UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1201 ELM STREET, SUITE 500
DALLAS, TEXAS 75270

April 14, 2023

Ms. Gwen Rico
Office of Legal Services
Texas Commission on Environmental Quality (MC 205)
Post Office Box 13087
Austin, Texas 78711-3087

RE: Non Rule Project Number 2023-027-122-AI

Dear Ms. Rico:

EPA provides the attached comments for consideration in regards to the 30 TAC Chapter 122, Permits by Rule, which are open for review as part of the Quadrennial review process under the Texas Government Code §2001.039.

If you have any questions, please contact our Air Permits Section Manager, Cynthia Kaleri at (214) 665-6772, or Aimee Wilson at (214) 665-7596.

Sincerely,

JEFFERY ROBINSON

Digitally signed by JEFFERY ROBINSON
Date: 2023.04.14 16:03:53 -05'00'

Jeff Robinson
Branch Manager
Grants, Monitoring and Air Permits Branch

Enclosure

ENCLOSURE

What did EPA approve?

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

Title V Petitions and EPA Objections

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 the EPA for review. 42 U.S.C. § 7661d(a). Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. 42 U.S.C. § 7661d(b)(1); see also 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of the EPA's 45-day review period, petition the Administrator to object to the permit. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

The information that the EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) 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.

If the EPA grants a title V petition, a permitting authority may address the EPA's objection by, among other things, providing the EPA with a revised permit. See, e.g., 40 C.F.R. § 70.7(g)(4); 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 the EPA has issued a title V objection on the grounds 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 authority must provide for notice and opportunity for public comment for the significant modification consistent with 40 C.F.R. § 70.7(h) or the state's corresponding regulations.

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

Title V minor revisions have always been eligible to the petition process. EPA made revisions to the Part 70 regulations to the petition provisions that became effective on April 6, 2020. The changes to Part 70 regulations regarding the availability of an opportunity to file a petition on a minor permit modification was not a change in the underlying requirements but rather a change to the regulatory text intended to clarify the operation of the existing regulations. See, e.g., 57 FR 32283 (July 21, 1992) (addressing the availability of EPA's 45-day review period and petition opportunities for minor permit modifications under the part 70 rules). Currently TCEQ's title V rules at 122.360(a) do not comply with the additional language added to the title V regulations at 40 CFR § 70.12, specifically § 70.12(a)(1). TCEQ should evaluate if any of the chapter 122 rules should be revised or amended to reflect any of the changes made to the Part 70 regulations made final on February 5, 2020. 85 FR 6431.

Recent History of EPA Objections and Petition Orders.

EPA has issued 13 Orders granting claims in petitions since January 1, 2021. Additionally, EPA has objected to 11 title V permits during the same time period. Many of the issues that EPA has been objecting to in title V permits appear to be programmatic issues with the TCEQ title V program. EPA would suggest making revisions to the Chapter 122 rules to address these recurring programmatic issues.

Incorporation of Permits by Rule (PBRs) into Title V Permits

Under title V of the CAA, the 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)[1]. "Applicable requirements," as defined in the 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 for Improved Implementation of The Part 70 Operating Permits Program, 40 (March 5, 1996) (White Paper Number 2) (explaining how IBR can satisfy CAA § 504 requirements)[2]. When the EPA approved the Texas title V program, the 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 requirements (including PBRs), provided the program was implemented correctly. See 66 Fed Reg. 63318, 63321–32 (December 6, 2001). The 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, the 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 the 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 the 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.").

EPA has made a variety of objections related to permits by rule. There has been inadequate incorporation of PBRs into the title V permits, failure to identify monitoring associated with PBRs, failure to include all registered and claimed PBRs, and other related issues. EPA suggests revising the definition of applicable requirement at 122.10(2)(H) to clarify that all emission units permitted under chapter 106 or 116 must be included in the title V permit (excluding any that are insignificant emission units), even if the emission unit has no other applicable requirement than the new source review authorization for which it is permitted under.

Insignificant Emission Units

The approval of a title V operating permits program includes requirements for applications. This includes that the State program must have a standard application form or forms. The EPA Administrator may approve as part of a State program a list of insignificant activities and emissions levels which do not need

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[1] 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.").

[2] In upholding the 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).

to be included in the application for a title V permit. 40 CFR § 70.5(c). However, for insignificant activities which are exempted because of size or production rate, a list of such insignificant activities must be included in the application. TCEQ has established 30 TAC 116.119 De Minimis Facilities or Sources. However, this rule has not been approved into the Texas State Implementation Plan or the Part 70 program, nor does this rule include information on the permits by rule which the TCEQ considers to be only for insignificant emission units. TCEQ does have a variety of forms that are used to form an application for a title V permit. None of the forms appear to include a list of insignificant emission units. The only location where you can find such a list is on the Statement of Basis that is issued with any draft or proposed title V permit. TCEQ should make the necessary corrections needed to their rules or forms to ensure compliance with 70.5(c).

