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January 7, 2014

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

Re: SOAH Docket No. 582-13-4611, TCEQ Docket No. 2013-0657-AIR, Application of ExxonMobil for State Air Quality Permit No. 102982

Dear Ms. Bohac:

Enclosed please find Sierra Club and Air Alliance Houston's Exceptions to the Administrative Law Judges' Proposal for Decision.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Clark-Leach', is written over a light gray rectangular background.

Gabriel Clark-Leach
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Enclosures



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Administrative Law Judge Sharon Cloninger
Administrative Law Judge Richard R. Wilfong
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, Texas 78701
Telephone: (512) 475-4993
Facsimile: (512) 322-2061

Re: SOAH Docket No. 582-13-4611, TCEQ Docket No. 2013-0657-AIR, Application of ExxonMobil for State Air Quality Permit No. 102982

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SOAH DOCKET NO. 582-13-4611
TCEQ DOCKET NO. 2013-0657-AIR

APPLICATION OF EXXONMOBIL CHEMICAL CORPORATION FOR NEW AIR QUALITY PERMIT NO. 102982	§ § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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**PROTESTANTS AIR ALLIANCE HOUSTON AND SIERRA CLUB’S EXCEPTIONS
TO THE ADMINISTRATIVE JUDGES’ PROPOSAL FOR DECISION**

I. INTRODUCTION

Sierra Club and Air Alliance Houston (“Protestants”) file these exceptions to the Administrative Law Judges’ (“ALJs”) Proposal for Decision (“PFD”) in the above-captioned matter. The ALJs recommend that the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”) issue Permit No. 102982 authorizing ExxonMobil to construct a new ethylene production unit (“EPU”) at its existing Baytown Olefins Plant (“BOP”), which is located in Harris County, Texas. Because ExxonMobil failed to demonstrate compliance with all applicable statutory and regulatory requirements, the Commission should not issue the requested permit.

The ALJs’ determination that ExxonMobil’s EPU may be authorized as a minor source and that ExxonMobil demonstrated by a preponderance of the evidence that its application met all applicable statutory and regulatory requirements fails to adequately address testimony and evidence presented by the parties and misreads applicable regulations and policies. For this reason, as set forth more fully below, Protestants take exception to the ALJs’ PFD.

II. ARGUMENT

A. THE ALS ERRED BY DETERMINING THAT THE EPU MAY BE AUTHORIZED AS A MINOR MODIFICATION

ExxonMobil proposes to build its EPU in Harris County, which is designated as a severe ozone nonattainment area and may soon be designated as a nonattainment area for fine particulate matter. New emissions from the EPU exceed the regulatory significance thresholds for particulate matter (“PM”), particulate matter with a diameter of ten microns or less (“PM₁₀”), fine PM (“PM_{2.5}”), nitrogen oxides (“NO_x”), carbon monoxide (“CO”), and volatile organic compounds (“VOC”).¹ Nonetheless, the Executive Director determined that the project did not trigger major NSR requirements for any of these pollutants, because (1) ExxonMobil’s Permit No. 3452/PAL6 establishes alternative case-specific site-wide significance thresholds, or Plantwide Applicability Limits (“PALs), for each of these pollutants and (2) so long as emissions are maintained below these thresholds, the EPU does not trigger major NSR requirements.

Protestants objected to the Executive Director’s determination on three grounds:

- ExxonMobil’s Permit No. 3452/PAL6 does not establish a PAL for PM_{2.5} or PM₁₀;
- ExxonMobil has already exceeded the PM threshold in Permit No. 3452/PAL6; and
- The so-called PALs in Permit No. 3452/PAL6 are not federally approved permit provisions and may not be used to determine major NSR applicability in this case.

The ALJs rejected each of these objections and concluded that the Executive Director’s reliance on the PALs in Permit No. 3452/PAL6 was proper and that ExxonMobil’s EPU may be authorized as a minor modification. Protestants take exception to this conclusion.

¹ Protestants Ex. 100 at 34-35.

1. ExxonMobil's Permit No. 3452/PAL6 does not include a PM_{2.5} PAL

A PAL is a pollutant-specific limit established for an existing major stationary source.² For sources with a PAL, major NSR requirements are not triggered for the PAL pollutant so long as emissions from the source do not exceed the PAL.³ PM, PM₁₀, and PM_{2.5} are separately regulated pollutants.⁴ Applicants seeking a permit to authorize construction or modification of source that will emit PM must consider major NSR applicability for each class of PM.⁵ Protestants contend that ExxonMobil does not have a PM_{2.5} PAL and that ExxonMobil must assess major NSR applicability for PM_{2.5} through a netting demonstration, as required by 30 Tex. Admin. Code § 116.160(b).

Though Permit No. 3452/PAL6 does not indicate on its face that it includes a PM₁₀ PAL or a PM_{2.5} PAL, the definition of PM listed in the permit's maximum allowable emission rate table ("MAERT") indicates that PM includes PM₁₀.⁶ The ALJs rely on this fact and ExxonMobil's witness testimony that the regulatory significance threshold for PM₁₀ was applied to set this limit to determine that the PM limit listed in the MAERT of Permit No. 3452/PAL6 is a PM PAL and PM₁₀ PAL listed as a single line item.⁷ Though the permit's PAL condition and limits do not make any reference to PM_{2.5} PAL, the ALJs found that a PM_{2.5} PAL may be

² PFD at 8; 40 CFR § 52.21(aa)(2)(i) ("Actuals PAL for a major stationary source means a PAL based on the baseline actual emissions . . . of all emissions units . . . at the source, that emit or have the potential to emit the PAL pollutant,"), 52.21(aa)(4)(i)(e) ("Each PAL shall regulate emissions of only one pollutant.") (emphasis added); 30 Tex. Admin. Code § 116.186(a) ("The plant-wide applicability limit (PAL) will impose an annual emission limitation in tons per year, that is enforceable for all facilities, or emissions units at a major stationary source, that emit the PAL pollutant.").

³ Protestants Ex. 100 at 15-16.

⁴ *Id.* at 41.

⁵ 77 Fed. Reg. 65111 ("All three of the indicators of PM are considered separately as regulated NSR pollutants subject to review under the PSD program, which means that proposed new and modified sources must treat each indicator of PM as a separate regulated pollutant for applicability determinations, and must then apply the PSD requirements, as appropriate, independently for each indicator of PM.") (emphasis added).

⁶ EM Ex. 302, Special Condition 6 ("This permit establishes PALs for VOC, carbon monoxide (CO), nitrogen oxide (NO_x), sulfur dioxide (SO₂), sulfuric acid (H₂SO₄), and particulate matter."), Emission Points, Emission Caps, and Individual Emission Limitations Table, n3 ("PM – particulate matter, suspended in atmosphere, including PM₁₀.").

