UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	§	PETITION FOR OBJECTION
	§	
Clean Air Act Title V Permit No. O4169	§	
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Gulf Coast Grown Ventures, LLC	§	Permit No. O4169
	§	
Issued by the Texas Commission on Environmental Quality	§	
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PETITION TO OBJECT TO TITLE V PERMIT NO. O4169 ISSUED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Pursuant to section 42 U.S.C. § 7661d(b)(2), Coastal Alliance to Protect our Environment ("CAPE"), Texas Campaign for the Environment, Sierra Club, and Environmental Integrity Project ("Petitioners") hereby petition the Administrator of the U.S. Environmental Protection Agency ("Administrator" or "EPA") to object to Proposed Federal Operating Permit No. O4169 ("Proposed Permit") issued by the Texas Commission on Environmental Quality ("TCEQ" or "Commission") authorizing operation of the Gulf Coast Growth Ventures, LLC's ("GCGV") Plastics Manufacturing Plant, located in San Patricio County, Texas.

I. PETITIONERS

CAPE is an alliance of non-profit corporations, grassroots groups, and individuals that have come together to address the growing environmental concerns associated with the rampant industrialization in the Coastal Bend of Texas.

Texas Campaign for the Environment is a nonprofit membership organization dedicated to informing and mobilizing Texans to protect their health, their communities, and the environment. Texas Campaign for the Environment works to promote strict enforcement of anti-pollution laws designed to stop

or clean up air, water, and waste pollution. Texas Campaign for the Environment has approximately 35,000 Texas members, including members living near the GCGV plant.

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

The Environmental Integrity Project is a nonpartisan, nonprofit watchdog organization that advocates for effective enforcement of environmental laws. Comprised of former EPA enforcement attorneys, public interest lawyers, analysts, investigators, and community organizers, EIP has three goals: (1) to illustrate through objective facts and figures how the failure to enforce or implement environmental laws increases pollution and harms public health; (2) to hold federal and state agencies, as well as individual corporations, accountable for failing to enforce or comply with environmental laws; and (3) to help local communities obtain the protections of environmental laws.

II. PROCEDURAL BACKGROUND

This petition addresses the TCEQ's initial issuance of Permit No. O4169 authorizing operation of GCGV's Plastics Manufacturing Plant. This plant is a major source of criteria air pollutants and hazardous air pollutants located in San Patricio County, Texas.

GCGV filed its Title V permit application on August 21, 2019. The Executive Director concluded his technical review of GCGV's application on February 17, 2020. The Executive Director proposed to approve GCGV's application and issued Draft Permit No. O4196, notice of which was published on March 19, 2020. Petitioners timely-filed comments with the TCEQ

identifying deficiencies in the Draft Permit. (Exhibit A), Public Comments on Draft Permit No. O4169 ("Public Comments").[1]

On October 30, 2020, the TCEQ's Executive Director issued notice of Proposed Permit No. O4169 along with his response to public comments on the Draft Permit. (Exhibit B), Notice of Proposed Permit and the Executive Director's Response to Public Comment ("Response to Comments"); (Exhibit C), Proposed Permit. The Executive Director made limited revisions to the Draft Permit resolving several issues raised by Petitioners. Those revisions, however, did not resolve the issues discussed in Section IV of this petition below.

Additionally, the Response to Comments explains at length that some revisions voluntarily undertaken by GCGV were not required to conform the Proposed Permit to Clean Air Act requirements and that the TCEQ's review of issues related to those revisions is precluded by EPA's Hunter policy. Response to Comments at Response 2. The Executive Director's reliance on the Hunter policy raises serious concerns about the policy and, for the reasons discussed below, Petitioners request that the Administrator formally disavow this ill-conceived policy as part of his response to this petition.

EPA's 45-day review period ended on December 18, 2020 and the public petition period ended on February 17, 2021. Petitioners were unable to meet this petition deadline due unforeseeable emergency conditions caused by Winter Storm Uri. The undersigned attorney responsible for preparing this petition was without power and heat for a majority of the week of February 15-19. The power outage made it impossible for Petitioners' attorney to access files related to this project, including the draft petition.

[1] Exhibit A also contains attachments filed with the Public Comments, which are referenced throughout this petition.

In light of emergency conditions caused by Winter Storm Uri, the TCEQ is allowing members of the public to request the extension of public participation deadlines.[2] Petitioners respectfully request that EPA follow Texas's lead, consider the circumstances that caused this petition to be filed late, and accept this petition as timely filed. If EPA lacks discretion to accept this petition because it is untimely, Petitioners ask that the Administrator consider the arguments presented in the petition and issue an order reopening Permit No. O4169 to correct deficiencies identified by this petition.

III. LEGAL REQUIREMENTS

Title V permits are the primary method for enforcing and assuring compliance with the Clean Air Act's pollution control requirements for major sources of air pollution. *Operating Permit Program,* 57 Fed. Reg. 32,250, 32,258 (July 21, 1992). Prior to enactment of the Title V permitting program, regulators, operators, and members of the public had difficulty determining which requirements applied to each major source and whether sources were complying with applicable requirements. This was a problem because applicable requirements for each major source were spread across many different rules and orders, some of which did not make it clear how general requirements applied to specific sources.

