BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF OAK GROVE MANAGEMENT COMPANY OAK GROVE STEAM ELECTRIC STATION ROBERTSON COUNTY, TEXAS PERMIT NO. O2942 ISSUED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY	)	PETITION NO. VI-2017-12 ORDER RESPONDING TO PETITION REQUESTING OBJECTION TO THE ISSUANCE OF TITLE V OPERATING PERMIT

ORDER GRANTING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated July 25, 2017, (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 EPA Administrator object to the proposed operating permit No. O2942 (the Permit) issued by the Texas Commission on Environmental Quality (TCEQ) to the Oak Grove Steam Electric Station (Oak Grove or the facility) in Robertson County, Texas. The operating permit was issued pursuant to title V of the CAA, 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, 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 EPA an operating permit program to meet the requirements of title V of the CAA and 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. 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). This program, which became effective on November 30, 2001, 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. 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* 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) 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 EPA for review. 42 U.S.C. § 7661d(a). Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the proposed permit if EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of EPA's 45-day review period, petition the Administrator to object to the permit. 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). 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. 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 EPA.[2]

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[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.

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 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 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*).

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. 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 EPA examines is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, 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, EPA has pointed

[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

out in numerous previous orders that general 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 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) (*Homer City Order*).[8]

The information that EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. 40 C.F.R. § 70.13. 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 required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis'); any comments the permitting authority received during the public participation process on the draft permit; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; and all 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). *Id.* 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 when making a determination whether to grant or deny the petition. *Id.*

If EPA grants a title V petition, a permitting authority may address EPA's objection by, among other things, providing EPA with a revised permit. *See, e.g.*, 40 C.F.R. § 70.7(g)(4); *see generally* 81 Fed. Reg. 57822, 57842 (August 24, 2016) (describing post-petition procedures); *Nucor II Order* at 14–15 (same). In some cases, the permitting authority's response to an EPA objection may not involve a revision to the permit terms and conditions themselves, but may instead involve revisions to the permit record. For example, when 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 an additional rationale to support its permitting decision.

When the permitting authority revises a permit or permit record in order to resolve an EPA objection, it must go through the appropriate procedures for that revision. 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

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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.

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.

In any case, whether the permitting authority submits revised permit terms, a revised permit record, or other revisions to the permit, and regardless of the procedures used to make such revision, 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 EPA's 45-day review per CAA § 505(b)(1) and 40 C.F.R. § 70.8(c), and an opportunity for the public to petition under CAA § 505(b)(2) and 40 C.F.R. § 70.8(d) if EPA does not object during its 45-day review period.

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 EPA identified; permitting authorities need not address elements of the permit or the permit record that are unrelated to EPA's objection. As described in various title V petition orders, the scope of 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. 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. 42 U.S.C. §§ 7501–7515. 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 EPA's federal PSD program, which applies in areas without a SIP-approved PSD program. 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. EPA commonly refers to the latter program as the "minor NSR" program. States must also develop minor NSR programs to, along with the major source programs, 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.

EPA has approved Texas's PSD, NNSR, and minor NSR programs as part of its SIP. See 40 C.F.R. § 52.270(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 Oak Grove Steam Electric Station Facility

The Oak Grove Steam Electric Station Facility, located in Robertson County, Texas, is an electric utility power plant consisting of two lignite-fired pulverized coal boilers and ancillary equipment. The facility is a major source of volatile organic compounds (VOCs), sulfur dioxide (SO_2), particulate matter (PM), nitrogen oxides (NOx), hazardous air pollutants, and carbon monoxide (CO), and is subject to title V of the CAA. Emission units within the facility are also subject to the PSD program, other preconstruction permitting requirements, and various New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants.

B. Permitting History

Oak Grove Management company LLC (Oak Grove) applied for a title V permit for the Oak Grove Steam Electric Station Facility in 2007. TCEQ noticed the draft permit on August 3, 2016, subject to a public comment period ending September 4, 2016. On April 7, 2017, TCEQ transmitted the Proposed Permit, along with its Response to Comments and Statement of Basis, to EPA for its 45-day review. EPA's 45-day review period started on April 11, 2017, and ended on May 26, 2017, during which time EPA did not object to the Proposed Permit. TCEQ issued the final title V permit for the Oak Grove Steam Electric Station Facility on June 6, 2017 (Permit).

C. Timeliness of Petition

Pursuant to the CAA, if 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). EPA's 45-day review period expired on May 26, 2017. Thus, any petition seeking EPA's objection to the Proposed Permit was due on or before July 25, 2017. The Petition was received July 25, 2017, and, therefore, EPA finds that the Petitioners timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Claim A: The Petitioners Claim That "The Proposed Permit Omits Enforceable Requirements in Oak Grove's Written Maintenance, Startup, and Shutdown Plan."

Petitioners' Claim: The Petitioners claim generally that "[t]he proposed permit is deficient because it fails to include federally enforceable requirements in Oak Grove's written Maintenance, Startup, and Shutdown Plan ("MSS Plan")." Petition at 4. The requirement to develop a MSS plan is found in Oak Grove's PSD Permit, which states:

> The holder of this permit shall operate the PC boilers and associated air pollution control equipment in accordance with good air pollution control practice to minimize emissions during MSS, by operating in accordance with a written MSS plan. The plan shall include detailed procedures for review of relevant operating parameters of the PC boiler and associated air pollution control equipment during MSS to make adjustments and corrections to reduce or eliminate any excess emissions. The plan shall also address readily foreseeable startup scenarios, including hot startups, when the operation of the boiler is only temporarily interrupted, and provide for appropriate review of the operational condition of the boiler before initiating startup. In addition, the plan shall address procedures for minimizing opacity and PM emissions while conducting on-line maintenance of the PC boiler or its control equipment.

Special Condition No. 16, PSD Permit No. 76474/PSDTX1056.

The Petitioners contend that because the MSS plan is an enforceable requirement of a major NSR permit, the operating requirements and emission limits the MSS plan contains must be listed on the face of the Proposed Permit and may not simply be incorporated by reference (IBR). Petition at 5 (citing to *In the Matter of Premcor Refining Group,* Order on Petition No. VI-2007-02 (May 28, 2009) at 5-6 (objecting to Texas's use of IBR for major NSR permit requirements) (*Premcor Order*). The Petitioners assert that, as a matter of policy, EPA has allowed TCEQ to incorporate by reference minor NSR permit requirements but has been clear that major NSR permit requirements, which the Petitioners assert include the requirements of the MSS plan, must be included on the face of, or as an attachment to, the Proposed Permit. Petition at 6 (citing to *Premcor Order* at 6).

In particular, the Petitioners assert that "Title V permits must include and assure compliance with PSD permit requirements, including Best Available Control Technology ("BACT") requirements." Petition at 5 (citing to 42 U.S.C. § 7661c(a); 40 C.F.R. §§ 70.2, 70.6(a)(1); *In the Matter of Southwestern Electric Power Company, H.W. Pirkey Power Plan,* Order on Petition No. VI-2014-01 (February 3, 3016) at 8). The Petitioners contend that based on TCEQ's technical review document, the provisions of the MSS plan are part of the BACT control strategy for the facility. Petition at 6. The Petitioners cite Permit No. 76474 Review Analysis & Technical Review, signed February 22, 2006, at 6 (Technical Review Document), which states, in part:

CONTROL TECHNOLOGY – Best Available Control Technology (BACT)
A. PC Boilers

PC Boiler Startup/Shutdown emissions are proposed to be included in the permit maximum allowable emission rate table. The applicant has agreed to develop a written plan to minimize emissions during startups and shutdowns. In addition, the applicant agrees to operate the scrubber from the initiation of oil firing during startup and not to bypass the baghouse while firing lignite. While preheating the baghouse, care will need to be taken to prevent the exhaust from oil firing from damaging (blinding) the bags.

PSD Permit No. 76474 Review Analysis & Technical Review, signed February 22, 2006 at 6.

Petitioners conclude, "Because the MSS Plan is a BACT requirement established by Oak Grove's PSD Permit, it must be included in the Proposed Permit." Petition at 6 (citing to 40 C.F.R. § 70.6(a)(1) and *In the Matter of WE Energies Oak Creek Power Plant,* Order Objecting to Permit No. 241007690-P10 (June 12, 2009) at 25) (*Oak Creek Order*)).

