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November 29, 2016

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 Electronic Filing

Re: Petition for Objection to Texas Title V Permit No. O1445

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. O1445, issued to Flint Hills Resources for operation of the Corpus Christi East Refinery. This petition is timely submitted by the Environmental Integrity Project and Sierra Club. As required by law, Petitioners are filing this Petition with the EPA Administrator, with copies to the TCEQ, and Flint Hills Resources.

Thank you for your attention to this matter.

Sincerely,

/s/ 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. O1445	§	
	§	
Issued to Flint Hills Resources East Refinery	§	Permit No. O1445
	§	
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 CORPUS CHRISTI EAST REFINERY, PERMIT NO. O1445

Pursuant to section 42 U.S.C. § 7661d(b)(2), Environmental Integrity Project and Sierra Club ("Petitioners") hereby petition the Administrator of the U.S. Environmental Protection Agency ("Administrator" or "EPA") to object to Federal Operating Permit No. O1445 ("Proposed Permit") issued by the Texas Commission on Environmental Quality ("TCEQ" or "Commission") for the Corpus Christi East Refinery, operated by Flint Hills Resources ("Flint Hills").

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 and public health protections.

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.

I. PROCEDURAL BACKGROUND

This Petition concerns the TCEQ's renewal of Permit No. O1445 authorizing operation of Flint Hills's Corpus Christi East Refinery. Permit No. O1445 was first issued on January 29, 2007

and expired on January 29, 2012. Flint Hills filed its application to renew the permit on June 22, 2011. The Executive Director completed his technical review of Flint Hills's renewal application on April 26, 2013. Notice of the Draft Renewal Permit was published on May 23, 2013. The public comment period for the Draft Renewal Permit ran from May 23, 2013 until June 24, 2013. Environmental Integrity Project timely-filed comments on June 24, 2013. (Exhibit 1), EIP's Comments on Draft Renewal Permit No. O1445 ("Public Comments"). Upon receiving these comments, the Executive Director placed Flint Hills's renewal application on a management delay for more than three years: from June 24, 2013 until August 12, 2016. On August 12, 2016, the Executive Director 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. O1445 ("Response to Comments"). In response to EIP's public comments, the Executive Director made the following changes to the Draft Permit:

1. Appendix B was added to the proposed permit for incorporating an inventory of emission units that are authorized under PBR registrations that were not previously represented in the draft permit; and

2. Appendix B in the draft permit is now Appendix C in the proposed permit. Appendix C includes the Major NSR Summary Table, Special Conditions, and the Maximum Allowable Emission Rates Table for permit 6308/PSDTX137M2.

The Executive Director forwarded the Proposed Permit and his Response to Comments to EPA for review. (Exhibit 3), Proposed Permit No. O1445. EPA's 45-day review period ran from August 16, 2016 until September 30, 2016. EPA did not object to the Proposed Permit and thus, 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 asks EPA to object to the Proposed Permit based on deficiencies that were raised with reasonable specificity during the public comment period.

II. LEGAL REQUIREMENTS

All major stationary sources of air pollution are required to apply for operating permits under Title V of the Clean Air Act. 42 U.S.C. § 7661a(a). 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 enforceable document. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a)(1). 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. Title V permits are the primary method for enforcing and assuring compliance with State Implementation Plan requirements for major sources. *Operating Permit Program*, 57 Fed. Reg. 32,250, 32,258 (July 21, 1992). 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 take care to ensure that Title V permits accurately and clearly list 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 will object to the permit if it is not in compliance with applicable requirements under 40 C.F.R. Part 70 or fails to assure compliance Title I major source preconstruction permitting requirements. 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).

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." *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) ("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").

III. GROUNDS FOR OBJECTION

A. The Proposed Permit Fails to Include and Assure Compliance with Planned Maintenance, Startup, and Shutdown Requirements Established by Permit Nos. 6308/PSDTX137M2 and 2945

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

The Proposed Permit is deficient because it fails to identify and assure compliance with operating requirements, emission limits, and conditions on planned maintenance, startup, and shutdown ("MSS") activities authorized by New Source Review ("NSR") Permit Nos. 6308/PSDTX137M2 and 2495. Specifically, the Proposed Permit fails to identify the scope of planned MSS activities authorized by these permits. In both cases, Flint Hills's NSR permits incorporate by reference representations contained in permit applications without providing enough information about which representations and applications are incorporated.

