UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	§	PETITION FOR OBJECTION
	§	
Clean Air Act Title V Permit No. O1440	§	
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Issued to Phillips 66 Company	§	Permit No. O1440
	§	
Issued by the Texas Commission on Environmental Quality	§	
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PETITION TO OBJECT TO TITLE V PERMIT NO. O1440 ISSUED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Pursuant to section 42 U.S.C. § 7661d(b)(2), the Environmental Integrity Project and Sierra Club ("Petitioners") hereby petition the Administrator of the U.S. Environmental Protection Agency ("Administrator" or "EPA") to object to Proposed Federal Operating Permit No. O1440 issued by the Texas Commission on Environmental Quality ("TCEQ" or "Commission") authorizing operation of the Borger Refinery in Hutchinson County, Texas.

I. PETITIONERS

The Environmental Integrity Project is a non-profit, non-partisan watchdog organization that advocates for effective enforcement of environmental laws. EIP has three goals: (1) to illustrate through objective facts and figures how the failure to enforce and 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 protections guaranteed by environmental laws. The Environmental Integrity Project has offices and programs in Austin, Texas and Washington, D.C.

The Sierra Club is a national nonprofit organization with 67 chapters and over 635,000 members dedicated to exploring, enjoying, and protecting the wild places of earth; to practicing and promoting the responsible use of earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Lone Star Chapter of the Sierra Club has members who live, work, and recreate in areas affected by air pollution from the Borger Refinery.

II. PROCEDURAL BACKGROUND

This petition addresses the TCEQ's renewal of Permit No. O1440 authorizing operation of Phillips 66's Borger Refinery. The Borger Refinery is a major source of criteria air pollutants and hazardous air pollutants located in the city of Borger, Texas about 50 miles northeast of Amarillo.

Phillips 66 filed its application to renew Permit No. O1440 on August 28, 2013. The Executive Director concluded his technical review of Phillips 66's application on September 28, 2015. The Executive Director proposed to approve Phillips 66's application and issued Draft Permit No. O1440, notice of which was published on October 14, 2015. (Exhibit A), Draft Permit No. O1440 ("Draft Permit"). Petitioner groups timely-filed comments with the TCEQ identifying deficiencies in the Draft Permit. (Exhibit B), Public Comments on Draft Permit No. O1440 ("Public Comments").

On May 25, 2017, the TCEQ's Executive Director issued notice of Proposed Permit No. O1440 along with his response to public comments on the Draft Permit. (Exhibit C), Notice of Proposed Permit and the Executive Director's Response to Public Comment ("Response to Comments"); (Exhibit D), Proposed Permit No. O1440 ("Proposed Permit"); (Exhibit E), Statement of Basis, Permit No. O1440. The Executive Director revised the Proposed Permit to address some, but not all of the deficiencies that Petitioners identified in their Public Comments.

EPA's 45-day review period for the Proposed Permit began on May 30, 2017 and ended on July 14, 2017. Because the Administrator did not object to the Proposed Permit during his 45-day review period, members of the public have 60-days from the close of the review period to petition the Administrator to object to the Proposed Permit. This petition for objection is timely filed.

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 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. The Proposed Permit is Deficient Because it Allows Phillips 66 to Use Texas's Minor Source Flexible Permit Program to Authorize Modifications to a Major Source

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

The Proposed Permit is deficient because it fails to assure compliance with applicable federally-approved preconstruction permitting requirements for minor and major sources in the Texas State Implementation Plan ("SIP"). Specifically, the Proposed Permit fails to assure compliance with preconstruction permitting requirements in 30 Tex. Admin. Code, Chapter 116, Subchapter B. The Proposed Permit incorporates Phillips 66's state-only major source flexible permit and Texas's federally-approved minor source flexible permit program rules as applicable requirements. Texas's minor source flexible permit program rules provide minor sources in Texas with an alternative to the State's Chapter 116 preconstruction permitting rules for major and minor sources. Phillips 66, however, is not eligible for a federally-approved flexible permit and may not use Texas's federally-approved minor source flexible permit program rules to authorize projects at the Borger Refinery, because the flexible permit program only applies to minor sources and the Borger Refinery is a major source of air pollution.

Proposed Permit, Special Condition No. 21 incorporates Texas's federally-approved minor source flexible permit program rules as applicable requirements. Specifically, Special Condition No. 21(F) incorporates 30 Tex. Admin. Code § 116.721(a), which provides that flexible permit projects that do not result in an increase in allowable emissions do not require a permit

amendment.[1] *Compare with* 30 Tex. Admin. Code § 116.116(b)(1)(C) (any project that causes an increase in actual emissions requires an amendment).

Proposed Permit, Special Condition No. 17 provides that flexible permits referenced in the Proposed Permit's New Source Review Authorization References attachment are applicable requirements incorporated by reference into the Proposed Permit.

Proposed Permit, New Source Review Authorization References attachment lists Permit Nos. PSDTX102M7 and 9868A as permits incorporated by reference into the Proposed Permit. Proposed Permit at 280. The two permit numbers refer to the same permit, henceforth referred to in this petition as "Flexible Permit," which is included in its entirety in Appendix B to the Proposed Permit.

2. Applicable Requirement or Part 70 Requirement Not Met

Each Title V permit must include conditions necessary to assure compliance with applicable requirements, including requirements in a state's federally-approved State Implementation Plan. 42 U.S.C. § 7661c(a). Texas's federally-approved Chapter 116, Subchapter B rules establish preconstruction permitting requirements for major and minor sources of air pollution. According to these rules, a project at an existing source that will cause an increase in actual emissions must be authorized by a permit amendment. 30 Tex. Admin. Code §§ 116.110(a) and 116.116(b)(1)(C). To obtain a permit amendment, an applicant must demonstrate compliance with various requirements, including Best Available Control Technology and impacts requirements. *Id.* at § 116.111(a)(2). Texas's minor source flexible permit program establishes an exemption from the Subchapter B amendment application and demonstration requirements for

[1] Specifically, 30 Tex. Admin. Code § 116.721(a) provides that any change that results in a "significant increase in emissions" requires an amendment. 30 Tex. Admin. Code § 116.718 states that "[a]n increase in emissions from operational or physical changes at an existing facility authorized by a flexible permit is insignificant, for purposes on the minor new source review under this subchapter, if the increase does not exceed either the emission cap or individual emission limitation.").

projects at an existing facility authorized by a flexible permit, so long as emission increases caused by the project can be accommodated within existing emission caps and limits in a federally approved flexible permit. *Id*. at §§ 116.710(a), 116.718 and 116.721. The minor source flexible permit program rules also provide that changes at existing flexible permit facilities that do not require an amendment are not subject to Best Available Control Technology requirements. *Id*. at § 116.721(b)(3). Texas's federally-approved minor source flexible permit program rules, however, may not be used to exempt *major sources* of air pollution from preconstruction permitting requirements in Chapter 116, Subchapter B. This is so because, as explained below, Texas's federally approved flexible permit program is limited to minor sources.

3. Inadequacy of the Permit Term

The Clean Air Act "distinguishes between major and minor pollution sources based on a threshold amount of pollution; major sources are subject to much more stringent regulations." *Environmental Integrity Project v. EPA* ("Flex II"), 2015 WL 4399482 (5th Cir. 2015) (unpublished). While the preconstruction permitting exemption for flexible permit changes that do not increase allowable emissions may not threaten the integrity of Texas's major source permitting requirements if it is only available to minor sources, it undermines the enforceability of major source requirements if it is made available to major sources, like the Borger Refinery. Accordingly, as Texas argued to the Fifth Circuit Court of Appeals and as the Court subsequently held, Texas may not issue flexible permits to major sources and emission caps in flexible permits must remain below the applicable major source threshold. *Flex II* at *1 (holding that major sources may not use flexible permits, that such sources are regulated under Texas's more stringent major NSR rules, and that emission caps in federally-approved flexible permits must remain below the major source threshold); *see also*, Brief of Intervenor, State of Texas, In Support of Respondent Environmental Protection Agency, 2015 WL 1156712 at *7 ([M]inor new source review . . .

pertains to the construction of new *minor sources* and to *minor modifications* of minor sources. A minor source is any source that is not a major source") and *16 ("Texas's Flexible Permit Program is a state *mi*nor new source review program") (emphasis in original); Petition for Review, *State of Texas v. EPA* ("Flex I") (July 23, 2010) ("The FPP is a voluntary authorization mechanism for *Minor NSR* sources designed to enhance control of emissions while allowing for greater operational flexibility") (emphasis added).

