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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 10, 2021

Mr. Jeff Robinson
Branch Chief
Air Permits, Air Monitoring & Grants Branch
U.S. Environmental Protection Agency Region 6
1445 Ross Ave., Ste. 1200
Dallas, TX 75202-5766

Re: Executive Director's Response to EPA Comments
Minor Revision
Permit Number: O3336
Sandy Creek Services, LLC
Sandy Creek Energy Station
Riesel, McLennan County
Regulated Entity Number: RN104136700
Customer Reference Number: CN604335455

Dear Mr. Robinson:

On October 1, 2021, the U.S. Environmental Protection Agency Region 6 Office sent comments via an email letter related to the issuance of the proposed federal operating permit for the above referenced site, which was revised in response to ORDER RESPONDING TO PETITION (PETITION NO. III-2018-1) REQUESTING OBJECTION TO THE ISSUANCE OF TITLE V OPERATING PERMIT O3336. In accordance with Title 30 Texas Administrative Code §§ 122.350 and 122.360 (30 TAC §§ 122.350, 122.360), the Texas Commission on Environmental Quality (TCEQ) may not issue the permit until the issues identified in your Order and comments letter are resolved.

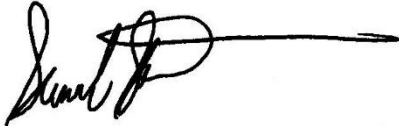
The TCEQ has completed the technical review of your comments and offers the enclosed responses to facilitate resolution of your comments. In addition, the attached responses to the comments describe the changes, if applicable, that have been made to the revised proposed permit and supporting statement of basis (SOB). The revised proposed permit and SOB are attached for your review.

Consistent with 30 TAC § 122.350, please provide an indication of your acceptance or assessment of the responses and resolution of your comments and concerns as soon as possible but no later than 45 days from the date of this letter.

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After receipt of your acceptance to the responses and resolution of your comments, TCEQ will issue the revised proposed permit. Thank you for your cooperation in this matter. Please contact Mr. Vasant V. Chaphekar, P.E., at (512) 239-1341 if you have any questions concerning this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Samuel Short', followed by a long horizontal line extending to the right.

Samuel Short, Deputy Director
Air Permits Division
Office of Air
Texas Commission on Environmental Quality

cc: Mr. Peter Guletsky, Environmental Consultant, Sandy Creek Services, LLC, Riesel
Air Section Manager, Region 9 - Waco
Air Permit Section Chief, U.S. Environmental Protection Agency, Region 6-Dallas (Electronic copy)

Enclosure: TCEQ Executive Director's Response to EPA Comments
Proposed Permit
Statement of Basis

Project Number: 32522

Executive Director's Response to EPA Comments

Permit Number O3336

The Texas Commission on Environmental Quality (TCEQ) Executive Director (ED) provides this Response to EPA's comments on the minor revision of the Federal Operating Permit (FOP) for Sandy Creek Services, LLC, Sandy Creek Energy Station, Permit No. O3336, McLennan County, Texas.

Background

Procedural Background

The Texas Operating Permit Program requires that owners and operators of sites subject to 30 Tex. Admin. Code (TAC) Chapter 122 obtain a FOP that contains all applicable requirements to facilitate compliance and improve enforcement. The FOP does not authorize construction or modifications to facilities, and it does not authorize emission increases. To construct or modify a facility, the responsible party must have the appropriate new source review authorization. Sandy Creek Services, LLC applied to the TCEQ for a minor revision of the FOP for the Sandy Creek Energy Station located in Riesel, McLennan County on August 10, 2021, and a public announcement dated August 17, 2021 was posted on TCEQ's website. The public comment period ended on September 16, 2021. During the concurrent 45-day EPA review period, TCEQ received comments on the permit via an email from EPA on October 1, 2021.

In accordance with state and federal rules, the permit minor revision may not be issued until TCEQ resolves EPA's comments.

The following responses follow the references used in EPA's email comments letter dated 10/01/2021.

EPA Comment 1: In responding to a Petition Order from the EPA Administrator, it would be helpful for TCEQ to include a written response to EPA with the proposed permit. In our directions to TCEQ we may request that TCEQ explain in the permit record the basis or rationale for any changes made or not made to the permit. For example, in the Sandy Creek Order on page 13 we state "...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." If TCEQ is declining to make changes as requested, it's possible we might agree with such a decision if it is supported with sufficient rationale. However, we can't make such a determination without reviewing a detailed response.