Proposed Permit, Special Condition No. 27 requires Flint Hills to "comply with the requirements of New Source Review authorizations issued or claimed by the permit holder" and states that NSR permit requirements "[a]re incorporated by reference into this permit as applicable

requirements." Permit Nos. 6308/PSDTX137M2 and 2495 are listed in the Proposed Permit's New Source Authorization References table as NSR permits incorporated by reference into the Proposed Permit. Proposed Permit at 277.

Permit No. 6308/PSDTX137M2 is attached to the Proposed Permit. A copy of Permit No. 2495 is included as (Exhibit 4) to this Petition.

Permit No. 2495, Special Condition No. 19 provides that:

> This permit authorizes maintenance, start-up, and shutdown emissions associated with the operation of East Boiler A (EPN 95) described in the permit application dated April 2007. Changes to the types of activities in the future will require either an amendment or an alteration of this permit.

In relevant part, Permit No. 6308/PSDTX137M2, Special Condition No. 45 provides that:

> This permit authorizes emissions for the storage tanks identified in the attached facility list during planned floating roof landings. Unless the tank vapor space is routed to a control device meeting the requirements of Special Condition No. 52, tank roofs may only be landed for changes of tank service or tank inspection/maintenance as identified in the permit application.

2. Applicable Requirement or Part 70 Requirement Not Met

Each Title V permit must include applicable emission limits and operating requirements and conditions necessary to assure compliance with applicable limits and operating requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a) and (c). The Clean Air Act does not allow emission limits and operating requirements in Prevention of Significant Deterioration ("PSD") permits to be incorporated by reference into Texas Title V permits. *In the Matter of the Premcor Refining Group* ("Premcor Order"), Order on Petition No. VI-2007-002 at 5-6 (May 28, 2009). Instead, such information must be listed on the Title V permit's face. Some other kinds of information may be incorporated by reference into a Title V permit, so long as the following conditions are met:

> In order for incorporation by reference to be used in a way that fosters public participation and results in a title V permit that assures compliance with the Act, it

> is important that: (1) referenced documents be specifically identified; (2) descriptive information such as the title or number of the document and the date of the document be included so that there is no ambiguity as to which version of a document is being referenced; and (3) citations, cross references, and incorporations by reference are detailed enough that the manner in which any referenced material applies to a facility is clear and is not reasonably subject to misinterpretation."

In the Matter of United States Steel Corp.—Granite City Works, Order on Petition No. V-2009-03 ("Granite City I Order") at 43-44 (January 31, 2011).

The Proposed Permit is deficient because it improperly incorporates conditions on planned MSS activities authorized by Flint Hills's PSD permit by reference and it fails to include information necessary to assure compliance with the Act.

3. Inadequacy of the Permit Term

Permit No. 2495, Special Condition No. 19 "authorizes maintenance, start-up, and shutdown emissions associated with the operation of East Boiler A (EPN 95) described in the permit application dated April 2007." While this special condition may include information satisfying the first two requirements of the *Granite City I Order*, it does not include information sufficient to explain which activities described in the April 2007 permit application are authorized. This is so because the April 2007 application does not appear to contain *any* information about planned MSS activities and emissions related to East Boiler A. (Exhibit 5), Application for amendment to Permit No. 2495 dated April 16, 2007. The PI-1 form submitted as part of this application asks whether "routine maintenance, start-up, or shutdown emissions [are] included" with the application and Flint Hills checked "No." *Id.*

Because Permit No. 2495 purports to authorize planned MSS activities from Flint Hills's boiler and because the permit term authorizing such activities fails to identify the activities authorized and because the permit application referenced by the special condition does not contain any representations regarding planned MSS activities, applicable limits, or compliance conditions,

the Proposed Permit's incorporation of Permit No. 2495 fails to identify and assure applicable control requirements and emission limits that must apply at all times, including planned MSS activities.

Permit No. 6308/PSDTX137M2, Special Condition No. 45 requires tank vapor space to be routed to a control device during tank landings *unless* tank roofs are "landed for changes of tank service or tank inspection/maintenance as identified in the permit application." This provision fails all three parts of the *Granite City I Order* test: (1) it fails to indicate which application contains the relevant information; (2) it fails to include any descriptive information so there is no ambiguity about which version of a document is being references; and (3) it fails to include any citations or cross references, and is therefore unclear and subject to misinterpretation. The Proposed Permit's omission of information about the circumstances under which a tank roof may be landed without venting vapors to a control device not only undermines the enforceability of applicable operating requirements. It also undermines the public's ability to evaluate whether the exception to vapor control requirements in Permit No. 6308/PSDTX137M2 is consistent with federal Best Available Control Technology requirements. *See, e.g., In the Matter of Southwestern Electric Power Company—H.W. Pirkey Power Plant*, Order on Petition No. IV-2014-01 at 7-11 (February 3, 2016) (BACT requirements must apply continuously and permitting authorities may not establish blanket exemptions to BACT control requirements during startup, shutdown, and maintenance activities).

