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September 22, 2003

VIA MESSENGER

Barry Young
Greg Solomon
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA

Re: Bay Area Refinery Title V Permits – Conoco Phillips, Chevron, and
Martinez Refining Company

Dear Mr. Young and Mr. Solomon:

We are in receipt of the Bay Area Air Quality Management District's (District) Consolidated Responses to Comments on Refinery Title V Permits ("Responses"). On behalf of, the International Brotherhood of Boilermakers Local 549, Plumbers & Steamfitters Local 342, the International Brotherhood of Electrical Workers Local 302, Laborers Local Union 324, and Insulators Local Union 16, we submit this letter in addition to comments we already submitted on the draft Title V permits for the Chevron refinery in Richmond, the Shell Martinez refinery in Martinez and the ConocoPhillips refinery in Rodeo (collectively "the refineries").

I. The Public Process for the Permits Is Fundamentally Flawed

The purpose of the comment period on the draft permit is to allow the public to submit their objections to the permits with sufficient specificity to aid the EPA in making a determination on the adequacy of those documents. Clean Air Act § 505(b). Here, the District gave the public barely over a month to comment on the proposed permits for five refineries. Given the scope of the permits, each containing hundreds of pages of technical information, one month is simply not a sufficient amount of time to review and comment meaningfully on the documents. To compound the inadequate public process due to unreasonable time constraints, the content of the District's Responses deviate significantly from the text of the permits.

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As one small example, the Responses fail to mention that many of the numerical values for the throughput thresholds are different from the ones contained in the first draft of the permits, instead misleading the public to believe that the only change made to those values was their regulatory significance (from substantive “limits” to “reporting thresholds”). From our brief review of the text of the permits, it is clear that reliance on the District’s Responses does not provide a complete or accurate record of the changes that the District has made to permits. Another example of a major change that is not mentioned in the Responses is the removal of a significant number of sources in Chevron’s permit from the grandfathered unit list, to another list for non-grandfathered sources without NSR thresholds. A list of those sources is attached as Exhibit D. Neither the Responses nor the face of the permit offer an explanation for these changes from the first draft of the permit. The District provides no explanation, legal or otherwise, for the redesignation of the attached list of units. Yet another example of inconsistency between the Responses and the proposed permit is that the Table appearing on page 47 of the Responses, which claims to provide the corrected throughput values for four Boilers at the Shell Martinez refinery does not appear in the proposed permit from the refinery. Although the proposed permit strikes out the old values, it does not incorporate the new values provided in the Responses. The permits continue to suffer from massive errors, inconsistencies and incoherencies. These issues must be addressed before meaningful public comment can occur. The inconsistencies between the actual Title V permits and the District’s responses to comments serve only to confuse and mislead the public, thereby undermining the fundamental purpose of the statutory public review and comment period.

} COMMENT
1

The District’s attempt to respond to hundreds of pages of comments from multiple commenters for all five refineries in one convoluted document is ill-conceived and unworkable. More importantly, the responses fail as a tool for meaningful public participation. It is impossible to discern which responses are directed to which commenter. The District often employs sweeping generalizations that ostensibly address “categories” of comments, and ignore some comments altogether. The Responses in many cases are not coherent. In order to be useful to the public and the EPA, the Responses must be separated out to address each comment letter for each refinery separately.

} COMMENT
2

The degree of modifications that the District has included in the drafts necessitates a second review of the full texts of the permits themselves and an additional 60 days in which such review could reasonably take place.

} COMMENT
3

Furthermore, the permits contain numerous inconsistencies in their tables, making it impossible for the public to determine which numerical values are the correct ones. Finally, it has come to our attention that the District will make further substantive changes to its Responses to Comments and the text of the permits themselves. Responses at 1; See September 15, 2003 letter from ChevronTexaco to Mr. Jack Broadbent, p.3, attached as Exhibit A (“based on discussions Chevron has had with District staff, Chevron understands that the District will attempt to resolve many of the significant permit concerns raised in Chevron’s September 2002 Comments and in Chevron’s subsequent discussions with the District and its soon-to-be submitted comments on the Revised Draft Permit. For these reasons, it is reasonable to assume that Chevron’s final Title V permit will contain numerous substantive changes from the Revised Draft Permit.”). Because both the public and the EPA have been deprived of the opportunity to comment on the version of the permits that the District plans to approve, the public comment process is inadequate on its face.

} COMMENT
4

As Chevron correctly points out in its letter to EPA requesting that the EPA object to its permit (attached as Exhibit A), because the version of the permit forwarded to the EPA is not the version that the District “proposes to issue,” the EPA does not have “all the information necessary to review adequately the proposed permit.” 40 CFR § 70.2; 40 CFR § 70.8(c)(3). Due to these legal deficiencies in the public process, we reserve the right to supplement the issues we have raised against the permits during the petition process to the EPA. The introduction of previously-unidentifiable issues in response to the District’s final versions of the permits is appropriate under Clean Air Act § 505(b)(2) and 40 CFR §70.8(d). Both of those provisions speak to the introduction of issues for the first time in a petition to EPA when a petitioner can demonstrate that “it was impracticable within [the public comment] period,” or “when the grounds for such objection arose after such period.” Because we were deprived of access to the final versions of the permits, it is not only impractical, but impossible for us to comment on any new issues they may raise.

With respect to the issues we raised in our original comments on the draft permits, the District’s Responses fail to resolve many, if not most of those concerns. For this reason, we resubmit the comments that we provided the District nearly a year ago. Copies of those comments are submitted concurrently with this letter.

} COMMENT
5

The District’s Responses raise some new issues that warrant discussion. By this letter, we would like to take the opportunity to address some of those new

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issues, again urging the District to correct and recirculate the Permits before giving final approval.

II. Federal Law Requires the District to Issue Correct and Complete Permits, Including the Resolution of Past Preconstruction Review Issues

The District claims that the Title V permit is “not supposed to be a stand-alone document.” Responses at 19. According to caselaw on the subject, the District is incorrect. “Title V permits do not impose additional requirements on sources but, to facilitate compliance, consolidate all applicable requirements in a single document. *See* 42 U.S.C. § 7661a(a); *see also* *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996) (Title V permit ‘is a source-specific bible for [CAA] compliance’), *cert. denied*, 519 U.S. 1090, 136 L. Ed. 2d 711, 117 S. Ct. 764 (1997).” *Public Citizen, Inc. v. United States EPA*, 2003 U.S. App. LEXIS 16735. August 15, 2003, Filed.

Under federal regulations, the purpose of the federal Clean Air Act’s Title V program is provide “comprehensive State air quality permitting systems” and to create a permit that “assures compliance by the source with all applicable requirements.” 40 C.F.R. 70.1(a); 40 C.F.R. 70.1(b). Title V’s requirements are not advisory, but mandatory in nature. “These regulations define the *minimum elements required by the Act* for State operating standards and procedures by which the Administrator will approve, oversee, and withdraw approval of State operating permit programs.” *Id.* (emphasis added). As part of the Title V permitting process, the District must develop a “schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance.” 40 C.F.R. § 70.5(c)(8)(iii)(C). In light of this “minimum requirement” under Title V, our original comments provided numerous examples of Clean Air Act noncompliance by ConocoPhillips, Chevron and Martinez Refining Company (“the refineries”) and requested that the District acknowledge these instances of non-compliance and develop a schedule of compliance in the respective permits for the refineries. *See* our comments on the refineries’ draft permits attached.