TCEQ Response to Comment 1: As requested, the ED is providing a response to each of EPA's comments received October 1, 2021, as well as responses to Order signed June 30, 2021. Responses to the order will be found following responses to the comments.

EPA Comment 2: Incorporation of the PBR Supplemental Table into the title V permit via special condition.

The proposed Sandy Creek permit O3336 now references the PBR Supplemental Table via Special Condition 8, which 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 (including the permits by rule identified in the PBR Supplemental Tables dated July 16, 2021 in the application for project 32522), [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*

This level of specificity when referencing the location (project number) and date of the PBR Supplemental Table is sufficient for the EPA and public to locate the latest version of the table itself. However, in order to ensure that the terms identified in the PBR Supplemental Table are adequately incorporated into the title V Permit, we are requesting that Special Condition 8 include additional clarifying language. Special Condition 8 could be modified to read: "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 (including the terms, conditions, monitoring, recordkeeping, and reporting identified in registered PBR final actions and the PBR Supplemental Tables dated July 16, 2021 in the application for project 32522), [and other types of permits] . . . referenced in the New Source Review Authorization References attachment.” This additional language provides clarity in that not only do the requirements of the PBR (rule itself) apply but the modified/expanded monitoring terms in the PBR Supplemental Table also apply.

TCEQ Response to Comment 2: Special term and condition 8 in the revised proposed permit has been modified to include the text “(including the terms and conditions which include monitoring, recordkeeping, and reporting identified in registered PBRs and permits by rule identified in the PBR Supplemental Tables dated November 18, 2021 in the application for project 32522)”.

EPA Comment 3: Incorporation of monitoring, recordkeeping, and reporting requirements from registered PBR’s into the title V permit / PBR Supplemental Table.

In response to discussions regarding PBR programmatic changes and EPA’s order requesting that TCEQ incorporate monitoring, recordkeeping, and reporting that ensures compliance with the requirements of PBR’s that apply to non-insignificant emission units, TCEQ has developed the following PBR Supplemental Tables associated with the Sandy Creek Energy Station (SCES):

- Table A: List of registration numbers for registered PBRs for the Application Area
- Table B: List of claimed (not registered) PBRs for the Application Area
- Table C: List of claimed (not registered) PBRs for Insignificant Sources for the Application Area
- Table D: List of monitoring requirements for claimed (not registered) PBRs for the Application Area

However, with respect to registered PBRs that do not contain adequate underlying monitoring to demonstrate compliance, the proposed title V permit has not sufficiently incorporated the PBR-specific monitoring for units authorized under these PBRs. EPA believes that the most straightforward way to satisfy EPA’s objection is to request that Sandy Creek list the monitoring requirements for registered Permits by Rule directly within PBR Supplemental Table D. This approach would ensure that the monitoring terms for each unit authorized under a registered PBR are easily accessible and adequately incorporated into the title V permit. The *Sandy Creek Order* specifies that “TCEQ should include or identify the monitoring, recordkeeping, and reporting requirements from the application forms for registered PBRs (in addition to the claimed but not registered PBRs).” However, in response to our objection, TCEQ has not provided any reasoning or rationale as to why this method is not being utilized.

If TCEQ instead wishes to establish the monitoring requirements within the underlying PBR registration first, and then incorporate those terms into the title V permit, TCEQ should ensure that the underlying PBR registration is formally updated, and that those terms are clearly and unambiguously incorporated into the title V permit. To do this, TCEQ could issue a new final approval letter for the PBR registration that includes both the certified emission limits and monitoring requirements. Then, to adequately incorporate these requirements (by reference) into the title V permit, TCEQ could continue the practice of only listing the registration number within the title V permit’s NSR Authorization References tables (and the PBR Supplemental Table). However, as PBR registrations are updated, TCEQ would need to update the registration date listed within PBR Supplemental Table A to ensure that the latest version of the registration is easily identifiable. This approach would not require additional title V permit terms (e.g., listing each monitoring requirement), since reference to the registration number points to the specific final approval document that includes the limits (and now monitoring).