PBR Supplemental Table

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)[3]. EPA supports TCEQ's efforts to incorporate PBRs into the title V permit in a manner that clearly identifies each registration and the emission unit(s) to which it applies. The PBR Supplemental Tables are accomplishing the task, but there is always room for improvement. EPA regularly finds that these tables do not always identify all registered PBRs and routinely lack the level of detailed required for monitoring. TCEQ should consider if the chapter 122 rules should be revised to ensure they conform with TCEQ's EPA-approved regulations, 30 TAC 122.142(2)(B)(i), as well as with the agreements underpinning the 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 63324 n.4.

Identification of Emission Units

EPA understands that there can be a distinct difference in the manner in which an emission unit can be identified in an NSR permit and in a title V permit. In the NSR permit, emission units are often given an emission point number (EPN) that can be used to identify the emission unit and it's emissions in the Maximum Allowable Emission Rate Table (MAERT) for the NSR permit. When the NSR permit is incorporated into the title V permit, those emission units may now be given a "Unit/Group/Process ID No." or a "SOP Index No." that is completely different than the EPN given in the NSR permit. EPA understands that the NSR permit is often identifying the point of the actual emissions and that the title V permit refers to emission unit in it's entirety. It would be beneficial, and would provide clarity, if the title V permit would include a table that identified all the emission units with the EPN (or other identifier from the NSR permit) and the "Unit/Group/Process ID No." used for that emission unit in the title V permit. Without this sort of crosswalk table, it can be difficult to determine if all emission units in an NSR permit are included in the title V permit with all of their applicable requirements identified.

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[3] 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).

Incorporation of Confidential Information

The CAA provides that certain documents created pursuant to the title V permitting program, including the permit application, be made available to the public but also allows some protections for confidential information. This protection however is not absolute as the types of information that may be treated as confidential, and therefore withheld from the public, is limited. Specifically, "[t]he contents of a permit shall not be entitled to [confidential] protection under section 7414(c) of this title." CAA §503(e). See also 40 C.F.R. § 70.4(b)(3)(viii). In addition to the title V program requirements, confidentiality is also addressed in the EPA's regulations governing the disclosure of records under the Freedom of Information Action (FOIA). Pursuant to those requirements, information which is considered emission data, standards or limitations are also not entitled to confidential treatment. See 40 C.F.R. §2.301(f).

The EPA has previously evaluated the use of confidential requirements in permits issued by TCEQ. See In the Matter of ExxonMobil Corporation, Baytown Refinery, Order on Petition No. VI-2016-14 (April 2, 2018) (Baytown Order). The EPA acknowledged that potential conflict exists between TCEQ's regulatory scheme and the CAA mandate that does not afford confidential protections to the contents of a permit. The EPA stated that "this potential conflict should be mitigated if no portions of the confidential section of a permit application establish what would otherwise be treated as binding, enforceable permit terms (e.g., emission limits, operating limits, work practice standards, etc.), or any other type of "emission data" (as defined in 40 C.F.R. § 2.301(a)(2)(i)(B)) necessary to assure compliance with an applicable requirement or permit term." Baytown Order at 8-9.

TCEQ's rules address NSR permit applications and state that the representations with regard to construction plans and operation procedures in an application for a permit are one of the conditions upon which a permit is issued. See 30 TAC 116.116(a). Therefore, as explained by TCEQ, "the permit application, and all representations in it, is part of the permit when it is issued and as such is enforceable." 79 Fed. Reg. 8368, 8385 (February 12, 2014). Relying on this assessment, the application for an NSR Permit containing confidential information is an enforceable part of the NSR Permit. Problems arise when the confidential information appears to establish binding requirements governing the operation of the facility and the application becomes a part of the NSR permit upon permit issuance. If these limits (either emission limits or operational limits) are requirements of the NSR permit and if these requirements become incorporated into and become contents of the title V permit, then they can no longer be afforded confidential protection as they are binding requirements. TCEQ should consider if changes to the chapter 122, possible 122.132(a) to clarify that emission limitation and operational limitations cannot be claimed as confidential under the title V program and any such claims within an NSR permit and it's application that are incorporated into the title V permit should be evaluated for compliance. TCEQ should also consider revisions to 122.132(a) to clarify that title V applications are not entitled to confidential treatment. This would ensure compliance with 40 CFR § 70.4(b)(3)(viii) and section 114(c) of the CAA.

