

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

In the Matter of the Proposed Title V)	
Operating Permit Issued to)	
)	
Valero Refining Company – California)	Facility Permit #B2626
to operate a petroleum refinery)	
located in Benicia, California)	
)	
Issued by the Bay Area Air Quality)	
<u>Management District</u>)	

**PETITION REQUESTING THE ADMINISTRATOR TO OBJECT TO ISSUANCE OF
THE PROPOSED TITLE V OPERATING PERMIT TO
VALERO REFINING COMPANY – CALIFORNIA**

INTRODUCTION AND BACKGROUND

Pursuant to section 505(b)(2) of the Clean Air Act (the “Act”), 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d), Our Children’s Earth (“Petitioner” or “OCE”) hereby petitions the Administrator (“Administrator”) of the United States Environmental Protection Agency (“EPA”) to object to issuance of the proposed August 2004 Title V Operating Permit issued to Valero Refining Company – California (“Valero Refinery” or “facility”) Facility #B2626, Permit Application #16423, which incorporates revisions made on December 1, 2003, and August 25, 2004 to the August 2003 draft permit (“Permit”).¹

The Permit is the subject of several multi-year proceedings, briefly summarized here. The facility submitted the Title V permit application to the Bay Area Air Quality Management District (“BAAQMD” or “District”) on July 10, 1996.² The District issued a draft Title V permit for public comment in June 2002 and again in August 2003. Petitioner submitted timely comments on the draft permits. See letter to Douglas W. Hall, BAAQMD, from Environmental Law and Justice Clinic (“ELJC”), September 9, 2002 (“OCE 2002 Comments”) (Exhibit A);

¹ Petitioner uses the term “object” and “objection” to refer to any procedure EPA has authority to use to correct the deficiencies in the Permit.

² See Permit Evaluation and Statement of Basis for Major Facility Review Permit, Valero Refining Company—California, Site #B2626, Benicia, California.” (“SB-I”), at 36 (accompanying the December 1, 2003 permit).

letter to M.K. Carol Lee, BAAQMD, from ELJC, September 22, 2003 (“OCE 2003 Comments”) (Exhibit B).

On August 12, 2003, the District forwarded the August 2003 draft permit to EPA for review. After EPA failed to object to issuance of that permit, on November 24, 2003, Petitioner filed a petition with the Administrator.³ On December 1, 2003, the District finalized the permit after EPA failed to make objections. On December 12, 2003, EPA notified the District that cause existed to reopen the permit due to improper procedures that “may have resulted in deficiencies in the content of the permits.”⁴ On December 19, 2003, EPA dismissed OCE’s petition as unripe, citing the impending reopening of the permit as grounds for dismissal.⁵ Petitioner challenged this dismissal, and the parties entered into a Settlement Agreement, setting forth a procedure for the Administrator’s consideration of Petitioner’s objections. See Settlement Agreement (Exhibit G).

Pursuant to EPA’s request to reopen the December 2003 permit, in August 2004, BAAQMD forwarded to EPA a revised permit for EPA’s review.⁶ EPA committed to conduct a “new review of the refinery permits in their entirety.”⁷ EPA received the proposed Title V permit on August 26, 2004, and its 45-day review period ended on October 9, 2004. Petitioner now files this timely petition, within sixty days of the expiration of EPA’s 45-day review period, based on objections that were raised with reasonable specificity during the public comment period, or on grounds that arose after the public comment period, as required by the Act. 42 U.S.C. § 7661d(b)(2). Pursuant to the Settlement Agreement, the Administrator must respond to this petition by March 15, 2005. Exhibit G at 3.

³ See U.S. EPA Title V Petition Database, available at http://www.epa.gov/region7/programs/artd/air/title5/petitiondb/petitions/valero_refining_petition2003.pdf (last accessed November 10, 2004).

⁴ See letter to Jack Broadbent, BAAQMD, from Gerardo Rios, EPA Region 9, December 12, 2003.

⁵ See letter to ELJC, from Deborah Jordan, Acting Director, Air Division, EPA Region 9, December 19, 2004, (describing EPA’s determination that BAAQMD followed improper permitting procedures, requiring permit reopening and an additional review period), available at http://www.epa.gov/region7/programs/artd/air/title5/petitiondb/petitions/oce_decision2003.pdf (last accessed November 10, 2004).

⁶ See letter to Deborah Jordan, Director, Air Management Division, U.S. EPA Region 9, August 25, 2004, available at http://www.baaqmd.gov/pmt/title_v/B2626/B2626_2004-08_reopening_05.pdf (last accessed November 1, 2004).

⁷ See Permit Evaluation and Statement of Basis for Major Facility Review Permit, Reopening—Revision I, Valero Refining Company—California, Site #B2626, Benicia, California, August 2004 (“SB-II”) (available at http://www.baaqmd.gov/pmt/title_v/B2626/B2626_2004-08_reopening_03.pdf), at 3.

PETITIONER—OUR CHILDREN’S EARTH

Petitioner Our Children’s Earth (“OCE”) is an organization dedicated to protecting the public, especially children, from the health impacts of pollution and other environmental hazards and to improve environmental quality for the public benefit. OCE has members who live, work, recreate and breathe air in the San Francisco Bay Area, including Benicia, California, where the Valero Refinery is located. OCE is active in issues concerning air quality in the Bay Area and throughout the State of California.

APPLICANT – VALERO REFINING COMPANY-CALIFORNIA

The Valero Refinery, located in Benicia, California, was constructed in 1969 and Valero Refining Company acquired the facility in 2000. SB-I at 4. The Refinery has a total throughput capacity of 180,000 barrels of crude oil per day and the petroleum products it produces include gasoline, diesel fuel, jet fuel, fuel oil, residual oil and asphalt. SB-I at 4. As of 1999, the facility emitted more than 10,000 tons per year of criteria pollutants, including nitrogen and sulfur oxides, particulate matter, and volatile organic compounds, and more than 36 tons per year of hazardous air pollutants.⁸

TITLE V OVERVIEW

The Valero Refinery is subject to the operating permit requirements of Title V of the federal Clean Air Act, 42 U.S.C. §§ 7661-7661f, 40 C.F.R. Part 70, and BAAQMD Regulation 2, Rule 6 (“Major Facility Review rules”), because it is a major facility as defined by BAAQMD Regulation 2-6-212. The Valero Refinery is a major facility because it has the “potential to emit” more than 100 tons per year of a regulated air pollutant. *See* BAAQMD Reg. 2-6-218; 40 C.F.R. § 70.2. Major Facility Review Permits (“Title V permits”) must meet the requirements of Part 70 and BAAQMD Regulation 2, Rule 6.

Major facilities have a duty to apply for a Title V permit. 40 C.F.R. § 70.5(a); BAAQMD Reg. 2-6-403. A facility must submit specific information as a part of its Title V application. *See* 40 C.F.R. § 70.5(c); BAAQMD Reg. 2-6-403. Before a Title V permit can be issued, the permitting authority (“District”) must receive a complete permit application, including all information necessary to determine the applicability of all requirements for each source. *See* 40 C.F.R. §§ 70.7(a)(1)(i); § 70.5(a)(2), 70.5(c); BAAQMD Reg. 2-6-405.

In the initial application, the facility must certify compliance with all applicable requirements and report any instances of non-compliance, so that a schedule of compliance can be incorporated into the permit. 40 C.F.R. §§ 70.5(c)(8) & (9); BAAQMD Regs. 2-6-405.7, 405.8. “Applicable requirements” are defined as “[a]ir quality requirements with which a facility must comply pursuant to the District’s regulations, codes of California statutory law, and the federal Clean Air Act, including all applicable requirements as defined in 40 C.F.R. section 70.2.” BAAQMD Reg. 2-6-202; 40 C.F.R. § 70.2.

⁸ California Air Resources Board (“CARB”) 1999 emissions inventory data.

Specifically, the application must include a compliance plan containing a description of the current status of each source's compliance with all applicable requirements. 40 C.F.R. § 70.5(c)(8)(i); BAAQMD Reg. 2-6-405.7. The compliance plan must contain a statement certifying that the source will comply with all requirements that become effective during the permit term on a timely basis, and must explain how the source will achieve compliance with all applicable requirements if the source is not in compliance at the time of permit issuance. 40 C.F.R. § 70.5(c)(8)(ii); BAAQMD Reg. 2-6-405.8. In addition, for sources not in compliance, the compliance plan must include a schedule of compliance that demonstrates how the facility will achieve compliance. 40 C.F.R. § 70.5(c)(8)(iii). "Such a schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements." *Id.* § 70.5(c)(8)(iii)(C); *see also* 42 U.S.C. § 7661(3); BAAQMD Reg. 2-6-224.

The compliance statements in the application must be certified by a responsible official as "true, accurate and complete." 40 C.F.R. §§ 70.5(c)(9), 70.5(d); BAAQMD Reg. 2-6-405.9. The facility has a duty to supplement the application as new or incorrect information comes to its attention. 40 C.F.R. § 70.5(b); BAAQMD Reg. 2-6-405.10. The District has the authority to require information disclosure from the facility prior to deeming the application complete. *See* 40 C.F.R. § 70.5(a)(2), 70.7(a)(2) & (4); BAAQMD Reg. 2-6-408.3. Each facility must respond to the District's requests for information regarding its Title V permit application, including the compliance status of every source at the facility. *See* 40 C.F.R. §§ 70.5(a)(2), 70.5(c)(8) & (9); *see also* BAAQMD Reg. 2-6-407.3. Once deemed complete, if the District "determines that additional information is necessary to evaluate or take final action on th[e] application," it can request that information from the facility, setting a "reasonable deadline" for response. 40 C.F.R. § 70.5(a)(2).

The District has a duty to take final action on a permit application submitted by a facility. *See* 40 C.F.R. § 70.7(a)(2); BAAQMD Reg. 2-6-410. When proposing a draft permit, the District must provide an explanation for its permitting decisions in a "statement that sets forth the legal and factual basis for the draft permit conditions" ("Statement of Basis"). 40 C.F.R. § 70.7(a)(5); BAAQMD Reg. 2-6-427. The District may only issue a final Title V permit if the terms and conditions of the permit "provide for compliance with all applicable requirements and the requirements of [Part 70]." *See* 40 C.F.R. § 70.7(a)(1)(iv).

Part 70 contains multiple requirements for assuring compliance with all applicable requirements. *See, e.g.,* 40 C.F.R. §§ 70.6(a)(1), 70.6(c). For example, every Title V permit must include "compliance certification, testing, monitoring, reporting and record-keeping requirements sufficient to assure compliance with the terms and conditions of the permit." 40 C.F.R. § 70.6(c)(1). Monitoring provisions in a Title V permit must contain "[a]s necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods." 40 C.F.R. § 70.6(a)(3)(i)(C). In addition, all Title V permits must contain a compliance plan, including a schedule of compliance consistent with 40 C.F.R. § 70.5(c)(8). *See* 40 C.F.R. § 70.6(c)(3); BAAQMD Reg. 2-6-409.10. Developed as an enforceable plan to assure that a facility will achieve compliance with all applicable requirements, a schedule of compliance in a permit should consist of three parts: (1) a statement that the facility will continue to comply with applicable requirements with which it is currently

in compliance; (2) a statement that the facility will comply with all applicable requirements that will become effective during the permit term in a timely manner; and (3) for sources that are not in compliance at the time of permit issuance, an enforceable schedule detailing how the source will achieve compliance with all applicable requirements. 40 C.F.R. §§ 70.5(c)(8), 70.6(c)(3); BAAQMD Reg. 2-6-409.10.

Additionally, Title V permits must contain specific requirements for the submission of regular compliance certifications. 40 C.F.R. § 70.6(c)(5). The certification includes information regarding whether compliance with the permit terms and conditions during the certification period was “continuous” or “intermittent” and must identify the means used to determine compliance status with each term and condition, as well as “such other facts the [District] may require to determine the compliance status of the source.” *See id.* § 70.6(c)(5)(iii).