The Title V permitting program was created to improve compliance with and to facilitate enforcement of Clean Air Act requirements by requiring each major source to obtain an operating permit that (1) lists all applicable federally-enforceable requirements, (2) contains enough information for readers to determine how applicable requirements apply to units at the permitted source, and (3) establishes monitoring requirements that assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a) and (c); *Virginia v. Browner*, 80

[2] *See* https://www.tceq.texas.gov/downloads/response/temporary-suspension-of-rules-due-to-severe-weather/public-participation-deadline-extension-requests.pdf

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."); *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").

The Title V permitting program provides a process for stakeholders to resolve disputes about which requirements should apply to each major source of air pollution outside of the enforcement context. 57 Fed. Reg. 32,266 ("Under the [Title V] permit system, these disputes will no longer arise because any differences among the State, EPA, the permittee, and interested members of the public as to which of the Act's requirements apply to the particular source will be resolved during the permit issuance and subsequent review process."). Accordingly, federal courts do not generally second-guess Title V permitting decisions made by state permitting agencies and will not enforce otherwise-applicable requirements that have been omitted from or displaced by conditions in a Title V permit. *See,* 42 U.S.C. § 7607(b)(2); *see also, 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 courts rely on Title V permits to determine which requirements may be enforced and which requirements may not be enforced against each major source, state-permitting agencies and EPA must exercise care to ensure that each Title V permit includes a clear, complete, and accurate account of the requirements that apply to the permitted source.

The Act requires the Administrator to object to a state-issued Title V permit if he determines that it fails to include and assure compliance with all applicable requirements. 42

U.S.C. § 7661d(b)(1); 40 C.F.R. § 70.8(c). If the Administrator does not object to a Title V permit, "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).

IV. GROUNDS FOR OBJECTION

A. To Discourage Texas's Abuses of its NSR Permitting Authority and to Establish a Uniform National Policy Regarding the Proper Scope of Title V Reviews, EPA Should Expressly Abandon the Interpretation of Title V Advanced by its Now-Vacated Hunter Order.[3]

Texas has a long history of ignoring constraints upon its authority to authorize construction of new and modified sources of air pollution established by the Clean Air Act. Specifically, Texas has long-implemented programs and policies that displace and relax preconstruction permit, application, and public participation requirements in Texas's federally-approved State Implementation Plan ("SIP"). For example, Texas issued 140 flexible permits to sources in Texas, including many major sources of air pollution, prior to EPA's approval of Texas's flexible permit program rules. *Final Rule, Revisions to the NSR Implementation Plan, Texas*, 79 Fed. Reg. 40,666, 40,667-68 (July 14, 2014). These permits were issued under state-law rules that relaxed otherwise applicable SIP requirements for modifications to existing units. Though these permits were not

[3] Petitioners may request an EPA objection based upon Texas's improper reliance on the Hunter policy for the first time in this petition, because the state's reliance on the policy only became an issue when the Executive Director invoked it in his Response to Comments, which was issued after the close of the public comment period. 42 U.S.C. § 7661d(b)(2) (providing that a petition may be based on objections not raised with reasonable specificity during the public comment period if "the grounds for such objection arose after such period.").

issued pursuant to the Texas SIP and were not federally-enforceable, *see* 40 C.F.R. § 51.105, Texas incorporated them into Texas Title V permits as federally-enforceable applicable requirements. While EPA used its Title V authority to object to Texas Title V permits that incorporated state-only flexible permits as federally enforceable authorization, *contra* 40 C.F.R. § 70.6(b)(2), *see Notice, Audit Program for Texas Flexible Permit Holders*, 75 Fed. Reg. 34,445, 34,446 (June 17, 2010), the Fifth Circuit recently held that Environmental Integrity Project's petition for objection based on a Title V permit's unqualified incorporation of a state-only requirement as a federally-enforceable authorization, *contra* 40 C.F.R. § 70.6(b)(2), was an attack on the validity of the incorporated state-only permit that was not ripe for review pursuant to EPA's Hunter policy.

Even where Texas issues permits using its federally-approved rules, those permits are frequently inconsistent with Title V requirements, because they include confidential permit terms, *see e.g. In the Matter of Dow Chemical Company, Dow Salt Domes Operations*, Order on Petition No. VI-2015-12 (February 18, 2020), incorporate illegal exemptions to SIP requirements, *see e.g. In the Matter of Southwestern Electric Power Company, H.W. Pirkey Plant*, Order on Petition No. VI-2014-01 (February 3, 2016), and fail to include monitoring, testing, and recordkeeping requirements that assure compliance with applicable limits. *See, e.g.*, *In the Matter of Motiva Enterprises, Port Arthur Refinery*, VI-2016-23 at 9-14, 23-26 (May 31, 2018). When members of the public raise concerns that NSR permit terms are not enforceable, the TCEQ responds that such concerns are not relevant to the NSR permitting process. For example, when Protestants challenging the issuance of Permit No. PSDTX1518/146425, which is incorporated by reference into the Proposed Permit, argued that permit was deficient because it made emission calculation methods necessary to determine compliance with emission limits confidential, the Executive Director responded that:

> [t]he general public is not expected to be able to determine compliance with each individual source in a complex facility. Rather, members of the public should refer any concerns regarding compliance to the TCEQ regional office or other government agency with authority to investigate those concerns.