⁷ PFD at 33.

inferred from the PM₁₀ limit, because the PM₁₀ limit serves as a surrogate for PM_{2.5} under EPA's—now terminated—interim PM₁₀ Surrogate Policy.⁸ Protestants take exception to this conclusion. EPA's terminated interim policy does not apply to PALs and the ALJs' conclusions regarding the weight of the evidence presented by parties on this issue are erroneous.⁹ Moreover, inferring a PM_{2.5} PAL from ExxonMobil's PM₁₀ PAL is clearly contrary to the requirement—under Texas and federal PAL rules—that “each PAL may only regulate emissions of only one pollutant.”¹⁰

A party wishing to rely on upon a regulatory policy that is not incorporated into an applicable rule bears the burden of proof to authenticate the policy and to demonstrate its applicability to the facts of the case.¹¹ While Protestants do not dispute that EPA established an interim PM₁₀ Surrogate Policy and that the policy was effective at the time ExxonMobil's Permit No. 3452/PAL6 was issued, ExxonMobil failed to demonstrate that EPA's terminated interim PM₁₀ Surrogate policy applies to the facts of this case.

a. The record does not contain any evidence that the Commission relied upon EPA's PM₁₀ Surrogate Policy to issue Permit No. 3452/PAL6

Despite their ready access to ExxonMobil's PAL6 permit application and files in the Commission's permitting file relating to the permit's issuance, neither ExxonMobil nor the Executive Director presented any documentary evidence showing that the Commission actually applied or even considered applying EPA's interim PM₁₀ Surrogate Policy to issue Permit No. 3452/PAL6. Protestants' expert witness, Mr. Powers, testified that he “reviewed ExxonMobil's application to establish the PM PAL in Permit No. 3452 and the TCEQ's review documents for

⁸ *Id.*

⁹ Protestants also take exception to the ALJs' determination that Permit No. 3452/PAL6 contains a PM₁₀ PAL .

¹⁰ 40 CFR § 52.21(aa)(4)(i)(e); 30 Tex. Admin. Code § 116.186(a) (“Each PAL must include emissions of only one pollutant.”).

¹¹ 1 Tex. Admin. Code § 155.419(a).

that project, and no mention is made in any of those documents indicating that the permit was issued in accordance with reliance on EPA's PM₁₀ Surrogate Policy."¹² Neither ExxonMobil nor the Executive Director challenged this testimony. Instead, ExxonMobil argued that documentary evidence showing the policy had been applied was unnecessary:

Q: (Mr. Axe) Starting on Line 13—Lines 13 through 18 [of Protestants 100], Mr. Powers says that when he went back and looked at the ExxonMobil application for PAL6 that he did not see any reference to the PM₁₀ surrogate policy, and, therefore, it couldn't possibly have been used by the TCEQ in its consideration of PAL6. Do you have any thoughts about that?

A: (Mr. Brewer) Well, first, I don't agree that just because something wasn't mentioned in their review documentation that they weren't aware of and using that EPA policy that had been in effect since 1997 and had been the basis for doing particulate matter permitting throughout that period of time.¹³

Thus, ExxonMobil's argument and the ALJs' finding turns on whether the Commission, as a matter of course, relied on EPA's interim policy to issue PAL permits. Neither ExxonMobil nor the Executive Director provided any evidence demonstrating such reliance. In fact, the Executive Director's permit engineer testified that he was unaware of *any* guidance documents or memorandums issued by the Commission or EPA indicating that EPA's PM₁₀ Surrogate Policy should be used to issue PALs.¹⁴ He also testified that this is the only case he is aware of where EPA's terminated interim PM₁₀ Surrogate Policy had been used to determine that PSD requirements for PM_{2.5} were not triggered by a proposed project.¹⁵ Because the record does not contain any evidence directly demonstrating that the Commission regularly relied on EPA's interim PM₁₀

¹² Protestants Ex. 100 at 52.

¹³ 2 Tr. 301-302.

¹⁴ 2 Tr. 250, 254.

¹⁵ 2 Tr. 250.

Surrogate Policy to issue PALs, ExxonMobil's argument and the ALJs' finding that the policy was used to issue PALs must turn upon whether the substance of EPA's interim PM₁₀ Surrogate Policy makes it *so obvious* that the policy was used to issue PALs that neither EPA nor TCEQ ever needed to specifically say so.¹⁶ To figure this out, we must first know what EPA's policy actually is, or rather, was. Because the PFD does not squarely attempt to define EPA's interim policy, Protestants revisit that question here.

b. What was EPA's Interim PM₁₀ Surrogate Policy?

In a nutshell: Under EPA's interim PM₁₀ Surrogate Policy, preconstruction permit applicants were not required to demonstrate compliance with PM_{2.5} preconstruction requirements. The policy provided that an applicant's demonstration of compliance with applicable PM₁₀ requirements was sufficient to ensure compliance with PM_{2.5} requirements.

After EPA promulgated PM_{2.5} NAAQS in 1997, it determined that technical difficulties with respect to PM_{2.5} monitoring, emissions estimation, and modeling made it impracticable for applicants and permitting agencies to directly implement NSR permitting programs for PM_{2.5}.¹⁷ Accordingly, EPA determined that "[u]ntil these deficiencies are corrected . . . sources should continue to meet PSD and NSR program requirements for controlling PM₁₀ emissions (and, in the case of PM₁₀ nonattainment areas, offsetting emissions) and for analyzing impacts on PM₁₀ air quality."¹⁸ EPA further determined that "[m]eeting these measures in the interim will serve as a surrogate approach for reducing PM_{2.5} emissions and protecting air quality."¹⁹ Thus, so long as technical difficulties precluded the direct implementation of PM_{2.5} NSR requirements, EPA's

¹⁶ This suggestion is implausible on its face. If EPA or TCEQ believed that EPA's policy—established more than 16 years ago—applied to PALs, surely ExxonMobil or the Executive Director should have been able to find at least one document that addressed the policy's applicability to PALs.

¹⁷ Protestants Ex. 107.

¹⁸ *Id.*; 2 Tr. 313 ("Q: (Mr. Clark-Leach) Is the purpose of—well, Exhibit 107, the Seitz memo, do I summarize it correctly that the PM₁₀ surrogate policy allows applicants to demonstrate compliance for PM_{2.5} NSR requirements by making a demonstration of compliance with PM₁₀ requirements? A: (Mr. Brewer) That sounds accurate.").

¹⁹ Protestants Ex. 107.

interim PM₁₀ Surrogate Policy “grandfathered” or “exempted” sources applying for NSR permits from having to make PM_{2.5} NSR demonstrations.²⁰

Thus, the policy applied to permit *demonstrations*, not to *permit limits*. Under the policy, an applicant demonstrated compliance with PM_{2.5} NSR requirements by demonstrating compliance with applicable PM₁₀ NSR requirements. Nothing in EPA’s memorandums and rulemakings regarding the interim PM₁₀ Surrogate Policy suggests that the policy should be applied to infer a PM_{2.5} PAL when a PAL permit only includes a PM or a PM₁₀ PAL on its face. Thus, the substance of EPA’s interim PM₁₀ Surrogate Policy, as described by EPA’s memorandum and rulemakings relating to the policy do not make it clear that the policy was used to issue PALs or may be used to infer a PM_{2.5} PAL from a PM₁₀ limit.

In the face of EPA’s silence, ExxonMobil offered the curious argument that EPA’s policy must have been applied to issue PAL6, because the policy applied to major NSR applicability determinations and PAL6 is an applicability determination.²¹ This argument is wrong, because the interim PM₁₀ Surrogate Policy, as explained below, did not apply to applicability determinations. The argument is also a non sequitur, because even if the policy did apply to applicability determinations, a PAL is not an applicability determination.

c. PM_{2.5} major NSR determinations were unnecessary under EPA’s interim PM₁₀ Surrogate Policy

According to the PFD:

Applicant argued that in more than 100 pages of the 2002 Final PAL Rule *Federal Register* preamble, EPA never implied nor hinted that the PM₁₀ Surrogate Policy could not be used for major source applicability determinations, including

²⁰ 76 Fed. Reg. 28646, 28649-50 (The PM₁₀ Surrogate Policy “allows proposed major sources and major modifications to satisfy the PSD requirements for PM_{2.5} by meeting the requirements for controlling PM₁₀ and for analyzing impacts on PM₁₀ air quality as a surrogate approach.”); 70 Fed. Reg. 65984, 66043 (“The 1997 guidance stated that sources would be allowed to use implementation of a PM₁₀ program as a surrogate for meeting PM_{2.5} NSR requirements until certain difficulties were resolved.”).

