BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION NO. VI-2015-12
	)	
DOW CHEMICAL COMPANY	)	ORDER RESPONDING TO
DOW SALT DOME OPERATIONS	)	PETITION REQUESTING AN
BRAZORIA COUNTY, TEXAS	)	OBJECTION TO THE ISSUANCE OF A
PERMIT NO. O2212	)	TITLE V OPERATING PERMIT
	)	
ISSUED BY THE TEXAS COMMISSION ON	)	
ENVIRONMENTAL QUALITY	)	
	)	

ORDER GRANTING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition on August 31, 2015 (the Petition) from the Environmental Integrity Project and Sierra Club (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to the proposed operating permit No. O2212 (the Proposed Permit or Permit) issued by the Texas Commission on Environmental Quality (TCEQ) to the Dow Chemical Company. (Dow or the facility) in Brazoria County, Texas. The operating permit was issued pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and Title 30, Chapter 122 of the Texas Administrative Code (TAC). *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further below, the EPA grants the Petition requesting that the EPA Administrator object to the Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(l) of the CAA, 42 U.S.C. § 766la(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. The state of Texas submitted a title V program governing the issuance of operating permits on September 17, 1993. The EPA granted interim approval of Texas's title V operating permit program in 1996, and granted full approval in 2001. *See* 61 Fed. Reg. 32693 (June 25, 1996) (interim approval effective July 25, 1996); 66 Fed. Reg. 63318 (December 6, 2001) (full approval effective November 30, 2001). This program is codified in 30 TAC Chapter 122.

All major stationary sources of air pollution and certain other sources are required to apply for and operate in accordance with title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. CAA §§ 502(a), 503, 504(a), 42 U.S.C. §§ 7661a(a), 7661b, 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* CAA § 504(c), 42 U.S.C. § 7661c(c). One purpose of the title V program is to "enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." 57 Fed. Reg. at 32251. Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the source's emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements.

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of the EPA's 45-day review period, petition the Administrator to object to the permit. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(l).[1] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[2]

The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," under which the

[1] *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (*NYPIRG*).

[2] *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *cf. NYPIRG*, 321 F.3d at 333 n.11.

Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).[3] When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g.*, *MacClarence*, 596 F.3d at 1130–31.[4] Certain aspects of the petitioner's demonstration burden are discussed below. A more detailed discussion can be found in *In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the state's response to comments), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.[5] Another factor the EPA examines is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for the petitioner's objection, contrary to Congress's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.").[6] Relatedly, the EPA has pointed out in numerous previous orders that general

[3] *See also Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' . . . plainly mandates an objection *whenever* a petitioner demonstrates noncompliance." (emphasis added)).
[4] *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.
[5] *See also, e.g.*, *Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. App'x *11, *15 (2d Cir. 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012) (denying a title V petition issue where petitioners did not respond to the state's explanation in response to comments or explain why the state erred or why the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007) (*Georgia Power Plants Order*) (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).
[6] *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (September 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked

assertions or allegations did not meet the demonstration standard. *See, e.g.*, *In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013).[7] Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g.*, *In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).[8]

The information that the EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) on a proposed permit generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement of basis for the draft and proposed permits; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; relevant supporting materials made available to the public according to 40 C.F.R. § 70.7(h)(2); and all other materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). If a final permit and a statement of basis for the final permit are available during the agency's review of a petition on a proposed permit, those documents may also be considered as part of making a determination whether to grant or deny the petition.

If the EPA grants an objection in response to a title V petition, a permitting authority may address the EPA's objection by, among other things, providing the EPA with a revised permit. *See, e.g.*, 40 C.F.R. § 70.7(g)(4). However, as explained in the *Nucor II Order*, a new proposed permit in response to an objection will not always need to include new permit terms and conditions. For example, when the EPA has issued a title V objection on the ground that the permit record does not adequately support the permitting decision, it may be acceptable for the permitting authority to respond only by providing additional rationale to support its permitting decision. *Id*. at 14 n.10. In any case, whether the permitting authority submits revised permit terms, a revised permit record, or other revisions to the permit, the permitting authority's response is generally treated as a new proposed permit for purposes of CAA § 505(b) and 40 C.F.R. § 70.8(c) and (d). *See Nucor II Order* at 14. As such, it would be subject to the EPA's opportunity to conduct a 45-day review per CAA § 505(b)(1) and 40 C.F.R. § 70.8(c), and an opportunity to petition under CAA § 505(b)(2) and 40 C.F.R. § 70.8(d) if the EPA does not object. The EPA has explained that treating a state's response to an EPA objection as triggering a new EPA review period and a new petition opportunity is consistent with the statutory and regulatory process for addressing objections by the EPA. *Nucor II Order* at 14–15. The EPA's view that the state's response to an EPA objection is generally treated as a new proposed permit

---

required monitoring); *In the Matter of Portland Generating Station*, Order on Petition at 7 (June 20, 2007) (*Portland Generating Station Order*).