GROUND FOR OBJECTIONS

Petitioner requests that the Administrator object to the Permit for because it does not comply with the Clean Air Act, 40 C.F.R. Part 70 and BAAQMD Regulation 2, Rule 6. In particular:

- 1) EPA Determined that the Permit Contains Provisions that Are Not in Compliance with the Applicable Requirements of the Act But Failed to Object as Required by 42 U.S.C. § 7661d (b)(1) and 40 C.F.R. § 70.8(c)(1); and the Procedure EPA and BAAQMD Used in Allowing Issuance of a Deficient Permit Is Not Authorized by the Act or Part 70.
- 2) The Permit Application Failed to Include Necessary Information to Determine Applicable Requirements and Failed to List Insignificant Sources
- 3) The Permit Does Not Assure Compliance with All Applicable Requirements Pursuant to the Act, Part 70 and BAAQMD Regulations
 - a. The District Ignored Its Own Records Showing Recurring Compliance Problems at the Refinery in Concluding that a Schedule of Compliance Was Not Necessary
 - b. The District Ignored Non-Compliance Issues Raised by Public Comments in Concluding that a Schedule of Compliance Was Not Necessary
 - c. The District Ignored Its Own Assessment that the Facility Cannot Continuously Comply with the Terms of the Permit; and the Intermittent Compliance Standard Damages the Integrity of the Title V Program
 - d. The District Did Not Require the Refinery to Properly Certify Compliance with All Applicable Requirements and Update Its Initial Certification, Pursuant to 40 C.F.R. §§ 70.5(c)(5) and 70.5(b) and BAAQMD Regulations 2-6-426 and 2-6-405.10
- 4) The Statement of Basis Does Not Include the Factual or Legal Basis for Certain Permit Decisions as Required by 40 C.F.R. § 70.7(a)(5)

- 5) The Permit Shield Provisions are Improper
 - 6) The Throughput Limits on Grandfathered Sources at the Refinery Do Not Assure Compliance with All Applicable Requirements, in Violation of 40 C.F.R. § 70.6 (a)(1)
 - 7) The Permit Lacks Monitoring that Is Sufficient to Assure the Facility's Compliance with All Applicable Requirements, and Many Individual Permit Conditions Are Not Practicably Enforceable
 - a. Exemption of Flares from 40 C.F.R. Section 60 (NSPS) Subpart J
 - b. Flare Opacity Monitoring
 - c. Cooling Tower Monitoring
 - d. Pressure Relief Valves Should Be Monitored Prior to the First Release Event
 - e. Insufficient Monitoring for Opacity, Nuisance Fallout, and Filterable Particulate
 - 8) There Are Miscellaneous Permit Deficiencies
 - a. Missing Federal Requirements for Flares
 - b. Insufficient Basis for Tank Exemptions
 - 9) The District Failed to Comply with the Public Participation Requirements of 40 C.F.R. § 70.7(h)
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I. EPA Determined that the Permit Contains Provisions that Are Not in Compliance with the Applicable Requirements of the Act But Failed to Object as Required by 42 U.S.C. § 7661d (b)(1) and 40 C.F.R. § 70.8(c)(1); and the Procedure EPA and BAAQMD Used in Allowing Issuance of a Deficient Permit Is Not Authorized by the Act or Part 70

The Act requires the Administrator to object to the issuance of a Title V permit that is not in compliance with the applicable requirements of the Act. *See* 42 U.S.C. § 7661d(b)(1); 40 C.F.R. § 70.8(c)(1); *see also NYPIRG v. Whitman*, 321 F.3d 316, 333, n.12 (2d Cir. 2003) (citing 136 Cong. Rec. S16,895, S16,944 (1990)); *In re Consolidated Edison Co. of N.Y., Inc., Ravenswood Steam Plant, Order Granting In Part and Denying In Part Petition for Objection to Permit*, Petition No.: II-2001-08, at 6. (U.S. EPA Adm'r, Sept. 30, 2003) (“*Ravenswood*”).

EPA Region 9 has delegated authority to object to Title V permits. Pursuant to its authority, Region 9 identified numerous significant problems in the Permit. But EPA failed to object on the basis of the deficiencies it determined existed. While concluding that there are deficiencies in the Permit and requesting that the District revise the permit prior to issuance and submit additional information for future revisions, EPA failed to object to the permit as required by the Clean Air Act and Part 70. The procedure EPA and BAAQMD used in allowing issuance of the

deficient permit has no legal basis. The Administrator is required to object to the permit at least on the basis of the deficiencies it has already determined to exist, as identified in the EPA Reopening Letter, Attachments 2 and 3. Without EPA's objection made in accordance with section 505(b) of the Act, 42 U.S.C. § 7661d(b), the sequence of events Congress mandated for permit revision is not triggered, and therefore the public has no means to enforce the scheme Congress mandated. That is, if the permit is not issued, the District is under a strict 90-day time limit to revise the permit once EPA objects. Section 505(b)(3) of the Act, 42 U.S.C. § 7661d(b)(3). If the permit is issued and EPA objects, the District "may thereafter issue only a revised permit that satisfies EPA's objection." 40 C.F.R. § 70.8(d). The Administrator must therefore object to the permit at least on the basis of the deficiencies that it has already determined to exist, as identified in the EPA's Reopening Letter of October 8, 2004 and related correspondence.⁹

A. Objections Not Made as to Deficiencies EPA Identified in July 2004 Letter

In its July 28, 2004 letter to the District, EPA stated that the refinery flares were subject to 40 C.F.R. Section 60 ("NSPS") Subpart J. Letter to Steve Hill, BAAQMD, from Gerardo Rios, Chief, Air Permits Office, EPA, July 28, 2004 & August 2, 2004 ("EPA July 28 Letter") (Exhibit H) at 2, Issue #1. As discussed below in Section VII.A, EPA determined that the Permit should but does not include federally enforceable monitoring and reporting requirements to verify that each flaring event qualifies for the "emergency" exemption contained in 40 C.F.R. § 60.104(a)(1), and that the District is improperly taking a "blanket exemption approach by not treating NSPS J as an applicable requirement." *Id.* EPA found that the permit condition prohibiting "routine" flaring was not practically enforceable and that federally enforceable reporting requirements must be included in the permit to ensure compliance with the federal requirements. *Id.* EPA, however, failed to object on this basis.

B. Objections Not Made as to Deficiencies EPA Identified in its Reopening Letter

EPA Region 9 identified significant problems in the Permit in October 2004. See Exhibit L. EPA addressed the deficiencies in three ways. First, EPA made a limited objection to the permit for certain monitoring deficiencies, which are not at issue in this petition. Second, as to numerous "unresolved" applicability and monitoring determinations, EPA requested that the District submit applicability determinations to EPA by February 15, 2005, and publish a public notice of any necessary permit revisions by April 15, 2005. See Exhibit L, Attachment 2. As to a third set of deficiencies, EPA states that the District "has agreed" to conduct a review of certain applicability determinations and revise specific Permit conditions prior to issuance. See Exhibit

⁹ See letter to Jack Broadbent, APCO, BAAQMD, from Deborah Jordan, Director, Air Division, EPA, October 8, 2004 ("EPA Reopening Letter") (Exhibit L); *see also* letters to Deborah Jordan, Director, Air Division, EPA, from Jack Broadbent, APCO, BAAQMD, October 6 & 8, 2004 ("BAAQMD October 6 Letter") (Exhibit J) (listing issues raised by EPA letters and the District's "intentions" regarding those issues) & ("BAAQMD October 8 Letter") (Exhibit K) (listing issues to address in "Revision 1" and "Next Revision"); letters to Steve Hill, BAAQMD, from Gerardo Rios, Chief, Air Permits Office, EPA, July 28, 2004 & August 2, 2004 ("EPA July 28 Letter") (Exhibit H) (containing "initial list of issues for discussion") & ("EPA August 2 Letter") (Exhibit I) (listing "additional" issues for discussion).

L, Attachment 3. As demonstrated in the discussion below, EPA in its Reopening Letter correctly identified serious deficiencies in the Permit in Attachments 2 and 3 and should have objected, instead of using a procedure that has no legal basis or force of the law.

Deficiencies Identified in EPA Reopening Letter, Attachment 2

In Attachment 2 of the Reopening Letter, EPA proposed to allow the District additional time to review a list of 13 “unresolved” applicability and monitoring determinations, including six issues that are relevant to the Valero Refinery. See Exhibit L, Attachment 2, Issues #1, 4, 9, 11-13.¹⁰ As to these “unresolved” issues, EPA requested that the District to review and submit applicability determinations to EPA by February 15, 2005, and to publish a public notice of any permit revisions by April 15, 2005. *Ibid.*

At least as to the issues identified below, the Administrator should object to the Permit, thereby requiring revisions to be made prior to issuance. Had EPA objected as it did with certain monitoring deficiencies, *see* Exhibit L, Attachment 1, Issue #1, the District would have had 90 days to revise and submit a proposed permit satisfying EPA’s objections. 40 C.F.R. § 70.8(c)(1)&(4); *see also id.* § 70.7(g)(4). Instead, EPA invented a process that has no legal basis or legal effect. In an attempt to remedy deficiencies, EPA requested that the District review and submit applicability determinations by February 15, 2004, and publish notice of any permit revisions by April 15, 2004. Assuming that these significant revisions are made in accordance with the schedule in the EPA Reopening Letter, the *earliest* possible issuance date would be May 31, 2005, nearly *eight months* after EPA identified the deficiencies, compared to the 90 days the District would have had under the procedure specified in Part 70. In any event, because the “agreement” between EPA and the District is not enforceable, there is a real possibility that the deadlines EPA set forth in the Reopening Letter will slip, as such deadlines have before.

In addition to being illegal, EPA’s decision to provide the District with an extended deadline for correcting deficiencies was unreasonable. In the first place, applicability and monitoring determinations should have been resolved during the permit application process. See Section II. The District should have had the information it needed to make all applicability determinations, at the latest, by the time it was drafting the permit in 2002. Even if the District did not have the information, it had another opportunity to request the information after the District received public comments, as many of these applicability issues were raised during public review by public comments in 2002, 2003 and 2004. Furthermore, most, if not all, of these issues were previously identified by EPA in its July 28, August 2 and Reopening Letters.

The issues as to which the Administrator should object are identified below:

¹⁰ EPA Reopening Letter, Attachment 2, Issue #1: 40 CFR Part 63 (MACT), Subpart CC applicability for Flares; #4 Cooling Tower Monitoring; #9: NSPS Subpart QQQ Applicability Determination for New Process Units; #11: NESHAP Subpart FF—10% Annual Average Water Content; #13: Electro-Static Precipitator Particulate Monitoring.

1. EPA identified “incorrect applicability determinations” for flares at the Valero Refinery, and that the applicable MACT (40 C.F.R. Part 63, Subpart CC) is missing from the permit. See Exhibit L, Attachment 2, Issue #1 (citing SB-II at 20). Further, EPA found that the District actually incorrectly determined that flares were categorically exempt from Subpart CC. Therefore, the District’s proposal to exempt Valero flares from Subpart CC is inappropriate. The permit for the Valero Refinery must include all applicable requirements of Subpart CC, such as 40 C.F.R. §§ 63.643(a)(1), 63.644(a)(2), and 63.653(a)(1), and Subpart A.
2. EPA identified an “incorrect” applicability determination regarding benzene waste streams and NESHAP Subpart FF, specifically the restriction contained in section 61.342(e)(1) that the District ignored. See Exhibit L, Attachment 2, Issue # 11. As EPA stated, “[t]he District’s silence on this issue raises a question as to whether the control requirements of 61.342(e)(1) were considered at all for the operations at the refineries.” EPA directed the District to “revise the applicability determinations” and the Statement of Basis, and to ensure that all appropriate requirements are included in the permit, in the next revision. Similarly, the District’s misinterpretation or disregard for the Subpart FF requirements may have led to other “inappropriate conclusions regarding what waste streams may go untreated.” See Exhibit L, Attachment 2, Issue #12.
3. EPA identified that the District failed to make applicability determinations for the cooling towers and to include all permit conditions necessary to assure that the cooling towers are in compliance with BAAQMD Regulation 8-2. See Exhibit L, Attachment 2, Issue #4.
4. EPA identified deficiencies in the District’s applicability determinations for NSPS Subpart QQQ for new process units at the Refinery. See Exhibit L, Attachment 2, Issue #9.
5. EPA found that the Permit contained deficient particulate monitoring in several respects. For instance, “the permits must be revised to include periodic monitoring under 70.6(a)(3)(B)” for BAAQMD SIP Rules 6-310 and 6-311 particulate limits from electro-static precipitators (“ESP”) to control emissions from various units at the facility. With regard to opacity monitoring for the limit in Rule 6, EPA found that “no connection has been established in the rule or in the permit between compliance with the opacity limit in the SIP and the particulate limits.” Exhibit L, Attachment 2, Issue # 13. Lastly, EPA stated that the District “has committed” to analyzing relevant data and to develop permit conditions that require Valero to monitor ESP operating parameters. Yet despite the absence of proper parameters in the permit, EPA stated, “[w]e anticipate that the District will select the appropriate monitoring parameter[s] and specific range[s] and revise the permits accordingly.” Exhibit L, Attachment 2, Issue # 13.

Deficiencies Identified in EPA Reopening Letter, Attachment 3

In Attachment 3 of the EPA Reopening Letter, EPA listed seven issues that the District “has agreed” to address, including two that are relevant to the Valero Refinery. See Exhibit L, Attachment 3, Issues #1 & 4.¹¹

¹¹ See Attachment 3 to EPA Reopening Letter, Issue #1: Support Facilities; #4: Valero Permit Shield from Rule 8-2 Not Public Noticed.

As with the issues identified in Attachment 2, EPA should have made an objection on its own. If the revisions are not made before the issuance of the revised Permit, OCE may file a petition with the Court of Appeals for the Ninth Circuit on the basis that the Administrator is required to object to the Permit on the basis of at least the following deficiencies EPA has identified.

The issues as to which the Administrator should object are identified below:

1. EPA proposed to allow the District additional time to determine whether “certain operations” at the Valero Refinery, specifically the loading racks, qualify as “support facilities” such that they would require a Title V permit. The District “has agreed” to meet a schedule for listing and analyzing adjacent facilities to determine whether a Title V permit is required, and to transmit letters requiring submittal of a permit application. See Exhibit L, Attachment 3, Issue #1.
2. The District “has agreed” to remove a permit shield from BAAQMD Reg. 8-2, as it was not publicly noticed. See Exhibit L, Attachment 3, Issue #4. Also, EPA found that the Permit fails to demonstrate that the flares meet the basis for the shield.

