

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of Chevron Products
Company,
Richmond, California Facility

Major Facility Review Permit
Facility No. A0010
Issued by the Bay Area Air Quality
Management District

Petition No. IX-2004-10

ORDER RESPONDING TO
PETITIONERS' REQUEST THAT THE
ADMINISTRATOR OBJECT TO
ISSUANCE OF A STATE OPERATING
PERMIT

ORDER DENYING A PETITION FOR OBJECTION TO PERMIT

On December 9, 2004, the Environmental Protection Agency ("EPA") received a petition ("Petition") from Plumbers and Steamfitters Union Local 342, Heat and Frost Insulators / Asbestos Workers Local 16, the International Brotherhood of Electrical Workers Local 302, the Boilermakers Union Local 549 and the Laborers Union Local 324 ("Unions" or "Petitioners") requesting that the EPA Administrator object to the issuance of a state operating permit from the Bay Area Air Quality Management District, ("BAAQMD" or "District") to Chevron Products Company to operate its petroleum refinery located in Richmond, California ("Permit"), pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, EPA's implementing regulations in 40 C.F.R. Part 70 ("Part 70"), and the District's approved part 70 program. *See* 66 Fed. Reg. 63503 (Dec. 7, 2001).

Petitioners requested EPA object to the Permit on several grounds. Generally, Petitioners alleged that the Permit was deficient in its treatment of, *inter alia*, combustion units, cooling towers, flares, storage tanks, and other units at the facility. Petitioner also alleged several deficiencies in the Permit Application and the public process employed by BAAQMD in issuing the Permit.

EPA has now fully reviewed the Petitioners' allegations pursuant to the standard set forth in section 505(b)(2) of the Act, which places the burden on the petitioner to "demonstrate[] to the Administrator that the permit is not in compliance" with the applicable requirements of the Act or the requirements of part 70, *see also* 40 CFR § 70.8(c)(1), and I hereby respond to them by this Order. In considering the allegations, EPA reviewed the Chevron Permit and related

materials and information provided by the Petitioners in the Petition.¹ Based on this review, I deny the Petitioners' request that I object to issuance of the Chevron Permit for the reasons described below.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. In 1995, EPA granted interim approval to the title V operating permit program submitted by BAAQMD. 60 Fed. Reg. 32606 (June 23, 1995); 40 CFR part 70, Appendix A. Effective November 30, 2001, EPA granted full approval to BAAQMD's title V operating permit program. 66 Fed. Reg. 63503 (Dec. 7, 2001).

Major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes applicable emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. *See* CAA §§ 502(a) and 504(a). The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other compliance requirements when not adequately required by existing applicable requirements to assure compliance by sources with existing applicable emission control requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, permitting authorities, and the public to better understand the applicable requirements to which the source is subject and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under section 505(a) of the Act and 40 CFR § 70.8(a), permitting authorities are required to submit all operating permits proposed pursuant to title V to EPA for review. If EPA determines that a permit is not in compliance with applicable requirements or the requirements of 40 CFR part 70, EPA will object to the permit. If EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act and 40 CFR § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. Section 505(b)(2) of the Act requires the Administrator to issue a permit objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act, including the requirements of part 70 and the applicable implementation plan. *See*, 40

¹On March 7, 2005 EPA received a lengthy (over 250 pages, including appendices), detailed submission from Chevron Products Company regarding this Petition. Due to the fact that Chevron Products Company made its submission very shortly before EPA's settlement agreement deadline for responding to the Petition and the size of the submission, EPA was not able to review the submission itself, nor was it able to provide the Petitioner an opportunity to respond to the submission. Although the Agency previously has considered submissions from permittees in some instances where EPA was able to fully review the submission and provide the petitioners with a chance to review and respond to the submissions, time did not allow for either condition here. Therefore, EPA did not consider Chevron Products Company's submission when responding to the Petition via this Order.

CFR § 70.8(c)(1); *New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (“*NYPIRG*”). Part 70 requires that a petition must be “based only on objections to the permit that were raised with reasonable specificity during the public comment period . . . unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period.” 40 CFR § 70.8(d). A petition for objection does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA’s 45-day review period and before receipt of an objection. If EPA objects to a permit in response to a petition and the permit has been issued, the permitting authority or EPA will modify, terminate, or revoke and reissue such a permit using the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

II. PROCEDURAL BACKGROUND

A. Permitting Chronology

BAAQMD held its first public comment period for the Chevron permit, as well as BAAQMD’s other title V refinery permits from June through September 2002.² BAAQMD held a public hearing regarding the refinery permits on July 29, 2002. From August 5 to September 22, 2003, BAAQMD held a second public comment period for the permits. EPA’s 45-day review of BAAQMD’s initial proposed permits ran concurrently with this second public comment period, from August 13 to September 26, 2003. EPA did not object to any of the proposed permits under CAA section 505(b)(1). The deadline for submitting CAA section 505(b)(2) petitions was November 25, 2003. EPA received petitions regarding the Chevron Permit from (i) Chevron USA; (ii) Communities for a Better Environment; and (iii) the various Unions represented by Adams Broadwell Joseph & Cardozo (“Adams Broadwell”). EPA also received section 505(b)(2) petitions regarding three of the other BAAQMD refinery permits.

On December 1, 2003, BAAQMD issued its initial title V permits for the Bay Area refineries, including the Chevron facility. On December 12, 2003, EPA informed the District of EPA’s finding that cause existed to reopen the refinery permits because the District had not submitted proposed permits to EPA as required by title V, part 70 and BAAQMD’s approved title V program. See Letter from Deborah Jordan, Director, Air Division, EPA Region 9 to Jack Broadbent, Air Pollution Control Officer, Bay Area Air Quality Management District, dated December 12, 2003. EPA’s finding was based on the fact that the District had substantially revised the permits in response to public comments without re-submitting proposed permits to EPA for another 45-day review. As a result of the reopening, EPA required BAAQMD to submit to EPA new proposed permits allowing EPA an additional 45-day review period and an opportunity to object to a permit if it failed to meet the standards set forth in section 505(b)(1).

²There are a total of five petroleum refineries in the Bay Area: Chevron Products Company’s Richmond refinery, ConocoPhillips Company’s San Francisco Refinery in Rodeo, Shell Oil Company’s Martinez Refinery, Tesoro Refining and Marketing Company’s Martinez refinery, and Valero Refining Company’s Benecia facility.

On December 19, 2003, EPA dismissed all of the section 505(b)(2) petitions seeking objections to the refinery permits as unripe because of the just-initiated reopening process. See e.g., Letters from Deborah Jordan, Director, Air Division, EPA Region 9, to John Hansen, Pillsbury Winthrop (representing Chevron USA), William Rostov and Holly Gordon, Communities for a Better Environment, and Daniel Cardozo, Richard Drury and Suma Peesapati Adams Broadwell, dated December 19, 2003. EPA also stated that the reopening process would allow the public an opportunity to submit new section 505(b)(2) petitions after the reopening was completed. In February 2004, three groups filed challenges in the United States Court of Appeals for the Ninth Circuit regarding EPA's dismissal of their section 505(b)(2) petitions. The parties resolved this litigation by a settlement agreement under which EPA agreed to respond to new petitions (i.e., those submitted after EPA's receipt of BAAQMD's re-proposed permits, such as this Petition) from the litigants by March 15, 2005. *See* 69 Fed. Reg. 46536 (Aug. 3, 2004).

BAAQMD submitted new proposed permits to EPA on August 25, 2004; EPA's 45-day review period ended on October 9, 2004. EPA objected to the Chevron Permit on one issue: the District's failure to require adequate monitoring, or a design review, of thermal oxidizers subject to EPA's New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants.