4. Issues Raised in Public Comments

Environmental Integrity Project raised this issue on pages 2-3 of their public comments.

5. Analysis of State's Response

The Executive Director made the following response to EIP's comments on this issue:

The ED disagrees that the draft Title V permit needs to provide any additional information regarding MSS activities that are authorized in NSR Permits 2495 and

> 6308/PSDTX137M2 which have been incorporated by reference (permit 2495) or attached in Appendix B (permit 6308/PSDTX137M2) to the Title V permit.
>
> The application representations made in permit 2495 and 6308/PSDTX137M2 are enforceable in accordance with 30 TAC § 122.140(3) and are the conditions under which the site is operated. There is no requirement in 30 TAC Chapter 122 to list MSS application representations in the draft permit.
>
> Special Conditions 41-42 and Attachment C in permit 6308, and Special Condition 19 in NSR permit 2495, are explicitly clear in identifying the planned MSS activities that occur at the FHR East Refinery. Furthermore, Special Condition 56 of NSR permit 6308 specifies that monitoring and recordkeeping is required to demonstrate compliance with the planned MSS activities referred to in Special Condition 41. Unplanned or upset-related emissions are not authorized in permits 2495 and 6308/PSDTX137M2, therefore no additional language is required to be added to the Draft Permit.

Response to Comments at 2.

The Executive Director's response confirms that the application representations incorporated by reference into Permit Nos. 2495 and 6308/PSDTX137M2 are enforceable requirements of the Proposed Permit. Thus, the Proposed Permit's incorporation of these requirements must be sufficiently clear to assure compliance. While the Executive Director contends that special conditions in Permit Nos. 2495 and 6308/PSDTX137M2 are "explicitly clear in identifying the planned MSS activities that occur at the FHR East Refinery," this contention is not supported by the relevant permit terms. Permit No. 2495, Special Condition No. 19 provides that "[t]his permit authorizes maintenance, start-up, and shutdown emissions associated with the operation of East Boiler A (EPN 95) described in the permit application dated April 2007." The relevant application does not appear to contain any description of boiler startup, shutdown, or maintenance activities. *See,* (Exhibit 5). Accordingly, either the permit does not authorize any planned MSS activities—because none are described in the relevant application—or the Proposed Permit's incorporation by reference of Permit No. 2495 fails to provide enough information to allow the reader to identify which kinds of planned MSS activities related to East Boiler A are

authorized and which are not. In either case, the Proposed Permit is not sufficiently clear about the planned MSS activities authorized by Permit No. 2495.

Contrary to the Executive Director's contention, Permit No. 6308/PSDTX137M2 is not explicitly clear about which requirements must be met before Flint Hills may perform a tank roof landing without routing vapor space to a control device. The permit references information in a permit application without identifying which application contains the relevant information, where that information can be found in the application, or explaining what steps Flint Hills must take to minimize emissions during such landings. Moreover, the Executive Director's response fails to explain why it is appropriate to incorporate major NSR permit requirements contained in Flint Hills's permit application(s) by reference into the Proposed Permit when EPA has made it clear that incorporation by reference is not an appropriate method for including major NSR permit requirements in Texas Title V permits. *Premcor Order* at 5-6.

B. The Proposed Permit Fails to Include and Assure Compliance with Permit by Rule ("PBR") Requirements

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

The Proposed Permit is deficient, because it fails to provide enough information to allow the reader to identify applicable emission limits for emission units at the Corpus Christi East Refinery that are authorized by PBRs and Standard Exemptions.

The Proposed Permit provides that PBRs and Standard Exemptions claimed by Flint Hills are applicable requirements and lists the claimed PBRs and Standard Exemptions. Proposed Permit at Special Condition Nos 27 and 28 and New Source Review Authorization References table.

2. Applicable Requirement or Part 70 Requirement Not Met

Each Title permit must include "[e]missions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." 40 C.F.R. § 70.6(a)(1). The terms and conditions of preconstruction permits, including PBRs and Standard Exemptions claimed by Flint Hills for emission units at the Corpus Christi East Refinery, are "applicable requirements." *Id*. at § 70.2.

As explained below, the Proposed Permit fails to provide enough information for readers to determine which units are authorized by certain PBRs and Standard Exemptions that Flint Hills has claimed, how much pollution emission units authorized by PBRs and Standard Exemptions may emit, and which pollutants emission units authorized by PBRs and Standard Exemptions may emit.