Public Comments, Attachment F, Executive Director's Reply to Closing Arguments, TCEQ Docket Nos. 2018-0899-AIR and 2018-0900-AIR at 4.

Any state court challenge to issuance of the NSR permit based on these issues would be an uphill battle, because the Clean Air Act's prohibition on confidential permit terms for Title V permits does not directly apply to NSR permitting actions in states—like Texas—that implement separate NSR and Title V permitting programs. *Compare* 30 Tex. Admin. Code §§ 116.111 and 116.116 (establishing requirements for issuance of new, altered, and amended Texas NSR permits that do not include provisions directly mandating conditions necessary to assure compliance with applicable requirements, prohibiting confidential permit terms, or providing that applicable requirements are enforceable by members of the public) with 42 U.S.C. § 7661c(a) and (c) (expressly requiring Title V permits to establish conditions, including monitoring, testing, and recordkeeping conditions, that assure compliance with all applicable requirements), 42 U.S.C. § 7661b(e) (prohibiting confidential Title V permit terms), and 40 C.F.R. § 70.6(b)(1) (providing that applicable requirements are enforceable by members of the public).

Texas's abuses of its preconstruction permitting authority often go unchecked, because there is no right for members of the public to petition EPA to intervene in the Texas preconstruction process. And while EPA has, at times, addressed such abuse through the Title V permitting process, Texas is now using the Hunter policy to thwart that avenue for review. For example, after claiming that the Texas SIP's NSR provisions did not require Permit No. PSDTX1518/146425 to be enforceable by members of the public in administrative proceedings for the issuance of that permit, the Executive Director turned around and characterized Petitioners' attempt to address the

issue through the Title V process as an attack on the validity of Permit No. PSDTX1518/146425 that should have been litigated when the NSR permit was issued:

> [A]ny challenges to the validity of an NSR permit, such as asserted deficiencies in NSR Permit 146425, PSDTX1518 including whether it is federally enforceable, has missing emission calculations or emission factors, use of confidential business information or any other comment regarding the completeness or content of the NSR permit; should have been raised or should be raised through the appropriate NSR permit process. It is not appropriate for Commenters to attempt to challenge these issues in a Title V permit action. The ED notes such issues regarding NSR permits were not properly presented before the TCEQ in processing this Title V application and thus it is not appropriate for Commenters to attempt to challenge these issues in a Title V permit action. See ExxonMobil Baytown Olefins Plant Order at 11, 14.

Response to Comments at Response 2.

As we explain below, the Executive Director's argument here clearly misreads EPA's application of its Hunter policy in the ExxonMobil Baytown Olefins Plant, which indicates that states should continue to consider whether monitoring, testing, recordkeeping, and reporting requirements established through the NSR permitting process assure compliance with applicable requirements. Nonetheless, as long as the Hunter policy lives on in Texas, the state will continue to rely upon it to evade effective federal oversight and to thwart public attempts to enforce the limits of the state's authority under the SIP.

To discourage this kind of abuse going forward, EPA should expressly abandon the Hunter policy in its order responding to this petition. To establish a uniform policy with respect to the appropriate scope of state Title V permit reviews, EPA's order should specifically provide that its rejection of the Hunter policy is based on a determination of nationwide scope and effect.[4] Such

[4] After the Tenth Circuit Court of Appeals vacated the Hunter Order, Sierra Club filed a follow-up petition asking EPA to object to the Hunter Power Plant's Title V permit based on the same issue raised in the 2016 petition that gave rise to the vacated order. EPA's response to this follow-up petition indicates that the agency will continue to rely on the reasoning in the vacated order to evaluate petitions for sources in states outside of the Tenth Circuit. *In the Matter of PacifiCorp Energy, Hunter Power Plant*, Order on Petition Nos. VIII-2016-4 & VIII-2020-10 at 15, n.26.

an order would also have the beneficial results of correcting the incorrect reading of Title V adopted by the Fifth Circuit Court of Appeals, it would clarify that EPA regulations that the Baytown Olefins Plant Order read out of the Code of Federal Regulations are still effective, and it would advance Congress's clear intent when enacting Title V to establish an overarching program that improves enforcement and implementation of all Clean Air Act requirements.[5]

B. The Proposed Permit is Deficient Because it was Issued Before GCGV Complied with Applicable Public Participation Requirements.

1. Public Participation Procedure Not Provided

Texas's Title V regulations provide that a Title V permit may only be issued if "the requirements … for public notice, affected state review, notice and comment hearing, and EPA review have been satisfied." 30 Tex. Admin. Code § 122.201(a)(3). One such requirement provides that an applicant must publish a public notice that identifies the location and availability of the complete permit application, the draft permit, the statement of basis, and all other relevant supporting materials in the public files of the agency. *Id.* at § 122.320(b)(6). Additionally, 30 Tex. Admin. Code § 122.320(g) provides that the Executive Director "shall make available for public inspection the draft permit and the complete application throughout the comment period during business hours at the commission's central office and at the commission's regional office where the site is located." The Executive Director improperly issued the Proposed Permit, because GCGV's public notice failed to comply with § 122.201(a)(3) and because the complete application file was not available for public inspection throughout the comment period.