B. Timeliness of Petition

The deadline for section 505(b)(2) petitions expired on December 8, 2004. EPA finds that the Petition was submitted on December 8, 2004, which is within the 60-day time frame established by the Act and Part 70. EPA therefore finds that the Petition is timely.

III. ISSUES RAISED BY PETITIONERS

A. Issues Identified by EPA

Petitioners allege that EPA identified conditions in Chevron's proposed permit as not in compliance with applicable requirements. Petitioners state that "when the EPA finds that a proposed permit fails to comply with Title V, the agency must issue an objection to that permit." Petitioners attach to their Petition as Exhibit A EPA's comments on the draft Chevron permit dated September 26, 2003. Petitioners summarize some of EPA's comments and state that their failure to mention other comments does not constitute a "waiver" of these issues. Petition at 4-7.

EPA does not agree with Petitioners' allegations that it must object to the Permit because of comments EPA made during its review of the Permit. As set forth below, EPA's response to Petitioners' allegations is founded on both procedural and substantive grounds.

1. Reliance on EPA's Comments

Petitioners support their claim that EPA must object to the Permit by attaching EPA's

comments dated September 26, 2003. Petitioners assert that EPA's comments are "explicit findings of failure to include all applicable limits." *Id.* at 7. Petitioners suggest that EPA's comments are essentially a finding that "numerous provisions in Chevron's proposed Title V permit are not in compliance with applicable requirements for the refinery." *Id.* at 4. EPA disagrees with Petitioners' characterization of its comments on the draft Permit.

EPA notes that the Petitioners provide no more than a "summary" of certain of EPA's comments. Despite their exaggerated claims regarding the significance of EPA's comments to the District, Petitioners merely paraphrase a few of them. Petitioners make no attempt to elaborate on EPA's comments or to provide any independent factual or legal analysis. Petitioners cannot merely attach comments from EPA (or any other commenter) to the Petition to support a claim that the Permit is deficient without providing any legal or factual analysis of an alleged deficiency in the Petition itself. Petitioners bear the burden of demonstrating that the alleged flaw – whether identified by the Petitioners or by EPA – resulted in, or may have resulted in, a deficiency in the Permit's content. *See* 42 U.S.C. § 7661d(b)(2). Petitioners have failed to carry their burden by merely "summarizing" certain EPA comments.

Petitioners' reliance on EPA's comments is also misplaced because it overlooks that fact that EPA, in overseeing the implementation of state Title V programs, frequently provides comments to Title V permitting authorities to suggest revisions, clarifications, and improvements. EPA's comments in this regard do not necessarily constitute findings that permits fail to assure compliance with the Act. Petitioners confuse EPA's suggestions and comments to improve permits with the legal standard EPA must apply in order to object to a permit.

In addition to Petitioners' failure to distinguish between EPA comments and EPA findings of deficiency, Petitioners fail to acknowledge that the District may have revised the Permit in response to EPA's comments prior to issuing it. Thus, as discussed below, many potential deficiencies implied by EPA's comments have been cured and are therefore moot.

Petitioners also claim that they are not "waiving" issues identified by EPA's comments that they do not include in their summary. EPA assumes that Petitioners intend for the Petition to encompass unspecified EPA comments. Petitioners' implication is not sufficient to maintain valid claims for a section 505(b)(2) petition. Since Petitioners have the burden to demonstrate the Permit is deficient, any issues not directly raised in the Petition are not properly before the Agency. To the extent the Petition requests consideration of issues not raised in the Petition, that request is denied.

Petitioners' attempt to use EPA comments as *per se* legal evidence of actual deficiencies in the Permit is insufficient to demonstrate a deficiency in the Permit. For the reasons set forth above, the Petition is denied.

2. BAAQMD Response to EPA's Comments

As stated above, Petitioners summarize certain of EPA's September 2003 comments. EPA finds that Petitioners' allegations with respect to each item in this list are inadequate to support a finding that the Permit is deficient. Petitioners' list is no more than a paraphrasing of EPA's comments and provides no legal or factual analysis of actual deficiencies in the Permit. Despite Petitioners' clear failure to demonstrate a deficiency in the Permit, EPA explains its conclusions regarding the issues in Petitioners' list in the following paragraphs.

a. Combustion Units

Petitioners noted that EPA commented regarding the 2003 proposed permit that, "The daily throughput limit specified for S-4044 in Table II A 2 on page 40 is greater than the limit allowed by Condition #16686 on page 368." The original proposed permit contained a daily limit that is equivalent to 72 mmbtu/hr in condition #16686,³ and Table II-A contained a limit equivalent to 78 mmbtu/hr. The District's document responding to EPA's comments, dated December 1, 2003, ("2003 RTC (EPA)") states that, "The suggested change corrects a mistake. The mistake has been corrected in the final permit." 2003 RTC (EPA) at 6, #102. EPA has determined that the District has corrected the discrepancy between the two conditions; therefore, this issue is dismissed as moot.

b. Cooling Towers

Petitioners allege that the Permit does not include all applicable pollution control and monitoring requirements for the cooling towers. Specifically, Petitioners allege that (i) the Permit does not subject Source 4329 to the requirements of other cooling towers and does not provide an explanation for the inconsistency; (ii) sources 4018, 4179, and 4074 are improperly omitted from the applicable requirements table on page 138 of the Permit; and (iii) the Permit improperly exempts certain cooling towers from monitoring requirements without providing reliable emissions data and calculations revealing the compliance status of those units. Each claim is discussed separately below.

(i) Source 4329

EPA has determined that the District amended the Permit in response to EPA's comments by adding the source to tables IV.C.1.1 and VII.C.1.1, which contain applicable requirements for the cooling towers at the facility. EPA is therefore denying Petitioners' request to object to the Permit on these grounds.

(ii) Sources 4018, 4179, and 4074

Sources 4018, 4179, and 4074 are no longer in operation and have been removed from the Permit. Therefore, EPA is denying the Petitioners' request to object to the Permit as the

³The typical engineering convention is to rate boilers in terms of mmbtu/hr. The proposed permit contains a daily limit of 1728 mmbtu/day in condition #16686 and 1,872 mmbtu/day in Table II-A.

request pertains to these emission units.

(iii) Monitoring for cooling towers

In response to EPA's previous comments, the District revised Appendix G of the December 2003 Statement of Basis to include data and calculations for all of the cooling towers identified in Table IV.C.1.1 of the final revised Permit that was issued on December 16, 2004. As a result, the Petitioners' claim that the Permit improperly exempts certain cooling towers from monitoring requirements without providing reliable emissions data and calculations for them is no longer valid. Therefore, EPA is denying the Petitioners' request to object to the Permit as it applies to cooling tower monitoring.

c. Emissions Caps

(i) Burning Fuel Oil

Petitioners request that EPA object to the Permit based on EPA's comment that on one hand the draft Permit stated, "Fuel oil shall not be burned at the refinery" yet the draft Permit also contained conditions on how to monitor when burning fuel oil. While EPA believes that the general reference in the Permit at pages 267-277 as to how to monitor any fuel oil usage that occurs should be removed for additional clarity, it does not by itself authorize fuel oil usage. In addition, Table II-A states that "All combustion sources are fired on natural gas or refinery fuel gas, except where noted in permit conditions." Thus, EPA believes that the Permit assures compliance with the prohibitions on firing fuel oil. Therefore, the Petition is denied on this issue.

(ii) Emission Cap Monitoring

Petitioners request that EPA object to the Permit for the two monitoring issues cited in EPA's comments to the District dated September 26, 2003. The first issue concerned EPA's request that the District list which units would be required to install CEMs, and the second issue concerned clarifying source testing requirements used to verify compliance with the emissions cap (specifically related to wharf/marine loading terminal operations).