II. The Permit Application Failed to Include Necessary Information to Determine Applicable Requirements and Failed to List Insignificant Sources

The Valero Refinery Major Facility Review Permit Application (“permit application”) submitted on July 10, 1996, failed to include information that was necessary to determine the applicability of certain requirements to specific sources. See Section I; EPA Reopening Letter, Attachments 2 and 3. “An application may not omit information needed to determine the applicability of, or to impose, any applicable requirement.” 40 C.F.R. § 70.5(c). District regulations therefore require permit applications to contain “[a] list, including citation and description, of all applicable requirements for each source.” BAAQMD Reg. 2-6-405.5. A complete application must identify and describe all permitted sources at the facility, and all sources and activities that are exempt or excluded from District regulations, with a citation to the rule under which the exemption is claimed. BAAQMD Reg. 2-6-405.4. In addition, the application must include a description of the compliance status of each source “with respect to all applicable requirements” and a signed compliance certification. BAAQMD Regs. 2-6-405.7, 405.9; 40 C.F.R. § 70.5(c).

Once deemed complete, if the District “determines that additional information is necessary to evaluate or take final action on th[e] application,” it can request that information from the facility, setting a “reasonable deadline” for response. 40 C.F.R. § 70.5(a)(2). Moreover, the applicant has an affirmative duty to supplement or correct its application with “any relevant facts” and corrected information, and also must “provide additional information as necessary to address any requirements that become applicable” to the source between the application date and issuance of the draft permit. *Id.* § 70.5(b); BAAQMD Reg. 2-6-405.10. The District can only take action on the application to issue a permit if its terms and conditions “provide for compliance with all applicable requirements” including Part 70 requirements. 40 C.F.R. § 70.7(a)(iv).

Here, the application process was defective, resulting in a flawed permit that fails to assure compliance with all applicable requirements. The District failed to require the necessary information in the application to determine all applicable requirements in 1996 or before deeming it complete. Further, in the nearly eight years since the application was submitted, the District failed to request additional information from the facility to make all of the necessary determinations.

Applicable Requirements

As a result of the deficiencies in the application and permit process, the Permit contains numerous significant “unresolved” applicability and monitoring determinations. See Section I (above); Exhibit L, Attachment 2 (requesting that the District submit various determinations to EPA in 2005 for a future permit reopening). The Administrator should therefore object to the issuance of the permit until it assures compliance with all applicable requirements.

Identification of Insignificant Sources

Valero’s permit application fails to list insignificant sources at the facility. See Permit Application, at 8. A list of insignificant activities that are claimed as exempt due to size or production rate must be included in the permit application. 40 C.F.R. § 70.5(c). BAAQMD Regulation 2-6-405.4 requires every facility source to be listed in the Title V permit application even if the source is exempt or insignificant. Further, in response to a comment by the California Air Resources Board (“CARB”) on the changes to BAAQMD Regulation 2-6, Major Facility Review, the District stated that it “requires a listing of all sources in the [Title V] permit application (Section 2-6-405.4) whether significant or insignificant.”¹² The lack of information in the permit application inhibits meaningful public review of the Title V permit.

Identification of Non-compliance

As discussed below in Section III.D, the District failed to compel the facility to identify non-compliance prior to initial permit issuance on December 1, 2003. During the application process the District should have required the facility to update or supplement statements regarding the compliance status of certain sources, where District records indicate recurring or ongoing problems at the facility. This led to the District’s fundamental inability to determine and assure compliance, resulting in a deficient permit.

The Administrator should therefore object to the Permit on these grounds.

III. The Permit Does Not Assure Compliance with All Applicable Requirements Pursuant to the Clean Air Act, Part 70 and BAAQMD Regulations

A Title V permit must contain enforceable conditions sufficient to assure compliance with all applicable requirements, including a compliance schedule to resolve non-compliance issues and

¹² See BAAQMD Staff Report, Proposed Amendments to BAAQMD Regulation 2, Rule 6, April 17, 2001 at 12.

monitoring, reporting and record-keeping requirements. Section 504 of the Act, 42 U.S.C. § 7661c(a) & (c); 40 C.F.R. § 70.6(c)(1) & (3); 57 Fed. Reg. 32250, 32275 (July 21, 1992).¹³

Here, before issuing the initial permit on December 1, 2003 and proposing the permit for revision in 2004, the District ignored evidence of recurring or ongoing compliance problems at the facility, instead relying on limited review of outdated records to conclude that a compliance schedule is unnecessary. Had it not willfully turned a blind eye to its own records and the public comments on non-compliance issues, and had it obtained relevant records, the District would have had to include a compliance schedule in the Permit, or explain why one was not necessary. See 40 C.F.R. § 70.7(a)(5); *In re Huntley Generating Station, Order Granting In Part and Denying In Part Petition for Objection to Permit*, Petition No.: II-2002-01, at 4-5 (U.S. EPA Adm'r, July 31, 2003) ("*Huntley*").¹⁴ Additionally, the District would have had to include additional monitoring, record-keeping and reporting requirements to assure compliance with all applicable requirements.

The Permit also fails to assure compliance because the District takes the illegal position that intermittent compliance – that is, non-compliance – is an acceptable standard for assuring compliance for Title V permit issuance. The District's complete disregard for these lynchpins of the Title V program – that there be continuous compliance and that violators identify their violations – fundamentally damages the integrity of the program, which was intended to duplicate the success of the Clean Water Act's permit program.

Petitioner therefore requests that the Administrator object to the permit on these grounds, which are more specifically discussed below. See 40 C.F.R. § 70.8(c)(1); *Ravenswood* at 5; see also *In re Dynergy Corp., Order Granting In Part and Denying In Part Petition for Objection to Permit*, Petition No.: II-2001-06, at 5 (U.S. EPA Adm'r, Feb. 14, 2003) ("*Dynergy*") ("Defects in the

¹³ Congress considered compliance plans to be essential to the Title V program. "Congress considered and rejected even a limited exemption from the requirement to submit compliance plans for sources in compliance." 57 Fed. Reg. 32250, 32274 (July 21, 1992) (EPA final rule promulgating 40 C.F.R. Part 70). Thus, Congress specified that all permit applications identify violations and "include a schedule of compliance that describes what steps the source will take to come into compliance with the applicable requirements and to fulfill obligations with respect to penalties." 1990 U.S.C.C.A.N. 3385, 3736. Congress contemplated that such plans "set reasonable and enforceable conditions to accomplish timely compliance with the Act, and well-defined interim compliance steps and deadlines for their accomplishment." Clean Air Act Amendments of 1990: Remarks on H.R. Conf. Rep. on S.1630, 101st Congress (1990) (Statement of Hon. Michael Bilirakis) at E3674; see 42 U.S.C. § 7661b(b). See also EPA Region 9, Draft Title V Permit Review Guidelines, at 90 (Sept. 9, 1999) ("Where a source is not in compliance, the schedule of compliance establishes enforceable milestones to bring the source into compliance and requires status reports on at least a semi-annual basis. The schedule of compliance documents that the source has a plan for correcting the problem, and provides means of tracking the source's progress.").

¹⁴ In that matter, because the facility had violations of SIP opacity limits and PSD requirements at the time of permit issuance and the permit record did not show the facility had come into compliance by the time the final permit was issued, EPA determined that the agency either had to include a schedule of compliance in the permit or explain why one was unnecessary. See *Huntley* at 4.

application process can provide a basis for objecting to a title V permit if flaws in the application could result in a deficient permit”).

A. The District Ignored Its Own Records Showing Recurring Compliance Problems at the Refinery in Concluding that a Schedule of Compliance Was Not Necessary

The Valero Refinery has experienced significant non-compliance in recent years, including numerous unexplained events resulting in excess emissions. The facility’s compliance record is cause for concern as it has worsened since 2001, with a consistent number of violations since 2002 and a significant number of episodes resulting in excess emissions and related to equipment failures, including, for example, a fire in 2003 and a broken instrument line that forced an shutdown of a unit at the plant. See District 2003 Annual Compliance Report for the Valero Refinery (“2003 Annual Report”) (Exhibit M) at 5. In addition, the facility had two major incidents¹⁵ in 2002 and 2003. See BAAQMD 2004 Incident Reports for Valero Refinery, Site #B2626 (“Valero Incidents”) (Exhibit P).¹⁶

Evidently, the District failed to consider its own enforcement records before concluding that it was not necessary to include a compliance schedule in the December 1, 2003 permit. SB-I at 35. Petitioner commented in 2002 and 2003 that, considering the facility’s serious history of non-compliance between 2001 and 2003, the District should determine whether this serious record warranted imposition of a compliance schedule or additional monitoring, record-keeping and reporting sufficient to assure compliance with all applicable requirements. See, e.g., Exhibit B, Sec. II.B at 3-15 & Exhibit B. In response, the District states that a schedule of compliance may be warranted where there is “evidence of current ongoing or recurring non-compliance.” See District Response to GGU Comments (Sept. 22, 2003) (“District 2003 Response”) (Exhibit E), #1 at 1. Despite a history of compliance problems and a substantial number of significant incidents and District claims to have conducted an “updated” compliance review, the District concluded that it had not found “a pattern of violations that would warrant imposition of a compliance schedule.” SB-II at 34. However, the District provided no basis is provided for this conclusion; in fact, there was no evaluation or analysis of the facts to support such a determination anywhere in the permit record.¹⁷

As discussed below, the facts indicate recurring compliance problems at the facility. Petitioner evaluated the facility’s recent compliance record by reviewing the District’s 2003 Annual Compliance Report for the Valero Refinery and other records requested under the Public Records Act (“PRA”) in 2003 and 2004. The 2003 “compliance” report merely lists violations

¹⁵ When a facility releases a “significant” amount of pollution that the District believes is of “general public interest,” it posts an Air Pollution Incident Report on the BAAQMD website (available at <http://www.baaqmd.gov/enf/incidents/index.asp>).

¹⁶ Valero Incidents included in Exhibit P: June 3, 2003; January 29, 2003.

¹⁷ See proposed Title V permit, Statements of Basis and accompanying documents for the Valero Refinery, Site #2626 (available at: http://www.baaqmd.gov/pmt/title_v/public_notices.asp (last accessed November 1, 2004).

that occurred between 2001-2003, and limits discussion of “significant” violations to one public nuisance violation from 2003. See 2003 Annual Report at 2.

Notices of Violation (NOVs)

According to District records, between January 1, 2001 and October 1, 2004, the facility was issued at least 85 notices of violation (“NOVs”),¹⁸ 51 of which were issued in 2003 and 2004. See District NOV Printout for Valero Refinery, January 1, 2003-October 1, 2004 (“Valero NOVs 2003-2004”)¹⁹ (Exhibit N). The number of NOVs issued has remained consistent in the past three years, with 26 NOVs issued in 2002, 23 in 2003, 26 issued as of October 1, 2004 (and 2 NOVs from 2003 or 2004 include no date of issuance). See Exhibit M at 4, 6-7.

The 51 NOVs issued to the facility between January 1, 2003 and October 1, 2004 include at least the following:

- 20 NOVs were for violations of organic liquid storage requirements (BAAQMD Reg. 8-5), including excess emissions as well as:
 - 8 NOVs for violations of storage requirements (BAAQMD Regulation 8-5-320);
 - 4 NOVs for failure to conduct proper inspections (BAAQMD Reg. 8-5-401-403);
 - 1 NOV for late certification of 57 tanks (38 in 2003 & 19 in 2004) (BAAQMD Reg. 8-5-404);
- 7 NOVs were for equipment leaks (BAAQMD Reg. 8-18), including 1 NOV for failure to repair leaks in 24 hours;
- 7 NOVs were for violations of permit conditions (BAAQMD Regs. 2-1-307 & 2-6-307); including excess emissions and late deviation reporting under the Title V permit;
- 2 NOVs were for late reporting violations (BAAQMD Regs. 1-522 & 1-523);
- Numerous violations were for excess emissions, including:
 - 3 NOVs for excess visible emissions (BAAQMD Regs. 6-301 & 6-302);
 - 2 NOVs for violations of hydrogen sulfide limits (BAAQMD Reg. 9-2); and 1 NOV for violations of sulfur dioxide emissions limits (BAAQMD Regs. 9-1-307);
 - 5 NOVs for violations of permit conditions (BAAQMD Regs. 2-1-307 & 2-6-307);
- 2 NOVs were issued for improper flare monitoring in February and March 2004 (BAAQMD Reg. 12-11-502);
- 1 NOV for failure to inspect pressure release valve vents within 5 days (BAAQMD Reg. 8-28-402);
- 1 NOV for a public nuisance from a 2003 crude oil spill (BAAQMD Reg. 1-301).

See Exhibit M at 4, 6-7; see also Exhibit N; letter to Kelly Wee, BAAQMD, from Donald W. Cuffel, Valero Refining Co., June 24, 2004, and attached “Notice of Violation Summary for

¹⁸ *Notices of Violation*—When a violation of a BAAQMD Regulation is documented at a facility, a Notice of Violation (“NOV”) may be issued and the District may assess a penalty.

