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7

8 **BEFORE THE ADMINISTRATOR**

9 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

10

11 IN THE MATTER OF PROPOSED TITLE V
12 PERMIT ISSUED TO SHELL MARTINEZ
13 REFINING COMPANY, SHELL OIL
14 PRODUCTS COMPANY FOR ITS
PETROLEUM REFINERY LOCATED IN
MARTINEZ, CALIFORNIA

BAAQMD Application No. 16467

15 ISSUED BY THE BAY AREA AIR
QUALITY MANAGEMENT DISTRICT

16 Plumbers & Steamfitters Union Local 342, Heat
and Frost Insulators/Asbestos Workers Local 16,
17 the International Brotherhood of Electrical
Workers Local 302, the Boilermakers Union Local
18 549 and the Laborers Union Local 324, Petitioners

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21 **PETITION REQUESTING THE ADMINISTRATOR TO OBJECT TO THE**
PROPOSED ISSUANCE OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE
SHELL MARTINEZ REFINERY

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24 **INTRODUCTION**

25 The Clean Air Act's Title V program exists to provide a "comprehensive State air quality
26 permitting system" and to create a permit that "assures compliance by the source with all applicable
27 requirements." 40 C.F.R. 70.1(a); 40 C.F.R. 70.1(b). Shell Martinez Refining Company, Shell Oil
28 Products Company's ("Shell") proposed Title V permit defies this purpose both by its plain terms and

1 by its omissions. The document fails to include all applicable requirements and distorts many of the
2 requirements it does include. By accepting Shell's incomplete and inaccurate application without
3 performing its own compliance investigation, the permitting agency turned a blind eye to other
4 applicable requirements, such as preconstruction review, thereby issuing an inadequate Title V permit
5 to the company.

6 Under the Clean Air Act § 505(b)(2), 42 U.S.C. § 7661(d) (b)(2), Petitioners hereby request
7 that the Administrator object to the Bay Area Air Quality Management District's ("BAAQMD" or
8 "District") issuance of a proposed Title V Major Facility Review Permit ("Proposed Permit") to Shell
9 for its refinery in Martinez, California. The EPA received the proposed Title V permit from the
10 BAAQMD on August 13, 2003.¹ EPA's 45-day review period of the permit ended on September 26,
11 2003, making this petition timely because it is filed within sixty days of the expiration of EPA's 45-
12 day review period. *See* Clean Air Act § 505(b)(2). Under the Clean Air Act, the Administrator must
13 render a decision granting or denying this petition within sixty days after it is filed. *Id.* This petition
14 is based on issues petitioners raised during the public comment periods for the draft and proposed
15 permits.

16 PETITIONERS

17 Petitioners Plumbers & Steamfitters Union Local 342, Heat and Frost Insulators/Asbestos
18 Workers Local 16, the International Brotherhood of Electrical Workers Local 302, the Boilermakers
19 Union Local 549 and the Laborers Union Local 324 ("Petitioners") construct and maintain
20 commercial, residential and industrial projects, primarily in the vicinity of Contra Costa County. They
21 are concerned with sustainable land use and development in Contra Costa County. Poorly operated
22 and environmentally detrimental projects may jeopardize future jobs by making it more difficult and
23 more expensive for business and industry to expand in the region, and by making it less desirable for
24 businesses to locate and people to live there. Continued degradation can, and has, caused construction
25 moratoria and other restrictions on growth in the County that, in turn, reduce future employment
26 opportunities. Additionally, workers themselves live in the communities that suffer the impacts of

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¹ <http://yosemite.epa.gov/R9/AIR/EPSS.NSF/e0c49a10c792e06f8825657e007654a3/2331ea39437a600486256d7b00586c74>

1 environmentally detrimental projects. Union members breathe the same polluted air that others
2 breathe and suffer the same health and safety impacts. Finally, union members are concerned about
3 projects that carry serious environmental risks without providing countervailing employment and
4 economic benefits to local workers and communities. Therefore, Petitioners and their members have a
5 strong interest in enforcing environmental laws such as the federal Clean Air Act² (“CAA” or “the
6 Act”).