Concerning the first issue, a permit condition requires continuous emission monitors for nitrogen oxide and carbon dioxide from units equipped with selective catalytic reduction ("SCR"), without specifying the particular units. Permit (Dec. 16, 2004) at 269. While it would be convenient for the District to list these units in this section of the Permit, the units with SCR are listed on Table II-B. *Id.* at 39. Petitioners have failed to demonstrate a deficiency in the Permit with respect to units with SCR. EPA denies the Petition on this issue.

Concerning the second issue, the Permit contains limits on hydrocarbons and other pollutants "which are never to be exceeded." *Id.* at 267. Violation of these limits "shall subject Chevron to enforcement action under Chapter 4 of Part 4 of Division 26 of the California Health

and Safety Code, and to enforcement action by the U.S. Environmental Protection Agency pursuant to the Clean Air Act.” *Id.* at 271. The Permit contains emission factors in “Appendix I”, which also states that “where monitors are available, actual values will be used.” *Id.* at 288. Refinery product loading and crude oil unloading factors are listed on pages 289 and 291 of Appendix I.

As noted in the Petition, recent information indicates that emissions from these operations may be significantly higher than emissions calculated from the emission factors used in the Permit. In addition to the emission factors, however, the Permit also requires that the vapor recovery system be fully operational for all loads of regulated organic liquids, and that records of these loading operations be kept for five years. *See* Permit (Dec. 16, 2004) at 298 (Condition #4714). Petitioners have failed to demonstrate a deficiency in the Permit with regard to emission cap monitoring for wharf loading operations. EPA denies the Petition on this issue.

d. Flares

Petitioners allege that EPA must object to the Permit because EPA allegedly found that the Permit (i) contains an improper flare exemption from BAAQMD Regulation 8-2, thereby failing to include all applicable requirements; (ii) fails to identify parts 1 and 2 of condition 18656 as federally enforceable; and (iii) fails to identify whether source S-6004 is in operation.

(i) Exemption from BAAQMD Reg. 8-2

EPA has determined that its comment in the September 26, 2003 letter to the District was based on an incorrect interpretation of the District’s regulations. In this comment, EPA stated that it is inappropriate to exempt flares from Regulation 8-2 based on a determination that they are exempt from Regulation 8-1, and requested that the District remove citations to Regulation 8-1-110.3 exempting flares from Regulation 8-2. In response to EPA’s comments, BAAQMD provided the following explanation:

The argument supporting a suggested change is incorrect as a matter of law. The comment misstates the requirements of Regulation 8-1. Any stream that is vented to a flare or thermal oxidizer that meets the requirements of 8-1-110.3 is exempt from Regulation 8, including 8-2. No change has been made to the permit.

2003 RTC (EPA) at 7 (#115).

Based on the District’s explanation and on a reexamination of the regulation, EPA no longer believes that it is inappropriate to exempt flares from Regulation 8-2 based on the exemption provided in Regulation 8-1. Because Petitioners have not provided any new information in support of their claim that flares should not be exempted from Regulation 8-2, we are denying the Petition⁴ on this issue. In a separate action, however, EPA is partially granting a petition from Communities for a Better Environment requesting that EPA object to issuance of this Chevron Permit on the basis that it does not assure compliance with Regulation 8 for flares.

(ii) Parts 1 and 2 of Condition 18656

BAAQMD has corrected the Permit in response to EPA's comments. Table IV.A.2.1 in the December 16, 2004 Permit cites these parts of condition 18656 as federally enforceable. Permit (Dec. 16, 2004) at 89. Therefore, this issue is denied as moot.

(iii) Source S-6004

BAAQMD has corrected the inconsistency in the Permit. EPA is denying this issue as moot.

e. Fluid Catalytic Cracking Unit

Petitioners reference EPA's comment that the 2003 proposed permit omitted certain sections of the applicable NSPS requirements for the FCCU. EPA has determined that the Permit has been revised to include these requirements. Permit (Dec. 16, 2004) at 126 (Table IV.C.2.1) Therefore, this issue is denied as moot.

f. Permit Shield

Petitioners allege that EPA must object to the Permit because EPA allegedly found (i) that federal regulations 40 C.F.R. 60.482-7(g) and 40 C.F.R. 61.242-7(g) are improperly subsumed by BAAQMD Regulations, and (ii) that Table IX-A-2 improperly identifies applicable subsumed requirements as "non-applicable requirements."

EPA has determined that BAAQMD corrected the mistakes in response to EPA's comments. Federal regulations 60.482-7(g) and 61.242-7(g) have been removed from the Permit shields and added to the applicable requirements and monitoring sections of the Permit. Permit (Dec. 16, 2004) at 255, 258, 438, and 440. Table IX-A-2 has been renamed to reflect that the shield is for subsumed requirements rather than for non-applicable requirements. *Id.* at. 451. Therefore, this issue is denied as moot.

g. Storage Tanks

(i) Inspections of secondary seals

Referencing EPA's previous comments, Petitioners claim that for storage tanks subject to NSPS, EPA allegedly found the frequency specified for inspections of the secondary seal is not consistent with federal requirements calling for inspections on an annual basis.

EPA has determined that the District revised the Permit in response to EPA's comments. The current Permit, as issued December 16, 2004, properly incorporates this requirement for internal floating roof tanks subject to NSPS Subpart Kb (Volatile Liquid Storage Vessels; 40 C.F.R. part 60, subpart Kb). Therefore, EPA is denying the Petitioners' request to object to the

Permit on these grounds.

(ii) Condition #20773

Referencing EPA's previous comments, Petitioners claim the Permit fails to indicate that several sources are subject to Condition #20773. EPA has determined that the District amended the Permit in response to EPA's previous comments. The current Permit, as issued December 16, 2004, properly incorporates Condition #20773 for the appropriate sources. EPA is therefore denying the Petitioners' request to object to the Permit on these grounds.

(iii) Regulation 8-5 and Cluster 02 Tanks

Referencing previous EPA comments, Petitioners claim that the Permit contains a discrepancy in the way the requirements of Regulation 8-5 are applied to the tanks in Cluster 02. EPA has determined that the District amended the Permit in response to EPA's comments by clarifying that the tanks in Cluster 02 are operating under the exemption in BAAQMD Regulation 8-5-117. EPA is therefore denying Petitioners' request to object to the Permit on these grounds.

(iv) Conditions not Identified as Federally Enforceable

Petitioners claim that the Permit fails to identify conditions 4233, 12580, and 18137 as federally enforceable.

Although Petitioners noted that conditions 4233, 12580, and 18137 are not federally enforceable, they did not provide any basis to support their claim other than a reference to a previous comment made by EPA. EPA's original comment simply inquired as to the basis for the District's determination that the conditions should not be federally enforceable and did not itself assert that they should be. In response to EPA's question, the District stated that the conditions were imposed to implement non-federal requirements. Permitting authorities may designate state-only requirements in title V permits. *See* 40 C.F.R. § 70.6(b)(2). Because Petitioners have failed to demonstrate that these conditions should be federally enforceable, EPA is denying the Petitioners' request to object to the Permit.

(v) Monitoring

Petitioners claim that various tank monitoring requirements identified in EPA's September 26, 2003 letter are improperly omitted or inaccurately and inadequately described in the Permit.

EPA has determined that the District amended the Permit in response to EPA's comments regarding the tank monitoring requirements. The current Permit, as issued December 16, 2004, properly incorporates the tank monitoring requirements addressed in EPA's September 26, 2003 letter and referenced in the Petition. EPA is therefore denying Petitioners' request to object to

the Permit on these grounds.

h. Sulfur Treatment Emissions

Petitioners allege that EPA must object to the Permit because EPA allegedly found that it improperly fails to indicate that the requirements for SIP-approved BAAQMD Regulations 9-1-313, 9-1-313.2, 1-522 and 1-522.7 are federally enforceable for units S-4227, S-4228, and S-4229.