Phillips 66 may not use Texas's federally-approved minor source flexible permit program rules to authorize modifications to facilities at the Borger Refinery, because the refinery is a major source of air pollution. The Proposed Permit fails to assure compliance with the limits of Texas's federally-approved *minor source* flexible permit program and the State's federally-approved Chapter 116, Subchapter B requirements for major and minor sources, because it incorporates by reference a state-only major source flexible permit, which establishes emission caps much higher than the applicable major source threshold, and indicates that Phillips 66 may use Texas's minor source flexible permit program rules to authorize projects at the Borger Refinery.

Even if Texas's federally-approved minor source flexible permit program could be used to authorize projects at major sources, Phillips 66 still cannot use the program to avoid preconstruction permitting requirements in Texas's Chapter 116, Subchapter B rules. This is so, because Phillips 66's flexible permit is a state-only authorization that was issued prior to EPA's approval of Texas's minor source flexible permit program rules. A state-only permit may not be used to modify a source's SIP obligations. 42 U.S.C. § 7410(i) (prohibiting states and EPA from issuing orders that modify State Implementation Plan requirements with respect to any stationary source). Sources without a federally approved minor source flexible permit must comply with preconstruction permitting requirements in Chapter 116, Subchapter B. 30 Tex. Admin. Code §

116.110. EPA made it clear when it approved Texas's minor source flexible permit program rules that the approval did not convert existing state-only flexible permits into federal authorizations. *Approval and Promulgation of Implementation Plans; Texas; Flexible Permit Program*, 79 Fed. Reg. 40,666, 40,667-68 (July 14, 2014) (strongly rejecting the suggestion that EPA's program approval transformed pre-approval state-only permits into federally approved permits, because such permits were issued under different rules); 40 C.F.R. § 51.105 ("Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with tis part."); *see also*, 42 U.S.C. § 7410(i).

4. Issues Raised in Public Comments

Petitioners raised this issue on pages 2-4 of their Public Comments.

5. Analysis of the State's Response

Petitioners demonstrated that the Proposed Permit is deficient, because it incorporates Phillips 66's state-only major source flexible permit as a federally enforceable authorization and allows Phillips 66 to take advantage of the minor source flexible permit program's exemption to preconstruction permit amendment requirements for projects at the Borger Refinery that do not exceed emission caps or emission limits in Phillips 66's flexible permit. The Executive Director's response to comments does not directly address Petitioners' demonstration, nor does it answer questions directly posed by Petitioners' Public Comments concerning the Executive Director's apparent disregard for the clear holdings of *Flex II* and the TCEQ's representations regarding the limitations of the flexible permit program in pleadings and briefing filed in *Flex I* and *Flex II*. Public Comments at 4.

First, the Executive Director acknowledges that Phillips 66's flexible permit was issued before EPA approved Texas's minor source flexible permit program. Response to Comments at 4. The Executive Director then points out that Texas's minor source flexible permit program was

eventually approved by EPA. *Id*. This portion of the Executive Director's response repeats, rather than disputes, background facts that Petitioners included in their Public Comments.

Next, the Executive Director contends that Texas's Title V rules compel him to include Phillips 66's state-only major source flexible permit as an applicable requirement in the Proposed Permit:

> The Texas FOP Program was granted full approval on December 6, 2001, (66 FR 63318) and subsequent rule changes were approved on March 30, 2005 (70 FR 161634). The application procedures, found in 30 TAC § 122.132(a), require an applicant to provide information required by the ED to determine applicability of, or to codify, an "applicable requirement." In order for the ED to issue an FOP, the permit must contain all applicable requirements for each emission unit (30 TAC § 122.142). "Applicable requirement" is specifically defined in 30 TAC § 122.10(2)(h) to include all requirements of 30 TAC Chapter 116 and any term and condition of any preconstruction permit. As a Chapter 116 preconstruction authorization, flexible permits are applicable requirements and shall be included in applications and Texas-issued FOPs, in compliance with Texas' approved program.

Id.

This response does not address Petitioners' demonstration. Even if it is true that Texas's Title V rules require the Executive Director to include Phillips 66's state-only major source flexible permit as an applicable requirement in the Proposed Permit, the Executive Director has not explained (1) why he is also required to include Texas's flexible permit program rules at 30 Tex. Admin. Code § 116.718 and 116.721—which establish an exemption from the permit amendment requirement for projects that will not cause an increase in allowable emissions—as applicable requirements in the Proposed Permit; and (2) why he is not required to clarify that Phillips 66 may not use Texas's federally-approved minor source flexible permit program rules to avoid Chapter 116, Subchapter B preconstruction permitting requirements for major and minor sources.

The Executive Director may not issue a Title V permit that fails to assure compliance with preconstruction permitting requirements in the Texas State Implementation Plan. 42 U.S.C. § 7661c(a). The Executive Director may not rely on the State's definition of "applicable requirement" to avoid this clear statutory mandate. If the Executive Director believes that the TCEQ's rules require him to include Phillips 66's state-only major source flexible permit as an applicable requirement in the Proposed Permit, he must find a way to do that without undermining the enforceability of Texas's Chapter 116, Subchapter B rules.

Next, the Executive Director takes issue with Petitioners' claim that the Proposed Permit's incorporation by reference of Phillips 66's state-only major source flexible permit and the State's federally approved minor source flexible permit program rules allows circumvention of applicable major source requirements:

> The ED also notes that 30 TAC § 101.3 prohibits the use of any mechanism to circumvent regulations or the Clean Air Act, which includes major NSR permitting requirements. Therefore, the flexible permit authorization mechanism may not be used to circumvent major NSR permitting requirements. This is reinforced by the Fifth Circuit Court of Appeal's [sic] *Flex II* decision which states:
>
> "All of the petitioners' arguments rest on the assumption that the SIP will somehow allow flexible permit holders to bypass Major NSR when making major modifications to existing constructions. Our 2012 opinion forecloses that assumption. As we explained, the flexible permit program by definition covers only Minor NSR and affirmatively requires compliance with any applicable Major NSR. If, as the petitioners argue, some flexible permit holders attempt to evade Major NSR, they will be doing so not in accordance with the SIP but in violation of it."
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> The Court's *Flex I* decision further states, ". . . because the Texas permitting scheme affirmatively requires compliance with 'Non-attainment review' and 'PSD'—the components of Major NSR—it does not, on its face, allow major sources to evade Major NSR."

Response to Comments at 4.

This argument fails for two reasons. First, the Executive Director's reliance on 30 Tex. Admin. Code § 101.3 fails because it is the Proposed Permit that, as a matter of law, identifies the

Clean Air Act requirements that are enforceable against the Borger Refinery. As EPA explained in the preamble to its initial Title V rules:

> One of the primary goals behind title V is to have greater certainty for sources and State and Federal enforcement personnel as to what requirements under the Act apply to a particular source. In order to achieve that certainty, the terms of the permit cannot be subject to challenge in enforcement actions. Limiting judicial review of permits has advantages for the permittee, the permitting authority and EPA. The advantage for permittees is the added certainty and stability gained by their permit no longer being subject to challenge. Enforcement at the State and Federal level should also benefit significantly. Currently, many enforcement actions are hindered by disputes over which Act requirements apply. Under the permit system, these disputes will no longer arise because any differences among the State, EPA, the permittee, and the 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.