²¹ PFD at 27-28.

PALs Moreover, Applicant argued that an exception to the PM₁₀ Surrogate Policy for PM_{2.5} applicability determinations would have required explanation and guidance by EPA to instruct the states on how to evaluate PM_{2.5} applicability determinations—particularly without the PM_{2.5}-specific NSR regulatory provisions such as the SER which was not promulgated by EPA when the PAL was issued in 2005—and Protestants have not identified any EPA guidance that states that the Surrogate Policy did not apply to applicability determinations.²²

The purpose of a major NSR applicability determination is to decide, with respect to each regulated NSR pollutant that may be emitted by a proposed new or modified source, whether a proposed project triggers major NSR permit application requirements. Under the interim PM₁₀ Surrogate Policy, it was unnecessary for applicants to determine whether a proposed project triggered major NSR permitting requirements, because applicants were not required to make PM_{2.5} NSR demonstrations. Instead, an applicant was only required to demonstrate compliance with applicable PM₁₀ preconstruction permitting requirements. Once this demonstration was made, no additional demonstration with respect to PM_{2.5} was required.

Thus, the fact that EPA’s PAL rule did not include an express prohibition on use of the interim PM₁₀ Surrogate Policy for PM_{2.5} major NSR applicability determinations, does not suggest that the policy covered PM_{2.5} major NSR applicability determinations or PALs. Rather, the rule does not include an applicability determination exception, because EPA’s policy made PM_{2.5} applicability determinations unnecessary.²³

²² *Id.* at 27.

²³ Because the interim PM₁₀ Surrogate Policy made PM_{2.5} major NSR applicability determinations unnecessary, ExxonMobil’s claim that the policy was necessary to determine PSD applicability for PM_{2.5} prior to EPA’s promulgation of significant emission rates for PM_{2.5} manufactures a problem that did not exist. *See* PFD at 28-29. Whether or not the policy was applied to determine which PM_{2.5} requirements were triggered by a project (PSD, NNSR, or minor NSR), and whether or not a project was major for PM_{2.5}, an applicant was only required to demonstrate compliance with applicable PM₁₀ NSR requirements. Note also, that ExxonMobil does not provide any support for its claim that unless the PM₁₀ Surrogate Policy was used in applicability determinations, “then any net emission increase of PM_{2.5} would have been a ‘major modification.’” *Id.* A project is a major modification only if it results in a “significant emissions increase.” An emissions increase is significant if it exceeds one the pollutant-specific thresholds listed at 40 CFR § 51.21(b)(23). EPA did not establish PM_{2.5} significance thresholds until 2008. ExxonMobil presumes, without explaining why, any increase in the emission of a criteria pollutant is significant unless 52.21(b)(23) establishes a threshold for that pollutant. That conclusion does not follow from the cited rules.

Furthermore, if EPA believed its interim PM₁₀ Surrogate Policy applied to PALs at the time it promulgated its PAL rules, one would expect to see an explanation of the conflict between its application and the rules' requirement that "[e]ach PAL shall regulate emissions of only one pollutant."²⁴ Applying the policy, as ExxonMobil proposes in this case, to infer a PM_{2.5} limit from a PM₁₀ limit is clearly contrary to this rule. Thus, it is amazing to think that EPA, "in more than 100 pages of the 2002 Final PAL Rule *Federal Register* preamble," would have failed to clarify this apparent conflict if it believed that the interim PM₁₀ Surrogate Policy applied to PALs.²⁵

d. *A PAL is not a major NSR applicability determination and issuance of a PAL does not involve a major NSR applicability determination*

Contrary to the PFD and ExxonMobil's post-hearing briefing, a PAL is not a major NSR applicability determination and issuance of a PAL does not involve a major NSR applicability determination.²⁶ A PAL is a pollutant-specific threshold that is used to determine whether future projects at the source trigger major NSR permitting requirements. So long as emissions of site-wide emissions of the PAL pollutant are maintained below the PAL, emissions increases resulting from changes to the source are insignificant and do not trigger major NSR permitting requirements. Thus, a PAL serves as an alternative to a netting demonstration based on the significance emission rate thresholds in the Code of Federal Regulations.²⁷ While the CFR

²⁴ 40 CFR § 52.21(aa)(4)(i)(e).

²⁵ ExxonMobil's Response to Closing Argument at 20.

²⁶ PFD at 26-27 ("... EPA never implied nor hinted that the PM₁₀ Surrogate Policy could not be used for major source applicability determinations, including PALs."), 28 ("TCEQ appropriately relied on the federal PM₁₀ Surrogate Policy memorandum in making federal applicability determinations, including issuance of PAL6."), 29-30 ("Protestants point to no authority that requires prior permits or applicability determinations to be revisited or revised 8 years after issuance."), and 33 ("[T]he ALJs also find that the Commission's PAL6 issuance determinations 8 years ago are not now subject to challenge.") (emphasis added).

²⁷ Executive Director's Supplemental Responses to Protestants' Written Discovery Requests ("**Request for Admission No. 7:** Please admit that one purpose of PAL6 is to provide an alternative to netting, otherwise required under 116.160(b), as the test for determining whether proposed modifications to the Baytown Olefins Plant trigger major NSR permitting requirements. **Response:** Admit.").

significance thresholds are used to make applicability determinations, they are not thereby applicability determinations. The same goes for PALs: while they are used to evaluate major NSR applicability, they are not applicability determinations.

The Commission's major NSR applicability guidance makes it clear that "[m]ajor NSR is only applicable for new major sources and major modifications of existing major sources."²⁸ Major NSR applicability determinations are made to decide which preconstruction permitting demonstrations an applicant must make to obtain authorization to construct a new facility or modify an existing facility.²⁹ A PAL is not a preconstruction permit, it does not authorize any new construction or emissions of any pollutant.³⁰ A PAL does not trigger major NSR requirements.³¹ For this reason, evaluation of a PAL application does not involve a major NSR applicability determination.³²

Thus, even if the Commission disagrees with Protestants' argument EPA's interim PM₁₀ Surrogate Policy did not apply to major NSR applicability determinations, it does not follow that the policy was applied in 2005 to make an applicability determination with respect to issuance of Permit No. 3452/PAL6 in 2005. Indeed, the policy could not have been so applied, because a PAL is not an applicability determination and no applicability determination was made to issue the PAL. Because ExxonMobil's Flex/PAL PM limit is not an applicability determination and did not require an applicability determination, EPA's interim PM₁₀ Surrogate Policy was not applied to make any applicability determination with respect to PAL6 at the time it was issued. Because neither the Executive Director nor ExxonMobil has provided any other account of how

²⁸ ED Ex. 20 at 518.

²⁹ See e.g., ED Ex. 21 (TCEQ's Air Pollution Control Guidance Document) at 537-538 (explaining that major NSR applicability determinations apply to preconstruction applications and describing federal review requirements that apply to major projects).

³⁰ EM Ex. 300 at 3 and 13.