[7] *See also Portland Generating Station Order* at 7 ("[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement]."); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (April 20, 2007); *Georgia Power Plants Order* at 9–13; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (March 15, 2005).

[8] *See also In the Matter of Hu Honua Bioenergy*, Order on Petition No. IX-2011-1 at 19–20 (February 7, 2014); *Georgia Power Plants Order* at 10.

does not alter the procedures for the permitting authority to make the changes to the permit terms or condition or permit record that are intended to resolve the EPA's objection, however. When the permitting authority modifies a permit in order to resolve an EPA objection, it must go through the appropriate procedures for that modification. For example, when the permitting authority's response to an objection is a change to the permit terms or conditions or a revision to the permit record, the permitting authority should determine whether its response is a minor modification or a significant modification to the title V permit, as described in 40 C.F.R. § 70.7(e)(2) and (4) or the corresponding regulations in the state's EPA-approved title V program. If the permitting authority determines that the modification is a significant modification, then the permitting authority must provide for notice and opportunity for public comment for the significant modification consistent with 40 C.F.R. § 70.7(h) or the state's corresponding regulations.

When a permitting authority responds to an EPA objection, it may choose to do so by modifying the permit terms or conditions or the permit record with respect to the specific deficiencies that the EPA identified; permitting authorities need not address elements of the permit terms or conditions or the permit record that are unrelated to the EPA's objection. As described in various title V petition orders, the scope of the EPA's review (and accordingly, the appropriate scope of a petition) on such a response would be limited to the specific permit terms or conditions or elements of the permit record modified in that permit action. *See In The Matter of Hu Honua Bioenergy, LLC*, Order on Petition No. VI-2014-10 at 38–40 (September 14, 2016); *In the Matter of WPSC, Weston*, Order on Petition No. V-2006-4 at 5–6, 10 (December 19, 2007).

C. New Source Review

The major New Source Review (NSR) program is comprised of two core types of preconstruction permit requirements for major stationary sources. Part C of title I of the CAA establishes the Prevention of Significant Deterioration (PSD) program, which applies to new major stationary sources and major modifications of existing major stationary sources for pollutants for which an area is designated as attainment or unclassifiable for the national ambient air quality standards (NAAQS) and for other pollutants regulated under the CAA. CAA §§ 160–169, 42 U.S.C. §§ 7470–7479. Part D of title I of the Act establishes the major nonattainment NSR (NNSR) program, which applies to new major stationary sources and major modifications of existing major stationary sources for those NAAQS pollutants for which an area is designated as nonattainment. CAA §§ 171–193, 42 U.S.C. §§ 7501–7515. The EPA has two largely identical sets of regulations implementing the PSD program. One set, found at 40 C.F.R. § 51.166, contains the requirements that state PSD programs must meet to be approved as part of a state implementation plan (SIP). The other set of regulations, found at 40 C.F.R. § 52.21, contains the EPA's federal PSD program, which applies in areas without a SIP-approved PSD program. The EPA's regulations specifying requirements for state NNSR programs are contained in 40 C.F.R. § 51.165.

While parts C and D of title I of the Act address the major NSR program for major sources, section 110(a)(2)(C) addresses the permitting program for new and modified minor sources and for minor modifications to major sources. The EPA commonly refers to the latter program as the "minor NSR" program. States must also develop minor NSR programs to attain and maintain the

NAAQS. The federal requirements for state minor NSR programs are outlined in 40 C.F.R §§ 51.160 through 51.164. These federal requirements for minor NSR programs are less prescriptive than those for major sources, and, as a result, there is a larger variation of requirements in EPA-approved state minor NSR programs than in major source programs.

The EPA has approved Texas's PSD, NNSR, and minor NSR programs as part of its SIP. *See* 40 C.F.R. § 52.2270(c) (identifying EPA-approved regulations in the Texas SIP). Texas's major and minor NSR provisions, as incorporated into Texas's EPA-approved SIP, are contained in portions of 30 TAC Chapters 116 and 106.

III. BACKGROUND

A. The Dow Salt Dome Facility

The Dow Salt Dome operations facility is owned by Dow Chemical and is located in Brazoria County, Texas. The facility consists of pipelines and approximately 60 storage caverns used for storing materials including ethylene, propylene, propane, butane, naptha, liquified petroleum gas, and pyrolysis gasoline. Material is moved in and out of the caverns by adjusting the amount of brine within. Waste gas from filling, well de-pressurizing, and other maintenance is controlled through flares.