TCEQ provided responses to the Petitioners' underlying comment on the draft permit, but the Petitioners disagree with those responses. First, TCEQ asserted that comments concerning MSS conditions are beyond the scope of the title V review process. The Petitioners reply that this response mischaracterizes their comment. They explained that their comment demonstrated that federally enforceable requirements established through the PSD permitting process have been omitted from the Proposed Permit, which is a title V issue. Petition at 7. TCEQ's second response was that nothing in Texas's SIP or federal regulations requires that the MSS plan be made part of the NSR or draft Permit. The Petitioners reply that TCEQ is incorrect because the CAA and EPA regulations require each title V permit to include and assure compliance with all applicable requirements. TCEQ also stated that Texas regulations only require an operator to submit a technical plan for any scheduled maintenance, startup, or shutdown activity when requested by the executive director. The Petitioners reply that these regulations are irrelevant because the MSS plan is an applicable requirement that must be included in the Proposed Permit. Petition at 8. Lastly, TCEQ stated that all relevant requirements to assure compliance with operating under MSS conditions are already explicitly stated in the PSD Permit in Special Conditions 15 through 20, [and] Attachments B and C. The Petitioners reply that this response does not address their contention that the Proposed Permit is deficient because it omits enforceable requirements in the MSS plan. The Petitioners assert that these federally-enforceable requirements include "detailed procedures for review of relevant operating parameters of the PC boiler and associated air pollution control equipment during MSS to make adjustments and corrections to reduce or eliminate any excess emissions…" and "procedures for minimizing opacity and PM emissions while conducting on-line maintenance of the PC boiler or its control equipment." Petition at 9 (citing to PSD Permit Special Condition 16).

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

EPA Analysis

The CAA requires that title V permits include emissions limitations and standards and a compliance schedule and such other conditions as are necessary to assure compliance with "applicable requirements," including monitoring, recordkeeping, and reporting conditions. CAA

§ 504(a), (c); 40 C.F.R. §§ 70.6(a)(1), (3), 70.6(c)(1). EPA has recognized that some conditions need not be specifically, expressly restated and set out, in full, in a permit but may—in appropriate circumstances—be incorporated by reference in permits. *White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program*, 40 (March 5, 1996) (*White Paper Number 2*) at 38; *see also In the Matter of Tesoro Refining and Marketing,* Order on Petition No. IX-2004-6 (March 15, 2005) (*Tesoro Order)* at 8. However, the benefits achieved through incorporating by reference must be balanced with the need to issue comprehensive, unambiguous permits useful to all affected parties. *Id*. EPA's expectations for what requirements may be referenced and for the necessary level of detail are guided by CAA Sections 504(a) and (c) and corresponding provisions at 40 C.F.R. § 70.6(a)(1) and (3). *Tesoro Order*, at *8.* Generally, EPA expects that title V permits will explicitly state all emission limitations and operational requirements for all applicable emission units at the facility. *Id.* Permitting authorities may reference the details of those limits and other requirements rather than reprinting them in permits provided that (i) applicability issues and compliance obligations are clear, and (ii) the permit contains any additional terms and conditions necessary to assure compliance with all applicable requirements. *Id.* The cited requirement should also be part of the public docket or readily available. *See Tesoro Order* at 9.

The Petitioners assert that because the MSS plan is a required condition of a major NSR permit, the operational requirements and emission limits it contains must be included on the face of the title V permit and not incorporated by reference. The Petitioners state that based on a previous Order, EPA's policy is that major NSR permit requirements may not be incorporated by reference into Texas title V permits. Petition at 6 (citing to the *Premcor Order*). However, the Petitioners have taken an overly broad reading of the Premcor Order. EPA did state that its decision approving the use of IBR in Texas' program was limited to, and specific to, minor NSR permits and permits by rule (PBR) in Texas, but did not go as far to say that *all* conditions of a major NSR permit must be included on the face of the title V permit rather than incorporated by reference. *See also In the Matter of Shell Chemical LP,* Order on Petition Nos. VI-2014-04 and VI-2014-05 (September 24, 2015) at 9. That is not to say that requirements of the MSS plan need not be included on the face of the permit, only that further analysis is required. That analysis is case-specific and begins by determining if the MSS plan is one that is required to be included in the permit at all (whether by incorporation by reference or otherwise).

When evaluating whether plans should be included in permits, EPA has stated that only plans (or portions of plans) that are necessary to impose an applicable requirement or assure compliance with an applicable requirement need be included in a title V permit or included in a permit application and available for public review. *See In the Matter of Kentucky Syngas, LLC,* Order on Petition No. IV-2010-9 at 11–14 (June 22, 2012) (*Kentucky Syngas Order*); *In the Matter of Cash Creek Generation, LLC,* Order on Petition No. IV-2010-4 at 11–12 (June 22, 2012) (*Cash Creek II Order)*; *In the Matter of EVRAZ Rocky Mountain Steel*, Order on Petition No. VIII-2011-01 at 7–8 (May 31, 2012); *In the Matter of Alliant Energy, WPL Edgewater Generating Station*, Order on Petition No. V-2009-02 at 12–14 (August 17, 2010) (*Edgewater Order*); *Oak Creek Order* at 24–25. *See* also CAA § 504(a), (c); 40 C.F.R. §§ 70.5(c), 70.6(a)(1), 70.6(c)(1). Determining whether the provisions of a specific plan must be included in (or incorporated into) a permit is necessarily a fact-specific inquiry depending on the nature of the plan and the

relationship between the plan and the underlying legal authority and permit terms giving rise to the plan. *See, e.g., Cash Creek II Order* at 11; *Edgewater Order* at 12.

Central to EPA's evaluation of whether the Agency must object to the issuance of a title V permit in response to a petitioner's assertion that such plans must be included in the permit is the petitioner's demonstration burden. Accordingly, EPA has denied claims where "the Petitioners have not demonstrated that the . . . plan's content is needed to impose an applicable requirement or as a compliance assurance measure." *Kentucky Syngas Order* at 11. More specifically, EPA has denied claims where petitioners did not include any specific discussion of the nature and purpose of the plan; where petitioners did not identify any legal requirement directing a source to prepare and implement a plan; and where petitioners did not identify how a state's explanation of a plan was unreasonable. *See Kentucky Syngas Order* at 11–14; *Cash Creek II Order* at 11–12. On the other hand, EPA has granted other claims where petitioners claimed and demonstrated that certain plans "define[d] permit terms" and that the permit relied on other plans "to assure compliance with applicable requirements." *Oak Creek Order* at 24, 25. In either case, the underlying question of whether the provisions of a plan must be included in a facility's title V permit is a fact-specific inquiry and the Petitioner has the burden to demonstrate under the particular relevant circumstances that the plan in question must be included in the permit.

The Petitioners have asserted that provisions of the MSS plan are enforceable requirements of a major NSR permit and part of the BACT control strategy and therefore are applicable requirements. Petition at 6. Applicable requirements include the terms or conditions of a PSD permit including those limits that are established as part of the BACT analysis. 40 C.F.R § 70.2. The permit must contain those limitations and standards, including operational requirements that assure compliance with those BACT requirements. 40 C.F.R. § 70.6(a)(1).

The Petitioners have demonstrated that the requirement to develop and implement the MSS plan is an applicable requirement of the NSR Permit and therefore, the MSS plan needs to be included as part of the title V permit. In order to comply with the Permit, Oak Grove must not only develop the MSS plan, but must operate the PC boilers and associated air pollution control equipment "in accordance with a written MSS plan," which must include detailed procedures. *See* PSD Permit Special Condition 16. *See also, Oak Creek Order* at 25 (finding that the startup/shutdown plan contained operational requirements and limitations applicable to the startup and shutdown operations that exceed the opacity limit, therefore, the plan must be included in the permit.) Moreover, the Technical Review Document cited by the Petitioners includes the plan as part of the BACT strategy to minimize emissions during startup and shutdown. *See* Technical Review Document at 6. This further indicates that the MSS plan includes additional operational requirements for Oak Grove to follow during periods of maintenance, startup and shutdown in order to assure compliance with BACT. As noted previously, requirements necessary to impose or demonstrate compliance with applicable requirements, including BACT, must be included in the title V permit. *See* CAA § 504(a), (c); 40 C.F.R. § 70.6(a)(1), 70.6(c)(1). TCEQ stated in its response that all relevant monitoring/testing, recordkeeping, and reporting requirements to assure compliance under MSS conditions are already explicitly stated in the Permit. However, the permit conditions TCEQ cites to do not appear to include procedures for reviewing operating parameters of the boiler and control equipment or procedures for minimizing opacity and PM emissions during maintenance periods

as required by the MSS plan.[9] TCEQ has not shown where the requirements of the MSS plan are in the Permit or Permit record. Nor has TCEQ made any showing to demonstrate that the MSS plan is *not* required to assure compliance with BACT.