¹⁹ Valero NOVs 2003-2004 is a District printout of NOVs issued to the refinery between 1/1/03 and 10/1/04, sorted by source number (data provided in response to a September 2004 PRA request).

Plant B2626 Valero Benicia Refinery, from 12/1/2003 to 5/31/2004” (Exhibit S). All NOV’s issued in 2003 and 2004 were still “pending” and not resolved as of October 22, 2004.

Moreover, the facility experienced several instances of multiple violations on the same day. On at least 11 separate days during 2003 and 2004, the facility experienced 2 or more violations on one day. See Exhibit N. Remarkably, many of the NOV’s were issued during the initial permit drafting process in 2002 and 2003 and during permit revision in 2004, such that the facility could have been characterized as a “recalcitrant violator” under the District’s own regulations. A recalcitrant violator is defined as follows:

A person which has been cited for chronic violations²⁰ or has engaged in a pattern of neglect or disregard with respect to the requirements of district rules and regulations, permit conditions, or other applicable provisions of state or federal law or regulations, as evidenced within the prior three (3) years by at least two (2) Notices to Comply and/or Notices of Violation of the same or different District, state or federal rules, regulations or requirements, unless a higher number is specified in the District’s Notice to Comply Policies and Procedures.

BAAQMD Regulation 1-2-207.

Episodes

In addition to NOV’s, the number of *episodes*²¹ at the facility is significant. According to District records, the facility experienced at least 199 episodes between January 1, 2001 and October 11, 2004, with nearly 88 episodes in 2003 and 2004 alone. See District Episode Printout for Valero Refinery, January 1, 2003-October 11, 2004 (“Valero Episodes 2003-2004”) (Exhibit Q). The Refinery experienced 50 episodes in 2003,²² 65 episodes in 2002, and 46 episodes in 2001. See 2003 Annual Report at 4-5; Valero Episodes 2003-2004. As of October 11, 2004, the facility already experienced at least 38 episodes during 2004. See Valero Episodes 2003-2004. Of the 88 episodes at the facility in 2003 and 2004 alone, at least 43 episodes resulted in excess emissions, 30 episodes were due to inoperative monitors, 14 were due to equipment breakdowns, and one was related to pressure release valves. See Exhibit Q.

²⁰ A “chronic violation” is defined as one that has been preceded by at least one Notice to Comply or 1 NOV of the same or similar nature at the same source or facility within the prior three years. See BAAQMD Reg. 1-2-201.

²¹ *Episodes*—The District defines episodes as reported equipment breakdowns, monitored emission excesses, inoperative monitors, and pressure relief valve venting. Episodes are investigated by District inspectors for compliance with applicable regulations, and may result in the issuance of an NOV.

²² Note the discrepancy of the number of episodes at the Valero Refinery in 2003, as listed in the District’s 2003 Annual Compliance Report (46 episodes), versus the District’s recent Valero Episode printout (50 episodes). This is due to the fact that the 2003 Annual Report was produced in June 2004, while the more updated 2003 printout was generated in October 2004.

In the 2003 Annual Report, the District found that the facility had experienced “an increasing number of incidents relating to equipment failures.” Exhibit M at 5. As a result, the District’s enforcement division “will be requesting a meeting with Valero, to explain these recent equipment failures.” One of these events was a fire “due to a hole in the side of the tower” of the jet fuel hydrofiner, and another was a “vapor release from a broken instrument line” that forced a shutdown of the hydrocracker unit. Exhibit M at 5. Yet there is no explanation in the permit record as to whether these issues have been resolved.

Other specific examples illustrate the types of problems commonly experienced at the facility. Numerous episodes appear to be related to electrical problems, circuit failures, broken equipment and malfunctions. See Exhibit Q. Numerous “inoperative monitors” remained out of operation for more than three days, including at least two episodes that lasted more than 5 days, one for more than 10 days, and two that lasted 14 days.²³ The duration of nine episodes is unknown, as the end-date is not included on the District’s printout. In two other episodes, 9 days worth of flare monitoring video files from December 2003 and March 2004 were “accidentally” erased and unrecoverable.²⁴ During the first six months that its Title V permit was in effect, the facility reported 14 “inoperative monitors.” See letter to Kelly Wee, BAAQMD, from Donald W. Cuffel, Valero Refining Co., June 24, 2004, and attached “Title V Permit 6 Month Monitoring Report, 12/1/03 to 5/31/04, Valero Benicia Refinery, #B2626” (Exhibit S). There is no evidence in the record that the District has reviewed or evaluated whether these serious episodes may reflect compliance problems. As of October 22, 2004, 33 of the 88 episodes from 2003 and 2004 were still “pending,” with “no action.”

In addition, the facility had two major incidents in recent years. See Valero Incidents. On June 3, 2002, the facility experienced a power outage that “triggered a shut down of most of the refinery’s process units,” including several boilers and the Hydrocracker unit, with flaring for over three hours. On January 29, 2003, approximately 250,000 gallons of crude oil spilled from “an approximate 3-inch hole in one of their crude oil tanks,” resulting in a public nuisance violation. See Valero Incidents.

Problematic Sources Are Responsible for Repeat Episodes and Violations

Further review of the District’s records indicates that several sources at the facility are responsible for multiple episodes and violations, possibly revealing serious ongoing or recurring compliance issues. For instance, the 88 episodes at the facility between January 2003 and October 11, 2004 include the following sources with a record of non-compliance:

- The FCCU Catalytic Regenerator (S-5) was responsible for 16 episodes in 2003 and 2004 (including numerous excess emissions and breakdowns) and 8 NOVs between 2001-2004.
- A hot oil furnace (S-220) was responsible for 9 episodes in 2003 and 2004 (including “plugged” equipment and excess emissions) and 4 NOVs between 2002-2004.

²³ Exhibit Q, #04C39, # 04A60, #03V74, #03W90, #03W18 (respectively).

²⁴ Exhibit Q, #04C39, #04C41.

- The Heat Recovery Steam Generator (S-1031) was responsible for 9 episodes in 2003 and 2004 (including six over a 6-month period in 2004), involving failed electrical supply and multiple excess emissions, as well as 2 NOVs in 2003 and 2004.
- The South flare (S-18) monitor failed to properly sample flare data twice in February and March 2004, resulting in 2 NOVs, and there were 3 episodes between December 2003 and February 2004, including one in which flare monitoring data were “accidental erased.”

See Exhibit Q; Exhibit N; Exhibit O.²⁵

In addition, other sources are responsible for multiple episodes in 2003 and 2004, including:

- A Coker burner (S-6) was responsible for 7 episodes in 2003 and 2004 (including “plugged” monitors and excess emissions).
- One boiler (S-40) was responsible for 5 episodes in a one-year period from September 2003 to October 2004 (including inoperative monitors due to power interruptions and circuit breaker problems).
- The Combustion Turbine Generator (S-1030) was responsible for 4 episodes in 2003 and 2004 (including excess emissions, an episode of “unknown cause” and one in which the “CO went of compliance”).

See Exhibit Q. Given these serious episodes, and in particular the sources responsible for multiple or repeat episodes and violations, the District should have explained whether these issues have been addressed such that compliance can be assured.

Complaints

The facility was also the subject of numerous *complaints*²⁶ between 2001 and 2004. Between January 1, 2003 and October 21, 2004, the facility was the subject of 56 complaints by nearby residents. Of these complaints, 46 were for “odor,” 6 were for “smoke” and 4 were for “other,” including “flaring,” “black cloud” and “yellow, brown cloud.” See District Complaint Printout for Valero Refinery, January 1, 2003-October 11, 2004 (“Valero Complaints 2003-2004”) (Exhibit R). In 2001 and 2002, the facility was the subject of 69 complaints. See Exhibit M at 4.

There Is No Evidence that Problems Have Been Resolved

²⁵ The District printout of 2001-2003 NOVs for the Valero Refinery covers the period 1/1/01 to 10/27/03; (NOVs sorted by source number; data provided in response to a 2003 PRA request).

²⁶ *Complaints*—The District maintains a toll-free number for lodging public complaints of odors, smoke, fires, dust, fall-out, and other related air pollutants. Complaints can also be referred from U.S. EPA and CARB. Complaints are categorized as either confirmed or unconfirmed. A confirmed complaint requires a District inspector, employee or the complainant to “be able to testify that a particular operation or combination of operations is the source of the air contaminant,” which requires personal observation tracing the contaminant to the source or identification by sampling or other data analysis. BAAQMD Complaint Guidelines, Sec. 2.E at 7 (July 31, 2002).

Despite this overall record, however, there is no evidence the District has evaluated, addressed or resolved compliance issues at the facility such that compliance can be assured by the terms and conditions of the permit. The District surprisingly concludes, without analysis or explanation of the record, that a compliance schedule is not required in the facility's permit. SB-I at 35; SB-II at 29, 34. The District merely states that, after an "updated" review, it "has not found a pattern of violations that would warrant imposition of a compliance schedule." SB-I at 34. In fact, the permitting record lacks any review of the facility's compliance history or record to support this determination.²⁷ Had the District not willfully ignored the facility's recent compliance record—including 85 NOVs and 199 episodes between January 2003 and October 7, 2004 alone—the District would have had to conclude that the record appears to have worsened and that these compliance issues may need to be addressed in the permit through a compliance schedule and additional maintenance, monitoring and reporting requirements in the permit. In the alternative, the District should have provided a sufficient explanation why a schedule of compliance is not required to assure compliance with all applicable requirements.

EPA should therefore object to the Permit to have these non-compliance issues addressed, as required by the Act. Some illustrations of potential solutions to ensure compliance follow:

1. The District has not addressed recurring compliance problems at specific sources that are responsible for multiple and recurring violations and episodes. Notably, at least three of the sources discussed above (S-5, S-220 and S-1030) appear to have recurring or ongoing compliance problems that may need to be addressed through a schedule of compliance, as may other sources responsible for repeat episodes (e.g., S-6, S-40 and S-1031).
2. As to the 30 episodes involving inoperative monitors in 2003 and 2004, it is unclear why this problem continues to occur and whether it has been resolved such that a compliance schedule is not necessary. For instance, the monitor for the coker burner (S-6), which was responsible for 7 episodes in 2003 and 2004, has repeatedly been "inoperative" as it as "plugged" or not properly calibrated.²⁸ A monitor for a boiler (S-40) has also been repeatedly "inoperative," resulting in 5 episodes in a one-year period from September 2003 to October 2004.²⁹ Given this and other recurring problems, the permit may require additional maintenance or installation of monitoring

²⁷ See proposed Title V permit, Reopened Statement of Basis and accompanying documents for the Valero Refinery, Site #2626 (available at: http://www.baaqmd.gov/pmt/title_v/public_notices.asp (last accessed November 1, 2004). Note a prior version of the draft Title V permit was accompanied by a "Compliance Record," which was merely the District's 2001 "Annual Compliance Report" for the facility and did not include any information about the facility's compliance between January 2002 and September 2003. However, the materials accompanying the current proposed permit include no such record for 2002 or 2003; nor is information about the facility's compliance in 2004 included. Aside from the District's bald conclusion that a compliance schedule is not necessary, there is no indication in the record that the District evaluated or addressed the recurring compliance problems the facility experienced up to at least August 25, 2004, the date the Permit was transmitted to EPA.

²⁸ Exhibit Q, #03U49, #03V74, #03W17, #03D04.

²⁹ Exhibit Q, #03Z04, #04A60, #04D90, #04G34, #04G82.

equipment, or new monitoring methods. See 40 C.F.R. § 70.6(a)(3)(i)(C) (the permit must contain “[a]s necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods”). Problems with monitors are important to address because an inoperative monitor would not record exceedances that may occur, which may then conceal a more serious problem. Equipment breakdowns pose similar problems for excess emissions.

3. With the significant number of violations and episodes regularly occurring at the Valero Refinery, including recurring problems at specific sources as discussed above, it appears that the facility may not be operating applicable NSPS sources in compliance with “good air pollution control practices.” NSPS regulations provide that:

At all times, including periods of startup, shutdown, and malfunction, owners and operators shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source.

40 C.F.R. § 60.11(d). For instance, four of the seven problematic sources that are responsible for multiple violations and/or episodes as discussed above are NSPS sources: S-40, S-220, S-1030 and S-1031.³⁰ The District should have reviewed the facility’s record for compliance with the “good air pollution control practices” standard for these and other NSPS sources, especially flares, and should have imposed operational and maintenance requirements in a compliance schedule to assure compliance.

B. The District Ignored Non-Compliance Issues Raised by Public Comments in Concluding that a Schedule of Compliance Was Not Necessary

“Applicable requirements” include a requirement to obtain preconstruction permits under New Source Review (“NSR”). When EPA promulgated the Part 70 regulations, the Act’s definition of “applicable requirements” was revised “in part to clarify that applicable requirements include terms and conditions of preconstruction permits issued pursuant to SIPs and other regulations approved by EPA in formal rulemaking after notice and an opportunity for public comment.” 57 Fed. Reg. at 32,276; see *In re Pacific Coast Building Products, Inc., Order Denying Petition for Objection to Permit*, at 7 (U.S. EPA Adm’r, Dec. 10, 1999) (applicable requirements in Title V permits include the requirement to obtain a preconstruction review permit under the Act); May 20, 1999 letter from John Seitz, Office of Air Quality Planning and Standards, U.S. EPA to Robert Hodanbosi & Charles Lagges, STAPPA/ALAPCO, Enclosure A, p.2.³¹ EPA Region 9’s

³⁰ See Valero Refinery Permit, Tables: VII-A15 at 527; VII-A19 at 535; VII-A22.1 at 542; VII-A22.2 at 549.