³¹ 2 Tr. 315-316 (Q: (Mr. Clark-Leach) So are there any PM_{2.5}-specific requirements with respect to issuance of the PAL the policy was used to satisfy? . . . A: (Mr. Brewer) No."); Protestants Ex. 100 at 54.

³² See 30 Tex. Admin. Code § 116.182, which lists PAL application requirements.

EPA's interim PM₁₀ Surrogate Policy could have been applied to issue Permit No. 3452/PAL6, the ALJs' conclusions that the policy was applied to issue the permit or to make any determination with respect to the permit's issuance is unfounded, and their conclusion that Protestants are collaterally attacking the Commission's issuance of that permit are without support.³³

ExxonMobil has not demonstrated by a preponderance of the evidence that Permit No. 3452/PAL6 includes a PM_{2.5} PAL. ExxonMobil's position is unsupported by the record and turns upon several mistaken presumptions about what the policy was and how it was applied. These presumptions are also unsupported by evidence. EPA has determined that its expired interim PM₁₀ Surrogate Policy is no longer justified and does not ensure maintenance of the PM_{2.5} NAAQS.³⁴ The policy may no longer be used "for any purpose."³⁵ Permit No. 3452/PAL6 does not include a PM_{2.5} PAL. For these reasons, the ALJs' determination that ExxonMobil may rely on Permit No. 3452/PAL6 to avoid PM_{2.5} major NSR permitting requirements is wrong and should be rejected.

2. The Administrative Law Judges erred in finding that emissions from ExxonMobil's Baytown Olefins Plant have not exceeded the Particulate Matter ("PM") limit in Permit No. 3452/PAL6

³³ PFD at 33 ("In addition to finding Protestants' arguments contrary to the preponderance of the evidence, the ALJs also find that the Commission's PAL6 issuance determinations 8 years ago are not now subject to challenge.").

³⁴ 76 Fed. Reg. 28648 ("We do not believe that the use of the 1997 PM₁₀ Surrogate Policy affords the same degree of protection of the PM_{2.5} NAAQS from major new and modified stationary sources as does direct analysis of PM_{2.5} emissions. In addition to the fact that the original PM_{2.5} NAAQS promulgated in 1997 were generally more stringent than the corresponding PM₁₀ NAAQS, the strengthening of the 24-hour primary PM_{2.5} NAAQS in 2005 created a greater disparity between the relative stringency of the PM_{2.5} and PM₁₀ standards. Thus, no that the necessary tools are available, we believe that it is important to move as quickly as possible to implement fully the PSD program for PM_{2.5}").

³⁵ Protestants 100 at 50 (Citing 76 Fed. Reg. 28646,28648, *Implementation of the New Source Review Program for Particulate Matter Less than 2.5 Micrometers* (May 18, 2011)).

According to the PFD, all parties agree with the following two basic propositions concerning Plantwide Applicability Limits:

- “[A] PAL imposes a pollutant-specific annual emission limitation in tons per year that is enforceable for all emissions units at the major stationary source that emit the PAL pollutant” and
- “Once a PAL has been exceeded, an applicant may no longer rely on it to avoid major NSR permitting requirements.”³⁶

The Executive Director’s permit engineer testified that, “based on the best information” available to him, his opinion is that “combined PM emissions from . . . the Baytown Olefins Plant have exceeded” the Permit No. 3452/PAL6 limit.³⁷ This testimony is confirmed by ExxonMobil’s self-reported certified emissions inventory data, which indicates that PM emissions from the Baytown Olefins Plant exceeded the PM limit in Permit No. 3452/PAL6 in 2007, 2008, 2009, 2010, and 2011.³⁸

Based on this evidence and the two above-cited uncontroverted legal propositions, Protestants argued that ExxonMobil may not rely on the PM Flex/PAL limit in Permit No. 3452/PAL6 to avoid major NSR requirements for the EPU, because emissions of PM from BOP already exceed ExxonMobil’s PM Flex/PAL limit.³⁹

The ALJs rejected Protestants’ argument and held that ExxonMobil had demonstrated that PM emissions at the BOP have not exceeded the PM Flex/PAL limit. To reach this conclusion, they found that:

³⁶ PFD at 8. See also 30 Tex. Admin. Code § 116.186(a) (“The plant-wide applicability limit (PAL) will impose an annual emission limitation in tons per year, that is enforceable for *all facilities, or emissions units at a major stationary source, that emit the PAL pollutant.*”) and 40 CFR § 52.21(aa)(2)(i) (“Actual PAL for a major stationary source means a PAL based on the baseline actual emissions . . . of *all emissions units . . . at the source, that emit or have the potential to emit the PAL pollutant.*”) (emphasis added).

³⁷ Protestants Ex. 106 at 35-36.

³⁸ Protestants Ex. 103 at 2.

³⁹ Protestants’ Closing Argument at 12-16.

- The PM limit in Permit No. 3452/PAL6 does not include existing cooling towers at the BOP;
- ExxonMobil’s annual emissions inventory submissions are not reliable indicators of non-compliance with Permit No. 3452/PAL6; and
- Protestants’ argument that compliance with Permit No. 3452/PAL6 must be determined based on emissions from all emissions units at the Baytown Olefins Plant was a collateral attack on Permit No. 3452/PAL6.⁴⁰

Each of these findings is in error and the ALJs’ conclusion based upon them is also erroneous.

a. The PM limit in Permit No. 3452/PAL6 must cover existing cooling towers at the BOP

The ALJs’ finding that the PM Flex/PAL limit in Permit No. 3452/PAL6 does not include existing cooling towers is incompatible with the basic undisputed proposition that “a PAL imposes a pollutant-specific annual emission limitation . . . that is enforceable for all emissions units at the major stationary source that emit the PAL pollutant.”⁴¹ The BOP cooling towers are part of the BOP major stationary source and they emit PM. Therefore, PM emissions from the cooling towers must be evaluated to determine whether ExxonMobil may rely on its PM Flex/PAL to avoid major NSR requirements for the EPU.⁴²

The purpose of a PAL is to establish a pollutant-specific, plantwide limit that may be used to determine whether physical and/or operational changes made to an existing major stationary source, including construction of new emissions units, triggers major NSR

⁴⁰ PFD at 21-22.

⁴¹ *Id.* at 8.

⁴² While ExxonMobil focusses its attention on arguments regarding the appropriate means of determining compliance with its Flex/PAL limits, it is worth noting that the Executive Director’s determination that PM BOP emission levels are below the Flex/PAL PM limit in Permit No. 3452/PAL6—to the extent that such a finding was actually made—did not turn on his evaluation of ExxonMobil’s semi-annual PAL compliance reports. Indeed, the permit engineer testified that he did not even review any of ExxonMobil’s semiannual reports until after his technical review was complete. Protestants Ex. 106 at 27 (explaining that he reviewed PAL reports attached to Protestants’ second comment letter. These comments—Protestants Ex. 3B—were filed after the conclusion of the Executive Director’s technical review).

requirements.⁴³ As such, a PAL must apply to all sources at a major stationary source and not just those listed in the permit at the time it is issued. Otherwise, for example, new units at a source permitted in reliance on the PAL, but not listed on its face, would not be subject to the PAL. As the Executive Director's response to public comments clearly states: "PAL6 is enforceable for all facility or emission units at the major stationary source identified by TCEQ Regulated Entity Number RN102212925, not just the units listed on the MAERT."⁴⁴

b. *The TCEQ's draft cooling tower guidance does not support exclusion of BOP cooling towers from the scope of PAL6*