Now that EPA has determined that the MSS plan is required to be part of the permit, the next part of the analysis is how the plan should be included. The Petitioners have asserted that because the MSS plan is a condition of the PSD Permit it must be included on the face of the Permit and cannot be incorporated by reference. As noted previously, EPA has not gone as far to say that all conditions of a PSD permit must be on the face of the Permit and may not be incorporated by reference. Regardless of how the plan is included in the Permit, it must be done so in a way that ensures there is sufficient information for EPA, TCEQ, and the public to be able to tell what is required by the plan and how compliance is determined. If the plan is incorporated by reference, in addition to the references being clear and unambiguous, one of the foundational elements of incorporating by reference is the plan must be readily available. *See White Paper Number 2* at 5 (stating that the permitting authority may allow information to be cited or cross-referenced in permits if the information is current and readily available to the permitting agency and to the public). As noted by the Petitioners, TCEQ's response to comments states that Oak Grove is only required to submit the plan to the permitting agency when requested by TCEQ. Petition at 8 (citing TCEQ Response to Comments at 14). For the plan to be readily available, it must be made available as part of the public docket on the permit action or as information available in publicly accessible files located at the permitting authority or on TCEQ online database. *See White Paper Number 2* at 37 n.23. The Petitioners have therefore demonstrated that the plan has not been properly included in the Permit. Under these circumstances, EPA grants this claim.

Direction to TCEQ: In responding to this Order, TCEQ should evaluate what BACT requirements Oak Grove must comply with to minimize emissions during startups and shutdowns and ensure they are clearly identified in the permit. If the MSS plan contains terms that are necessary to impose or demonstrate compliance with applicable requirements, TCEQ should amend the Permit to include those terms directly in the permit or incorporate by reference as appropriate.

Claim B: The Petitioners Claim That "The Proposed Permit Omits Limits and Representations in Oak Grove's Certified Permit by Rule Regulation, which are Applicable Requirements."

The Petitioners assert that the Proposed Permit fails to identify and assure compliance with all applicable requirements because it fails to indicate that the facility is subject to source-specific emission limits established through the PBR certification process. Petition at 11.

[9] In addition to the MSS Plan, the Technical Review Document also provides operational conditions to which the facility has agreed to minimize emissions during startup and shutdown. These include operating the scrubber and not bypassing the baghouse under certain conditions. While TCEQ has stated that the Permit includes all relevant monitoring/testing, recordkeeping, and reporting requirements to assure compliance under MSS conditions, these operational conditions do not appear on the face of the Permit.

The Petitioners note that for projects subject to a PBR, TCEQ's rules allow operators to certify emission rates that are more stringent than the generic limits established in TCEQ's PBR rules in 30 TAC Chapter 106. Petition at 10. The Petitioners assert that these certified PBR emission rates and representations are federally enforceable requirements. *Id*. (citing to 30 TAC 106.6(a))

The Petitioners allege that Oak Grove has certified PBR emission limits for units at the facility in PBR Registrations 106925 and 142258 and note that the Proposed Permit does not contain any condition or table that identifies Oak Grove's certified PBR registrations as applicable requirements.

The Petitioners acknowledge that the Proposed Permit incorporates by reference TCEQ's general PBR rules and identifies various PBRs claimed by Oak Grove but it does not indicate that Oak Grove has requested or "certified" emission rates lower than those allowed by TCEQ's PBR rules, nor does it identify the applicable source-specific emission limits established by certified PBR registrations or which units are subject, or specify how compliance with the limits should be determined. Petition at 11.

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

Under title V of the CAA, EPA's part 70 regulations, and TCEQ's EPA-approved title V program rules, every title V permit must include all applicable requirements that apply to a source, as well as any permit terms necessary to assure compliance with these requirements. *E.g.*, 42 U.S.C. § 7661c(a).[10] "Applicable requirements," as defined in EPA's and TCEQ's rules, include the terms and conditions of preconstruction permits issued by TCEQ, including requirements contained in a PBR that is claimed by a source, as well as source-specific emission limits established through certified registrations associated with PBRs. *See* 40 C.F.R. § 70.2; 30 TAC 122.10(2)(H).

The CAA requirement to include all applicable requirements in a title V permit can be satisfied through the use of incorporation by reference (IBR) in certain circumstances. *See, e.g., White Paper Number 2* (explaining how IBR can satisfy CAA § 504 requirements).[11] When EPA approved the Texas title V program, EPA balanced the streamlining benefits of IBR against the value of a more detailed title V permit and approved TCEQ's use of IBR for minor NSR

[10] CAA section 504(a) requires the following: "Each permit issued under this subchapter shall include enforceable emission limitations and standards, . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan." *Id*; *see also* 40 C.F.R. § 70.6(a)(1) ("Each permit issued under this part shall include the following elements: (1) Emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance."); § 70.3(c)(1) ("For major sources, the permitting authority shall include in the permit all applicable requirements for all relevant emissions units in the major source."); 30 TAC 122.142(2)(B)(i) ("Each permit shall also contain specific terms and conditions for each emission unit regarding the following: . . . the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards.").

[11] In upholding EPA's approval of IBR in Texas, the U.S. Court of Appeals for the Fifth Circuit noted: "Nothing in the CAA or its regulations prohibits incorporation of applicable requirements by reference. The Title V and Part 70 provisions specify *what* Title V permits 'shall include' but do not state *how* the items must be included." *Public Citizen, Inc. v. U.S. E.P.A.*, 343 F.3d 449, 460 (5th Cir. 2003).

requirements (including PBRs), provided the program was implemented correctly. *See* 66 Fed Reg. 63318, 63321–32 (December 6, 2001). EPA stated as a condition of program approval that "PBR are incorporated by reference into the title V permit by identifying . . . the PBR by its section number." *Id*. at 63324. Notably, EPA and TCEQ also agreed as part of the approval process that "PBRs will be cited to the lowest level of citation necessary to make clear what requirements apply to the facility." *Id*. at 63322 n.4. This agreement is consistent with the TCEQ's regulations approved by EPA. *See* 30 TAC 122.142(2)(B)(i) ("Each permit shall also contain specific terms and conditions for each emission unit regarding the following: . . . the *specific regulatory citations* in each applicable requirement or state-only requirement *identifying the emission limitations and standards*." (emphasis added)). This is also consistent with EPA's longstanding position that materials incorporated by reference must be clearly identified in the permit. *See, e.g.*, *White Paper Number 2* at 37 ("Referenced documents must also be specifically identified.").

Turning to the issues raised in the Petition, Condition 11 of the Oak Grove title V permit indicates the following:

> Permit holder shall comply with the requirements of New Source Review authorizations issued or claimed by the permit holder for the permitted area, including permits, permits by rule, [and other types of permits] . . . referenced in the New Source Review Authorization References attachment. These requirements:
>
> A. Are incorporated by reference into this permit as applicable requirements . . .

Thus, the title V permit clearly incorporates those NSR authorizations, including PBRs, that are referenced in the New Source Review Authorization References attachment. In the title V permit, the New Source Review Authorization References table and the New Source Review Authorization References by Emissions Unit table (both part of the aforementioned attachment) include references to PBRs by citing various PBR rule numbers and the effective date of each PBR rule. Therefore, it is clear that the requirements contained within the PBR rules cited in these two tables are incorporated by reference into the title V permit.

However, the title V permit does not appear to incorporate other requirements associated with PBR authorizations that are not directly referenced in the New Source Review Authorization References attachment or elsewhere in the title V permit. For example, as the Petitioners point out, the New Source Review Authorization References attachment contains no reference to registered PBRs that contain requirements (including certified source-specific emission limits) that differ from those contained in the PBR rules that the title V permit does directly reference.[12] Although the registered PBRs containing source-specific emission limits are available online, that does not resolve the question of whether the title V permit itself currently includes or incorporates these requirements.

[12] As the Petitioners point out, this is problematic given that, by their nature, the certified source-specific emission limits contained in registered PBRs are necessarily different than the limits contained in the PBR rules they are associated with. *See* 40 C.F.R. § 70.6(a)(1)(i) ("The permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.").

In sum, because the permit contains no direct reference to certain source-specific requirements (e.g., certified emission limits) derived from registered PBRs, it is not clear that the Permit currently includes or incorporates all requirements that are applicable to the facility, as required by the CAA, EPA's regulations, TCEQ's regulations, the agreements underlying EPA's approval of IBR in Texas, and EPA's longstanding position concerning IBR. Therefore, EPA is granting the Petition with respect to this claim. As discussed further below, however, EPA believes that this issue can, and most likely will, be resolved expeditiously by a straightforward solution that the Agency understands TCEQ to be in the process of implementing.

