1206 San Antonio St.
Austin, TX 78701
Phone: (425) 381-0673
www.environmentalintegrity.org

December 11, 2020

The Honorable Ken Paxton
Office of the Attorney General
Price Daniel Sr. Building, 6th Floor
209 W. 14th Street
Austin, Texas 78701

via electronic submission

Attention: Justin Gordon, Division Chief, Open Records Division

Re: Request for Attorney General Opinion
Public Information Act Request Regarding Information for
Max Midstream Texas, LLC
TCEQ PIR No. 21-56505

Dear Attorney General Paxton:

Environmental Integrity Project ("EIP") has requested a copy of materials related to Max Midstream Texas, LLC's ("Max Midstream") application for an air permit authorizing construction of a significant expansion project at the company's Seahawk Crude Condensate Terminal ("Terminal") located in Point Comfort, Calhoun County, Texas. Environmental Integrity Project represents San Antonio Bay Waterkeepers, a group of concerned citizen living near the Terminal who do not believe that Max Midstream has demonstrated that the expansion project at the Terminal is consistent with applicable pollution control requirements established to protect public health and the environment. As is our right, we have filed comments and a request for a contested case hearing with the Texas Commission on Environmental Quality ("TCEQ") opposing issuance of the requested air permit, based on Max Midstream's failure to make demonstrations required by Texas's federally-approved air permitting program. (Attachment A), Comments and Contested Case Hearing Request Concerning Max Midstream Texas LLC's Application for Permit No. 162941.

The Environmental Integrity Project's Public Information Act records request asks for information necessary to undertake a meaningful review of Max Midstream's proposed project and to participate in the permitting process. (Attachment B), PIR Request 21-56505 (October 21, 2020). In its request, Environmental Integrity Project explained that the emissions calculations section of Max Midstream's application had been improperly designated as confidential and requested that the TCEQ "direct Max Midstream to resubmit this information without designating confidential to avoid an unnecessary referral to the Texas Attorney General." *Id*. The TCEQ

declined to so direct Max Midstream and the agency submitted a request for an opinion from the Texas Attorney General as to whether the requested information may be withheld under the Texas Public Information Act and the Texas Clean Air Act. (Attachment C), Request for Attorney General Opinion, Public Information Act Request Regarding Max Midstream Texas, LLC, TCEQ PIR No. 21-56505. In its request, the TCEQ declined to provide comments upon whether the requested information was properly designated as confidential. *Id*.

As a preliminary matter, the TCEQ informed Max Midstream that the Environmental Integrity Project had requested the company's "confidential" application documents on October 30, 2020. (Attachment D), Email to Brandon Lantrip, EHS Manager, Max Midstream Texas, Re: TCEQ PIR No. 21-56505. This letter explained that if Max Midstream failed to submit a letter to the Attorney General providing arguments establishing that the requested documents are entitled to protection as confidential information within 10 business days, "the OAG will presume that you have no interest in maintain the confidentiality or your records and will more than likely rule that the records must be released to the public." *Id*. The letter also explained that Max Midstream was required to provide a copy of any arguments sent to the Attorney General to the Environmental Integrity Project. *Id*. To date, the Environmental Integrity Project has not received a copy of Max Midstream's arguments. If the Attorney General has not received comments from Max Midstream demonstrating that the requested information is entitled to treatment as confidential information, he should presume that Max Midstream does not object to the release of the requested documents and direct the TCEQ to make the documents available to the Environmental Integrity Project.

If Max Midstream has submitted arguments in support of its claim that the requested documents are entitled to protection as confidential information, the Attorney General should reject those arguments, because much or all of the requested information is public information as a matter of law. Under Texas and federal law, members of the public have a right to review Max Midstream's application materials to determine whether the company has demonstrated compliance with application requirements established to protect public health, and to oppose issuance of the permits if the application is deficient. Max Midstream and the TCEQ are improperly limiting the Environmental Integrity Project and its client's ability to exercise their right to participate in the permitting process by treating key application information as confidential, even though much of this information is public information as a matter of law.

Specifically, Max Midstream has designated emissions calculations that the company relies upon to contend that this project is not subject to federal major source preconstruction permitting requirements for criteria pollutants and hazardous air pollutants as "confidential." *See* Attachment A at 2 and 4. Representations contained in the confidential application section, including limits on the amount of time Max Midstream will operate specific pieces of equipment at the Terminal, the number of tank turnovers it will conduct, and operating parameters for Terminal equipment used to calculate the proposed numerical emission limits will become enforceable conditions of Max Midstream's permit. 30 Tex. Admin. Code § 116.116(a)(1), *see also In the Matter of Dow Chemical Company, Dow Salt Dome Operations*, Response to Petition

No. VI-2015-12 at 8 (February 18, 2020) ("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.'").[1] These representations establish enforceable operating limits that are public information as a matter of law. 40 C.F.R. § 2.301(f) (providing that "[e]missions data, standard or limitations" … shall not be entitle to confidential treatment, [and] shall be available to the public notwithstanding any other provision of this part."). Likewise, this information also constitutes emissions data as defined by 40 C.F.R. § 2.301(a)(2), which § 2.301(f) designates as public information.

Recent orders from EPA and the Texas Attorney General's longstanding interpretation of applicable federal law and state law requirements establish that the emission calculations and application representations establishing enforceable operational limits is public information as a matter of law. (Attachment E), Objection to Title V Permit No. O2269, ExxonMobil Corporation, Baytown Chemical Plant ("Baytown Order") at 3-5 (January 23, 2020); Open Records Letter Decision OR2012-03248 (March 5, 2012) ("However, the requestor notes, and we agree, under the federal Clean Air Act emission data must be made available to the public, even if the data otherwise qualifies as trade secret information."). As the Baytown Order and the Attorney General's OR2012-03248 decision make clear, the TCEQ may not treat emissions data and enforceable application representations as confidential even if Max Midstream demonstrates that such data and representations are otherwise entitled to protection as confidential business information or trade secrets under Texas state law.

Because information designated as "confidential" in Max Midstream's application consists of enforceable representations and emission data, such information must be made publicly available. Neither the TCEQ nor Max Midstream have attempted to demonstrate that the requested information is confidential. Accordingly, Max Midstream and the TCEQ have failed to provide a *prima facie* basis that information in Max Midstream's "confidential" application materials is exempt from disclosure. Accordingly, the Environmental Integrity Project requests that the Texas Attorney General direct the TCEQ to release the requested information.

Respectfully,

/s/ Gabriel Clark-Leach
Gabriel Clark-Leach
Senior Attorney
Environmental Integrity Project
1206 San Antonio St.
Austin, Texas 78701
(425) 381-0673
gclark-leach@environmentalintegrity.org

[1] Available electronically at: https://www.epa.gov/sites/production/files/2020-02/documents/dow_salt_dome_response2015.pdf (last accessed, December 11, 2020).

ATTACHMENT A

Comments and Contested Case Hearing Request Concerning Max Midstream Texas LLC's Application for Permit No. 162941

November 12, 2020

Ms. Bridget C. Bohac
Chief Clerk, MC-105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
Fax: (512) 239-3311

Via Electronic Filing

Re: Comments and Contested Case Hearing Request Concerning Max Midstream Texas LLC's Application for Permit No. 162941, Authorizing an Expansion of the Company's Seahawk Terminal, Located in Calhoun County, Texas

Dear Ms. Bohac,

Diane Wilson, San Antonio Bay Waterkeepers, Texas Rio Grande Legal Aid, and Environmental Integrity Project ("Commenters") appreciate this opportunity to comment on and **request a contested case hearing** regarding Max Midstream Texas LLC's ("Max Midstream") application for New Source Review ("NSR") Permit No. 162941, which would authorize an expansion of the company's existing Seahawk Crude Condensate Terminal ("Terminal"), in Point Comfort, Calhoun County, Texas. The proposed expansion project would authorize construction of eight new storage tanks, seven marine loading docks and associated vapor combustion units, three firewater pumps, piping fugitives, and authorize planned maintenance, startup, and shutdown ("MSS") activities.

