Available electronically at: http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2010-0682-0209

6. Analysis of State's Response

In response to Petitioners' Public Comments concerning the Draft Permit's flare monitoring provisions, the Executive Director explained that: (1) "flares like the ones at this site have a low probability of visible emissions when operated correctly," (2) visible emissions are subject to Method 22 opacity monitoring requirements, (3) "[t]here is no currently-available, EPA–approved mechanism for testing or monitoring emissions from an operating flare," and (4) that because applicable federal rules only require ExxonMobil to continuously monitor for the presence of a pilot flare, "the federal operating permit already requires continuous mentoring necessary to assure compliance." Response to Comments at 11-12.

The Executive Director's first two arguments related to visible emissions requirements are not responsive to Petitioners' Public Comments, because Petitioners did comment about visible emissions from the flares. Instead, Petitioners demonstrated that the Proposed Permit fails to assure compliance with VOC and benzene emission limits and caps. The Executive Director's focus on visible emissions is surprising, because studies cited in Petitioners' Public Comments explain that assist steam used to minimize visible emissions may interfere with the proper combustion of VOC and benzene. Public Comments, Attachment 9.

The Executive Director's third contention, that there is no currently-available EPA-approved mechanism for testing or monitoring emissions from an operating flare, is incorrect. EPA has approved monitoring requirements that "ensure that refinery flares meet 98-percent destruction efficiency at all times." *Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards*, 80 Fed. Reg. 75178, 75211 (December 1, 2015). These requirements are found at 40 C.F.R. § 63.670. While these monitoring requirements had not

been approved at the time Petitioners filed their Public Comments, they were approved well before the Executive Director issued his Response to Comments.

The Executive Director's final argument, that the Proposed Permit's flare monitoring requirements are sufficient because they incorporate the monitoring requirements established by applicable EPA rules, is also incorrect. If monitoring methods established by applicable requirements are not sufficient to assure compliance, the TCEQ must establish additional monitoring provisions that do assure compliance. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a)(3)(i)(B). Petitioners have demonstrated that Permit No. 18287/PSDTXM4/PAL7 monitoring requirements do not assure compliance with applicable VOC and benzene emission limits and caps. Accordingly, the Executive Director must include additional monitoring conditions that do assure compliance with the applicable limits and caps.

The Executive Director's Response to Comments failed to address the substance of Petitioners' Public Comments, ignored the studies presented in those comments, and failed to acknowledge monitoring requirements for flares promulgated after the close of the public comment period, which were established to address factors Petitioners identified in their public comments that diminish flare performance. Because the permit record fails to contain information showing that the Executive Director considered issues raised in the Petitioners' Public Comments and because the TCEQ has not explained how the monitoring requirements in the Proposed Permit assure ongoing compliance with VOC and benzene emission limits and caps contained in Permit No. 18287/PSDTX730M4/PAL7, the Administrator must object to the Proposed 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 Comments also failed to address Petitioners' significant comments. Accordingly, the Clean Air Act and EPA's 40 C.F.R. Part 70 rules require that the Administrator object to the Proposed Permit.

Sincerely,

/s/ Gabriel Clark-Leach

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