To find that PM emissions from ExxonMobil's BOP cooling towers are outside ExxonMobil's Flex/PAL limit, the ALJs rely on ExxonMobil's argument that exclusion of PM emissions cooling towers was consistent with the Commission's 2001 draft cooling tower guidance document. This draft document stated that cooling tower PM emissions were usually not included in permit MAERTs.⁴⁵ However, neither the Executive Director nor ExxonMobil presented evidence demonstrating that the draft guidance applied to PALs. Indeed, the document's focus on MAERTs suggests that it was not meant to apply to PALs. The Commission's rules define MAERT to mean "[a] table included with a preconstruction permit issued under this chapter that contains the allowable emission rates established by the permit for a facility."⁴⁶ A PAL is not a preconstruction permit and it does not authorize any emissions.⁴⁷

⁴³ EM Ex. 300 at 6 ("A PAL does not authorize emissions. Instead a PAL is used to determine whether a facility should go through major (also referred to as federal) review for an NSR permitting action. Once a PAL is established as a federal applicability limit, all permitting actions are only subject to minor NSR as long as the site's actual emissions do not exceed the annual PAL caps.") and 13 ("[A] PAL does not authorize emissions or operating conditions but rather sets an emission cap limit to determine whether major NSR is required. This goes to the purpose of the PAL, which is not to establish operating requirements for individual emission units or facilities, but rather to implement a site emission cap that gives the permittee an incentive to keep emissions below the PAL cap even if additional emission units are added to a site.")

⁴⁴ ED Ex. 36 at 697 (emphasis added).

⁴⁵ PFD at 14; EM Ex. 309.

⁴⁶ 30 Tex. Admin. Code § 116.10(8)(emphasis added).

While annual PAL thresholds may often be included in permit MAERTs, PALs are not MAERT limits. In other words, a PAL does not establish an “allowable” emission rate. Thus, the fact that the TCEQ’s 2001 draft cooling tower guidance indicates that allowable limits for PM emissions from cooling towers were not usually included in MAERTs does not indicate that the guidance applied to PALs or that PM emissions from the BOP cooling towers fall outside of the scope of the PM Flex/PAL limit in Permit No. 3452/PAL6.

c. ExxonMobil’s annual emissions inventory submissions are reliable indicators that PM emissions from the Baytown Olefins Plant have exceeded the PM Flex/PAL limit in Permit No. 3452/PAL6

According to the PFD, ExxonMobil’s PAL witness—Mr. Brewer—testified that “emissions reported in AEIUs [or “emissions inventory reports”] are based on different emissions sources, monitoring, and calculation methods than those required for PAL6.”⁴⁸ The ALJs relied on this testimony, and the Executive Director’s responses to Protestants’ discovery requests indicating that emissions inventory reports are not verified for accuracy or veracity by the ED⁴⁹ to determine that emissions inventory reports “are not accurate or representative for purposes of determining PM PAL compliance.”⁵⁰ The PFD misconstrues both ExxonMobil’s testimony and the ED’s responses to Protestants’ discovery requests.

Mr. Brewer did not testify that ExxonMobil’s emissions inventory reports are, in fact, based on calculation methods or monitoring requirements different from those required to demonstrate compliance with PAL6. Rather, he said:

The statewide emission inventory can be equivalent to the PAL SAR calculations
but the Annual Emission Inventory Update (“AEIU”) is geared toward collecting

⁴⁷ EM Ex. 300 at 6 and 13; 30 Tex. Admin. Code § 116.186(b)(1) (“This section does not authorize any facility to emit air pollutants but establishes an annual emissions level below which new and modified facilities, or emissions units at a major stationary source, will not be subject to major new source review for that pollutant.”).

⁴⁸ PFD at 11 (citing EM Ex. 300 at 45-46) and 21.

⁴⁹ PFD at 13 (citing ED’s Responses to Protestants’ Discovery Requests, Response to Interrogatory No. 1).

⁵⁰ PFD at 21.

consistent statewide data and is not prepared to demonstrate compliance with individual permits. As a result, the emissions reported in the AEIU *may* be based on different calculation methods and requirements than are required in PAL 6 and associated TCEQ rules.⁵¹

Thus, while emission calculations methods appropriate for demonstrating compliance with a PAL *may* differ from those appropriate for calculating emissions levels for emissions inventory reports in some circumstances, Mr. Brewer testified that in some cases, they may be the same. The TCEQ's emission inventory rules and PAL rules both require sources to accurately report actual emissions of regulated pollutants using reliable monitoring methods approved by the Executive Director.⁵² The rules for both programs also require sources to certify the veracity of emissions data submitted to the Commission.⁵³ Thus, even though the methods for calculating emissions for emissions inventory submissions and PAL compliance reports *may* differ with respect to some pollutants in some situations, the ALJs may not simply presume that ExxonMobil's certified self-reported emissions inventory reports do not reliably indicate PM emission levels at BOP.

Though ExxonMobil had ample opportunity to identify significant differences in the way *PM* emissions were calculated for its emissions inventory reports and PAL compliance demonstrations, the only such difference that ExxonMobil identified is that cooling tower PM emissions were omitted from its PAL compliance demonstrations. The fact that ExxonMobil could not identify any other differences should be construed as evidence that no other meaningful differences exist. ExxonMobil may not disown the veracity of its self-reported certified emissions inventory reports simply by insinuating

⁵¹ EM Ex. 300 at 45(emphasis added).

⁵² See, 30 Tex. Admin. Code §§ 101.10 and 116.186.

⁵³ *Id.*

that its method of calculating PM emissions for emissions inventory submissions may be different than its method for calculating PM emissions for its PAL compliance reports.

The Executive Director's statement that emissions inventory reports are not verified for accuracy or veracity by the ED does not support a finding that information contained in these reports is therefore less reliable than information contained in PAL compliance reports. This testimony only distinguishes emissions inventory reports from PAL compliance reports to the extent that PAL compliance reports are verified for accuracy or veracity by the ED. The record does not provide any support for this proposition.

The PFD, citing the Executive Director's responses to Protestants' Discovery Requests, erroneously states that the Executive Director "denied Protestants' assertion that combined PM emissions from all facilities at BOP have exceeded 365.62 tons during at least one 12-month period since September 1, 2005."⁵⁴ Here is what the cited response actually says:

REQUEST FOR ADMISSION NO. 1: Please admit that combined PM emissions from all facilities and emission units at the major stationary source identified by TCEQ Regulated Entity Number RN102212925 have exceeded 365.62 tons during at least one 12-month period since September 1, 2005.

RESPONSE: The Executive Director cannot admit or deny this request.

INTERROGATORY NO. 1: If your response to Request for Admission No. 1 is anything but an unqualified admission, please state the legal and factual basis for your denial or partial denial.

RESPONSE: The Executive Director objects to the use of "have exceeded." Emission levels reported through the TCEQ Emissions Inventory are not verified for accuracy or veracity by the Executive Director and the Executive Director only has knowledge that certain levels are reported. Notwithstanding his objection, the Executive Director admits that ExxonMobil reported PM

⁵⁴ PFD at 13, notes 58 and 59.

emissions greater than 365.62 tons during at least one 12-month period since September 1, 2005.⁵⁵

Clearly, the Executive Director did not deny the proposition that PM emissions from BOP had exceeded 365.62 tons for at least one 12-month period since ExxonMobil's Permit No. 3452/PAL6 was issued in 2005. Instead, he avoids the question completely. Protestants did not ask about ExxonMobil's emissions inventory reports. Rather, Protestants asked whether PM emissions from BOP had exceeded the Flex/PAL limit in Permit No. 3452/PAL6.