B. Permitting History

TCEQ issued an initial title V permit to Dow for the facility on July 7, 2003. On October 1, 2013, Dow submitted an application to renew the title V permit. TCEQ provided a public notice and comment period for the draft permit beginning on June 12, 2014. TCEQ submitted the proposed permit to EPA for its 45-day review on May 19, 2015. The EPA's 45-day review period ended on July 3, 2015, during which time the EPA did not object to the proposed permit. TCEQ issued the final title V renewal permit for the facility on July 15, 2015.

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The EPA's 45-day review period expired on July 3, 2015. Thus, any petition seeking the EPA's objection to the Proposed Permit was due on or before September 2, 2015. The Petition was received on August 31, 2015, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Claim A: The Petitioners Claim That the Permit Improperly Incorporates Confidential Operational Limits.

Petitioners' Claim: The Petitioners claim that the Proposed Permit is objectionable because it improperly incorporates confidential limits. The Petitioners state that the Proposed Permit

incorporates by reference all the requirements of New Source Review Permit No. 22072 (NSR Permit). Petition at 2, citing Proposed Permit, Special Condition 14(a). The NSR Permit establishes hourly and annual injection rates for liquefied petroleum gas, pyrolysis gasoline, propane, and naptha, however, these injection rate limits are not directly listed in the NSR Permit. Instead the NSR Permit indicates that the injection rates shall be limited to the quantities specified in Table 2 of a "confidential application submitted October 18, 2006." Petition at 2 citing to NSR Permit No. 22072, Special Condition 2. The Petitioners assert that the "injection rate limitations are federally enforceable permit terms that must be publicly available and listed in the Proposed Permit." Petition at 2.

Petitioners state that pursuant to 40 C.F.R. § 70.6(a)(1), the title V permit must include all "[e]mission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements" and that those terms and conditions are enforceable by the EPA and citizens. Petition at 3, citing to 40 C.F.R. § 70.6(a)(1) and 70.6(b)(1). The Petitioners assert that confidential operating limits are not practicably enforceable.

The Petitioners also claim that "title V permit applications, compliance plans, compliance monitoring reports, certifications, and the permits themselves must be 'available to the public". Petition at 3 citing to 40 U.S.C. §7661b(e). The Petitioners acknowledge that the Act protects some application information from disclosure but states the contents of a permit are not entitled to that protection. Petition at 3.

The Petitioners object to TCEQ's response which stated that the table can be confidential because the referenced injection rates are not emissions limits, are not necessary for calculating emissions rates and therefore not emission data as defined by 40 C.F.R. §2.301(a)(2)(i). The Petitioners state that this response is insufficient as it does not address the Petitioners' claim based on 42 U.S.C. §7661b(e) which provides that title V permit terms shall be available to the public and that the contents of a permit shall not be entitled to protection under 7414(c) of this title.[9]

The Petitioners also do not agree with TCEQ's assessment that the injection rate limits should not be considered emission data because the Petitioners assert that short-term emission limits in NSR Permit No. 22072 are based on injection rates rather than unloading rates. In support of its assertion, the Petitioners cite to a Permit Alteration and Technical Review document which states in the description of the project overview, that "[a]n alteration request letter … was received from Dow asking that the limitations on unloading rates be removed since short-term emissions are determined by injection rates … and injection rates are independent of unloading rates. (VOC

[9] 42 U.S.C. §7414(c) states that any records, reports or information obtained under subsection (a) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

from displaced brine going to the flare), and injection rates are independent of unloading rates (pipeline export can occur simultaneously with marine unloading and injection). Limitations on injection rates will remain in effect… No emission rates are dependent upon unloading rates." Petition at 4.

EPA's Response: For the following reasons, the EPA grants the Petitioners' request for an objection on this claim.

The CAA provides that certain documents created pursuant to the title V permitting program, including the permit application, be made available to the public but also allows some protections for confidential information. This protection, however, is not absolute as the types of information that may be treated as confidential, and therefore withheld from the public, is limited. Specifically, "[t]he contents of a permit shall not be entitled to [confidential] protection under section 7414(c) of this title." CAA §503(e).[10] *See* also 40 C.F.R. § 70.4(b)(3)(viii). Contents of a title V permit include "emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." 40 C.F.R. §70.6(a)(1). Further, "terms and conditions in a part 70 permit… are enforceable by the Administrator and citizens under the Act." 40 C.F.R. §70.6(b)(1). In addition to the title V program requirements, confidentiality is also addressed in the EPA's regulations governing the disclosure of records under the Freedom of Information Act (FOIA). Pursuant to those requirements, information which is considered emission data, standard or limitations are also not entitled to confidential treatment. *See* 40 C.F.R. §2.301(f).

