



ENVIRONMENTAL LAW AND JUSTICE CLINIC • SCHOOL OF LAW

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Re Comments Pursuant to BAAQMD Regulation 2-6-412 on Draft Major Facility Review Permits: Shell Martinez Refining-Facility #A0011, Tesoro Refining and Marketing Company-Facility #B2758 & #B2759, Valero Refining Co.-Facility #B2626, Chevron Products Company-Facility #A0010, ConocoPhillips – San Francisco Refinery-Facility #A0016

I. Introduction

We are writing to provide comments on behalf of Our Children’s Earth (“OCE”), Environment California (formerly “CALPIRG”), and Sierra Club-Redwood Chapter-Solano Group (commenting on the Benicia Refinery only) (hereinafter “Commenters”), pursuant to BAAQMD Regulation 2-6-412, on the Bay Area Air Quality Management District’s (“District”) draft Major Facility Review Permits for Shell Martinez Refining, Shell Oil Products, U.S., Facility #A0011 (“Martinez Refinery”), Tesoro Refining and Marketing Company, Facility #B2758 & #B2759 (“Avon Refinery”), Valero Refining Co. – California, Facility #B2626 (“Benicia Refinery”), Chevron Products Company, Facility #A0010 (“Chevron Refinery”), and ConocoPhillips – San Francisco Refinery, Facility #A0016 (“Rodeo Refinery”) (collectively “draft Refinery Permits”).

OCE originally submitted timely comments on the 2002 drafts of the five Refinery Permits on September 9, 2002 (“Benicia Refinery Comment Letter”), September 13, 2002 (“Martinez Refinery Comment Letter”), September 17, 2002 (“Avon Refinery Comment Letter”), September 27, 2002 (“Chevron Refinery Comment Letter”), and September 30, 2002 (“Rodeo Refinery Comment Letter”) (collectively “2002 Refinery Comments”). The Sierra Club-Redwood Chapter-Solano Group joined in the Benicia Refinery comment letter and the California Public Interest Research Group (now “Environment California”) joined in the Chevron Refinery and Rodeo Refinery Comment Letters.

We note that the District has made a number of changes to the draft Refinery Permits based upon comments already submitted. Nonetheless, the draft Refinery Permits cannot be finalized in their current form because of problems that remain with the content of the permit—including the inaccuracy of some of the applicable requirements, the lack of compliance schedules or plans,

and the failure to assure compliance with all applicable requirements—and the inadequacy of the review of the compliance status of the facilities. Commenters discuss these and other concerns in greater detail in the following sections.¹

II. General Permit Issues

A. Title V Overview

The five refineries at issue are subject to the operating permit requirements of Title V of the federal Clean Air Act (42 U.S.C. § 7661, *et seq.* – “Clean Air Act” or “Act”), the Code of Federal Regulations (40 C.F.R. Part 70), and BAAQMD Regulation 2, Rule 6 because they are major facilities as defined by BAAQMD Regulation 2-6-212. The refineries are major facilities because they have the “potential to emit,” as defined by BAAQMD Regulation 2-6-218, more than 100 tons per year of a regulated air pollutant. Major Facility Review Permits (“Title V permits”) must meet the requirements of 40 C.F.R. Part 70 and BAAQMD Regulation 2, Rule 6. As required by Part 70, a Title V permit must contain all applicable requirements, monitoring requirements, recordkeeping requirements, and reporting requirements.

Major facilities have a duty to apply for a Title V permit. *See* 40 C.F.R. § 70.5(a), BAAQMD Regulation 2-6-403. Section 70.5(c) of Part 70 requires a facility to submit specific information as a part of its Title V application and section 70.5(a)(2) requires the application be complete. Before a Title V permit is issued, section 70.7(a)(1) requires that the permitting authority receive a complete permit application. As a part of the application a facility has a duty to certify compliance with all applicable requirements and a duty to report any instances of non-compliance so that a schedule of compliance can be incorporated into the permit. *See* 40 C.F.R. § 70.5(c)(8)(i) & (ii)(C). The facility has a duty to supplement the application as new information or incorrect information comes to its attention. *See* 40 C.F.R. § 70.5(b). Each facility must respond to the District’s requests for information regarding its Title V permit application, including the compliance status of every source at the facility. *See* BAAQMD Reg. 2-6-407.3; *see also* 40 C.F.R. § 70.5(c)(8) & (9).

The District has a duty to take final action on a permit application submitted by a facility. *See* 40 C.F.R. § 70.7(a)(2); BAAQMD Reg. 2-6-410. The District has the authority to require information disclosure from the facility prior to deeming the application complete. *See* 40 C.F.R. § 70.5(a)(2), 70.7(a)(2) & (4); BAAQMD Regulation 2-6-408.3. The District also has the duty to assure that the facility is in compliance with the terms of the permit before it is issued. *See* 40 C.F.R. § 70.7(a)(1)(iv). All Title V permits must contain specific requirements for compliance certification. *See id.* § 70.6(c)(5). This includes information regarding whether compliance was “continuous” or “intermittent,” as well as “such other facts the [District] may require to determine the compliance status of the source.” *See id.* §§ 70.6(c)(5)(iii)(C) & (D).

Part 70 contains multiple requirements for assuring compliance with applicable requirements. *See, e.g., id.* at §§ 70.6(a)(1), 70.6(c). Specifically, a Title V permit may only be issued if “the conditions of the permit provide for compliance with all applicable requirements.” *See id.* at § 70.7(a)(1)(iv). “Applicable requirements” are defined as “[a]ir quality requirements with

¹ To the extent the District fails to address our 2002 Comments with revisions in permit terms or Statements of Basis, those comments stand.

which a facility must comply pursuant to the District's regulations, codes of California statutory law, and the federal Clean Air Act, including all applicable requirements as defined in 40 C.F.R. section 70.2." BAAQMD Regulation 2-6-202.

B. The Draft Refinery Permits Do Not Assure Compliance With All Applicable Requirements

To assure compliance with all applicable requirements, every Title V permit must comply with the provisions of 40 C.F.R. section 70.6(c). All Title V permits must contain a compliance plan consistent with 40 C.F.R. section 70.5(c)(8). *See* 40 C.F.R. § 70.6(c)(3). A compliance plan includes a certified statement of the current compliance status of each source, and a statement regarding the source's future ability to comply with all applicable requirements that will become effective during the permit term. *Id.* at § 70.5(c)(8)(iii); BAAQMD Reg. 2-6-409.10. For sources not in compliance at the time of permit issuance, the statement must include a schedule of compliance. *Id.* "Such a schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements." 40 C.F.R. § 70.5(c)(8)(iii)(C); *see also* CAA § 501(3), 42 U.S.C. § 7661(3).