For example, the final action and approval letter associated with Sandy Creek’s effective PBR registration (97212) lists the certified emission limits and specifies that Sandy Creek has certified its emissions under 30 TAC §§ 106.144, 106.261, and 106.262. To resolve the lack of monitoring in the underlying PBR and PBR registration, Sandy Creek sent a letter to TCEQ on July 28, 2021 titled “Update to Permit by Rule Registration Number: 97212” to clarify their monitoring practices for several units authorized under this PBR registration. This letter included requirements directly from 30 TAC §106.261 and §106.262 stating that visible emissions, except uncombined water, to the atmosphere from any point or fugitive source shall not exceed 5% opacity in any six-minute period. However, the letter also supplemented these pre-existing

requirements with monitoring by specifying an observation frequency and methodology to determine compliance with the 5% opacity requirement. As stated above, using this method to update registered PBR application representations could be appropriate if TCEQ would go one step further and issue a new final approval letter for the PBR registration that includes both the authorized emission limits and the updated monitoring requirements. Simply stopping the update process upon the receipt of a letter is not sufficient to update the PBR registration, or to incorporate the additional monitoring into the title V permit.

EPA acknowledges that there may be other methods to prescribe and incorporate monitoring for PBR registrations into the title V permit beyond what is listed above. However, to the extent TCEQ chooses such an alternative method to establish additional monitoring for registered PBRs, it is critical that TCEQ clearly and unambiguously incorporate such monitoring (i.e., the document containing such monitoring) into the title V permit.

TCEQ Response to Comment 3: TCEQ has issued a new final approval letter for the PBR registration 97212 for the additional monitoring representations that have been included as part of the Permit by Rule registration. The 10/14/2021 letter, which becomes part of the permit record, ensures federal enforceability of the PBR registration. Table A of the OP-PBRSUP table dated November 18, 2021 is revised to include 09/26/2011 and 10/14/2021 dates (under the “Registration Date” column) for Registered PBR 97212. The signed letter dated 10/14/2021 is publicly accessible and PBR registration related records, including certified emissions limits, may be publicly accessed via TCEQ CFR Online website https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_SEARCH. Guidance documents for conducting air permit related searches on TCEQ Records Online can be accessed at https://www.tceq.texas.gov/permitting/air/nav/air_status_permits.html.

EPA Comment 4: Adequacy of monitoring for registered PBR's.

Whenever opacity is used to determine compliance with a limit on PM emissions, TCEQ should identify the basis for such a determination. In addition, if a unit is subject to the general limits under 106.4 or other PBR-specific limits under the various 106.4 subchapters, there must be adequate monitoring and recordkeeping to show how compliance with such a limitation is determined.

For example, the only monitoring requirements specified in the 97212 update letter (and registration file) are related to the 106.261(a)(5) and 106.262(a)(6) requirements of no visible emissions in excess of 5% in any six-minute period. Does TCEQ intend for monthly visible emission monitoring to ensure compliance with all registered emission limits and requirements of 106.261, 106.262, and 106.144? If so, TCEQ should explain how monthly visible emission observations assures compliance with those other limits and requirements.

TCEQ Response to Comment 4: In response to EPA's comment “Whenever opacity is used to determine compliance with a limit on PM emissions, TCEQ should identify the basis for such a determination”, the ED notes the Rationale for Compliance Assurance Monitoring (CAM)/ Periodic Monitoring (PM) Methods Selected (CAM/PM) section of the SOB already includes “Basis of Monitoring” description for various units (such as S01, GRP-COAL1, GRP-COAL2, S13, S18AB and S32) that are subject to state and/or federal particulate matter (PM) or opacity limits. However, for improved clarity, the paragraph below is added to the Permits by Rule section in the SOB – “The following is the basis of monitoring for units authorized by PBRs that may use opacity to determine compliance with a limit on PM emissions: The option to perform opacity readings or visible emissions to demonstrate compliance is consistent with EPA Reference Test Method 9 and 22. Opacity and visible emissions have been used as an indicator of particulate emissions in many federal rules including 40 CFR Part 60, Subpart F and Subpart HH. In addition, use of these indicators is consistent with the EPA's “Compliance Assurance Monitoring (CAM) Technical Guidance Document” (August 1998). Monitoring specifications and procedures for the opacity are consistent with federal requirements and include the EPA's Test Method 9 for determining opacity by visual observations and the requirements of 40 CFR § 60.13 for a continuous opacity monitoring system (COMS). The monitoring specifications and procedures for the visible emissions monitoring are similar to “EPA Reference Method 22” procedures.”