One disputed category of “applicable requirements” in the Title V process includes documents related to requirements contained in the District’s preconstruction permitting rules. The District claims that “EPA does not view preconstruction permitting rules as applicable requirements under Title V and Part 70.” This claim is belied by a 1999 decision by EPA which states as follows:

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The merits of federal preconstruction review permits can be ripe for consideration in a timely petition to object under title V. See Order *In re Shintech Inc.*, at 3 n.2 (Sept. 10, 1997). Under 40 CFR § 70.1(b), “all sources subject to Title V must have a permit to operate that assures compliance by the source with applicable requirements.” Applicable requirements are defined in 40 CFR § 70.2 to include: “(1) any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under Title I of the [Clean Air] Act . . .” *Such applicable requirements include the requirement to obtain preconstruction permits that comply with preconstruction review requirements under the Act, EPA regulations, and State Implementation Plans (“SIPs”).* See generally CAA § § 110(a)(2)(C), 160-169, &173; 40 CFR §§ 51.160-66 & 52.21. Thus, the applicable requirements of the PABCO Permit include the requirement to obtain a preconstruction permit that complies with requirements under the Act, EPA regulations, and the Nevada SIP.

In the Matter of Pacific Coast Building Products, Order Responding to Petitioner’s Request That the Administrator Object to the Issuance of a State Operating Permit, p.7 (December 10, 1999) (emphasis added). As we discussed in our original comments, the EPA has expressed this view in correspondence on this issue. The agency found that applicable requirements include “the requirement to obtain preconstruction permits that comply with applicable preconstruction review requirements under the Act, EPA regulations, and SIP’s.”¹ In that same letter the agency made clear that it “expects companies to rectify past noncompliance as it is discovered. Companies remain subject to enforcement actions for any past noncompliance with requirements to obtain a permit or to meet air pollution control obligations.”²

The District’s own Title V program, as approved by the EPA, supports this view. Under District Reg. 2-6-202 the term “Applicable Requirements” includes “air 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,

¹ Letter from John Seitz, EPA, to Mr. Robert Hodanbosi *et al.*, Enclosure A, p. 2 (May 20, 1999).

² Memorandum for Kathie A. Stein and Lydia N. Wegman, EPA, re Initial Operating Permit Application Compliance Certification Policy (July 3, 1995) (emphasis added).

including all applicable requirements as defined in 40 CFR 70.2.” Under the District’s own definition, approved by the EPA on December 7, 2001 (66 FR 63503), the agency’s preconstruction permitting rules are “applicable requirements” under Title V of the Clean Air Act. Thus, we reiterate the need for a schedule of compliance for all preconstruction permitting rules with which the refineries are not currently in compliance. The District’s later statement that “[r]e-examination of the construction and permitting history for sources is generally beyond the scope of Title V review,” (Responses, p.12) similarly lacks any legal authority or statutory support.

Rather than correct the compliance deficiencies we raised in our original comments, the District’s Responses stated that “there is *no advantage* to holding the Title V permit in abeyance while compliance issues are investigated and resolved.” Response at 6 (emphasis added). Although it is unfortunate that the District fails to appreciate the “advantage” gained by observing federal law, this alone does not save the agency from its mandate. As explained above, resolution of those compliance issues is a basic condition of permit adequacy under the Clean Air Act. 40 C.F.R. § 70.5(c)(8)(iii)(C). We therefore reiterate the need to resolve all areas of noncompliance we identified in our original comments on the refineries’ Title V permits.

} COMMENT
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III. Failure to Provide the Public Access to All Relevant Information Is A Per Se Violation of Title V

In response to our comment related to the unavailability of all relevant documents, the District admits that it did not provide all documents that are relevant to its permitting decision. Response at 8 (“the District was able to produce less than half of its total refinery permitting files during the public comment period”). The agency mentions our specific citation to the Code of Federal Regulations requiring the agency to grant public access to all relevant documents, yet claims that our “comments cite no authority for the proposition that the public review process is flawed if the public is not provided access to all relevant information in the District’s files.” District Responses at 7.

To be clear, under EPA’s Title V regulations and under the specific regulation we cited in our original set of comments, the District must provide the public access with “copies of the permit draft, the application, and *all relevant supporting materials, . . .*, and *all other materials available to the permitting authority that are relevant to the permit decision.*” 40 C.F.R. § 70.7(h)(2) (emphasis added). The

District dismisses the plain language of this regulation by stating “though the idea of public reviewer as informed as District staff is worthy as a general goal, it is highly impractical. Because it is highly impractical, it could not have been the intent of . . . EPA in promulgating the Part 80 regulations.” Responses at 7. Of course, the District may not ignore the plain language of federal law on the basis of it being inconvenient or impractical. While public accountability may be impractical at times, it is the hallmark of an open government. By its statements, it appears that the District believes that it was the intent of the federal government to hide the District’s decisionmaking process from public scrutiny.³ Of course, this cannot be the case. The intent of the EPA is best understood by the plain language of its regulation, not by the District’s self-serving interpretation of that language. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). The District’s opinion that it is not required to provide the public with all relevant information related to Title V permits is incorrect.

Faced with a similar problem, the Second Circuit Court of Appeals recently held that when there is a demonstration of noncompliance with Title V regulations, the “Administrator *shall* issue an objection.” Clean Air Act § 505(b)(2)(emphasis added). In that case, the petitioner’s claim that the public notice procedure was flawed formed an adequate basis to force the EPA to object to the permit. *NYPIRG v. EPA*, 321 F.3d 316, 332-333 (2003).

The District’s claims of excessive burden do not save the agency from its obligation to provide the public with all relevant documents under either Title V or the California Public Records Act. The District argues that its ability to provide all the relevant documents to the public is primarily constrained by “1) the quantity of records requested and the difficulty involved in identifying and gathering those records, and 2) the PRA’s prohibition on releasing ‘trade secret’ information.” Responses at 7. Neither the Clean Air Act, nor the Public Records Act allows the District to refuse to provide the relevant public records based on the quantity of documents responsive to the request. The District provides no authority to support its contrary position. The District’s second claimed constraint covers only a fraction of the relevant documents. A list of specific documents responsive to commentors’ Public Records Act requests that the District withheld under the “trade secret” exemption of the Act must be published to support the District’s response.

} COMMENT
7

³ Later on in the document, the District admits that it relies on the “personal knowledge of the District permit division staff and inspection staff” in its permitting decisions. Responses at 36.
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Finally, the District attempts to set forth a completely novel standard for determining the scope of public records it considers relevant under Title V. The Responses abandon Title V's requirement that all relevant documents be provided to the public in favor of a standard that simply calls for the provision of "sufficient information to support decision on issues that are legitimately raised in the Title V process." Responses at 8. This manufactured standard has absolutely no basis in law, regulation, or ordinance and is too ambiguous to have any practical significance. For example, the District does not specify what constitutes "sufficient information" nor does it specify those the specific issues that are "legitimately raised in the Title V process." *Id.* Furthermore, the District's self-serving standard conveniently allows the District to avoid the disclosure of information that does not support its decision on issues raised by the Title V process. The only issue the District specifically mentions as being beyond the scope of the Title V permitting process is the inapplicability of preconstruction review permits. As explained above, this argument is belied by the District's own Regulation 2-6 and by federal law.