Numerous public comments on the 2002 draft Refinery Permits, including our previous comments, raised issues regarding the refineries' compliance status and compliance assurance requirements. *See, e.g.*, Draft District Consolidated Response to Comments on Refinery Title V Permits, July 25, 2003 ("Dist. Resp. Comments"), § 3.B-C at 4-6; § 5 at 12, 14-16; § 6 at 22; § 6.V. at 50-52. Responding generally to comments raising concerns about potential non-compliance, the District has concluded that it is not obligated to address or resolve compliance issues in the Refinery Permits. *See id.* The District's approach, however, is inconsistent with the law.

In fact, for most sources at issue, the District failed to gather the requisite information and therefore has no factual basis upon which to conclude that a schedule of compliance or compliance plan is not necessary to assure the refineries' compliance with all applicable requirements. The District does not have sufficient information to make the requisite compliance determination and assurance of compliance. First, the District did not conduct a comprehensive review of each refinery's compliance record. Second, the District did not require the refineries to certify compliance with all applicable requirements and to identify non-compliance issues to be addressed in a schedule of compliance. Third, the District did not assess potential non-compliance issues raised by public commenters. Finally, the District relied on an improper standard to assure compliance with applicable requirements in the Title V permits. In addition, even in the instances where the District had sufficient information demonstrating a compliance problem, the District did not address them in the draft permits.

1 Compliance Records

There is no indication that the District conducted a thorough review of the refineries' compliance records since at least June 2002 when it issued the initial draft Refinery Permits in 2002. In fact, the "Compliance Record" made available to the public for each facility in September 2003 is merely the District's "Annual Compliance Report" for 2001, which does not include any

information about the refineries' compliance between January 2002 and September 2003.² Moreover, the revised Statements of Basis for the refineries continue to rely on outdated compliance data from 2001 to support the District's conclusion that a schedule of compliance is not required in any of the permits. *See* Engineering Evaluations and Statements of Basis for the Avon Refinery ("Avon SB") at 10, 47; Martinez Refinery ("Martinez SB") at 14, 77-78; Benicia Refinery ("Benicia SB") at 12, 35-36; Chevron Refinery ("Chevron SB") at 14-15, 40-41; and Rodeo Refinery ("Rodeo SB") at 12-13, 29.

The lack of availability of the Annual Compliance Reports for 2002 further supports our conclusion that the District failed to conduct a thorough review of the refineries' compliance records. Commenters were able to obtain the District's six-month update to the 2001 Annual Compliance Reports for the refineries for the period of January 1, 2002—June 30, 2002. However, in August 2003 when we requested the information for 2002 for our review of the draft Refinery Permits, the District informed us that it had not completed the reports for any of the refineries. Although it is possible that the District reviewed compliance information for 2002 without having compiled the reports, if indeed the District has done so, it is not apparent. Similarly, there is no six-month update for the first half of 2003, and again there is no indication that the District reviewed such information for the issuance of the draft Refinery Permits.

If the District had done a comprehensive compliance review, it would have had to address compliance issues in the permits. For example, even the limited review we have done of information we received in response to our August 2003 Public Records Act requests indicates regular compliance problems at the refineries. Remarkably, during the permit drafting process in 2002 and 2003, for which the District had numerous meetings with refinery officials, the District repeatedly issued multiple notices of violations ("NOVs")³ to all five refineries. In addition, the District has documented numerous episodes⁴ at all five refineries, including many involving excess emissions, as well as numerous complaints.⁵ However, the District has not addressed any

² *See e.g.* "Compliance Record" for Martinez Refinery (*available at* <http://www.baaqmd.gov/pmt/t5/Refinery2003/A0011-ann-reprt-2001.pdf>); Benicia Refinery (*available at* <http://www.baaqmd.gov/pmt/t5/Refinery2003/b2626compliance.pdf>); Avon Refinery (*available at* <http://www.baaqmd.gov/pmt/t5/Refinery2003/B2758Compliance.pdf>); Chevron Refinery (*available at* <http://www.baaqmd.gov/pmt/t5/Refinery2003/A0010compliance.pdf>); and Rodeo Refinery (*available at* <http://www.baaqmd.gov/pmt/t5/Refinery2003/A0016compliance.pdf>).

³ *Notices of Violation*—When a violation of a BAAQMD Regulation is documented at a facility, a Notice of Violation ("NOV") may be issued and the District may assess a penalty.

⁴ *Episodes*—The District defines episodes as reported equipment breakdowns, monitored emission excesses, inoperative monitors, and pressure relief valve venting. Episodes are investigated by District inspectors for compliance with applicable regulations, and may result in the issuance of an NOV.

⁵ *Complaints*—The District maintains a toll-free number for lodging public complaints of odors, smoke, fires, dust, fall-out, and other related air pollutants. Complaints can also be referred from the U.S. EPA and CARB. Complaints are categorized as either confirmed or unconfirmed. A confirmed complaint requires a District inspector, employee or the complainant to "be able to testify that a particular operation or combination of operations is the source of the air contaminant," which requires personal observation tracing the contaminant to the source or identification by sampling or other data analysis. BAAQMD

of these issues in the draft Refinery Permits. (The individual refineries' compliance records are discussed below.)

Because of the District's failure to review and address the relevant compliance records, the District has not adequately demonstrated the refineries' current compliance status and future ability to comply with all applicable requirements. Commenters agree that not every instance of non-compliance may warrant the imposition of a schedule of compliance, but rather may warrant additional monitoring, recordkeeping or reporting requirements, or the imposition of a civil penalty. *See* Dist. Resp. Comments, § 3.C at 5-6. However, in the process of issuing a Title V permit, the District must explain why a facility's historical non-compliance does not warrant the imposition of a compliance schedule.⁶ *See* 40 C.F.R. § 70.7(a)(5).

COMMENT

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COMMENTS

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In our 2002 Refinery Comments, we urged the District to impose additional operational and monitoring requirements that would result in a decrease in the yearly number of NOVs, episodes and complaints for each facility. This would require, for example, the implementation of new or modified maintenance programs for process, abatement, and monitoring equipment, additional reporting requirements, and the installation of improved monitoring and abatement devices. The District has not adequately characterized nor responded to our previous comments regarding the District's determination of compliance for the refineries. The District merely states that it disagrees with the public comments' "generalization" regarding the role of enforcement in Title V permitting, stating: "whether enforcement concerns translate into a need for additional terms for assuring compliance is a case-by-case determination." Dist. Resp. Comments § 6.VII at 53. Commenters could not agree more that such a case-by-case determination should have been made for the refineries, which have experienced a consistently high number of NOVs, episodes and complaints, compared to other major facilities in the Bay Area.

We noted in 2002 that this high level of non-compliance is unacceptable for neighboring communities, as evidenced in part by the number of official complaints by residents. The District, however, does not believe that issues regarding complaints should be addressed through the Title V process. *See* Dist. Resp. Comments § 5 at 15, § 6 at 20. This high level of non-compliance should, however, be addressed in the Title V permits.

