

1 **BEFORE THE ADMINISTRATOR**  
2 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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4 In the Matter of the Proposed Title V )  
5 Operating Permit Issued to )  
6 Valero Benicia Asphalt Plant ) Facility Permit # B3193  
7 to operate a petroleum refinery )  
8 located in Benicia, California )  
9 Issued by the Bay Area Air Quality )  
10 Management District )

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12 **PETITION REQUESTING THE ADMINISTRATOR TO OBJECT TO ISSUANCE OF**  
13 **THE PROPOSED TITLE V OPERATING PERMIT FOR THE**  
14 **VALERO BENICIA ASPHALT PLANT**

15  
16 INTRODUCTION

17 Pursuant to section 505(b)(2) of the Clean Air Act (the “Act”), 42 U.S.C. § 7661d(b)(2),  
18 and 40 C.F.R. § 70.8(d), Our Children’s Earth (“OCE” or “Petitioner”) hereby petitions the  
19 Administrator (“Administrator”) of the United States Environmental Protection Agency (“EPA”)  
20 to object to issuance of the proposed Title V Operating Permit for Valero Benicia Asphalt Plant  
21 (“Valero Asphalt”) Facility #B3193, Permit Application #17468 (“proposed Title V permit”).

22 The Bay Area Air Quality Management District (“BAAQMD” or “District”) submitted  
23 the proposed Title V permit for EPA’s review on June 30, 2003. *See* Letter to Jack Broadbent,  
24 Director, Air Management Division, U.S. EPA Region 9, June 30, 2003.<sup>1</sup> EPA received the  
25 proposed Title V permit on July 3, 2003 and its 45-day review period ended on August 16,  
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28 <sup>1</sup> Available at [http://yosemite.epa.gov/R9/AIR/EPSS.NSF/6924c72e5ea10d5e882561b100685e04/fde2bd099\\_d0299fe88256d56007eea39/\\$FILE/B3193EPA6-30-03.pdf](http://yosemite.epa.gov/R9/AIR/EPSS.NSF/6924c72e5ea10d5e882561b100685e04/fde2bd099_d0299fe88256d56007eea39/$FILE/B3193EPA6-30-03.pdf) (last accessed October 10, 2003).

1 2003.<sup>2</sup> This petition is timely because it is filed within sixty days of the expiration of EPA's 45-  
2 day review period, as required by section 505(b)(2) of the Act. *See* 42 U.S.C. § 7661d(b)(2).  
3 The Administrator must grant or deny this petition within sixty days after it is filed. *See id.* In  
4 compliance with section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), this petition is based on  
5 objections to the Valero Asphalt proposed Title V permit that were raised during the public  
6 comment period or on grounds that arose after the public comment period.<sup>3</sup>

7 PETITIONER – OUR CHILDREN'S EARTH

8 Petitioner OCE is an organization dedicated to protecting the public, especially children,  
9 from the health impacts of pollution and other environmental hazards and to improve  
10 environmental quality for the public benefit. OCE has members who live, work, recreate and  
11 breathe air in the San Francisco Bay Area, including Benicia, California, where Valero Asphalt  
12 is located. OCE is active in issues concerning air quality in the Bay Area and throughout the  
13 State of California.

14 APPLICANT – VALERO ASPHALT

15 Valero Asphalt is a petroleum refinery that primarily produces asphalt from crude oil.  
16 *See* Permit Evaluation & Statement of Basis for Major Facility Review Permit (“Statement of  
17 Basis”), Valero Benicia Asphalt Plant, Facility #B3193 at 3, available at <http://www.baaqmd.gov/pmt/t5/t5publicnotices/B3193SOBepareview-1.pdf> (last accessed October 10, 2003). The  
18 manufacturing operations at Valero Asphalt produce by-products that include naphtha, kerosene,  
19 and gas oil. *Id.* at 4. While Valero Asphalt has a separate Title V permit, Valero Refining  
20 Company and Valero Asphalt are considered to be the same facility for purposes of the Clean Air  
21 Act and Valero Asphalt is subject to several requirements to which Valero Refining is subject.  
22 *Id.* at 8.