IV. The District May Not Issue Permits Without Complete Applications

In response to our comments challenging the sufficiency of the refineries' permit applications the District does not deny the validity of those comments, but instead claims that "[i]nadequacies in the permit application do not necessarily invalidate the permit. The requirement to submit a complete application is an obligation on the facility. . . Whether the facility has met its obligation to submit a complete application does not predetermine whether the District can meet its obligation to issue an accurate permit. . . . The District could spend a vast amount of time and effort working with the facility to perfect its application, but this would be an exceedingly inefficient allocation of resources, particularly when the legal risk for application incompleteness fall [sic] upon the facility, not the District." Responses at 9.

The District's legal analysis is simply incorrect as a matter of law. Under the Title V implementing regulations, the District may not issue a permit that is not supported by a complete application. "A permit . . . may be issued *only* if all of the following conditions have been met; (i) the permitting authority has received a complete application for a permit." 40 C.F.R. § 70.7(a)(1)(i) (emphasis added).

The District is attempting to make the same "harmless error" argument rejected by the Second Circuit in the *NYPIRG v. EPA* case, cited above. There, the

EPA argued that the failure to provide the statutorily-required public notice was “harmless error” because the environmental group in that case still had the opportunity to request a public hearing, thereby keeping the ultimate result unaltered. Here, the District is arguing that an incomplete application does not alter the outcome of its permitting decision because they are ostensibly independent from one another meaning that the sufficiency of the permit does not depend on the submission of a complete application. Putting aside the contradiction created by the District’s later statement that it bases the applicability of requirements to individual units based, in part, on “information in the Title V application” (Responses at 36), the claimed disconnect between application completeness and permit adequacy does not save the agency from strict compliance with Title V’s implementing regulations. As the Second Circuit explained in response to a similar argument by the EPA, “this argument blurs the important distinction between the discretionary part of the statute (whether the petition demonstrates non-compliance) with the non-discretionary part (if such a demonstration is made, objection must follow).” *NYPIRG v. EPA*, 321 F.3d at 333. Just as EPA has a non-discretionary duty to object to a permit that does not comply with Title V, the District has a non-discretionary duty to refrain from issuing a Title V permit that is not supported by a complete application. 40 C.F.R. § 70.7(a)(1)(i).

} COMMENT
8

The District further argues that the refineries are in compliance with the District’s certification requirements since they have submitted “recertifications” since their 1996 applications. Responses at 11. Although it appears that each of the three refineries did submit a document entitled “recertification,” those “recertifications” make no reference to the accuracy of the information contained their original applications or any supplemental information submitted by the refineries. Those “recertifications” merely state that the facility “is in compliance with the terms and conditions of the draft Title V permit.” See recertifications attached to this letter collectively as “Exhibit B.” Contrary to the District’s claim to the contrary, these “recertifications” do not satisfy its own rule requiring resubmittal of compliance certifications connected to the facility’s Title V *application*, not the permit. District Regulation 2-6-426. More importantly, those “recertifications” do not satisfy Part 70’s requirement that any “application form [and] report . . . contain certification by a responsible official of truth, accuracy, and completeness” as a condition of application completeness. 40 CFR § 70.5(d). Our review of those claimed “recertifications” reveals no reference to the accuracy of the refineries applications at all. Lastly, we have seen no evidence that the refineries have submitted recertifications for year 2003 in violation of District Reg. 2-6-426. These violations must be cured before the permits are finalized.

} COMMENT
9

V. The District Admits that the Permits Do Not Incorporate The Correct HAP Standard

The Responses admit that under BAAQMD Rule 2-6-210, the significance thresholds for Hazardous Air Pollutants (HAPs) is 400 pounds per day, but that the permits incorrectly lists the significance threshold for those pollutants at 1000 pounds per day. Responses at 9. As a result of this mistake, the District failed to require the listing of all significant sources of HAPs in the permits. The Responses fail to provide an explanation for this inconsistency and further fail to correct this mistake. This issue must be resolved in new drafts of the permits that are recirculated for public review.

COMMENT
10

VI. The District May Not Issue Permits Based On Uncertified Information from the Refineries

Under the implementing regulations for Title V, applicants must certify the accuracy of the information contained in their applications. 40 C.F.R. § 70.5(d). In its Responses, the District does not deny that there is uncertified information in the refineries' application, but instead dismisses the problem by stating that "[t]he legal risk for a failure to submit an accurate certification falls upon the facility, not upon the District." Responses at 10. The District's response is incorrect. As explained above, federal law prohibits the District from issuing permits that are incomplete. 40 C.F.R. § 70.7(a)(1)(i). An uncertified application is incomplete, making the District's permitting decision improper, as a matter of law. The District's next statement that "the District's responsibility is to draft an accurate permit using any information available to it" (Responses at 10) shows a lack of concern with the accuracy of the information underlying its permitting decision. It also indicates that the agency finds itself justified in the use of "any information available to it" in the development of permit conditions for the refineries regardless of the veracity of that information, and regardless of the quality of information required by federal law. Needless to say, these statements are incongruent with both the letter and spirit of Title V's regulatory scheme. Federal law requires the District to base its permits on specific highly reliable information. The District has simply disregarded this mandate, and instead based its permits on less reliable "any information available to it." As a result, the District has undermined the adequacy of the entire permit.

COMMENT
10a

VII. District Regulations Do Not Take Precedence Over Federal Regulations

On pages 10 and 11 of its Responses, the District repeatedly claims that applications for Title V permits “must comply with requirements of Regulation 2-6, not Part 70” of the Code of Federal Regulations. In so stating, the District summarily dismisses at least 6 different comments related to the sufficiency of the refineries’ applications. Of course, pursuant to the Supremacy Clause of the United States Constitution the District may not elevate its own regulations to a status above that of federal law. To the extent that District Regulation 2-6 has been approved by the EPA, it has federal significance. This does not mean, however, that compliance with the EPA-approved version of Regulation 2-6 absolves the District from non-compliance with EPA’s Title V implementing regulations. In fact, the EPA issued an opinion addressing this very issue in 1999 which makes clear that the District must comply with all applicable requirements, not merely its own EPA-approved regulations. Under EPA’s published decision, the District’s refusal to comply with Part 70 of the CFR is grounds for EPA’s objection to the permits.

COMPLIANCE
10a

Under 40 CFR §§ 70.2 and 70.6 as well as the approved Part 70 permit program . . . all provisions of the Clark County portion of the Nevada SIP are applicable requirements with which the Part 70 permit must assure compliance. However, Petitioner is incorrect when he alleges that requirements adopted locally by CCHD are included in the Part 70 permit in place of SIP requirements. . . .

White Paper 2 sets forth the Agency’s view that multiple applicable requirements may be streamlined into a single new permit term (or set of terms) that will assure compliance with all of the requirements. The legal basis for such streamlining relies on section 504(a) of the Act and 40 CFR § 70.6(a), which require that title V permits contain emission limits and standards and other terms as needed to assure compliance with applicable requirements, including the requirements of the applicable implementation plan. See 42 U.S.C. § 7661c(a); 40 CFR § 70.6(a).