According to the TCEQ's Commissioners Integrated Database, GCGV published notice of the Draft Permit on March 19, 2020. Public Comments, Attachment A, CID Entry for Initial

[5] The Fifth Circuit's misreading of the Clean Air Act, EPA's regulations, and EPA's original interpretation of Title V are explained in depth by the Petitioners' Petition for Panel Rehearing, which is attached to this petition as (Exhibit D).

Issuance of GCGV's Title V permit. The public notice language approved for publication indicates that § 122.320(b)(6) materials are available for viewing at the TCEQ's main office in Austin, Texas, the TCEQ's Corpus Christi Regional Office, and the Bell Whittington Public Library. Public Comments, Attachment B, Notice of Draft Federal Operating Permit, Draft Permit No. O4169 ("Public Notice").[6]

The TCEQ's main office in Austin, Texas and its regional office in Corpus Christi, Texas have been closed since March 23, 2020.[7] According to its Facebook page, the Bell/Whittington Public Library closed on March 18, 2020—one day *before* GCGV published public notice of the Draft Permit—in response to the Covid19 outbreak. Public Comments, Attachment C, Bell/Whittington Library Closure Announcement. The library remained closed through the entirety of the public comment period. Public Comments, Attachment D, Bell/Whittington Library Home Page on April 19, 2020 (indicating that the library is "Closed Until Further Notice").

Accordingly, the materials Texas's Title V regulations require to be available for viewing and copying during the public comment period were not available during the comment period and the published notice did not provide identify viable alternative methods to view and copy project materials. Thus, the Title V public participation requirements established by the TCEQ's Title V regulations were not satisfied and the TCEQ's decision to issue the Proposed Permit violates black letter law. 30 Tex. Admin. Code § 122.201(a)(3).

2. Issues Raised in Public Comments

Petitioners raised this issue on pages 3-4 of the Public Comments.

[6] The notice provides an electronic link to the Draft Permit and Statement of Basis. The other § 122.320(b)(6) materials are not accessible using the provided link.
[7] TCEQ Building Closures notice, available electronically at: https://www.tceq.texas.gov/response/covid-19/potential-impacts-customer-service (last accessed on February 12, 2021).

3. Analysis of State's Response

According to the Executive Director:

> Public participation requirements and all requirements under 30 TAC 122.320 were met by the following actions taken by the applicant and TCEQ. The public comment period began on March 15, 2020 with the publication of the public notice in the Tejano y Grupero News followed by the publication in English on March 19, 2020; however, by March 13, 2020, the applicant had already posted the notice signs at the GCGV site and provided the Bell/Whittington Library with both hard copies and electronic versions of the complete application, draft permit, and statement of basis. Applicant recognized that after the public comment period began, the City of Portland Mayor issued a Declaration of Local Disaster and Public Health Emergency and gave the City Manager the authority to close the Bell/Whittington Public Library to help prevent the spread and impact of COVID-19 in Portland, Texas. The Bell/Whittington Public Library was the public place to view the Title V application and was listed on the newspaper notice.
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> Applicant made a copy of the application, Draft Permit, and SOB available for review and copying at a public place in the county, and the applicant also worked with the Bell/Whittington Public Library Director on March 20, 2020 to post a sign at the library entrance, and the library website at https://www.portlandtx.com/181/Library was updated to include information for the public to have access to view the complete application, SOB, and the Draft Permit electronically or by contacting the applicant's representative by phone or email.
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> Further, in addition to hard copies of the permit materials being available at TCEQ's main office in Austin and the Corpus Christi Regional Office, as well as through the Office of the Chief Clerk by telephone request, the public also had online access to the Draft Permit and SOB on TCEQ's "Current Public Notices, Operating Permits" website, located at: https://www.tceq.texas.gov/assets/public/permitting/air/Title_V/announcements/pnwebrpt.htm.
>
> Finally, beginning in early April and continuing to this day, TCEQ has been posting on its web site a list of Pending Permit Applications During the COVID-19 Disaster for public access at https://www.tceq.texas.gov/response/covid-19/pending-permit-applications-during-covid-19-disaster.

Response to Comments at Issue 1.

These actions fail to establish that the TCEQ and GCGV satisfied the requirements of § 122.320. Specifically, the public notice of the Draft Permit failed to provide information about

the location and availability of the relevant permit application, draft permit, statement of basis, and all other relevant supporting materials in the public files of the agency, as required by § 122.320(b)(6). The Public Notice stated that "the permit application, statement of basis, and draft permit will be available for viewing and copying at the TCEQ Central Office …; the TCEQ Corpus Christi Regional Office …; and the Bell Whittington Public Library … beginning the first day of publication of this notice." But that was not true. The TCEQ's Central Office, its Corpus Christi Regional Office, and the Bell Whittington Public Library were all closed for the entirety of the public comment period. Even if the TCEQ's actions making the application available online addressed other potential public participation deficiencies, it did not cure the violation of black letter requirements established by its public notice rule. The Public Notice was deficient because it failed to provide accurate information about where to obtain the permit application and other relevant information subject to § 122.320(b)(6). This defect was not corrected through publication of a revised and corrected notice. While Petitioners understand that emergency conditions caused by the COVID-19 pandemic have been a significant burden on regulators, the regulated, and members of the public alike, the TCEQ has established practices to ensure proper public notice and to protect public participation in other contexts. For example, the TCEQ directed multiple applicants for NSR permits to republish notices that included information about how to obtain application files.[8] Texas's failure to require re-publication of an amended public notice in this

