

BEFORE THE ADMINISTRATOR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of the Proposed Title V
Operating Permit for Equilon Enterprises LLC,
dba Shell Oil Products US

Facility No. A0011

Shell Martinez Refinery, Martinez, California

Proposed for Issuance by the Bay Area Air
Quality Management District

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

I. INTRODUCTION

Petitioner Equilon Enterprises LLC, a Delaware limited liability company doing business as Shell Oil Products US ("Shell"), is the owner and operator of a petroleum refinery located at 3485 Pacheco Blvd., in Martinez, California (the "Shell Martinez Refinery"). Pursuant to Section 505(b)(2) of the Clean Air Act (the "Act"), 42 U.S.C. Section 7661d(b)(2), 40 C.F.R. Section 70.8(d), and Bay Area Air Quality Management District (the "BAAQMD" or "District") Regulation 2-6-411, Shell hereby petitions the Administrator (the "Administrator") of the United States Environmental Protection Agency ("EPA") to object to the Title V operating permit the District proposes to issue for the Shell Martinez Refinery, officially designated by the District as Facility No. A0011.

Under Section 505(b) of the Act, the EPA is authorized to review Title V operating permits proposed for issuance by a state permitting authority and to object to any permits that fail

to ensure compliance with applicable requirements of the Act. In those situations where the EPA does not issue a written objection to a proposed permit, any person may petition the Administrator to take such action. 42 U.S.C. § 7661d(b)(2). This Petition has been filed within 60 days after the expiration of the EPA's 45-day review period, as required by Section 505(b)(2) of the Act. The Administrator is required to grant or deny this Petition within 60 days after it is filed. 42 U.S.C. § 7661d(b)(2). Further, in compliance with Section 505(b) of the Act, this Petition is based on objections raised by Shell with specificity during the public comment period provided by the BAAQMD.

The Administrator is required to object to the issuance of any proposed permit when a petitioner demonstrates that the permit is not in compliance with "the requirements of this chapter, including the requirements of the applicable implementation plan." 42 U.S.C. § 7661d(b)(2). Implementing regulations promulgated by the EPA also require the Administrator to object to issuance when he or she determines a permit is not in compliance with "requirements under this part." 40 C.F.R. § 70.8(c)(1). "Requirements under this part" refer to requirements found in Part 70, and largely concern the procedures that must be followed by a state permitting authority when issuing a Title V operating permit. As will be set forth in this Petition, the Title V operating permit proposed for issuance to the Shell Martinez Refinery was not developed by the District in accordance with certain requirements found in Part 70, and also contains provisions not in compliance with substantive requirements of the Act.

II. PROCEDURAL HISTORY

The draft Title V operating permit proposed by the District for issuance to the Shell Martinez Refinery has been over seven years in the making. Shell originally submitted its Title V permit application to the District in 1996. On or around June 15, 2002, the District issued a preliminary draft permit for public review and comment. A public hearing regarding the initial draft permit was held on July 15, 2002. The public comment period, initially proposed to last for

60 days, was subsequently extended until September 28, 2002. Shell submitted voluminous comments objecting to numerous instances in which the initial draft permit contained provisions inconsistent with applicable requirements under the Act.

The District purportedly reviewed the comments submitted by Shell, in addition to those submitted by other interested parties, and made significant modifications and corrections in response thereto. The revised draft permit prepared by the District to reflect these changes also contained new conditions to implement the District's Interchangeable Emission Reduction Credits Rule and imposed new monitoring requirements for emissions from boilers, steam generators and process heaters. Based on the nature and extent of these revisions, the District concluded that it needed to make the revised draft permit available to the public for a second public comment period. At this same time, the District also decided to classify the revised draft permit as a "proposed permit," and forwarded the document to the EPA to start that agency's 45-day review period for permits proposed for final issuance.

On August 5, 2003, the District issued a Notice Inviting Written Public Comments on the revised draft permit. The public comment period was originally proposed to close on September 15, 2003, but it was subsequently extended by the District until September 22, 2003. The EPA purports to have received the revised draft permit on August 13, 2003, and accordingly calculated that its 45-day review period ended on September 26, 2003.