Direction to TCEQ: In order to resolve EPA's objection on this claim, EPA directs TCEQ to modify the title V permit to incorporate certified PBR registrations in a manner that clearly identifies each registration and the emission unit(s) to which it applies. The most straightforward way to do this would involve a reference to the registration numbers associated with each certified PBR registration. These registration numbers function like permit numbers, as they each identify a specific document that contains the specific requirements that apply to the source, including any certified source-specific emission limits taken per 30 TAC 106.6. Thus, the registration numbers point directly to the specific requirements that are applicable to the source. The registered PBR requirements themselves may be found either online, or in person at the TCEQ file room.[13]

Incorporating certified registration numbers could be accomplished in various ways. EPA understands that TCEQ intends to require permit applicants to fill out a PBR Supplemental Table, which will include registration numbers for all registered PBRs, in all title V applications submitted after August 1, 2020.[14] Further, TCEQ will include the registration numbers in the New Source Review Authorization References by Emission Unit Table with the unit/group/process ID number to which they apply. EPA expects that this practice would conform with TCEQ's EPA-approved regulations, 30 TAC 122.142(2)(B)(i), as well as with the agreements underpinning EPA's approval of the IBR of PBRs—namely that "PBRs will be cited to the lowest level of citation necessary to make clear what requirements apply to the facility." 66 Fed. Reg. at 63322 n.4.

Claim C: The Petitioners Claim That "The Proposed Permit Fails to Assure Compliance with Emission Limits and Operating Requirements Established by Oak Grove's New Source Review Permits Including Permits by Rule."

The Petitioners claim generally that "[t]he Proposed Permit is deficient because it fails to establish monitoring, reporting, and recordkeeping requirements that assure ongoing compliance with emission limits in Oak Grove's NSR permits, including PBRs, that it incorporates by reference and because the permit record does not contain a reasoned explanation supporting the Executive Director's determination that monitoring provisions in the Proposed Permit assure compliance with these requirements." Petition at 14. The Petitioners assert that title V permits must contain monitoring, recordkeeping, and reporting conditions that assure compliance with all

[13] *See https://www.tceq.texas.gov/permitting/air/nav/air_status_permits.html*.
[14] *See* Letter from Tonya Baer, Deputy Director of Air, TCEQ, to David Garcia, Director, Air and Radiation Division, Region 6, U.S. EPA, *Permits by Rule Programmatic Changes* (May 11, 2020 letter).

applicable requirements. *Id*. (citing 42 U.S.C. § 7661c(a), (c); 40 C.F.R. §§ 70.2, 70.6(a)(3), (c)(1); *In the Matter of Wheelabrator Baltimore, L.P.*, Order on Petition, Permit No. 24-510-01886 at 10 (April 14, 2010)). Moreover, the Petitioners contend that the "rationale for the selected monitoring requirements must be clear and documented in the permit record." *Id*. (citing 40 C.F.R. § 70.7(a)(5); *In the Matter of United States Steel, Granite City Works*, Order on Petition No. V-2009-03 at 7–8 (January 31, 2011)). The Petitioners have split Claim C into subparts which evaluate the adequacy of monitoring to assure compliance with PBRs and with other emission limits within Oak Grove's PSD Permit No. 76474/PSDTX1056 (PSD Permit).[15]

Claim C.1: The Petitioners Claim That "Neither the Proposed Permit nor the PBR rules listed in the Proposed Permit's New Source Review Authorization References table specify monitoring methods that assure compliance with applicable PBR emission limits."

The Petitioners claim that the Proposed Permit fails to specify monitoring methods that assure compliance with applicable PBR emission limits. Petition at 17. As an example, the Petitioners contend that PBR 106.472 (9/4/2000) authorizes emissions from six tanks and a loading facility; however, they assert that this PBR only contains a list of chemicals that may be stored and does not specify any specific monitoring requirements. *Id*. The Petitioners claim that the Proposed Permit identifies PBR general requirements found at 30 TAC § 106.472 as applicable requirements and includes Special Condition Nos. 12 and 13, which are related to PBR recordkeeping, but assert that these provisions do not specify which monitoring methods, if any, are necessary to assure compliance with applicable PBR requirements. "Rather these provisions provide a non-exhaustive menu of options that Oak Grove may pick and choose from at its discretion to demonstrate compliance. This broad, non-exhaustive list does not assure compliance with PBR requirements." Petition at 18. The Petitioners claim that these conditions are vague and prevent both "EPA and the public from effectively evaluating whether the monitoring methods Oak Grove actually uses to determine compliance with PBR requirements are consistent with Title V." Petition at 18.

EPA's Response: For the reasons set forth under the heading "*EPA Analysis*" below, EPA grants the Petitioners' request for an objection on this claim.

Relevant Permit Terms and Conditions

Special Condition 12 of the Oak Grove title V permit states:

> The permit holder shall comply with the general requirements of 30 TAC Chapter 106, Subchapter A or the general requirements, if any, in effect at the time of the claim of any PBR.

Final Permit at 11.

[15] PSD Permit No. 76474/PSDTX1056 is included as an attachment to Oak Grove's title V permit and its terms and conditions are incorporated by reference as applicable requirements. *See* Oak Grove's title V Permit, Special Condition 11, stating that NSR authorizations including permits are incorporated as applicable requirements.

Special Condition 13 of the Oak Grove title V permit states:

> 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 § 122.145 (Reporting Terms and Conditions).

Id.

EPA Analysis

The Petitioners have demonstrated that with regard to the monitoring, recordkeeping, and reporting requirements for PBRs, the Oak Grove title V permit does not assure compliance with the CAA, part 70, and Texas's approved title V program. Specifically, the Petitioners have demonstrated that certain PBRs incorporated by reference into the title V permit do not contain any additional PBR-specific monitoring, recordkeeping, and reporting and solely rely on the general requirements in Special Conditions 12 and 13. Further, the Petitioners have demonstrated that the general list of monitoring, recordkeeping, and reporting options under special conditions 12 and 13 may not be adequate for all PBRs. As explained in EPA's *Motiva Order*,[16] a streamlined approach to monitoring, such as in Special Conditions 12 and 13, can be appropriate for generally applicable requirements for *insignificant* units. *Motiva Order* at 26; *White Paper Number 2* at 32. However, EPA cannot determine if any PBRs in the title V permit apply only to insignificant units.

It is TCEQ's responsibility, as the title V permitting authority, to ensure that the title V permit "set[s] forth" monitoring sufficient to assure compliance with all applicable requirements. 42 U.S.C. § 7661c(c); *see id*. § 7661c(a); 40 C.F.R. § 70.6(a), (a)(3), (c); 30 TAC 122.142(c).[17]

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[16] *In the Matter of Motiva Enterprises, LLC Port Arthur Refinery,* Order on Petition No. VI-2016-23 (May 31, 2018).

[17] 42 U.S.C. § 7661c(a) ("Each permit issued under [title V of the CAA] shall *include* . . . such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan."), 7661c(c) ("Each permit issued under [title V of the CAA] shall *set forth* . . . monitoring and reporting requirements to assure compliance with the permit terms and conditions."); 40 C.F.R. § 70.6(a) ("Each permit issued under this part shall *include* . . ."), 70.6(a)(3)(i) ("Each permit shall *contain* the following requirements with respect to monitoring: . . . ."); 70.6(c) ("All part 70 permits shall *contain* the following with respect to compliance: . . . testing, monitoring, reporting, and recordkeeping requirements sufficient to assure

Special Condition 12 incorporates the general requirements for PBRs found in 30 TAC Chapter 106, Subchapter A. These requirements do not specify any monitoring methods for demonstrating compliance with the emission limits and standards set forth in the PBRs or for the general emission limits found in Subchapter A. Likewise, Special Condition 13 does not specify any particular monitoring requirements and instead allows Oak Grove to select the monitoring, recordkeeping, or reporting it will use to assure compliance. Because neither these generic permit terms nor the PBRs themselves require Oak Grove to follow a particular monitoring or recordkeeping methodology, the title V permit cannot be said to "set forth" monitoring sufficient to assure compliance. 42 U.S.C. § 7661c(c). The Petitioners have demonstrated that the generic Special Conditions 12 and 13 also contain no assurance that the monitoring or recordkeeping selected by the source will, as a technical and legal matter, be sufficient to ensure compliance. Because the permit does not specify any particular monitoring or recordkeeping requirement, neither the public nor EPA can ascertain from the Permit what monitoring or recordkeeping methodology the source has elected to use, or whether this methodology is sufficient to assure compliance with all applicable requirements. This effectively prevents both the public and EPA from exercising the participatory and oversight roles provided by the CAA. *See* 42 U.S.C. §§ 7661a(b)(6), 7661d(a), (b); *see also* 40 C.F.R. §§ 70.7(h), 70.8(a), (c), (d). Even if the monitoring, recordkeeping, or reporting is eventually specified in a compliance certification, that does not remedy the fact that the title V permit itself still does not include the monitoring, recordkeeping, or reporting.[18] Therefore, the Petitioners have demonstrated that for PBRs authorizing non-insignificant units, Special Conditions 12 and 13 do not contain adequate monitoring, recordkeeping, and reporting requirements that assure compliance with the requirements in each PBR.