24 <sup>2</sup> *See* <http://yosemite.epa.gov/R9/AIR/EPSS.NSF/e0c49a10c792e06f8825657e007654a3/78c91a0d32c3bad286256d7b00839ff7?OpenDocument> (last accessed October 10, 2003).

26 <sup>3</sup> Valero Asphalt's draft Title V permit was first issued by the District in June 2002, and it held a public  
27 hearing on July 10, 2002. The District made changes to the draft permit sufficient to require an additional  
28 public comment period and reissued another draft for public comment on June 26, 2003. Petitioner  
submitted comments on the draft Title V permit on August 9, 2002 and August 11, 2003, which are  
attached as Exhibits A and B for reference. This petition does not raise all of the issues identified in the  
comments.



1 regarding the source’s future ability to comply with all applicable requirements that will become  
2 effective during the permit term. *Id.* § 70.5(c)(8)(iii); BAAQMD Reg. 2-6-409.10. For sources  
3 not in compliance at the time of permit issuance, the statement must include a schedule of  
4 compliance. *See* 40 C.F.R. § 70.5(c)(8)(iii). “Such a schedule shall include a schedule of  
5 remedial measures, including an enforceable sequence of actions with milestones, leading to  
6 compliance with any applicable requirements.” *Id.* § 70.5(c)(8)(iii)(C); *see also* 42 U.S.C.  
7 § 7661(3). In addition, if the current monitoring at the facility is insufficient to detect non-  
8 compliance, monitoring, recordkeeping and recording requirements should be added to the  
9 permit to assure compliance with applicable requirements. *See* 40 C.F.R. § 70.6(c)(1).

10         The proposed Valero Asphalt Title V permit, with its accompanying documents,  
11 demonstrates that the District cannot assure compliance at the facility. In fact, the District  
12 concluded that only “*reasonable intermittent compliance* can be assured at this facility.” *See*  
13 *Review of Compliance Record – Valero Asphalt, July 17, 2001 (“Compliance Record”)*  
14 (emphasis added), attached as Exhibit C; *see also* Statement of Basis at 15. For the reasons  
15 discussed below, this assurance of intermittent compliance is equivalent to an assurance of non-  
16 compliance, and because the proposed permit does not include a compliance plan and other  
17 provisions to assure compliance, the permit violates Title V requirements.

18         The District’s use of the terms “reasonable” and “intermittent” to modify the term  
19 “compliance” does not assure continuous compliance and therefore is inconsistent with the law.  
20 As legislative history demonstrates, Congress intended Title V permits to “assure prompt and  
21 *continuing* compliance with applicable requirements of the Act.” *See* 136 Cong. Rec. S16,895,  
22 S16,943 (1990) (emphasis added); *see also Utility Air Regulatory Group v. U.S. EPA*, 320 F.3d  
23 272, 275 (D.C. Cir. 2003) (the purpose for inserting monitoring and testing requirements into a  
24 Title V permit is to “ensure that sources continuously comply with emission standards”). The  
25 term “intermittent” ordinarily means “stopping and starting at intervals” and is synonymous with  
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1 “occasional, periodic, [and] sporadic.” Webster’s II New Riverside University Dictionary.  
2 Thus, the District’s assurance of “intermittent compliance” can only mean noncompliance.<sup>4</sup>

3 Indeed, the District has conceded that its assurance of “reasonable intermittent  
4 compliance” is equivalent to an assurance of noncompliance. *See* Draft District Consolidated  
5 Response to Comments on Refinery Title V Permits, July 25, 2003 (“Dist. Refinery  
6 Comments”), at 15, available at <http://www.baaqmd.gov/pmt/t5/Refinery2003/response.doc> (last  
7 accessed October 10, 2003) (stating that “occasional events of non-compliance can be predicted  
8 with a high degree of certainty” and “compliance by the refineries with all District and federal air  
9 regulations will not be continuous”).<sup>5</sup> However, the plain language of Title V and its regulations  
10 require compliance with the terms of the permit, not “intermittent” compliance.