On September 22, 2003, Shell submitted extensive comments to the District on the revised draft permit, copies of which, along with an accompanying transmittal letter, are attached hereto as Exhibit A and incorporated herein by reference. As will be discussed further below, Shell objected to the District's failure to prepare the revised draft permit for issuance in accordance with Part 70 procedures. Shell also asserted that certain requirements contained in the revised draft permit were inconsistent with the Act and its implementing regulations.

On September 26, 2003, the last day of its public review period, the EPA provided extensive comments to the District on the proposed Title V permits for three of the five Bay Area petroleum refineries, all of whose permits were subject to review. Although acknowledging that these permits required "specific improvements," including promises to follow EPA guidelines and regulations, the EPA wrote that it would not object to their issuance based on commitments made by the District concerning future modifications. In its letter, the EPA also noted that it was "unable to review the proposed Title V permits for Conoco-Phillips Company and Shell Martinez Refinery due to the short review period." The agency concluded, however, that the District would revise these two permits in a manner consistent with the revisions requested by the EPA to the other three permits.

On October 31, 2003, the EPA was finally able to issue preliminary comments on the two outstanding refinery permits, based on its "limited review" of each document. The EPA reiterated its understanding that both of the remaining refinery permits would be revised in a manner consistent with the "General Comments" contained in its September 26, 2003 comment letter. The EPA also included 17 pages of specific changes to the revised draft permit for the Shell Martinez Refinery. The agency recommended that the District include as many of these revisions as possible in the facility's final Title V permit.

Both comment letters, attached hereto as Exhibits B and C respectively, clearly indicate that the EPA has serious concerns with the Title V permits the District proposes to issue for every Bay Area petroleum refinery, including the Shell Martinez Refinery. However, the agency has decided not to object to the issuance of any of these permits based on commitments it has received from the District to make appropriate changes in the final versions of these documents. Shell acknowledges that it too has worked, and continues to work, with the District in a cooperative manner to address the comments it has submitted to both versions of the draft Title V operating permit issued for public comment. Notwithstanding the foregoing, Shell understands that the District has concluded it is compelled to issue a final Title V operating permit for the

Shell Martinez Refinery, as well as for all other petroleum refineries located in the San Francisco Bay Area, pursuant to a 2002 settlement agreement resolving litigation filed against the District officially captioned as *Our Children's Earth Foundation v. BAAQMD*, San Francisco Superior Court, Case No. CPF-02500595. As part of the settlement in this action, to which neither Shell nor any other petroleum refinery was a party, the District agreed to issue all remaining Title V operating permits by December 1, 2003.

To the extent the District insists on adhering to this deadline, Shell is concerned that there simply is not adequate time for District staff to address and correct all of the acknowledged deficiencies in the revised draft permit proposed for the Shell Martinez Refinery. At this point, Shell is unable to determine whether some, all, or even any of the comments it has submitted for the record will be addressed by the District in the final Title V permit that will purportedly be issued for the Shell Martinez Refinery on or around December 1, 2003. District personnel have recently informed Shell that due to the short time frame, they may be unable to incorporate any of the EPA's facility-specific recommendations into the final permit. Additionally, Shell will not be provided with the opportunity to review or comment on the final permit, which by all accounts will contain substantial revisions from the version last circulated for public comment. Because even erroneous terms and conditions will be considered federally enforceable once the Title V permit is issued, and it is clear that the District will not make all of the appropriate changes before issuing the permit on December 1, 2003, Shell requests that the EPA formally object to the District's issuance of the revised draft permit for the Shell Martinez Refinery based on the procedural and substantive grounds noted below, or take such other action as may be within its power to compel the District to delay issuance of the final Title V permit until such time as this document accurately reflects the requirements of the Act with which the facility must comply.

III. GROUNDS FOR OBJECTIONS

A. The Revised Draft Permit Issued by the District is not in Compliance with Requirements Under 40 C.F.R. Part 70

1) The Revised Draft Permit is not a "Proposed Permit"