The District has never imposed a single enforceable schedule of compliance in any of the approximately 75 Title V permits it has issued so far, regardless of a facility's non-compliance history, the number or nature of violations, or the location of the facility and its proximity to the neighboring community. In fact, it is unclear what factual circumstances, in the District's view,

Complaint Guidelines, Sec. 2.E at 7 (July 31, 2002) (*available at* http://www.baaqmd.gov/field/pnp/part_1/ii_complaint%20index.pdf).

⁶ We are astonished by the District's view that members of the public should have to explain to the District when and why a compliance schedule is warranted. *See* Dist. Resp. Comments, § 3.C at 5-6 ("The comments that are the most useful in this regard are those that explain specifically how a compliance schedule might be useful in correcting past violations or preventing future violations"). As the agency primarily responsible for Title V implementation, the District is in the best position to evaluate a facility's history of non-compliance, and to impose a compliance plan to address non-compliance issues.

would necessitate the imposition of a compliance plan, given its practice of ignoring multiple violations in the Title V permitting process or finding violations to be acceptable.⁷

Under the District's logic, a schedule of compliance has no place in a Title V permit, as the District would always rely on enforcement to bring about compliance. The District's approach to permitting while deferring enforcement of non-compliance is inconsistent with the mandate of the Act. A Title V permit must contain enforceable conditions sufficient to assure compliance with all applicable requirements, including, where warranted, an "a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements." 40 C.F.R. § 70.5(c)(8)(iii)(C).

We believe the ongoing compliance problems at the refineries, which we have gleaned in part from the 2002 and 2003 compliance records for each refinery, highlight the particular need for a case-specific compliance plan in each permit. The following summaries are based on our review of District records.⁸

i. Compliance Record—Martinez Refinery

The status of the Martinez Refinery's current compliance and future ability to comply with applicable requirements is at best unclear. The District classified the Martinez Refinery's compliance in 2001 as "marginal" citing 25 NOVs, a number of pressure release events, and a series of events that occurred in October 2001 that had "significant community impacts." See "Compliance Record 2001" for Martinez Refinery (*available at* <http://www.baaqmd.gov/pmt/t5/Refinery2003/A0011-ann-reprt-2001.pdf>).

Since 2001, however, the Martinez Refinery's compliance record appears to have worsened. According to District records, 40 NOVs were issued to the facility during 2002, up from 25 in 2001.⁹ Of the 40 NOVs in 2002, 4 were violations of sulfur dioxide emission limits (BAAQMD Reg. 9-1-307), 4 were violations of hydrogen sulfide emission limits (BAAQMD Reg 9-2-301),

⁷ The District has proposed and issued Title V permits without compliance plans to facilities with serious, recurring compliance problems. For example, according to District records, the relatively new, Calpine-owned Delta Energy Center (Facility #B2095) was issued at least 47 NOVs and had at least 52 Episodes between March 2002 and July 2003, the majority of which resulted in excess emissions. Yet the District recently proposed a significant revision to the facility's Title V permit without evaluating Delta's serious history of noncompliance. See BAAQMD Notice Inviting Public Comment (*available at* <http://www.baaqmd.gov/permit/t5/NOTICES/B2095pn8-4-2003.pdf>).

⁸ Commenters base the discussion of the refineries' compliance history on a review of District records. We reviewed the District's "Update Compliance Report," January 1, 2002 to June 30, 2002, for each refinery. See Update Compliance Reports attached as Exhibit A. Additionally, our analysis of the refineries' compliance records for the remainder of 2002 and part of 2003 is based on our review of District records provided in response to an August 2003 Public Records Act request. See Compliance Records attached as Exhibit B.

⁹ There were 22 NOVs reported in the Six-Month Update—Compliance Report for Martinez (January 2002 through June 30, 2002), and an additional 18 NOVs issued during 2002 according to District records, 5 of which from May 2002 and June 2002 were not included in the six month report.

and 2 were violations of permit conditions. Additionally, at least 8 NOVs have been issued to the refinery between January 11, 2003 and June 7, 2003. Notwithstanding these violations, the District determined there are no ongoing or recurring compliance problems that would require a schedule of compliance or additional monitoring or other requirements in the Title V permit. *See* Martinez SB at 77-78. The District does not in any way explain its rationale for concluding there are no compliance problems at the Martinez Refinery even though the number of NOVs has increased dramatically.

Although the number of episodes at the Martinez Refinery declined from 116 in 2001 to 77 in 2002, they continue to remain unacceptably high, with 29 episodes resulting in excess emissions, 39 of which were due to inoperative monitors, and 6 to equipment breakdowns. The District should explain whether the problems leading to the high number of episodes at the refinery have been addressed such that compliance can be assured.

The refinery was also the subject of 30 complaints in 2002. While this number is down from the 61 complaints in 2001, the majority of complaints continue to go unconfirmed. It is unclear why the District has such a low rate for confirming community complaints, particularly where they may be indicative of compliance problems at the facility. Of the 30 complaints in 2002, 26 were for “odor” and 1 was for “smoke.” So far in 2003, there have been at least 8 complaints, 7 for “odor” and 1 for “smoke.” Seven of these were confirmed, which appears to be an improvement, while one is pending. The District must review the causes for these complaints so that it can address the affected communities’ concerns, if appropriate, in a compliance plan.

Overall, the compliance record for the Martinez Refinery indicates the facility is still experiencing compliance problems that the District has not fully explained; nor has it explained how compliance with all applicable requirements can be assured, given the high number of problems at the refinery. For example, as to the 39 episodes of inoperative monitors, it is unclear why this occurred and if the problems have been fixed such that a compliance plan for assuring compliance is not necessary. Problems with monitors should be addressed because an inoperative monitor would not record exceedances that may occur, which may then conceal a more serious problem. Equipment breakdowns pose similar problems for excess emissions. A thorough review of these issues may lead the District to place additional monitoring requirements in the permit to assure that the number of excess emission episodes decline, and to insert a schedule of compliance into the permit to address the recurring and ongoing violation problems at the Martinez Refinery.

ii. Compliance Record—Avon Refinery

The status of the Avon Refinery’s current compliance and future ability to comply with applicable requirements is at best unclear. While the District classified the Avon Refinery’s compliance in 2001 as “good,” the District noted that the number of NOVs for 2001 was significantly higher than prior years at 17, and attributed some of these to maintenance performed at the end of the year. Although the District concludes in the Avon SB that there are no activities that have been identified as ongoing or recurring problems that would require a schedule of compliance, the District fails to discuss the refinery’s compliance record since 2001, which appears to have dramatically worsened. *See* Avon SB at 10, 47.