Regarding EPA's comment, “Does TCEQ intend for monthly visible emission monitoring to ensure compliance with all registered emission limits and requirements of 106.261, 106.262, and 106.144?”, the ED

notes that all monitoring, recordkeeping and reporting requirements to demonstrate compliance with applicable requirements under the registered PBRs are performed on a site and unit specific basis. While monthly visible emission monitoring is performed to ensure compliance with opacity limits specified in the PBRs 106.261/106.262, various operating parameters such as throughput of material, hours of operation, flow, and any other applicable input, are used to calculate emissions and records are maintained to demonstrate compliance with registered emission limits and requirements listed under PBRs 106.261, 106.262, and 106.144. These emission calculations and recordkeeping requirements are documented in application representation for PBR Registration 97212, Project 167589 (publicly accessible via WCC as document content ID number 1064589 which contains 179 pages). For example, refer to Tables D-1 through D-3 and D-11 that document bulk material handling and silo emissions calculations, Table D-4 table which documents emergency engine emissions calculations, and Table D-12 that documents PBRs 106.261 and 106.262 emissions limit evaluation. In addition, in regard to authorization under PBRs 106.261 and 106.262, applicant does not plan to: 1) add any new emissions or increase any emissions over what is represented in the application, or 2) make any physical changes or modifications to the current equipment that is represented in the application for Permit Registration Number 97212.

EPA Comment 5: Clarification of PBR Authorizations.

The tech review and supplemental table for PBR registration 97212 indicates that EPNs S72 and S73 (diesel storage tanks) are authorized under 106.473. However, the NSR Authorization References by Emission Unit Table within O3336 lists S72/S73 as subject to 106.472. Please verify which document lists the correct PBR authorization.

TCEQ Response to Comment 5: After an internal review, the applicant has determined that PBR No. 106.473 is the correct PBR authorization for units S72 and S73 (diesel storage tanks). Due to an error, the FOP O3336 application dated 08/29/2013 submitted to TCEQ incorrectly listed PBR No. 106.472 as the preconstruction authorization for units S72 and S73. The proposed permit is revised to reflect the correct authorization.

EPA Comment 6: Lb/hr “limits” in PBR registrations.

We would advise TCEQ against identifying any lb/hr figures in the technical review documents for PBRs as an emission limit unless they are truly an emission limit. If these lb/hr figures are used to determine applicability of a PBR, then we would advise TCEQ to refer to these as an emission threshold. However, if TCEQ does consider these to be emission limits, then monitoring sufficient to show compliance on an hourly basis would be needed for each pollutant.

TCEQ Response to Comment 6: The ED would like to clarify the lb/hr figures referenced in the technical review documents for the PBRs are “threshold” values. However, to further clarify the technical review document going forward, TCEQ intends to change the heading of the table in future technical review documents.

The following responses follow the references used in EPA’s order dated 06/30/2021 granting a petition for objection to permit O3336.

EPA Objection Regarding Claim A: In order to resolve the EPA’s objection on this claim, the 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.¹²

¹² See https://www.tceq.texas.gov/permitting/air/nav/air_status_permits.html.

Incorporating certified registration numbers could be accomplished in various ways. The 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 [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)]. 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. The 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 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 63322 n.4.

TCEQ Response to EPA Objection Regarding Claim A: As directed by EPA, the applicant submitted a minor revision project 32522 to revise SOP O3336 as follows:

- 1) New Source Review Authorization References by Emissions Unit Table in FOP O3336 is revised to add PBR Registration Number 97212, which includes PBRs 106.261, 106.262, and 106.144 preconstruction authorization for units S10EC, S10EH, S12, S31, S35, S42, S44, S58 and S74AB.
- 2) A PBR Supplemental Table (OP-PBRSUP) was added to the permit record and a reference to the PBR Supplemental Table was added in the Special Term and Condition 8 in the FOP.
- 3) The statement of basis (SOB) was updated to revise the insignificant activities list and add a reference to the PBR Supplemental Table, and the Special Term and Condition 8 listed in the FOP.

These actions 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”.

EPA Objection Regarding Claim B: 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 Sandy Creek title V permit. If the underlying PBR contains monitoring, recordkeeping, and reporting requirements, TCEQ should identify those PBRs in the permit record and determine if the monitoring in those PBRs is adequate. On the other hand, if the PBRs do not contain any underlying monitoring, recordkeeping, or reporting, like 30 TAC §§106.261, 106.262, 106.263, and 106.473, 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, NSPSs, NESHAPs, 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 adequate monitoring, recordkeeping, and reporting that assures compliance with the requirements and limits identified, then TCEQ should add such terms to the Permit.