EPA has determined that the District fixed the Permit in response to EPA's comments. The current Permit, as issued December 16, 2004, identifies these conditions as federally enforceable. Permit (Dec. 16, 2004) at 138 (Table IV.E.2.1). Therefore, this issue is denied as moot.

i. VOC Component Fugitives

Petitioners allege that EPA must object to the Permit because EPA allegedly found that (i) the Permit mischaracterizes or lacks various applicable requirements for fugitive VOC sources; (ii) an applicability determination for 40 C.F.R. Part 63, Subpart CC for gasoline loading rack S-9304 is ambiguous; (iii) the Permit improperly omits the requirements of 40 C.F.R. Part 63, Subpart Y and BAAQMD Rule 8-44-305; (iv) federal enforceability of Condition 8869 is ambiguous; and (v) the Permit improperly omits and mischaracterizes monitoring for fugitive VOC sources. Petitioners cite to EPA's September 26, 2003 comment letter, pages 5-9 of Enclosure C, in support of these allegations.

In response to allegations (i)-(iv) above, BAAQMD has revised the Permit to address all of EPA's concerns, Permit (Dec. 16, 2004) at 122, 253-260 (Tables IV.B.5.1 and IV.H.2.1), or provided a satisfactory explanation in the Response to Comments document (*see* District Response to EPA's September 26, 2003 Comments). In response to allegation (v), where BAAQMD had not fixed the Permit in response to EPA's comments, EPA objected to and reopened the Permit on October 8, 2004. *See* letter from Deborah Jordan, Director, Air Division, EPA Region 9 to Jack Broadbent, Air Pollution Control Officer, BAAQMD, dated October 8, 2004. All other issues were adequately addressed in one of the manners noted above for issues (i)-(iv).

For the reasons stated above, this issue is denied as moot.

j. General Concerns

Petitioners make a superficial reference to comments on pages 1-4 of EPA's September 2003 comment letter to the District. EPA directed the comments that are referenced by Petitioners in a general manner to the draft permits for the Chevron, Tesoro and Valero. The Petition makes no attempt to distinguish which issues apply to the Chevron Permit. Petitioners provide no legal or factual basis to support their claim that the Permit is deficient. Petitioners'

allegations fail to demonstrate any deficiency in the Permit; therefore, EPA denies Petitioners' request to object to the Permit.

B. District's Statements On Whether Permit Complies With Title V

1. Incorporation By Reference of Public Comments

Petitioners "incorporate by reference all the issues raised during the public comment period as the basis for this petition." Petition at 7. Petitioners attach comments that they and other groups have submitted to the District.⁴ Specifically, Petitioners incorporate by reference comments that they submitted, dated September 27, 2002 and September 22, 2003, comments submitted by Communities for a Better Environment, dated September 27, 2002 and September 22, 2003, and comments submitted by Our Children's Earth Foundation, dated September 27, 2002 and September 22, 2003. Petitioners contend that the "vast majority" of concerns raised by the commenters "remain uncured." Petitioners provide a "summary" of the comments in order to "merely highlight some of the most egregious omissions" without "waiv[ing] any issues raised in the prior comments by failing to mention them [in the Petition]."

EPA has reviewed Petitioners' allegations pursuant to the standard set forth in Section 505 (b)(2) of the CAA, which requires the Administrator to issue an objection to a Permit if the petitioner demonstrates to the Administrator that the Permit is not in compliance with the applicable requirements of the Clean Air Act, including the requirements of 40 C.F.R. Part 70. *See also*, 40 C.F.R. § 70.8(c)(1); *NYPIRG*, 321 F.3d at 333. The general allegation that a permitting authority has not corrected deficiencies raised during the public comment period does not demonstrate that the Permit is not in compliance. The burden is on the petitioner to demonstrate that the permit is not in compliance with all applicable requirements by identifying specific flaws in the permit. *In the Matter of Al Turi Landfill, Inc.*, Petition No. II-2002-13-A (Jan.30, 2004), at 3.

Petitioners' general allegation that the vast majority of previous comments remain uncured does not, by itself, demonstrate that the Permit is not in compliance with the requirements of the Act. Therefore, EPA denies the Petition as to any issues not specifically raised in the Petition.

2. Completeness of Application

a. Elements of 40 C.F.R. § 70.5(c)

Petitioners list the informational elements from 40 C.F.R. § 70.5(c) that must be included

⁴It appears that Petitioners erroneously included their September 30, 2002, comments on the proposed Title V permit for the *Phillips Rodeo Refinery* in place of their September 27, 2002, comments on the *Chevron Refinery*. *See* Petition, Exhibit 2. EPA will respond to this Petition based on a copy of Petitioners' September 27, 2002, comments that EPA previously received from Petitioners.

in applications for Title V permits and allege that BAAQMD admitted that Chevron's application was inadequate. Petition at 8.⁵ Petitioners also argue that the "refinery's failure to provide legally compliant certifications in their draft permits [sic]" is a problem that renders the application "legally inadequate."

In support of their allegation that the Permit is inadequate, Petitioners refer to their comments on the draft permit to the District. The Petition contains no specific allegations as to the inadequacy of the application, nor does it contain any factual or legal analysis on this point. The reference to their comments is not through a specific citation to a page or pages, but to the comments in their entirety. As noted above, EPA is not obligated to consider general allegations of permit deficiencies that are raised only through incorporation by reference of previous comments. *See In the Matter of Al Turi Landfill, Inc.*, Petition No. II-2002-13-A (Jan. 30, 2004), at 3. EPA nevertheless responds as follows.

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, EPA considers whether the petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See* CAA, Section 505(b)(2); *NYPIRG*, 321 F.3d at 333 n.11. An objection is required if the Petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]. *Id.*; 40 C.F.R. § 70.8(c)(1).

Under Part 70, a standard application permit form must include the informational elements set forth at 40 C.F.R. § 70.5(c)(1) - (9), including those elements recited by Petitioners as missing from the permit application. Petitioners implicitly assume that the District does not possess the application information allegedly missing from Chevron's permit application. The District states, however, that it did rely on previously submitted materials in its possession when it reviewed the permit application. *See* District's Consolidated Responses to Comments on Refinery Title V Permits, dated December 1, 2003 ("CRTC") at 9-11. More importantly, Petitioners have not demonstrated that the alleged lack of certain information in the permit application resulted in, or may have resulted in, a deficiency in the permit. Petitioners have not presented any reason to believe that the Permit lacks any applicable requirements or is otherwise flawed as a result of the allegedly incomplete application. Therefore, EPA denies the Petition on this issue.

b. Certification

⁵ Petitioners assert that the District admitted that Chevron failed to comply with application adequacy requirements by omitting the following information from its permit application: a list of all sources in the permit application, stack discharge points, description of fuels, fuel use, raw materials, production rates and operating schedules, detailed information on air pollution control equipment and monitoring devices, dates when emission sources and air pollution control equipment were last installed and modified, calculations, input assumptions to the calculations and sufficiently detailed process production rate and throughput capacities which would be required to support other quantitative aspects of the facility's application, emission estimates from all significant sources, and a compliance statement.

Regarding certification, Petitioners again refer generally to their comments dated September 22, 2003 to assert that the refinery failed to provide legally compliant certifications “in their draft permits.” Petition at 8.