In 2002, the number of NOV's issued to the Avon Refinery nearly tripled, to 46. In 2003, NOV's have been issued to the refinery at a consistent rate, with at least 23 issued in the first half of the year. The types of violations clearly indicate there are factors other than the maintenance performed at the end of 2001 responsible for the facility's non-compliance. Of the 46 NOV's in 2002, at least two were permit condition violations, 5 were violations regarding equipment leaks of organic compounds (BAAQMD Reg. 8-18-301), one was a violation of emission control system requirements (BAAQMD Reg. 8-5-306), and one was a violation of NOx emission limits for CO boilers (BAAQMD Reg. 9-10-304). Of the 23 NOV's issued between January 14, 2003 and July 1, 2003, 5 were issued for permit condition violations, 6 were for violations of storage tank requirements for organic liquids (BAAQMD Regs. 8-5-303, 8-5-306, 8-5-307), 3 were for violations of NOx emissions limits (BAAQMD Regs. 9-10-301, 9-10-304), 2 were for violations of sulfur recovery emissions limits (BAAQMD Reg. 9-1-307), and 3 were for visible PM emissions and opacity limit violations (BAAQMD Regs. 6-301, 6-302).

Although the number of episodes at the facility is down from 76 in 2001, the number remains high. According to District records, the refinery experienced 48 episodes in 2002, 28 of which resulted in excess emissions, 11 due to inoperative monitors, 7 due to equipment breakdowns, and 2 related to pressure release valves. Additionally, the refinery experienced 24 episodes between January 8, 2003 and June 16, 2003, which indicates the same rate of episodes as in 2002. Given the high number of episodes at the refinery, the District should explain whether these issues have been addressed such that compliance can be assured.

Furthermore, the refinery was the subject of 28 complaints in 2002, 27 of which were for "odor" and one for "asbestos." Of the 28 complaints in 2002, only 8 were confirmed. Between January 15, 2003 and September 3, 2003 the District had already received 28 complaints regarding the Avon Refinery, 27 of which were for "odor." While 8 complaints were confirmed, 18 were unconfirmed and 2 are pending. The District must review the causes for these complaints so that it can address the affected communities' concerns, if appropriate, in a compliance plan.

Overall, the compliance record for the Avon Refinery indicates the facility is still experiencing compliance problems that the District has not fully explained; nor has it explained how compliance with all applicable requirements can be assured, given the high number of problems at the refinery. The concerns we have expressed for the Martinez Refinery apply here as well.

iii. Compliance Record—Benicia Refinery

The status of Benicia Refinery's current compliance and future ability to comply with all applicable requirements is at best unclear. The revised Benicia SB states that no problems have been identified that should be subject to a schedule of compliance of that would require the imposition of additional monitoring requirements to assure compliance. *See* Benicia SB at 35-36. However, the Benicia SB fails to discuss the refinery's compliance record since 2001, which appears to have dramatically worsened.

When compared to 2001, both the number of NOV's and the number of episodes at the refinery have increased dramatically. According to District records, the total number of NOV's issued to

the refinery in 2002 almost tripled to 27 from 10 NOV's in 2001.¹⁰ Six of the 2002 NOV's were for violations of permit conditions, with others ranged from emissions violations to leaks. Benicia's compliance record for the first eight months of 2003 indicates no real improvement. From January 2003 to July 2003, the refinery was issued at least 15 NOV's.

The number of episodes at the refinery increased to 59 in 2002 from 46 in 2001, doubling the number of episodes in 1999. Of the 59 episodes in 2002, 31 resulted in excess emissions, 23 were due to equipment breakdowns, and 5 were due to inoperative monitors. In 2003, the refinery has already experienced 16 episodes, 11 of which resulted in excess emissions, and 5 due to equipment breakdowns.

The number of complaints in 2002 remained constant at 34. However, between January 1, 2003 and August 27, 2003, there were at least 22 complaints filed, 16 for "odor," five for "smoke" and one for "other." Of the 22 complaints so far in 2003, only 6 were confirmed, 13 were unconfirmed, and 3 are pending. The District must review the causes for these complaints so that it can address the affected communities' concerns, if appropriate, in a compliance plan.

Overall, the compliance record for the Benicia Refinery indicates the facility is still experiencing compliance problems that the District has not fully explained; nor has it explained how compliance with all applicable requirements can be assured, given the high number of problems at the refinery. The concerns we have expressed for the Martinez Refinery apply here as well.

iv. Compliance Record—Chevron Refinery

The status of Chevron Refinery's current compliance and future ability to comply with all applicable requirements is at best unclear. Chevron was issued 53 NOV's in 2002, which is nearly triple the rate of 19 NOV's issued in 2001. Between January 9, 2003 and July 29, 2003, there were at least 15 NOV's issued to the refinery. These NOV's were for a variety of violations at the refinery, some of which appear to be repeated, recurring or ongoing violations.

In 2002, the refinery experienced 97 episodes, as compared to 105 in 2001. This number means the refinery still has an average of nearly two episodes per week. A significant number of the 2002 episodes resulted in excess emissions. Many of these emissions violations lasted several days, with the longest one lasting 41 days. For the first eight months of 2003, there were a total of 39 episodes all of which resulted in excess emissions. Again, many of these emissions violations lasted several days, with the longest one lasting 27 days.

Additionally, the refinery was the subject of 45 complaints in 2002, an increase from 2001 in which there were 34 complaints. Many of these complaints were unconfirmed. From January 3, 2003 until August 9, 2003 there were 35 complaints about the refinery, 26 of which were for "odor," one for "soot," 3 were for "smoke" and 5 were undefined. Again, the District must

¹⁰ There were 9 NOV's reported in the six-month "Update Compliance Report" for Benicia (January 1, 2002 through June 30, 2002), and an additional 18 NOV's were issued in 2002, according to District records. The following NOV's were not included in the updated compliance report, as they were issued in July or August of 2002: NOV#: A13184, A13188, A13185, A13186, A13190, A13189.

review the causes for these complaints so that it can address the affected communities' concerns, if appropriate, in a compliance plan.

Overall, the compliance record for the Chevron Refinery indicates the facility is still experiencing compliance problems that the District has not fully explained; nor has it explained how compliance with all applicable requirements can be assured, given the high number of problems at the refinery. The concerns we have expressed for the Martinez Refinery apply here as well.

v. Compliance Record—Rodeo Refinery

The status of the Rodeo Refinery's current compliance and future ability to comply with applicable requirements is at best unclear. The District has not evaluated the facility's compliance history for 2002 or 2003, which may indicate compliance problems at the refinery.

While 5 NOVs were issued to the refinery in 2001, Rodeo was issued 30 NOVs in 2002. Additionally, at least 9 NOVs have been issued so far in 2003. None of the NOVs from 2002 or 2003 have been explained in the revised Statement of Basis for Rodeo.