[8] *See*, e.g. Amended Notice of Application and Preliminary Decision for Air Quality Permit Numbers 103832, PSDTX1566, N166M2, and GHGPSDTX196, available electronically at: https://www14.tceq.texas.gov/epic/eNotice/index.cfm?fuseaction=main.PublicNoticeDescResults&requesttimeout=5000&CHK_ITEM_ID=563435472020093; Amended Notice of Receipt of Application and Intent to Obtain Air Permit Renewal, Air Permit No. 2167, available electronically at: https://www14.tceq.texas.gov/epic/eNotice/index.cfm?fuseaction=main.PublicNoticeDescResults&requesttimeout=5000&CHK_ITEM_ID=674459192020097; Amended Notice of Application and Preliminary Decision for Air Quality Permit No. 19200, available electronically at: https://www14.tceq.texas.gov/epic/eNotice/index.cfm?fuseaction=main.PublicNoticeDescResults&requesttimeout=5000&CHK_ITEM_ID=771460392020097.

case made issuance of the Title V permit improper. Because issuance of the GCGV's Permit violated 30 Tex. Admin. Code § 122.201(a)(3), the Administrator must object to the Proposed Permit.

C. The Proposed Permit Fails to Include and Assure Compliance with All Applicable Requirements.

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

Proposed Permit, Special Condition No. 21 incorporates New Source Review authorizations referenced in the New Source Review Authorization References table by reference as applicable requirements.

The Proposed Permit's New Source Review Authorization References table lists Permit Nos. GHGPSDTX170, PSDTX1518, and 146425 as incorporated permits. Proposed Permit at 219. Permit Nos. PSDTX1518 and 146425 refer to the same permit, which is included as part of Appendix B to the Proposed Permit.

Permit No. PSDTX1518/146425 contains the following special conditions:

> 25. Emissions from tanks shall be calculated using the methods were used to determine the MAERT limits in the permit application (Form PI-1 dated April 19, 2017, as revised). Sample calculations from the application shall be retained at the plant site and made available upon request to authorized representatives of TCEQ.
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> 36(K). Emission rates of total particulate [from cooling tower EPN UCCT01] shall be calculated using the measured TDS, the design drift rate, the calculation methodology specified in the permit application (form PI-1 dated April 19, 2017, as updated), and the daily maximum and average actual cooling water circulation rate for the short term and annual average rates. Alternately, the design maximum circulation rate may be used for all calculations.
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> 40(A)(4). Wastewater treatment plant emission shall be estimated every month using the following procedure. …. Calculations shall be as specified in permit application, PI-1 dated April 19, 2017, as updated.

40(B). The permit holder shall calculate short term loading rate in terms of lb/hr and rolling 12-month loading rate in terms of tpy for each air contaminant. The measured concentrations of each speciated air contaminant shall be converted into an equivalent mass emission rate based upon the flow rates during the sample collection period using the calculation methods and assumptions in the permit application, PI-1 dated April 19, 2017, as updated.

40(C). All air contaminants ascertained by the analytical methods shall be evaluated. For any tentatively identified air contaminant that can be confirmed as present and that would have a calculated air contaminant mass emission rate more than 0.04 pound per hour (lb/hr) above that represented in the permit application (PI-1 dated April 19, 2017, as updated), the total emissions of that compound must satisfy the following [requirements].

48. This permit authorizes the planned maintenance, startup, and shutdown (MSS) activities summarized in the MSS Activity Summary (Special Condition 49. C) attached to this permit. Special condition 49.A identifies the inherently low emitting MSS activities that may be performed at the plant. Emissions from activities identified in Special Condition 49.A shall be considered to be equal to the potential to emit represented in the permit application….Routine maintenance activities, as identified in Special Condition 49.B may be tracked through the work orders or equivalent. Emissions from activities identified in Special Condition 49.B shall be calculated using the number of work orders or equivalent that month and the emissions associated with that activity identified in the permit application.

The performance of each planned MSS activity not identified in Paragraphs A and B of Special Condition 49 and the emissions associated with it shall be recorded and include at least the following information: …. [T]he estimated quantity of each air contaminant, or mixture of air contaminants, emitted with the data and methods used to determine it. The emissions shall be estimated using the methods identified in the permit application, consistent with good engineering practice.

The TCEQ's permit engineer for the initial issuance of Permit No. PSDTX1518/146425 testified in a sworn deposition that these special conditions reference emission calculations in GCGV's permit application and that all such emission calculations were designated "confidential" by the TCEQ and are inaccessible to members of the public. Public Comments, Attachment E,

Closing Brief of Texas Campaign for the Environment and the Sierra Club, TCEQ Docket Nos. 2018-0899-AIR and 2018-0900-AIR at 21-23.

The TCEQ's federally-approved preconstruction permitting rules provide that application representations regarding construction plans and operation procedures are enforceable conditions of a preconstruction permit. 30 Tex. Admin. Code § 116.116(a); *see also* 79 Fed. Reg. 8368, 8385 (February 12, 2014) ("the permit application, and all representations in it, is part of the permit when it is issued and as such is enforceable.").

