

1 **BEFORE THE ADMINISTRATOR**
2 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
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5 In the Matter of the Final Title V)
6 Operating Permit Issued to)
7 Los Medanos Energy Center) Facility Permit # B1866
8 to operate an electricity generating power)
9 plant located in Pittsburg, California)
10 Issued by the Bay Area Air Quality)
11 Management District)

12 **PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE**
13 **OF THE TITLE V OPERATING PERMIT FOR**
14 **LOS MEDANOS ENERGY CENTER**
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16 Pursuant to section 505(b)(2) of the Clean Air Act (the "Act"), 42 U.S.C. § 7661d(b)(2),
17 and 40 C.F.R. § 70.8(d), Our Children's Earth Foundation ("OCE") and Californians for
18 Renewable Energy, Inc. ("CARE") (collectively "Petitioners") hereby petition the Administrator
19 ("the Administrator") of the United States Environmental Protection Agency ("U.S. EPA") to
20 object to issuance of the Title V Operating Permit for Los Medanos Energy Center. The permit
21 was proposed to U.S. EPA by the Bay Area Air Quality Management District ("BAAQMD" or
22 "District") for EPA review in a letter to Jack Broadbent, Director, Air Management Division,
23 U.S. EPA, dated June 28, 2001. This petition is filed within sixty days following the expiration
24 of U.S. EPA's 45-day review period, as required by section 505(b)(2) of the Act, 42 U.S.C.
25 § 7661d(b)(2). The Administrator must grant or deny this petition within sixty days after it is
26 filed. *See id.*

27 In compliance with section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), this petition is
28 based on objections to Los Medanos Energy Center's proposed permit that were raised during

1 the public comment period provided by the Act. Comments on the draft permit are attached as
2 Exhibit A for reference.¹

3 OCE is an organization dedicated to protecting the public, especially children, from the
4 health impacts of pollution and other environmental hazards and to improve environmental
5 quality for the public benefit. OCE has members who live, work, recreate and breathe air in the
6 San Francisco Bay Area, and OCE is active in issues concerning air quality in the Bay Area and
7 throughout the State of California. In addition, OCE commented on the Los Medanos Energy
8 Center's proposed Title V permit. CARE's mission is to provide professional and legal
9 assistance to planning, conservation, and neighborhood groups on new energy projects in the
10 State of California. CARE has offices located in Sunnyvale, California, and has members who
11 live, work, pay taxes, and breathe the air in and around the Los Medanos Energy Center.

12 Petitioners request that the Administrator object to the final Title V permit for Los
13 Medanos Energy Center because it does not comply with 40 C.F.R. Part 70. In particular:

- 14 1) The permit's definition of "emergency" is broader than the definition allowed by
15 40 C.F.R. § 70.6(g);
- 16 2) The permit improperly includes variance relief provisions which are not federally
17 enforceable;
- 18 3) The permit fails to include a statement of basis as required by 40 C.F.R. § 70.7(a)(5);
- 19 4) The permit contains permit conditions that are inadequate under 40 C.F.R. Part 70; and
- 20 5) Some of the changes OCE requested during the public comment period and agreed to by
21 the BAAQMD were not incorporated into the final permit.

22 If the Administrator determines that a permit does not comply with legal requirements, he
23 or she must object to its issuance. *See* 40 C.F.R. § 70.8(c)(1) ("The Administrator will object to
24 the issuance of any proposed permit determined by the Administrator not to be in compliance
25 with applicable requirements or requirements of this part."). The numerous and significant
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28 ¹ The original comments on the draft permit are attached to this petition for reference only. This petition does not
raise all of the issues in the original comments on the draft permit.

1 violations of 40 C.F.R. Part 70 discussed below require the Administrator to object to the Title V
2 permit issued to Los Medanos Energy Center.