11 In a mistaken attempt to justify the sufficiency of assuring “intermittent” compliance, the  
12 District points to the fact that the term “intermittent” can be used in compliance certifications.  
13 *See* Dist. Refinery Comments at 15. Indeed, federal regulations require Title V compliance  
14 certifications to include information regarding the compliance status of each source and to  
15 specify whether compliance was “continuous” or “intermittent.” *See* 40 C.F.R.  
16 §§ 70.6(c)(5)(iii)(C); 71.6(c)(5)(iii)(C); *see also* 42 U.S.C. § 7414(a)(3)(D). However,  
17 “intermittent” compliance is *not* sanctioned by the Act. To the contrary, any instance of non-  
18 compliance is considered a violation. *See* 40 C.F.R. § 70.6(a)(6)(i). In fact, EPA’s use of the  
19 term “intermittent” to specify a source’s compliance in compliance certifications is intended to  
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22 <sup>4</sup> The District claims that the Compliance Record is not its only assessment of compliance at the facility.  
23 *See* Response to Comments for Proposed Major Facility Permit for Valero Benicia Asphalt Plant –  
24 Facility #B3193, June 30, 2003, at 1, attached as Exhibit D. However, the Statement of Basis for Valero  
25 Asphalt refers only to the Compliance Report for its justification that “intermittent” compliance can be  
26 assured at the facility. *See* Statement of Basis at 15, 37. Furthermore, the District’s determination of  
“intermittent” compliance indicates that instances of noncompliance *will* occur. Unless the determination  
is incorrect, the fact that the Compliance Record is only one part of the District’s compliance assessment  
is irrelevant.

27 <sup>5</sup> Although the District made the statement in the context of another refinery, Shell Martinez Refinery,  
28 Facility #A0011, this concession is relevant here because it was made in response to OCE’s public  
comments objecting to the District’s assurance of “reasonable intermittent compliance” there.

1 require the facility to explicitly identify instances of noncompliance.<sup>6</sup> Thus, the District’s  
2 reliance on the use of the term “intermittent” in the context of compliance certifications is  
3 misplaced and inconsistent with the law.<sup>7</sup>

4 Even so, the proposed permit might have complied with the Act had it contained  
5 provisions to address noncompliance issues – such as through compliance plans or additional  
6 monitoring requirements. *See* 40 C.F.R. §§ 70.5(c)(8) & 70.6(c)(3). However, the proposed  
7 permit fails to include such measures. In fact, the proposed Title V permit’s failure to include a  
8 compliance plan is inconsistent with the District’s own policy, which requires a schedule of  
9 compliance for a “facility [that] is out of compliance at the time of permit issuance.” *See*  
10 *Response to Public Comment on Title V Permit for Crown, Cork and Seal (“Crown Response”)*,  
11 January 24, 2001, available at <http://www.baaqmd.gov/pmt/t5/t5publicnotices/b0989res.pdf>, and  
12 attached as Exhibit E.

## 13 **2. The District Cannot Possibly Assure Compliance with its Superficial** 14 **Compliance Review**

15 The Compliance Record fails to include the most recent compliance information,  
16 including Valero Asphalt’s current compliance status, as the review only covers the period  
17 between June 15, 2000 and June 15, 2001. Thus the review ignores the possibility of violations  
18 and episodes that could have occurred in the two years since June 2001. Moreover, this  
19 superficial “review” fails to describe or even evaluate the types of enforcement-related incidents  
20 occurring during the review period and the reasons they occurred. The review simply

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21 <sup>6</sup> When EPA attempted to remove this language from the compliance certification procedure, the D.C.  
22 Circuit held that it could not do so, as Congress’ “express and unambiguous” intent was for Title V  
23 sources to explicitly certify whether their compliance was “continuous” or “intermittent.” *See Natural*  
*Resources Defense Council v. EPA*, 194 F.3d 130, 138 (D.C. Cir. 1999); *see also* 66 Fed. Reg. 12872  
(Mar. 1, 2001).