In the Matter of Pacific Coast Building Products, Order Responding to Petitioner’s Request That the Administrator Object to the Issuance of a State Operating Permit, p.5 (December 10, 1999). Although the District does not claim that the provisions of Part 70 are inconsistent with its own regulations, if any potential inconsistency

exists, then the District must harmonize the requirements of both provisions, to assure compliance with all applicable requirements. *Pauley v. BethEnergy Mines*, 501 U.S. 680, 706 (1991) (“An interpretation that harmonizes an agency's regulations with their authorizing statute is presumptively reasonable,”)

VIII. Investigation and Disclosure Refineries' Compliance Status Is A Critical Element of the Title V Permitting Process

Rather than respond individually to our specific examples of the refineries' non-compliance with applicable requirements, the District offers a sweeping dismissal of these issues by claiming that the purpose of the Title V program is not to address issues of past and existing noncompliance, but to provide “an effective means of ascertaining when violations have occurred.” Responses at 15. In so stating, the District boldly defies the plain language of Part 70 which requires a “compliance plan for all part 70 sources that contains all the following; (i) a description of the compliance status of the source with respect to all applicable requirements” as part of a facility's application. 40 CFR § 70.5(c)(8)(i) (emphasis added). Part 70 further requires “a schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance. . . . Any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.” 40 CFR § 70.5(c)(8)(i)(C). In short, a legally adequate permit requires the District to investigate the compliance history of the refineries and to actually resolve areas of noncompliance in the permit, rather than merely provide “an effective means of ascertaining when violations have occurred.” Responses at 15.

COMMENT
10 b

The Districts further attempts to skirt the plain language of Part 70 by promoting the novel theory that “denial of the Title V permit due to compliance history would be reserved for those *extreme* situations of non-compliance, but would not be appropriate where instances of non-compliance are sporadic and can be addressed through the exercise of enforcement authorities.” Responses at 15 (emphasis added). This standard for permit denial finds no basis in law. In fact, it contradicts the plain language of Part 70 which invalidates a permit that sanctions noncompliance with all applicable requirements, as explained above. The District must resolve each example of noncompliance that we raised in our original comments on the refineries' draft permits.

COMMENT
11

The District further attempts to skirt its obligations under Part 70 by stating that its permits can assure only “reasonable intermittent compliance” with the

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

The District chastises commenter's reliance on the dictionary definition of "intermittent" as a means to "attribute a position to the District" that is not consistent with the District's view on the issue. As explained above, the distinction is not merely semantic, but legal. Regardless of the District's view of the meaning of the term "assure compliance with applicable limits", it is clear that the attempt to qualify the mandate with words such as "reasonable" and "intermittent" are aimed at blurring the effect of the plain language of Part 70 and at avoiding the requisite investigation into the refineries' compliance history. Such liberties are not supported by traditional canons of statutory interpretation.

IX. Emissions Inventory Data is Highly Relevant to the Issue of Compliance History

In response to our comments that find noncompliance history based on exceedances of the refineries' reported emissions inventories, the District claims that "[b]ecause the emissions inventory functions as a macro tool the District does not subject emissions inventory figures to analysis sufficiently rigorous to ensure credibility relative to compliance with applicable requirements." Responses at 16. Yet, the District utilizes emissions inventory estimates for purposes of establishing exemptions from refineries' emissions limits. The District must take a consistent position. If emissions inventory data is not sufficiently accurate for purposes of Title V permitting, then it cannot be included in the refineries' permit applications and may not be used for establishing any permit conditions, including exemptions. This is consistent with the District's written findings regarding the use of emissions inventory data.

comment 12

The requirement to include emission calculations for a source may be satisfied by the submission of emission inventory calculations provided by the District, based on throughput data from the most recent annual renewal and calculated using APCO approved emission factors. *If*

accurate emission inventory calculations for a source are not available from the District, the facility must provide the calculations and explain any assumptions regarding emission factors and abatement factors. . . . The emission calculations included in the permit application (whether those supplied by the District or calculated independently by the facility) must be certified by the responsible official as complete, accurate, and true.

BAAQMD Manual of Procedures, Volume II, Part 3, p.3-7,3-8 (May 2, 2001) (emphasis added).

X. The District Must Require a Compliance Schedule For Odor-Related Violations At the ConocoPhillips Refinery and Illegal Releases of Hydrocarbons at Martinez Refining Company

In response to our comment that the District did not provide a schedule of compliance with odor-related violations from the ConocoPhillips refinery culminating into orders of abatement, the District offers the following nonsensical response: "The order of abatement does not constitute a compliance plan, because it does not authorize violations of the underlying applicable requirements . . . In other words, the order does not impose new requirements." Responses at 17. Regardless of whether the order imposes new requirements, the title V permit must include a schedule of compliance for the violations that underlie that order. 40 CFR § 70.5(c)(8)(i)(C). Our original comment on this issue still stands.

} COMMENT
13

Similarly, with respect to our comments regarding releases of catalyst dust and other hydrocarbons from Martinez Manufacturing, the District improperly dismisses our comments as "too vague to respond to" in an attempt to avoid establishing a compliance schedule for these areas of noncompliance. Responses at 18. Our comments on this issue also still stand.

} COMMENT
14

XI. NSR Violations Must Be Addressed Before the District Issues Final Permits

In response to our specific comments pointing to the refineries' NSR violations, the District again refutes the use of emissions inventory data as an accurate basis from which to determine noncompliance with NSR requirements. As explained in Section IX above, emissions inventory data must either be corrected in the refineries' applications or accurate data must be offered in its place. The

} COMMENT
15

District further claims “investigation of all possible NSR violations is not a required component of issuance of a Title V permit.” Again as mentioned in our original comments, and as discussed above in Section I, faulty preconstruction review permits and past failures to enforce against noncompliance with pollution control requirements must be corrected in the Title V permit.

} COMMENT
16

Our original comments provided specific evidence of NSR violations, including references to the District’s “administrative increases” in the firing rates of specific units at the facilities without requiring NSR compliance. Although these specific sources were discussed in our original comments on the draft permit for ConocoPhillips, attached is additional evidence that the firing rates of Sources # 4330-4339 and 4349 were allowed “an administrative increase in firing rates” by the District without being subject NSR, despite significant increases in these rates. For example, the District allowed ConocoPhillips’ Source #4338 a 63% “administrative increase” in its firing rate without NSR compliance. See Exhibit C at 1.

Not only did the District allow for these “administrative increases,” but made a specific agreement with ConocoPhillips to not pursue any potential NSR violations with regard to this information. See Exhibit C at 1. This nonenforcement agreement directly refutes the District’s claim that “[i]f further investigation results in discovery of violations, enforcement action will follow. . . .” Responses at 22. For Sources # 4330-4339 and 4349 at the ConocoPhillips refinery, the District has no intention of enforcing against the resulting NSR violations, as evidenced by the agency’s explicit agreement with the refinery. In any case, these known NSR violations must be corrected in the proposed permit.