³¹ Available at <http://www.epa.gov/Region7/programs/artd/air/title5/t5memos/hodan7.pdf> (last accessed November 14, 2003).

Title V permit guidance also clearly states that “[t]he title V permit for a source must assure compliance with all applicable requirements. If a NSR permit was not issued in the past, and should have been, then the source is not in compliance with the requirement to obtain a NSR permit as required in Title I of the CAA.” EPA Region 9, Draft Title V Permit Review Guidelines, Sept. 9, 1999, at III-24 (discussing the importance of reviewing Title V permits for past NSR determinations).

District regulations define “applicable requirements” as “[a]ir quality requirements with which a facility must comply pursuant to the District’s regulations, codes of California statutory law, *and the federal Clean Air Act*, including all applicable requirements as defined in 40 C.F.R. 70.2.” BAAQMD Regulation 2-6-202 (emphasis provided). Under the District’s definition, all provisions of the Clean Air Act, including the requirement to undergo NSR permitting, are “applicable requirements” to be included in a Title V permit.

Petitioner’s 2002 and 2003 Comments identified potential violations of New Source Review (“NSR”) requirements and permit conditions at the Valero Refinery.³² First, Petitioner commented that the District’s emissions inventory indicated that NOx emissions from certain boiler units (S-3 and S-4) had dramatically increased between 1993 and 2001, and appeared to exceed the NSR significance level for modified sources of NOx. Second, Petitioner indicated what appeared to be a substantial rebuild of an FCCU catalytic regenerator unit (S-5) without proper preconstruction review and emissions limitations and other requirements under 40 C.F.R. § 63 Subpart UUU. Third, Petitioner noted that sulfur dioxide emissions at a coker burner (S-6) had increased dramatically in 2001 to 4991 tons per year, a 1248 tons-per-year increase over the highest emission rate during 1993-2000. Petitioner noted that if this significant increase in emissions was the result of a major modification, then the source should have undergone proper preconstruction review, including adding NSR requirements to the permit. Petitioner requested that, prior to issuance of the final Title V permit, the District determine whether the sources underwent a physical change or change in the method of operation that increased emissions, which would have triggered NSR, demonstrating the sources’ compliance, or include a schedule of compliance in the permit. See Exhibit A, § 21 at 18-19 & Exhibit E; and Exhibit B at 13, 27 (Sec. III.A.6., Supplemental Comment).

As with its own compliance records, the District ignored Petitioner’s well-documented concerns regarding potential non-compliance. See, e.g., District Consolidated Response to Comments on Refinery Title V Permits, December 1, 2003 (“District 2002 Response”) (Exhibit D), § 3.B-C at 4-6; § 5; #33 at 16; § 6 at 22.³³ First, the District dismissed Petitioner’s comments and request for compliance assurance by stating that Petitioner “does not provide sufficient information or

³² See OCE 2002 Comments, § 21 at 18-19 & Exhibit E (Exhibit A); and OCE 2003 Comments at 13, 27 (Sec. III.A.6., Supplemental Comment) (Exhibit B).

³³ See also District 2003 Response (Exhibit E), #3, 6, 7, 8 at 1, and #38 at 3. Note, in response to Petitioner’s 2003 comments, the District apparently numbered comments and prepared a numbered table of responses purporting to correlate to these comments. Yet the District has mischaracterized several of Petitioner’s comments while ignoring others, making the task of public review even more difficult.

analysis” to support the request and that the comment “has not identified any relevant information” that the District should obtain from the facility to assist its compliance determination. District 2003 Response (Exhibit E), #7 at 1. This response simply ignored the issue of potential non-compliance raised by the comment. Second, the District mischaracterized the comment by stating that Petitioner “does not suggest a change,” but instead merely “requests additional information” for which Petitioner may submit a PRA request. Exhibit E, #38 at 3. In response to a similar comment raising potential NSR issues and requesting a compliance determination before issuance of the final permit, the District stated it has no obligation to find that “future” violations are not likely to occur. Exhibit E, #3 at 1. Again, these responses mischaracterized Petitioner’s comment and ignored the issue.

Had the District evaluated the issue in 2002 and 2003, it could have investigated whether the sources in question are in fact in compliance with all applicable requirements. If the District lacked sufficient information for this determination, it could have used its authority to request the necessary information from the facility, setting a reasonable deadline for a response. *See, e.g.*, 40 C.F.R. § 70.5(a)(2); BAAQMD Reg. 2-6-407.3.

Instead, the District dismissed the evidence of potential non-compliance identified by Petitioner, stating: “Investigation of all possible NSR violations is not a required component of issuance of a Title V permit, and is beyond the District’s resources.” Exhibit D, § 6 at 22. The District’s position is that “preconstruction review rules themselves are not applicable requirements, for purposes of Title V,” and therefore allegations of failure to comply with NSR requirements do not need to be addressed in the context of issuing a Title V permit. Exhibit D, § 3.D at 6-7. This is not consistent with EPA’s regulatory interpretation, guidance or precedent and District Regulations.

Accordingly, the District’s failure to resolve the NSR compliance issues violates Title V. Therefore, the Administrator should object to the issuance of the permit to require either a compliance schedule or an explanation that one is not necessary, despite the record.³⁴

C. The District Ignored Its Own Assessment that the Facility Cannot Continuously Comply with the Terms of the Permit; and the Intermittent Standard of Compliance Damages the Integrity of the Title V Program

The Administrator should object to the Permit on the ground that the District’s interpretation that the facility is required to comply only intermittently – rather than continuously. The District’s interpretation fails to assure compliance.

³⁴ “[W]here EPA believes that an emission unit has not gone through the proper preconstruction permitting process (and therefore one or more applicable requirements are not incorporated in the draft or proposed title V permit), EPA may object to the title V permit. The permitting authority may then resolve the issue either by demonstrating to EPA’s satisfaction that preconstruction permitting requirements were not applicable or by incorporating a schedule requiring the source to obtain a preconstruction permit.” EPA Region 9, Draft Title V Permit Review Guidelines, Sept. 9, 1999, at III-25.

Congress intended Title V permits to “assure prompt and *continuing* compliance with applicable requirements of the Act.” See 136 Cong. Rec. S16,895, S16,943 (1990) (Clean Air Act Amendments of 1990, Chafee-Baucus Statement of Senate Managers, S.1630) (emphasis added); see also *Utility Air Regulatory Group v. U.S. EPA*, 320 F.3d 272, 275 (D.C. Cir. 2003) (the purpose for inserting monitoring and testing requirements into a Title V permit is to “ensure that sources *continuously* comply with emission standards”) (emphasis added).

Petitioner’s 2003 comments on various refinery draft permits including the Valero Refinery challenged the District’s reliance on a “reasonable intermittent” compliance standard to assure compliance. See Exhibit B at 13-14. The District responded that it need only assure “reasonable intermittent” compliance because, for one, “[c]ompliance by the refineries with all District and federal air regulations will not be continuous.”³⁵ Exhibit D, § 5, #30 at 15. Of course, the term “intermittent,” as the District implicitly recognizes, means “stopping and starting at intervals” and is synonymous with “occasional, periodic, [and] sporadic.” Webster’s II New Riverside University Dictionary. That is, “intermittent” compliance can only mean non-compliance.³⁶

Because the District expects only intermittent compliance, the District ignored its own assessment that instances of non-compliance will recur at the facility and did not see the need for a compliance schedule. The District’s fundamentally flawed philosophy dooms its proper administration of the Title V program.³⁷

³⁵ Although made in the context of the Shell Martinez Refinery, Facility #A0011, this concession is relevant here as the District made clear it relates to all Bay Area refineries. In its 2003 Response, the District states that it “may have created confusion through its choice of phrasing” when in its compliance determination the District predicted “the facility was capable of ‘intermittent compliance.’” Exhibit E, #4 at 1. Yet again, the District mischaracterized Petitioner’s position by suggesting that a comment regarding the need for a compliance schedule to “assure compliance” where non-compliance is expected is equivalent to requiring “a guarantee of no future violations.” *Id.*

³⁶ In a mistaken attempt to justify the assurance of intermittent compliance, the District pointed to use of the term “intermittent” as a regulatory “term of art” meaning “anything other than continuous compliance.” See Exhibit D § 5, #30 at 15. The District appears to point to the term as used in compliance certifications. Indeed, federal regulations require Title V compliance certifications to include information regarding the compliance status of each source and to specify whether compliance was “continuous” or “intermittent.” See 40 C.F.R. §§ 70.6(c)(5)(iii)(C); 71.6(c)(5)(iii)(C); see also 42 U.S.C. § 7414(a)(3)(D). However, intermittent compliance is *not* sanctioned by the Act. To the contrary, any instance of non-compliance is considered a violation. See 40 C.F.R. § 70.6(a)(6)(i). In fact, EPA’s use of the term “intermittent” to specify a source’s compliance is intended to require the facility to explicitly identify instances of non-compliance. Thus, when EPA attempted to remove the term “intermittent” from the compliance certification procedure, the D.C. Circuit held that it could not do so, as Congress’ “express and unambiguous” intent was for Title V 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. 12,872 (Mar. 1, 2001).

³⁷ Instead of fulfilling its legal duty to issue a Title V permit that assures compliance with all applicable requirements, the District plans to issue the facility permit while deferring non-compliance issues to its enforcement division to possibly address at some unspecified time in the future. See, e.g., Exhibit D, §3.B-C at 4-6; §5 at 12; §6.V at 51; Exhibit E, #4 at 1.

D. The District Did Not Require the Refinery to Properly Certify Compliance with All Applicable Requirements and Update Its Initial Certification, Pursuant to 40 C.F.R. §§ 70.5(c)(5) and 70.5(b) and BAAQMD Regulations 2-6-426 and 2-6-405.10

Every Title V permit applicant must comply with specific requirements when initially certifying compliance in its application. *See* 40 C.F.R. § 70.5(c)(9). The certification must include a certification of compliance with all applicable requirements under the Act and a statement of the methods used for determining compliance. *Id.* The application must contain “specific information that may be necessary to implement and enforce other applicable requirements.” *Id.* § 70.5(c)(5). The application must also contain “[a] certification by a responsible official of truth, accuracy and completeness.” *Id.* § 70.5(d). In addition, every permit applicant has a duty to supplement and correct its application as new or incorrect information comes to its attention. *See id.* § 70.5(b); BAAQMD Reg. 2-6-405.10. BAAQMD Regulation 2-6-426 further requires the facility to “submit a new certification of compliance on every anniversary of the application date if the permit has not been issued.”

Congress mandated that facilities and permitting agencies establish reliable compliance certifications in part “to provide an incentive for sources to come into compliance with applicable requirements before they complete their applications,” and “to alert the permitting authority to compliance issues in advance so that it can work with the source on such problems and develop an appropriate schedule of compliance in the title V permit.” *Dynergy* at 5. If a facility fails to properly certify compliance in its initial application, “the State, EPA and the public have been deprived of meaningful information on compliance status which may have a negative effect on source compliance and could impair permit development.” *Id.* Flaws in the initial compliance certification process may in fact result in a deficient permit. Where a facility does not properly certify compliance prior to permit issuance, “the consequence in the final permit may be the omission of a compliance schedule to address non-compliance that occurred as of the date of application submission.” *Dynergy* at 6.

Here, Petitioner is unaware of any supplementation or correction made to the application by the facility regarding compliance, other than a letter to the District from the facility purporting to certify compliance with applicable requirements. *See* July 10, 2003 Letter from William H. Buckalew, Valero Refining Company, to William C. Norton, BAAQMD (attached as Exhibit B to OCE 2002 Comments) (“2003 certification”). The Refinery’s 2003 certification, however, is incomplete and may be inaccurate. According to the 2003 certification, the facility is in compliance with every single requirement that applies to the several hundred sources operating at the facility. Although the District’s records demonstrate that there have been recurring or ongoing compliance problems at the facility, nowhere in the 2003 certification does the facility identify any of these issues.

Furthermore, the District did not require supplementation or correction of the application to obtain self-reporting of violations.³⁸ Not having sought such information to which it is fully

³⁸ The reporting required under the Title V permit effective December 1, 2003 does not cure the problem. Since issuance of the permit, the facility has been required to submit deviation reports and self-report violations. The required reporting, however, does not cure the flawed application procedure, which resulted in the District’s inability to assure compliance or to impose additional enforceable requirements

entitled, the District states that it cannot issue a compliance schedule because, to do so, the District would need the type of information necessary to prove an enforcement action.³⁹ See Exhibit D, § 3.C at 5. But Congress included the requirement for facilities to self-report violations at the application stage precisely so that permitting agencies would be able to obtain the kind of information the District is saying that it does not have. Indeed, the concept of self-reporting of violations, borrowed from the Clean Water Act, is one of the lynchpins of the Title V program. Of course, updated information and certifications are particularly important here, where the initial certification was made over eight years ago, in 1996, when the facility originally submitted its permit application.