DISPUTED ISSUES OF FACT

The Terminal is currently classified as a minor source of air pollution and existing units at the Terminal are authorized by and subject to requirements in Permit by Rule ("PBR") Registration No. 98075. Because the Terminal is characterized as an existing minor source and proposed project increases are less than the applicable major source threshold (100 TPY of any criteria pollutant), Max Midstream contends that the expansion project as a minor modification even though project increases exceed the applicable major modification thresholds for NO_X (40 TPY) and Ozone (40 TPY NO_X or VOC). *See* 30 Tex. Admin. Code § 116.12(20) ("At a stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified for a major source.").

Commenters, however, have been unable to fully evaluate Max Midstream's representation that this project does not trigger major NSR preconstruction permitting requirements and many of

the applicant's representations because crucial application material has been improperly designated confidential by the applicant. Based upon the limited information contained in the publicly-available application file, Commenters request a contested case hearing on the following issues of disputed fact:

- Max Midstream's application failed to include information sufficient to demonstrate that emissions from the proposed new and modified facilities and activities meet all of the criteria established by Texas's federally-approved preconstruction permitting rule at 30 Texas Administrative Code § 116.111(a)(2).

- Max Midstream's application failed to include a demonstration, including modeling, that demonstrates that emissions from the requested project will be protective of the health and property of the public. *Id*. at § 116.111(a)(2)(A)(i) and (J). Additionally, while the application does contain information about potential parameters for a modeling demonstration that was not included in the application, Max Midstream failed to include any information establishing that these parameters were properly determined and reflect worse-case emissions from the Terminal under the requested authorization.

- The application fails to demonstrate that monitoring, testing, and recordkeeping requirements proposed by the applicant are sufficient to measure emissions related to the proposed project and to ensure that emission limits in the requested permit are practicably enforceable. *Id*. at § 116.111(a)(2)(B).

- Max Midstream contends that the federal Clean Air Act's Best Available Control Technology ("BACT") requirements do not apply to this project, because the Terminal is a minor source and the project is a minor modification. Accordingly, the application does not attempt to demonstrate compliance with federal BACT requirements. Max Midstream, however, failed to demonstrate that the project is a minor modification.

  New and modified units that would be authorized as part of the proposed project have the physical capacity to emit criteria pollutants at levels that exceed applicable major source thresholds. For example, Max Midstream proposes to construct 18 marine vapor combustion units and has requested a permit authorizing each of these units to emit 15 pounds of NOx and CO per hour. Application, Permit No. 162941 at Table 1-2. The applicable major source threshold for each of these pollutants is 100 tons per year. *Id*. at Table 1-1; *see also* 30 Tex. Admin. Code § 116.12(20). If all of these vapor combustion units were operated year round at the requested hourly rate, NO_X and CO emissions from these units alone would be almost 1,183 tons per year. Yet, the requested annual NO_X and CO emission cap covering all these units would only authorize Max Midstream to emit 75 tons of NO_X and CO each year. The publicly-available application materials do not indicate that Max Midstream has requested any operating limitations for these units that would ensure that they will comply with the proposed annual NO_X and CO emission caps, and the public application materials do not explain how

the monitoring method Max Midstream has proposed—continuous monitoring of VCU exhaust temperature—will be used to determine emissions from the VCUs or establish that this method is sufficient to make the annual emissions cap practicably enforceable, as required to limit the units' potential to emit for preconstruction permitting purposes.

This same problem applies for the 15 tanks associated with this project, for which Max Midstream has proposed hourly VOC emission rates of 13.40 pounds (tanks TK-06-01, and TK-06-03 through TK-06-15) and 18.42 pounds (TK-06-02). If these tanks emitted the maximum requested hourly VOC rate year round, annual VOC emissions from the tanks would amount to 902 tons. Yet the storage tank annual VOC cap would authorize less than 50 tons per year. The public portion of the application file does not contain any operating limitations that would assure compliance with this annual cap and the application fails to demonstrate how the proposed monitoring regime, throughput monitoring and temperature monitoring, is sufficient to make the proposed cap practicably enforceable.

Without additional operating limitations and monitoring requirements sufficient to make annual emission limits proposed to avoid major New Source Review applicability practicably enforceable, the project's physical potential to emit VOC, CO, and NO_X well above applicable major source thresholds dictates that this project should be treated as a major modification, subject to federal BACT requirements. Thus, the application is deficient because Max Midstream failed to demonstrate compliance with federal BACT requirements. 30 Tex. Admin. Code § 116.111(a)(2)(C).

Additionally, Max Midstream appears to use an inapplicable equation to determine emissions related to loading losses at the Terminal. Max Midstream's application indicates that "[l]oading losses are comprised of the total vapors displace and generated by crude oil and/or crude oil condensates into the marine vessels." Application, Permit No. 162941 at 5-2. To calculate project emissions rates related to loading losses, Max Midstream relies on Equation 1 from AP-42, Section 5.2. *Id*. Max Midstream's reliance on this equation is problematic for two reasons. First, according to AP-42, this equation builds in a probable error rate of 30%. AP-42, Section 5.2 at 5.2-4. An equation that may be expected to underestimate actual project emissions by a third does not accurately represent project emissions. Additional VOC emissions within this range of error may be sufficient to trigger major New Source review requirements. Second, AP-42 indicates that Equation 1 should only be used for "products other than gasoline and crude oil." AP-42, Section 5.2 at 5.2-5. For marine loading of crude oil, as proposed by this project, AP-42 directs usage of Equations 2 and 3, instead of Equation 1. *Id*. at 5.2-5.

The application, moreover, fails to demonstrate compliance with BACT requirements established by the Texas Clean Air Act. As the application makes clear, "[e]ach facility is

evaluated for [BACT] on a case-by-case basis." Application, Permit No. 162941 at 6-1. According to TCEQ policy, BACT evaluations are conducted using a tiered approach. *Id*. In the first tier, "controls accepted as BACT in a recent permit review for the same process in the same industry are approved as BACT . . . if no new technical developments have been made that would justify additional controls as economically or technically reasonable." *Id*. The application fails to demonstrate compliance with Texas's state BACT requirement, because it fails to include any information about the level of control mandated in recent permit reviews for the same industry and does not indicate that Max Midstream made any effort to determine whether improvements beyond the unspecified level of control required by undisclosed recently permitted facilities are achievable. Instead, Max Midstream relies entirely on recommended controls in the TCEQ's outdated BACT guidance documents. For example, Max Midstream relies on the TCEQ's five year old guidance document to identify applicable controls for its storage tanks. *Id*. The guidance Max Midstream relies upon for its proposed loading operation was written nearly a decade ago, in 2011. *Id*. at 6-2. The application fails to identify the basis for the proposed BACT determinations for Max Midstream's VCUs. The flare control requirements and emission factors for NO_X and CO are based on Texas's two decades old 2000 guidance on air permitting for chemical flares and vapor oxidizers at chemical sources. *Id*. at 6-3. The SO_2 control requirements for the proposed flare are said to be "consistent" with unidentified "recent BACT determinations for flares." *Id*. Again, the basis for Max Midstream's determination that the proposed level of control for VOC flare emissions satisfied applicable Texas BACT requirements is undisclosed. *Id*. at 6-3-6-4. This same kind of treatment renders the application's BACT demonstrations for fugitives, the proposed emergency generator and firewater pump engines and MSS activities deficient.