The Petition contains no factual or legal analysis on this point. Petitioners’ reference to their comments is not through a specific citation to a page or pages, but to the comments in their entirety. EPA is not obligated to consider general allegations of permit deficiencies that are raised only by incorporation by reference of previous comments. *See In the Matter of Al Turi Landfill, Inc.*, Petition No. II-2002-13-A (Jan. 30, 2004), at 3. EPA nevertheless responds as follows.

Petitioners’ argument is misplaced. Section 70.5(d) requires that any *application* form, report or compliance certification submitted under Part 70 must contain a certification by a responsible official of truth, accuracy, and completeness. Petitioners do not allege that Chevron’s initial application failed to contain the appropriate compliance certification pursuant to 40 C.F.R. § 70.5(d). Rather, Petitioners allege that the “draft permits” failed to contain “legally compliant certifications” and that this problem “renders Chevron’s application legally inadequate.” Petition at 8. Petitioners have failed to provide a legal basis for this allegation. For the foregoing reasons, EPA denies the Petition on this issue.

c. Public Process

Petitioners, citing their September 22, 2003 comments on the draft permit, contend that the public process for the permit was fundamentally flawed. Specifically, Petitioners assert that the District “refused Petitioners access to all documents relevant to the permitting action,” in violation of 40 C.F.R. § 70.7(h)(2). Petitioners also argue that the District failed to provide the public and EPA with a copy of the permit proposed to be made final, in violation of 40 C.F.R. §§ 70.2 and 70.8(c)(3).

(i) Access to Documents

The Petition contains almost no factual or legal support for Petitioners’ claims regarding the inadequacy of the public process. Petitioners’ reference to their comments is not through a specific citation to a page or pages, but to the comments in their entirety. As noted above, EPA is not obligated to consider general allegations of permit deficiencies that are raised only through incorporation by reference of previous comments. *See In the Matter of Al Turi Landfill, Inc.*, Petition No. II-2002-13-A (Jan.30, 2004), at 3. EPA nevertheless responds as follows.

Petitioners’ comments did not identify any particular documents to which they were denied access. Petitioners’ comments, however, make much of the District’s statement that it “was able to produce less than half of its total refinery permitting files [requested] during the public comment period.” CRTC at 7-8. The District’s response to comments also stated that “the District received PRA [Public Records Act] requests from two environmental groups and a

law firm representing certain labor unions that collectively requested, ‘all permit files as far back as your records go’ for each of the [five] refineries.” 2003 CRTC at 7. The District determined that the requests encompassed tens of thousands of pages, with much of it difficult to access because it related to permits issued ten or more years ago. *Id.* The District also stated that it did not consider all materials request by Petitioners to be relevant to the Permit. *Id.* at 8. The District’s determination appears consistent with section 70.7(h)(2), which specifies that notice of title V permits include notice of “materials...that are relevant to the permit decision.” The plain language of this provision suggests that it is the permitting authority that decides what materials are relevant to its decision and therefore subject to the notice requirements. However, EPA need not rule on this basis because Petitioners have not met their burden under CAA 505(b)(2).

Petitioners fail to identify flaws in the District’s public participation process. In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, EPA considers whether the petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit’s content. *See* CAA, Section 505(b)(2) (objection required “if the Petitioner demonstrates ... that the permit is not in compliance with the requirements of [the Act], including the requirements of the applicable [SIP].”) Part 70 specifically identifies the failure of a permitting authority to process a permit in accordance with procedures approved to meet the public participation provisions of 40 C.F.R. § 70.7(h) as grounds for an objection. 40 C.F.R. § 70.8(c)(3)(iii). Section 70.7(h)(2) requires, *inter alia*, that the public notice offering an opportunity to comment on the draft permit contain the name, address and telephone number of a person from whom interested persons may obtain “all relevant supporting materials, ..., and all other materials available to the permitting authority that are relevant to the permit decision.” *See*, CAA § 502(b)(6) (requiring that Part 70 programs include “reasonable procedures” for public notice, “including offering an opportunity for public comment and a hearing”).

District Regulations 2-6-412 and 2-6-419, approved by EPA, implement the public participation requirements of 40 C.F.R. § 70.7(h). BAAQMD Regulation 2-6-412, *Public Participation, Major Facility Review Permit Issuance*, provides for notice and comment procedures that the District must follow when proposing to issue any major facility review permit. The public notice, which shall be published in a major newspaper in the area where the facility is located, shall identify, *inter alia*, information regarding the operation to be permitted, any proposed change in emissions, and “a District source for further information.” BAAQMD Regulation 2-6-419, *Availability of Information*, requires the contents of the permit applications, compliance plans, emissions or compliance monitoring reports, and compliance certification reports to be available to the public, except for information entitled to confidential treatment.

The February 24, 2004 public notice for comment on the Permit identified a source where the public could obtain relevant documents:

The proposed Major Facility Review permit and permit evaluation/statement of basis are available for public inspection by appointment at the District Headquarters, 939 Ellis Street, San Francisco, CA. For an appointment, please call May Leung at (415)

749-4729. The permit and permit evaluation/statement of basis are also available on the District's webpage at the following address:
<http://www.baaqmd.gov/pmt/t5/t5publicnotices/t5publicnotices.asp>. Written comments should be directed to Barry Young and Greg Solomon at Bay Area Air Quality Management District, 939 Ellis Street, San Francisco, CA 94109 or by email to byoung@baaqmd.gov or gsolomon@baaqmd.gov. Any request for information should be directed to Barry Young, (415) 749-4721 or Greg Solomon, (415) 749-4715.

EPA finds that this public notice meets the requirements of 40 C.F.R. § 70.7(h)(2). *See In the Matter of Shaw Industries, Inc. Plant No. 80*, Petition No. IV-2001-9 (Nov. 15, 2002), at 8. Petitioners have failed to demonstrate that the District did not follow the procedures in 40 C.F.R. § 70.7(h)(2). Therefore, EPA denies the Petition on this issue.

(ii) Copy of Proposed Permit

As to Petitioners' claim that the District failed to provide the public and EPA with a copy of the Permit proposed to be made final, this matter was resolved by the District's submittal dated August 24, 2004. Therefore, EPA denies the Petition on this issue.

3. Threshold for HAP Sources

Petitioners allege that BAAQMD admitted in the draft 2003 RTC (dated July 2003) that, "under BAAQMD Rule 2-6-210," the significance level for hazardous air pollutants ("HAPs") is 400 pounds per day, "but that the permits incorrectly lists [sic] the significance threshold for those pollutants at 1000 pounds per day." Petitioners allege that this "mistake" resulted in the BAAQMD's failure to list all significant HAPs sources in the Permit. Petitioners also complain about the adequacy of the District's response. Petitioners claim that the Permit lists the threshold as 1000 pounds per day and that this "inconsistency with title V" requires EPA to object to the Permit.

EPA reviewed the citation to BAAQMD's draft 2003 RTC provided by Petitioners, but did not find that BAAQMD admitted to using an inappropriate threshold. In fact, BAAQMD directly states that it disagreed with the comment that deficiencies in applications led to deficiencies in permits. EPA also checked BAAQMD Rule 2-6-210 but failed to find any reference to significance thresholds; rather Rule 2-6-210 provides the definition of "hazardous air pollutant." Further research by EPA revealed that in October 1999, BAAQMD revised its title V rules to provide, at Rule 2-6-239, a definition of "significant source," which includes a HAPs significance threshold of 400 pounds per year (not, as Petitioners claim, 400 pounds per day). EPA's final approval of BAAQMD's title V program approved this rule as part of the BAAQMD title V program. *See* 66 Fed. Reg. 63503, 63506 (Dec. 7, 2001). Therefore, EPA believes BAAQMD should be following and applying this threshold in its permits.