3. Inadequacy of the Permit Term

The Proposed Permit does not directly list any of the operating requirements or emission limits contained in the many different PBRs and Standard Exemptions used to authorize equipment at the Corpus Christi East Refinery. Instead, the Proposed Permit incorporates applicable PBRs and Standard Exemptions by reference. Consistent with 42 U.S.C. § 7661c(a) and 40 C.F.R. § 70.6(a), EPA has read the Act to establish reasonable limits on the proper use of incorporation by reference in Title V permits:

> In order for incorporation by reference to be used in a way that fosters public participation and results in a title V permit that assures compliance with the Act, it is important that: (1) referenced documents be specifically identified; (2) descriptive information such as the title or number of the document and the date of the document be included so that there is no ambiguity as to which version of a document is being referenced; and (3) citations, cross-references, and incorporations by reference are detailed enough that the manner in which any referenced material applies a facility is clear and is not reasonably subject to misinterpretation.

Granite City I Order at 42-43.

The Proposed Permit's incorporation by reference of Flint Hills's PBRs and Standard Exemptions fails to consistently comply with these three conditions. Specifically, the Proposed Permit's incorporation by reference of PBRs and Standard Exemptions claimed by Flint Hills is deficient, because it fails to provide information necessary for the reader to answer the following basic questions about how PBRs apply to emission units at the Corpus Christi East Refinery:

- How much pollution is Flint Hills authorized to emit from each unit under claimed PBRs?
- Which pollutants may Flint Hills emit from each unit authorized by PBR?
- Which emission units at the Refinery are subject to limits in the claimed PBRs?

The Proposed Permit is deficient because it is impossible for the reader to identify, with reasonable certainty exactly which requirements each unit at the Corpus Christi East Refinery is subject to under the various preconstruction permits, including PBRs and Standard Exemptions, it incorporates by reference. This deficiency has already been acknowledged by EPA in its order granting a petition to object to Title V permits issued by the TCEQ authorizing the operation of Shell's Deer Park Chemical Plant and Refinery on substantially identical grounds. *In the Matter of Shell Chemical Company and Shell Oil Company*, Order on Petition Nos. VI-2014-04 and VI-2014-05 at 11-16 (September 24, 2015).

a. The Proposed Permit and the permit record fails to provide enough information for a reader to determine how much each unit authorized by PBR or Standard Exemption may emit

Before any actual work is begun on a new or modified facility, an operator must obtain a permit or permit amendment authorizing the project. 30 Tex. Admin. Code § 116.110(a). To authorize construction of new or modified facilities, an operator may apply for a new or amended Chapter 116 case-by-case permit. *Id.* at §§ 116.110 and 116.111. In lieu of applying for a new or amended case-by-case permit under § 116.111, an operator may instead claim a PBR (or PBRs) to

authorize construction or modification of a facility, so long as the proposed construction project complies with PBR requirements. *See, e.g., id.* at §§ 106.4 (stating that construction may be authorized by PBR) and 116.116(d) (stating that a PBR may be used in lieu of a permit amendment to authorize construction).[1]

While each Chapter 116 case-by-case NSR permit is assigned a unique permit number and includes source-specific emission limits and special conditions based on the Executive Director's review of the operator's application, PBRs and Standard Exemptions establish generic emission limits and operating requirements that apply to all new and modified facilities authorized by PBR or Standard Exemption, unless the operator registers PBR emissions at rates lower than those included in the applicable rule. *Id.* at §§ 106.4 and 106.6. These generic requirements are found in Texas's 30 Texas Administrative Code, Chapter 106 PBR rules. When construction of a new or modified emission unit is authorized by PBR, the PBR or PBRs claimed by the operator—*i.e., the rule itself*—is the permit authorizing the project. *See, e.g., id.* at § 106.261 ("[F]acilities, or physical or operational changes to a facility, are permitted by rule provided that all of the following conditions of this section are satisfied.").

Thus, while the Proposed Permit identifies Chapter 116 case-by-case NSR permits by listing their unique permit numbers and the dates on which they were issued, the Proposed Permit identifies applicable PBRs and Standard Exemptions by *rule* number and the date that each rule was promulgated (not the date(s) the PBR or Standard Exemption was claimed to authorize construction at the Corpus Christi East Refinery). Proposed Permit at 277-278. This way of listing applicable requirements is misleading, because it suggests that each claimed PBR, like the Chapter 116 NSR permits identified in the Proposed Permit, is a single authorization. This suggestion is

[1] The TCEQ's Chapter 106 PBR rules replaced and are substantially similar to Texas's outdated Standard Exemption rules.

misleading because Flint Hills has claimed some PBRs and Standard Exemptions multiple times to authorize multiple projects involving one or more emission units at the Corpus Christi East Refinery.