57 Fed. Reg. 62265-66.

For this reason, federal courts have routinely declined to enforce otherwise-applicable requirements that were omitted or undermined by provisions in a Title V permit. *See, e.g.*, *Otter Tail*, 615 F.3d 1020-22. Thus, to assure compliance with applicable provisions in the Texas State Implementation Plan, as required by 42 U.S.C. § 7661c(a), the Proposed Permit may not incorporate Texas's minor source flexible permit program rules at 30 Tex. Admin. Code §§ 116.718 and 116.721 as applicable requirements. Said differently, it is not enough to prohibit violations of the Clean Air Act. The Proposed Permit must identify and assure compliance with applicable requirements. 42 U.S.C. § 7661c(a) and (c).

The Executive Director's attempt to leverage 30 Tex. Admin. Code § 101.3 into a defense of the Proposed Permit also proves too much. If merely prohibiting non-compliance with the Clean Air Act was sufficient to assure compliance with the Act's requirements, there would be no need for the Title V permitting process. In fact, if a general prohibition on circumvention assured compliance with the Act, there would be no need for any judicial oversite of and public

participation in any permitting process. The problem, as Congress realized when it created the Title V permitting program, is that it is often difficult to identify which requirements apply to a particular source. To effectively assure compliance with applicable requirements, the Proposed Permit must identify the specific requirements that apply to the Borger Refinery. Because the Proposed Permit improperly allows Phillips 66 to take advantage of exemptions to Chapter 116, Subchapter B preconstruction permitting requirements, it undermines the enforceability of those requirements.

The Executive Director's reading of the *Flex I* and *Flex II* decisions is also flawed and does not rebut Petitioners' demonstration that the Proposed Permit is deficient. While it is true that the Court held that the federally-approved minor source flexible permit program does not threaten the integrity of the Act's major NSR requirements, the reason that is so—as made clear by the portion of the *Flex II* decision cited by the Executive Director—is that "the flexible permit program by definition covers only Minor NSR[.]" The program only covers Minor NSR, because "[u]nder the plan, an entity may obtain a flexible permit for emissions up to a specified aggregate limit *below the major source threshold*." *Flex II* at *1 (emphasis added). This position is consistent the description of its program Texas provided to the Court: the flexible permit program only applies "to the construction of new *minor sources* and to *minor modifications* of minor sources." Brief of Intervenor, State of Texas, In Support of Respondent Environmental Protection Agency, 2015 WL 1156712 at *7. Thus, the Proposed Permit threatens the integrity of major NSR permitting requirements because it violates the limits of Texas's federally-approved minor source flexible permit program rules by allowing Phillips 66 to use those rules to authorize projects and emissions increases at a *major source* of air pollution.

Petitioners anticipated that the Executive Director would attempt to mischaracterize the Court's *Flex II* decision, and provided him with an opportunity to (1) identify the basis of his authority to issue major source flexible permits that establish emission caps above applicable major source thresholds; and (2) explain why his position that the TCEQ may issue major source flexible permits was not foreclosed by the State's own pleadings and briefing and the Court's decisions in *Flex I* and *Flex II*. Public Comments at 4. The Executive Director did not attempt to answer either of these key questions. Thus, his appeal to the *Flex I* and *Flex II* decisions is incomplete and misleading, and it does not rebut Petitioners' demonstration that the Proposed Permit is deficient. Accordingly, the Administrator must object to the Proposed Permit.

B. The Proposed Permit Fails to Include Monitoring, Testing, and Recordkeeping Requirements that Assure Compliance with Applicable Requirements

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

The Proposed Permit is deficient because it fails to establish monitoring, testing, and recordkeeping conditions that assure compliance with emission limits in New Source Review ("NSR") permits, including Permits by Rule ("PBRs") and Standard Permits, that it incorporates by reference and because the permit record does not contain a reasoned explanation supporting the Executive Director's determination that monitoring, testing, and recordkeeping conditions in the Proposed Permit assure compliance with these requirements.

Proposed Permit, Special Condition No. 17 provides that NSR permits, including PBRs and Standard Permits, listed in the Proposed Permit's New Source Review Authorization References attachment are incorporated by reference into the Proposed Permit as applicable requirements.

The Proposed Permit's New Source Review Authorization References attachment incorporates many different Chapter 116 NSR permits by reference, including PSDTX102M7,

PSDTX1158M1, 100477, 104928, 14441A, 43073, 80799, 82659, 85872, 87458, 90208, and 9868A. Proposed Permit at 280. The attachment also lists nine current and outdated Chapter 106 PBR rules that Phillips 66 has claimed to authorize projects and emissions at the Borger Refinery. *Id.*

The Proposed Permit includes the following special condition that establishes recordkeeping requirements for PBRs and Standard Permits:

> The permit holder shall maintain records to demonstrate compliance with any emission limitation or standard that is specified in a permit by rule (PBR) or Standard Permit listed in the New Source Review Authorizations attachment. The records shall yield reliable data from the relevant time period that are representative of the emission unit's compliance with the PBR or Standard Permit. These records may include, but are not limited to, production capacity and throughput, hours of operation, safety data sheets (SDS), chemical composition of raw materials, speciation of air contaminant data, engineering calculations, maintenance records, fugitive data, performance tests, capture/control device efficiencies, direct pollutant monitoring (CEMS, COMS, or PEMS), or control device parametric monitoring. These records shall be made readily accessible and available as required by 30 TAC § 122.144. Any monitoring or recordkeeping data indicating noncompliance with the PBR or Standard Permit shall be considered and reported as a deviation according to 30 TAC § 122.142 (Reporting Terms and Conditions).

Proposed Permit, Special Condition No. 19.

The Statement of Basis provides the following statement regarding the sufficiency of monitoring in the Proposed Permit:

> Federal and state rules, 40 CFR § 70.6(a)(3)(i)(B) and 30 TAC § 122.142(c) respectively, require that each federal operating permit include additional monitoring for applicable requirements that lack periodic or instrumental monitoring (which may include recordkeeping that serves as monitoring) that yields reliable data from a relevant time period that are representative of the emission unit's compliance with the applicable emission limitation or standard. Furthermore, the federal operating permit must include compliance assurance monitoring (CAM) requirements for emission sources that meet the applicability criteria of 40 CFR Part 64 in accordance with 40 CFR § 70.6(a)(3)(i)(A) and 30 TAC § 122.604(b).

> With the exception of any emission units listed in the Periodic Monitoring or CAM Summaries in the FOP, the TCEQ Executive Director has determined that the permit contains sufficient monitoring, testing, recordkeeping, and reporting requirements that assure compliance with the applicable requirements. If applicable, each emission unit that requires additional monitoring in the form of periodic monitoring or CAM is described in further detail under the Rationale for CAM/PM Methods Selected section following this paragraph.

Statement of Basis at 105.

None of the Periodic Monitoring or CAM summaries in the Proposed Permit address requirements in Phillips 66's NSR permits, including PBRs and Standard Permits, and the Statement of Basis does not provide a reasoned justification for the Executive Director's determination that existing provisions in Phillips 66's NSR, PBRs, and Standard Permits assure compliance with applicable permit limits and operating requirements.

2. Applicable Requirement of Part 70 Requirement Not Met

Each Title V permit must contain monitoring, recordkeeping, and reporting conditions that assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a)(3) and (c)(1); *In the Matter of Wheelabrator Baltimore* ("Wheelabrator Order"), Permit No. 24-510-01886 at 10 (April 14, 2010). Emission limits in NSR permits, including PBRs and Standard Permits, incorporated by reference into the Proposed Permit are applicable requirements. 40 C.F.R. § 70.2; Proposed Permit, Special Condition No. 17(A). The rationale for the selected monitoring requirements must be clear and documented in the permit record. 40 C.F.R. § 70.5(a)(5); *In the Matter of United States Steel, Granite City Works* ("Granite City I Order"), Order on Petition No. V-2009-03 at 7-8 (January 31, 2011).