In addition, the number of episodes at the Rodeo Refinery nearly doubled between 2001 and 2002. Of the 15 episodes in 2002, 6 resulted in excess emissions, 6 were due to equipment breakdowns, 2 were due to inoperative monitors, and one was for a pressure release valve. The refinery has experienced at least 3 episodes in 2003 so far. Also, in 2001 the District received 39 complaints regarding the Rodeo Refinery, 37 of which were for "odor." In 2002, the facility was the subject of 38 complaints, 20 for "odor" and 15 for "dust."

Overall, the compliance record for the Rodeo Refinery indicates the facility may be experiencing compliance problems that the District has not fully explained; nor has it explained how compliance with all applicable requirements can be assured. The concerns we have expressed for the Martinez Refinery apply here as well.

2. Compliance Statement

Part 70 and BAAQMD Regulations require that an application for a Title V permit contain a compliance plan, which includes a statement of the compliance status of each source, and a statement regarding the source's future ability to comply with all applicable requirements that will become effective during the permit term. *See* 40 C.F.R. § 70.5(c)(8)(iii); BAAQMD Regulation 2-6-405.8.

The refineries' permit applications may have contained compliance statements when they were submitted in 1996, but the compliance statements and applications are now seven years old and out of date. In July 2003, each refinery submitted a "new certification of compliance," purportedly to comply with BAAQMD Regulation 2-6-426, which requires all applicants to

“submit a new certification of compliance on every anniversary of the [Title V] application date if the permit has not been issued.”¹¹

With the possible exception of the Chevron Refinery, the July 2003 letters from the refineries do not comply with Regulation 2-6-426 as they do not certify compliance with all applicable requirements. In fact, the refineries have stated they are unable to certify compliance with the terms and conditions of their draft Title V permits.¹² Some of these letters purport to certify compliance with outdated prior drafts of the permits, but do not certify compliance with currently proposed permit conditions. *See* letters for: Martinez Refinery (purports to certify compliance with June 15, 2002 draft permit); Benicia Refinery (purports to certify compliance with September 6, 2002 draft permit). The Avon Refinery purports to certify compliance with requirements as submitted in 1996 application and as updated. The letters from the Martinez, Avon and Rodeo Refineries each state they cannot certify compliance with any new emission limitations, standards, work practices or other new requirements and/or test methods that may be included in the Refinery Permits. “Potential compliance exceptions” are listed for Avon and Rodeo. *Id.*

Therefore, with the possible exception of Chevron, none of the refineries have submitted a sufficient certified statement of compliance as required by Part 70 and BAAQMD Regulations 2-6-426 and 2-6-405.8. Despite the inability to certify compliance with all applicable requirements, however, these refineries did not submit a compliance plan as required. *See* 40 C.F.R. § 70.5(c)(8)(iii)(C); BAAQMD Reg. 2-6-405.8.

3. Determination of Compliance

The District has no factual basis upon which to conclude that the refineries are currently in compliance, or that compliance with all applicable requirements can be assured by the permits. Instead of fulfilling its duty to issue Title V permits that assure compliance with applicable requirements, the District plans to issue the Refinery Permits, while deferring non-compliance issues to its enforcement division to address at some unspecified time in the future. *See* Dist. Resp. Comments, § 3.B-C at 4-6; § 5 at 12, 14-16; § 6 at 22; § 6.V at 50-52. With limited exceptions,¹³ the District takes the view that “the goal of ‘assuring compliance’ may be served by

¹¹ *See* July 10, 2003 letter from Valero Refining Company to William C. Norton, BAAQMD (Benicia); July 10, 2003 letter from Shell Oil Products US to Steve Hill, BAAQMD (Martinez); July 15, 2003 letter from Phillips 66 Company to Steve Hill, BAAQMD (Rodeo); July 17, 2003 letter from Chevron Products Company to Kelly Wee, BAAQMD (Chevron); July 25, 2003 letter from Tesoro Refining and Marketing Company to Steve Hill, BAAQMD (Avon). *See* letters attached as Exhibit C.

¹² Although the Refinery Permits contain the general statement of compliance as required by BAAQMD Regulation 2-6-409.10.1 and 2-6-409.10.2 (*see* Section V of the draft Refinery Permits), this is inconsistent with the refineries’ inability to certify compliance with all applicable requirements in the 2003 letters to the District.

¹³ While the District acknowledges a facility’s non-compliance with an applicable requirement is grounds for denial of a Title V permit, the District views permit denial as an option only for “extreme” or “rare instances of serious, ongoing compliance problems.” *See* Dist. Resp. Comments, § 3.B at 4; § 5 at 15.

resolving compliance issues through enforcement mechanisms and revising the Title V permit as needed at a later point in time.” See Dist. Resp. Comments, § 3.B at 4. This approach is inconsistent with Title V and Part 70. Compliance with all applicable requirements must be assured by the terms and conditions of a Title V permit when it is issued. See 40 C.F.R. § 70.7(a)(1)(iv). Outstanding compliance issues must be addressed in the Refinery Permits through a schedule of compliance. See 40 C.F.R. § 70.6(c)(3).

Citing both policy considerations and “legal constraints” on the District’s authority to impose a schedule of compliance, the District has refused to include a schedule of compliance in any of the Refinery Permits. See Dist. Resp. Comments, § 3.C at 4-6. The District claims its legal authority to impose a schedule of compliance is limited by evidentiary concerns.¹⁴ The District’s rationale is flawed, however, for several reasons.

First, the District has ample authority under Title V to access information to determine compliance at a facility.¹⁵ The District’s claim that it may lack sufficient factual evidence to investigate or pursue a potential enforcement action or to impose a schedule of compliance has no merit. Indeed, as the agency primarily responsible for implementing the Title V program, the District has broad authority and a duty to investigate potential violations before issuance of Title V permits, and to evaluate whether a schedule of compliance is required to assure compliance.

The District should have initially required the refineries to fully certify the compliance status of each source with “all applicable requirements” and to develop a compliance plan to resolve non-compliance issues. If the proper compliance certification procedure had been followed, the District could have then included appropriate compliance plans in the Refinery Permits as warranted. The refineries then would have been required to comply with the compliance plans, subject to the remedies provided under the Act for non-compliance. The District’s failure to compel the refineries—which may have the best information regarding their compliance status—to identify their non-compliance results in the District’s fundamental inability to determine and

¹⁴ The District states that “the factual support for imposing a schedule of compliance on a permit applicant would be similar to the factual support needed to prove a violation in an enforcement case.” See Dist. Resp. Comments, § 3.C at 5. Because “any attempt to impose a schedule of compliance could be appealed by the permittee,” the District believes it “must essentially be ready to prove the existence of a violation before it can impose a schedule of compliance.” *Id.*

¹⁵ For example, after an application is deemed complete, the District may request “additional information necessary to evaluate or take final action on the permit.” BAAQMD Reg. 2-6-408.3. Also, the District’s general regulations grant broad authority to require the submission of information from facility to determine the compliance of a source. See, e.g., BAAQMD Regs. 1-101, 1-440, 1-441.