The District's failure to compel the facility—which presumably has the most information regarding its compliance—to identify its violations during the application process resulted in the District's fundamental inability to determine and assure compliance, and to impose additional enforceable requirements in the permit where necessary to assure compliance with all applicable requirements. Thus, the Administrator should object to the Permit on the ground that the defects in the compliance certification procedure have resulted in deficiencies in the Permit.

IV. The Statement of Basis Does Not Include the Factual or Legal Basis for Certain Permit Conditions as Required by 40 C.F.R. § 70.7(a)(5)

Each Title V permit must be accompanied by a “statement that sets forth the legal and factual basis for the draft permit conditions” (“Statement of Basis”). 40 C.F.R. § 70.7(a)(5). A recent Order by the Administrator affirms the critical role of the Statement of Basis, in providing a record to explain permitting decisions:

“A statement of basis ought to contain a brief description of the origin or basis for each permit condition or exemption. ... It should highlight elements that EPA and the public would find important to review. ... Thus, it should include a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public and EPA a record of the applicability and technical issues surrounding the issuance of the permit.”

where necessary to assure compliance. Moreover, Petitioner had no opportunity to challenge this issue prior to issuance of the initial defective permit on December 1, 2003.

³⁹ The District's argument has no merit, however. In addition to the facility's compliance records, the District has ample authority under Title V to obtain information to determine compliance at the facility. For example, after a Title V permit application is deemed complete, the District may request any additional information that is “necessary to evaluate or take final action” on the permit application. 40 C.F.R. § 70.5 (a)(2); BAAQMD Reg. 2-6-408.3. The District's general regulations also grant broad authority to require the submission of information from the facility to determine the compliance of a source. *See, e.g.*, BAAQMD Regs. 1-101, 1-440, 1-441. The District should have used this authority to assist its compliance determination. *See* EPA Region 9, Draft Title V Permit Review Guidelines, Sept. 9, 1999, at II-7 (agencies should “[u]se information in the application and other available information to determine if [a compliance] schedule must be included”).

In the Matter of Los Medanos Energy Center, Order Denying In Part And Granting In Part Petition For Objection To Permit, 2001 Petition, at 10-11 (U.S. EPA Adm'r, May 24, 2004) ("Los Medanos") (citing, e.g., *In Re Port Hudson Operation Georgia Pacific*, Petition No. 6-03-01, at 37-40 (U.S. EPA Adm'r, May 9, 2003) ("Georgia Pacific"); *In Re Doe Run Company Buick Mill and Mine*, Petition No. VII-1999-001, at 24-25 (U.S. EPA Adm'r, July 31, 2002) ("Doe Run")).

According to EPA, five key elements of an adequate Statement of Basis are:

- (1) a description of the facility;
- (2) a discussion of any operational flexibility that will be utilized at the facility;
- (3) the basis for applying the permit shield;
- (4) any federal regulatory applicability determinations; and
- (5) the rationale for the monitoring methods selected.

See *Los Medanos* at 10, n.16 (citing 67 Fed. Reg. 732 (Jan. 7, 2002) (EPA NOD issued to Texas) and letter from Stephen Rothblatt, Air Programs Branch, U.S. EPA to Robert F. Hodanbosi, Chief, Ohio Environmental Protection Agency, December 20, 2001 (EPA Region V guidance letter to Ohio),⁴⁰ which further recommends discussion of applicability and exemptions, and "certain other factual information as necessary"]. See also *In re Fort James Camas Mill*, Petition No. X-1999-1, at 8 (U.S. EPA Adm'r, Dec, 22, 2000) ("*Fort James*") at 8 ("the rationale for the selected monitoring method must be clear and documented in the permit record"); and U.S. EPA Region 10 guidance by Elizabeth Waddell, Region 10 Permit Review, May 27, 1998, at 4 (a Statement of Basis should include detailed facility descriptions, including emission units, control devices, and manufacturing processes; explanations for all actions including documentation of compliance with one time NSPS requirements and emission caps; and the basis for periodic monitoring, including appropriate calculations, especially when less stringent than would be expected).

"[W]here flaws in the statement of basis resulted in, or may have resulted in, deficiencies in the title V permit, EPA will object to the issuance of the permit." *Los Medanos* at 11 (citing *Fort James* at 8; *Georgia Pacific* at 37-40). The Administrator's objection to insufficient statements of basis is important because, without a sufficient statement of basis, it is virtually impossible for the public to evaluate the legal and factual basis for certain permit conditions and to prepare effective comments during the public comment period.

In this case, the District released SB-I with issuance of the initial proposed permit in 2003. The District intends for SB-I to serve as the "comprehensive" document for the facility. These statements are insufficient because:

- They do not contain a detailed facility description, including comprehensive process flow information. See SB-I, Sec. B at 4-5; SB-II, Sec. B at 4-6. When Petitioner commented in 2002 that the Statement of Basis should include process flow diagrams to illustrate

⁴⁰ Available at <http://www.epa.gov/rgytrmj/programs/artd/air/title5/t5memos/sbguide.pdf> (last accessed November 10, 2004).

how the sources, abatement devices and waste streams are connected, the District responded that “[a]ssembling this information would be extremely resource-intensive.” Exhibit D, #13 at 12. The District should not have to assemble such information. The District has authority to request such information from the facility.

- They fail to provide a basis for proposed exemptions for certain sources including numerous storage tanks. Specific tanks are listed in the permit application and claimed as exempt from permitting requirements. See Section VIII.D. The District fails to provide any explanation of the claimed exemption.
- They do not contain sufficient information for EPA or the public to determine the applicability of certain requirements to specific sources. Without such information, neither the public nor EPA can discern what the applicable requirements should be, and to which sources such requirements should apply.

The insufficiency was highlighted when, during permit review, EPA concluded that it lacked sufficient information to determine applicability of certain requirements to specific sources. See *e.g.*, Exhibit L, Attachments 2 and 3. This type of information should have been required in the application process, so that applicability determinations would not remain “unresolved” at the time of permit issuance but rather explained in the Statement of Basis.

Indeed, as EPA implicitly acknowledges, SB-II has resulted in a deficient permit. For instance, EPA notes that SB-II contains an “incorrect applicability determination” for Valero flares S-18 and S-19, resulting in the District’s proposal to categorically exempt flares from 40 C.F.R. Part 63 (MACT), Subpart CC testing, monitoring, reporting and record-keeping requirements. See Exhibit L Attachment 2, Issue #1 (citing SB-II at 20 and Valero Refinery permit, Table IIA). In addition, EPA found that while SB-II acknowledged that certain flares are capable of “routine” flaring, the District did not impose federally enforceable monitoring and reporting requirements to verify that each flaring event would qualify for the “emergency” exemption from H₂S limits contained in 40 C.F.R. § 60.104(a)(1). See SB-II at 23; Exhibit H at 2, Issue #1.

EPA also identified that SB-II failed to “discuss the applicability of [NSPS Subpart QQQ]” for wastewater from two new process units at the facility. See Exhibit L, Attachment 2, Issue #9. EPA stated that “it is not clear if the enclosed system that receives the process waste is included in the permit or if it was considered in the applicability determination.”

Additionally, EPA stated that SB-II contains an incorrect applicability determination regarding benzene waste streams and sewer pipelines and process drains, and NESHAP Subpart FF, specifically the restriction contained in section 61.342(e)(1) that was ignored by the District. Exhibit L, Attachment 2, Issue #11. As a result, waste streams may not contain the proper controls. “The District’s silence on this issue raises a question as to whether the control requirements of 61.342(e)(1) were considered at all for the operations at the refineries.” Thus, EPA directed the District to “revise the applicability

determinations” and SB-II for Valero, and to ensure that all appropriate requirements are included in the permit, in the next revision. EPA further noted that the District’s misinterpretation in Valero SB-II of Subpart FF may have led to other “inappropriate conclusions regarding what waste streams may go untreated” at the Valero Refinery. Exhibit L, Attachment 2, *Issue #12*.

- They fail to provide any basis for the District’s compliance determination, as discussed in Section III.

SB-I is also deficient because:

- It was not made available with the permitting materials on the District’s web site for public review in this permit reopening, despite that the District said it was “soliciting comment” on revisions made to the permit between the August 2003 draft and the final permit issued in December 2003. See SB-II at 3-4.⁴¹
- It does not include information about the permit reopenings in March and August 2004.

Separately, SB-II is deficient because:

- It does not include any discussion of revisions made to the permit between the August 5, 2003 draft and the December 1, 2003 final permit. In August 2004, the District stated it was “soliciting comment on changes that were made between the version of the permits that were issued for public comment in July of 2003 and the final permits issued December 1, 2003.” SB-II at 3. The District also stated that, “because of the extent of changes made between proposal and final, [EPA] “intends to conduct a new review of the refinery permits in their entirety.” SB-II at 3. Yet the District failed to include any discussion or explanation of revisions made to the permit between the July 2003 draft and issuance of the final permit in December 2003. Instead, discussion is limited only to revisions made as part of the limited reopening in February 2004. This severely inhibits effective public participation and permit review.

Because the Statements of Basis accompanying the facility permit do not sufficiently set forth the legal and factual basis for the permit conditions as required by section 70.7(a)(5), which has resulted in a deficient permit, the Administrator must object to the issuance of the permit for the Valero Refinery.

V. Permit Shield Provisions are Improper

Section 504(f) of the Act allows Title V permits to contain permit shields and also allows the permitting authority to treat compliance with the permit as equivalent to compliance with all other applicable provisions of the Act. This determination can only be made if the requirements of other applicable provisions are included in the permit, or if the permitting authority

⁴¹ The two versions of the Valero Statement of Basis available on the District’s web site (dated February 2004 and August 2004) relate only to the limited permit reopenings and not to initial permit issuance.

determines that the provisions are not applicable. *See* 42 U.S.C. § 7661c(f) (1) & (2), *see also* 57 Fed. Reg. at 32,255, 32,277 (July 21, 1992) (EPA promulgation of Part 70). The permitting authority's determination regarding the shield must be included in the permit. *Id.* A permitting authority's failure to adequately explain its basis for granting a permit shield either in the Statement of Basis or elsewhere in the permit record calls into question the adequacy of the permit. *See In re Consolidated Edison Company Hudson Avenue Generating Station, Order Granting In Part And Denying In Part Petition For Objection To Permit, Petition No.: II-2002-10, at 45* (U.S. EPA Adm'r, Sept. 30, 2003).

BAAQMD regulations allow for two types of permit shields: a shield for non-applicable requirements, and a shield for subsumed requirements. BAAQMD Reg. 2-6-233. The District must make a proper determination that a permit shield applies and must justify that determination. *See. e.g.,* 40 C.F.R. § 70.7(a)(5); *Los Medanos* at 10, n.16 (a key element of the Statement of Basis includes "the basis for applying the permit shield" (citations omitted)).

The District improperly granted certain permit shields to the facility and has failed to fully explain the use of other shields, as discussed below. Accordingly, the Administrator should object to issuance of the permit until the shields are removed or sufficiently explained.

1. 40 C.F.R. §§ 60.7 (c) & (d)

Table IX B on pages 669-670 of the facility permit states that 40 C.F.R. §§ 60.7 (c) and (d) may be subsumed by BAAQMD Regulation 1-522.8, because the BAAQMD rule satisfies the reporting requirements of the federal regulation. *See also* SB-I at Table II B-2. Petitioner disagrees. BAAQMD Regulation 1.522.8 states simply that "[m]onitoring data shall be submitted on a monthly basis in a format specified by the [BAAQMD Air Pollution Control Officer]. Reports shall be submitted within 30 days of the close of the month reported on." The BAAQMD rule allows the APCO to define the reporting format instead of specifying the reporting format.

In contrast, 40 C.F.R. §§ 60.7 (c) and (d) provide extensive and explicit reporting requirements, as indicated in the following excerpts:

(c) Written reports of excess emissions shall include the following information:

(1) The magnitude of excess emissions computed in accordance with Sec. 60.13(h), any conversion factor(s) used, and the date and time of commencement and completion of each time period of excess emissions. The process operating time during the reporting period.

(2) Specific identification of each period of excess emissions that occurs during startups, shutdowns, and malfunctions of the affected facility. The nature and cause of any malfunction (if known), the corrective action taken or preventative measures adopted.

(3) The date and time identifying each period during which the continuous monitoring system was inoperative except for zero and span checks and the nature of the system repairs or adjustments.

(4) When no excess emissions have occurred or the continuous monitoring system(s) have not been inoperative, repaired, or adjusted, such information shall be stated in the report.

(d) The summary report form shall contain the information and be in the format shown in figure 1 unless otherwise specified by the Administrator. One summary report form shall be submitted for each pollutant monitored at each affected facility.

(1) If the total duration of excess emissions for the reporting period is less than 1 percent of the total operating time for the reporting period and CMS downtime for the reporting period is less than 5 percent of the total operating time for the reporting period, only the summary report form shall be submitted and the excess emission report described in Sec. 60.7(c) need not be submitted unless requested by the Administrator.

(2) If the total duration of excess emissions for the reporting period is 1 percent or greater of the total operating time for the reporting period or the total CMS downtime for the reporting period is 5 percent or greater of the total operating time for the reporting period, the summary report form and the excess emission report described in Sec. 60.7(c) shall both be submitted.