Each PBR submission may involve one or more claimed PBRs that establish limits that apply to a single emission unit or to multiple emission units. Additionally, Flint Hills may claim the same PBR is different submissions to authorize multiple modifications to different emission units.[2] Unless the Proposed Permit provides information identifying each emission unit covered by each claimed PBR (or Standard Exemption) *for each submission*, it is impossible to tell how much each emission unit is authorized to emit under PBRs and Standard Exemptions claimed by Flint Hills.

For example, the Proposed Permit's New Source Review Authorization References by Emission Unit table indicates that Flint Hills has claimed the PBR at § 106.473 (3/14/1997) to authorize emissions from 15 different tanks: TK-151596, TK-151597, TK-151598, TK-151607, TK-151609, TK-151611, TK-151615, TK-151616, TK-151617, TK-C15173, TK-C15213, TK-C15214, TK-C15214, TK-C15791, and TK-N87367. Proposed Permit at 279-297. This PBR prohibits uncontrolled emissions of any contaminant at a rate exceeding 25 tons per year calculated using the version of AP-42 in effect at the time the PBR is claimed.[3] This limit is consistent with 30 Tex. Admin. Code § 106.4(a)(1)(B), which provides that facilities authorized by PBR may not emit more than 25 TPY of VOC.

[2] Appendix B to the Proposed Permit, which lists certified PBR registrations claimed under § 106.6, makes this clear. For example, Flint Hills has registered many different projects under the § 106.261 PBR for units that the Proposed Permit's New Source Review Authorizations References by Emission Unit table does not list as subject to § 106.261. Flint Hills may have claimed this and other PBRs multiple times without requesting certified limits under § 106.6.

[3] The text of this PBR is available electronically at: https://www.tceq.texas.gov/assets/public/permitting/air/PermitsByRule/old106list/ed_0397.pdf .

While it is clear that the 106.473 PBR may not be used to authorize more than 25 TPY of VOC from any tank, one cannot tell, based on information contained in the Proposed Permit and the incorporated PBR, whether each of the above-listed tanks were authorized as part of the same submission or as different project. This matters, because if construction or modification of each tank was separately authorized—meaning that the PBR has been claimed 15 times—*each* unit may emit up to 25 TPY of VOC, while the units' *combined VOC emissions* must remain below 25 TPY if construction of or modifications to all of the above-listed tanks were authorized as part of the same submission/project. The difference between these two scenarios is huge: If all of the tanks were authorized as part of the same submission, then their combined VOC emissions must remain below 25 tons per year. If each tank was individually authorized, then combined VOC emissions from the tanks allowed under § 106.4 and 106.473 would be 375 TPY (25 TPY * 15 tanks). Because the Proposed Permit is ambiguous as to whether these tanks are authorized to emit 25 TPY of VOC, 375 TPY of VOC, or some other amount, it fails to specify and assure compliance with applicable emission limits.

This same problem also applies to the following PBRs and Standard Exemptions incorporated by reference into the Proposed Permit to authorize multiple emission units at the Corpus Christi East Refinery: 106.261, 106.262, 106.454, 106.472, 106.512, 51 (11/5/1986), 51 (7/20/1992), and 69. Proposed Permit at 279-297.

b. The Proposed Permit and permit record fail to provide enough information for a reader to determine which pollutants Flint Hills is authorized to emit under claimed PBRs and Standard Exemptions

Texas's General PBR requirements rule at § 106.4 indicates that a PBR may be used to authorize emission of *any* contaminant other than water, nitrogen, ethane, hydrogen, oxygen, and

greenhouse gasses. 30 Tex. Admin. Code § 106.4(a)(1)(E).[4] However, claiming a PBR for a project cannot automatically authorize the emission of *all* pollutants up to the limits in § 106.4 (*i.e.*, 250 TPY NO_x + 250 TPY CO + 25 TPY VOC + 25 TPY SO_2 + 25 TPY PM + 25 TPY Lead + 25 TPY H_2S + 25 TPY H_2SO_4). If PBRs worked that way, *each* claimed PBR would authorize emission increases exceeding applicable major source and major modification thresholds, in most cases, without any prior authorization or public participation. Such a program would completely undermine the integrity of Texas's PSD and NNSR programs and would improperly allow Flint Hills to construct emission units with the potential to emit NSR pollutants at levels that could significantly deteriorate existing air quality and contribute to violations of health-based ambient air quality standards without prior approval by the TCEQ. 42 U.S.C. § 7410(a)(2)(D) (providing that State Implementation Plans must contain provisions to prohibit construction of sources that will cause or contribute to the violation of ambient air quality standards or PSD requirements).