The District is required under Section 505(a) of the Act and 40 C.F.R. Section 70.8(a)(1) to provide the EPA with a "proposed permit" for review at least 45 days prior to issuance. The revised draft permit forwarded to the EPA on August 5, 2003, was more akin to a "draft permit" as that term is defined in 40 C.F.R. Section 70.2. This distinction is not simply a matter of semantics. A "draft permit" is defined as "the version of a permit for which the permitting authority offers public participation under § 70.7(h) or affected State review under § 70.8 of this part." 40 C.F.R. § 70.2. When a state permitting authority issues a draft permit for public review and comment it typically envisions that it will receive substantive comments that may require further permit revisions. This is especially true in the present situation, where the draft permit submitted for public review and comment contains significant new requirements not previously made available to the public. The term "proposed permit," on the other hand, is defined as "the version of a permit that the permitting authority proposes to issue and forwards to the Administrator for review in compliance with § 70.8." 40 C.F.R. § 70.2. There is a presumption, if not an absolute requirement, that the document submitted by a permitting authority to the EPA for final review will not be a version that the authority contemplates will be subject to substantial revisions. Otherwise, the EPA review would in essence be meaningless.

The available record indicates that the revised draft permit submitted to the EPA for review on August 5, 2003, was known by the District to be in a condition potentially requiring major revisions. The District's Notice Inviting Written Public Comments clearly indicates that the District was seeking, and expected to receive, substantive comments on the revised draft permit. The applicable public comment period was extended an additional seven days, primarily

due to the fact that Shell and other interested parties had lengthy comments and objections concerning certain erroneous and/or misapplied requirements identified in the permit. Based on both of its comment letters, the EPA would appear to have similar concerns with all five draft Title V permits proposed for issuance to petroleum refiners in the San Francisco Bay Area.

40 C.F.R. Section 70.7(a)(1) provides in relevant part that a permit may only be issued by a permitting authority if the conditions of the permit provide for compliance with all applicable requirements and requirements of this part. 40 C.F.R. § 70.7(a)(1)(iv). Shell asserts that there can be no dispute that the revised draft permit presently before the EPA fails to meet this standard. While the District has made a commitment to address the acknowledged deficiencies in the revised draft permit, and to make all appropriate changes, regulations adopted by the EPA to implement Title V require these changes to have been incorporated into the "proposed permit" submitted to the EPA at the start of the 45-day review process. Under the approach developed by the District, the so called final permit it now proposes to issue on or before December 1, 2003 will, in reality, be at best the "proposed permit" that it should only now be submitting to the EPA for review and comment.

2) Inadequate Coordination of the EPA Review and Public Comment Periods

Shell also asserts that the review and comment process developed by the District for the revised draft permit failed to comply with 40 C.F.R. Section 70.8(c)(3), which also constitutes grounds on which the Administrator shall object to issuance of the permit. In relevant part, Section 70.8(c)(3)(ii) provides that the District must ensure that the EPA is provided with "any information necessary to review adequately the proposed permit." As will be set forth in further detail below, the review and comment schedule adopted by the District resulted in the EPA effectively being precluded from the benefit of necessary public comment on the revised draft permit prior to the end of its 45-day review period.

While the EPA is provided with a 45-day review period, applicable regulations provide members of the public with at least 30 days to review and comment on a proposed or draft permit. 40 C.F.R. § 70.7(h)(4). EPA allocated a greater amount of time for its review in part to ensure that the agency had adequate time to consider all public comments before determining whether to object to a proposed permit. In reality, the schedule adopted by the District for review of the revised draft permit ensured that the contemplated level of review would not occur in this instance. With a public comment period ending on September 22, 2003, and EPA's review period expiring on September 26, 2003, it was virtually certain that the agency would not have been able to rely on any public comments when considering how or whether to respond to the revised draft permit. As expected, the EPA acknowledged in its letter to the District dated September 26, 2003 that it did not have time to review any of the "substantial comments from the public and the refineries" prior to the close of its 45-day review period for just this reason. Based on its October 31, 2003 comment letter, it still does not appear as if the agency has yet had time to consider written comments submitted on behalf of Shell.

Were the revised draft permit to have come even close to meeting the definition of a "proposed permit," the District arguably could contend that such a result was harmless error. However, as will be set forth in more detail below, the revised draft permit was so fraught with errors that it prompted extensive comments from Shell as well as members of the public. Particularly in the situation at hand, where the District was issuing a revised draft permit which it knew was not close to being final, applicable regulatory authority imposed an obligation on it to sufficiently delay the EPA review period so as to ensure that the agency had reasonable access to all public comments.