- A stationary source that emits or has the potential to emit ten tons or more of any hazardous air pollutant per year or more than 25 tons per year of any combination of hazardous air pollutants is a "major source," subject to applicable major source requirements in EPA's National Emission Standards for Hazardous Air Pollutants. According to the application, the Terminal is not a major source of hazardous air pollutants, but the public application fails to include any information supporting this claim. While Max Midstream's electronic workbook appears to propose site-wide HAP limits consistent with this threshold, it does not identify how much hazardous air pollution the terminal has the physical capacity to emit, which HAPs will be emitted from the Terminal, what operational limits, if any, Max Midstream has requested to assure compliance with these emission limits, or monitoring, testing, and recordkeeping requirements for each kind of unit that will emit HAPs that make the 10/25 ton per year site-wide limits practicably enforceable. Accordingly, Max Midstream failed to make the demonstration required by 30 Texas Administrative Code § 116.111(a)(2)(E), (F), and (K).

- Max Midstream relies on vendor specifications and engineering knowledge to claim that its proposed emission rates will be achieved in practice across all operating scenarios that will be authorized by the requested permit. This information, however, is not included in the public

application file, which fails altogether to demonstrate that the project—if authorized—will achieve the performance specified in the application, as required by 30 Texas Administrative Code § 116.111(a)(2)(G).

- As explained above, this project is subject to major New Source Review preconstruction permitting requirements, because the project's physical capacity to emit criteria pollutants above the applicable major source threshold is not sufficiently constrained by practicably enforceable emission limits and operating limitations. Max Midstream's application is deficient because it does not demonstrate compliance with applicable major New Source Review requirements as mandated by 30 Texas Administrative Code § 116.111(a)(2)(I).

CONTESTED CASE HEARING REQUEST

San Antonio Bay Estuarine Waterkeeper and S. Diane Wilson request a contested case hearing concerning Max Midstream's application for Permit No. 162941 authorizing an expansion project at the Terminal. Communications regarding this hearing request should be directed to Gabriel Clark-Leach at the physical or email address listed below.

1. San Antonio Bay Estuarine Waterkeeper

San Antonio Bay Estuarine Waterkeeper is part of a national network of Waterkeeper organizations, the Waterkeeper Alliance. San Antonio Bay Estuarine Waterkeeper ("Waterkeeper") is a volunteer-run, non-profit membership organization whose mission is to protect Lavaca Bay, where the Terminal is located, Matagorda Bay and San Antonio Bay, and to educate the public about these ecologically important estuarine systems. Waterkeeper pursues its organizational goals by engaging media sources to publicize areas of concern, hosting public meetings, filing comments and hearing request on permit applications at environmental agencies, notifying government agencies when there are problems in the waterways and air, and filing lawsuits when other alternatives are unavailing.

Lavaca Bay supports a wide range of legally protected interests, including property interests, economic interests, and aesthetic interests, that are recognized and protected by the federal Clean Air Act, the Texas Clean Act and by regulations implementing these statutes. These interests are threatened by air pollution from industrial sources, like the Terminal, and container ships that will be loaded at with crude oil at the Terminal. Waterkeeper members reasonably anticipate that construction and operation of the Terminal expansion project will make Lavaca Bay less fishable, diminish natural resources Waterkeeper members rely upon for their livelihoods, interfere with members' longstanding and deeply fulfilling recreational activities in the Bay and the surrounding area, interfere with members' use and enjoyment of their own property, and increase members' unwanted exposure to air contaminants regulated by federal and state law.

Waterkeeper members who will be affected by the proposed Terminal expansion project include, but are not limited to:

- Dale Jurasek, who lives approximately five miles east of the Terminal;
- Mauricio Blanco, who lives approximately six miles west of the Terminal; and
- S. Diane Wilson, who lives between Seadrift and Port O'Connor, near the intracontinental waterway approximately 15 miles southwest of the Terminal.

Each of these members lives, works, and recreates in areas that will be exposed to increased air pollution from the Terminal if Max Midstream's application for Permit No. 162941 is approved. Members of Waterkeeper walk the beaches of Lavaca Bay and swim and boat in its waters. Waterkeeper members reasonably worry that increased pollution from the proposed expansion project will negatively affect their own health, the health of their families, and interfere with the use and enjoyment of their property. Waterkeeper members are also concerned about the damage to the beaches, wetlands, shores, bays, and wildlife and marine life that depend on those resources that will result from construction and operation of the proposed Terminal expansion project. These injuries to the interests of Waterkeeper members are not generalized, abstract, or theoretical. Waterkeeper members include commercial fisherman, shrimpers, and oystermen whose livelihoods depend upon the health of the Lavaca Bay ecosystem. Waterkeeper members have a deep aesthetic and recreational connection to the Bay, which has developed over many years of active use of the Bay and surrounding lands and that is not widely shared by members of the general public.

2. S. Diane Wilson

S. Diane Wilson has spent her life working in the local bays surrounding Calhoun County; including Lavaca/Matagorda Bays and San Antonio Bays. For four generations, Ms. Wilson and her family have relied upon these bays for their financial, physical, and spiritual well-being. Ms. Wilson, following in the footsteps of her parents and her grandparents, worked in Lavaca Bay where the Terminal is located, Matagoda Bay, and San Antonio Bay for forty years as a commercial fisherman, shrimper, oysterman, fin fisher, and as a manager at a fish house. Though she has retired from those professions, she continues to rely on the fishing trade in Lavaca Bay as a net builder and mender in the shrimping industry. Ms. Wilson's deep connection with the waters and trades that are directly endangered by air pollution from industrial sources, like the Terminal, is highly personal, specific, and encompasses interests that are not shared by the general public. Ms. Wilson has participated formally in administrative proceedings before the EPA and TCEQ to ensure that government decisions—including air and water permitting decisions—that could compromise the ecological integrity of the Lavaca Bay system strictly comply with federal and state anti-pollution requirements and that risks of environmental harm resulting from industrial

development in the area are properly addressed and minimized. Ms. Wilson has also participated in litigation against polluters that have violated federal pollution control requirements.

Ms. Wilson has dedicated decades of her life working to protect Texas bays from pollution and degradation. The bays not only support her financially. They are also precious to her. From time to time, Ms. Wilson goes out on a skiff into Lavaca and Matagorda Bays. She swims with her children and grandchildren in Matagorda Bay at Magnolia Beach. She is a monitor that kayaks weekly on the bays and creeks and shores surrounding the project area. Ms. Wilson's enjoyment of the Bays near her home has been diminished, and in some cases thwarted entirely, by upset events at industrial facilities with the same kind of equipment—tanks, flares, and VCUs—that will be constructed as part of the proposed Terminal expansion project. Given this experience, Ms. Wilson's belief that the TCEQ's failure to ensure compliance with state and federal pollution control requirements that apply to the proposed expansion project threatens her physical, economic, and spiritual well-being is well-founded. Ms. Wilson is an affected person with standing to participate in a contested case hearing to ensure that any permit issued by the TCEQ authorizing construction of the Terminal expansion project is sufficiently protective.

CONCLUSION

Commenters appreciate the opportunity to file these comments and this hearing request and reserve the right to provide additional information on the matters discussed in this document as allowed by the Clean Air Act, the Texas Clean Air Act, and regulations implementing these statutes.