Direction to TCEQ: In responding to this order, TCEQ should specify the monitoring, recordkeeping, and reporting that assures compliance with the requirements of the PBRs that apply to non-insignificant units in the Oak Grove title V permit. If any underlying PBRs contain monitoring, recordkeeping, and reporting, TCEQ should identify those PBRs in the permit record and determine if the monitoring in those PBRs is adequate. On the other hand, if any PBRs do not contain any underlying monitoring, recordkeeping, or reporting, like 30 TAC § 106.472, then TCEQ should specify what monitoring, recordkeeping, or reporting will assure compliance with the requirements of those PBRs and the emission limits in 30 TAC 106.4(a)(1) as they apply to units authorized by those PBRs. If the title V permit, Chapter 116 NSR permits, new source performance standards (NSPS), national emission standards for hazardous air pollutants (NESHAP), or enforceable representations in an application already contain adequate terms to assure compliance with PBRs, then TCEQ should amend the Permit to identify such terms and explain in the permit record how these other requirements assure compliance with the requirements and emission limits for each PBR that applies to significant units. However, if the title V permit and all enforceable, properly incorporated documents do not contain monitoring, recordkeeping, and reporting sufficient to assure compliance with the PBR requirements then

compliance with the terms and conditions of the permit."); 30 TAC § 122.142(c) ("Each permit shall *contain* periodic monitoring requirements that are sufficient to yield reliable data from the relevant time period that are representative of the emission unit's compliance with the applicable requirement, and testing, monitoring, reporting, or recordkeeping sufficient to assure compliance with the applicable requirement.") (all emphasis added).

[18] The requirement that a title V permit contain sufficient monitoring and the requirement that sources submit compliance certifications are independent (albeit related) obligations.

TCEQ should add such terms to the permit.

EPA notes that TCEQ is planning to specify the monitoring for certain PBRs in the PBR Supplemental Table provided by applicants. *See* Letter from Tonya Baer, Deputy Director of Air, TCEQ, to David Garcia, Director, Air and Radiation Division, Region 6, U.S. EPA, *Permits by Rule Programmatic Changes*, at 2 (May 11, 2020 Baer Letter). It is important to also explain what is required for something to be incorporated by reference so that the title V permit actually includes all applicable requirements. Title V of the CAA requires that all applicable requirements and adequate monitoring, recordkeeping, and reporting is "set forth," "included," or "contained" in a title V permit, as required by the Act, EPA's regulations, and TCEQ's EPA-approved regulations. *E.g.*, 42 U.S.C. § 7661c(c).[19] In order for something to be incorporated by reference, one must first *reference* it. As EPA has explained:

> Referenced documents must also be specifically identified. Descriptive information such as the title or number of the document and the date of the document must be included so that there is no ambiguity as to which version of which document is being referenced. Citations, cross references, and incorporations by reference must be detailed enough that the manner in which any referenced material applies to a facility is clear and is not reasonably subject to misinterpretation. Where only a portion of the referenced document applies, applications and permits must specify the relevant section of the document. Any information cited, cross referenced, or incorporated by reference must be accompanied by a description or identification of the current activities, requirements, or equipment for which the information is referenced.

White Paper 2 at 37. Additionally, EPA explained:

> Incorporation by reference in permits may be appropriate and useful under several circumstances. Appropriate use of incorporation by reference in permits includes referencing of test method procedures, inspection and maintenance plans, and calculation methods for determining compliance. One of the key objectives Congress hoped to achieve in creating title V, however, was the issuance of comprehensive permits that clarify how sources must comply with applicable requirements. Permitting authorities should therefore balance the streamlining benefits achieved through use of incorporation by reference with the need to issue

[19] 42 U.S.C. § 7661c(a) ("Each permit issued under [title V of the CAA] shall *include* . . . such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan."), 7661c(c) ("Each permit issued under [title V of the CAA] shall *set forth* . . . monitoring . . . and reporting requirements to assure compliance with the permit terms and conditions."); 40 C.F.R. § 70.6(a) ("Each permit issued under this part shall *include* . . ."), 70.6(a)(3)(i) ("Each permit shall *contain* the following requirements with respect to monitoring: . . . ."); 70.6(c) ("All part 70 permits shall *contain* the following with respect to compliance: . . . testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit."); 30 TAC § 122.142(c) ("Each permit shall *contain* periodic monitoring requirements that are sufficient to yield reliable data from the relevant time period that are representative of the emission unit's compliance with the applicable requirement, and testing, monitoring, reporting, or recordkeeping sufficient to assure compliance with the applicable requirement.") (all emphasis added).

> comprehensive, unambiguous permits useful to all affected parties, including those engaged in field inspections.

Id. at 38.

EPA understands that TCEQ is now requiring title V applicants to fill out the PBR Supplemental Table, which TCEQ will then incorporate into the title V permit through a general condition in the title V permit itself. *E.g.*, Colorado Bend I Power title V Permit No. O2887 at 5, Special Condition 7, (March 11, 2021). However, title V applications can be hundreds (if not over a thousand) pages long, and a search of the TCEQ online database will usually return multiple title V applications for a specific facility that has had multiple revisions and renewals. Thus, a general statement incorporating the PBR Supplemental Table without providing additional information detailing where the table is located is not specific enough to meet the standards described above. In order to satisfy the requirement in title V for the permit to "set forth," "include," or "contain" monitoring to assure compliance with all applicable requirements, a special condition incorporating the PBR Supplemental Table would need to include, at minimum, the date of the application and specific location of the table, for example by providing a page number from the application. Alternatively, a more straightforward approach that would obviate these IBR-related concerns would be for TCEQ to directly include (i.e., attach) this PBR Supplemental Table as an enforceable part of the title V permit itself.

Additionally, although this table requires the applicant to specify monitoring, recordkeeping, and reporting for "claimed (not registered)" PBRs, the table does not appear to address monitoring for the registered PBRs. For registered PBRs, EPA understands that TCEQ intends to start having applicants include monitoring in the registration form.[20] However, TCEQ has not indicated how it will appropriately incorporate that monitoring into an enforceable part of the title V permit. EPA understands that TCEQ's EPA-approved regulations state: "All representations with regard to construction plans, operating procedures, and maximum emission rates in any certified registration under this section become conditions upon which the facility permitted by rule shall be constructed and operated." 30 TAC § 106.6(b). However, the fact that the PBR regulations state that information in the application will be conditions upon which the facility permitted by rule shall be constructed and operated has little to no bearing on whether those provisions are "included," or "contained" in a title V permit, as required by the Act, EPA's regulations, and TCEQ's EPA-approved regulations. *E.g.*, 42 U.S.C. § 7661c(c).[21] For a requirement to be included in a title V permit, the permit must include it (or properly incorporate it by reference).

IBR is a prominent feature of TCEQ's title V program. When EPA approved the Texas title V program, EPA balanced the streamlining benefits of IBR against the value of a more detailed title V permit and approved TCEQ's use of IBR for PBRs, provided the program was implemented

[20] TCEQ has stated that it will require applicants to "[u]pdate PBR application representations with monitoring that is sufficient to demonstrate compliance." May 11, 2020 Baer Letter at 3.
[21] *See supra* note 18.

correctly. *See* 66 Fed Reg. 63318, 63321–32 (December 6, 2001).[22] In its program approval, EPA indicated that monitoring specified in the *terms and conditions* of a minor NSR permit could be incorporated into the title V permit.[23] EPA did not suggest that unidentified application representations for minor NSR permits or PBRs would automatically be considered to be incorporated by reference into a title V permit as adequate monitoring, recordkeeping, and reporting. Rather, as far as application representations are concerned, TCEQ's EPA-approved title V regulations expressly require that such representations be identified in the permit itself. *See* 30 TAC § 122.140 ("The only representations in a permit application that become conditions under which a permit holder shall operate are the following: . . . (3) any representation in an application *which is specified in the permit* as being a condition under which the permit holder shall operate." (emphasis added)).

Therefore, TCEQ should include or identify the monitoring, recordkeeping, and reporting from the application forms for registered PBRs (in addition to the claimed but not registered PBRs). With these changes, and provided the PBR Supplemental Table is either included or sufficiently incorporated by reference into the title V permit, the title V permit should include identifiable monitoring, recordkeeping, and reporting necessary to assure compliance with the emission limits and standards in the PBRs.