} COMMENT
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XII. “Thresholds” That Merely Trigger Reporting Requirements Do Not Constitute Permit Conditions that Assure Compliance with NSR or CEQA

As mentioned above, under the Title V program the District must create a permit that “assures compliance by the source with all applicable requirements.” 40 C.F.R. 70.1(a); 40 C.F.R. 70.1(b). As we mentioned in our original comments, the District offers “thresholds” for grandfathered units that are baseless. Oddly, the language in the proposed permit is even more ambiguous than the language contained in the draft permit. In the draft permit, the throughput levels were meant to be presumptive limits, thereby providing at least some level of predictability with respect to enforcement action. Still, as we explained in our original comments, the unjustified increases in throughput levels trigger both NSR

} COMMENT
8

and CEQA review, since they carry the potential for significant emission increases from the refineries. Because the District failed to comply with CEQA review and failed to impose NSR requirements associated with the inflated throughput levels, those comments still stand.

A. Failure to Perform Environmental Review of the Proposed Permits Violates CEQA

As explained by air quality expert Dr. Phyllis Fox, Ph.D., P.E., in her attached comments, the throughput thresholds contained in the proposed permits could allow operational and physical modifications to the refineries that would cause significant adverse impacts to air quality. Because the refineries' proposed Title V permits authorize operational and physical changes at the refineries, it is not exempt from CEQA review. CEQA Guidelines § 15281. Because, as explained below, those operational and physical changes could result in significant increases in emissions according to District significance thresholds, the District must prepare an EIR studying the environmental impacts of proposed approval of each Title V permit for each refinery. Full environmental review must also study the cumulative impacts of potential emissions increases from all the refineries being issued Title V permits.

COMMENT
19
COMMENT
20

The District has provided no evidence of CEQA compliance whatsoever, let alone provide the public notice of such compliance. As explained below, the District may not escape the CEQA mandate of public disclosure and environmental review.

1. Approval of the Refineries' Title V Permits is a "Project" under CEQA

CEQA defines a "project" broadly to include any "activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment and which [includes] . . . [a]n activity that involves the issuance to a person of a lease, *permit*, license, certificate, or other entitlement for use by one or more public agencies." Public Resources Code § 21065 (emphasis added). Under CEQA, issuance of a permit is an "approval" triggering CEQA. *Miller v. City of Hermosa* (1993)13 Cal.App.4th 1118,1142-1143. Because the District's Title V process for the refineries includes the grant of a "permit" that "may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment." Thus, the action is a "project" under CEQA.

Finally, the District's approval of the project is a "discretionary," not a "ministerial" action. CEQA defines "discretionary actions" to be "situations where a governmental agency can use its judgment in deciding whether and how to carry out or approve a project." CEQA Guidelines §15002(i). The different conditions and redlined changes in the proposed permits demonstrate the use of agency discretion in the Title V permitting process. Such conditions are the hallmark of a discretionary action, and thus an action that is governed by CEQA.

2. The Current Project is Not Exempt from CEQA

Because the current matter is a "project" subject to CEQA, the City must assess whether the project is exempt from CEQA. CEQA Guidelines § 15061 ("Once a lead agency has determined that an activity is a project subject to CEQA, a lead agency shall determine whether the project is exempt from CEQA"). The only types of exemptions recognized by CEQA for projects that may cause a significant effect on the environment are those created by the California legislature (by statute) and those created by the California Resources Agency (categorical exemption), the agency responsible for issuing the CEQA Guidelines. CEQA Guidelines § 15061. Although the CEQA Guidelines create a general exemption for Title V permits, the Guidelines make clear that the general exemption does not apply when the Title V permit "authorizes a physical or operational change to a source or facility." CEQA Guidelines § 15281.

As explained by Dr. Fox in her attached comments (Exhibit E), the inflated throughput "thresholds" contained in the Title V permits authorize physical and/or operational changes to the refineries. Dr. Fox lists the following potential operational or physical changes to tanks at the refinery: the throughput of tanks could be increased by operating existing pumps at capacity; modifying existing pumps to increase their capacity; using spare pumps on a routine basis; installing new low-emission pumps that would not otherwise trigger permit modification; or replacing an existing tank with a larger tank that is within the new permit limits. The need for an increase in tank throughput could arise from importing feedstocks from outside of the refinery, debottlenecking upstream processing units, increasing the crude throughput of the refinery, or adding a new processing unit, among others.

Dr. Fox further lists the following physical or operational changes to fired sources at the refineries: The throughput of these units could be increased by increasing the crude throughput to the refinery; changing the chemical composition

of refinery feedstock, e.g., using a higher sulfur crude; changing the fuel composition, e.g., changing the fuel gas blend, or switching from refinery fuel gas to natural gas or vice versa; debottlenecking upstream units; replacing an existing unit with a new, functionally-equivalent unit with a higher firing rate; and modifying the burners or adding additional burners in fired sources, among others.

Finally, categorical exemptions may not be used where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. CEQA Guidelines § 15300.2(c). *Also see, Azusa Land Reclamation Company, Inc. v. Main San Gabriel Basin Watermaster*, (1997) 52 Cal.App.4th 1165. As explained below, the inflated throughput levels contained in the permit create a fair argument of significant, adverse impact to air quality.

Thus, the general exemption for Title V permits does not apply here.

a. The Exemption was Improper Pursuant to CEQA §21084 Because the Facilities are Located on Property Contaminated with Hazardous Waste.

Under CEQA §21084(c), no project shall be exempted from CEQA if it is located on a site which is included on any list compiled pursuant to Government Code §65962.5. The refinery is located on land which is included on at least two lists compiled pursuant to the Government Code: §65962.5(c)(1)(list of underground storage tanks for which an unauthorized release report is filed pursuant to Health & Safety Code §25295) and (3) (list of all cleanup or abatement orders issued after January 1, 1986 pursuant to Water Code §13304 concerning discharge of wastes that are hazardous materials. See also McQueen, 202 Cal.App.3d 1136 (exemption improper because hazardous waste on site).

Here, the State Water Resources Control Board lists the refinery properties as having releases from underground storage tanks located on the properties. Moreover, the California Regional Water Quality Control Board, has issued clean up and abatement orders to the refineries. The District has improperly attempted to “use limited exemptions contained in CEQA as a means to subvert rules regulating the protection of the environment.” *Azuza Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 116, citing Castaic Lake 41 Cal.App.4th at 1268.

3. In Violation of CEQA, the District Failed to Prepare and Initial Study for the Project

Because the proposed Title V permits are a “project” that is not exempt from CEQA, the District must prepare an initial study for the project before it may approve the project. “Following preliminary review, the lead agency shall conduct an initial study to determine if the project may have a significant effect on the environment.” CEQA Guidelines § 15063. Here, the District has not prepared an initial study for the Title V permits, in violation of CEQA. As such, the District may not grant final Title V permits with the current throughput limits.] - COMMENT 21

4. There is a “Fair Argument” that the Refineries’ Title V Permits Will Cause Significant Adverse Impacts to Air Quality, Triggering CEQA’s EIR Requirement

When considering a CEQA exemption, an impact is considered significant if there is a “fair argument” demonstrating a “reasonable possibility” that the project may have a significant environmental impact. *Azusa*, 52 Cal.App.4th at 1198.⁴ Under the “fair argument” standard, an effect is considered significant even if there is contrary evidence, so long as there is some substantial evidence in the record indicating a significant impact. *Id.* at 1202. “Where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper.” *Wildlife Alive*, 18 Cal.3d at 205-206. CEQA “requires the agency to be *certain* that there is *no possibility* the project may cause significant environmental impacts.” *Davidon Homes*, 54 Cal.App.4th at 117 (original emphasis).