Sincerely,

/s/ Gabriel Clark-Leach
Gabriel Clark-Leach
ENVIRONMENTAL INTEGRITY PROJECT
1206 San Antonio St.
Austin, Texas 78701
Telephone: (425) 381-0673
E-mail: gclark-leach@environmentalintegrity.org

/s/ Jennifer Richards
Jennifer Richards
TEXAS RIOGRANDE LEGAL AID, INC.
4920 N. I-35
Austin, TX 78751
Telephone: (512) 374-2758

Fax: 447-3940 (fax)
E-mail: jrichards@trla.org

ATTACHMENT B

PIR Request 21-56505 (October 21, 2020)

PIR Request submitted on 10/21/2020 03:56 PM

PIR Code: 21-56505-PIR
Due Date: 11/04/2020

Page One

Name Prefix:
Name: Gabriel Clark-Leach
Company/Organization: Environmental Integrity Project
Requestor Type: Non-Profit
Mailing Address 1:
Mailing Address 2:
City:
State/Province/Region:
Zip/Postal Code:
Country:
E-mail Address: gclark-leach@environmentalintegrity.org
Phone Number:
FAX Number:

Page Two

Sites/Facilities :

RN	Facility	CN	Customer	Program	Additional ID
					162941
				Air New Source Permits	
RN106209190	SEAHAWK CRUDE CONDENSATE TERMINAL				

Area Description:

Page Three

Date Range: 2020
Agency Programs: Air - New Source Permits (OA)
Addition Record Search: We are requesting documents, including but not limited to notes, email correspondence, and emissions calculations in or related to the application file for NSR Permit No. 162941, Project No. 320923 that are not available through the following link included in the public notice for this project: https://disorboconsult.box.com/v/MaxMidstreamPublicNotice This request does include information designated "confidential." Note that the emissions calculation section of the relevant application has been improperly designated confidential. As EPA has explained to the

TCEQ such information is emissions data, which is public information as a matter of law. We request that the TCEQ direct Max Midstream to resubmit this information without designating it confidential to avoid an unnecessary referral to the Texas AG.
Data Only: No
Confidential Information: Yes
Certified Information: No
Request Documents: No data found

ATTACHMENT C

Request for Attorney General Opinion, Public Information Act Request Regarding Max Midstream Texas, LLC, TCEQ PIR No. 21-56505

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 30, 2020

The Honorable Ken Paxton
Office of the Attorney General
Open Records Division
Price Daniel Sr. Building, 6th Floor
209 W. 14th Street
Austin, Texas 78701

Attention: Justin Gordon, Division Chief, Open Records Division

Re: Request for Attorney General Opinion
Public Information Act Request Regarding Max Midstream Texas, LLC
TCEQ PIR No. 21-56505

Dear Attorney General Paxton:

The Texas Commission on Environmental Quality (TCEQ) received a Public Information Act (PIA) request for certain documents related to Max Midstream Texas, LLC's air permit application for New Source Review (NSR) Permit No. 16291 (Attachment A). This PIA request (PIR) was made by Gabriel Clark-Leach on October 21, 2020, and was received by TCEQ on the same day.

In light of recent state and federal disaster declarations, and to limit the risk associated with COVID-19, TCEQ began operating with a skeleton crew and transitioning staff to fully teleworking on March 17, 2020. The transition to full telework was complete as of March 23, 2020, and all TCEQ offices state-wide were closed to the general public and only open to staff on a limited basis. Since that date TCEQ has been operating remotely to provide critical services and perform the essential functions necessary to fulfill the statutory and regulatory responsibilities of the agency, and continues to operate remotely as of the date of this letter. While operating remotely, TCEQ employees have limited access to agency records. Specifically, staff does not have access to records such as physical files that have not been converted to electronic format, electronic files not stored on an agency server, working files of staff, files stored in closed agency buildings and locked offices, and the like.

Because skeleton crew days, days on which a governmental body has closed its physical offices for purposes of a public health or epidemic response, and days that a governmental body is unable to access its records are not counted as business days

under the PIA,[1] TCEQ's PIR deadlines have been tolled since March 17, 2020. Accordingly, because the date on which TCEQ will resume normal operations with full access to agency records is currently unknown, the 10th business and 15th business day after the receipt of this request cannot be determined at this time. Nevertheless, to minimize the impact that indefinite delays would have on our customers and staff, TCEQ is continuing to respond to PIRs such as this one that can be fulfilled while the agency continues to operate remotely.

TCEQ has made available to the requestor the information that TCEQ believes to be public information. Other information, which TCEQ believes may be excepted from disclosure under the PIA, has not been released to the requestor. On October 29, 2020, the requestor was notified of our decision to withhold a portion of the requested information for the purpose of requesting an Attorney General decision about whether the information is excepted from public disclosure under the PIA (Attachment B). In accordance with Sections 552.301 and 552.305 of the PIA, TCEQ requests a formal opinion on this matter.

TCEQ has declined to release the information in Attachment C pursuant to Tex. Gov't Code § 552.305 for the purpose of requesting an attorney general decision. In accordance with §§ 552.301(e) and 552.305(d) of the PIA, TCEQ submits the following information: (1) this signed statement evidencing the date the request was received; (2) a copy of the request for information (Attachment A); (3) the specific information at issue (Attachment C); and (4) a copy of the notification of this request for an attorney general decision sent to Max Midstream Texas, LLC (Attachment D). Pursuant to § 552.305(c), TCEQ has declined to submit written comments explaining why the information should be withheld or released based on any applicable exceptions.

Tex. Gov't Code Section 552.305, Information Involving Privacy or Property Interests of Third Party

Texas Government Code § 552.305 states that:

> (a) In a case in which information is requested under this chapter and a person's privacy or property interests may be involved, including a case under Section 552.101, 552.110, 552.1101, 552.114, 552.131. or 552.143, a governmental body may decline to release the information for the purpose of requesting an attorney general decision.

Max Midstream Texas, LLC identified the documents submitted in Attachment C as confidential when it provided the documents to TCEQ. Pursuant to Tex. Gov't Code § 552.305(a), TCEQ has not taken a position on whether the information should be withheld or released and has declined to release the information for the purpose of requesting an attorney general decision.

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[1] *See, e.g. OR2016-15430, OR2018-23725; OR2012-11207*; *See also* Update: Calculation of Business Days and COVID-19 *https://www.texasattorneygeneral.gov/open-government/governmental-bodies/catastrophe-notice/update-calculation-business-days-and-covid-19*

In accordance with § 552.305(d), on October 30, 2020, TCEQ notified Max Midstream Texas, LLC of this request for an attorney general decision and made available the documents submitted to the Office of the Attorney General (Attachment D).

Conclusion

Because the information requested involves a third-party's privacy or property interests, TCEQ has declined to release the information pursuant to Tex. Gov't Code § 552.305 for the purpose of requesting an attorney general decision. In accordance with §§ 552.301 and 552.305 of the PIA, I request a formal opinion on this matter.

I appreciate your response to this request. If you have any questions about this matter, please call Sierra Redding, Staff Attorney, with TCEQ's Environmental Law Division, at (512) 239-2496.

Sincerely,

Robert Martinez, Director
Environmental Law Division
Texas Commission on Environmental Quality

Enclosures

cc: Collin Lawrence, TCEQ General Law Division
Sierra Redding, TCEQ Environmental Law Division
Lena Roberts, TCEQ General Law Division
Max Midstream Texas, LLC, 1800 Post Oak Blvd, Suite 450, Houston, TX 77056, *via email* (without attachments)
Gabriel Clark-Leach, 6905 Vassar Drive, Austin, Texas 78723, *via e-mail* (without attachments)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this referral was sent, via interagency mail, on October 30, 2020, to:

The Honorable Ken Paxton
Office of the Attorney General
Open Records Division
Price Daniel, Sr. Building, 6th Floor
209 West 14th Street
Austin, Texas 78701

Attention: Justin Gordon, Division Chief, Open Records Division

Collin Lawrence, Legal Assistant
General Law Division

ATTACHMENT D

Request for Attorney General Opinion, Public Information Act Request Regarding Max Midstream Texas, LLC, TCEQ PIR No. 21-56505

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 30, 2020

Via Email

Mr. Brandon Lantrip, EHS Manager
Max Midstream Texas, LLC
1800 Post Oak Blvd, Suite 450
Houston, TX 77056

Re: TCEQ PIR No. 21-56505

Dear Mr. Lantrip:

TCEQ received the attached Public Information Request (PIR), which includes a request for certain records identified as confidential by Max Midstream Texas, LLC. The Office of the Attorney General (OAG) will review these records and issue a decision on whether the information may be withheld or whether Texas law requires TCEQ to release them. Generally, the Public Information Act (PIA) (Tex. Gov't Code ch. 552) requires the release of requested information, however, there are exceptions.

You have the right to object to the release of your records by submitting written arguments to the OAG that one or more exceptions apply to the records you identified as being confidential. You are not required to submit arguments to the OAG, however, if you decide not to submit arguments, the OAG will presume that you have no interest in maintaining the confidentiality of your records and will more than likely rule that the records must be released to the public.