To the extent that any PBRs apply solely to insignificant units, TCEQ should make those clarifications in the permit and permit record, as necessary, and evaluate whether the general monitoring conditions are or are not sufficient to assure compliance for these insignificant units.[24] EPA notes that TCEQ has begun including a list of PBRs that only apply to insignificant units in the statement of basis for title V permits. For example, in the statement of basis of title V Permit No. O3027 for Odfjell Terminal Houston, the TCEQ noted that the following PBRs apply to insignificant units: 30 TAC §§ 106.102, 106.122, 106.141, 106.143, 106.148, 106.149, 106.161, 106.162, 106.163, 106.229, 106.241, 106.242, 106.243, 106.244, 106.266, 106.301, 106.313, 106.316, 106.317, 106.318, 106.319, 106.331, 106.333, 106.372, 106.391, 106.394, 106.414, 106.415, 106.431, 106.432, 106.451, 106.453, 106.471, 106.531. *See e.g.*, Statement of Basis for Draft Title V Permit for Odfjell Terminal Houston at 7–8 (December 20, 2020). EPA directs TCEQ to make similar clarifications for the Oak Grove title V permit and then determine if the monitoring, recordkeeping, and reporting in Special Conditions 12 and 13 are sufficient for these insignificant units.

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[22] *See also Public Citizen v. EPA*, 343 F.3d 449, 460 (5th Cir. 2003) (upholding EPA's approval of incorporation by reference in Texas; stating "Nothing in the CAA or its regulations prohibits incorporation of applicable requirements by reference. The Title V and Part 70 provisions specify what Title V permits 'shall include' but do not state how the items must be included.").

[23] *Id*. at 63324 ("[A]ll the title V permits will incorporate the necessary [monitoring, recordkeeping, and reporting] which will assure compliance with the title V permit, including [minor] NSR and PBR requirements. . . . [U]nder the incorporation by reference process, Texas must incorporate all terms and conditions of the [minor] NSR permits and PBR, which would include emission limits, operational and production limits, and monitoring requirements. We therefore believe that the terms and conditions of the [minor] MNSR permits so incorporated are fully enforceable under the full approved title V program that we are approving in this action.").

[24] EPA has explained that if a regular program of monitoring, recordkeeping, and reporting for insignificant units would not significantly enhance the ability of the permit to assure compliance with the applicable requirements, general monitoring requirements or even no monitoring can sometimes satisfy title V and 40 CFR § 70.6(a)(3)(i). *See White Paper Number 2* at 32.

Claim C.2: The Petitioners Claim that "The Proposed Permit Fails to Assure Compliance with the Opacity Limit Established by Oak Grove's PSD Permit."

The Petitioners note that the PSD Permit establishes a limit on opacity emissions from the boilers of 10 percent averaged over a six-minute period. Petition at 19 (citing to PSD Permit, Special Condition 10). The Petitioners add that compliance with the opacity limit is established by demonstrating compliance with the filterable PM emission limit in the Permit's Maximum Allowable Emission Rates Table (MAERT) using PM CEMS. The Petitioners further note that the Permit provides that compliance with the hourly filterable PM emission limit is based on a three-hour block average of the CEMS data. Petition at 19 (citing to the PSD Permit, Special Conditions 10 and 35).

The Petitioners assert that using a three-hour average filterable PM limit does not assure compliance with the opacity limit because "the opacity limit's six-minute averaging period is much shorter and significant variation in the amount of PM emitted during any three-hour block may mask violations of the six-minute opacity limit." Petition at 19. The Petitioners assert that TCEQ's response to this claim supports, rather than rebuts the Petitioners' claim. TCEQ's response states, in part, that "[o]pacity is used as an indicator of PM emissions but that opacity limits in the permit are not directly correlated to the PM limit in the MAERT; therefore, non-compliance with the opacity limit does not constitute non-compliance with the PM limit." Petition at 25 (citing to TCEQ Response to Comments at 22). The Petitioners contend that if Oak Grove can comply with the filterable PM limit while violating its opacity limit, then compliance with the filterable PM limit is not a reliable measure of compliance with the opacity limit and should compel the Administrator to object to the Permit. Petition at 25. The Petitioners further assert that TCEQ's remaining responses fail to address the claim that different averaging periods for opacity limits and filterable PM limits make compliance with the PM limit an unreliable indicator of compliance with the opacity limit. Petition at 25-26.

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

Relevant Permit Terms and Conditions

Special Condition 10 of PSD Permit No. 76474/PSDTX1056 states:

> Opacity of emissions from EPNs E-OGU1 and E-OGU2 must not exceed 10 percent, averaged over a six-minute period, except for those periods described in Title 30 Texas Administrative Code § 111.111(a)(1)(E), 40 CFR § 60.11(c), or as otherwise allowed by law.

Special Condition 11 of PSD Permit No. 76474/PSDTX1056 provides a table which limits PM/PM10 emissions to 0.015 lb/MMBtu with a compliance averaging period of 3-hours.

Special Condition 35 of PSD Permit No. 76474/PSDTX1056 states in part:

> The holder of this permit shall install, calibrate, certify, operate, and maintain CEMS to measure and record the filterable PM/PM10 emission from [the boilers] … After the initial determination of compliance, the CEMS shall be used to determine continuous compliance with the opacity limitations in Special Condition Nos. 3 and 10. Compliance with the PM mass emission limit will be considered to demonstrate compliance with the opacity limit…

The CAA requires that "[e]ach permit issued under [title V] shall set forth … monitoring … requirements to assure compliance with the permit terms and conditions." CAA § 504(c), 42 U.S.C. § 7661c(c). EPA's part 70 monitoring rules (40 C.F.R. §§ 70.6(a)(3)(i)(A) and (B) and 70.6(c)(1)) are designed to satisfy this statutory requirement.

As EPA has noted in previous Orders, the determination of whether monitoring is adequate in a particular circumstance generally is a context-specific determination, made on a case-by-case basis and guided by multiple factors and considerations. *See, e.g., In the Matter of CITGO Refining and Chemicals Co.,* Order on Petition No. VI-2007-01 at 6-8 (May 28, 2009) (*CITGO Order).* The analysis should begin by assessing whether the monitoring required in the applicable requirement is sufficient to assure compliance with permit terms and conditions. Some factors that permitting authorities may consider in determining appropriate monitoring are: (1) the variability of emissions from the unit in question; (2) the likelihood of a violation of the requirements; (3) whether add-on controls are being used for the unit to meet the emission limit; (4) the type of monitoring, process, maintenance, or control equipment data already available for the emission unit; and (5) the type and frequency of the monitoring requirements for similar emission units at other facilities. Other site-specific factors may also be considered. *Homer City Order* at 45; *CITGO Order* at 6-8. The permitting authority is required to explain how the monitoring requirements assure compliance, and the rationale for the monitoring requirements selected by a permitting authority must be clear and documented in the permit record. 40 C.F.R. § 70.7(a)(5).

When alleging that monitoring requirements are not adequate, Petitioners have the burden to demonstrate that inadequacy. In evaluating a petitioners' claims, EPA considers, as appropriate, the adequacy of the permitting authority's rationale in the permitting record, including the response to comments document. *In the Matter of Raven Power Fort Smallwood, LLC,* Order on Petition No. 111-2017-3 at 14 (*Raven Power Fort Smallwood Order*).

The Petitioners' claim involves monitoring established to assure compliance with a 10% opacity limit found in the PSD Permit and incorporated into the title V Permit (PSD opacity limit). Specifically, the Petitioners have asserted that using PM CEMS for demonstrating compliance with the opacity limit is not adequate due to the differences in averaging periods, and that TCEQ has failed to address their concerns. The Petitioners raised this specific issue for TCEQ's consideration and response. *See* Petition Ex. 2, Response to Comments at 21-22. Rather than explaining how PM can be used to demonstrate compliance with opacity, TCEQ stated generally that the relationship between opacity and PM can vary significantly and that "[o]pacity is used as an indicator of PM emissions, but the opacity limits in the permit are not directly correlated to the PM limit in the MAERT; therefore, non-compliance with the opacity limit does not constitute non-compliance with the PM limit." *Id. at 22.* This response does not address the Petitioners'

assertion that the averaging period used for PM compliance is longer than what is required for the PSD opacity limit and therefore, opacity exceedances may be masked. *See, In the Matter of Northeast Maryland Waste Disposal Authority,* Order on Petition No. III-2019-2 at 10-12 (December 11, 2020) (finding that using a 3-hour block average from an HCl monitor was insufficient to assure compliance with a 1-hour HCl emission limit). TCEQ also provided a listing of various monitoring, testing, recordkeeping, and reporting requirements included in the permit, which it asserts demonstrates compliance with the applicable opacity limits. However, TCEQ does not explain how these conditions are used to assure compliance with the 10% opacity limit. TCEQ also points to compliance assurance monitoring (CAM) to which the boilers are subject as additional monitoring used to assure compliance with opacity limits. *Id. at 22.* However, the CAM analysis and required monitoring apply to a different opacity limit, namely the 15% opacity limit that comes from the SIP, not the 10 percent opacity limit in the PSD permit.[25] There is nothing in the Permit that states the CAM monitoring is also intended or could be used to demonstrate compliance with the 10 percent PSD opacity limit. *See* CAM Summary, title V Permit at 74 (providing a maximum opacity limit of 15 percent).