2. Applicable Requirement or Part 70 Requirement Not Met

42 U.S.C. § 7661c(a) and 40 C.F.R. § 70.6(a) require each Title V permit to include all applicable requirements and conditions necessary to assure compliance with those requirements.

40 C.F.R. § 70.2 provides that Title V applicable requirements 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, of the Act."

40 C.F.R. § 70.6(b)(1) provides that "[a]ll terms and conditions in a part 70 permit, including any provisions designed to limit a source's potential to emit, are enforceable by the Administrator *and citizens* under the Act." (emphasis added). Applicable requirements incorporated into a Title V permit are not considered practically enforceable, and therefore fail to comply with 42 U.S.C. § 7661c(a), (c), unless incorporation by reference is used in a way that fosters public participation and results in a Title V permit that assures compliance with the Clean Air Act. *In the Matter of United States Steel—Granite City Works*, Order on Petition No. V-2009-03 at 43 (January 31, 2011).

42 U.S.C. § 7661b(e) provides that "[t]he contents of a [Title V] permit shall not be entitled to protection [as confidential information] under section 7414(c) of [the Clean Air Act.]"

Emissions data is public information as a matter of law. 40 C.F.R. § 2.301(f). EPA's regulations define "emissions data" to include:

> (A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;
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> (B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under the 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).

3. Inadequacy of the Permit Term

Petitioners' public comments explained that the Draft Permit was deficient because it incorporated confidential permit terms and because the public's inability to access this confidential information undermined the enforceability of emission limits in Permit No. PSDTX1518/146425. Public Comments at 5-12. Petitioners also explained that the Draft Permit was deficient because it failed to provide information necessary for readers to identify and find enforceable application representations incorporated by reference into Permit No. PSDTX1518/146425 (and the Draft Permit). *Id.* at 12-15.

In response to these comments, the Executive Director disagreed that the Draft Permit was deficient but indicated that GCGV had voluntarily revised Permit No. PSDTX1518/146425 to make previously-confidential representations publicly-accessible. Response to Comments at Response 2 ("Through the alteration to NSR Permit No. 146425/PSDTX1518 issued 06/26/2020, emission calculation methods and other application representation expressly incorporated by Permit No. 146425, PSDTX1518 … are not part of TCEQ's non-confidential file and are publicly accessible.").

Petitioners appreciate GCGV's decision to make these representations publicly-available despite the Executive Director's incorrect assertions that incorporation of confidential material into a Title V permit is acceptable and that Petitioners' challenge to the Draft Permit's incorporation of confidential permit terms is barred from review as part of this project by the Hunter policy. *Id*. Unfortunately, the Proposed Permit is still deficient because it fails to explain where the previously-confidential application representations incorporated by reference into Permit No. PSDTX1518/146425 (and the Proposed Permit) may be found.

The practice of incorporating applicable requirements by reference into Title V permits is only permissible if it is "used in a way that fosters public participation and results in a title V permit that assures compliance with the Act[.]" *In the Matter of United States Steel—Granite City Works*, Order on Petition No V-2009-03 at 43 (January 31, 2011). To meet this standard, "referenced documents [must] be specifically identified[,] … descriptive information such as the title or number of the document and the date of the document [must] be included so that there is no ambiguity as to which version of a document is being referenced[,] … and 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." *Id*.

The special conditions incorporating application representations and emission calculations in Permit No. PSDTX1518/146425 listed above fail to assure compliance with applicable requirements because they do not provide enough information to allow interested parties to identify the incorporated representations.

Permit No. PSDTX1518/146425, Special Condition Nos. 25, 36(K), 40(A)(4), 40(B), and 40(C), which are incorporated by reference into the Draft Permit, in turn incorporate information

"in the permit application, PI-1 dated April 19, 2017, *as updated*." (emphasis added). This brisk citation fails altogether to identify the revision application that contains previously-confidential applicable requirements. A person with the Proposed Permit and its Statement of Basis would be left to guess which of the original application files—which contains at least 15 separate updates—or subsequently filed permit revision applications contain the controlling applicable requirements. And while the information in the Executive Director's Response to Comments indicating that incorporated representations are no longer confidential is not included in the Proposed Permit or Statement of Basis, an interested and resourceful reader who stumbled across this response may still be unable to identify the relevant application materials. This is so because the application file for the permit revision issued on 6/26/2020, which the Executive Director identifies as the project that contains publicly accessible copies of applicable requirements that were previously designated confidential, Response to Comments at Response 2, is not actually the application file that contains the relevant information. As the TCEQ's Air Permitting webpage indicates, the version of Permit No. PSDTX1518/146425 issued on June 26, 2020 revised Special Condition No. 69. (Exhibit E), TCEQ Air Permitting Webpage for Permit No. 146425. None of the files related to this project available through the TCEQ's online records webpage include the previously-confidential representations.[9] Instead, the relevant representations are included in an "Agency Review" file for a previous revision to Permit No. PSDTX1518/146425 that was issued on June 11, 2020.[10] This "Agency Review" document is not referenced anywhere in the Proposed Permit, the Statement of

[9] Files related to the June 26, 2020 revision to Permit No. PSDTX1518/146425 are available electronically at: https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_PERFORM_SEARCH&xIdcProfile=Record&IsExternalSearch=1&sortSearch=false&newSearch=true&accessID=1326542&xRecordSeries=0&xInsightDocumentType=0&xMedia=0&select0=xSecondaryID&input0=316946&select1=&input1=&select2=&input2=&select3=&input3=&operator=AND&ftx=