7 **APPLICANT – SHELL MARTINEZ REFINERY**

8 Shell operates a petroleum refinery in Martinez, California (“Refinery”). The Refinery emits a
9 variety of pollutants, including, but not limited to, volatile organic compounds (“VOCs”), nitrogen
10 oxides (“NOx”), and sulfur dioxide (“SO₂”), and include some of the most toxic chemicals known to
11 science. The emissions from the Shell Refinery have varying levels of toxicity and concentrations.
12 The Refinery is a major facility required to obtain an operating permit under Title V of the 1990 Clean
13 Air Act Amendments, the Federal Operating Permit Program and District’s Regulation 2, Rule 6 -
14 Major Facility Review.

15 **GROUNDS FOR OBJECTION**

16 Petitioners request that the Administrator object to the Proposed Permit for the Shell refinery
17 because, as explained below, it does not meet the requirements of 40 C.F.R., Part 70. In particular, the
18 EPA has identified numerous applicable requirements that are not included in the Proposed Permit,
19 Petitioners have identified numerous applicable requirements that are not included in the Permit, and
20 various other inaccuracies and inconsistencies must be corrected before a final permit may be issued
21 by the BAAQMD.

22 **A. THE EPA HAS IDENTIFIED APPLICABLE REQUIREMENTS THAT ARE
23 NOT INCLUDED IN SHELL’S PROPOSED PERMIT,
24 CREATING A NON-DISCRETIONARY DUTY TO OBJECT**

25 Under the Clean Air Act “If any permit contains provisions that are determined by the
26 Administrator as not in compliance with the applicable requirements of this chapter, including the
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28 ² 42 U.S.C. § 7401 *et seq.*

1 requirements of an applicable implementation plan, the Administrator shall . . . object to its issuance.”
2 Clean Air Act, § 505(b)(1). The Second Circuit Court of Appeals recently held that when there is a
3 demonstration of noncompliance with Title V regulations, the “Administrator *shall* issue an
4 objection.” *NYPIRG v. EPA*, 321 F.3d 316, 333 (2003); *see also* Clean Air Act § 505(b)(2)(emphasis
5 added); *see also* 40 C.F.R. § 70.8(c) (EPA’s own regulation, which states that the EPA “will object to
6 the issuance of any proposed permit” if the EPA determines it violates an applicable requirement). In
7 the *NYPIRG* case, the petitioner’s claim that the public notice procedure was flawed formed an
8 adequate basis to force the EPA to object to the permit. *NYPIRG v. EPA*, 321 F.3d at 332-333. In
9 response to the EPA’s claim that the inadequate public notice procedure constituted “harmless error”
10 -- a determination the agency claimed to be within its discretion -- the Court explained that “this
11 argument blurs the important distinction between the discretionary part of the statute (whether the
12 petition demonstrates non-compliance) with the non-discretionary part (if such a demonstration is
13 made, objection must follow).” *NYPIRG v. EPA*, 321 F.3d at 333. In short, when the EPA finds that
14 a proposed permit fails to comply with Title V, the agency *must* issue an objection to that permit. *Id.*
15

16 The most important mandate of Title V is that permits issued under its authority contain “all
17 applicable requirements.” 40 C.F.R. 70.1(a); 40 C.F.R. 70.1(b). Here, the EPA has identified
18 numerous provisions in Shell’s proposed Title V permit that are not in compliance with all applicable
19 requirements for the refinery. *See Exhibit 1, Enclosure B, “EPA Comments on Proposed Shell*
20 *Martinez Refinery Permit.” Specifically, the EPA found inconsistencies and omissions in Shell’s*
21 *Proposed Permit for the following sources: Abatement Devices, Catalytic Cracking Unit,*
22 *Combustion Units (CO Boilers), Cooling Towers, Electrostatic Precipitators, Flares, Fugitive Sources*
23 *(Pressure Relief Valves, Pumps, Compressors), Hydrogen Plant, Loading Racks, Floating Roof*
24 *Tanks, Tanks, Sulfur Treatment Emissions, Support Facilities, Grandfathered Units and Wastewater*
25 *Treatment Systems. See id. EPA further found significant problems with the permit shields*
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1 contained in Proposed Permit. One type of shield EPA finds problematic in its comments are
2 “facility-wide shields, which apply to the entire refinery and prospectively to an unknown universe of
3 potential future new units.” Exhibit 1, Enclosure B, page 10. “Another facility-wide shield included
4 in the proposed permit consists of a very large list of sources exempted from the boiler NSPS [new
5 source performance standards]. . . without a specific reason.” *Id.* at 11. With respect to both types of
6 shields, the agency found that it “does not believe that 40 CFR, Subpart 70 allows either of these
7 shields.” *Id.* at 11. Finally, the agency found that the Proposed Permit’s monitoring provisions for
8 miscellaneous units are inadequate. *See id.* at 16-17. Petitioners do not waive any issues raised in the
9 by EPA’s comments by failing to mention them above, but merely highlight some of the most
10 egregious omissions.