Nevertheless, EPA denies Petitioners' claim on this issue. First, Petitioners fail to demonstrate that BAAQMD did not apply the 400 pound per year threshold. Second, even

assuming, *arguendo*, that BAAQMD did not apply the threshold set forth in the District's rules, EPA cannot conclude that the Permit is necessarily deficient if BAAQMD applied a 1000 pound per year threshold. Petitioners did not identify any specific change to the Permit that would have resulted if BAAQMD had applied the higher threshold. For example, Petitioners fail to identify any equipment that should have been included in the Permit, but was not. In reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet all procedural requirements in issuing the permit, EPA considers whether the petitioner has demonstrated that the permitting authority's failure resulted in, or may have resulted in, a deficiency in the content of the permit. *See* CAA § 505(b)(2); *see also* 40 C.F.R. § 70.8(c)(1); *In the Matter of Los Medanos Energy Center*, at 11 (May 24, 2004); *In the Matter of Doe Run Company Buick Mill and Mine*, Petition No. VII-1999-001, at 24-25 (July 31, 2002). Because the Petitioners have not made such a demonstration, EPA denies the Petition on this issue.

4. Continuous Compliance

Petitioners contend that EPA must object to the Permit because Title V requires continuous compliance and that the District "admits" that the Permit will not assure continuous compliance. Petitioners point to a statement made by the District in its draft Response to Public Comments, dated July 25, 2003 that "[c]ompliance by the refineries with all District and federal air regulations will not be continuous" and that the Proposed Permit can assure only "reasonable intermittent compliance" Petitioners conclude that the District's admission means that "EPA must object to the Proposed Permit for failing to include all applicable requirements."

Petitioners cite to the requirement for permittees' compliance certifications to specify whether compliance has been "continuous" or "intermittent" (*see* 40 C.F.R. § 70.6(c)(5)(C)) for the principle that part 70 distinguishes between continuous and intermittent compliance. EPA, however, finds no logical connection between that rather self-evident principle and the position advanced by Petitioners that Title V permits must assure continuous compliance as a practical matter. To the contrary, the language cited by Petitioners clearly contemplates that facilities may have to certify to intermittent compliance without stating that the such a situation necessarily means that the Title V permit is deficient.

Petitioners' argument, taken to its logical extreme, is that any instance of noncompliance would constitute a basis to find that the Permit is deficient. This view ignores the fact that the adequacy of the Permit largely reflects a legal analysis of whether it contains conditions sufficient to assure compliance with all applicable requirements at the time of issuance. *See* 40 C.F.R. § 70.6(a)(1). Instances of non-compliance during the permit term, on the other hand, involve factual circumstances that are entirely independent of the legal adequacy of the permit. The ability to enforce such instances of non-compliance through enforcement of the Permit is an essential part of the legal analysis of determining whether a permit "assures" compliance." *See*,

40 C.F.R. §§ 70.6(a)(6)(i), 70.6(b)(1).⁶

EPA further finds that Petitioners' argument blends what are essentially two different questions: the legal and factual aspects of compliance. For example, a perfectly-drafted permit may require state of the art monitoring, scrupulous record keeping, and regular reporting to regulatory agencies; the question, however, of whether the permittee remains in compliance with that permit is essentially a factual matter. A fair reading of the District's statement that it "cannot rule out that instances of non-compliance will occur" and that "[c]ompliance by the refineries with all District and federal air regulations will not be continuous," 2003 CRTC at 15, reflects that practical reality. Plaintiffs have not demonstrated that the permit is not in compliance with all applicable requirements based on the District's statements, and EPA denies the Petition on this issue.

C. Issues Identified by Petitioners

1. Preconstruction Review Permits

Petitioners request that all areas of New Source Review ("NSR")⁷ noncompliance be resolved in the Title V permit. Petition at 11. Petitioners claim to have identified at least 40 sources at the refinery that have dramatically increased their emissions without necessary NSR permits. Petition at 10. Petitioners support their claim by referring to their comments dated September 27, 2002 (the "2002 Comments"); and September 22, 2003 (Petition, Exhibit 3, the "2003 Comments"). Petition at 10. In essence, Petitioners claim that the District allowed more than 40 sources, consisting of furnaces, heaters, and boilers, to increase firing rates without submitting an application for a major modification under the NSR program. 2002 Comments at 36.

All sources subject to Title V must have a permit to operate that assures compliance by the source with all applicable requirements. *See* 40 C.F.R. § 70.1(b); CAA §§ 502(a), 504(a). Such applicable requirements include the requirement to obtain NSR permits that comply with applicable NSR requirements under the Act, EPA regulations, and state implementation plans. *See generally* CAA §§ 110(a)(2)(C), 160-69, 172(c)(5), and 173; 40 C.F.R. §§ 51.160-66 and 52.21. NSR requirements include the application of the best available control technology ("BACT") to a new or modified source that results in emissions of a regulated pollutant above

⁶Petitioners rely on *Utility Air Regulatory Group v. Environmental Protection Agency*, 320 F.3d 272, 275 (D.C. Cir. 2003), for the proposition that "courts have made clear that Title V requires continuous compliance." The question of whether Title V requires continuous compliance, however, was not before that court. In fact, that court dismissed the action before it, a challenge to EPA's interpretation of the monitoring requirements of 40 C.F.R. §§ 70.6(c)(1) and 71.6(c)(1), on grounds of standing and ripeness without ever reaching any issue truly on the merits.).

⁷ "NSR" is used in this section to include both the nonattainment area New Source Review permit program and the attainment area Prevention of Significant Deterioration ("PSD") permit program.

certain legally-specified amounts.⁸

Petitioners have failed to demonstrate that NSR permitting and BACT requirements have been triggered at the refinery. The 2002 Comments claim that “the District concluded and the evidence demonstrates that the increase in firing rates was due to debottlenecking the Refinery’s fuel gas system in 1992, more than doubling fuel gas compressor capacity.” 2002 Comments, at 35-36. Assuming, for the moment, that the changes in the firing rates of the furnaces, heaters, and boilers would constitute “modifications” under NSR rules,⁹ Petitioners offer no credible evidence that refinery emissions were in any way affected by these changes in firing rates. First, in support of its claims, Petitioners attach to both the 2002 Comments and 2003 Comments several “Evaluation Reports” prepared by the District. These Reports evaluate about half of the sources Petitioners refer to in their 2002 Comments, and in each one the District concludes that the proposed change (e.g., installation of ultra-low NOx burners, change in firing rate) neither increases combustion emissions nor increases cumulative emissions.¹⁰

Second, Petitioners do not claim to have sufficient evidence to establish that these sources are subject to NSR permitting and the application of BACT. In their 2002 Comments, Petitioners admit that they “could not evaluate the magnitude of the emissions increase associated with this debottlenecking of the fuel gas system.” 2002 Comments at 38. Instead, Petitioners merely “assum[e] a modest 5% refinery-wide increase in firing rates due to this debottlenecking.” 2002 Comments at 39 (emphasis added). Petitioners then proceed to calculate the potential to emit due to this debottlenecking by taking “5% of the average annual total refinery-emissions for the period 1993-2001.”¹¹ 2002 Comments at 39 (emphasis added). The result, Petitioners conclude, is that: “[t]hese emissions exceed the NSR threshold of 40 ton/yr by a significant amount. Thus, all sources that were debottlenecked by the 1992 increase in compressor capacity should undergo NSR review.” 2002 Comments at 39.

⁸ The Act distinguishes between the requirement to apply BACT, which is part of the PSD permit program for attainment areas, and the requirement to apply the lowest achievable emission rate (“LAER”), which is part of the NSR permit program for nonattainment areas. In this case, however, the District’s NSR rules use the term “BACT” to signify “LAER.”