Fortunately, Texas does not seem to read its rules to provide that each unit authorized by PBR is authorized to emit all contaminants up to the thresholds contained in § 106.4(a)(1). Instead, (1) only emission related to the particular construction project for which a PBR is claimed are authorized, *see, e.g.*, 30 Tex. Admin. Code § 106.4(a) (stating that emissions from a facility authorized by PBR must remain below the § 106.4(a)(1) limits "*as applicable*") (emphasis added), and (2) cumulative authorized emissions for each PBR project must remain below major modification thresholds. PBR Checklist, Section 1.[5] The Proposed Permit, however, undermines the enforceability of these necessary restrictions because it does not contain any information about the projects and emissions authorized by PBR (or Standard Exemption) for any emission unit at

[4] The term "contaminant," as defined by the Texas Clean Air Act encompasses all federally-regulated NSR pollutants. Tex. Health & Safety Code § 382.003(2).
[5] Available electronically at:
https://www.tceq.texas.gov/assets/public/permitting/air/Forms/PermitsByRule/Checklists/10149.pdf

the Corpus Christi East Refinery. Instead, the Proposed Permit only lists claimed PBRs and Standard Exemptions by rule number and identifies emission units subject to requirements in some, but not all, of the claimed PBRs and Standard Exemptions. Because the incorporated rules do not identify which of the many different pollutants each claimed PBR and Standard Exemption *may* be used to authorize each unit at the Corpus Christi East Refinery is *actually authorized to emit*, the Proposed Permit must provide this information: It must explain how the incorporated PBRs and Standard Exemptions apply to emission units at the Refinery. Because the Proposed Permit omits this information, it is incomplete and fails to assure compliance with applicable requirements. *Granite City I Order* at 42-43.

As the Proposed Permit is written, the only limits that clearly apply to emission units authorized by PBR are those listed at 30 Tex. Admin. Code § 106.4 and the claimed PBRs. These limits are not stringent enough to assure compliance with PSD and NNSR requirements and to prevent construction of projects that violate applicable air quality standards. Because the Proposed Permit incorrectly suggests that all pollutants that *may* be authorized by a PBR are in fact authorized by each PBR Flint Hills has claimed, it fails to assure compliance with applicable requirements.

c. The Proposed Permit fails to identify any emission unit authorized by three of the PBRs and Standard Exemptions claimed by Flint Hills

While the Proposed Permit incorporates the following PBRs and Standard Exemptions, it does not identify *any* emission unit or group of units subject to requirements in the claimed rules: 106.451, 106.452, and 15 (5/12/1981). Proposed Permit at 277-297. Because the Proposed Permit fails to identify the emission units authorized by and subject to the requirements in these claimed rules, it is completely opaque as to how the PBRs and Standard Exemption apply to units at the Corpus Christi East Refinery and thereby undermines the enforceability of Standard Exemption

requirements. *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) and (3) because it does not list any emission units authorized under specified PBRs); *Deer Park Order* at 11-15. Moreover, even if an interested party is able to determine which emission units *should* be subject to one or more of these PBRs and Standard Exemptions, a court is unlikely to enforce these requirements, because the Proposed Permit fails to identify them as applicable for any specific emission unit or units at the Corpus Christi East Refinery. *See, United States v. EME Homer City Generation,* 727 F.3d 274, 300 (3d Cir. 2013) (explaining that court lacks jurisdiction to enforce requirements improperly omitted from a Title V permit). Because this is so, the Proposed Permit fails to identify and assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a).

4. Issues Raised in Public Comments

Environmental Integrity Project raised this issue on pages 3-7 of their public comments.