11 In light of the EPA’s explicit findings that the Proposed Permit failed to include all applicable
12 limits, the agency had a non-discretionary duty to object to Shell’s proposed permit by the end of its
13 45-day review period, September 26, 2003. Clean Air Act, § 505(b)(1); *see also* 40 C.F.R. § 70.8(c);
14 *see also* *NYPIRG v. EPA*, 321 F.3d at 333. Because the EPA failed to perform this nondiscretionary
15 duty, Petitioners submit this petition to request that EPA cure this deficiency and object to the
16 Proposed Permit at this time.

17 **B. BY THE DISTRICT’S OWN ADMISSION, SHELL’S PERMIT IS NOT IN
18 COMPLIANCE WITH TITLE V, REQUIRING OBJECTION BY THE EPA**

19 The Clean Air Act states that the EPA “*shall* issue an objection within [60 days] if the
20 petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements
21 of this chapter.” *See* Clean Air Act, § 505(b)(2); 42 U.S.C. § 7661(d) (b)(2) (emphasis added). As
22 explained below, Petitioners and other commenters demonstrated that Shell’s Proposed Permit is not
23 in compliance with the Clean Air Act during the public comment period provided by the District. In
24 response, the District actually admitted to the existence of some violations while ignoring most of the
25 issues raised by Petitioners during the public comment period. Based on the District’s admissions
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1 alone, the EPA must object to Shell's Proposed Permit. *See id.*

2 While the District did address some of the issues raised by Petitioners and other commenters in
3 the Proposed Permit, the vast majority of Petitioners' concerns remain uncured. For that reason,
4 Petitioners incorporate by reference all the issues raised during the public comment period as the basis
5 for this petition. Two sets of comments submitted by Petitioners in response to the draft and proposed
6 permits are attached to this letter as Exhibits 2 and 3. Comments submitted by other groups are
7 attached as Exhibits 6-9 and incorporated into this petition by reference.

8 Although the various comments provide an in-depth discussion of inadequacies in the
9 Proposed Permit, a summary of some of the issues raised in those comments is provided below.
10 Petitioners do not waive any issues raised in the prior comments by failing to mention them below, but
11 merely highlight some of the most egregious omissions.

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13 **1. The District Admits that Shell's Permit Is Not Supported By a**
14 **Complete Application**

15 EPA's regulations provide specific criteria for determining the adequacy of a facility's
16 application. *See, generally, 40 C.F.R. § 70.5(c).* Those informational requirements include, but are not
17 limited to, a list of all sources in the permit application, stack discharge points, description of fuels,
18 fuel use, raw materials, production rates and operating schedules, detailed information on air pollution
19 control equipment and monitoring devices, dates when emission sources and air pollution control
20 equipment were last installed and modified, calculations, input assumptions to the calculations and
21 sufficiently detailed process production rate and throughput capacities which would be required to
22 support other quantitative aspects of the facility's application, emission estimates from all significant
23 sources, and a compliance statement. *See id.* In its Response to Comments on the Draft Permit
24 (Exhibit 4, p. 9-11), the BAAQMD admits that Shell failed to comply with these requirements for
25 application adequacy. The agency dismisses commenters' concerns related to permit adequacy simply
26 by stating that an incomplete application does not affect the adequacy of the permit. Of course, as
27 explained by Petitioners' September 22, 2003 comments, attached as Exhibit 3, application adequacy
28 requirements are separate and independent provisions of the Title V program that demand strict

1 adherence.

2 Next, under the implementing regulations for Title V, applicants must certify the accuracy of
3 the information contained in their applications. 40 C.F.R. § 70.5 (d). Petitioners discussed the
4 refinery's failure to provide legally compliant certifications in their draft permits as a problem that
5 renders Shell's application legally inadequate. See Petitioners' September 22, 2003 Comments,
6 attached as Exhibit 3. This deficiency remains uncured.