As explained below, the Proposed Permit is deficient because (1) it fails to specify monitoring, testing and recordkeeping requirements that assure compliance with emission limits and operating requirements in NSR permits, PBRs, and Standard Permits incorporated by

reference into the Proposed Permit; and (2) the permit record does not contain a reasoned justification for the Executive Director's determination that monitoring, testing, and recordkeeping requirements in the Proposed Permit assure compliance with emission limits and operating requirements established by Phillips 66's NSR permits, PBRs, and Standard Permits.

3. Inadequacy of the Permit Term

a. Permits by Rule

The Proposed Permit incorporates by reference the following PBRs as applicable requirements: 106.261, 106.262, 106.263, 106.371, 106.472, 106.511, 106.512, 106.532, and 106.533. Proposed Permit at 280.

Facilities authorized by these PBRs must comply with general PBR requirements listed at 30 Tex. Admin. Code § 106.4 as well as any requirements listed in the specific claimed PBRs. *Id*. at Special Condition Nos. 17 and 18. Requirements listed at § 106.4 include emission limits for facilities authorized by PBR, 40 Tex. Admin. Code § 106.4(a)(1), as well as a prohibition on the use of PBRs to authorize construction of a new major source or major modification to an existing source. *Id*. at § 106.4(a)(2) and (3). Because the NO_x, CO, H_2SO_4, H_2S, and TRS emission limits established by § 106.4(a)(1) exceed the netting trigger to determine major NSR applicability for modifications to the Borger Refinery, and because PBRs can be used to authorize increases of other pollutants at multiple units within the Refinery at levels that exceed applicable netting thresholds, projects authorized by PBR may trigger PSD netting requirements. *See*, *Id*. at § 116.160(b).

In addition to these general PBR requirements, the following emission limits and standards contained in PBRs claimed by Phillips 66 are applicable requirements of the Proposed Permit:

PBRs 106.261 and 106.262 establish hourly and annual emission limits for various contaminants, *Id*. at §§ 106.261(a)(2) and (3), 106.262(a)(2), and prohibit visible emissions exceeding five percent opacity. *Id*. at §§ 106.261(a)(5), 106.262(a)(5). Additionally, § 106.262(a)(4) limits the amount of certain chemicals that may be stored at the Refinery.

PBR 106.263, which authorizes routine maintenance, startup, and shutdown activities establishes daily emission limits, *Id*. at § 106.263(d)(1), incorporates by reference emission limits and conditions established by various other PBRs for specific source categories, *Id*. at § 106.263(e)(1)-(5), and incorporates emission limits listed at § 106.4(a)(1)-(3) for any rolling 12-month period. *Id*. at § 106.263(f).

PBR 106.511, which authorizes portable and emergency engines and turbines, limits the maximum operation of such units authorized by PBR to ten percent of the normal annual operating schedule of the primary equipment.

PBR 106.512, which authorizes stationary engines and turbines, requires operators to register emissions from the engines and turbines rated 240 hp or greater, *Id*. at § 106.512(1), establishes emission limits and operating requirements for engines and turbines 500 hp or greater, *Id*. at § 106.512(2) and (3), and limits the kinds and pollutant content of fuel used to power units authorized by the PBR. *Id*. at § 106.512(5).

Though the Proposed Permit requires Phillips 66 to maintain records demonstrating compliance with PBR emission limits and operating requirements, the Proposed Permit is deficient because it does not specify monitoring methods that assure compliance with these limits and requirements. Instead, the Proposed Permit outsources the TCEQ's obligation to specify conditions that assure compliance with applicable requirements to Phillips 66. Proposed Permit, Special Condition No. 19 (establishing non-exhaustive list of data Phillips 66 may consider—at

its discretion—to determine compliance with PBR requirements). This outsourcing renders the Proposed Permit deficient for two reasons: First, the Proposed Permit is deficient because it fails to specify monitoring conditions that assure compliance with each applicable requirement. Second, the Proposed Permit is deficient because the permitting record does not explain how the recordkeeping special condition, Proposed Permit, Special Condition No. 19, and the PBR rules it incorporates by reference assure compliance with applicable PBR emission limits and operating requirements.

The Proposed Permit is deficient for an additional reason: It fails to require permit records demonstrating compliance to be made available to the public, as required by Texas's Title V program. *In the Matter of Shell Chemical LP and Shell Oil Co* ("Deer Park Order"), Order on Petition Nos. VI-2014-04 and VI-2014-05 at 15 (Sep. 24, 2015) ("[T]he permit records for demonstrating compliance with PBRs must be available to the public as required under the approved Texas title V program.").

b. Flexible Permit No. 9868A

Flexible permits must specify methods for calculating annual and short term emissions from each type of facility covered by a multi-unit emissions cap to assure compliance with the caps. 30 Tex. Admin. Code § 116.715(c)(5)(A) and (B). Additionally, flexible permits with multi-unit emission caps "must include special conditions" that require monitoring methods that "accurately determine all emissions of . . . pollutants in terms of mass per unit of time." *Id.* at § 116.715(d).

Phillips 66's state-only major source flexible permit does not include such special conditions and therefore fails to assure compliance with the flexible permit's multi-unit emission caps and Texas's flexible permit program rules. Instead, the Flexible Permit requires Phillips 66

to develop recordkeeping programs *outside* of the permitting context that serve as a substitute for the monitoring special conditions required by Texas's flexible permit program rules:

> Recordkeeping programs for those facilities authorized by the flexible permit shall be established and maintained such that the ability to demonstrate compliance with all authorized caps (short-term and annual) are ensured. Records of all compliance testing, CEM results, and process parameters necessary to demonstrate compliance with the emission rate caps shall be maintained on-site for a period of three years.

Flexible Permit, Special Condition No. 57.

Because these recordkeeping programs are applicable requirements and are necessary to assure compliance with multi-unit emission caps in the Flexible Permit as well as Texas's flexible permit program rules, they must be identified in Phillips 66's Title V permit application, included in the Proposed Permit, and they should have been available for review during the public comment period for the Draft Permit. Because the applicable monitoring programs were not incorporated into the Proposed Permit, the Proposed Permit is incomplete and fails to assure compliance with applicable requirements.

c. Permit No. 80799

Permit No. 80799 authorizes planned MSS emissions and activities at various facilities at the Borger Refinery, including facilities previously-authorized by and subject to emission limits in Phillips 66's PSD permits and Flexible Permit. These facilities, along with the relevant previously-issued permits, are listed in Permit No. 80799, Attachment D. Public Comments, Attachment 1.[2] The permit provides that, unless it establishes alternative limits, the planned MSS activities it authorizes may not cause emissions from the Borger Refinery to exceed existing limits for routine operation established by previously-issued permits. *Id*. at Special Condition No. 12.

[2] References to Permit No. 80799 special conditions and attachments are based on the version of the permit issued on September 12, 2011. While the Proposed Permit incorporates a later version of this permit, a copy of the most current special conditions was not available during the public comment period or the public petition period.

Permit No. 80799 does not establish alternative limits for units listed in Attachment D that are subject to emission limits established by Phillips 66's Flexible Permit and PSD permits. Accordingly, to ensure that additional planned MSS emissions authorized by Permit No. 80799 do not contribute to violations of applicable emission limits in Phillips 66's PSD permits and Flexible Permit, the Proposed Permit must specify monitoring methods for planned MSS activities at those previously permitted units. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a) and (c). The Proposed Permit is deficient because it does not identify planned MSS monitoring methods that assure compliance with applicable emission limits in Phillips 66's PSD permits and Flexible Permit.