If you decide to submit arguments to OAG as to why the information should not be disclosed to the public, **you must do so not later than the tenth business day after the date you receive this notice.** If you submit arguments to the OAG, you must:

a) identify the specific information in each document that you contend is confidential under a legal exception under the PIA,

b) identify the legal exceptions in the PIA that apply to the information, and

c) explain why each exception applies.

Tex. Gov't Code § 552.305(d). A claim that an exception applies without further explanation will not suffice. *Attorney General Opinion H-436 (1974*).

A copy of the information at issue is attached. We will also provide the OAG with a copy of the request for information and a copy of the requested information, along with other material required by the PIA. The OAG is generally required to issue a decision within 45 business days.

Please send your written comments to the OAG at the following address:

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Be sure to reference the TCEQ PIR number listed in the reference line of this letter when you submit your arguments to the OAG. If you wish to submit your arguments electronically, you may only do so via the OAG's eFiling System. An administrative convenience charge will be assessed for use of the eFiling System. No other method of electronic submission is available. Please visit the OAG's website at http://www.texasattorneygeneral.gov for more information.

In addition, you are required to provide the requestor with a copy of the arguments that you submit to the OAG. *Tex. Gov't Code § 552.305(e)*. You may redact the requestor's copy to the extent it contains the substance of the requested information. *Tex. Gov't Code § 552.305(e).* The requestor's name and contact information are provided in the cc line at the end of this letter. You may also provide a copy of your arguments to TCEQ via the email address used to provide you with this notification.

Commonly Raised Exceptions

In order for a governmental body to withhold information requested under the PIA, specific tests or factors for the applicability of a claimed exception must be met. Failure to meet these tests may result in the release of requested information. Below are listed the most commonly claimed exceptions in the PIA concerning trade secrets, proprietary information, and confidential business information, and the leading cases or decisions discussing them. This listing is not exhaustive and is not intended to limit the exceptions or other laws or statutes you may raise:

Section 552.101: Information Made Confidential by Law

Open Records Decision No. 652 (1997).

Section 552.110: Confidentiality of Trade Secrets and Commercial or Financial Information

Birnbaum v. Alliance of Am. Insurers, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. filed) (construing previous version of section 552.110), *abrogated by In re Bass*, 113 S.W.3d 735 (Tex. 2003).

Open Records Decision No. 639 (1996).

Open Records Decision No. 661 (1999).

Section 552.1101: Confidentiality of Proprietary Information

Section 552.113: Confidentiality of Geological or Geophysical Information

Open Records Decision No. 627 (1994).

Section 552.131: Confidentiality of Certain Economic Development Negotiation Information

If you have questions about this notice or release of information under the Act, please refer to the *Public Information Handbook* published by the Office of the Attorney General, or contact the OAG's Open Government Hotline at (512) 478-OPEN (6736) or toll-free at (877) 673-6839 (877-OPEN TEX). To access the *Public Information Handbook* or Attorney General Opinions, including those listed above, please visit the attorney general's website at http://www.texasattorneygeneral.gov.

Sincerely,

Lena Roberts, Public Information Counsel
General Law Division, Office of Legal Services
Texas Commission on Environmental Quality
Lena.Roberts@tceq.texas.gov

Enclosure: Public Information Request
Information identified as confidential by Max Midstream Texas, LLC

cc: Gabriel Clark-Leach, 1206 San Antonio Street, Austin, TX 78701, *via email* (w/o enclosures)
Open Records Division, Office of the Attorney General

ATTACHMENT E

Objection to Title V Permit No. O2269, ExxonMobil Corporation, Baytown Chemical Plant ("Baytown Order") (January 23, 2020)

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

January 23, 2020

Ms. Tonya Baer, Deputy Director
Office of Air
Texas Commission on Environmental Quality (MC 122)
P.O. Box 13087
Austin, TX 78711-3087

Re: Objection to Title V Permit No. O2269
ExxonMobil Corporation, Baytown Chemical Plant
Harris County, Texas

Dear Ms. Baer:

This letter is in response to the Texas Commission on Environmental Quality (TCEQ) submittal to our office containing the proposed renewal of the Title V permit for the ExxonMobil Baytown Chemical Plant referenced above. TCEQ indicated in the cover letter of the submittal that EPA's 45-day review period would begin on December 10, 2019, and end on January 24, 2020. We have reviewed the proposed title V permit action including TCEQ's response to comments and Statement of Basis. In accordance with 40 CFR § 70.8(c) and 42 U.S.C. § 7661d(b)(1), EPA is objecting to the proposed permitting action. Section 505(b)(1) of the federal Clean Air Act (Act) requires EPA to object to the issuance of a proposed Title V permit during its 45-day review period if EPA determines that the permit is not in compliance with applicable requirements of the Act or requirements under 40 CFR Part 70. The Enclosure to this letter provides the specific reasons for each objection and a description of the terms and conditions that the permit must include to respond to the objections.

Section 505(c) of the Act and 40 CFR § 70.8(c)(4) provide that if the permitting authority fails, within 90 days of the date of the objection, to submit a permit revised to address the objections, then EPA will issue or deny the permit in accordance with the requirements of 40 CFR Part 71. Because the State must respond to our objection within 90 days, we suggest that the revised permit be submitted with sufficient advance notice so that any outstanding objection issues may be resolved prior to the expiration of the 90-day period.

We are committed to working with the TCEQ to ensure that the final title V permit is consistent with all applicable title V permitting requirements and the EPA approved Texas Title V air permitting program. If you have questions or wish to discuss this further, please contact Cynthia Kaleri, Air Permits Section Chief at (214) 665-6772, or Aimee Wilson, Texas Permit Coordinator at (214) 665-7596. Thank you for your cooperation.

Sincerely,

1/23/2020

X David F Garcia

Signed by: DAVID GARCIA

David F. Garcia, P.E.
Director
Air & Radiation Division

Enclosure

cc: Baytown Chemical Plant Site Manager
ExxonMobil Corporation

Mr. Sam Short, Director
Air Permits Division
Texas Commission on Environmental Quality (MC-163)

Objections to Title V Permit O2269

1. **Objection to Improperly Incorporating Confidential Operational Limits and Emission Calculations.** The proposed title V permit incorporates by reference NSR permits 96220, 28441, and 8586. Each of these NSR permits contains special conditions which references confidential information submitted in permit applications.

    - NSR permit 96220 includes references to the initial permit application's confidential file dated November 2011 at special conditions 4(A), 11, and 12. Special Condition 4(A) in permit 96220, establishes a production rate for polymer production. Special Condition 11 in permit 96220, enforces a limitation on the products to be stored in seven storage tanks. Special Condition 12 in permit 96220, enforces a limitation on the products to be loaded and unloaded at three loading racks.
    - NSR permit 28441, at Special Condition 4, references confidential information contained in the associated August 2014 permit amendment application. Special Condition 4 in permit 28441 establishes an operational production limitation on the Toluene Disproportionation Unit.
    - NSR permit 8586, at Special Condition 4, references confidential information contained in the associated February 2003 application. Special Condition 4 in NSR permit 8586 provides an operational limitation on the production rates of polypropylene for all production lines.

    The Clean Air Act ("CAA") limits the types of information that may be treated as confidential in a title V permit, and therefore withheld from the public. In this instance, NSR applications containing confidential information have been incorporated into corresponding NSR permits and, in turn, are now incorporated by reference into the proposed title V permit as a term of that permit. As a general matter, some information may be protected as a trade secret under section 114(c) of the CAA. 42 U.S.C. § 7414(c). However, the CAA specifically limits this protection: "The contents of a [title V] permit shall not be entitled to [confidential] protection under section [114(c)]." 42 U.S.C. § 7661b(e). Regarding the contents of a title V permit, the CAA further requires that "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 …." 42 U.S.C. § 7661c(a). EPA regulations further require that the contents of a title V permit include "emissions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." 40 C.F.R. §70.6(a)(1). Further, "terms and conditions in a part 70 permit… are enforceable by the Administrator and citizens under the Act." 40 C.F.R. §70.6(b)(1). Additionally, information which is considered emission data, as well as standards or limitations, are also not entitled to confidential treatment. *See* CAA § 114(c) ("other than emissions data"); 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). In granting that petition, the EPA acknowledged that a potential conflict exists between TCEQ's regulatory scheme and the CAA mandate that does not afford confidential protections to the contents of a permit.