By issuing "proposed permits" for all five Bay Area petroleum refineries on the same date, the District knew that an already overburdened EPA staff would be responsible for reviewing literally thousands of pages of technical documentation within 45 days, by all accounts a daunting task. As should have been expected, the EPA was only able to review three of the

five draft permits prior to the close of the 45-day permit review period, and only recently was able to report on the results of its "limited review" of the remaining two draft permits. The agency further acknowledged that it had no time available to review any public comments submitted in response to these permits prior to the close of the 45-day review period. Shell does not believe the agency has yet had time to review any of the written comments the company submitted on its revised draft permit. Again, Shell reiterates that such a schedule, seemingly designed more to prevent rather than promote careful EPA review, is inconsistent with the intent, if not the express requirements, of 40 C.F.R. Section 70.8(c)(3), violations of which arguably require the Administrator to object to the issuance of a proposed permit.

B. The Revised Draft Permit Does Not Accurately Reflect the Substantive Requirements of the Act Applicable to the Shell Martinez Refinery

Through two sets of comment letters, the EPA has identified significant deficiencies in the draft Title V permits proposed for issuance by the District to each petroleum refinery in the San Francisco Bay Area, including the Shell Martinez Refinery. Nevertheless, the agency has decided not to object to these permits in reliance on the promises and good will of the District to correct the acknowledged deficiencies prior to issuing the final permits for each facility. Shell is privy to no such promises. In fact, based on recent discussions with District personnel, Shell believes that the District is unlikely to have sufficient time to incorporate any of the EPA's recommended facility-specific changes prior to issuing the final permit for the Shell Martinez Refinery. Given the absence of key revisions between the initial draft permit and revised draft permit, Shell also believes that even in the absence of the noted time constraints, there is little reason to believe that all of the necessary corrections would be addressed in the final permit.

Notwithstanding the presumed cooperation and good will of the District, Shell asserts that the EPA has a statutory duty under the Act to object to issuance of the revised draft permit for the Shell Martinez Refinery when it has determined that substantial errors exist. The applicable regulatory authority states that the "Administrator will object to the issuance of any

proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under the part." 40 C.F.R. § 70.8(c)(1). This language would appear on its face to provide the Administrator with a non-discretionary duty to object to a permit's issuance when significant deficiencies are detected. In New York Public Interest Research Group v. Whitman, 321 F.3d 316 (2nd Cir. 2003), the Second Circuit Court of Appeals reached exactly this conclusion, stating that once the EPA concedes that a draft permit is deficient, it is required under Section 505(b)(2) to issue an objection to the permit's issuance. Id. at 333. Although reasoning that such a result flows from the express wording of the statute, that Court also referred to the legislative history behind this particular statutory provision, which states in relevant part as follows: "This duty to object to such permits is a nondiscretionary duty. Therefore, in the event a petitioner demonstrates that a permit violates the Act, the Administrator must object to that permit." 136 Cong. Rec. S16,895, S16,944 (1990).

Shell believes that the two EPA comment letters clearly evidence a determination by the agency that the revised draft permit proposed for issuance to the Shell Martinez Refinery is not in compliance with "applicable requirements," as defined in 40 C.F.R. Section 70.2. To the extent the EPA disputes that it has yet made such a finding, this Petition will establish that the revised draft permit does, in fact, violate substantive requirements of the Act. As set forth in detail in Shell's written comments for the record, attached hereto as Exhibit A and incorporated herein by reference, the revised draft permit omits requirements applicable to a host of permitted emission sources at the Shell Martinez Refinery, misapplies other applicable requirements, and also includes requirements not apparently authorized under any regulatory standard. The revised draft permit also imposes significant new periodic monitoring requirements, some of which are sufficiently lacking in specificity so as to violate the "practical enforceability" standard relied upon by EPA in reviewing draft permits. Other new monitoring requirements mandate the installation of hardware that does not currently exist at the refinery, requiring the inclusion of a compliance schedule as yet missing from the permit. Pursuant to 40 C.F.R. Section 70.8(c), the

Administrator must object to the issuance of the revised draft permit until such time as the appropriate revisions are made by the District.

Outlined below is an overview of certain key conditions included in, or requirements that are omitted from, the revised draft permit for the Shell Martinez Refinery which Shell contends are in violation of substantive requirements in the Act.