Moreover, once a Title V permit has been issued, upon written request from the District, a facility must provide any information “to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with the permit,” including “confidential” information, 40 C.F.R. § 70.6(a)(6)(v). In addition, the District has authority to enter a facility and inspect equipment, practices or operations, to access and copy required records, and to monitor for the purpose of assuring compliance with the permit or applicable requirements. See 40 C.F.R. § 70.6(c).

assure compliance with all applicable requirements and to impose additional enforceable requirements in the Title V permits where necessary to assure compliance.

Second, the District has no factual basis for its determination of compliance for the refineries, as it failed to investigate well-documented concerns from Commenters regarding potential non-compliance. In our 2002 Refinery Comments we identified potential violations of New Source Review (“NSR”) requirements and permit conditions at three of the refinery facilities.¹⁶ The District has ignored these concerns and has stated in its draft response to comments that with regard to potential NSR violations it “takes the position that the preconstruction review rules themselves are not applicable requirements, for purposes of Title V” and therefore allegations of failure to comply with NSR requirements do not need to be addressed in the context of issuing a Title V permit. Dist. Response to Comments § 3.D at 6-7. However, the District’s position is not consistent with District Regulations or EPA precedent.

District regulations define “applicable requirements” as “[a]ir quality requirements with which a facility must comply pursuant to the District’s regulations, codes of California statutory law, and the federal Clean Air Act, including all applicable requirements as defined in 40 C.F.R. 70.2.” BAAQMD Regulation 2-6-202. Under the District’s definition all provisions of the Clean Air Act including the requirement to undergo NSR permitting are applicable requirements and should be included as “applicable requirements” in a Title V permit. Further, the EPA has determined that applicable requirements in Title V permits include the requirement to obtain a preconstruction review permit under the Act. *See* Order In re Pacific Coast Building Products, Inc., p. 7, (Dec. 10, 1999) (*available at* http://www.epa.gov/region7/programs/artd/air/title5/petitiondb/petitions/pacific_coast_decision1999.pdf). *See also*, May 20, 1999 letter from John Seitz, Office of Air Quality Planning and Standards, U.S. EPA to Robert Hodanbosi & Charles Lagges, STAPPA/ALAPCO, Enclosure A, p. 2, (*available at* <http://www.epa.gov/Region7/programs/artd/air/title5/t5memos/hodan7.pdf>).

Until the District assures that well-founded concerns about potential violations need not be addressed through a compliance plan, the permits fail to meet the requirements of Part 70 and District regulations.

COMMENT
3

Third, the District has used an improper standard for its determination that the Refinery Permit conditions assure compliance with applicable requirements, which is inconsistent with the law. In our 2002 Refinery Comments we challenged the District’s assurance of only “reasonable intermittent compliance” for the Martinez Refinery, as the plain language of the Title V regulations require compliance, not “intermittent” compliance. In response, the District states that “at a refinery, at least occasional events of non-compliance can be predicted with a high degree of certainty.” *See id.* “Compliance by the refineries with all District and federal air regulations will not be continuous. However, the District believes the compliance record at this and the other refineries is well within a range to predict reasonable intermittent compliance.” *Id.*

¹⁶ *See* Avon Refinery Comment Letter, § 2.c.iii at 33, § 2.c.iv at 34; Benicia Refinery Comment Letter, § 21 at 18-19; Martinez Refinery Comment Letter, § 15 at 15-16, § 25 at 24, § 27 at 25. Our comment on page 25, section 27 of the Martinez Refinery Comment Letter appears to be the only allegation of a violation of a permit condition that has been investigated by the District to date, and the source appears to be in compliance. *See* Dist. Resp. Comments at 22-23; *see also* § III.A.6 of this letter.

In a mistaken attempt to justify its reliance on the term “intermittent compliance,” the District points to EPA’s use of the term “intermittent” in compliance certifications as excusing non-continuous compliance. *Id.* Indeed, federal regulations require Title V compliance certifications to include information regarding the compliance status of each source and to specify whether compliance was “continuous” or “intermittent.” See 40 C.F.R. §§ 70.6(c)(5)(iii)(C); 71.6(c)(5)(iii)(C); see also CAA § 114(a)(3)(D), 42 U.S.C. § 7414 (a)(3)(D). However, “intermittent” compliance is *not* sanctioned by the Act. To the contrary, any instance of non-compliance is considered a violation. See 40 C.F.R. § 70.6(a)(6)(i). In fact, EPA’s use of the term “intermittent” to specify a source’s compliance in compliance certifications is intended to require the facility to explicitly identify instances of non-compliance.¹⁷ In doing so, Title V facilities and permitting agencies can identify problematic sources that may require a compliance plan or some other permit modification. Thus, the District’s reliance on the term “intermittent” as a sufficient standard for assuring compliance is misplaced and inconsistent with the law.

The District’s view is that “a Title V permit assures compliance by providing an effective means of ascertaining when violations have occurred. If violations can be detected, enforcement authorities can be used to provide a disincentive to future non-compliance.” Dist. Resp. Comments at 15. This position is only partially supported by law. While it is true that Title V permits will lead to better detection of non-compliance, the law requires the conditions of the Title V permit *itself* to assure compliance with all applicable requirements. Therefore, the District must not issue the permits until the terms and conditions assure compliance, which may require the imposition of additional requirements or a compliance schedule or plan.

COMMENT
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Finally, as discussed above, there is no indication that the District conducted a comprehensive review of the refineries’ compliance records for 2002 and 2003, which appear to indicate ongoing or recurring compliance problems at the refineries. See Section II.B.1 of this letter. Until the District fully evaluates and explains the refineries’ non-compliance, there is no valid basis for its determination of compliance or that the permits “assure compliance” with applicable requirements.

COMMENT
5

In sum, the District must not issue the Refinery Permits until the terms and conditions assure the refineries’ compliance with all applicable requirements. The District has no basis on which to conclude that a schedule of compliance or compliance plan is not necessary to assure compliance. Moreover, the District’s conclusion that it is not obligated to address or resolve compliance issues in the Refinery Permits is inconsistent with its legal duties under the Act, Part 70, and District regulations.