5. Analysis of State's Response

The Executive Director's response to EIP's comments concerning the Draft Permit's opaque incorporation by reference of PBR and Standard Exemption requirements makes the following arguments: (1) incorporation by reference of PBR requirements is not impermissible; (2) all PBR emission limitations and standards and conditions necessary to assure compliance with such limitations and standards are specified in the incorporated PBRs and Texas's PBR rule at § 106.4; and (3) active PBR registrations with certified limits lower than the applicable rule are listed in Proposed Permit, Appendix B, which was added to the permit in response to EIP's comments. Response to Comments at 5-6. The Executive Director also contends that certain issues related to the content of claimed PBRs, their effect on ambient air quality standards, and public participation in the PBR process are beyond the scope of this Title V permitting project. *Id.*

These responses fail to address and rebut the substance of EIP's comments. First, EIP has not argued that incorporation by reference of PBR requirements is impermissible as a matter of law. Instead, EIP demonstrated that the Draft Permit's method of incorporating PBR emission limits failed to provide enough information for the reader to determine how incorporated limits applied to emission units at the Corpus Christi East Refinery. Second, EIP's comments demonstrate that the Executive Director's claim that the TCEQ's PBR rules contain all the information necessary to determine which PBR/Standard Exemption emission limits apply to each unit at the Corpus Christi East Refinery is false. Because each PBR and Standard Exemption may be claimed multiple times to authorize varying levels of nearly every regulated pollutant, and because the limits established by applicable PBR and Standard Exemption rules for each project may be divided between multiple emission units, the Proposed Permit must include additional information to allow the reader to determine with reasonable certainty how each claimed PBR and Standard Exemption applies to emission units at the Corpus Christi East Refinery.

Petitioners appreciate the Executive Director's decision to include an appendix listing each of the active certified PBR registrations claimed by Flint Hills under § 106.6, which responds to EIP's concern that the Draft Permit failed to identify and assure compliance with emission limits in Flint Hills's certified PBR registrations. Public Comments at 6-7.

C. The Proposed Permit Fails to Require Flint Hills to Obtain SIP-Compliance Authorizations for Flexible Permit Projects at the Corpus Christi East Refinery

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

The Proposed Permit is deficient because it fails to include a schedule for Flint Hills to address its non-compliance with Texas SIP preconstruction permitting requirements. Flint Hills violated the Texas SIP by making changes to the Corpus Christi East 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 EIP's Public Comments, Attachment 19. Flint Hills 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 permit alterations 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 Corpus Christi East Refinery—and the minor source flexible permit rules were not applicable requirements at the time the projects in EIP's Public Comments were undertaken.

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

2. Applicable Requirement of Part 70 Requirement Not Met

If a source has failed to comply with applicable requirements at the time its Title V permit is renewed, 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 Corpus Christi East 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 Corpus Christi East Refinery and were not federally-approved at the time the projects listed in EIP's Public Comments were undertaken.

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

As EPA has explained to Flint Hills and the TCEQ, Flint Hills's flexible permit is a State-only permit that does not displace Flint Hills's obligation to comply with preconstruction permitting requirements in the Texas SIP. At the time each of the projects listed in EIP's Public Comments, Attachment 19 were undertaken, the Texas SIP did not include Texas's flexible permit program rules at 30 Texas Administrative Code, Chapter 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 Flint Hills 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 Corpus Christi East Refinery.

Flint Hills did not obtain the required § 116.116 authorizations for the projects listed in EIP's Public Comments, Attachment 19. Instead, Flint Hills 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 Flint Hills from its obligation to obtain authorization for each of the projects listed in EIP's Public Comments, Attachment 19 under Texas's federally-approved rule at 30 Tex. Admin. Code § 116.116. Because Flint Hills failed to obtain these necessary authorizations, Flint Hills is in violation of the Texas SIP and the Proposed Permit must establish a schedule for Flint Hills to correct this non-compliance.

4. Issue Raised in Public Comments

EIP raised this issue on pages 13-14 of its Public Comments.

5. Analysis of State's Response

In response to EIP's Public Comments, the Executive Director acknowledges that Texas's flexible permit rules were not federally-approved at the time EIP submitted its Public Comments, points out that the program was subsequently approved by EPA, states that Flint Hills intends to continue with the de-flex process, and disagrees with EIP's characterization of the flexible permit program as conflicting with applicable SIP-approved preconstruction permitting requirements that applied to projects listed in Attachment 19 to EIP's Public Comments. Response to Comments at 16-17.

None of these responses rebuts EIP's demonstration that Flint Hills failed to obtain necessary SIP-approved preconstruction authorizations for the projects listed in EIP's Public Comments. First, EPA's approval of Texas's flexible permit program rules for minor sources has no bearing on the question of whether Flint Hills's failure to obtain SIP-compliance authorizations for projects at the Corpus Christi East Refinery is a violation of the Texas SIP. Moreover, the preamble to EPA's approval of the flexible permit program is absolutely clear that the approval did not convert State-only flexible permit authorizations issued prior to the approval into federal

authorizations. 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 effected date of this rule. *This is not the case and EPA strongly rejects any suggestion to the contrary*") (emphasis added). Thus, Flint Hills's flexible permit is a State-only permit that does not satisfy or displace Flint Hills's obligation to obtain SIP-compliant authorizations for projects at the Corpus Christi East Refinery.