⁹ Based on the information provided by Petitioners, EPA is unable to conclude at this time that changes in the firing rates of the sources included in Petitioners’ 2002 and 2003 Comments would constitute “modifications” under NSR rules. Generally speaking, increasing a heater’s firing rate above its enforceable permit condition may, in certain cases, constitute a change in the method of operation and, therefore, a “modification” under NSR rules. *See* District Rule 2-2-223 and 40 C.F.R. § 52.21(b)(2).

¹⁰ One of these Reports (Application No. 1786) refers to furnaces S-4188 and S-4189, but does not discuss emissions calculations or plant cumulative increases.

¹¹ For its calculation, Petitioners use a table they created and attached to the 2002 Comments. Petitioners claim that this table includes a subset of units at the refinery, as well as corresponding District emissions inventories for these units for the years 1993 to 2001. 2002 Comments at 60. Even assuming the data in the table are correct, some of the calculated amounts on Page 39 of the 2002 Comments appear inaccurate. For example, it appears that the average annual CO and SOx amounts were obtained by dividing the total emissions for the years 1993 to 2001 by 8 and 6, respectively, rather than by 9 (i.e., by the number of years that make up the total emissions).

Petitioners' method of analysis, selecting an arbitrary percentage (i.e., 5%) and applying it to the average annual total refinery-emissions, is purely speculative and of no probative value. Thus, based on the information provided by Petitioners, EPA is unable to conclude at this time that the increase in firing rates resulted in daily or annual cumulative emissions increases that would trigger NSR requirements. *See* SIP-approved BAAQMD Regulations 2-2-301 and 2-2-304. Especially absent evidence regarding emissions, Petitioners have not met their burden of demonstrating that the Permit is not in compliance with the NSR requirements.

During the title V permitting process, EPA has also been pursuing similar types of claims in another forum. As part of its National Petroleum Refinery Initiative, EPA identified four of the Act's programs where non-compliance appeared widespread among petroleum refiners, including apparent major modifications to refinery heaters and boilers that resulted in significant increases in NO_x and SO₂ emissions without complying with NSR requirements. On October 16, 2003, the United States filed a complaint and lodged a consent decree alleging NSR violations at certain heaters and boilers at Chevron's refineries.¹² Chevron's Richmond refinery is part of this action. However, consistent with its approach under the Refinery Initiative, EPA has not conducted an in-depth investigation of each heater and boiler at Chevron's refineries to identify potential NSR violations at individual units.¹³ The United States' claims have not been subject to full adjudication, and Petitioners have failed to provide EPA sufficient additional information to establish conclusively that the furnaces, heaters, or boilers referred to in its 2002 and 2003 Comments are out of compliance with NSR requirements.

Since Petitioners have failed to show that NSR requirements apply to these sources, EPA finds that Petitioners have not met their burden of demonstrating a deficiency in the Permit. Therefore, the Petition is denied on this issue.

2. Throughput Limits

Petitioners allege that EPA should object to the Permit because the District "failed to impose NSR requirements associated with . . . inflated throughput limits." Petition at 11. Petitioners allege that the Permit contains "unjustified increases in throughput levels" that trigger NSR requirements.

The District has established throughput limits on sources that have never gone through

¹² The case was filed in the United States District Court for the Northern District of California, San Francisco Division (Civil Action No. C-03-4650 MEJ). The District is one of the Plaintiff-Intervenors in the case. The settlement is not effective until it is approved and entered by the District Court.

¹³ EPA notes that with respect to the specific claims of NSR violations raised by Petitioners in their comments, the District "intends to follow up with further investigation." CRTC at 22. In particular, the District is investigating the allegation that several furnaces may have increased their firing rates without going through NSR. "If violations are discovered and new permits issued as a result, any new conditions imposed will be incorporated into the Title V permit through the modification process." As with EPA, the District finds that these "allegations [do not] provide sufficient evidence to support imposing a schedule of compliance." 2003 CRTC at 37.

new source review (“grandfathered sources”). The Clean Air Act does not require permitting authorities to impose such requirements. Therefore, to understand the purpose of these limits, EPA is relying on the District’s statements characterizing the reasons for and legal implications of these throughput limits. The District’s 2003 CRTC makes the following points regarding throughput limits:

- The throughput limits being established for grandfathered sources will be a useful tool that enhances compliance with NSR. . . . Requiring facilities to report when throughput limits are exceeded should alert the District in a timely way to the possibility of a modification occurring.
- The limits now function merely as reporting thresholds rather than as reporting thresholds and presumptive NSR triggers.
- They do not create a baseline against which future increases might be measured (“NSR baseline”). Instead, they act as a presumptive indicator that the equipment has undergone an operational change (even in the absence of a physical change), because the equipment has been operated beyond designed or as-built capacity.
- The throughput limits do not establish baselines; furthermore, they do not contravene NSR requirements. The baseline for a modification is determined at the time of permit review. The proposed limits do not preclude review of a physical modification for NSR implications.
- Throughput limits on grandfathered sources are not federally enforceable.
- The [permits] have been modified to clearly distinguish between limits imposed through NSR and limits imposed on grandfathered sources.

2003 CRTC 31-33.

EPA believes the public comments and District’s responses have done much to describe and explain, in the public record, the purpose and legal significance of the District’s throughput limits for grandfathered sources. Based on these interactions, EPA denies Petitioners’ request that I object to the Permit. Petitioners’ allegation that the throughput levels trigger NSR requirements is directly contradicted by the record, which is clear that the throughput limits impose a reporting obligation, do not establish NSR baselines, preclude NSR review, or function as and do not function as presumptive NSR triggers. Petitioners offer no evidence to support its allegations otherwise. Because Petitioners have failed to demonstrate any deficiency in the Permit, EPA denies this claim.

3. Permit Does Not Assure Compliance with Regulation 9-10

Petitioners allege that EPA must object to the Permit because the Facility has repeatedly

exceeded NOx emission standards set forth in BAAQMD Regulation 9-10 and that therefore a compliance schedule is necessary.

As a preliminary matter, EPA must correct Petitioners' misstatement that EPA approved BAAQMD's definition of "applicable requirement" (codified in BAAQMD Regulation 2-6-202) into BAAQMD's portion of the California State Implementation Plan ("SIP"). EPA did not approve BAAQMD's title V rules into the California SIP. EPA approved BAAQMD's Title V program pursuant to 40 C.F.R. Part 70, not Part 52, as is the case for approval of state implementation plans. *See* 66 Fed. Reg. 63503 (Dec. 7, 2001).¹⁴ Therefore, BAAQMD Regulation 2-6-202 is not part of the California SIP.

Petitioners' main contention, however, is that the Permit is deficient because it lacks a compliance schedule to address Chevron's non-compliance with BAAQMD Regulation 9-10. Petitioners do not specify which version of BAAQMD Regulation 9-10 is at issue. EPA has approved Regulation 9-10, as adopted by BAAQMD on January 5, 1994, into BAAQMD's portion of the California SIP. *See* 66 Fed. Reg. 17078 (March 29, 2001). BAAQMD, however, adopted a revised version of Regulation 9-10 on July 17, 2002. This version has not been approved into the California SIP. Relevant to Petitioners' claim is the fact that the federally-enforceable NOx limit is 0.20 pounds of NOx per million BTU of heat input, whereas the non-federally enforceable NOx limit is much more stringent, at 0.033 pounds of NOx per million BTU of heat input.¹⁵ *See* SIP-approved BAAQMD Regulation 9-10-303 (as adopted Jan. 5, 1994); BAAQMD Regulation 9-10-301 (as adopted July 17, 2002). Therefore, it is possible for the facility to be in compliance with the federally-enforceable limit, 9-10-303, and out of compliance with the non-federally enforceable limit, 9-10-301.