    Here, the confidential information that is referenced in NSR permits 96220, 28441, and 8586 and subsequently incorporated into the proposed title V permit establishes binding requirements

governing operations of the plant related to production limits of various products. Since the limitations from the NSR permits and associated applications are incorporated into the proposed title V permit, these production rates would be part of the contents of the title V permit. Therefore, for purposes of title V permitting, they are not entitled to protection as confidential pursuant to CAA § 503(e). Further, since these limitations on production are applicable requirements for purposes of title V, they must be enforceable by citizens in addition to the EPA. *See* CAA § 504(a); 42 U.S.C. § 7414(b)(2); *id.* § 7604(a)(1), (f)(4). Because the production rates or limitations are confidential, the public does not know what these applicable requirements are, negating the ability of citizens to enforce these conditions. TCEQ asserts that according to the Texas Health & Safety Code § 382.041 that as an agent of the commission they "may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." The Texas Health & Safety Code § 382.041 cannot override 503(e) of the CAA. The CAA states that permit terms of the title V permit cannot be withheld from the public. TCEQ failed to provide a sufficient response to comments received on this issue by failing to adequately explain why the claimed confidential information does not establish binding, enforceable permit terms (or other information necessary to assure compliance with a permit term). Since these special conditions are incorporated by reference into the title V permit, they appear to be "contents of a [title V] permit" and therefore ineligible for confidential treatment.

In addition, while EPA was in the process of reviewing PBR registrations applicable to ExxonMobil Baytown Chemical Plant, we identified PBR applications which had the emission calculations marked as confidential and these PBR applications were for registering the PBR establishing federally enforceable emission limits, and thus incorporated by reference into the title V permit. The following PBR registrations establishing federally enforceable emission limits had the emission calculations identified as confidential on the application (identified by registration and PBR rule number): 39070 (106.262), 50952 (106.261 and 106.124), 74542 (106.261), 83400 (106.261 and 106.262), 151078 (106.261 and 106.262), 151047 (106.261 and 106.262), 151017 (106.261 and 106.262), 149708 (106.261 and 106.262), 148321 (106.261 and 106.262), 148861 (106.261 and 106.262), 148600 (106.261 and 106.262), 148594 (106.261 and 106.262), 147480 (106.262), 147270 (106.261 and 106.262), 145967 (106.262), 145938 (106.261), 144055 (106.261 and 106.262), 144054 (106.261 and 106.262), 143521 (106.261 and 106.262), 138869 (106.261 and 106.262), 141229 (106.261 and 106.262), 140847 (106.262), 139477 (106.261 and 106.262), 138601 (106.261 and 106.262), 136257 (106.261 and 106.262), 136019 (106.262), 136006 (106.261 and 106.262), 135448 (106.262), 134883 (106.261 and 106.262), 132686 (106.261 and 106.262), 131804 (106.261 and 106.262), 131373 (106.261), 131037 (106.261, 106.262, and 106.478), 130000 (106.261 and 106.262), 129961 (106.262), 129931 (106.261 and 106.262), 126098 (106.262), 124201 (106.262 and 106.472), 124055 (106.261 and 106.262), 124140 (106.262), 123832 (106.261 and 106.262), 123403 (106.261 and 106.262), 123247 (106.262), 122827 (106.261 and 106.262), 122598 (106.261 and 106.262), 151221 (106.261), 153201 (106.261 and 106.262), and 151078 (106.261 and 106.262). The emissions calculations in the PBR registrations are emissions data under CAA 114(c) and 40 C.F.R. § 2.301(a)(2)(i)(B) and should not be treated as confidential. TCEQ should evaluate if the emission calculations that support the enforceable limits established in the PBR registration are emissions data.

For each of these issues—the claimed confidential information in the title V permit and the claimed confidential emissions calculations—TCEQ should conduct a reevaluation to ensure that this information is neither part of the title V permit, establishing binding, enforceable permit terms, nor

considered emissions data for purposes of CAA 503(e) and 40 C.F.R. § 2.301(a)(2)(i)(B). If TCEQ can establish that this information is not part of the title V permit operational limit or emissions data, TCEQ will still need to establish the basis or details in the permit record for why it is not necessary to enforce these as a term or condition of the title V permit.

2. **Objection for Failure to Include all Applicable Requirements.** The proposed title V permit fails to meet the requirements of CAA § 504(a) for "(e)ach 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." TCEQ's definition of "applicable requirement" (found at 30 TAC § 122.10(2)) includes an extensive list of federal and state provisions. Minor NSR permits and Permits by Rule (PBRs) are included in TCEQ's definition of applicable requirement and are applicable requirements as defined under 40 CFR § 70.2. TCEQ's response to a comment on this issue did not fully respond to the public comment received and was not entirely correct, as explained in more detail below.

   The proposed title V permit does not contain enough information to clearly identify if all applicable requirements have been included in the title V permit. The table *New Source Review Authorization References* lists the following PBR authorizations as applicable requirements: 106.122, 106.183, 106.261, 106.262, 106.263, 106.264, 106.266, 106.371, 106.478, and 106.512. The proposed title V permit does not list any emission units to be authorized under PBR 106.122, 106.183, 106.266, 106.371, or 106.512 and does not identify, in the statement of basis, that these PBRs only apply to insignificant units.

   PBRs 106.261, 106.262, 106.263, 106.478, and 106.512 require registration. The TCEQ database[1] shows over 50 PBR registrations each for PBRs 106.261 and 106.262. There are entries in the permit associated with emission units, but it is unclear if all are represented since not all have the registration number identified. The database shows two registrations for PBR 106.478, but only one is identified with an emission unit and it does not include the registration number. In the *Motiva Order*, signed May 31, 2018, and the *ExxonMobil Baytown Refinery Order*, signed April 2, 2018, we granted a petition for an objection on facts closely resembling this type of incorporation by reference issue. In those orders, EPA objected 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, the EPA's regulations." *ExxonMobil Baytown Refinery Order* at 22; *Motiva Order* at 30. Notably, the EPA and TCEQ also agreed as part of the Operating Permits Program approval process that "PBRs will be cited to the lowest level of citation necessary to make clear what requirements apply to the facility." *See* 66 Fed Reg. 63322 n.4. (December 6, 2001). This agreement is evident in TCEQ's regulations approved by the EPA. See 30 TAC l22.l42(b)(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."). 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.") Pursuant to 40 CFR § 70.8(c)(1), EPA objects to the issuance of the proposed title V

[1] https://www.tceq.texas.gov/permitting/air/nav/air_status_permits.html

permit since it is not in compliance with the requirements of CAA § 504(a) and 40 CFR § 70.6(a)(1) & (3). In responding to this objection, the TCEQ should identify which PBRs apply to which emission units or process areas, and which PBRs apply generally or site-wide to the facility or only to insignificant units. Once TCEQ identifies which PBRs apply to which emission units, TCEQ should revise the permit and/or the permit record to ensure the permit itself is clear as to this point. TCEQ should also ensure that the title V permit includes all current PBRs authorized at the source and that it does not reference minor NSR permits or PBRs that are no longer applicable. TCEQ had initially proposed changes to their OP-REQ1 form of their title V permit application to include an additional table for applicants to fill out that would identify registered/certified PBRs, PBRs that were claimed as site-wide, and those PBRs which were claimed for insignificant emission units. EPA encourages TCEQ to reconsider these changes as were proposed in their June 13, 2018 letter to EPA, Re: Executive Director's Response to EPA Objections Regarding Permits by Rule.