7 Finally, as explained in Petitioners' attached comments, the public process for the permit was
8 fundamentally flawed. Specifically, in violation of 40 C.F.R. § 70.7(h)(2), the District refused
9 Petitioners access to all documents relevant to the permitting action. And, in violation of 40 CFR §
10 70.2 and 40 CFR § 70.8(c)(3), the District failed to provide the public and the EPA with a copy of the
11 Permit it proposes to make final. Instead, the District merely provided the public with a draft of the
12 permit, which is subject to change, according to the EPA's own admission: "We understand that the
13 District intends to propose additional refinery Title V permit revisions in the near future, and we will
14 continue working cooperatively with the District during these revisions." See Exhibit 1, October 31,
15 2003 letter from Gerardo C. Rios to Mr. Steve Hill. These flaws in the public process are strikingly
16 similar to the *NYPIRG* case where the petitioner was denied an adequate opportunity to request a
17 public hearing. The EPA's admission of this flaw was sufficient to require the agency to object in that
18 case. *NYPIRG v. EPA*, 321 F.3d 316, 333 (2003). Just as in the *NYPIRG* case, the EPA's
19 acknowledgement of deficiencies in the public process is sufficient to trigger the agency's non-
20 discretionary duty to object to the permit.

21 **2. The District Admits that the Bay Area Refinery Permits Do Not**
22 **Incorporate The Correct HAP Standard**

23 The District's Responses admit that under BAAQMD Rule 2-6-210, the significance thresholds
24 for Hazardous Air Pollutants (HAPs) is 400 pounds per day, but that the permits incorrectly lists the
25 significance threshold for those pollutants at 1000 pounds per day. Exhibit 4 at page 9. As a result of
26 this mistake, the District failed to require the listing of all significant sources of HAPs in Shell's
27 Proposed Permit. The Responses fail to provide an explanation for this inconsistency and further fail
28 to correct this mistake. This District-admitted inconsistency with Title V means that the EPA must

1 object to Shell's permit. *See Clean Air Act, § 505(b)(2); 42 U.S.C. § 7661(d) (b)(2).*

2 **3. The District Admits that the Proposed Permit Does Not Assure**
3 **"Continuous Compliance," In Violation of Title V**

4 Part 70 creates a legal distinction between continuous compliance and intermittent compliance.
5 As part of the requirements for compliance certification, Part 70 permits must include the "status of
6 compliance with the terms and conditions of the permit for the period covered by the certification,
7 including whether compliance during the period was continuous or intermittent." 40 CFR 70.6
8 (c)(5)(C). Non-continuous compliance therefore affects the compliance status of the source under Part
9 70.

10 Furthermore, the courts have made clear that Title V requires continuous compliance. "[Title
11 V's] monitoring and testing requirements ensure that sources *continuously* comply with emission
12 standards." *Utility Air Regulatory Group v. Environmental Protection Agency*, 320 F.3d 272, 275
13 (D.C. Cir. 2003) (emphasis added).

14 In its Response to Comments, the District admits that "[c]ompliance by the refineries with all
15 District and federal air regulations will not be continuous." *See Exhibit 4, p.15.* The District further
16 states that the Proposed Permit can assure only "reasonable intermittent compliance" with the
17 applicable requirements for the refinery, rather than consistent compliance with applicable
18 requirements. *See id.* The District's position is especially troubling given the episodes of
19 noncompliance detailed in Petitioners' attached comments and those that have occurred at the Refinery
20 in the recent past. Attached is a list of pending and resolved Notice of Violations for the Refinery
21 during 2001, 2002 and 2003, as reported by the District. *See Exhibit 5.* As that list demonstrates, at
22 just one of the Refinery's sources, (Source # 1,426) Shell experienced 19 violations of District rules
23 during years 2001 and 2002. *See id.* The attached list provides evidence that a number of sources
24 have experienced more than 5 violations over the past few years. In spite of these serious
25 noncompliance issues, the District refuses to ensure that the Proposed Permit will ensure continuous
26 compliance with all applicable requirements. Because the Proposed Permit does not ensure
27 continuous compliance with emission standards, the EPA must object to the Proposed Permit for
28 failing to include all applicable requirements.