[10] This Agency Review file is available electronically at: https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_EXTERNAL_SEARCH_GET_FILE&dID=5077408&Rendition=Web

Basis, or the Executive Director's Response to Comment. The Response to Comments does state that "the applicant voluntarily submitted an NSR alteration request application for Permit No 146425/PSDTX1518 to TCEQ on June 3, 2020" to "remove[] reference to confidential business information," but the application file is not one of the files available through the TCEQ's online records webpage for this project.[11]

The Proposed Permit is deficient because it incorporates by reference Permit No. PSDTX1518/146425, which in turn incorporates by reference applicable requirements that were previously designated confidential, without providing information necessary for a reader to determine where to find the incorporated requirements. The incorporated requirements are not practically enforceable and the Proposed Permit fails to include conditions necessary to assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a), (c); *In the Matter of United States Steel—Granite City Works*, Order on Petition No V-2009-03 at 43 (January 31, 2011).

4. Public Participation Procedure Not Provided

As described above, GCGV's application and the Draft Permit violated Title V's prohibition on confidential permit terms. 42 U.S.C. § 7661b(e). Though the Executive Director incorporated a version of Permit No. PSDTX1518/146425 that made previously-confidential representations publicly-accessible, this revision occurred after the close of the public comment period and the Executive Director failed to require GCGV to re-notice a version of the Draft Permit that included the now-publicly-available representations. Thus, members of the public did not have an opportunity to review and comment on the sufficiency of the Draft Permit and materials, as required by Texas's Title V program regulation at 30 Tex. Admin. Code § 122.320(b)(6)(D).

[11] Files related to the June 11, 2020 revision to Permit No. PSDTX1518/146425 are available electronically at: https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_PERFORM_SEARCH&xIdcProfile=Record&IsExternalSearch=1&sortSearch=false&newSearch=true&accessID=1326546&xRecordSeries=0&xInsightDocumentType=0&xMedia=0&select0=xSecondaryID&input0=316526&select1=&input1=&select2=&input2=&select3=&input3=&operator=AND&ftx=

Accordingly, the Executive Director violated 30 Tex. Admin. Code § 122.201(a)(3), which requires compliance with applicable public notice and review requirements like § 122.320(b) prior to issuance of a Title V permit. Thus, the Administrator must object to the Proposed Permit. 42 U.S.C. § 7661d(b)(2). The Administrator should require the TCEQ to re-issue and re-notice a draft permit that contains reasonable instructions about where incorporated representations may be found and explains how members of the public may obtain the representations during the public comment period.

5. Issues Raised in Public Comments

Petitioners raised these issues on pages 5-15 of the Public Comments. Deficiencies related to the Executive Director's revision to the Draft Permit to incorporate a new version of Permit No. PSDTX1518/146425 may be raised for the first time in this petition, because this change was not undertaken until after the close of the public comment period. 42 U.S.C. § 7661d(b)(2) (providing that a petition may be based on objections not raised with reasonable specificity during the public comment period if "the grounds for such objection arose after such period.").

6. Analysis of the State's Response

The Executive Director relies on the policy established by EPA's now-vacated Hunter Order to argue that Petitioners' concerns about confidential representations in the application files for Permit No. PSDTX1518/146425 and the Proposed Permit's deficient incorporation by reference of those representations is an improper attack on the validity of Permit No. PSDTX1518/146425:

> [T]he task of TCEQ in issuing or modifying the Title V permit is to incorporate the terms and conditions of the underlying NSR permits (including NSR Permit No. 146425, PSDTX1518), and to ensure that the Title V permit contains adequate monitoring, recordkeeping, and reporting requirements to assure compliance with those terms and conditions. See also PacifiCorp-Hunter Order at 8, 13–18; Big River Steel Order at 8–9, 14–20. It is not a correct statement that federal regulations

> and the EPA-approved state rules *require* emission calculations as part of the application or that omission of these calculations deems the draft permit deficient. Operating permit application requirements are listed in 30 TAC § 122.132 and track 40 CFR section 70.5(c). What is required is information for each emission unit at the site that is sufficient to determine the basis for each applicability determination. As stated above, applications must list the NSR permits that apply to emission units at the site and thus the applicability determination for preconstruction requirements has been met.
>
> After going through extensive review, including a public comment period and a contested case hearing, NSR Permit No. 146425, PSDTX1518 was initially issued on June 12, 2019. A revised version of the NSR Permit No. 146425, PSDTX1518 was issued on November 27, 2019, which has been incorporated by reference in the Draft Permit. The ED disagrees with the commenter's assertion that it must have information in the application or draft permit so that previously issued preconstruction permit reviews may be scrutinized at the Title V issuance stage. As stated earlier, any challenges to the validity of an NSR permit, such as asserted deficiencies in NSR Permit 146425, PSDTX1518 including whether it is federally enforceable, has missing emission calculations or emission factors, use of confidential business information or any other comment regarding the completeness or content of the NSR permit; should have been raised or should be raised through the appropriate NSR permit process. It is not appropriate for Commenters to attempt to challenge these issues in a Title V permit action. The ED notes such issues regarding NSR permits were not properly presented before the TCEQ in processing this Title V application and thus it is not appropriate for Commenters to attempt to challenge these issues in a Title V permit action. See ExxonMobil Baytown Olefins Plant Order at 11, 14.
>
> Furthermore, the ED notes that EPA denied a similar claim on an ExxonMobil petition stating "So long as a permit specifies all binding emissions and operating limits, as well as all other conditions necessary to assure compliance with such limits (either on the face of the NSR permit or in the non-confidential portion of the application); these permits will generally not conflict with the EPA's title V requirements" (ExxonMobil Baytown Refinery Order for FOP O1229, Section IV, pages 8 and 9.). The ExxonMobil claim maintains that the underlying final NSR permit was not properly issued. As stated above, the opportunity to challenge the NSR application has passed. The commenter has not demonstrated that the confidential information in the underlying NSR application makes the draft Title V permit deficient.