If the Executive Director had any information tending to demonstrate that ExxonMobil's PM emissions had not exceeded 365.62 tons for any twelve month period since the issuance of Permit No. 3452/PAL6, he should have identified that information in his response to Interrogatory No. 1 and presented it at the hearing. If the Executive Director actually believed that ExxonMobil's PAL compliance reports provided reliable evidence that combined PM emissions from all facilities and emissions units at BOP had not exceeded the Flex/PAL PM limit in Permit No. 3452/PAL6, then the Executive Director should have relied on those reports to deny Protestants' request for admission No. 1. Indeed, if the Executive Director believed that ExxonMobil's PAL compliance reports had any probative value with respect to the question of whether PM emissions from all facilities and emission units at BOP exceed the Flex/PAL PM limit in Permit No. 3452/PAL6, then he should have identified the reports as a factual basis for his inability to admit or deny Protestants' first request for admission. He did not. Thus, the Executive Director's responses to these discovery requests should not read as supporting ExxonMobil's claim that its emissions inventory submissions do not provide reliable information about PM emission levels from the BOP.

⁵⁵ Protestants Ex. 103 at 2 (emphasis added).

d. The ALJs fail to acknowledge Mr. Virr's opinion, based on the best information available to him, the BOP emissions exceeded the Flex/PAL PM limit in Permit No. 3452/PAL6

Even if the Commission disagrees that ExxonMobil's emissions inventory reports are reliable indicators of PM emission levels at BOP sufficient to demonstrate that BOP PM emissions already exceed the Flex/PAL PM limit, it should not disregard the clear, unequivocal testimony of the Executive Director's permit engineer. Mr. Virr testified that, based on the best information available to him, he believed that BOP PM emissions have exceeded the PM Flex/PAL limit in Permit No. 3452/PAL6.⁵⁶ The PFD does not even acknowledge this credible testimony. ExxonMobil's emissions inventory reports and Mr. Virr's testimony establish, by a preponderance of the evidence, that total PM emissions from BOP already exceed the Flex/PAL PM limit in Permit No. 3452/PAL6.

e. Protestants' attempt to enforce the Flex/PAL PM limit in Permit No. 3452/PAL6 is not a collateral attack on that limit

The PFD misconstrue Protestants' attempt to enforce the PM Flex/PAL limit in Permit No. 3452/PAL6 as a collateral attack on the validity of that limit.⁵⁷ Protestants' attempt to enforce ExxonMobil's PM limit is only a collateral attack to the extent that ExxonMobil's application calculations are sufficient to place cooling tower PM emissions outside the scope of its PAL. Because a PAL, by definition, covers all emission units at the PAL source that emit the PAL pollutant, ExxonMobil's decision not to include PM cooling towers in its application calculations could not have this effect. Protestants do not take issue with ExxonMobil's failure to include PM emissions from its cooling tower as part its application or argue that the Flex/PAL PM limit is invalid because ExxonMobil failed to include cooling tower PM emissions in its baseline calculations. Rather, Protestants contend that, however ExxonMobil calculated its

⁵⁶ Protestants Ex. 106 at 35-36.

⁵⁷ PFD at 21.

baseline emissions, ExxonMobil must live with its permit limit.⁵⁸ Understanding that this is so, ExxonMobil filed an application with the TCEQ to increase the PM Flex/PAL limit in Permit No. 3452/PAL6.⁵⁹ That application has not been approved.

According to the PFD, ExxonMobil argued that the Commission's PAL rules are clear that PAL permit compliance demonstrations need only include emissions from facilities "under the PAL."⁶⁰ And that the rules may be read to exempt sources at a major stationary source from PAL requirements if they are not "under the PAL." In support of this claim, the PFD cites the following language from 116.186(a):

For each month during the PAL effective period after the first 12 months of establishing a PAL, the major stationary source owner or operator shall demonstrate that the sum of monthly emissions from each *facility under the PAL* for the previous 12 consecutive months is less than the PAL (a 12-month average, rolled monthly).⁶¹

The citation omits the first sentence from 116.186(a), which identifies exactly which sources at a major stationary source are covered under a PAL: "The plant-wide applicability limit (PAL) will impose an annual emission limitation in tons per year, that is enforceable for all facilities, or emissions units at a major stationary source, that emit the PAL pollutant."⁶² Indeed, Mr. Brewer testified that the TCEQ's PAL rules require PAL permittees to report emissions from all emission units at a major stationary source that emit a PAL pollutant.⁶³ EPA's PAL rule also provides that PALs "impose an annual emission limitation . . . that is enforceable as a practical matter, for the entire major stationary source[.]"⁶⁴ Thus, neither the TCEQ's PAL rules nor the

⁵⁸ Protestants Ex. 100 at 39-40.

⁵⁹ PFD at 16, n75.

⁶⁰ PFD at 15.

⁶¹ PFD at 15 (emphasis in original).

⁶² 30 Tex. Admin. Code § 116.186(a) (emphasis added).

⁶³ 2 Tr. 307 ("Q: (Mr. Clark-Leach) And do you know whether or not the Commission's current PAL rules require PAL permittees to report emissions of the PAL pollutant from all emission units at the major stationary source covered by the PAL? A: (Mr. Brewer)It does.").

⁶⁴ 40 CFR § 52.21(aa)(4)(i)(a) (emphasis added).

federal PAL rule indicate that an applicant may place emission units at a major stationary source covered by a PAL outside of the scope of the PAL.

Next, the PFD relies heavily on ExxonMobil's argument that the specific language of Permit No. 3452/PAL6 is controlling with respect to which emissions must be reported to demonstrate compliance with the PM Flex/PAL limit.⁶⁵ According to this argument, ExxonMobil is only required to monitor and report emissions from BOP sources listed in the Permit No. 3452/PAL6 MAERT, consistent with the specific requirements for each listed source established by the permit's special conditions. This argument is inconsistent with the Executive Director's admission that reporting requirements established under the Commission's PAL rules also apply to PAL6.⁶⁶ To the extent that ExxonMobil's post-hearing briefing suggests that the specific language of Permit No. 3452/PAL6 exhausts the monitoring and reporting requirements for demonstrating compliance with the permit, that briefing is also inconsistent with the testimony of its own witness, Mr. Brewer. Mr. Brewer repeatedly testified that applicable monitoring, recordkeeping, and reporting requirements are found in the permit condition as well as federal and Texas PAL rules:

Q: How do you determine compliance with BOP PAL6?

A: ExxonMobil implements PAL monitoring, recordkeeping, and reporting requirements to demonstrate that the emissions are in compliance with PAL6. These requirements are in Permit 3452/PAL6 special conditions *as well as the PAL rules. See 30 TAC § 116.186; 40 CFR § 52.21[aa](12)-(13).*⁶⁷

...

⁶⁵ PFD at 15-17.

⁶⁶ Protestants Ex. 103 at 5 (“**Request for Admission No. 5:** Please admit that all general conditions listed at 30 Tex. Admin. Code § 116.186(b) apply to PAL 6. **Response:** Admit.”).