- The District's failure to include applicable requirements related to numerous permitted emission sources at the Shell Martinez Refinery, including, the Delayed Coking Unit, Heavy Gasoline Hydrotreater, Catalytic Gas Plant, Light Oil Products Gross Oil Separator, Sulfur Loading Rack, Vapor Recovery Flares, Light Oil Products Main Flare, Flexigas Flare, Clean Fuels Flare, Acid Sludge and Sulfonation Loading Rack, numerous process furnaces, and minor sources such as the Sand Hopper, and Seal Room Parts Cleaner.
- The District's inclusion of new monitoring requirements for certain flares which mandate the installation of hardware that does not currently exist, with no compliance schedule or time line allowed for such installation as contemplated by applicable EPA regulations. See, 40 C.F.R. §§ 70.5(c)(8); § 70.6(c)(3).
- The District's addition of new monitoring requirements that are based on non-federally enforceable requirements in violation of the Title V program.
- The District's addition of new monitoring requirements for flares that do not adequately describe how the refinery is to perform the necessary monitoring. Such vague permit conditions are not "practicably enforceable," in accordance with EPA guidelines.

- The District's failure to include Tank 17095, a 90,648 barrel tank, in the revised draft permit. Applicable requirements for this tank must be included in the final permit to ensure refinery operations will not be impaired.
- The District's failure to include Maximum Achievable Control Technology ("MACT"), 40 C.F.R. Part 63, Subpart UUU throughout the revised draft permit, including the omission of future effective dates pertaining to the refinery, compliance options, and monitoring requirements.
- The District's failure to include EPA approved Alternate Monitoring Provisions ("AMPs") for New Source Performance Standards ("NSPS") Subpart J, 40 C.F.R. Part 60. The use of AMPs is allowed under EPA regulations and has been authorized by the agency for certain sources at the Shell Martinez Refinery.
- The District's failure to correct significant typographical errors related to throughputs and capacities of some units (including the Sulfur Recovery Unit No. 4 and its gas turbines and duct burners). This type of information must be accurately reflected in the final permit to ensure refinery operations will not be impaired.
- The District's omission in the revised draft permit of any of the eleven standby diesel engines relied on by the Shell Martinez Refinery for safe operation during critical situations.
- The District's inclusion of a notification requirement for the startup and shutdown of non-major process equipment. Shell asserts there is no basis for such an overly-broad requirement, which is unrelated to compliance with any applicable requirement and has no provision for trade secret protection.

- The District's inclusion of new throughput limits on units that are grandfathered and currently have no throughput limits, and the District's contention that these limits are federally enforceable.
- Numerous errors in identifying those requirements included in the State Implementation Plan and those requirements which are federally enforceable.

IV. CONCLUSION

Shell is fully cognizant of the fact that the District is under tremendous pressure from a number of sources to issue final Title V permits for all regulated facilities under its jurisdiction. While not unsympathetic with this predicament, Shell notes that it has been seven years since the company first filed a timely and complete Title V permit application. Shell does not believe that the solution to the present time crunch lies in skirting the procedural safeguards provided in Part 70, or in issuing permits known to contain numerous errors or misstatements as to the applicability of substantive requirements of the Act, solely to comply with an arbitrary deadline bearing no relationship to the protection of human health or the environment. Certainly such a policy cannot be in accord with the Act, especially with regard to one of the more complex facilities regulated by the District, whose revised draft permit is over 550 pages in length.

In this Petition, and in the prior written comments for the record, Shell has outlined the procedural and substantive deficiencies in the revised draft permit proposed for issuance to the Shell Martinez Refinery. Through its own written comments, the EPA has also acknowledged concern with this permit, as well as those proposed for issuance to all other Bay Area refineries. Based on the foregoing, Shell contends that the Administrator must object to the issuance of the revised draft permit pursuant to Section 505(b) of the Act and 40 C.F.R. Section 70.8(c). In light of the impending deadline the District appears intent on following for the issuance of all outstanding Title V permits, Shell also respectfully requests that the EPA issue its objection in this matter before December 1, 2003, or take such other action as may be within the agency's

authority to compel the District to delay issuance of any final Title V permits, specifically including that proposed for the Shell Martinez Refinery, until all such documents accurately reflect the applicable requirements of the Act with which a facility must comply.

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Respectfully submitted,

By: _____

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