For example, Permit No. 80799, Special Condition No. 2 states that emissions from listed routine maintenance activities identified in permit Attachment B--related to valve and piping maintenance/replacement, pipeline pigging, compressor maintenance, maintenance on pumps, and heat exchanger maintenance—"shall be calculated using the number of work orders or equivalent that month and the emissions associated with that activity in the permit application." For other planned MSS activities, Permit No. 80799, Special Condition No. 2 states that "the emissions shall be estimated using the methods identified in the permit application, consistent with good engineering practice. Permit No. 80799, Special Condition No. 2(E). This special condition fails to assure compliance with hourly and annual emission limits in Phillips 66's PSD permits and Flexible Permit because (1) it does not identify specific monitoring methods and emissions calculation practices for planned MSS activity emissions that assure compliance with the applicable limits; (2) it does not identify the application(s) that contain the relevant information; and (3) the Executive Director has not explained how representations in Phillips 66's application(s) assure compliance with the applicable limits. *Granite City I Order* at 43.

4. Issues Raised in Public Comments

Petitioners raised these issues on pages 4-14 of their Public Comments.

5. Analysis of the State's Response

a. Permits by Rule

The Executive Director's Response to Comments provides a general account of how Texas's PBR program works and how PBRs are incorporated into the Texas Title V permits. Response to Comments at 12-14. The Executive Director, however, does not attempt to rebut Petitioners' demonstration that the Proposed Permit fails to specify monitoring and testing methods that assure compliance with applicable PBR emission limits and operating requirements. Accordingly, the Executive Director's response to comments is incomplete and the Administrator must object to the Proposed Permit.

While the Executive Director ignores the greater part of Petitioners' demonstration concerning the Proposed Permit's failure to assure compliance with PBR requirements, he does purport to address Petitioners' contention that the Proposed Permit is deficient because it fails to require records demonstrating compliance to be made available to the public. According to the Executive Director, such records are publicly available because "the Applicant must maintain a copy of the permit along with records containing the information and data (gathered through monitoring) sufficient to demonstrate compliance with the permit including PBRs, Standard Exemptions, and Standard Permits." *Id*. at 12-13. This response, however, does not actually address Petitioners' concern. Petitioners concede that Phillips 66 is required to maintain records demonstrating compliance with PBR requirements, but the Executive Director has not explained how the public may obtain such records maintained by a private entity.

The Executive Director does explain that members of the public may access copies of Phillips 66's compliance certifications. But permit compliance certifications, as the Response to Comments explains, only provide detailed information demonstrating *non-compliance*. *Id*. at 13. Thus, while permit compliance certifications may contain assertions that Phillips 66 is complying with various requirements, they do not include information *demonstrating* compliance with applicable PBR requirements. Because applicable requirements in the Proposed Permit are enforceable by the public, 40 C.F.R. § 70.6(c)(1), members of the public must be able to review and evaluate the information Phillips 66 relies on to certify compliance with such requirements. The Executive Director has not explained how members of the public may obtain this information nor has he identified any provision in the Proposed Permit or Texas's regulations that provides members of the public access to such information.

b. The Question of Whether the Proposed Permit Establishes Monitoring Requirements that Assure Compliance with NSR Emission Limits is Not Beyond the Scope of the Executive Director's Review for this Project

The Executive Director leads into his response to comments concerning the sufficiency of monitoring in Phillips 66's NSR permits with an argument that the sufficiency of monitoring requirements in Phillips 66's NSR permits is beyond the scope of this Title V permitting project:

> The Texas FOP program, as approved by EPA, results in a permit that contains all applicable requirements in order to facilitate compliance and improve enforcement. Air permits authorizing construction or modification of facilities or that authorize emission increases and planned MSS emissions are issued under the authority of 30 TAC Chapter 116. The ED has determined that, in the case of NSR permits, it is more straightforward and beneficial to the public and the regulated community to include all relevant NSR related requirements, including sufficiency of monitoring, in those particular NSR authorizations. Therefore, the FOP does not authorize construction or modifications of facilities, nor does the FOP authorize emission increases or emissions from MSS activities. During processing of an FOP application, the ED will respond to all comments concerning the draft FOP that are received during the 30 day public comment period under 30 TAC Chapter 122. The NSR permitting process is a separate permitting process and determinations made during the NSR permitting process are not subject to re-review during the FOP

> process. As such, the FOP process is not an opportunity to comment on the validity of other permitting processes, including NSR permits and the contents of such permits. In the case of NSR permits, the appropriate time to comment on NSR emission limits, terms and conditions is during the comment period for the specific authorization. The NSR permits are independent of the FOP and are inclusive of their own enforceable requirements, including monitoring, reporting, recordkeeping, and testing.

Response to Comments at 14-15.

While the Executive Director is correct that Texas implements separate NSR and Title V permitting programs, he has not explained why that fact places the sufficiency of monitoring in NSR permits beyond the scope of his Title V permit review process. *None* of the emission limits incorporated into the Proposed Permit were established as part of the Title V review process. Accordingly, if the Executive Director were correct that he only needed to evaluate the sufficiency of monitoring for applicable requirements established as part of the Title V permitting process, he would not need to undertake any monitoring review at all as part of the Title V permitting process.

But the Executive Director is not correct. As the D.C. Circuit Court of Appeals held, "Title V did more than require the compilation in a single document of existing emission limits, and monitoring requirements. It also mandated that each permit issued under Title V shall set forth monitoring requirements to assure compliance with the permit terms and conditions." *Sierra Club,* 536 F.3d 674-75 (internal quotations and citations omitted). According to the Court, "this mandate means that a monitoring requirement insufficient to assure compliance with emission limits has no place in a permit unless and until it is supplemented by more rigorous standards." *Id*. at 677. Operating requirements and emission limits in NSR permits authorizing construction of equipment at the Borger Refinery are applicable requirements for purposes of the Executive Director's Title V review. 30 Tex. Admin. Code § 122.10(2)(H). The Clean Air Act, EPA's Title V regulations, and Texas's federally-approved Title V permitting rules each require that Title V permits issued

by the TCEQ include monitoring sufficient to assure compliance with *all* applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a)(3) and (c)(1); 30 Tex. Admin. Code § 122.142(c). The Executive Director's claim that this obligation does not extend to applicable requirements in NSR permits is incorrect because it is contrary to the clear language of the Act and applicable regulations.

c. Flexible Permit No. 9868A

Petitioners demonstrated that the Proposed Permit is deficient because it fails to establish special conditions with monitoring and emission calculation methods for each category of unit covered by a multi-unit emission cap in Phillips 66's Flexible Permit that 1) assures compliance with the cap and 2) yields accurate information about the amount of pollution each such unit emits in terms of mass per unit of time, as expressly required by Texas's flexible permit program rules. 30 Tex. Admin. Code § 116.715(c)(5) and (d).

The Executive Director does not dispute that the Flexible Permit omits information about how Phillips 66 must calculate emissions from its units to demonstrate compliance with Flexible Permit multi-unit emission caps. Instead, the Executive Director denies that Texas flexible permits must include special conditions that explain how emissions from units at the Borger Refinery must be calculated:

> NSR Permit 9868A/PSDTX102M7, which is attached to Appendix B of FOP O1440, contains recordkeeping sufficient to demonstrate compliance with the emission caps of the permit. This recordkeeping is identified both on the permit face and in Special Conditions 57-58. The application representations that describe the calculation methodology for the emissions are not required to be listed in the NSR permit document itself since it would be impractical to include those extensive calculations in that document. As a point of comparison, the recently requested amendment application package to convert 9868A/PSDTX102M7 to a SIP approved 30 TAC 116, Subchapter G permit was contained in three folders, sum totaling six inches in document height. The greater share of the application package contains calculation methodology for those short and long term emissions, which would be summarized in the maximum allowable emission rates tables (MAERT)

> in the permit. Please note, however, that General Condition 1 of the permit face of 9868A/PSDTX1027M7 also specifically states, "Facilities covered by this permit shall be constructed and operated as specified in the application for the permit. All representations regarding construction plans and operation procedures contained in the permit application shall be conditions upon which the permit is issued." As such, all calculation methodologies are contained within the flexible permit application package and are conditions upon which the permit is issued. The NSR permitting files are located in the TCEQ Central File Room and some are becoming electronically available through the TCEQ public documents websites describe in footnote 1.