Therefore, the requirements of 40 C.F.R. § 60.7 are not “satisfied” by BAAQMD Regulation 1-522.8. If the reporting requirements were to be based upon Regulation 1-522.8 alone, the APCO would then have the discretion to define a reporting format that is far less comprehensive than the federally required format.

In its response to Petitioner’s comments on this issue, the District stated that “[a]ll the information required by 40 CFR § 60.7 is included in monthly monitoring reports.” See Exhibit E, #72. The response does not address Petitioner’s concerns. Even if this were true, there is no guarantee that it will remain so during the permit term, as the District rule may be revised in the future. Moreover, the Statement of Basis does not sufficiently explain the basis for the shield. Therefore, the permit shield proposed in Table IX B must be removed from the permit.

2. BAAQMD Regulation 11-7

The District incorrectly attempted to subsume the State-only requirements for valves of BAAQMD Regulation 11-7 under the requirements of SIP approved BAAQMD Regulation 8-18-404. See Valero Refinery Permit, Table IX B at 671; *see also* SB-I at Table IX B-3. The State-only requirements of Rule 11-7 cannot be subsumed in the permit. Under the District’s regulations, only a federal requirement may be subsumed “because other applicable requirements ... in the permit will assure compliance with all emissions limits.” BAAQMD Reg. 2-6-233.2.

3. 40 C.F.R. § 60.482-7 (g) (NSPS VV)

A permit shield should not be allowed for federal regulation 40 C.F.R. § 60.482-7 (g) based upon its subsumption by BAAQMD Regulation 8-18-404. *See* Valero Refinery Permit, Table IX B at 671; *see also* SB-I at Table IX B-3. The NSPS section defines monitoring protocols for valves

that are demonstrated to be unsafe to monitor, whereas Regulation 8-18-404 refers to an alternative inspection scheme for leak-free valves. Because the BAAQMD regulation does not address the same issue as 40 C.F.R. § 60.482-7 (g), it cannot subsume the federal requirement. Therefore, the shield should be removed.

VI. The Throughput Limits on Grandfathered Sources at the Refinery Do Not Assure Compliance with All Applicable Requirements, in Violation of 40 C.F.R. § 70.6 (a)(1)

The District proposes to establish “throughput” limits for grandfathered sources to “facilitate implementation” of the District’s NSR program. SB-I at 13. The purpose of these limits is to “determin[e] whether an increase in emission levels has occurred.” SB-I at 13. SB-I at 13. If exceeded, the facility must report the exceedance, which is presumed to establish that a “modification” occurred. While “exceedance of these limits is not a per se violation of the permit,” failure to report the exceedance would be a permit violation. *Id.* Petitioner supports improved monitoring and reporting requirements for better detection of NSR violations, as undetected NSR violations result in many tons of excess of pollution. Petitioner requests, however, that the Administrator object to the imposition of throughput limits to the extent that they set a *threshold level* below which the facility need not report. The facility should instead be required to report all relevant information that bears on whether new or modified construction may have occurred.

There are several reasons for Petitioner’s position. First, the throughput limits in the permit are not a reasonably accurate surrogate for an NSR baseline determination. The District states:

These [throughput] limits are generally based upon the District’s review of information provided by the facility regarding the design capacity or highest documented capacity of the grandfathered source. To verify whether these limits reflect the true design, documented, or “bottlenecked” capacity (pursuant to 2-1-234.1) of each source is *beyond the resource abilities of the District* in this Title V process. Moreover, the District *cannot be completely confident* that the facility has had time or resources necessary to provide the most accurate information available in this regard.

SB-I at 13 (emphasis added). The discussion of throughput limits in the Statement of Basis indicates that the District has little reliable information regarding these “grandfathered” sources with which to make judgments about the applicability of NSR at these sources. Rather than setting baselines that contravene NSR requirements, the District should devote the appropriate resources for the important task of determining the legally correct baseline. The District cannot bypass the required steps for determining the correct baseline merely because of its resource constraints, particularly given the importance of the NSR requirements.

Second, placing these throughput limits in the Title V permit may create an improper presumption of the correctness of the threshold, which may encourage illegal modifications below the threshold and deter future enforcement of NSR violations. See *id.* (referring to the throughput limits as “presumptive,” although the District’s current position appears to be that the limits are reporting thresholds and not presumptive). Although the District states that the limits

do not create a “safe harbor,” *id.* at 14, the incentive for investigating whether an event that does not exceed the threshold indeed triggered NSR requirements will be severely diminished. Penalties for NSR violations where the facility did not exceed the throughput limits may also be diminished.

Third, the District’s reliance on BAAQMD Regulation 2-1-234⁴² in deriving these throughput limits is not appropriate. BAAQMD Regulation 2-1-234 is not a State Implementation Plan (“SIP”) provision. The definition of “modification” in the SIP-approved version of BAAQMD Regulation 2-2-223⁴³ should be used for purposes of new source review. Any reliance on provisions not approved by U.S. EPA is inappropriate because the SIP sets forth the EPA-approved NSR program.

The Administrator should thus object to the throughput limits on grandfathered sources.

⁴² BAAQMD Regulation 2-1-234 provides as follows:

Modified Source: Any existing source which undergoes a physical change, change in the method of operation of, increase in throughput or production, or addition which results or may result in any of the following:

....

2-1-234.3 For sources which have never been issued a District authority to construct, and which do not have conditions limiting daily or annual emissions, an increase of either daily or annual emission level of any regulated air pollutant, or the production rate or capacity that is used to estimate the emission level, above the lowest of the following:

3.1 The highest of the following:

3.1.1 The highest attainable design capacity, as shown in preconstruction design drawings, including process design drawings and vendor specifications.

3.1.2 The capacity listed in the District permit to operate.

3.1.3 The highest documented actual levels attained by the source prior to March 1, 2000.

3.2 The capacity of the source, as limited by the capacity of any upstream or downstream process that acts as a bottleneck (a grandfathered source with an emission increase due to debottlenecking is considered to be modified).

⁴³ SIP Regulation 2-2-223 provides as follows:

Modified Source or Facility: Any existing source or facility which will undergo a physical change, change in the method of operation of, or addition to an existing facility which results or may result in either an increase, of the permitted emission level of a source, of any air pollutant subject to District control, or the emission of any such air pollutant not previously emitted in a quantity which would cause the source to fail an air toxic screening analysis performed in accordance with the current Air Toxic Risk Screening Procedure. Routine maintenance or repair or a change in ownership of itself shall not be considered a modification. Unless previously limited by a permit condition the following shall not be considered changes in method of operation:

223.1 An increase in the production rate if such increase does not exceed the operating design capacity or the actual demonstrated capacity of the facility as approved by the APCO.

223.2 An increase in the hours of operation.

223.3 Change in ownership.

223.4 Use of an alternative fuel or raw material if the source was capable of using such fuel or raw material prior to July 1, 1972, or had received permits to use such fuel or raw material.

VII. The Permit Lacks Monitoring that Is Sufficient to Assure the Facility's Compliance with All Applicable Requirements, and Many Individual Permit Conditions Are Not Practicably Enforceable

A basic tenet of Title V permit development is that the permit must require sufficient monitoring and record-keeping to provide assurance that the permitted facility is in compliance with legal requirements. *See, e.g.*, 42 U.S.C. § 7661c(a); 40 C.F.R. §§ 70.6(a)(3), 70.6 (c)(1). As EPA explained in response to a Title V petition:

[W]here the applicable requirement does not require any periodic testing or monitoring, section 70.6(c)(1)'s requirement that monitoring be sufficient to assure compliance will be satisfied by establishing in the permit 'periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit.' See 40 C.F.R. § 70.6(a)(3)(I)(B). Where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring, however, as noted above the court of appeals has ruled that the periodic monitoring rule in § 70.6(a)(3) does not apply even if that monitoring is not sufficient to assure compliance. In such cases the separate regulatory standard at § 70.6(c)(1) applies instead. By its terms, § 70.6(c)(1) – like the statutory provisions it implements – calls for sufficiency reviews of periodic testing and monitoring in applicable requirements, and enhancement of that testing or monitoring through the permit necessary to be sufficient to assure compliance with the terms and conditions of the permit.

In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Order Partially Granting and Partially Denying Petition for Objection to Permits, Petition No.: VIII-00-1 at 18-19 (U.S. EPA Adm'r, November 16, 2000).⁴⁴ *See also Fort James* at 5-9.

In addition to containing sufficient monitoring, each permit condition must be “enforceable as a practical matter” in order to assure the facility's compliance with applicable requirements. To be enforceable as a practical matter, a condition must (1) provide a clear explanation of how the actual limitation or requirement applies to the facility; and (2) make it possible to determine whether the facility is complying with the condition.⁴⁵

The District, however, states in the SB-I for the Valero Refinery that:

⁴⁴ Available at <http://www.epa.gov/region7/programs/artd/air/title5/petitiondb/petitions/woc020.pdf> (last accessed, November 6, 2003).

⁴⁵ EPA states that “practicable enforceability for a source-specific permit means that the permit's provisions must, at a minimum: (1) Be technically accurate and identify which portions of the source are subject to the limitation; (2) specify the time period for the limitation (hourly, daily, monthly, and annual limits such as rolling annual limits); (3) be independently enforceable and describe the method to determine compliance including appropriate monitoring, record-keeping and reporting; (4) be permanent; and (5) include a legal obligation to comply with the limit.” 66 Fed. Reg. 53,146, 53,147 (Oct. 19, 2001).

[A]lthough Title V calls for a re-examination of all monitoring, there is a presumption that these factors [used by the District to develop monitoring] have been appropriately balanced and incorporated in the District's prior rule development and/or permit issuance. It is possible that, where a rule or permit requirement has historically had no monitoring associated with it, *no monitoring may still be appropriate in the Title V permit if, for instance, there is little likelihood of a violation.* Compliance behavior and associated costs of compliance are determined in part by the frequency and nature of associated monitoring requirements. As a result, the District will generally revise the nature or frequency of monitoring only when it can support a conclusion that existing monitoring is inadequate.

See SB-I at 17 (emphasis added).

In its initial responses to public comments, the District explained that it relied upon a presumption that existing monitoring is adequate, stating, "a presumption of adequacy for existing monitoring is appropriate because the District has traditionally applied the same factors to assessing monitoring that are called for by Title V." See Exhibit D, at 17, 55. However, there is no legal basis for such a presumption, which is not authorized by Title V, its implementing regulations, or BAAQMD Regulation 2-6-503. To the contrary, Title V specifically authorizes a review of all monitoring requirements to assure compliance with permit conditions and other applicable requirements. The Administrator should object to issuance of the facility permit until the following issues are resolved.

A. Exemption of Flares from 40 C.F.R. Section 60 (NSPS) Subpart J

Refinery flares are subject to the H₂S limits under 40 C.F.R. Section 60 ("NSPS"), Subpart J.⁴⁶ See 40 C.F.R. § 70.2(3) ("applicable requirement" for emissions units includes any standard or requirement under section 111 of the Act, including section 111(d)). NSPS Subpart J includes a prohibition on the combustion of fuel gas in excess of 0.10 gr/dscf, with an exemption for gases resulting from "emergency malfunction" or "relief valve leakage" or "process upset gases."⁴⁷ 40 C.F.R. § 60.104(a)(1).

⁴⁶ Petitioner commented that NSPS requirements for flares were omitted from applicable limits and monitoring requirements. See, e.g., OCE 2002 Comments at 13-14, #15. BAAQMD first proposed to reopen the Title V permit on a limited basis on March 1, 2004. Petitioner submitted timely comments on the reopening. See letter to Pamela Leong, et al., BAAQMD, from ELJC, April 14, 2004 ("OCE 2004 Comment") (Exhibit F).

⁴⁷ EPA investigations suggest that refinery "flaring frequently occurs in routing, non-emergency situations or is used to bypass pollution control equipment," resulting in "unacceptably high releases" of sulfur dioxide and may also violate the requirement that facilities operate NSPS sources consistent with "good air pollution control practices." See EPA, *Enforcement Alert*, EPA Office of Regulatory Enforcement, Vol. 3, No. 9, October 2000 (attached as Exhibit D to OCE 2002 Comments).

The Permit must assure compliance with NSPS Subpart J. To this end, the permits must contain “[e]missions limitations and standards, including those *operational requirements and limitations* that assure compliance with all applicable requirements at the time of permit issuance.” 40 C.F.R. § 70.6 (a)(1) (emphasis added).

The Valero permit lists one NSPS flare at the facility (S-19),⁴⁸ but the District has not made an applicability determination for three other flares (S-16, S-17 and S-18). Certain flares have the potential to be used for “flaring of gases from routine processes.” SB-II at 23. The District prohibits routine flaring and limits the use of flares at the facility for “emergency” use SB-II at 22-23. However, there are no requirements in the permit to ensure that the flares are operated only in “emergencies,” or to assure compliance with the permit condition prohibiting routine flaring. As a result, there is no way to tell whether the flares qualify for the exemption.