Response to Comments at Response 2.

This response fails to rebut Petitioners' demonstration of deficiency for at least two reasons. First, the Hunter policy does not apply to issues raised in this petition. Petitioners are not

challenging the validity of any requirement established by Permit No. PSDTX1518/146425. Rather, Petitioners' claim rests entirely on the way that requirements established by Permit No. PSDTX1518/146425 are incorporated into the Proposed Permit. Specifically, Petitioners contend that emission calculation methodologies that the permit directs GCGV use to calculate emissions from various units at its plant for purposes of determining compliance with emission limits are not readily available to members of the public and are not sufficiently identified by the Proposed Permit to ensure compliance with the relevant emission limits. EPA has already explained that this kind of issue is still ripe for review as part of the Title V process. Public Comments, Attachment H, EPA Objection to Proposed Permit No. O2269 ("ExxonMobil Objection") ("Therefore, regardless of the monitoring, recordkeeping, and reporting initially associated with a minor NSR permit or PBR, TCEQ has a statutory obligation independent of the process of issuing those permits to evaluate monitoring, recordkeeping, and reporting in the title V permitting process to ensure that these terms are sufficient to assure compliance with all applicable requirements and title V permit terms. *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008); *see Motiva Order* at 25-26.").

Second, the Executive Director's reliance on the Hunter policy to argue that issues related public enforceability of Permit No. PSDTX1518/146425 should have been raised when the NSR permit was issued *after* the agency had argued that Texas's NSR SIP did not require permit terms to be enforceable by members of the public is clear evidence that Texas is using the Hunter policy to game the gap between NSR and Title V program requirements and thwart federal review of decisions intended to circumvent or undermine the enforceability of federal requirements. This is exactly the kind of problem Title V was intended to fix.

In this way, the Hunter policy is not only inconsistent with EPA's unambiguous regulations implementing Title V, *Sierra Club v. EPA*, 964 F.3d 882, 891 (10th Cir. 2020) ("We conclude that the regulation …. Unmistakably requires that each Title V permit include all requirements in the

state implementation plan, including Utah's requirement for major NSR), it is also being used to shield state decisions that violate federal law from federal administrative review, which is the guiding principle of Title V itself. *See, e.g., 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.").

The Executive Director's abuse of the Hunter policy in this case is intended to shield obvious defects in the Proposed Permit from federal review. Thus, his response to comments invoking the Hunter policy does not rebut Petitioners' demonstration of deficiency. Instead, it invites EPA to disregard its duty to object to Title V permits that fail to ensure compliance with applicable requirements. EPA must decline this invitation.

As the Tenth Circuit correctly held, EPA's Hunter policy, which disallows the kind of review necessary to ensure that states respect the limits of their authority under the Clean Air Act's system of cooperative federalism, is clearly inconsistent with EPA's regulations implementing Title V. The inconsistent decisions regarding the Hunter policy issued by the Tenth Circuit and the Fifth Circuit have created a confusing situation where the proper scope of a state's Title V permit review depends more upon the judicial circuit in which the state is located than the clear meaning of the Clean Air Act and EPA's regulations implementing Title V. To address this confusion, to discourage Texas from abusing its authority to implement federal Clean Air Act programs, and to restore a nationally uniform policy that is consistent with the unambiguous requirements of EPA's Title V regulations, EPA should directly disavow the Hunter policy in its order granting the petition and explain that this disavowal is nationally applicable.

V. CONCLUSION

For the foregoing reasons, the Proposed Permit fails to comply with the federal Clean Air Act and its implementing regulations. Accordingly, Petitioners respectfully request that the Administrator object to the Proposed Permit and (1) disavow the Hunter policy; (2) direct the TCEQ and GCGV to comply with Texas's Title V public notice requirements; and (3) require the Executive Director to revise the Proposed Permit to include conditions necessary to assure compliance with all applicable requirements.

Sincerely,

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EXHIBITS

Exhibit A	Public Comments on Draft Permit No. O4169 ("Public Comments")
Exhibit B	Notice of Proposed Permit and the Executive Director's Response to Public Comment ("Response to Comments")
Exhibit C	Proposed Permit No. O4169 ("Proposed Permit")
Exhibit D	Petition for Panel Rehearing, *Environmental Integrity Project v. EPA*, No. 18-60384, Document 00515481467 (Filed July 8, 2020)
Exhibit E	TCEQ Air Permitting Webpage for Permit No. 146425