Response to Comments at 15.

There are several problems with this response. First, the Executive Director's claim that "application representations that describe the calculation methodology for the emissions are not required to be listed in the NSR permit document itself" is directly rebutted by Texas's flexible permit program rules: "Each flexible permit *shall specify methods for calculating annual and short term emissions* for each pollutant for a given type of facility." 30 Tex. Admin. Code § 116.715(c)(5)(B) (emphasis added). While Petitioners understand that including calculation methodologies for each type of equipment at the Borger Refinery may be burdensome, that difficulty is the result of the Executive Director's improper issuance of a *minor source* flexible permit to a *major source* and not an indication that Petitioners' demonstration lacks merit.

Second, the Executive Director suggests that information about how Phillips 66 calculates emissions to demonstrate compliance with multi-unit Flexible Permit caps is found in Phillips 66's Flexible Permit applications. The Flexible Permit, however, directs Phillips 66 to develop "[r]ecordkeeping programs for those facilities authorized by the flexible permit . . . such that the ability to demonstrate compliance with all authorized caps . . . are [sic] ensured." Flexible Permit, Special Condition No. 57. This special condition does not require Phillips 66 to submit an application to the Executive Director identifying applicable emission calculation methods and does not require Phillips 66 to develop a recordkeeping program that uses calculation methodologies

included in its Flexible Permit application. Thus, Phillips 66's application files do not necessarily include information about the calculation methodologies that assure compliance with multi-unit emission caps in the Flexible Permit.

Finally, the pending application that the Executive Director points to in support of his contention that including calculation methodologies on the face of the Flexible Permit is impractical is a *pending* application and therefore does not necessarily contain currently enforceable representations. The TCEQ's rule at § 116.116(a) provides that application representations are "the conditions upon which a permit . . .[is] issued." Because the permit requested by the application has not yet been issued and incorporated into the Proposed Permit, representations in the pending application are not yet binding. The Executive Director does not identify which application(s), if any, contain currently enforceable representations regarding the methods Phillips 66 must use to assure compliance with multi-unit emission caps in the Flexible Permit.

d. Permit No. 80799

Permit No. 80799 authorizes new emissions—emissions during planned MSS activities—from units previously authorized by Phillips 66's PSD permits and Flexible Permit while requiring Phillips 66 to accommodate the new emissions under existing limits and emission caps established by the Company's PSD permits and Flexible Permit. Petitioners demonstrated that the Proposed Permit is deficient because (1) it does not identify monitoring methods that assure new emissions authorized by Permit No. 80799 from units subject to limits in Phillips 66's PSD permits and Flexible Permit are maintained under the applicable emission limits and caps established by those permits; and (2) it does not identify monitoring for units authorized by the Flexible Permit that is

capable of determining planned MSS emissions in terms of pounds per unit of time, as required by Texas's flexible permit program rules.

The Executive Director responds:

> The ED disagrees with the Commenter's statement that Special Conditions listed in Permit No. 80799 must identify "specific" method(s) to calculate MSS emissions that assure compliance with applicable emission limits. MSS related requirements are stated in Special Conditions 2, 3, 6, 9, 11, 12, and 13 of Permit No. 80799. The Proposed Permit, including Permit No 80799, provides operational flexibility to the Applicant while ensuring compliance with applicable emission limits. Specifically, general Condition 6 in Permit No. 80799 states that, "the permit holder must demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the conditions of the permit." In addition, Part 3 of the Permit Compliance Certification (PCC) Form (TCEQ 10490) requires the Applicant to list the selected Monitoring Option for each emission unit. These requirements assure compliance with the applicable requirements of the Proposed Permit and Permit No. 80799.

Response to Comments at 23.

This response does not rebut Petitioners' demonstration, because (1) the Executive Director has not identified the monitoring conditions in Permit No. 80799 or in Phillips 66's PSD permits and Flexible Permit that ensure that planned MSS emissions authorized by Permit No. 80799 for units previously authorized by Phillips 66's PSD permits and Flexible Permit will not cause violations of the applicable limits in those permits; and (2) the Executive Director has not identified the monitoring method(s) capable of determining planned MSS emissions from units authorized by Phillips 66's Flexible Permit in terms of pounds per unit of time, as required by Texas's flexible permit program rules.

While the Executive Director's response identifies "MSS related requirements" in Permit No. 80799, which are intended to assure compliance with BACT requirements for planned MSS activities as well as the emission limits listed in the MAERT for Permit No. 80799, the Executive

Director has not identified the special conditions that assure compliance with applicable emission limits in Phillips 66's PSD permits and Flexible Permit, nor has he explained how the MSS related requirements in Permit No. 80799 are sufficient to assure compliance with emission limits in other permits affected by Permit No. 80799.

The Executive Director's response to Petitioners demonstration that the Proposed Permit fails to include monitoring, testing, and recordkeeping requirements that assure compliance with emission limits and operating requirements in Phillips 66's NSR permits, including PBRs and Standard Permits, is incomplete and incorrect. Accordingly, the Administrator must object to the Proposed Permit.

C. The Proposed Permit Fails to Incorporate Phillips 66's Certified PBR Registrations as Applicable Requirements

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

The Proposed Permit is deficient because it omits source-specific applicable requirements for the Borger Refinery. Texas's rule at 30 Texas Administrative Code § 106.6 allows operators to certify emission rates for PBR projects that are more stringent than the generic limits established by Texas's general PBR rule at § 106.4(a)(1). Certified PBR emission rates and representations in a certified PBR registration are federally enforceable requirements. 30 Tex. Admin. Code § 106.6(a) ("An owner or operator may certify and register the maximum emission rates from facilities permitted by rule . . . in order to establish federally-enforceable emission rates which are below the limitations in § 106.4 of this title[.]"). Phillips 66 has certified the following source-specific emission rates for units authorized by PBR at the Borger Refinery:[3]

[3] TCEQ certification letters for each of these registrations are included in Public Comments, Attachment 2.

Certified PBR Registration 112249, PBR 106.478

EPN / Emission Source	VOC		Benzene	
	lbs/hr	tpy	lbs/hr	tpy
2674/Internal Floating Roof Tank	0.66	1.97	<0.01	0.01
F-2674/Fugitive Emissions	0.03	0.15	<0.01	<0.01
TOTAL EMISSIONS:		2.11		0.01

Certified PBR Registration 107921, PBR 106.261

EPN / Emission Source	VOC	
	lbs/hr	tpy
F-19-1-a/Unit 19.1 Fugitives	0.02	0.09
T-2575/ Tank 2575	0.14	0.25
T-5599/Tank 5599	0.14	0.25
TOTAL EMISSIONS:		0.59

Certified PBR Registration 114364, PBRs 106.261, 106.263, 106.478

EPN / Emission Source	VOC	
	lbs/hr	tpy
5589/External Floating Roof Tank	1.93	
5590/External Floating Roof Tank	1.90	0.58
5600/External Floating Roof Tank	1.93	0.59
F-KD Tanks/Fugitive Emissions	0.21	0.93
5589/External Floating Roof Tank MSS	3.54	0.02
5590/External Floating Roof Tank MSS		0.02
5600/External Floating Roof Tank MSS		0.02
TOTAL EMISSIONS:		2.75