Incorporation of Major NSR Permits – PSD, Nonattainment NSR, and PAL

Under title V of the CAA, the 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). "Applicable requirements," as defined in the EPA's and TCEQ's rules, include the terms and conditions of preconstruction permits issued by TCEQ, including PALs. See 40 C.F.R. § 70.2; 30 TAC § 122.10(2)(H).

The CAA § 504 requirement to include all applicable requirements in a title V permit can be satisfied using IBR in certain circumstances. See, e.g., White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program, 40 (March 5, 1996) (White Paper 2) (explaining how IBR can

satisfy the requirements of CAA § 504). The EPA's longstanding position is that all emission limitations and standards must be included on the face of a title V permit; other provisions, including provisions necessary to assure compliance with those requirements, may be incorporated by reference (provided certain criteria are met). White Paper 2 at 38, 40. With respect to the title V program in Texas, the EPA has provided additional flexibilities, allowing even certain emission limitations and standards to be incorporated by reference into title V permits. Specifically, when the EPA approved the Texas title V program, the Agency approved TCEQ's use of IBR for all minor NSR requirements—including the requirements of minor NSR permits under 30 TAC Chapter 116 and PBRs under Chapter 106—provided the program was implemented correctly. See 66 Fed. Reg. 63318, 63321–32 (December 6, 2001). The EPA subsequently elaborated on the scope of this approval in two title V petition orders, which explained:

> In approving Texas' limited use of incorporation by reference of emissions limitations from minor NSR permits and Permits by Rule, EPA balanced the streamlining benefits of incorporation by reference against the value of a more detailed title V permit and found Texas' approach for minor NSR permits and Permits by Rule acceptable. See Public Citizen, 343 F.3d at 460–61. EPA's decision approving this use of IBR in Texas' program was limited to, and specific to, minor NSR permits and Permits by Rule in Texas. EPA noted the unique challenge Texas faced integrating requirements from these permits into title V permits. EPA did not approve (and does not approve of) Texas' use of incorporation by reference of emissions limitations for other requirements. Thus, EPA grants the petition on this issue with regard to TCEQ's use of incorporation by reference for emissions limitations, with the exception of those emissions limitations from minor NSR permits and Permits by Rule

Premcor Order at 5–6; In the Matter of CITGO Refining and Chemicals Company, L.P., Order on Petition No. VI-2007-01 at 11 (May 28, 2009) (CITGO Order). In sum, allowing TCEQ to IBR emission limitations and standards in certain narrow circumstances is the exception, not the rule. The EPA has affirmed these principles on numerous subsequent occasions.

In addition to addressing the types of requirements that can be incorporated by reference into a title V permit, the EPA has also addressed some of the requirements that cannot be incorporated by reference. Specifically, the EPA has objected to TCEQ's use of IBR for requirements contained in PSD and NNSR permits. Citing these prior decisions, TCEQ's RTC asserts that the "EPA limited the scope of which NSR permits" must be included in (or attached to) title V permits, suggesting that only PSD and NNSR requirements must be directly included. RTC at Response 2. TCEQ is incorrect. Nowhere has EPA suggested that PSD and NNSR permit terms are the only requirements that must be included in a title V permit (i.e., the only requirements that cannot be incorporated by reference). Rather, the EPA's longstanding guidance on this topic has "limited" the types of requirements that can be incorporated by reference, not those that cannot be incorporated by reference.

The EPA does not consider PAL permits—or the emission limitations established therein—to be the type of "minor NSR permit" that can be incorporated by reference into a title V permit. PALs are an element of the EPA's and TCEQ's major NSR program rules, and PALs may be used only by major sources. 40 C.F.R. §§ 51.165(f)(1)(i), 51.166(w)(1)(i), 52.21(aa)(1)(i); see also 30 TAC § 116.180(a)(5). As such, they are distinguishable from minor NSR permits and PBRs, and accordingly may not be incorporated into a title V permit by reference in the same manner as minor NSR permits. At minimum, to satisfy CAA § 504(a), the emission limitations of PAL permits must be included on the face of a title V permit. 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a)(1); White Paper 2 at 38, 40. While changes to the TCEQ chapter 122 regulations are not required to clarify that PAL permits in addition to PSD and Non-Attainment NSR permits must be attached to the title V permit, TCEQ should confirm that the program is being implemented properly to ensure title V permits satisfy section 504(a) of the CAA.