⁶⁷ EM Ex. 300 at 14. 40 CFR § 52.21(aa)(12)(i)(a) provides that “[e]ach PAL permit must contain enforceable requirements for the monitoring system that accurately determines *plantwide* emissions of the PAL pollutant[.]” (emphasis added).

Q: In addition to the state and federal regulations, does PAL6 establish certain requirements for measuring compliance with each compound-specific PAL?

A: Yes.⁶⁸

Thus, even though Permit No. 3452/PAL6 does not establish any special conditions regarding the calculation and reporting of PM emissions from BOP combustion sources, ExxonMobil calculates and reports those emissions as required by 30 Tex. Admin. Code § 116.186. ExxonMobil must do the same for PM emissions from the BOP cooling towers.

Because emissions from ExxonMobil's existing BOP cooling towers must be included to determine whether ExxonMobil has maintained emissions below its PM Flex/PAL limit, and because Protestants have presented compelling evidence demonstrating that PM emissions from BOP exceed that limit, ExxonMobil should not be allowed to rely on the limit to avoid major NSR requirements for PM. The ALJs' holding to the contrary should be rejected by the Commission.

3. PAL6 was not issued pursuant to the Commission's SIP-approved rules

The ALJs rely on EPA's preamble to its 2002 NSR reform rulemaking to determine that EPA granted states wide latitude to issue PAL-like permits under existing rules without obtaining specific EPA approval to implement a PAL program.⁶⁹ PAL6 was not issued pursuant to Texas's SIP-approved NSR rules and Texas's SIP-approved rules in 2005 did authorize issuance of PAL-like permits to Texas sources. Thus, even if EPA's preamble clarified that the federal PAL rule did not automatically invalidate existing SIP-approved state PAL (or PAL-like) programs, that clarification has no bearing on this case.

⁶⁸ *Id.* at 16 (emphasis added).

⁶⁹ PFD at 43-45. It is worth noting that PALs are not the only focus of the rulemaking and, as explained below, portions of the preamble cited by ExxonMobil and the ALJs do not directly apply to PALs.

ExxonMobil argues that the Commission is authorized to issue PAL-like permits under its 30 Tex. Admin. Code Section 116, Subchapter B rules, because those rules vest the Commission with authority to determine major NSR applicability for a project based upon concepts, like “actual emissions” and “significant levels” that also apply to PALs.⁷⁰ However, the Commission disowned this position when it promulgated its first PAL rules in 2006. When EPA commented that the Commission’s PAL permit alteration and permit amendment rule (116.192) must be consistent with TCEQ’s SIP-approved Subchapter B permit amendment rule at 116.116, the Commission responded that “Section 116.116 identifies requirements associated with the authorization of facilities that emit air contaminants. A PAL permit does not authorize facilities that emit air contaminants and is not subject to those requirements.”⁷¹ Thus, according to the Commission’s interpretation of its own rules, Subchapter B rules only apply to preconstruction permits and may not be used to amend or alter PALs. It follows that the rules also may not be used to establish PALs.⁷² Moreover, as Protestants explained, the Flex/PAL limits in Permit No. 3452/PAL6 do not reflect “actual emissions” as that term would be applied to determine major NSR applicability for a Subchapter B permitting project.⁷³

Because the Commission’s SIP-approved Subchapter B rules do not (and have never) authorized the Commission to issue PALs or PAL-like permits, and because neither the Executive Director nor ExxonMobil has identified any other source of authority under which the Commission could have issued ExxonMobil’s Flex/PAL permit in 2005, the ALJs’ finding that ExxonMobil’s Flex/PAL permit was issued pursuant to the Commission’s SIP-approved rules is without support.

⁷⁰ PFD at 37.

⁷¹ 31 Tex. Reg. 515, 523 (January 27, 2006)(emphasis added).

⁷² Note also that TCEQ’s PAL rules were not established under Subchapter B. Rather, those rules were placed in a separate Subchapter C.

⁷³ See, e.g., Protestants’ Closing Arguments at 32-34.

- a. *The federal NSR reform rulemaking preamble passages cited by ExxonMobil and the ALJs do not support a finding that TCEQ had authority to issue PAL-like permits without EPA approval*

The ALJs cite the Executive Director’s summary of the regulatory support document for the federal NSR reform rule as support for their finding that EPA’s PAL rulemaking did not cut off states authority to implement PAL-like programs under existing federally-approved SIPs:

Nothing in the final rules specifically precludes reviewing authorities from issuing PAL like permits under the existing regulations during the period prior to the adoption of any new PAL provisions into the State major NSR program.⁷⁴

This citation does not support the ALJs’ finding. The cited portion of the regulatory support document responds to a comment that existing state PAL-like programs should automatically be deemed equivalent or otherwise not required to demonstrate equivalency with the federal PAL rule.⁷⁵ EPA rejected this idea and determined that states must adopt the PAL provisions contained in its final rules.⁷⁶ However, EPA explained, states with SIP-approved PAL-like programs could continue to implement their SIP-approved PAL-like programs pending EPA approval of SIP revisions to reflect PAL requirements in EPA’s final rule.⁷⁷ Thus, the support document—like the preamble to the final rulemaking—does not suggest that states without SIP-approved PAL-like programs were allowed to issue PAL permits without EPA approval. Indeed, EPA does not have authority to allow states to implement permitting programs outside the scope of their federally approved SIPs.⁷⁸

⁷⁴ PFD at 43 (Citing Protestants Ex. 103 at 3).

⁷⁵ *Technical Support Document for the PSD and NNSR Regulations* at 1-7-33 (“We do not agree with the commenters who believed that existing State programs should automatically be deemed equivalent or otherwise not required to demonstrate equivalency.”).

⁷⁶ *Id.* (“After considering the comments and input gathered at public hearings and stakeholder meetings, we are requiring that States adopt the PAL provisions contained in the final rules.”).

⁷⁷ *Id.* (“Nothing in the final rules specifically precludes reviewing authorities from issuing PAL-like permits under the existing regulations during the period prior to adoption of any new PAL provisions into the State major NSR program. However, to minimize transition problems . . . we recommend reviewing authorities consider our final rules in developing any PALs issued in this interim period.”).

⁷⁸ 42 U.S.C. § 7410(i).

The ALJs relied on the following language from EPA’s NSR reform preamble to determine that “EPA specifically stated that States had authority to implement PALs using their existing regulations so long as those regulations were as stringent as the federal 2002 Final PAL Rules:”

[I]f a State decides it does not want to implement any of the new applicability provisions [contained in the 2002 PAL rules], that State will need to show that its existing program is at least as stringent as our revised base program.⁷⁹

This passage indicates that if a SIP-approved state did not wish to implement any of the new applicability provisions—which are not elements of the federal PAL rule as the ALJs’ citation suggests⁸⁰— to satisfy NSR reform rule requirements, the state would still have to demonstrate that its existing SIP applicability provisions are at least as stringent as those established by the new federal rules. That states were required to demonstrate that elements of their SIPs satisfied requirements arising from EPA’s NSR reform rulemaking has no bearing on the question of whether states were allowed to issue PAL-like permits simply because they thought the permits were as stringent as the federal PAL rules required.

Whatever EPA’s NSR reform rulemaking preamble says, it did not grant the Commission any new authority or provide any additional discretion for the TCEQ to implement its existing SIP-approved programs. The purpose of the preamble was to identify and explain new provisions added to the Code of Federal Regulations, including EPA’s PAL rules at 40 CFR § 52.21(aa). Because Texas is a SIP-approved state, it does not implement its permitting programs, including its PAL program, pursuant to the federal rules published in 40 CFR §

⁷⁹ PFD at 43-44.