The information that the Petitioners seek to have disclosed is found in the confidential section of an application for an NSR permit. The NSR permit explicitly references this confidential section in setting the injection limits. TCEQ's rules address NSR permit applications and state that the representations with regard to construction plans and operation procedures in an application for a permit are one of the conditions upon which a permit is issued. *See* 30 TAC 116.116(a). Therefore, as explained by TCEQ, "the permit application, and all representations in it, is part of the permit when it is issued and as such is enforceable." 79 Fed. Reg. 8368, 8385 (February 12, 2014). Relying on this assessment, the application for NSR Permit 22072 is an enforceable part of the NSR Permit that has then been incorporated into the Proposed Permit as an applicable requirement. *See* 40 C.F.R. §70.2, defining applicable requirements to include "any term or condition of any preconstruction permits."

The EPA has previously evaluated the use of confidential requirements in permits issued by TCEQ. *See In the Matter of ExxonMobil Corporation, Baytown Refinery*, Order on Petition No. VI-2016-14 (April 2, 2018) (Baytown Order). The EPA acknowledged that potential conflict exists between TCEQ's regulatory scheme and the CAA mandate that does not afford confidential protections to the contents of a permit. The EPA stated that "this potential conflict should be mitigated if no portions of the confidential section of a permit application establish

[10] Section 114(c) of the CAA provides protection of certain confidential trade secret information – but not emissions data – from disclosure. *See* 42 U.S.C. § 7414(c). The EPA's regulations at 40 C.F.R. § 2.301(a)(2)(i)(B) define "emission data" to include "Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source)."

what would otherwise be treated as binding, enforceable permit terms (e.g., emission limits, operating limits, work practice standards, etc.), or any other type of "emission data" (as defined in 40 C.F.R. § 2.301(a)(2)(i)(B)) necessary to assure compliance with an applicable requirement or permit term." Baytown Order at 8-9. The Baytown Order denied the claim regarding confidential information (Claim A), relying on evidence that the permit terms referencing confidential information were removed from the most recent version of the NSR permit and replaced with non-confidential terms, making the provisions at issue redundant and no longer applicable. Baytown Order at 9-10. TCEQ and the source were in the process of incorporating the revised NSR permit into the title V permit. *Id.* EPA does not have comparable evidence for the permits at issue for the Dow Salt Dome Facility.

Here, the Permit Alteration and Technical Review document referenced above as well as the language of Special Condition 2, which states "Injection rates into the respective wells *shall be limited* to the following"[11] indicate that the confidential information that is referenced in Special Condition 2 of the NSR Permit and subsequently incorporated into the title V permit establishes binding requirements governing operations during the filling of specified wells. *See also* NSR Permit No. 22072 Special Condition 1 which precedes Special Condition 2 and states "*This permit authorizes emissions only from* those points listed in the attached table entitled Emission Sources – Maximum Allowable Emission Rates, and the facilities covered by this permit are authorized to emit subject to the emission rate limits on that table *and other operating conditions specified in this permit*." (emphasis added). This is consistent with TCEQ's explanation that the NSR permit application becomes an enforceable part of the NSR permit upon permit issuance. Since the limitations from the NSR permit and associated application are incorporated into the title V permit, these injection rates are part of the contents of the title V permit. Further, as these limitations are applicable requirements for purposes of title V, they must be enforceable by citizens in addition to the EPA. *See* 40 C.F.R. § 70.6(b)(1). Because the injection rates are confidential, the public does not know what these applicable requirements are, significantly hampering the ability of citizens to enforce these conditions.

TCEQ has argued that the limits on injection rates are not emission limits, are not necessary for calculating emission rates and, therefore, do not constitute emission data and should be afforded confidential protection. However, as the Petitioners have pointed out, the Permit Alteration and Technical Review document constitutes evidence in the record indicating that these injection rates are used to determine short term emissions. TCEQ has not pointed to any evidence in the record to contradict this information or to explain why the injection rates continue to be required by the NSR permit.

Direction to TCEQ

TCEQ should revise the title V Permit so confidential information is not included as a binding limit in the title V permit. This could be done by updating the underlying NSR permit to include the injection rates and amending the title V permit to incorporate this NSR permit revision or the specific injection rates could be included directly in the title V permit. The EPA understands that TCEQ is currently evaluating the necessity of these limits. If TCEQ determines these limits are not required provisions, and, thus, are not applicable requirements, then it could convey that

[11] *See* NSR Permit No. 22072, Special Condition 2 (emphasis added).

conclusion to the facility and coordinate processing an updated title V application and title V permit to remove the limits and any associated confidential information from the title V permit. Regardless of the chosen path forward, TCEQ should ensure that the record clearly demonstrates the purpose of the injection rates and if they are needed or not. If they are not needed, TCEQ should also provide an explanation as to what circumstances changed since the Permit Alteration Technical Review document was drafted and identify the provisions that regulate the source emissions in lieu of the injection rate limitations.

V. CONCLUSION

For the reasons set forth above and pursuant to CAA § 505(b)(2) and 40 C.F.R. § 70.8(d), I hereby grant the Petition as described above.

Dated: FEB 18 2020

Andrew R. Wheeler
Administrator