Section 502(b)(10) Changes – Off-Permit Changes and Operational Flexibility

The CAA at 502(b)(10) states, "Provisions to allow changes within a permitted facility (or one operating pursuant to section 7661b(d) of this title) without requiring a permit revision, if the changes are not modifications under any provision of subchapter I of this chapter and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions): Provided, that the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies." These changes are allowed, provided they meet the requirements of 40 CFR § 70.4(b)(12) and (14). These changes are not prohibited as long as they are not modifications under any provision of title I, are not subject to any requirements under title IV of the Act and meet all applicable requirements of the Act. Title I modifications are modifications under §§ 111-12 of the CAA, 42 U.S.C. §§ 7411-12, and any physical change or change in method of operations that is subject to the preconstruction regulations promulgated under Parts C and D of the CAA. The majority, if not all, of the off-permit changes and operational flexibility actions that TCEQ approves are made through the use of a PBR and the submittal of the form OP-NOTIFY. Operational Flexibility actions are allowed for certain narrowly defined changes within a permitted facility that contravene specific permit terms without requiring a permit revision, as long as the source does not exceed the emissions allowable under the permit. 40 CFR § 70.4(b)(12)(i). While the TCEQ rules at 122.222 appear to align with the EPA regulations and guidance, EPA suggests that TCEQ consider revising the rules at 122.222 to include a requirement that off-permit changes and operational flexibility actions must be consolidated into the title V permit upon renewal.

High Level Citations for NSPS and NESHAP Regulations

Under 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). The CAA § 504 requirement to include all applicable requirements in a title V permit can be satisfied using IBR in certain circumstances. See, e.g., White Paper 2 at 40 (explaining how IBR can satisfy the requirements of CAA § 504). In all cases where IBR is employed, the title V permit must contain references that are "detailed enough that the manner in which the referenced material applies to the facility is clear and is not reasonably subject to misinterpretation." White Paper 2 at 37. Moreover, "Where only a portion of the referenced document applies, . . . permits must specify the relevant section of the document." [4]

Requirements of a NESHAP that apply to emission units at a facility are "applicable requirements." 40 C.F.R. § 70.2; 30 TAC § 122.10(2)(I)(ii). The EPA has previously addressed the manner by which NESHAP (or NSPS) requirements may be incorporated by reference into title V permits. In 1999, the EPA stated, "The permit needs to cite to whatever level is necessary to identify the applicable requirements that apply to each emissions unit or group of emission units (if generic grouping is used), and to identify how those units will comply with the requirements." The EPA has also objected to title V permits that have attempted to IBR NESHAP (or NSPS) requirements without providing sufficient detail to determine the specific requirements that apply to emission units at the source. Specifically, in the Tesoro Order, the EPA found that references to sections of a NESHAP that were not associated with

[4] The EPA has also explained: "Where the cited applicable requirement provides for different and independent compliance options . . . , the permitting authority generally should require that the part 70 permit contain (or incorporate by reference) the specific option(s) selected by the source." White Paper 2 at 39. This principle is even more relevant in situations where a NESHAP includes different regulatory requirements, only some of which apply to specific emission units at the source (i.e., to situations where determining the applicable requirements of the NESHAP depends not on the option chosen by the source, but rather on the option dictated by the regulations).

specific emission units created ambiguity and applicability questions that "render[ed] the Permit unenforceable as a practical matter and incapable of meeting the Part 70 standard that it assure compliance with all applicable requirements." In the Matter of Tesoro Refining, Order on Petition No. IX-2004-06 at 8 (March 15, 2005). Additionally, in the ETC Waha Order, the EPA found that high-level references to an entire NSPS subpart, which did not identify the specific requirements within the subpart that applied to each emissions unit, similarly failed to comply with the CAA. In the Matter of ETC Texas Pipeline, Ltd. Waha Gas Plant, Order on Petition No. VI-2020-3 at 17–19 (January 28, 2022).

TCEQ's EPA-approved title V regulations contain language that is consistent with the EPA's guidance on this issue. Specifically, the TCEQ regulations require title V permits to include:

> [D]etailed applicability determinations, which include . . . (i) the specific regulatory citations in each applicable requirement . . . identifying the emission limitations and standards; and . . . (ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards . . . sufficient to ensure compliance with the permit.

30 TAC § 122.142(b)(2)(B).

Despite this, TCEQ routinely issues title V permits that contain high level citations for NSPS and NESHAP applicable requirements. TCEQ should consider if the chapter 122 regulations should be revised to ensure the title V permits will satisfy the requirements of 40 CFR § 70.6(a)(1) and (c).

Title V Application and Emission Limitations

TCEQ has a variety of forms that a company may use to apply for a title V permit. TCEQ should ensure that its forms comply with 40 CFR 70.5(c). EPA has concerns that the main application form OP-REQ1 does not include all of the required emissions related information required by 40 CFR § 70.5(c)(3). This issue makes it nearly impossible to determine what the emissions are for a title V source permitted by TCEQ.