3 **I. The Permit's Definition of "Emergency" Is Broader than Is Allowed by 40 C.F.R.**
4 **§ 70.6(g).**

5 In Section I.H.1. the permit defines "breakdown" using the definitions provided in
6 BAAQMD Regulation 1-208. However, the definition of "breakdown" in Regulation 1-208 is
7 much broader than the federal definition of a breakdown, which is provided in 40 C.F.R. Part 70.
8 In 40 C.F.R. § 70.6(g), EPA clearly defines emergencies as arising from "sudden and reasonably
9 unforeseeable events . . . which situation requires immediate corrective action to restore normal
10 operation, and that causes the source to exceed a technology-based emission limitation." The
11 BAAQMD's definition would allow Los Medanos to obtain breakdown relief in situations
12 beyond those allowed under the Act.

13 In its response to Petitioners' comments, BAAQMD states that EPA has approved its
14 definition of breakdown, and that a facility is not provided relief from federal enforcement if the
15 breakdown exceeds the scope of the Part 70 definition of emergency. *See* August 27, 2001
16 Letter to Ken Kloc from William de Boisblanc, Director of Permit Services, BAAQMD, p. 1,
17 *Standard Conditions*, item 1 ("BAAQMD Response"); attached as Exhibit B. Under this permit
18 term, a facility can assume that if it has an emergency within the definition of BAAQMD
19 Regulation 1-208, it can get breakdown relief from BAAQMD under its permit, but the facility
20 will not necessarily be protected from federal or citizen enforcement, and does not provide any
21 justification for deviating from Title V regulations. This scheme creates unnecessary confusion
22 and unwarranted potential defenses to federal citizen enforcement. The Administrator should
23 object to the issuance of the Los Medanos Title V permit until the definition of emergency is
24 changed to limit the allowance for emergency breakdown relief as defined in 40 C.F.R. § 70(g).

25 **II. The Permit Improperly Includes State Variance Relief Provisions.**

26 Section I.H.2. of the permit provides that "[t]he holder of the permit may seek relief from
27 enforcement action for a violation of any of the terms and conditions of this permit by applying
28 to the District's Hearing Board for a variance pursuant to" state law (California Health & Safety

1 Code § 42350). First, variance relief issued by BAAQMD under state law does not qualify as
2 emergency breakdown relief authorized by the Title V provisions of the Act, and therefore
3 should not be included in the emergency breakdown relief provisions.

4 Second, BAAQMD's variance program is a creature of state law. Variance relief should
5 not be included in a federally enforceable permit. In fact, in 1997 U.S. EPA corrected several
6 State Implementation Plans ("SIP"), including California's, to remove the variance provisions
7 which had been erroneously included in each of the SIPs. *See* 62 Fed. Reg. 34,641 (June 27,
8 1997). Any reference to variance relief available under state law should be removed from the
9 Los Medanos Title V permit.

10 A variance from a SIP requirement allows for a SIP modification without the U.S. EPA
11 review. The Act prohibits States and U.S. EPA from revising the SIP by issuing an "order,
12 suspension, plan revision or other action modifying any requirement of an applicable
13 implementation plan" without a plan promulgation or revision. *See* 42 U.S.C. § 7410(i). Each
14 time the BAAQMD Hearing Board issues a variance from a SIP requirement, the Hearing Board
15 is granting a facility a waiver from SIP requirements without revising or promulgating a new
16 plan. Granting a variance to a SIP requirement is analogous to granting a permit with an
17 exemption from a SIP requirement. When granting a variance from a SIP requirement, the
18 responsible agency is failing to require compliance with the SIP and condoning current and
19 future SIP non-compliance by sources by ensuring immunity from enforcement. In effect, every
20 time the Hearing Board grants a facility a variance from a SIP requirement without modifying
21 the SIP it is violating section 110(i) of the Act, 42 U.S.C. § 7410(i).