Under CEQA §§ 21080(d) and 21082.2(d), and Title 14, Div. 6, Chap. 3 Cal.Code Regs. (“CEQA Guidelines”) § 15064(f)(1), an EIR is required for any project whenever substantial evidence in the record supports a fair argument that significant impacts may result. Public Resources Code section 21151 “creates a *low threshold* requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether

⁴ *Castaic Lake*, 41 Cal.App.4th at 1264065 (applying “fair argument” standard to categorical exemption); *Dunn-Edwards v. BAAQMD*, 9 Cal.App.4th at 656 (same); *Western States Petroleum Assn. v. Super. Ct.*, 9 Cal.4th 559 (1995) (same).
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any such review is warranted.” *Sierra Club v. Sonoma* (6 Cal. App. 4th at 1316-1317 (emphasis added)).

An agency may be obligated to prepare an EIR even when the agency has substantial evidence that no significant impacts will occur. The important factor in determining whether to prepare an EIR is whether it can be *fairly argued* that significant impacts *may* occur. *Dunn-Edwards*, 9 Cal.App.4th at 653. In other words, once a fair argument of possible significant impact is established, contradictory evidence does not excuse an agency from CEQA’s EIR requirement. *Stanislaus Audubon v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Friends of “B” Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1001-1003.

a. Expert Opinion is Substantial Evidence of a Fair Argument

CEQA was amended in 1993 to provide that, as a matter of law, “expert opinion” constitutes “substantial evidence” creating a fair argument of a significant environmental impact. CEQA § 21080(e)(1); CEQA Guidelines § 15064(f)(5) (“substantial evidence shall include...expert opinion supported by facts”). *City of Redlands v. San Bernardino*, (2002) 96 Cal. App. 4th 398, 410-411. Thus, if a qualified expert concludes that there is a fair argument that a project may have a significant adverse environmental impact, *then an EIR must be prepared*, even if the agency’s own experts reach a contrary conclusion. *Id.*

b. Expert Testimony Demonstrates That There Is A Fair Argument that The Refineries’ Title V Permits May Have An Adverse Environmental Impact, Triggering CEQA’s EIR Requirement.

As explained by air quality expert Dr. Phyllis Fox in her attached comments, refinery throughput is directly related to emissions. Because the Title V permits allow significant increases in throughput as compared to historical and current actual levels, the potential emissions from the refineries could increase significantly, well above BAAQMD significance thresholds. Dr. Fox’s attached declaration demonstrates much more than a fair argument that issuance of the refineries’ Title V permits may have significant adverse environmental impacts, both from individual refineries, and when considered together.

B. Ambiguous “Reporting Thresholds” Do Not Assure Compliance With Applicable Requirements

In its Responses, the District now takes the position that those throughput levels for grandfathered sources will not act as presumptive limits, but merely “reporting thresholds” for the refineries. This position is confused by the later statement that “they act as a presumptive indicator that the equipment has undergone an operational change.” Responses at 31. The confusion is then compounded by the District’s subsequent attempt to explain the inconsistencies between equipment capacity and throughput limits by stating that “equipment capacity in Table II is descriptive, while the throughput limit has regulatory significance.” Responses at p.53. The same confusion appears on the face of the proposed permits. The permits offer an inconsistent view of the throughput values for grandfathered sources at times characterizes the numbers as presumptive indicators. Indeed if the equipment capacity numbers are not accurate, they should be corrected. Furthermore, as explained below throughput levels triggering NSR must be explicit limits based on historical throughput data, not mere “reporting thresholds” which do not assure compliance with NSR. These ambiguities relating to the purpose of the throughput thresholds for grandfathered sources must be eliminated from the proposed permits.

COMMENT
22

If the thresholds merely trigger reporting requirements, they do not create a presumptive violation of the permit, but require the refinery to simply report the event to the District for potential investigation. Though the District characterizes this change as “minor” (Responses at 28), in actuality it renders the throughput thresholds utterly useless. The District’s failure to articulate specific throughput limits in the proposed permit on its face violates the Clean Air Act’s mandate that each Title V permit “shall include enforceable emission limitations and standards . . .” CAA § 504(a). It also violates the Title V implementing regulations. 40 CFR § 70.6 (a)(1) (each title v permit must include “emission limitations and standards, include those operational requirements and limitations that assure compliance with all applicable requirements . . .”). A “reporting threshold” for throughput levels in grandfathered sources does not constitute an emission limitation or standard nor an operational requirement and limitation against which NSR violations can be accurately gauged, in violation of the Clean Air Act.

The District further argues that it is not required to set throughput limits as claimed justification for inflated throughput “thresholds.” Responses at 28. This turns the purpose of Title V on its head. Rather than articulate a consolidated

expression of a facility's capacity and emission limitations that offer enforcement predictability, the District is using the Title V process as a vehicle to excuse the refineries from the future application of NSR. Aside from ignoring past noncompliance with NSR, through the present permitting process, the District is making explicit its intention to turn a blind eye to future noncompliance with NSR. This is inconsistent with the spirit and the letter of the Clean Air Act.

The District claims that the "throughput limits being established for grandfathered sources will be a useful tool that enhance compliance with NSR." Responses at 30. Yet, the same document states that that "just as exceedance of these thresholds is not presumed to be a modification, neither is it presumed that a modification has not occurred at throughput amount lower than the thresholds" thereby admitting that under the best-case scenario, these thresholds have no regulatory significance from the perspective of emission limits or operational standards. Responses at 28. Under the worst-case scenario, they allow significant increases of emissions without NSR or CEQA compliance. In no scenario do these thresholds actually "assure compliance" with NSR or CEQA or anything else, as required by Title V. These thresholds must be corrected to be consistent with historical throughput rates. } COMMENT 23

For other units, the District has not provided a threshold at all claiming that "[w]here the District lacked enough information to be confident that it could establish a useful threshold, it has left the matter to a future permitting action, and has indicated that the issue is 'under investigation.'" Responses at 31. Indeed, if, as the District claims, these thresholds are meant to assure compliance with NSR then the proposed permits should have correct thresholds for all grandfathered units. } COMMENT 24

XIII. "Impracticality" Does Not Excuse the District From Failure to Perform Its Nondiscretionary Duty to Include All Applicable Requirements

In response to our comments that the District has a non-discretionary duty under Title V to include all applicable requirements in the proposed permits, the agency stated that it "is impractical to expect the Title V permit to be completely up-to-date at any time." Responses at 30.

Impracticality does not save the agency from performing non-discretionary duties contained in the Clean Air Act. Under Part 70, the "the permitting authority

shall include in the permit *all* applicable requirements for *all* relevant emissions units” 40 CFR § 70.3(c)(1) (emphasis added). As the Second Circuit stated in *NYPIRG v. EPA, supra*, the District must perform all non-discretionary duties mandated by the statute – regardless of whether such duties are inconvenient or difficult.