Therefore, the Petitioners have demonstrated that the administrative record for the Permit, including the Response to Comments, does not adequately explain the rationale for the selected monitoring requirements, specifically to assure compliance with the 10 percent opacity limit. *See* 40 C.F.R. § 70.7(a)(5).

Direction to TCEQ: In responding to this Order, TCEQ should either explain how the Permit provides adequate monitoring for the 10 percent opacity limit or modify the permit to ensure that it contains monitoring sufficient to assure compliance with that limit.

EPA notes that the title V Permit CAM analysis for the 15 percent SIP opacity limit did provide an explanation for why monitoring opacity is not needed when PM emissions are monitored using a PM CEMS. *See* TCEQ Statement of Basis for the title V Permit at 27 through 28. This explanation is consistent with findings EPA made amending, in part, 40 C.F.R. part 60, subparts D through Dc that facilities meeting a PM limit of 0.030 lb/MMBtu will generally operate with little or no visible emissions. *See* 74 Fed. Reg. 5072. Along with this analysis, however, TCEQ states that "the visible emissions limitations in 30 TAC Chapter 111 are applicable regardless of whether or not a PM CEMS is utilized" and requires daily method 9 readings for opacity. TCEQ acknowledges that additional monitoring beyond the PM CEMs is necessary for demonstrating compliance with the 15 percent SIP opacity limit. This explanation and associated monitoring could also be applied to the 10 percent opacity limit.

Claim C.3: The Petitioners Claim that "The Proposed Permit Fails to Assure Compliance with Performance Standards and Emission Limits for H_2SO_4, HCl, HF, VOC, and Total PM/PM_{10} Established by Oak Grove's PSD Permit."

The Petitioners contend the Proposed Permit fails to assure compliance with PSD emission limits for H_2SO_4, HCl, HF, VOC, and Total PM/PM_{10}. They present two arguments in support. The

[25] The title V Permit also includes a 15percent opacity limit established by 30 TAC § 111.111(a)(1)(C) (SIP opacity limit).

first is that the annual stack testing required by the Proposed Permit "is too infrequent to provide a representative indication of the power plant's performance over the relevant averaging periods." Petition at 26. The Petitioners contend that an annual stack test cannot assure ongoing compliance because it is only a snapshot of a unit's performance, often taken under ideal circumstances, and does not reflect variations in performance over time or account for changes in performance across different operating scenarios. Petition at 21.

The Petitioners second argument is that the Permit contains a "loophole" to the stack-testing requirements "that further erodes the enforceability of applicable emission limits and performance standards." The Petitioners cite to Special Condition 40 of the PSD Permit, which states:

> If the annual test does not establish compliance with a performance standard of Special Condition No. 11(B), the holder of this permit may conduct additional tests during the year to be averaged with the previous test(s) to demonstrate compliance….

Special Condition No. 40, PSD Permit No. 76474/PSDTX1056.

The Petitioners assert that this exemption allows Oak Grove "to mask ongoing non-compliance by conducting an indefinite number of follow-up tests, the results of which would be averaged with the initial test results to demonstrate ongoing compliance with applicable requirements." Petition at 21.

TCEQ had several responses in its response to comments. First, it stated that the PSD Permit was issued pursuant to Texas's SIP-approved rules. The Petitioners do not dispute this but contend that the requirements fail to satisfy title V because they do not assure compliance with applicable requirements. Second, TCEQ asserted that the claim is beyond the scope of the title V review process. Petitioners disagree, stating that the CAA requires that the Administrator object to any title V permit that does not include monitoring sufficient to assure ongoing compliance with all applicable requirements and therefore this is a valid title V claim. Third, TCEQ provided a listing of various monitoring, recordkeeping, and reporting requirements, but the Petitioners replied that TCEQ failed to explain how these special conditions assure compliance with the applicable emission limits and performance standards. TCEQ's final response to comment states that the Permit assures compliance with all applicable requirements by means of a Permit Compliance Certification Form. The Petitioners reply that TCEQ "does not explain how the certification of compliance with permit requirements assures ongoing compliance with applicable emission limits and performance standards if the method established by the permit to determine compliance with such requirements is deficient." Petition at 27-30.

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

Relevant Permit Terms and Conditions

Special Condition 11.B and the MAERT of PSD Permit No. 76474/PSDTX1056 limit H_2SO_4, HCl, HF, VOC, and total PM/PM_{10}.

Special Condition 40 of PSD Permit No. 76474/PSDTX1056 states in part:

After the initial demonstration of compliance, on-going stack sampling of [the boilers] for H_2SO_4, HCl, HF, VOC, total PM/PM_{10} or coal concentration testing shall be used to demonstrate continuous compliance and shall meet the following specifications:

A. Stack sampling shall be performed once annually during periods of normal operations except as follows:
   (1) If the annual test does not establish compliance with a performance standard of Special Condition No. 11B, the holder of this permit may conduct additional tests during the year to be averaged with the previous test(s) to demonstrate compliance …
B. Sampling required in (A) of this Special Condition shall demonstrate compliance with the performance standards of Special Condition No. 11B and the lb/hr emission limits of the MAERT applicable to normal operations.

EPA agrees with the Petitioners that TCEQ is incorrect that this claim is beyond the scope of Oak Grove's title V permit. As noted by the Petitioners, the purpose of the title V permitting program is to collocate in one place all CAA applicable requirements relevant to a particular source along with the methods used to ensure compliance with those requirements. Petition at 3 (citing to 42 U.S.C. § 7661c(a) and (c); *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996)). To that end, the CAA and title V regulations require that all title V permits must "set forth," "include," or "contain" periodic testing, monitoring, recordkeeping, and reporting sufficient to assure compliance with all applicable CAA requirements and permit terms. CAA § 504(a), (c); 40 C.F.R. 70.6(a)(3). Thus, title V permits may be used to create new monitoring requirements that have not been promulgated under other authorities, even though in general, title V permits are otherwise limited to requirements found under other authorities. Where an underlying applicable requirement (e.g., an NSR permit or a SIP rule) does not contain any monitoring, or does not contain sufficient periodic monitoring, additional monitoring *must* be added to the title V permit. *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008).

Title V permits must contain monitoring necessary to assure compliance with applicable requirements. *See* CAA § 504(a). As described in EPA's response to the previous claim, the determination whether the monitoring requirements in a permit for a particular source are adequate to assure compliance requires a context-specific inquiry that depends on a multi-factor assessment concerning the source's emissions and controls as well as its permit. *See CITGO Order* at 6-7. The chosen monitoring must be sufficient to yield reliable data from the relevant time period that is representative of the source's compliance with the permit. 40 C.F.R. § 70.6(a)(3)(i)(B). The Permit in PSD Permit, Special Condition 11.B and the MAERT requires that Oak Grove comply with three emission limits for H_2SO_4, HCl, HF, VOC, and total PM/PM_{10}. PSD Permit, Special Condition 11.B requires compliance with a lbs/MMBtu limit for each pollutant while the MAERT requires compliance with both lbs/hr and tons per year (TPY) limits. PSD Permit, Special Condition 40.B provides that annual stack testing is used to demonstrate compliance with the lbs/MMBtu limit from PSD Permit, Special Condition No. 11.B and the 1bs/hr emission limits found in the MAERT. In addition, PSD Permit, Special

Condition 40.D provides that annual stack testing is used to determine emission factors that comprise part of a calculation, along with total heat input, to demonstrate compliance with TPY limits. Annual stack testing is the only compliance mechanism identified in the Permit for the lbs/MMBtu and lb/hr emission limits for H_2SO_4, HCl, HF, VOC, and total PM/PM_{10}, as well as the emission rates component of the TPY limits, for normal operations. The Petitioners contend that the annual stack testing required by the Permit is inadequate to assure ongoing compliance with these emission limits and rates due to potential variations in performance that may occur over the course of a year. Petition at 20. In its response, TCEQ identifies a list of permit conditions that it contends demonstrates compliance with the limits in PSD Permit, Special Condition No. 11.B. TCEQ Response to Comments at 26-27. However, TCEQ failed to provide any analysis or explanation for how these conditions are used to demonstrate continuous compliance or to refute the Petitioners' assertion that annual stack testing is inadequate. A review of these conditions shows they reference monitoring emissions during MSS, testing requirements for the initial demonstration of compliance and annual stack testing, and what records are required to be maintained, but none of these conditions require monitoring beyond the annual stack testing except monitoring during MSS.