EPA has discovered that ExxonMobil has requested that several registered PBRs and Standard Exemptions (SEs) be incorporated by consolidation into NSR permit 20211 upon issuance of its renewal. The renewal application for NSR permit 20211 was submitted to TCEQ on December 23, 2016. The renewal of the NSR permit has not been issued and it is premature not to include the PBRs and Standard Exemptions from the title V permit at this time. Once TCEQ consolidates by incorporating the PBRs and Standard Exemptions into the NSR permit and voids the PBR's and SE's, then their removal from the title V permit could be warranted after that process is completed. At this time, none of the PBRs that have been proposed to be consolidated into NSR permit 20211 are listed in the title V permit. Once NSR permit 20211 is issued, ExxonMobil should submit a minor revision application for the title V permit upon the issuance of the renewal for NSR permit 20211. The following PBRs are shown to be consolidated by incorporation into the renewal of NSR permit 20211:

- PBR 106.261, registrations 102554, 123403, 41621, 43766, 52417, 71653, 75416, 76270, and 87877
- PBRs 106.262, registrations 123403. 43700, 48743, 76179, 76270, 79993
- PBR 106.264, registrations 102544, 102545, 102549, 102550, 102551, 102552, 102553, 102558
- PBR 106.478, registration 39479
- PBR 106.533, registrations 39222, 71466
- Standard Exemption 76, registrations 103414, 103151
- Standard Exemption 46, registration 103165
- Standard Exemption 51, registration 22750
- Standard Exemption 86, registrations 22764, 22765, 22766, 34349
- Standard Exemption 87, registration 23981
- Standard Exemption 106 registrations 103133, 103152, 103159, 103167, 103170, 103175, 103179, 23448, 31854, 32592, 34522, 34849
- Standard Exemption 118 registration 23260, 23989, 31317, 34522, 34849
- Standard Exemption 7, registration 103178
- Standard Exemptions without a rule specified, registrations 14744, 14948, 14949, 15786

An update to the renewal application submitted on November 16, 2018, indicates that PBR registration 152890 (PBRs 106.261 and 106.262) for unit ID BTCPFUG and PBR registration

153201 (PBRs 106.261 and 106.262) for unit ID FS12 were to be added to the title V permit. The EPA has been unable to find these registration numbers in the proposed title V permit. In addition, Standard Permit 117789 was added to the title V permit but was not identified as being associated with any emission unit. It appears that standard permit 117789 should be included as an NSR authorization for RHB Fugitives (FGRHB). TCEQ should ensure that all applicable requirements are identified in the title V permit as requested by the applicant.

A review of the TCEQ NSR database shows that the following permits (with issuance dates prior to the title V renewal application) appear to be effective and are not identified in the title V permit (identified below by PBR/SE rule number and registration number): SE 76 (25071), SE 76 (25944), SE 75 (26135), SE 27 (103169), SE 76 (32622), SE 76 (103141), SE 76 (103147), SE 106 (33518), SE 106 (103134), SE 76 (103139), PBR 106.262 (35507), PBR 106.261 (102559), PBR 106.261 and 106.262 (36806), PBR 106.264 (102557), PBR 106.512 (38991), PBR 106.261 (38990), PBR 106.262 (39020), PBR 106.262 (39070), PBR 106.261 (39364), PBR 106.262 (39823), PBR 106.262 (39822), PBR 106.261 and 106.262 (40139), PBR 106.262 (40429), PBR 106.262 (40627), PBR 106.264 (102548), PBR 106.261 (45380), PBR 106.183 (45876), PBR 106.373 (102547), PBR 106.264 (102546), PBR 106.433 (50951), PBR 106.261 (51028), PBR 106.433 (52624), PBR 106.262 (53222), PBR 106.493 (55061L001), PBR 106.124 (55900), PBR 106.124 (70174), PBR 106.262 (71881), PBR 106.261 (72234), PBR 106.261 (74542), PBR 106.262 (124140), PBR 106.216, 106.262, and 106.478 (131037), and PBR 106.261 and 106.262 (144055). If these permits are still effective and are applicable requirements, they should be included in the title V permit. Please verify whether these PBRs have either been consolidated by reference or consolidated by incorporation into an NSR permit, or whether they should be included in the title V permit.

In addition, the EPA does not agree with the TCEQ's interpretation that *White Paper Number 1* and *White Paper Number 2* support the practice of not listing in the title V permit those emission units to which generic requirements apply. As both White Papers state, such an approach is only appropriate where the emission units subject to generic requirements can be unambiguously defined without a specific listing and such requirements are enforceable. *See, e.g., White Paper Number 1* at 14; *White Paper Number 2* at 31. Thus, not listing emission units for PBRs that apply site-wide or only to insignificant units may be appropriate in some cases. However, for other PBRs that apply to multiple and different types of emission units and pollutants, the proposed title V permit and the final title V permit should specify to which units and pollutants those PBRs apply. Further, PBRs are applicable requirements for title V purposes. The TCEQ's interpretation of how *White Paper Number 1* and *White Paper Number 2* would apply to insignificant emission units does not inform how PBR requirements must be addressed in a title V permit. *See, e.g.*, 30 TAC 122.10(2)(H). The TCEQ should provide a list of emission units for which only general requirements are applicable, and if an emission unit is considered insignificant, it should be identified in the Statement of Basis as such. Further, if a PBR only applies to insignificant units, it should also be identified in the Statement of Basis as such. The TCEQ must revise the permits accordingly to address the ambiguity surrounding PBRs.

3. Objection to the Lack of Assurance to Comply with Emission Limits and Operating Requirements. Commenters identified the following PBRs as not having monitoring or testing methods identified that assure compliance with applicable emission limits and operating requirements: 106.122, 106.183, 106.261, 106.262, 106.263, 106.264, 106.371, 106.472, 106.473, and 106.511. In responding to comments, TCEQ explained that PBRs were approved as part of the

Texas SIP under 30 TAC Chapter 106, Subchapter A, and are applicable requirements as defined by the Texas operating permit program under 30 TAC Chapter 122. RTC Response 9. TCEQ stated in their response to public comments, "Any challenges to the validity of an NSR permit or PBR, including whether it is federally enforceable, references confidential information, or any other comment regarding the completeness or content of the NSR permit; should have been raised or should be raised through the appropriate NSR permit process. It is not appropriate for Commenters to attempt to challenge these issues in a Title V permit action". This response was given in response to multiple comments with TCEQ citing the *PacificCorp-Hunter (Hunter) Order* at 8, 13-18; *Big River Steel Order* at 8-9, 14-20; and the *ExxonMobil Baytown Olefins Plant Order* at 14. See response to comments at Response 1, 3, 4, 8, and 9. This is a misinterpretation by TCEQ of the *PacifiCorp-Hunter Order* (Petition No. VIII-2016-4, Order issued October 16, 2017). As the EPA has previously explained, "claims concerning whether a title V permit contains enforceable permit terms, supported by monitoring [recordkeeping, and reporting] sufficient to assure compliance with an applicable requirement or permit term (such as an emission limit established in a [NSR] permit), *are* properly reviewed during title V permitting. The statutory obligations to ensure that each title V permit contains 'enforceable emission limitations and standards' supported by 'monitoring . . . requirements to assure compliance with the permit terms and conditions,' 42 U.S.C. § 7661c(a), (c), apply independently from and in addition to the underlying regulations and permit actions that give rise to the emission limits and standards that are included in a title V permit." *See South Louisiana Methanol Order* at 10; *Yuhuang II Order* at 7-8; *PacifiCorp-Hunter Order* at 16, 17, 18, 18 n.33, 19; *Big River Steel Order* at 17, 17 n.30, 19 n.32, 20. Therefore, regardless of the monitoring, recordkeeping, and reporting initially associated with a minor NSR permit or PBR, TCEQ has a statutory obligation independent of the process of issuing those permits to evaluate monitoring, recordkeeping, and reporting in the title V permitting process to ensure that these terms are sufficient to assure compliance with all applicable requirements and title V permit terms. *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008); *see Motiva Order* at 25-26.[2]