To support its allegation that a compliance schedule is required, Petitioners attach several reports from the facility to BAAQMD, titled "Quarterly NOx Emission Report". Each report mentions that it consists of two attachments – Attachment #1 is intended to satisfy Regulation 9-10-505.2.2; Attachment #2 is intended to satisfy Regulation 9-10-505.2.1. (Neither of these subsections is part of the SIP-approved version of Regulation 9-10.) Each report further specifies that Attachment #1 is a "summary of excess emissions events" and that Attachment #2 "is a summary of firing rate and emissions data obtained from the fuel meters and CEMS [continuous emissions monitor systems] installed pursuant to Regulation 9-10-502."

For each report included with the Petition, Petitioners include only Attachment #1. EPA has reviewed each Attachment #1 document included with the Petition. Each Attachment #1

¹⁴Also, unlike EPA approval of state implementation plans, EPA approval of state Title V programs was simply an approval. EPA did not approve Title V programs via incorporation by reference into the Code of Federal Regulations; hence, the rules and regulations that constitute state Title V programs are not federal law.

¹⁵Both the federally enforceable and non-federally enforceable limits are on an "operating day average." *See* SIP-approved BAAQMD Regulation 9-10-303 (as adopted Jan. 5, 1994); BAAQMD Regulation 9-10-301 (as adopted July 17, 2002).

document contains information pertaining either to “NOx Box firing rate excess” or “NOx Box O2 excess.” EPA has determined that neither type of data demonstrates noncompliance with the federally enforceable emission limit set forth in BAAQMD Regulation 9-10-303.

According to the District’s 2004 Statement of Basis, the “NOx Box” is an emissions factor approach to determining compliance with the non-SIP approved emission limit in BAAQMD Regulation 9-10-301. 2004 Statement of Basis at 15. The NOx Box applies to emissions units that do not have CEMS; hence, the reliance on emissions factors. According to the District, the NOx Box functions as follows:

Source tests to establish the NOx Box are conducted at extreme operating conditions (the “corners” of the NOx Box). As long as the facility operates within the perimeter defined by these source tests, emissions are assumed to be equal to the highest emission rate tested. By monitoring firing rate and O2 in the exhaust, the validity of using the emission factor is reasonably assured. . . Operation outside the box results in scrutiny to determine compliance with the emission standard including conduct of a test at the unproven conditions.

Id. (emphasis added). Therefore, according to the District, the emissions information contained in Attachment #1 does not automatically show non-compliance with an emissions limit, and additional source testing would be required to establish a violation. Moreover, because the BAAQMD has designed the NOx Box parameters to detect potential compliance problems with the more stringent non-federally enforceable limit in BAAQMD Regulation 9-10-301, the data in Attachment #1 is even less indicative of noncompliance with a federal applicable requirement.

For these reasons, EPA finds that Petitioner has failed to demonstrate that the Permit is deficient because it lacks a compliance schedule, and EPA therefore denies the Petition as to this issue.

Although EPA is denying the Petition for the reasons set forth above, EPA is concerned that the record suggests that Chevron may be improperly designating emissions information as trade secret information. In its cover letter to the quarterly emissions reports, Chevron claims that, “Attachment #2 contains “refinery-confidential information and is a trade secret of Chevron Products Company” The Clean Air Act, however, limits the type of information that may be withheld from the public on the basis of trade secret or business confidentiality, and consistency with these requirements was a prerequisite to EPA approval of BAAQMD’s title V program. Pursuant to 40 C.F.R. § 70.4(b)(3)(viii), the State of California has certified, through an opinion issued by the State Attorney General’s Office, that the District has authority to make available to the public all information that would be available under section 503(e) of the Act, with the exception of information that could be considered confidential pursuant to section 114(c) of the Act. EPA has promulgated regulations particular to the Clean Air Act, which would require EPA to release “emissions data,” which is defined as “information necessary to determine the identity, amount, frequency, concentration, or other characteristics . . of any emission which has been emitted by the source . . .” 40 C.F.R. § 2.301(f), (a)(2)(i)(A). Because

EPA could not withhold information necessary to determine compliance with Regulation 9-10-303, EPA believes it would be inappropriate for BAAQMD to do so.

EPA further notes that SIP-approved 9-10-502.2 requires a fuel-flow meter for each unit covered by the rule. The data from this monitor, at the very least, should be made available to the public. EPA also notes that non-SIP approved 9-10-505.2.1 requires reporting of the following information: “date, time, duration and magnitude of emissions in excess of the appropriate standards; the nature and cause of the excess (if known); the corrective actions taken; and the preventive measures adopted.” Chevron’s cover letter to the quarterly emissions reports states that Attachment #2 includes the information required by 9-10-505.2.1, yet also claims this information as trade secret. It is difficult to reconcile how this information, which clearly includes “emissions data” as that term is defined by EPA, could be treated as confidential business information in a manner that would be consistent with sections 114(c) and 503(e) of the Act. Although this issue was not raised by Petitioners and is therefore beyond the scope of the this Order, EPA recommends to the District that it carefully review the information provided by Chevron in Attachment #2 of its quarterly emission reports and make available any such data that cannot be claimed as trade secret consistent with the federal Clean Air Act. EPA would also recommend that BAAQMD advise Chevron to reformat its quarterly emission reports to segregate information that may be properly be treated as confidential from emissions data.

4. Other Commenters Have Raised Deficiencies

Petitioners’ final claim is that an objection to the Permit is warranted based on comments provided to the District by other organizations, specifically, Communities for a Better Environment, and Our Children’s Earth Foundation, which Petitioners claim, are incorporated into the Petition.

EPA denies Petitioners’ claim. First, Petitioners make only a generalized reference to comments provided by other organizations with no attempt to actually describe or demonstrate any deficiency in the Permit. We note, again, the statutory requirement for Petitioners to demonstrate to the Administrator that the Permit is not in compliance with the Act. 42 U.S.C. 7661d(b)(2). Second, EPA notes that the comments to which Petitioners refer relate to draft versions of the Permit. In this case, due to unusual procedural circumstances, the final Permit was issued more than one year ago; as a consequence, Petitioners have had ample opportunity to review the actual Permit for any actual deficiencies. The general allegation that a permitting authority has not corrected deficiencies raised previously does not demonstrate that the Permit is not in compliance. The burden is on the petitioner to demonstrate that the permit is not in compliance with all applicable requirements by identifying specific flaws in the permit. *See In the Matter of Al Turi Landfill, Inc.*, Petition No. II-2002-13-A (Jan. 30, 2004), at 3. Therefore, EPA denies the Petition as to any issues not raised in the Petition.

IV. TREATMENT, IN THE ALTERNATIVE, AS A PETITION TO REOPEN

As explained in the Procedural Background section of this Order, EPA received and

dismissed a prior petition (“2003 Union Petition”) from these Petitioners on a previous version of the Permit at issue in this Petition. EPA’s response in this Order to issues raised in this Petition that were also included in the 2003 Union Petition also constitutes the Agency’s response to the 2003 Petition. Furthermore, EPA considers the Petition validly submitted under CAA section 505(b)(2). However, if the Petition should be deemed to be invalid under that provision, EPA also considers, in the alternative, the Petition and Order to be a Petition to Reopen the Permit and a response to a Petition to Reopen the Permit, respectively.

V. CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, I deny the Petition requesting that the Administrator object to the Permit. This decision is based on a thorough review of the draft permit, the final revised permit issued on December 16, 2004, and other documents pertaining to the issuance of the Permit.

Date

Stephen L. Johnson
Acting Administrator