Failure to Identify Whether Each Source is Meeting All Applicable Requirements Is a Per Se Violation of Part 70

In their Responses the District claims that the Title V permit “functions well as a compendium of ongoing requirements but not as a document for recording compliance status at a particular moment in time.” Responses at 50. In fact, forming a record of the compliance status at a particular moment in time (the time of permit issuance) is the exact purpose of the Title V permit and the schedule of compliance contained therein. “Each permit issued under this part shall include the following elements: (1) Emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements *at the time of permit issuance*.” 40 CFR § 70.6 (a)(1) (emphasis added). We reiterate the need to identify whether each source is meeting all applicable requirements in the proposed permits.

} comment
25

The District May Not Rely on Arbitrary Standards to Determine Monitoring Requirements

In response to our comments related to the inadequacy of monitoring, the District insists on its standard of “likelihood of violation” in determining whether additional monitoring is necessary. The District also indicates that it used a “balancing test to determine the appropriate frequency for periodic testing” that includes the unusual danger and difficulty of testing coupled with the low probability of an otherwise undetected problem. These standards find no basis in law and cannot be used to justify the District’s failure to include sufficient monitoring to assure compliance with applicable requirements, as discussed in our original comments of the draft permit. Those monitoring-based comments still stand.

Furthermore, monitoring must be sufficient to determine whether the refinery is in continuous or intermittent compliance with its permit conditions. See 40 C.F.R. § 70.6(c)(5)(iii)(C); *id.* § 71.6(c)(5)(iii)(C); see also CAA § 114(a)(3)(D), 42 U.S.C. § 7414 (a)(3)(D). The proposed permits do not provide adequate monitoring

to determine the refineries' compliance status. For example, in the proposed permit for the Shell Martinez refinery, monitoring conditions for tank S-4310 fail to show continuous compliance because there is no evidence to support the District's claim that "vapor pressure can be expected to remain reasonably constant as long as the material stored remains the same." Responses at 42.

COMMENT
26

XVI. The District Cannot Arbitrarily Delete Or Ignore Applicable Requirements.

As explained above, the Title V permit must assure compliance with all applicable requirements. Although Martinez Refining Company's Condition #4041, Part 7 and BAAQMD Condition #4041, Part 9 are existing permit conditions for the refinery, the District arbitrarily removed each of them from the proposed permit by claiming that "there was no legal authority for its basis." Responses at 41. They are enforceable, existing conditions in existing District-issued permits for the refinery. The bald claim that they find no "legal authority" is belied by the District's own permitting action that created those conditions.

COMMENT
27

Next, the Responses claim that RCRA permit conditions are "outside of the scope of Title V" without any further explanation. Our original comments on the failure to incorporate the lower emission limits on CO Boilers created by a RCRA permit for Shell Martinez stands. Those lower limits are "applicable requirements" for purposes of Title V.

COMMENT
28

A similar argument is advanced by the District on p.42 in response to our comments that the draft permit does not incorporate the elements of the Consent Decree between the Shell Martinez refinery and US EPA. The District claims that it cannot enforce the terms of that Consent Decree and therefore refuses to include it in the permit. Again, those terms are "applicable requirements" under federal law and therefore belong in the proposed permit. The same response applies to all instances where the District cites "lack of authority," "lack of enforceability," and any other substantially similar excuse for failure to incorporate all applicable requirements in the refineries' permits.

COMMENT
29
COMMENT
30

With respect to our comments on BAAQMD Condition #11313, Part 2, the District responds to our comments by the blanket statement that "these underlying problems have been resolved." Responses at 41. This is an insufficient response. The underlying problems detailed in our comments cannot be resolved without a

COMMENT
31

physical modification of the facility. The District provides no evidence of such a modification. Our comment therefore still stands.

With respect to our comment on the maximum firing rate for S4021, the District claims that it will impose source tests for NOx emissions if the owner/operator increases firing rates above those listed in its permit condition. Responses at 48. Here, the District fails to impose monitoring of other pollutants, aside from NOx that would also be emitted in the event of such a deviation. The potential increase in other pollutants must be addressed.

COMMENT
32

Throughout its responses, the District cites to the “lack of numerical limits” to justify its failure to include permit conditions raised by our original comments. Contrary to the District’s interpretation of the term, “applicable requirements” for purposes of Title V are not simply numerical limits. As mentioned above, under the Clean Air Act, the permit “shall include enforceable emission limitations and standards” CAA § 504(a). The Title V implementing regulations also contain a much more expansive view of applicable requirements. 40 CFR § 70.6 (a)(1) (each Title V permit must include “emission limitations and standards, include those operational requirements and limitations that assure compliance with all applicable requirements”). In short, each instance where the District cites “lack of numerical limits” to avoid including permit conditions constitutes a violation of Title V.

COMMENT
33

XVII. Permit Shields Are Invalid

The end of each permit lists permit shields for the refineries that subsume District requirements into the federal requirements. In numerous instances, the subsumed requirements are substantially different from those included in the proposed permits. Because the Title V permit must assure compliance with all applicable requirements (both state and federal), the District may not subsume District requirements that are not satisfied by compliance with federal regulations. *In the Matter of Pacific Coast Building Products*, Order Responding to Petitioner’s Request That the Administrator Object to the Issuance of a State Operating Permit, p.5 (December 10, 1999). (“White Paper 2 sets forth the Agency’s view that multiple applicable requirements may be streamlined into a single new permit term (or set of terms) that will assure compliance with *all* of the requirements.”) The permits shields are therefore invalid and must be removed from all the permits.

COMMENT
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XVIII. Conclusion.

The District must correct the errors in the Title V Permit and re-circulate it for public review. Please contact us with any questions concerning these comments.

Sincerely,

Daniel L. Cardozo
Richard T. Drury
Suma Peesapati

SP:bh

cc: Ed Pike, EPA Region 9
Tom Baca, International Brotherhood of Boilermakers Local 549
Larry Blevins, Plumbers & Steamfitters Local 342
Greg Feere, Contra Costa Building and Construction Trades Council
Fred Fields, International Brotherhood of Boilermakers Local 549
Mike Hernandez, Plumbers & Steamfitters Local 342
Gene May, Laborers Local Union 324
Randy Le Moine, Laborers Local Union 324
Dale Peterson, International Brotherhood of Electrical Workers Local 302
Steve Steele, Insulators Local Union 16
Mike Yarbrough, International Brotherhood of Electrical Workers Local 302

Response to AB comments (9/22/03)

The District has prepared the following responses to the comments contained in this letter.

Each comment consists of 1) a suggestion for action or change, and 2) the argument, if any, supporting the suggestion.

The comments identified by the District have been numbered. Refer to the attached copy of the original comment letter for the comment numbers.