Certified PBR Registration 115785, PBR 106.512

EPN / Emission Source	VOC		NO_x		CO		PM_{10}		$PM_{2.5}$		SO_2		HCHO	
	lbs/hr	tpy	lbs/hr	tpy	lbs/hr	tpy	lbs/hr	tpy	lbs/hr	tpy	lbs/hr	tpy	lbs/hr	tpy
A-1 / Engine	0.66	1.06	0.79	1.27	1.87	3.00	0.04	0.06	0.04	0.06	<0.01	<0.01	0.19	0.30
A-2 / Engine	0.66	1.06	0.79	1.27	1.87	3.00	0.04	0.06	0.04	0.06	<0.01	<0.01	0.19	0.30
A-3 / Engine	0.66	1.06	0.79	1.27	1.87	3.00	0.04	0.06	0.04	0.06	<0.01	<0.01	0.19	0.30
A-4 / Engine	0.66	1.06	0.79	1.27	1.87	3.00	0.04	0.06	0.04	0.06	<0.01	<0.01	0.19	0.30
Total		4.24		5.08		12		0.24		0.24		<0.01		1.20

Certified PBR Registration 90182, PBR 106.261

EPN / Emission Source	VOC	
	lbs/hr	Tpy
Various		3.96
TOTAL EMISSIONS:		3.96

Certified PBR Registration 98518, PBRs 106.261, 106.262

EPN / Emission Source	VOC		H_2S	
	lbs/hr	tpy	lbs/hr	tpy
Coker Unit Sour Gas Coalescer		0.08		0.05
TOTAL EMISSIONS:		0.08		0.05

Certified PBR Registration 102757, PBR 106.261

EPN / Emission Source	PM_{10}		$PM_{2.5}$	
	lbs/hr	tpy	lbs/hr	tpy
Temporary Conveyor		0.21		0.03
TOTAL EMISSIONS:		0.21		0.03

Certified PBR Registration 106066, PBR 106.261

EPN / Emission Source	VOC	
	lbs/hr	tpy
F-22-VGA/Vapor Gas Absorber Fugitives	0.22	0.98
TOTAL EMISSIONS:	0.22	0.98

Certified PBR Registration 131269, PBR 106.371

EPN / Emission Source	VOC		PM_{10}		$PM_{2.5}$	
	lbs/hr	tpy	lbs/hr	tpy	lbs/hr	tpy
Cooling Towers	1.51	6.62	0.59	2.60	0.59	2.60
TOTAL EMISSIONS:	1.51	6.62	0.59	2.60	0.59	2.60

Certified PBR Registration 114332, PBR 106.261, 106.262

EPN / Emission Source	VOC		H_2S	
	lbs/hr	tpy	lbs/hr	tpy
F-82/Unit 82 Fugitives	0.03	0.14	<0.01	0.02
TOTAL EMISSIONS:		0.14		0.02

Certified PBR Registration 114364, PBRs 106.261, 106.263, 106.478

EPN / Emission Source	VOC	
	lbs/hr	tpy
Tank 5589-Routine Operation	1.93	0.59
Tank 5590-Routine Operation	1.90	0.58
F-KD Tanks Fugitives	0.20	0.86
Tank 5589-MSS	3.54	0.03
Tank 5590-MSS		
TOTAL EMISSIONS:		2.07

Certified PBR Registration 114429, PBR 106.478

EPN / Emission Source	VOC		Benzene	
	lbs/hr	tpy	lbs/hr	tpy
Tank 5532/EFR	6.49	21.05	0.04	0.13
TOTAL EMISSIONS:		21.05		0.13

Certified PBR Registration 99345, PBR 106.261

EPN / Emission Source	VOC	
	lbs/hr	tpy
Feed Filtration System, Unit 42 GOHDS		0.84
TOTAL EMISSIONS:		0.84

Certified PBR Registration 99365, PBR 106.261

EPN / Emission Source	VOC	
	lbs/hr	tpy
Fuel Gas Dehydration Project		0.71
TOTAL EMISSIONS:		0.71

Certified PBR Registration 99373, PBR 106.261

EPN / Emission Source	VOC	
	lbs/hr	tpy
Skelly-Belvieu Pipeline Project		1.69
TOTAL EMISSIONS:		1.69

Certified PBR Registration 129637, PBR 106.512

EPN / Emission Source	VOC		NO_x		CO		$PM_{10/2.5}$		SO_2	
	lbs/hr	tpy	lbs/hr	tpy	lbs/hr	tpy	lbs/hr	tpy	lbs/hr	tpy
ENG-SC1 / 440-hp Caterpiller Model C15 ACERT Engine	0.37	1.64	3.07	13.45	2.53	11.09	0.14	0.63	0.16	0.70
Total Emissions	0.37	1.64	3.07	13.45	2.53	11.09	0.14	0.63	0.16	0.70

Certified PBR Registration 96328, PBR 106.261

EPN / Emission Source	VOC	
	lbs/hr	tpy
Refined Petroleum Fractions		0.94
TOTAL EMISSIONS:		0.94

Certified PBR Registration 119377, PBRs 106.261, 106.262

EPN / Emission Source	VOC	
	lbs/hr	tpy
F11/Amine Flash Drum Fugitives	0.10	0.46
F-34/Amine Flash Drum Fugitives	0.22	0.97
TOTAL EMISSIONS:		1.43

Certified PBR Registration 95901, PBRs 106.261, 106.262

EPN / Emission Source	VOC		Organic & Inorganic Fluorides	
	lbs/hr	tpy	lbs/hr	tpy
U22 Defluorination Project		0.30		<0.001
TOTAL EMISSIONS:		0.30		<0.001

The Proposed Permit, however, does not contain any condition or table that identifies Phillips 66's certified PBR registrations or the source-specific emission limits that they establish as applicable requirements.

2. Applicable Requirement or Part 70 Requirement Not Met

Title V permits must include and assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a) and (c). "Applicable requirements" include certified PBR registrations. 30 Tex. Admin. Code § 122.10(2)(H).

The Borger Refinery is a major source of air pollution located in an area categorized as in attainment or unclassifiable with respect to each NSR pollutant. Accordingly, Phillips 66 is required to conduct netting to determine major NSR applicability for any construction project at the Borger Refinery that has the potential to increase emissions of any NSR pollutant beyond the significance thresholds listed at 40 C.F.R. § 52.21(b)(23). 30 Tex. Admin. Code § 116.160(b)(1).

As explained below, the Proposed Permit directly violates Title V requirements because it fails to incorporate Phillips 66's certified PBR registrations, which are applicable requirements. The Proposed Permit's failure to incorporate Phillips 66's certified PBR registrations undermines the enforceability of major NSR preconstruction permitting requirements, because it renders emission limits established to prevent major NSR preconstruction permitting requirements from being triggered not practicably enforceable.

3. Inadequacy of the Permit Term

a. The Proposed Permit Fails to Include All Applicable Requirements

While the Proposed Permit incorporates by reference the TCEQ's general PBR rules and identifies various PBRs claimed by Phillips 66, it does not indicate that Phillips 66 has certified emission rates lower than those established by Texas's PBR rules, incorporate the applicable source-specific emission limits established by applicable certified PBR registrations, explain which units are subject to source-specific certified PBR limits, or specify how compliance with these source-specific limits is assured. The Proposed Permit is deficient because it fails to identify and assure compliance with applicable source-specific emission limits established through the PBR certification process. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. 70.6(a) and (c).

b. The Proposed Permit Does Not Assure Compliance with Major New Source Review Requirements

Texas's general PBR requirements provide that facilities authorized by PBR may emit NO_x, CO, Pb, Fluorides, H_2SO_4, H_2S, and TRS at levels that exceed the applicable netting thresholds. *Compare* emission limits established by 30 Tex. Admin. Code § 106.4(a)(1) and significant thresholds at § 116.160(b)(1). In addition, cumulative potential VOC, SO_2, PM, PM_{10}, and $PM_{2.5}$ increases from multiple PBR submissions authorizing changes to various facilities related to the same project may trigger netting requirements. Phillips 66 has certified PBR emission limits lower than the limits in TCEQ's general PBR rules to avoid netting requirements that would otherwise be triggered by potential emission increases for PBR projects subject to § 106.4(a)(1) general limits. Public Comments, Attachment 2.