22 Further, variances issued under state law have the potential to affect attainment of air
23 quality standards because they authorize emissions in excess of the applicable emission limits.
24 The issuance of variances by BAAQMD, in many cases, allows the polluting facility to get a
25 waiver from the federally enforceable requirements contained in their Title V permit. While the
26 facility, in theory, remains subject to federal and citizen enforcement, in reality, citizens and
27 even EPA cannot enforce against every facility that receives a variance. EPA review and
28 approval is necessary to ensure that variances will not jeopardize attainment and maintenance or

1 ambient air quality standards. *See* 42 U.S.C. § 7410(i). A Title V permit should not contain
2 provisions that allow a facility to obtain a waiver from federally enforceable requirements which
3 could result in an increase in emissions without EPA review.

4 Finally, including the variance provisions into the permit is highly confusing to the
5 regulated community and the public. While the facility's Title V permit states that it is not
6 immune from federal enforcement (Section I.H.3.), the variance orders from the Hearing Board
7 do not include such a statement. The facility therefore often has no idea that the variance it has
8 obtained does not grant the facility any immunity from federal citizen or EPA enforcement. The
9 Administrator should object to the issuance of any Title V permit containing references to state
10 variance relief.

11 **III. Failure to Include a Statement of Basis as Required by 40 C.F.R. § 70.7(a)(5).**

12 The Administrator must object to the Title V permit issued to Los Medanos Energy
13 Center because it lacks a statement of basis as required by 40 C.F.R. § 70.7(a)(5). According to
14 § 70.7(a)(5), every Title V permit must be accompanied by a "statement that sets forth the legal
15 and factual basis for the draft permit conditions." Without a statement of basis, it is virtually
16 impossible for the public to evaluate BAAQMD's periodic monitoring requirements (or lack
17 thereof), among other things, and to prepare effective comments during the 30-day public
18 comment period.

19 According to U.S. EPA Region 10 the statement of basis should include:

- 20 (1) Detailed descriptions of the facility, emission units and control devices, and
21 manufacturing processes including identifying information like serial numbers that may
22 not be appropriate for inclusion in the enforceable permit;
- 23 (2) Justification for streamlining of any applicable requirements including a detailed
24 comparison of stringency;
- 25 (3) Explanations for actions including documentation of compliance with one time NSPS
26 requirements (e.g. initial source test requirements) and emission caps; and
- 27 (4) Basis for periodic monitoring, including appropriate calculations, especially when
28 periodic monitoring is less stringent than would be expected.

1 See Elizabeth Waddell, Region 10 Permit Review, May 27, 1998 (“Region 10 Permit Review”),
2 at 4. BAAQMD has never provided information in any of its permits that would constitute a
3 statement of basis, and did not do so with the Los Medanos permit.

4 BAAQMD did not respond to OCE’s comment that the permit should include a statement
5 of basis. See Exhibit A, p. 2 & 3. Instead BAAQMD’s response states that the permit is
6 adequate. See Exhibit B, BAAQMD’s Response to Comments, p. 2 & 4. BAAQMD has
7 previously stated that it does not prepare separate statements of basis for Title V permits because
8 the statement of basis is “contained in each permit within the citations of the applicable
9 requirements, and where the citations are not sufficient, such as citations of the case-by-case
10 permit conditions, by adding the basis for the case-by-case permit conditions.” See September 4,
11 2001 Letter to Kathryn Lewis & Lynne Saxton from William de Boisblanc, Director of Permit
12 Services, BAAQMD, p. 1 attached as Exhibit C.

13 The purpose of the statement is to enable citizens and EPA to effectively review the
14 permit by providing information regarding decisions made by the permitting authority in drafting
15 the permit. The Los Medanos permit fails to include this section, or one similar to it, and instead
16 sets forth in a general manner the governing law while leaving out altogether the factual basis for
17 the draft permit conditions.² No reasonable member of the public could conclude that
18 information provided in the Los Medanos permit suffices as the statement of basis.