Additionally, the Executive Director's observation that EPA has approved Texas's flexible permit program is irrelevant, because the federally-approved 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 Texas's representations about the program, was upheld by the Fifth Circuit Court of Appeals based on the Court's holding that the flexible permit program could not be used to authorize projects at major sources. *Environmental Integrity Project v. EPA* ("Flex II"), 610 Fed. Appx. 409, 410 (5th Cir. 2015) (unpublished) ("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). The Corpus Christi East Refinery is a major source of air pollution and major sources are not eligible for Texas's federally-approved flexible permit program.

Next, the Executive Director purports to dispute EIP's claim that the flexible permit program review procedures and requirements conflict with the SIP, because

> [t]he 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 permit issuance, 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 16.[6]

This response is irrelevant, because it focusses on flexible permit program requirements that were not triggered by the projects listed in EIP's Public Comments. Under Texas's 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 and limits 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) (only requiring preconstruction authorization for flexible permit 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 limitations.").[7] Flint Hills claimed this exemption for each of the projects listed in EIP's Public Comments, Attachment 19. 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, which first issued, complied with the requirements of 30 Tex. Admin. Code § 116.111.

Because Flint Hills has not obtained preconstruction authorizations required by the Texas SIP for projects identified in EIP's Public Comments, Attachment 19, and because the Executive Director failed to rebut EIP's demonstration that Flint Hills has failed to comply with the 30 Tex. Admin. Code § 116.116 at the time the Proposed Permit was issued, the Administrator must object

[6] Flint Hills's flexible permit is Permit No. 6308/PSDTX137M2 and not Permit No. 18287/PSDTX730M4/PAL7. It appears that this section of the Executive Director's response to comments was pasted from another document.
[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.

to the Proposed Permit and require the TCEQ to establish a schedule for Flint Hills to comply with the preconstruction permitting requirements at 30 Tex. Admin. Code § 116.116.

D. The Proposed Permit Fails to Include Monitoring, Recordkeeping, and Reporting Requirements that Assure Compliance with Emission Limits and Operating Requirements for Flint Hills's Flares

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

The Proposed Permit incorporates Permit No. 6308/PSDTX137M2 in its entirety. Permit No. 6308/PSDTX137M2, Special Condition No. 11 directs Flint Hills to presume that its refinery flares continuously achieve a 98% VOC destruction efficiency. Recent studies included in EIP's comments have shown that this method of calculating emissions from petroleum refinery flares does not accurately reflect 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 Proposed Permit's monitoring requirements 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). Emission limits in Permit No. 6308/PSDTX137M2 are "applicable requirements." 40 C.F.R. § 70.2 (defining "applicable requirement" to include "[a]ny term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D or the Act."). The Proposed Permit does not meet the requirement, as explained in the following analysis.

3. Inadequacy of the Permit Term

EIP's Public Comments identified studies showing that flare monitoring requirements included in the Proposed Permit do not ensure that the 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 petroleum refinery flares. Public Comments at 10, Attachments 8-12.

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 emission limits and caps.[8] 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).[9] 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. Issues Raised in Public Comments

Environmental Integrity Project raised this issue on pages 9-10 of their public comments.

[8] This information is properly raised for the first time in this Petition, because it was not available during the public comment period. 42 US.C. §7661d(b)(2).

[9] Available electronically at: https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2010-0682-0209&disposition=attachment&contentType=pdf

5. Analysis of State's Response

In response to EIP's 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) there is no currently-available, EPA-approved mechanism for testing or monitoring emissions from an operating flare, and (4) the because federal rules only require Flint Hills to continuously monitor for the presence of a pilot flare, the federal operating permit already requires continuous monitoring necessary to assure compliance. Response to Comments at 10-11.

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

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. 75175, 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 EIP filed its 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. 6308/PSDTX137M2 monitoring requirements do not assure compliance with applicable VOC 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 EIP's 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 EIP 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 EIP's Public Comments and because the TCEQ has not explained how the monitoring requirements in the Proposed Permit assure ongoing compliance with VOC emission limits and caps in Permit No. 6308/PSDTX137M2, the Administrator must object to the Proposed Permit.

IV. CONCLUSION

For the foregoing reasons, and as explained in EIP's timely-filed Public Comments, the Proposed Permit is deficient. The Executive Director's Response to Comments also failed to address EIP's significant comments. Accordingly, the Clean Air Act and EPA's rules require that the Administrator object to the Proposed Permit.

Sincerely,

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