Emission limits in Phillips 66's certified PBR registrations cannot effectively relieve the Company of its obligation to net out of major NSR preconstruction permitting requirements unless they are federally and practicably enforceable. *Guidance on Enforceability Requirements for*

Limiting Potential to Emit through SIP and § 112 Rules and General Permits, Katie A. Stein, Director, EPA Air Enforcement Division ("Enforceability Guidance") (January 25, 1995).

The Proposed Permit's omission of Phillips 66's certified PBR registrations renders it deficient, because emission limits that are not incorporated into Phillips 66's Title V permit are not practicably enforceable. Instead, the only practicably enforceable limits for certified PBR projects are those listed at § 106.4(a)(1) and the incorporated PBRs, which are not low enough to prevent major NSR netting requirements from being triggered.

4. Issue Raised in Public Comments

Petitioners raised this issue on pages 18-21 of their Public Comments. Copies of Phillips 66's certified PBR registrations are included in Public Comments, Attachment 2.

5. Analysis of State's Response

The Executive Director provides a general account of how the State's PBR permitting program works, Response to Comments at 13-14, and denies that PBRs may be used to circumvent major NSR requirements, *Id*. at 29, but he does not address Petitioners' contention that the Proposed Permit is deficient because it omits Phillips 66's source-specific certified PBR registrations. The Executive Director's response is therefore incomplete and the Administrator must object to the Proposed Permit.

The Executive Director's attempt to rebut Petitioners' demonstration that the Proposed Permit's failure to incorporate source-specific emission limits in certified PBR registrations that Phillips 66 relies on to avoid triggering major NSR requirements is incomplete. According to the Executive Director, Phillips 66 may not use PBRs to authorize emission increases that trigger major NSR requirements because Texas's PBR rules require Phillips 66 to ensure that any applicable netting requirements have been satisfied and to maintain records demonstrating

compliance with PBR requirements. *Id*. Petitioners agree that Phillips 66 may not use a PBRs to circumvent applicable major NSR requirements without violating the SIP. That, however, is not the issue Petitioners raised. Petitioners contend that the Proposed Permit's failure to incorporate source-specific emission limits established to prevent projects at the Borger Refinery from triggering major NSR netting requirements renders those limits not practicably enforceable. Because source-specific emission limits that the TCEQ relies upon to ensure that projects at the Borger Refinery do not trigger major NSR requirements are not practicably enforceable, members of the public, regulators, and judges are left without a clear way to determine whether violations of major NSR requirements have occurred and to demonstrate non-compliance with such requirements. Title V permits must include conditions necessary to assure compliance with all applicable requirements. 42 U.S.C. § 7661c(a). Major NSR netting and preconstruction permitting requirements are applicable requirements for the Borger Refinery. The Proposed Permit's failure to incorporate limits that Phillips 66 relies upon to demonstrate that projects at the Borger Refinery have not triggered major NSR requirements undermines the enforceability of those requirements. Accordingly, the Proposed Permit is deficient. The Executive Director's Response to Comments does not address this demonstration of deficiency. Accordingly, the Executive Director's response to comments is incomplete and the Administrator must object to the Proposed Permit.

D. The Proposed Permit Fails to Assure Compliance with Requirements in Permit No. 80799

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

The Proposed Permit is deficient because it fails to identify any emission unit at the Borger Refinery that is subject to requirements in Permit No. 80799, which the Proposed Permit incorporates by reference.

Proposed Permit, Special Condition No. 17 provides that requirements in NSR permits listed in the Proposed Permit's New Source Review Authorization References attachment are applicable requirements of the Proposed Permit. The Proposed Permit's New Source Review Authorization References attachment lists Permit No. 80799 as an incorporated permit. Proposed Permit at 280. The Proposed Permit's New Source Review Authorization References by Emission Unit attachment, however, indicates that none of the emission units at permitted source are subject to requirements in Permit No. 80799. *Id.* at 281-297.

2. Applicable Requirement or Part 70 Requirement Not Met

Each Title V permit must include all applicable requirements and conditions necessary to assure compliance with each such requirement. 42 U.S.C. § 7661c(a) and (c). Where a Title V permit incorporates by reference an applicable requirement, the Title V permit must unambiguously describe how the incorporated requirement applies to emission units at the Title V source. *White Paper 2* at 37 ("Any information . . . incorporated by reference must be accompanied by a description or identification of the current activities, requirements, or equipment for which the information is referenced."). A Title V permit that fails to explain how an incorporated applicable requirement applies to emission units at the permitted source is deficient. 40 C.F.R. § 70.6(a)(1); *Deer Park Order* at 14 (objecting to Title V permits because "Petitioners demonstrated that the permit records did not establish what emission units" applicable permits "apply to.").

3. Inadequacy of the Permit Term

Permit No. 80799 authorizes planned MSS activities and emissions at the Borger Refinery. Such activities and emissions are authorized for many units subject to requirements in previously issued permits. *See*, Public Comments, Attachment 1 (Permit No. 80799), Attachment 1 (Facility list). The Proposed Permit, however, does not include any information about applicable requirements in Permit No. 80799 and instead incorporates the permit by reference in its entirety.

While the Proposed Permit's New Source Review Authorization References by Emissions Unit attachment identifies units subject to requirements in various other NSR permits issued for the Borger Refinery, it does not identify any unit as subject to requirements in Permit No. 80799. Proposed Permit at 281-297. Accordingly, the Proposed Permit is deficient because it is completely opaque as to how requirements in Permit No. 80799 apply to units at the Borger Refinery. 42 U.S.C. § 7661c(a) and (c); 40 C.F.R. § 70.6(a) and (c); *Deer Park Order* at 11-17.

Similarly, the Proposed Permit's New Source Review Authorization References by Emissions Unit attachment is incomplete because it omits the following facilities and/or emission points authorized by and subject to regulation under Permit No. 80799: 66FL4, MSS-VAC, MSS-AIRMOVERS, MSS-BLAST, MSS-FRAC, MSS-VES, MSS-MAINTACT, MSS-EQP, MISC-MSS, MSS-DRAINING, MSS-CHEM, MSS-TANK, F-68-4A, F-68-4B, F-68-4C, F-68-4D, F-68-4E, F-68-4F, F-68-4G, and F-68-4H. Public Comments, Attachment 1, MAERT. Because the Proposed Permit fails to identify these facilities and/or emission points as part of the Title V source covered by the Proposed Permit, it also fails to put readers on notice that incorporated requirements in Permit No. 80799 apply to these units. Because this is so, the Proposed Permit does not identify and assure compliance with all applicable requirements.

4. Issues Raised in Public Comments

Petitioners raised this issue on page 23 or their Public Comments.

5. Analysis of State's Response

The Executive Director makes the following response to Petitioners' demonstration that the Proposed Permit fails to explain how requirements in Permit No. 80799 apply to emission units at the Borger Refinery:

> The MSS requirements are part of the underlying NSR permit and have no additional unique MSS requirements listed in the FOP other than by incorporation

> of the underlying NSR authorization in the FOP. The only exception would be if either a federally enforceable rule or a State SIP requirement included an MSS applicable requirement unique to that specific rule.

Response to Comments at 31.

Despite diligent efforts to make heads or tails of this response, Petitioners have come up empty. Whatever this paragraph might mean, it does not rebut Petitioners' demonstration that the Proposed Permit (1) fails to identify a single emission unit subject to requirements in Permit No. 80799; and (2) that the Proposed Permit fails to identify several emission points and/or facilities authorized by Permit No. 80799 as part of the Title V source subject to requirements in the Proposed Permit. Accordingly, the Executive Director's response to comments is incomplete and the Administrator must object to the Proposed Permit.

V. CONCLUSION

For the foregoing reasons, and as explained in Petitioners' timely-filed public comments, the Proposed Permit is deficient. The Executive Director's Response to Comments also failed to address Commenters' significant comments. Accordingly, the Clean Air Act requires the Administrator to object to the Proposed Permit.

Sincerely,

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