The EPA notes that TCEQ is already planning to begin specifying 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 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, the EPA's regulations, and TCEQ's EPA-approved regulations. *E.g.*, 42 U.S.C. § 7661c(c).¹⁸ In order for something to be incorporated by reference, one must first *reference* it. As the 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

¹⁸ 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).

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

Id. at 38.

First, the 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). Since title V applications can be hundreds (if not over a thousand) pages long, a general statement incorporating the PBR Supplemental Table in all title V permits without providing additional information detailing where the table is located is not specific enough to meet the standards described above. 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. In order to satisfy the requirement in title V for the Permit to set forth, include, or contain the applicable requirements, the special condition incorporating this table needs to include, at minimum, the date of the application and specific location of the supplemental 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.

Second, while 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, the EPA understands that TCEQ intends to start having applicants include monitoring in the registration form.¹⁹ However, TCEQ has not

¹⁹ In its May 11, 2020 letter, TCEQ stated that it will require applicants to “[u]pdate PBR application representations with monitoring that is sufficient to demonstrate compliance.” Letter from Tonya Baer, Deputy Director of Air,

indicated how it will appropriately incorporate that monitoring into an enforceable part of the title V permit. The 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, the EPA's regulations, and TCEQ's EPA-approved regulations. *E.g.*, 42 U.S.C. § 7661c(c).²⁰ 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 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 PBRs, provided the program was implemented correctly.

See 66 Fed Reg. 63318, 63321–32 (December 6, 2001).²¹ In its program approval, the EPA indicated that monitoring specified in the *terms and conditions* of a minor NSR permit could be incorporated into the title V permit.²² The 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.²³ The 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. 03027 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). The EPA directs TCEQ to make similar clarifications for the Sandy Creek title V permit and then determine if the monitoring, recordkeeping, and reporting in special conditions 9 and 10 are sufficient for these insignificant units.

TCEQ, to David Garcia, Director, Air and Radiation Division, Region 6, U.S. EPA, *Permits by Rule Programmatic Changes*, at 3.

²⁰ See *supra* note 18.

²¹ See also *Public Citizen v. EPA*, 343 F.3d 449, 460 (5th Cir. 2003) (upholding the 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.").

²² *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.”).

TCEQ Response to EPA Objection Regarding Claim B: As noted in TCEQ Response to EPA Objection Regarding Claim A and as directed by EPA, the proposed permit specifies the monitoring, recordkeeping, and reporting that assures compliance with the requirements of the PBRs that apply to non-insignificant units as follows:

- 1) New Source Review Authorization References by Emissions Unit Table is revised to include PBR registration number(s) on a unit specific basis. For example, New Source Review Authorization References by Emissions Unit Table in FOP O3336 is revised to add PBR Registration Number 97212, which includes PBRs 106.261, 106.262, and 106.144 preconstruction authorization for units S10EC, S10EH, S12, S31, S35, S42, S44, S58 and S74AB.
- 2) The PBR Supplemental Table (OP-PBRSUP) which is included in a Title V application becomes part of the permit record. A reference to the PBR Supplemental Table was added in the Special Term and Condition 8 in the FOP.
- 3) The statement of basis (SOB) was updated to revise the insignificant activities list and add a reference to the PBR Supplemental Table, and the Special Term and Condition 8 listed in the FOP.
- 4) For registered PBRs, TCEQ issued a new final approval letter for the PBR registration 97212 for the additional monitoring representations that have been included as part of the Permit by Rule registration. The 10/14/2021 letter, which becomes part of the permit record, ensures federal enforceability of the PBR registration. Table A of the OP-PBRSUP table dated November 18, 2021 is revised to include 09/26/2011 and 10/14/2021 dates (under the “Registration Date” column) for Registered PBR 97212. The signed letter will be publicly accessible and PBR registration related records, including certified emission limits, may be publicly accessed via TCEQ CFR Online website https://records.tceq.texas.gov/cs/idcplg?IdcService=TCEQ_SEARCH. Guidance documents for conducting air permit related searches on TCEQ Records Online can be accessed at https://www.tceq.texas.gov/permitting/air/nav/air_status_permits.html.
- 5) The SOB was updated to identify insignificant activities and emission units not required to be addressed in the operating permit application.