Instead, the District should evaluate public commenters’ well-founded concerns about compliance issues at the refineries and address non-compliance in the Title V permits. Where the District lacks sufficient information to determine compliance, the District should exercise its authority to require the refineries to submit relevant information so that the District can assess

COMMENT
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COMMENT
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¹⁷ When EPA attempted to remove this language from the compliance certification procedure, the D.C. Circuit held that it could not do so, as Congress’ “express and unambiguous” intent was for Title V sources to explicitly certify whether their compliance was “continuous” or “intermittent.” See *Natural Resources Defense Council v. EPA*, 194 F.3d 130, 138 (D.C. Cir. 1999); see also 66 Fed. Reg. 12872 (Mar. 1, 2001).

whether additional requirements must be included in the permits to assure compliance. The District should impose enforceable deadlines in a schedule of compliance for the submission of relevant data to assure compliance with applicable requirements. Until the conditions of the Refinery Permits assure compliance with all applicable requirements, the permits must not issue

COMMENT
8

C. Throughput Limits for Grandfathered Sources

The District states in each Statement of Basis that, for sources at the refineries that have undergone new source review (“NSR”), the District has reviewed the throughput limits and considers them to be the legally binding “emission levels” for purposes of BAAQMD Regulations 2-1-234.1 and 2-1-234.2.¹⁸ See Avon SB, p. 11-12, Benicia SB, p. 12-14, Martinez SB, p. 15-16, Chevron SB, p. 16-17, Rodeo SB, p. 13-15. For sources that have not gone through NSR review (“grandfathered sources”), the District has proposed throughput limits to be set forth in the Title V permit. *Id.*

In its draft response to comments, the District states that the throughput limits for grandfathered sources “now function merely as reporting thresholds rather than as reporting thresholds and presumptive NSR triggers.” See Dist. Resp. Comments, § 6.IV. at 31. However, the discussion in the Statements of Basis for each draft Refinery Permit still contains the language characterizing the thresholds as presumptive monitoring requirements. The Statement of Basis for the Avon Refinery refers to the District’s change, retains the old language about presumptive monitoring requirements, and neglects to indicate where the changes have occurred in the permit. Whether the District defines the throughput limits for grandfathered sources as reporting or presumptive monitoring requirements, the limits act as a surrogate for the baseline NSR determination required by the Clean Air Act. The throughput limits would thoroughly eviscerate the NSR requirements of the Act, and we continue to object to their inclusion in the Refinery Permits.

First, the throughput limits in the permit are not a reasonably accurate surrogate for an NSR baseline determination. The District states:

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

¹⁸ BAAQMD Regulation 2-1-234 provides as follows:

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

234.1 An increase of either the daily or annual emission level of any regulated air pollutant, or an increase in the production rate or capacity that is used to estimate the emission level, that exceeds emission or production levels approved by the District in any authority to construct.

234.2 An increase of either the daily or annual emission level of any regulated air pollutant, or the production rate or capacity that is used to estimate the emission level, above levels contained in a permit condition in any current permit to operate or major facility review permit.

be completely confident that the facility has had time or resources necessary to provide the most accurate information available in this regard.

Id. (emphasis added).

The discussion of throughput limits in each Statement of Basis indicates that the District has little reliable information regarding these “grandfathered” sources with which to make judgments about the applicability of NSR at these sources. Rather than setting baselines that contravene NSR requirements, the District should devote the appropriate resources for the important task of determining the legally correct baseline. The District cannot bypass the required steps for determining the correct baseline merely because of its resource constraints, particularly given the importance of the NSR requirements. COMMENT
9

Second, the District improperly proposes to allow potential major modifications without the prerequisite preconstruction permits. The District states that: COMMENT
10

It follows from the presumptive nature of these throughput limits for grandfathered sources that exceedence of these limits is not per se a violation of the permit. Failure to report an exceedence would be a permit violation. However, if an exceedence occurs, the facility would have an opportunity to demonstrate that the throughput limit in fact did not reflect the appropriate limit for purposes of 2-1-234.3. If the facility can demonstrate this, no enforcement action would follow, and the permit would be revised at the next opportunity. It also follows that compliance with these limits is not a ‘safe harbor’ for the facility. If evidence clearly shows that a grandfathered source has undergone a ‘modification’ as defined in 2-1-234.3, the District would consider that a preconstruction review-triggering event, notwithstanding compliance with the throughput limit in the Title V permit. In other words, the protection afforded the facility by complying with the throughput limit in the Title V permit is only as strong as the information on which it was based.

Id.

Third, placing these throughput limits in the Title V permit may create an improper presumption

Fourth, the District’s reliance on BAAQMD Regulation 2-1-234¹⁹ in deriving these throughput limits is not appropriate. BAAQMD Regulation 2-1-234 is not a State Implementation Plan

¹⁹ BAAQMD Regulation 2-1-234 provides as follows:

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

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

("SIP") provision. The definition of "modification" in the SIP-approved version of BAAQMD Regulation 2-2-223²⁰ should be used for purposes of new source review Any reliance on provisions not approved by U.S. EPA is inappropriate because the SIP sets forth the EPA-approved new source review program

COMMENT
12

Fifth, it is also possible that the District considers these throughput limits as a form of indicative monitoring, that is, any violation of the throughput limit would be an indication that something has changed at the refinery. If the District is inserting throughput limits in the permit as a form of indicative monitoring, then it should create a separate list of throughput limits for "grandfathered" sources based on actual emissions derived from SIP Regulation 2-2. These throughput limits should be based on the federally enforceable District NSR program and should be designed to indicate increases of actual emissions at grandfathered sources.

COMMENT
13

Finally, Commenters object to the throughput limits on California Environmental Quality Act ("CEQA") grounds. CEQA Guidelines state that the issuance of a Title V permit is exempt from CEQA "unless the issuance, modification, amendment, or renewal authorizes a physical or operational change to a source or facility." See CEQA Guidelines § 15281 & Cal. Pub. Res. Code § 21080.24. Here, if the District uses BAAQMD Regulation 2-1-234 to determine throughput limits on "grandfathered" sources the limits could be set at levels that are higher than the actual emissions at the source. If the limits are set at these higher levels, there is the potential for an increase in emissions at the refineries, which could exceed the CEQA threshold of significance set by the District. Because of this potential, the District's failure to perform the required environmental review violates CEQA.

COMMENT
14

3.1 The highest of the following:

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

3.1.2 The capacity listed in the District permit to operate.

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

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

²⁰ SIP Regulation 2-2-223 provides as follows:

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

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

223.2 An increase in the hours of operation.

223.3 Change in ownership.

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

D. Statement of Basis

The revised Statements of Basis for the draft Refinery Permits need to contain more detailed facility descriptions, including full information on the permitted and exempt sources (including capacity information which in many cases is blank or unknown), detail the changes to the refineries between application date (1996) and initial permit issuance (2002). In addition, the Statements of Basis should set out the revisions made to the permits based on public and refinery comments. Just as the Rodeo SB details changes made subsequent to the initial public comment period in 2002 (Rodeo SB at 31-42), all of the Statements of Basis should provide this type of detail. COMMENT 15. 16

Moreover, the revised Statements of Basis need to be updated to reflect the changes the District includes in its draft response to comments. For example, the District's draft response to comments claims to make changes in the permit and re-characterizes the throughput limits for grandfathered sources in the permits; however, the Statements of Basis do not fully explain or discuss these changes. The Statements of Basis also rely on outdated information to assess each facility's compliance. See § II.B of this letter. Further, while the revised Statements of Basis posted on the District's web site contained some redlined revisions, the District failed to redline the Martinez SB making the public review task even more difficult. COMMENT 17 18 19