	Response
1.	The argument supporting a suggested change does not provide sufficient information or analysis to support the change. No change has been made to the permit.
2.	The argument supporting a suggested change is factually incorrect. No change has been made to the permit. The format for the District's response to comments is similar to that employed by EPA in its rulemakings, and has proven useful both the public and EPA.
3.	The argument supporting a suggested change is incorrect as a matter of law. No change has been made to the permit. The legal basis for the suggestion is incorrect: first, no argument is provided to support the claim that review of the full permit text is required; second, there is no statutory basis for a claim that more than 30 days is necessary for permit review.
4.	The argument supporting a suggested change is factually incorrect. No change has been made to the permit. The suggestion is based on the following incorrect assumptions: both the public and EPA have been provided an opportunity to review the version of the permits that the District plans to approve, after consideration of comment. The commenter's reliance on Chevron's letter for its understanding of the District's intentions is misplaced.
5.	The argument supporting a suggested change does not provide sufficient information or analysis to support the change. No change has been made to the permit. All comments submitted earlier have been addressed.
6.	The suggested change concerns an issue beyond the scope of the revisions made to the earlier draft, and is therefore untimely. No change has been made to the permit. The District has reviewed the comment, and does not consider it to be correct. Detailed analysis has not, however, been prepared because the District has focused on responding to timely comments. See Consolidated Responses to Comments on Refinery Title V Permits (July 25, 1993) Section 3C.
7.	The argument supporting a suggested change does not provide sufficient information or analysis to support the change. No change has been made to the permit. The comment does not provide a single example of a relevant document available to the District that was not provided in response to a records request, nor does it provide any indication of how the permit's validity is compromised by the unspecified failure.
8.	The argument supporting a suggested change is incorrect as a matter of law. No change has been made to the permit. See Consolidated Responses to Comments on Refinery Title V Permits (July 25, 1993) Section 4.
9.	The argument supporting a suggested change is factually incorrect. No change has been made to the permit. All recertifications required under 2-6-426 have been submitted.
10.	The argument supporting a suggested change does not provide sufficient information or analysis to support the change. No change has been made to the permit. The comment did not identify any sources that should have been included, but were not.
11.	The argument supporting a suggested change is factually incorrect. No change has been made to the permit. No examples of current or ongoing noncompliance were raised in previous comments. See Consolidated Responses to Comments on Refinery Title V Permits (July 25, 1993) Section 3C.
12.	The argument supporting a suggested change is incorrect as a matter of law. No change has been made to the permit.
13.	The argument supporting a suggested change is incorrect as a matter of law. No change has been made to the permit. For sources that are in compliance when the permits are issued, the requirement for a schedule of compliance is satisfied by the statement that the source will continue to comply that is contained in Section V.
14.	Our reply still stands. The comment is too vague to respond to.
15.	The argument supporting a suggested change is incorrect as a matter of law. No change has been made to the permit. The accuracy or lack thereof of the emission inventory is not a bar to issuance of a valid permit.

Response to AB comments (9/22/03)

16.	The argument supporting a suggested change is incorrect as a matter of law. No change has been made to the permit. See Consolidated Responses to Comments on Refinery Title V Permits (July 25, 1993) Section 3D.
7.	The argument incorrectly names Conoco Phillips. The comment should be directed at the Chevron permit. The argument supporting a suggested change is incorrect as a matter of fact. No change has been made to the permit. There is no agreement between the District and any of the refineries that would preclude prosecution of NSR violations. Furthermore, the comment's characterization of the revised firing rates as "known NSR violations" is incorrect. At best, they are "suspected" NSR violations. Further investigation is needed to determine whether the higher firing rates are the result of illegal physical modifications or changes in method of operation. That investigation has not yet been completed.
18.	The argument supporting a suggested change is incorrect as a matter of fact. No change has been made to the permit. The throughput levels for grandfathered sources are not limits, and therefore neither permit or prohibit a change in throughput. NSR is triggered by a change in method of operation or physical modification, not a change in throughput. The throughput capacities included in the Title V permit represent design or demonstrated capacities. Where the demonstrated capacity is higher than the design, the District may undertake an investigation to determine whether a physical modification or change in operation has occurred. If that is the case, the District must then determine whether an emission increase has resulted. Only then may the District determine that an NSR violation has occurred. See Consolidated Responses to Comments on Refinery Title V Permits (July 25, 1993) Response 89.
19.	The argument supporting a suggested change is incorrect as a matter of fact. No change has been made to the permit. The throughput levels for grandfathered sources are not limits, and therefore neither permit or prohibit a change in throughput. See response to previous comment.
20.	The argument supporting a suggested change is incorrect as a matter of fact. No change has been made to the permit. The throughput levels for grandfathered sources are not limits, and therefore neither permit or prohibit a change in throughput. See response to previous comments.
21.	The argument supporting a suggested change is incorrect as a matter of fact. No change has been made to the permit. The throughput levels for grandfathered sources are not limits, and therefore neither permit or prohibit a change in throughput. See response to previous comments. Furthermore, the Title V permit is not a project, because it cannot "cause" either a direct or indirect physical change in the environment. Title V is, by its nature, a compilation of existing requirements and permits, and not a cause of new ones.
22.	The argument supporting a suggested change is incorrect as a matter of law. No change has been made to the permit. Because the throughput threshold are state-only requirements, they cannot be a bar to issuance of the Title V permit.
23.	The argument supporting a suggested change is incorrect as a matter of law. No change has been made to the permit. The comment is based on a speculative and inaccurate portrayal of the use of the thresholds and their evidentiary and regulatory status.
24.	The comment suggests a change that clarifies or improves the permit, but cannot be made at this time. No change has been made to the permit. The District will consider incorporating the suggestion at a later date.
25.	The District has determined that the facilities were in compliance with all applicable requirements as of the time that the draft permits were prepared. If violations exist at the time permits are to be issued, the District will take appropriate action.
26.	The argument supporting a suggested change does not provide sufficient information or analysis to support the change. No change has been made to the permit. The comment has not suggested an alternative monitoring condition, nor provided a basis for selecting it in preference to the one proposed by the District.
27.	The argument supporting a suggested change is incorrect as a matter of law. No change has been made to the permit. The District did not have the legal authority to impose the conditions in the first place. Administrative action taken without authority is void.
28.	The argument supporting a suggested change is incorrect as a matter of law. No change has been made to the permit. See Consolidated Responses to Comments on Refinery Title V Permits (July 25, 1993) Response 177.
29.	The argument supporting a suggested change is incorrect as a matter of law. No change has been made to the permit. See Consolidated Responses to Comments on Refinery Title V Permits (July 25,

Response to AB comments (9/22/03)

	1993) Response 178.
30.	See response to comment 27.
31.	The argument supporting a suggested change is incorrect as a matter of fact. No change has been made to the permit. The underlying odor problem has been resolved. Furthermore, the District lacks the authority to prohibit complying activities on the speculative ground that they may someday be non-complying.
32.	The argument supporting a suggested change is incorrect as a matter of law. No change has been made to the permit. The legal basis for the suggestion is incorrect: no legal basis for imposing the requested monitoring exists.
33.	The argument supporting a suggested change is incorrect as a matter of fact. No change has been made to the permit. The comment mischaracterizes the response to comments (one occurrence in a 75-page document is hardly "throughout its responses;" and the District did not state that the conditions were not applicable requirements). The permit conditions are included in the permit. See Consolidated Responses to Comments on Refinery Title V Permits (July 25, 1993) Response 192.
34.	The argument supporting a suggested change does not provide sufficient information or analysis to support the change. No change has been made to the permit. The comment did not specify the permit shields being questioned.