EPA has previously found that annual stack testing could be considered adequate monitoring if it is part of a multi-pronged approach for assuring compliance with emission standards. *See In the Matter of Xcel Energy, Cherokee Station,* Order on Petition No. VIII-2010-XX at 11-12 (September 29, 2011) (finding that a 3-pronged monitoring approach including annual stack testing in conjunction with proper control device maintenance and operations and a mechanism for assessing control performance on an ongoing basis was sufficient to assure compliance with the applicable emission limit); *In the Matter of Public Service of New Hampshire, Schiller Station,* Order on Petition No. VI-2014-04 at 14-16 (July 28, 2015) (finding that the Petitioner did not demonstrate that stack testing every 5 years was inadequate due to additional continuous parametric monitoring). Here, the Oak Grove Permit does not provide for any other monitoring that could be used, in conjunction with annual stack testing, to adequately assure continuous compliance with the lbs/MMBtu and lbs/hr emission limits for H_2SO_4, HCl, HF, VOC, and total PM/PM_{10}. EPA finds that under these circumstances, in which annual stack testing is the only monitoring required to demonstrate compliance with the lbs/MMBtu and lbs/hr limits during normal operations, the monitoring is inadequate to satisfy compliance with CAA title V monitoring requirements under Part 70. Since the annual stack test is also used to develop emission factors that are used to calculate compliance with the 12-month TPY limits in the MAERT, and similarly lack any additional monitoring, the petitioners have also demonstrated that the permit fails to assure continuous compliance with that limit for the same reasons.

EPA also grants the Petitioners' request for an objection for the second part of this claim. The permitting authority is required to explain how the monitoring requirements assure compliance and must do so in a way that is clear and documented in the permit record. 40 C.F.R. § 70.7(a)(5). The Petitioners have presented a scenario in both the Petition and their comments on the draft permit in which emission exceedances are revealed through stack testing but then masked through subsequent stack tests that are averaged with the original stack test. Therefore, the Petitioners assert the Permit fails to require monitoring or testing that assures ongoing compliance with applicable limits. Petition at 21; Response to Comments at 26. Neither in its response to comments nor elsewhere in the permit record has TCEQ responded to this concern

by evaluating the accuracy of the Petitioners' scenario or explaining how allowing additional stack testing ensures compliance with applicable requirements. The Permit condition as drafted allows using additional stack testing to eliminate an initial demonstration of non-compliance, which vitiates the utility of stack testing for showing continuous non-compliance. At a minimum, this provision is unclear for how it can be used to demonstrate continued compliance. This lack of clarity means that TCEQ has failed to make clear in the record how the compliance measures will assure compliance.

Therefore, the Petitioners have demonstrated that TCEQ has failed to adequately explain how the additional stack testing is used to ensure compliance with an applicable requirement of the Permit.

Direction to TCEQ: In responding to this Order, TCEQ should ensure that the Permit has adequate monitoring to demonstrate continuous compliance with permitted emission limits found in Special Condition 11.B and the MAERT. As noted in EPA's response, EPA has determined that annual stack testing could be considered adequate monitoring when paired with additional monitoring to ensure proper operation of controls. If there is additional monitoring that is used to supplement the annual stack testing, TCEQ should provide an explanation of that supplemental monitoring. Additionally, TCEQ should evaluate how the stack test data is being used to demonstrate compliance with emission limits. Specifically, TCEQ should clarify that compliance or non-compliance is demonstrated at the time of each stack test and that while further testing is appropriate to demonstrate a return to compliance, it is not used to eliminate previous periods of non-compliance. If TCEQ's position is that the additional stack testing is to be used to avoid treating the first stack test as an indicator of non-compliance, then TCEQ needs to revise the Permit to eliminate this averaging authorization.

Claim C.4: The Petitioners Claim that "The Proposed Permit Fails to Assure Compliance with PM/PM_{10} Emission Limits in Oak Grove's PSD Permit."

The Petitioners assert that the Proposed Permit fails to specify a method to assure compliance with hourly and annual PM/PM_{10} emission limits for the main boilers during planned MSS activities. Petition at 22. Specifically, they claim that the failure to specify how Oak Grove should quantify PM/PM_{10} emissions during planned MSS activities undermines the enforceability of the permit's PM/PM_{10} emission limits. The Petitioners argue that the record fails to explain how parametric monitoring requirements for planned MSS activities assure compliance with applicable hourly and annual PM/PM_{10} emission limits. Petition at 30. The Permit condition cited by the Petitioners states:

> Compliance with the lead and PM and PM10 (filterable and total) emission rates in the MAERT applicable during planned MSS will be demonstrated if the recorded pressure drop across the baghouse meets manufacturer guidelines for proper operating during planned MSS.

Special Condition No. 41(A), PSD Permit No. 76474/PSDTX1056

The Petitioners assert that "neither the Proposed Permit nor the Statement of Basis include any information (1) identifying the applicable pressure drop guidelines, (2) indicating how variations in pressure across the baghouses affects the amount of PM/PM_{10} emitted by Oak Grove's main boilers, or (3) demonstrating that maintaining baghouse pressure consistent with manufacturer guidelines ensures that PM/PM_{10} emissions from Oak Grove's main boilers during planned MSS activities, when combined with the PM/PM_{10} emissions from the boilers during routine operation, do not exceed the applicable annual total and filterable PM/PM_{10} limits." Petition at 22.

The Petitioners note TCEQ's response to comment, which stated that this issue is beyond the scope of the title V review process; provided other applicable monitoring, recordkeeping, and reporting requirements from the PSD Permit – in particular, Special Condition 40A (stack testing) – that TCEQ asserts assure compliance with MSS emission limits, and stated that the Proposed Permit's compliance certification form assures compliance. The Petitioners provide a rebuttal for each of these responses, stating that the sufficiency of monitoring is a title V issue; that none of the special conditions listed assures compliance, nor has TCEQ explained how they would do so; and that the compliance certification does not assure compliance with applicable requirements.

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

Title V permits must include monitoring sufficient to demonstrate compliance with applicable requirements and the rationale for the monitoring requirements selected by a permitting authority must be clear and documented in the permit record. 40 C.F.R. §§ 70.6(a)(3)(i)(A) and (B), 70.6(c)(1), and 70.7(a)(5). For this reason, as noted above, TCEQ's response that this monitoring issue is beyond the scope of a title V permit, is incorrect.

With respect to parametric monitoring, EPA has previously stated that if it is used to help assure compliance with PM standards, the values for these parameters must be included in the permit. *See In the Matter of Dunkirk Power, LLC,* Order on Petition No. II-2002-02 at 20 (July 31, 2003) and *In the Matter of Consolidated Edison Co. of NY, Inc., Ravenswood Steam Plant,* Order on Petition No. II-2002-08 at 21 (September 30, 2003).

TCEQ has chosen to require parametric monitoring to demonstrate compliance with the PM/PM_{10} emissions limit during periods of MSS by recording the pressure drop across the baghouse and ensuring it meets manufacturer guidelines. However, the PSD Permit does not clearly identify what those guidelines are or where they would be found in the record. Additionally, TCEQ has not explained how that monitoring is used to ensure that annual PM/PM_{10} emission limits are met. In its response, TCEQ points to Special Condition 40A for monitoring that can be used to demonstrate compliance, however, it is not clear how the annual stack testing is used to determine compliance with emission limits during periods of MSS, and TCEQ has not provided any explanation.

TCEQ also states that the compliance certification form can be used to indicate if any indications of non-compliance or deviations occurred during the certification period. However, this form

does not eliminate the need for the permit itself to contain adequate monitoring. Therefore, the Petitioners have demonstrated that the Permit and permit record are inadequate for EPA to determine if the monitoring required by the Permit satisfies compliance with CAA title V monitoring requirements.

Direction to TCEQ: In responding to this Order, TCEQ should evaluate the chosen monitoring for PM/PM_{10} emissions during periods of MSS to determine if the monitoring is sufficient. If TCEQ determines that the parametric monitoring of the pressure drop is sufficient, it should include justification in the permit record along with an explanation of how it ensures compliance with annual PM/PM_{10} emission limits. In addition, TCEQ should modify the title V permit to include the identified pressure drop range specified by the manufacturer.

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: OCT 15 2021

Michael S. Regan
Administrator