19 The purpose of a Title V permit is to reduce violations of air pollution laws and improve
20 enforcement of those laws. 57 Fed. Reg. 32250, 32251 (July 21, 1992). Title V permits do this
21 by recording in one document all of the air pollution control requirements that apply to the
22 source. *Id.* This gives members of the public, regulators, and the source a clear picture of what
23 the facility is required to do to keep its air pollution under the legal limits. Without a statement
24 of basis the public is left with no rationale for the District’s permit conditions and is unable to

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26 ² For example, in Tables VII-A through E, the permit does not require monitoring for opacity, filterable
27 particulate, or PM limits. Also, for source S-2, BAAQMD proposes no SO₂ monitoring. 40 C.F.R. § 70.6(a)(3)
28 requires “monitoring sufficient to yield reliable data from the relevant time periods that are representative of the
source’s compliance” and § 70.6(c)(1) requires all Title V permits to contain “testing, monitoring, reporting, and
recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.” Without

1 adequately review the permit. In the absence of a statement of basis, the final permit for Los
2 Medanos Energy Center violates Part 70 requirements. The Administrator must object to the
3 issuance of the final permit and insist that BAAQMD draft a new permit that includes a
4 statement of basis.

5 **IV. Inadequate Permit Conditions**

6 According to the Clean Air Act, conditions in a Title V permit must be enforceable. *See*
7 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(b); 57 Fed. Reg. at 32268. Therefore a permit condition
8 must make it possible to determine whether the facility is complying with the condition.

9 Currently, some of the permit conditions in the Los Medanos permit remain unenforceable.

10 Condition 22 appears to defer the development of a number of permit conditions related
11 to transient, non-steady state conditions to a time after approval of the Title V permit. For
12 example, Condition 22(f) states that the operator shall submit a plan to BAAQMD and EPA to
13 minimize emissions during transient, non-steady state conditions within 15 months from the end
14 of the commissioning period. Condition 22 is presently unenforceable and must be deleted from
15 the permit. A reasonable set of conditions should be defined which can be amended once the
16 facility collects better data. When the facility collects the data it should request an administrative
17 permit amendment from BAAQMD, as is allowed by 40 C.F.R. § 70.7(d).

18 The Administrator must object to the issuance of the final Title V permit for Los
19 Medanos Energy Center until it complies with the requirements of Part 70.

20 **V. BAAQMD Failed to Incorporate Agreed to Changes Into the Permit.**

21 Some of the changes OCE requested during the public comment period and agreed to by
22 the BAAQMD were not incorporated into the final permit. Petitioners requested that
23 recordkeeping be required for SIP Regulation 4 (Air Pollution Episode Plan) in Table III on page
24 eleven of the permit to ensure that the stipulated abatement strategies are implemented during air
25 pollution episodes. BAAQMD agreed to make the requested changes. *See* Exhibit B, Response
26 to Comments, p. 2, *Generally Applicable and Source-Specific Applicable Requirements*, item 2.

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28 further explanation in the form of a statement of basis, the public has no information as to why monitoring is not required.

1 BAAQMD, however, failed to do so. Petitioners also requested that NOx be included in the list
2 of regulated emissions under Condition 36. BAAQMD responded to the request by stating that
3 “Condition 36 applies to regulated air pollutants that are not monitored with CEMs. Since the
4 NOx emissions are measured directly with a CEM, a calculation is not necessary. The reference
5 to Condition 23 refers to the POC emission limit only. To clarify this, letters have been added to
6 the start-up emission limits of condition 23 and the reference in condition 36 has been revised
7 accordingly.” The final permit does not appear to contain the changes to which BAAQMD
8 committed. The Administrator should object to the issuance of the final Title V permit for Los
9 Medanos Energy Center until the agreed upon changes are incorporated into the permit.

10 **VI. Conclusion**

11 In light of the numerous and significant violations of 40 C.F.R. Part 70 identified in this
12 petition, the Administrator must object to the Title V permit for the Los Medanos Energy Center.

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14 Dated: October 9, 2001

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16 Respectfully submitted,

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