Below are the specific concerns associated with the title V permit incorporating individual PBRs by reference:

- PBR 106.122 Bench Scale Laboratory Equipment– permit does not specify any monitoring and testing methods that assure compliance with the emission limits assumed under 106.4. This PBR is a "one-liner" that TCEQ has identified in previous correspondence to EPA on June 13, 2018 as being for insignificant emission units.
- PBR 106.183 Boilers, Heaters, and Other Combustion Devices – permit does not specify any monitoring or testing requirements that assure compliance with emission limits and operating requirements established in the PBR. PBR contains an operational limit on the hours per year the unit can be fired and the fuel used. It also establishes a nitrogen oxide limit of 0.1 pounds per million Btu heat input in addition to the emission limits assumed under 106.4. This PBR requires registration. The PBR was registered on October 23, 2000 and given permit number 45876 by TCEQ. The permit files for this permit authorization are not available electronically from TCEQ's Central File Room Online. According to the permit entry on the TCEQ site all we know about this authorization is that it is apparently for the synthesis gas unit and assumed to limit standby mode to 330

[2] TCEQ's argument that EPA's interpretation in *Hunter* and *Big River Steel* makes it inappropriate to consider whether information be kept confidential is likewise misplaced. Nothing in *Hunter* or *Big River Steel* reached that issue. As explained above in Objection 1, the CAA is clear regarding the requirements for information to be publicly available and nothing in *Hunter* or *Big River Steel* even purported to change that.

days/year. The EPA assumes that this PBR authorization is for Air Preheater 1106 (F1106SG) and/or Air Preheater 1206 (F1206SGU). Both of these emission units are in NSR permit 36476/PSDTX996M1. However, the NSR permit does not indicate that there is a limit on the days the unit can be in standby mode. Further, it may be that the limit applies to both units combined. It is impossible to know how PBR 106.183 applies to the emission units and what additional requirements it imposed on the units without having the PBR registration file from TCEQ.

- PBR 106.261 Facilities (Emission Limitations) and PBR 106.262 Facilities (Emission and Distance Limitations) are very general and can be utilized to authorize a wide range of emission units. Often claimed together to permit a particular project, these PBRs have very generic terms and do not specify clearly what emissions are authorized nor which emission limits from 106.4 are applicable - each of these PBRs has a list for specific emission limits for some compounds. These PBRs do not contain any monitoring or testing requirements to assure compliance with the applicable emission limits or operational requirements.
- PBR 106.263 Routine Maintenance, Start-up and Shutdown of Facilities, and Temporary Maintenance Facilities – This PBR is also very generic as it can be applied to a variety of emission units. This PBR establishes several emission limits and incorporates requirements from other PBRs. This makes it impossible to determine what the PBR covers without the title V permit containing more information. The PBR and title V permit do not contain any monitoring or testing methods to assure compliance with any emission limits or operational requirements assumed under the PBR or 106.4.
- PBR 106.264 Replacement of Facilities – This is another fairly generic PBR that TCEQ has that may be used to authorize a variety of emission units. As the PBR is very generic, it contains no monitoring or testing requirements to show compliance with the 25 TPY of any contaminant emission limitation in the PBR. There are 8 registrations for this PBR, but none of the files are available from the TCEQ central fileroom online to determine what emission units it applies to, to determine if there is adequate monitoring or testing in the title V permit. The title V permit only shows one emission unit with this PBR as an applicable requirement and it is a tank (TK0063). This tank is also authorized by the flexible permit and PAL permit.
- PBR 106.371 Cooling Water Units – This PBR contains an operational limit that prohibits the unit from being in direct contact with a list of compounds. However, the PBR does not contain any monitoring or testing requirements to assure compliance with the emission limits assumed under 106.4 or the operational requirements of the PBR. This PBR was identified by TCEQ as being for insignificant emission units in previous correspondence to EPA on June 13, 2018.

In responding to this objection, TCEQ should amend the title V permit and permit record as necessary to specify monitoring, recordkeeping, and reporting requirements that assure compliance with the PBRs referenced above. As part of this process, it may be necessary for TCEQ to amend an underlying NSR permit and then incorporate the amended NSR permit into the title V permit. If the title V permit, the underlying PBR permit, or the enforceable representations in the application already contain adequate terms to assure compliance with these PBRs, then TCEQ should amend the permit and/or permit record to identify such terms and explain how these requirements assure compliance with these emission limits and operational requirements for an individual emission unit, process area, or site-wide where such permit applies site-wide.

To the extent that any units authorized by the PBRs listed above are insignificant units for title V purposes, TCEQ should make those clarifications in the permit and permit record, as necessary, and evaluate whether the general monitoring conditions are sufficient. EPA sent a letter to TCEQ on August 26, 2019 that identified steps TCEQ should take to identify insignificant emission units authorized by PBRs. If TCEQ determines that some units authorized by the PBRs listed above are insignificant emission units, then TCEQ should evaluate whether the general monitoring conditions contained in special condition 32 are adequate monitoring, recordkeeping, and reporting. The 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, no monitoring can sometimes satisfy title V and 40 CFR § 70.6(a)(3)(i). *White Paper Number 2* at 32. In addition, if TCEQ still believes monitoring is necessary for insignificant units subject to a generally applicable requirement, a streamlined approached to periodic monitoring, recordkeeping, and reporting may be appropriate. *Id*. If TCEQ amends the record or title V permit to identify those PBRs that only apply to insignificant units and includes a basis for their determination that the permit, including special condition 32, contains adequate monitoring for those PBR requirements that apply to those insignificant units, the EPA anticipates such an approach would be consistent with our guidance and the requirements of title V of the CAA.

Other Issues:

EPA has identified other areas of concern, that while we find these of concern, we are not raising specific objections in this letter. However, it is important to bring these issues forward as they compound the problems identified by the objections above.

1. PBR Consolidation into NSR Permits. TCEQ, in a September 1, 2006 memorandum, identified two different scenarios that determined when and how a PBR or a standard permit should be consolidated in a permit for a facility when the permit is amended or renewed: consolidation by reference and consolidation by incorporation. TCEQ states that "All SP and PBRs that directly affect the emissions of permitted facilities must, at a minimum be referenced when a NSR permit is amended." Consolidation by reference under these circumstances is mandatory. Consolidation by incorporation however is voluntary. Under consolidation by incorporation, a reauthorization of the permitted action occurs under the NSR permit triggering BACT and impacts review. Consolidation by incorporation also results in the voiding of the PBR authorization. When PBRs are consolidated by reference, it becomes more difficult to determine if and when they were consolidated as the PBR authorization remains active. It is unclear how TCEQ handles identifying PBRs in the title V permit once they are consolidated by reference. As the PBRs that are consolidated by reference still remain active authorizations, are they still applicable requirements under the title V permit?
2. PBRs issued for temporary sources or for a one-time emission event. There were multiple PBRs that were issued for pilot plants; e.g. PBR 106.261 with registration # 51028 issued August 20, 2002 for BCIT-MTO Pilot Plant. As the authorization and application are not available electronically from the TCEQ file room online, EPA was unable to determine what the extent of the pilot plant was. However, it seems improbable that a pilot plant would still be in operation 18 years later, but the PBR is still shown to be "effective" on the TCEQ website. Another example is PBR 106.261/106.262 issued on June 29, 2004 and given registration number 72234. This PBR registration was available electronically from the TCEQ file room online. In this

authorization the company was requesting authorization to conduct a test of the water wash BAPP line which was to take seven days. This PBR is also still shown on the TCEQ website to be “effective.” What procedures does TCEQ have in place to ensure that PBRs are voided when they are no longer needed or valid? As these PBRs are registered and have federally enforceable limits, they should be identified in the title V permit. If they are no longer valid authorizations, TCEQ should take steps to ensure they are voided.