1 **C. PETITIONERS HAVE SHOWN THAT SHELL'S PERMIT IS NOT IN**
2 **COMPLIANCE WITH TITLE V, REQUIRING OBJECTION BY THE EPA**

3 **1. The Proposed Permit Must Cure Any Failure to Obtain All**
4 **Legally-Required Preconstruction Review Permits**

5 According to the EPA's own interpretation of its Title V regulations:

6 Under 40 CFR § 70.1(b), "all sources subject to Title V must have a permit to operate
7 that assures compliance by the source with applicable requirements." Applicable
8 requirements are defined in 40 CFR § 70.2 to include: "(1) any standard or other
9 requirement provided for in the applicable implementation plan approved or
10 promulgated by EPA through rulemaking under Title I of the [Clean Air] Act"
11 *Such applicable requirements include the requirement to obtain preconstruction
12 permits that comply with preconstruction review requirements under the Act, EPA
13 regulations, and State Implementation Plans ("SIPs"). See generally CAA §§ 110(a)(2)(C), 160-169, &173; 40 CFR §§ 51.160-66 & 52.21.*

13 *In the Matter of Pacific Coast Building Products, Order Responding to Petitioner's Request That the
14 Administrator Object to the Issuance of a State Operating Permit, p.7 (December 10, 1999) (emphasis
15 added).*

16 Rather than investigate and resolve Shell's failure to obtain the required preconstruction review
17 permits described in the attached comments and in the section below, the District simply responded
18 with the following: "there is *no advantage* to holding the Title V permit in abeyance while compliance
19 issues are investigated and resolved." Exhibit 4 at 6 (emphasis added). Of course, the advantage
20 would be that a proper permit would comply with the law and would require ~~Chevron~~ to install the
21 proper pollution control technology – one of the fundamental goals of the Clean Air Act. As
22 explained in Petitioners' attached comments (Exhibits 2 and 3), resolution of those compliance issues
23 is a basic condition of permit adequacy under the Clean Air Act. 40 C.F.R. § 70.5(c)(8)(iii)(C).
24 Petitioners therefore reiterate the need to resolve all areas of noncompliance with the preconstruction
25 review provisions of the Clean Air Act identified in their attached comments on Shell's draft and
26 proposed Title V permit. Because of EPA's clear position requiring the resolution of all
27 preconstruction review requirements as a condition of Title V permit adequacy as quoted above, the
28 EPA must object to the Proposed Permit.

1 **2. The Proposed Permit Does Not Assure Compliance with the Clean Air**
2 **Act's New Source Review Requirements**

3 Under the Clean Air Act's Title V program the District must create a permit that "assures
4 compliance by the source with all applicable requirements." 40 C.F.R. 70.1(a); 40 C.F.R. 70.1(b). As
5 EPA found in its attached comments, for grandfathered sources, the Proposed Permit allows dramatic
6 increases in throughput levels without subjecting those sources to the Clean Air Act's New Source
7 Review requirements. The EPA specifically wrote that with respect to throughput limits on
8 grandfathered sources, the permit does not make clear that those limits are not to be "relied upon to
9 avoid NSR applicability." See Exhibit 1, Enclosure B, page 14. To highlight a few issues Petitioners
10 discussed in their original comments on this issue, Shell increased emissions from a CO Boiler in
11 1998, flares in 1997 and from Process Drains in 2000 without applying the Act's Prevention of
12 Significant Deterioration and New Source Review provisions. *See* Exhibit 2. These preconstruction
13 review anomalies must be resolved in Shell's Title V permit.

14 **3. EPA Must Object Based on Deficiencies Raised By Other Commenters**

15 During the public comment period on the draft and proposed permits, Communities for a Better
16 Environment and Our Children's Earth submitted comments detailing deficiencies in both versions.
17 Commenters and the District provided the EPA with copies of those comments during the public
18 comment period. Petitioners have attached those comments (Exhibits 6-9) and incorporate all issues
19 raised in those comments as independent grounds for this petition.

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CONCLUSION

Based on the significant deficiencies in Shell's Proposed Permit as discussed above, Petitioners respectfully petition the EPA to perform its non-discretionary duty to object to that Proposed Permit.

Respectfully submitted,

Dated: November 24, 2003

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