Since NSPS J is a federal requirement, there must be a federally enforceable reporting requirement to verify that each flaring event would qualify for an exemption from the H2S limit. EPA agrees. See EPA July 28 Letter (Exhibit H) at 2, Issue #1. The District “is taking a *blanket-exemption approach* for several flares at the [Bay Area] refineries” including Valero, by not treating NSPS Subpart J as an applicable requirement.⁴⁹ *Id.* (emphasis provided). “BAAQMD, however, has not adequately documented its determination that these flares are not designed to combust routine releases nor how routine releases can be prevented at these flares.” *Id.* The District’s flare monitoring rule (BAAQMD Reg. 12-11) “does not assure that *each* flaring event qualifies for the emergency exemption provided in NSPS J, nor is it federally enforceable.” Exhibit H at 2, Issue #1 (emphasis in original).

Furthermore, the exemption contained in section 60.104(a)(1) is limited only to the emission standard. The Permit fails to ensure that all other NSPS Subpart J requirements, which are still “applicable requirements,” are practically enforceable. To correct this deficiency, federally enforceable monitoring and reporting must be imposed pursuant to 40 C.F.R. §§ 70.6(a)(3)(B) and 70.6(c) and section 504(c) of the Act to verify that the flares are in compliance with all Subpart J requirements. Thus, the Administrator must object to the permit until all it assures compliance with all applicable requirements of Subpart J.

B. Flare Opacity Monitoring

There are no provisions in the Permit to monitor violations of the SIP opacity limits during short-duration flaring events at the facility. As a result, the limits are not practically enforceable. Flares S-16 through S-19 are subject to BAAQMD regulation 6-301, which requires that flare emissions should not exceed defined opacity limits for periods aggregating more than 3 minutes in any hour. However, the proposed monitoring only requires flare inspection within thirty

⁴⁸ See Valero Refinery Permit, Table VII-A9 at 516; SB-II at 15, 23.

⁴⁹ The District explains that it “proceeds on the assumption that the flare is exempt from the H2S limit of Subpart J” in “typical” situations “where the refinery has stated that a flare is used only for upsets and emergencies, and where there is not information to the contrary.” SB-II at 23.

minutes from the start of flaring and then within 30-minute periods thereafter.⁵⁰ Specifically, the permit conditions only require monitoring after a “flaring event” has been determined, which requires flaring to last for at least 15 minutes. See, *e.g.*, Valero Refinery Permit, Condition No. 20806-3 at 487; see also, *e.g.*, Table IV-A8-1 at 99. After this first 15 minutes, an additional 15 minutes is then allowed to inspect the flaring event. Thus, flares lasting less than 15 minutes could violate opacity limits but will not be subject to monitoring, and flares lasting longer than 15 minutes but less than 30 minutes could violate opacity limitations and may also not be monitored. Under these circumstances, repeated violations of BAAQMD Regulation 6-301 due to short-term flaring could be an ongoing problem that evades detection.

The District notes that flare monitoring will be carried out by the process-unit operator, and on this basis concludes that requiring monitoring in less than 30 minutes would be impractical and counterproductive, since the act of monitoring would prevent the operator from working to resolve the flaring problem in a timely fashion. SB-II at 24-25. However, making the process operator responsible for such monitoring does not represent a “good air pollution control practice.” In this instance, other refinery personnel should be responsible for flare monitoring. In addition, video monitoring should be used to obtain a continuous record of visible emissions from flares.

C. Cooling Tower Monitoring

EPA should object to the permit unless source testing is added to the permit for cooling towers at the facility. Cooling tower S-29 is required to comply with BAAQMD Regulations 6-301, 305, 310, and Regulation 8-2-301. Petitioner commented that BAAQMD Regulation 8-2-301 applies to cooling towers and that source testing should be required to assure compliance. See Exhibit A at 18; Exhibit B at 32-33 (#17). EPA agreed that the District must make applicability determinations for the cooling towers and include permit conditions to assure compliance. See Exhibit L, Attachment 2, Issue #4.

The cooling tower is required to comply with BAAQMD Regulation 6, as well as Regulation 8-2-301. The District did not impose monitoring requirements on the cooling tower based on calculations using EPA’s AP-42 default emission factors for refinery cooling towers. See District 2002 Response at 36. However, the AP-42 emission factor for VOCs from refinery cooling towers is rated “D” meaning the quality of this factor is below average. The emission factor for PM10 from cooling towers is rated “E” or of poor quality. Therefore it is unlikely that the calculated emissions based upon the AP-42 factors are representative of the actual cooling tower emissions. Source tests should also include determination of representative air and water circulation rates in the cooling tower. EPA agreed with Petitioner regarding the use of AP-42 emission factors, stating that it “does not recommend using them as source specific permit limits or as emission regulation compliance determinations.” See Exhibit H at 4, #6. EPA must therefore object to the issuance of the permit until appropriate conditions are included in the permit to assure compliance.

D. Pressure Relief Valves Should Be Monitored Prior to the First Release Event

⁵⁰ See Valero Refinery Condition #20806, Parts 3 through 5.

The Refinery permit must include additional monitoring to assure that all pressure relief valves at the refinery are in compliance with the requirements of BAAQMD Regulation 8-28 (Episodic Releases from Pressure Relief Valves). Regulation 8-29-401 requires that “[a] Release Event from a pressure relief device at petroleum refineries and chemical plants shall be reported to the APCO on the next working day following the venting.” The regulation requires that pressure relief devices at a facility be equipped with telltale indicators within 120 days of the *first reported* Release Event at the device. However, neither the regulation nor the Permit includes any monitoring requirements to insure that the first Release Event of a relief valve would ever be recorded. This is inconsistent with Title V monitoring requirements. Available telltale indicators or other objective monitoring method should be required for all pressure relief valves at the facility regardless of a valve’s Release-Event status. The Administrator should object on this basis.

E. Insufficient Monitoring for Opacity, Nuisance Fallout, and Filterable Particulate

Several refinery sources have federally enforceable limits for opacity, filterable particulate (“FP”), and nuisance fallout, pursuant to BAAQMD Regulations 6-301, 6-301.3, 6-305, 6-310, and 6-311, but do not have sufficient monitoring to insure compliance. These are listed in the following table:

Sources at issue	BAAQMD Regulations for which required monitoring is missing from the permit
S-157 (Sulfur Storage Pit)	6-301, 6-310
S-174 & S-175 (Lime Slurry Tanks)	6-301, 6-310, 6-311
S-240, S-241 & S-242 (Diesel Backup Generators)	6-301.3, 6-310
S-5 (FCCU Catalyst Regenerator) & S-6 (Fluid Coker)	6-305
S-8, S-10, S-11 & S-12 (Coke transport, Catalyst unloading, Carbon black storage, Lime silo)	6-311

EPA should object to the permit until additional monitoring requirements have been added in these instances.

VIII. There Are Miscellaneous Permit Deficiencies

A. Missing Federal Requirements for Flares

The District incorrectly determined that Valero flares are categorically exempt from 40 C.F.R. § 63 Subpart CC (MACT).⁵¹ See Exhibit L, Attachment 2, #1. Specifically, EPA disagreed with the District's claim that the flares qualify for a categorical exemption from Subpart CC when used as an alternative to the fuel gas system, stating, "[g]ases directed to a flare instead of the fuel gas system are not part of the fuel gas system, even if there is common piping between where gases are released from a unit and where the system branches off to either the flare, or the fuel gas system." *Ibid.* The Valero permit and SB-II at 20 contain "incorrect applicability determinations" for flares S-18 and S-19. *Ibid.* For flares S-16 and S-17, there is not enough information to determine applicability. See Exhibit L, Attachment 2, #1. For all flares subject to Subpart CC, the permit must include all applicable requirements, including 40 C.F.R. § 63 Subpart A, by reference from 40 C.F.R. § 63 Subpart CC.

In prior comments, Petitioner requested that several federal rules limiting the operation of flares be applied to the Valero flares. At that time, none of the permit review materials available to Petitioner provided a list of sources at the facility that are abated by the flares; nor did the permit materials contain adequate information related to construction or modification of the flares or sources connected to the flares. Under the circumstances, Petitioner was unable to make an independent determination as to whether the permit contained all applicable federal requirements for the flares. Thus, Petitioner requested that the District determine the potential applicability of a number of federal regulations to the Valero flares, S-16 through S-19. These included 40 C.F.R. § 63 Subpart A, by reference from 40 C.F.R. § 63 Subpart CC, and 40 C.F.R. § 60 Subpart A by reference from other NSPS subparts. The District did not do so.

In addition to the District's "incorrect applicability determinations" for flares S-18 and S-19, EPA agreed with Petitioner that the District failed to provide sufficient information for the other applicability determinations. EPA Reopening Letter, Attachment 2, #1. The Administrator should therefore object to the Permit until the District provides a sufficient analysis regarding the applicability of these federal rules to the Valero flares, and until the Permit contains all applicable requirements.

B. Insufficient Basis for Tank Exemptions

Both the Statements of Basis and the Permit are still missing an exempt source table that provides adequate basis information to support the proposed exempt status for numerous storage tanks. While Table II B of the Permit includes a list of exempt tanks along with tank capacity information, the table still does not indicate the liquid contained in the tank. Nor does it cite the regulatory basis for each tank exemption. Petitioner notes that, in response to public comments, the District did include such a table in a previous draft of the Valero permit. See Exhibit D at 36.

⁵¹ 40 C.F.R. Subpart CC at 63.640(d)5 provides an exemption from monitoring, record-keeping and reporting requirements for emission points routed to refinery fuel gas systems.

IX. The District Failed to Comply with the Public Participation Requirements of 40 C.F.R. § 70.7(h)

The public can participate in the Title V permitting process by commenting and requesting a public hearing on draft permits and by petitioning the Administrator to object to a permit that is not in compliance with all applicable requirements. See Section 502 of the Act, 42 U.S.C. § 7661a(b)(6); 40 C.F.R. §§ 70.7(h), 70.8(d). To facilitate the public review process, the District must make available specific information related to the permit and the facility. See 40 C.F.R. §§ 70.7(h), 70.4(b)(3)(viii); BAAQMD Regs. 2-6-412 & 2-6-419. In its public notice, the District must identify how the public may obtain additional information about the permit and facility, including “all relevant supporting materials ... and all other materials available to the [District] that are relevant to the permit decisions.” 40 C.F.R. § 70.7(h).

Here, the District failed to make available critical information that is relevant to important permitting decisions in a timely fashion. For example, the District did not make readily available to the public information relevant to the facility’s compliance necessary for evaluating whether a schedule of compliance should have been included in the Permit. Documents about the facility’s compliance could not be more relevant to the permitting decision. Compliance data should have been easily accessible to the public, even without a PRA request. Instead, Petitioner had to make several PRA requests seeking relevant information concerning NOV’s issued to the facility between 2001 and 2004.⁵² It is unclear what, if any, compliance records the District reviewed from 2003 and 2004 to conclude that the facility is in compliance with all applicable requirements. See SB-II at 30. To evaluate the facility’s recent compliance record, Petitioner again had to make a PRA request for the 2003 Annual Report and other compliance information, which is not readily available.

In the District’s view, it would be “highly impractical” for the District make available all the information contained in District files regarding a facility, and therefore, this could not have been the intent of Congress nor EPA in enacting Title V or promulgating Part 70. See Exhibit D, § 3.E. at 7-8.⁵³ The District believes that the only reasonable interpretation is that the District must merely explain and support its Title V permitting decisions. *Ibid.* The District appears to be confusing its obligation to prepare a Statement of Basis (explaining the legal and factual basis for its decisions) with its obligation to make relevant public records available to facilitate the public’s review of draft permits for sufficiency. The ultimate test here is *not* merely whether the District has provided sufficient explanation of its decisions, but whether it has provided

⁵² Petitioner’s 2003 PRA request had to be forwarded by the District’s public information officer to the District’s legal division, followed by three weeks of follow-up phone calls, e-mails, a letter to District Counsel and the threat of litigation, before the District finally produced the information. See Letter to Brian Bunger, District Counsel, BAAQMD from ELJC, October 22, 2003 (Exhibit C). While Petitioner ultimately received the information, Petitioner expended significant resources to obtain the data, and received the data so late in the process that they could not be sufficiently analyzed.

⁵³ The District admits that it does not attempt to review all files for each facility in drafting Title V permits, and thus believes the public should be equally ill-informed about the permitting and enforcement history of the facility. Exhibit D, § 3.E. at 7-8 (disagreeing that a public reviewer should be “*far more* informed” than District staff).

sufficient information for the public to evaluate whether its decisions are appropriate under the circumstances – i.e., whether the terms and conditions of the draft Title V permit properly assure compliance with all applicable requirements, or whether additional requirements must be imposed to assure compliance.

In addition, as discussed above, the Statement of Basis made available on the District's web site with the reopened permit materials fails to include any discussion or explanation of revisions made to the permit between the July 2003 draft and issuance of the final permit on December 1, 2003. This severely inhibits effective public participation and permit review.

The Administrator should therefore object to the Permit on the basis that the permit proceeding did not comply with the public participation requirements of 40 C.F.R. § 70.7(h).


X. Conclusion

For the reasons discussed above, the Administrator should object to issuance of the Valero Refinery Permit unless and until it assures compliance with all applicable requirements as defined by the Act, Part 70 and District regulations.


3 Dec. 2004
Date

Respectfully Submitted,

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