The Statements of Basis should, but do not address significant information regarding permit shields. For example, the Avon SB is inaccurate and misleading, as it states that "[t]his facility has no permit shields," see Avon SB at 46, when permit shields are clearly included in the Title V permit. See Avon Draft Title V Permit, Sec. IX at 877-879. In addition, the Statements of Basis fail to reflect significant revisions that were made in the permits regarding the permit shields. For example, Table IX-B-10.1 in the Benicia SB does not reflect the changes made to the permit shields in the Benicia Permit. See Benicia SB at 30; see also Benicia Draft Title V Permit, Sec. IX at 683. As noted above, changes made in the Martinez Permit including the permit shields are not highlighted in the Martinez SB. We point out other instances of the insufficiency of the Statements of Basis throughout this letter. COMMENT 20 21

E. Public Participation

Commenters previously submitted extensive comments regarding the role of the public in the Title V process and the sufficiency of information made available to the public during the review period. As a general response, the District claims comments asserted the review process was flawed "because the District did not provide all the information necessary for a reviewer to reach an independent judgment" regarding the District's permitting decisions. The District further states that "[t]hese comments are based on the conceptual premise that public review is only adequate to the extent it allows the reviewer to have before it all relevant information in the possession of the District. Without this, the reviewer cannot retrace the steps of the District's thought process in reaching its decisions." See Dist. Resp. Comments § 3.E. at 7. While grossly misstating our view of the public review process, the District's response demonstrates that its view of the public's role in the Title V process is indeed flawed. Title V and its implementing regulations squarely address this issue.

The general requirements for public participation are contained in CAA § 503(e), 42 U.S.C. § 7661b(e), 40 C.F.R. § 70.7(h), and BAAQMD Regulations 2-6-411, 2-6-412 and 2-6-419. Title V permit proceedings specifically provide an opportunity for the public to participate in permitting procedures, by commenting and requesting a public hearing on draft permits. To facilitate the review process for the public and EPA, the District is required to provide the legal and factual basis for all decisions related to the draft permit. *See* 40 C.F.R. § 70.7(a)(5); BAAQMD Reg. 2-6-427 (Statement of Basis). Additionally, the District must make available specific information related to the draft permit, and “all other materials available to the [District] that are relevant to the permit decisions.” 40 C.F.R. § 70.7(h). The District apparently believes the requirements of this section is “obliquely relevant” or of “limited relevance,” stating that the only reasonable interpretation of this requirement is that the District must merely explain and support its Title V permitting decisions.²¹ The District believes “the ultimate test is not whether it provided during the comment period all information that a reviewer might deem relevant, but whether it provided sufficient information to support its decisions on issues that are legitimately raised in the Title V process.” *See* Dist. Resp. Comments § 3.E. at 7-8.

The District appears to be confusing its obligation to prepare a Statement of Basis (explaining the legal and factual basis for its decisions) with its obligation to make public records available to facilitate the public’s review of draft permits for sufficiency. The ultimate test is *not* merely whether the District has provided sufficient explanation of its decisions, but whether it has provided sufficient information for the public to evaluate whether its decisions are appropriate under the circumstances – i.e., *whether the terms and conditions of the draft Title V permit assure compliance with all applicable requirements*, or whether additional requirements should be imposed to assure compliance.

For example, Commenters reviewed the facilities’ permitting and enforcement files in part to evaluate whether there are compliance issues that must be addressed in a Title V permit, either through the imposition of a compliance schedule or other additional requirements. That the District may not have taken the information in these files into account when drafting Title V permits²² creates an even greater need for public review of draft permits for sufficiency with federal requirements.

²¹ In the District’s view, it would be “highly impractical” for the District make available all the information contained in District files regarding a facility, and therefore, this could not have been the intent of Congress nor EPA in enacting Title V or promulgating Part 70. *See* Dist. Resp. Comments § 3.E. at 7-8.

²² The District disagrees with the view that the public should be able to review all records that may be viewed as “relevant” to the District’s permitting decisions, as District staff does not attempt to review all files for each facility when drafting Title V permits. The District thus disagrees that a public reviewer should be “far more informed” than District staff regarding a facility’s permitting and compliance history

F. Monitoring, Recordkeeping and Reporting

1. General

The District has determined that, with few exceptions, additional monitoring to assure compliance with all applicable requirements does not need to be imposed in the draft Refinery Permits. The District states in the revised Statements of Basis for the refineries that although Title V calls for a re-examination of all monitoring, there is a presumption that these factors [used by the District to develop monitoring] have been appropriately balanced and incorporated in the District's prior rule development and/or permit issuance. It is possible that, where a rule or permit requirement has historically had no monitoring associated with it, *no monitoring may still be appropriate in the Title V permit if, for instance, there is little likelihood of a violation*. Compliance behavior and associated costs of compliance are determined in part by the frequency and nature of associated monitoring requirements. As a result, the District will generally revise the nature or frequency of monitoring only when it can support a conclusion that existing monitoring is inadequate.

See Martinez SB at 52; Benicia SB at 14; Avon SB at 30; Chevron SB at 18-19; Rodeo SB at 16-17 (emphasis added).

The revised Statements of Basis explain that "The tables [listed in Section C.VII (Applicable Limits and Compliance Monitoring Requirements)] contain only the limits for which there is no monitoring or inadequate monitoring in the applicable requirements. The District has examined the monitoring for other limits and has determined that monitoring is adequate to provide a reasonable assurance of compliance." See Martinez SB at 52; Benicia SB at 16-17; Avon SB at 30; Chevron SB at 18; Rodeo SB at 16.

First, the District's determination that, in some cases, requiring additional monitoring is inappropriate directly contradicts the mandate of Title V of the Act, which requires all Title V permits to contain monitoring sufficient to assure compliance with all applicable requirements. See 42 U.S.C. § 7661c(c). The District has not explained how violations will be detected if there is no monitoring. The absence of monitoring for these sources is therefore insufficient.

Second, the District created and relies upon a presumption that existing monitoring is adequate. According to the District, "a presumption of adequacy for existing monitoring is appropriate because the District has traditionally applied the same factors to assessing monitoring that are called for by Title V." See Dist. Resp. Comments at 17, 55. The District claims it reviewed all monitoring in the draft Refinery Permits for sufficiency and determined that, with very few exceptions, the monitoring is sufficient. See *id.* However, the District has no legal basis for such a presumption, which is not authorized by either Title V, its implementing regulations, or BAAQMD Regulation 2-6-503. To the contrary, Title V specifically authorizes a review of all monitoring requirements to assure compliance with permit conditions and other applicable requirements.