24 <sup>7</sup> In contrast, the District has assured “ongoing compliance” at other Title V facilities. *See* *Review of*  
25 *Compliance Record for City of Palo Alto, Facility #A2721; Cypress Amloc Land Company, Facility*  
26 *#A1364; Hanson Permanente Cement, Facility #A0017; Owens Corning Santa Clara Plant, Facility*  
27 *#A0041; Potrero Hills Landfill, Facility #A2039; Redwood Landfill, Facility #A1179; San Jose/Santa*  
*Clara Water Pollution Control District, Facility #A0778; West Contra Costa Landfill, Facility #A1840;*  
28 *and Waste Management of Alameda County, Facility #A2066*, available at [http://www.baaqmd.gov/pmt/](http://www.baaqmd.gov/pmt/t5/t5publicnotices/t5publicnotices.asp)  
[t5/t5publicnotices/ t5publicnotices.asp](http://www.baaqmd.gov/pmt/t5/t5publicnotices/t5publicnotices.asp) (last accessed October 9, 2003). The assurance of “ongoing”  
compliance at other facilities provides further confirmation that “intermittent” compliance can only mean  
noncompliance.

1 enumerates the incidents without assessing whether these represent compliance problems  
2 requiring a compliance plan or additional monitoring. While neither the permitting agency nor  
3 EPA should necessarily have to review or assess a facility's entire compliance history for Title V  
4 purposes, a thorough review of the facility's current and recent compliance history is necessary  
5 to determine whether compliance can be assured.

6 **3. EPA Should Have Objected as Required by 42 U.S.C. § 7661d (b)(1) and 40**  
7 **C.F.R. § 70.8(c)(1) as EPA Has Found Noncompliance**

8 The Administrator is required to object to the issuance of a Title V permit that is not in  
9 compliance with the applicable requirements of the Clean Air Act. *See* 42 U.S.C. § 7661d  
10 (b)(1); 40 C.F.R. § 70.8(c)(1); *see also NYPIRG v. Whitman*, 321 F.3d 316, 333, fn. 12 (2d Cir.  
11 2003) (“the Administrator is required to object to permits that violate the Clean Air Act,” citing  
12 136 Cong. Rec. S16,895, S16,944 (1990)). Here, EPA Region 9, which has been delegated  
13 authority to object to Title V permits by the Administrator, identified problems and deficiencies  
14 in the proposed Title V permit and requested that the District make the suggested changes to the  
15 permit before finalizing it. *See* Letter to William deBoisblanc, Director of Permit Services,  
16 BAAQMD, August 18, 2003, attached as Exhibit F. While concluding that there are deficiencies  
17 in the permit and requesting that the District make changes to the permit prior to finalizing it,  
18 EPA failed to object to the permit as required by the Clean Air Act and Part 70. Therefore, the  
19 Administrator is required to object to the permit at least on the basis of the deficiencies identified  
20 in the August 18, 2003 letter to the District because EPA has already determined that the permit  
21 violated the Act.

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1 CONCLUSION

2 Because of the violations of 40 C.F.R. Part 70 identified in this petition, the  
3 Administrator must object to the proposed Title V permit for the Valero Benicia Asphalt Plant.

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5 Dated: October 13, 2003

6 Respectfully submitted,

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28 \* Patrick Williams is a law student certified under the California State Bar Rules governing the Practical Training of Law Students ("PTLS"), working under the supervision of Helen H. Kang, pursuant to the PTLS rules.