⁸⁰ EPA’s NSR reform rulemaking included elements and requirements that were not related to PALs. The “applicability provisions” referred to by the rule were not PAL elements. Rather, the term refers to methods for determining major NSR applicability that are listed at 40 CFR § 51.21(a)(2) (e.g., the Actual-to-projected-actual applicability test for existing units, Actual-to-potential test for any new unit, including electric utility steam generating units, The Clean Unit Test for existing emissions units with Clean Unit status (later vacated by the D.C. Circuit Court in *New York v. EPA*, F.3d 3, 10 (D.C. Cir. 2005)), and the hybrid test for modification with multiple types of emission units.). 67 Fed Reg. 80190.

52.21.⁸¹ Rather these federal rules are only effective insofar as they are incorporated into the Commission's rules. Thus, the crucial question with respect to the Commission's authority to issue PALs in 2005 is whether its SIP-approved permitting program authorized it to issue PAL permits. Neither the Executive Director nor ExxonMobil have pointed to any provision in the Commission's SIP approved rules, including its Subchapter B rules (past or present), that might be reasonably read to authorize issuance of PAL permits.

b. The record supports a finding that the Flex/PAL caps in Permit No. 3452/PAL6 were established pursuant to the Commission's non-approved Flexible Permit rules and not its Subchapter B preconstruction permit rules

Contrary to ExxonMobil's suggestion that PAL6 was issued as a Subchapter B permit, the record shows that the Commission—to the extent that it actually relied on its own rules to issue PAL6—relied on its minor source Subchapter G flexible permit rules.⁸² The Commission's flexible permit rules are not part of Texas's federally approved SIP for minor or major sources.⁸³ These rules, unlike the Commission's Subchapter B rules, specifically provide that flexible permits may include multi-unit caps and that these caps may be used to determine

⁸¹ 2 Tr. 308-309 (“Q: (Mr. Clark-Leach) So the purpose of the Federal Register passage you’ve relied upon in your testimony was to finalize or issue the PAL rules in 52.21. Is that correct? A: (Mr. Brewer) That is correct. Q: And your testimony today is that 52.21 doesn’t authorize the Commission to authorize any permits. Is that correct? A: That’s correct.”).

⁸² See, e.g. 30 Tex. Admin. Code § 116.718(a) (“An increase in emissions from operational or physical changes at an existing facility authorized by a flexible permit is insignificant, for purposes of minor new source review under this subchapter, if the increase does not exceed either the emission cap or individual emission limitation.”); Permit No. 3452 is a Flexible Permit and ExxonMobil’s Flex/PAL thresholds were based on flexible permit limits. EM Ex. 141 at 1 (Identifying Permit No. 3452 as a Flexible Permit), 3 (Special Condition 1 A “This flexible permit established emission caps which will be affected at the issuance of this permit. Compliance with the emission caps will be demonstrated and documented on-site within six months of the Flexible Plantwide Applicability Limit (Flex/PAL) permit issuance. Compliance with the conditions of this permit will commence six months after the Flex/PAL issuance.”), 45, 48, 51, 53, 55, 56, and 58 (Identifying “Flex/PAL” limits)(emphasis added); ED Ex. 36 at 700 (“When Flexible Permit 3452 was issued in 2001, an emissions cap was established by applying current BACT to existing furnaces. As a result, the cap was less than the prior two-year actual emissions. When PAL6 was issued, several additional furnaces were added to the flexible cap, and the PAL was set equal to the new flexible cap.”) (emphasis added).

⁸³ 40 CFR § 52.2270(c).

whether modifications at the source are significant, but only for *minor* modifications.⁸⁴ ExxonMobil's Flex/PAL limits are not based on "actual emissions" as that concept is applied in Subchapter B or the Commission's current PAL rules. Rather, as the Executive Director admits, the caps were based on Subchapter G flexible permit limits.⁸⁵

Therefore, the ALJs' determination that ExxonMobil's Flex/PAL permit was issued pursuant to the TCEQ's federally approved permitting rules and that it was supported by the preamble to EPA's 2002 NSR reform rulemaking is contrary to the evidence and unsupported by applicable legal authority. Because Permit No. 3452/PAL6 is not a SIP-approved permit, it may not be used to modify any otherwise applicable SIP requirement, including SIP requirements regarding the proper method for determining major NSR applicability. Because ExxonMobil may not rely on Permit No. 3452/PAL6 to determine major NSR applicability, it must conduct a netting analysis pursuant to 30 Tex. Admin. Code § 116.160(b) before its permit may issue.

B. OTHER ISSUES

1. The ALJs erred by finding that emissions from the EPU will not cause or contribute to a violation of the annual PM_{2.5} NAAQS

The ALJs find that ExxonMobil properly evaluated compliance with the PM_{2.5} annual NAAQS, and states that the Protestants offered no evidence to refute this finding. Protestants take exception to this conclusion. ExxonMobil did not account for secondarily-formed PM_{2.5} impacts from the BOP in its annual PM_{2.5} NAAQS analysis. The EPU will emit PM_{2.5} precursors at levels that have the potential to significantly degrade existing air quality. The only applicable modeling guidance for modeling compliance with EPA's annual PM_{2.5} NAAQS states

⁸⁴ The Commission's rules establish different permitting requirements for significant and insignificant minor modifications. 30 Tex. Admin. Code § 116.718(a).

⁸⁵ See, n82.

that secondarily-formed PM_{2.5} impacts must be evaluated for projects like the EPU. Thus, ExxonMobil's modeling demonstration was defective.

C. The ALJs erred by finding that ozone emissions from the EPU will not cause or contribute to a violation of the ozone NAAQS

ExxonMobil proposes to build a massive source of ozone precursor pollution in a severe ozone-nonattainment area. ExxonMobil did not conduct any source-specific demonstration that emissions from its EPU will not contribute to existing violations of the ozone NAAQS in Harris County. The ALJs conclusion, despite ExxonMobil's failure to make such a demonstration, that emissions from the EPU would not contribute to existing violations of the NAAQS is unsupported by the evidence. Protestants take exception to it.

D. The ALJs erred by finding that MSS activities associated with the EPU and their emissions are already authorized under Permit No. 3452

For the reasons raised in Protestants' Closing Arguments and Response to Closing Arguments, Protestants take exception to the ALJs' determination that EPU MSS activities and emissions are already authorized under Permit No. 3452/PAL6.

III. CONCLUSION

For the forgoing reasons, and for the reasons stated in Protestants' Closing Arguments and Response to Closing Argument, Protestants take exception to the ALJs' PFD and proposed order. Moreover, because the issues Protestants presented raise substantial and justified concerns about ExxonMobil's application, and because Protestants' conduct at the hearing was efficient, Protestants request that the Commission reject the ALJs' proposal that they share in the transcript costs. Protestants took reasonable measures to ensure that its prosecution of this case did not result in any undue burden on ExxonMobil and they should not be punished for seeking a hearing regarding ExxonMobil's proposal to build a large new source of air pollution in an area with poor baseline air quality.

Respectfully Submitted,
ENVIRONMENTAL INTEGRITY PROJECT

BY:

A handwritten signature in black ink, appearing to read 'G. Clark-Leach', written in a cursive style.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of January, 2014 a true and correct copy of the foregoing Exceptions to the Proposal for Decision and Order has been provided to the parties as identified below.



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