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1 Daniel L. Cardozo, CSB No. 111382
Richard T. Drury, CSB No. 163559
2 Suma Peesapati, CSB No. 203701
ADAMS BROADWELL JOSEPH & CARDOZO
3 A Professional Corporation
651 Gateway Boulevard, Suite 900
4 South San Francisco, CA 94080
Telephone: 650-589-1660
5 Facsimile: 650-589-5062

6 Attorneys for Petitioners

7
8 **BEFORE THE ADMINISTRATOR**

9 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

10
11 IN THE MATTER OF PROPOSED TITLE V
12 PERMIT ISSUED TO CONOCOPHILLIPS
13 66 COMPANY FOR ITS PETROLEUM
REFINERY LOCATED IN RODEO,
CALIFORNIA

BAAQMD Application No. 16487

14 ISSUED BY THE BAY AREA AIR
15 QUALITY MANAGEMENT DISTRICT

16 Plumbers and Steamfitters Union Local 342, Heat
and Frost Insulators/Asbestos Workers Local 16,
17 the International Brotherhood of Electrical
Workers Local 302, the Boilermakers Union Local
18 549 and the Laborers Union Local 324, Petitioners.

19
20 **PETITION REQUESTING THE ADMINISTRATOR TO OBJECT TO THE**
21 **PROPOSED ISSUANCE OF THE PROPOSED TITLE V OPERATING PERMIT FOR**
22 **CONOCOPHILLIPS' RODEO REFINERY**

23 INTRODUCTION

24 The Clean Air Act's Title V program exists to provide a "comprehensive State air quality
25 permitting system" and to create a permit that "assures compliance by the source with all applicable
26 requirements." 40 C.F.R. 70.1(a); 40 C.F.R. 70.1(b). ConocoPhillips' ("Conoco") proposed Title V
27 permit defies this purpose both by its plain terms and by its omissions. The document fails to include
28 all applicable requirements and distorts many of the requirements it does include. By accepting

1 Conoco's incomplete and inaccurate application without performing its own compliance investigation,
2 the permitting agency turned a blind eye to other applicable requirements, such as preconstruction
3 review, thereby issuing an inadequate Title V permit to the company.

4 Under the Clean Air Act § 505(b)(2), 42 U.S.C. § 7661(d) (b)(2), Petitioners hereby request
5 that the Administrator object to the Bay Area Air Quality Management District's ("BAAQMD" or
6 "District") issuance of a proposed Title V Major Facility Review Permit ("Proposed Permit") to
7 Conoco for its refinery in Rodeo, California. The EPA received the proposed Title V permit from the
8 BAAQMD on August 13, 2003.¹ EPA's 45-day review period of the permit ended on September 26,
9 2003, making this petition timely because it is filed within sixty days of the expiration of EPA's 45-
10 day review period. *See* Clean Air Act § 505(b)(2). Under the Clean Air Act, the Administrator must
11 render a decision granting or denying this petition within sixty days after it is filed. *Id.* This petition
12 is based on issues petitioners raised during the public comment periods for the draft and proposed
13 permits.

14 PETITIONERS

15 Petitioners Plumbers and Steamfitters Union Local 342, Heat and Frost Insulators/Asbestos
16 Workers Local 16, the International Brotherhood of Electrical Workers Local 302, the Boilermakers
17 Union Local 549 and the Laborers Union Local 324 ("Petitioners") construct and maintain
18 commercial, residential and industrial projects, primarily in the vicinity of Contra Costa County. They
19 are concerned with sustainable land use and development in Contra Costa County. Poorly operated
20 and environmentally detrimental projects may jeopardize future jobs by making it more difficult and
21 more expensive for business and industry to expand in the region, and by making it less desirable for
22 businesses to locate and people to live there. Continued degradation can, and has, caused construction
23 moratoria and other restrictions on growth in the County that, in turn, reduce future employment
24 opportunities. Additionally, workers themselves live in the communities that suffer the impacts of
25 environmentally detrimental projects. Union members breathe the same polluted air that others
26 breathe and suffer the same health and safety impacts. Finally, union members are concerned about

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28 ¹
<http://yosemite.epa.gov/R9/AIR/EPSS.NSF/e0c49a10c792e06f8825657e007654a3/2331ea39437a600486256d7b00586c74>

1 projects that carry serious environmental risks without providing countervailing employment and
2 economic benefits to local workers and communities. Therefore, Petitioners and their members have a
3 strong interest in enforcing environmental laws such as the federal Clean Air Act² (“CAA” or “the
4 Act”).

5 APPLICANT – CONOCOPHILLIPS SAN FRANCISCO REFINERY

6 Conoco operates a petroleum refinery in Rodeo, California (“Refinery”). The refinery emits a
7 variety of pollutants, including, but not limited to, volatile organic compounds (“VOCs”), nitrogen
8 oxides (“NOx”), and sulfur dioxide (“SO2”). The emissions from the Conoco Refinery have varying
9 levels of toxicity and concentrations and include some of the most toxic chemicals known to science.
10 The Refinery is a major facility required to obtain an operating permit under Title V of the 1990 Clean
11 Air Act Amendments, the Federal Operating Permit Program and District’s Regulation 2, Rule 6 -
12 Major Facility Review.

13 GROUND FOR OBJECTION

14 Petitioners request that the Administrator object to the proposed Title V permit for the Conoco
15 Refinery because, as explained below, it does not meet the requirements of 40 C.F.R., Part 70. In
16 particular, the EPA has identified numerous applicable requirements that are not included in the
17 permit, Petitioners have identified numerous applicable requirements that are not included in the
18 permit, and various other inaccuracies and inconsistencies must be corrected before a final permit may
19 be issued by the BAAQMD.

20 **A. THE EPA HAS IDENTIFIED APPLICABLE REQUIREMENTS THAT ARE**
21 **NOT INCLUDED IN CONOCO’S PROPOSED PERMIT,**
22 **CREATING A NON-DISCRETIONARY DUTY TO OBJECT**

23
24 The Clean Air Act provides that “If any permit contains provisions that are determined by the
25 Administrator as not in compliance with the applicable requirements of this chapter, including the
26 requirements of an applicable implementation plan, the Administrator *shall* . . . object to its
27 issuance.” Clean Air Act, § 505(b)(1) (emphasis added). The Second Circuit Court of Appeals
28

² 42 U.S.C. § 7401 *et seq.*

1 recently held that when there is a demonstration of noncompliance with Title V regulations, the
2 “Administrator *shall* issue an objection.” *NYPIRG v. EPA*, 321 F.3d 316, 333 (2003); *see also* Clean
3 Air Act § 505(b)(2)(emphasis added); *see also* 40 C.F.R. § 70.8(c) (EPA’s own regulation, which
4 states that the EPA “*will* object to the issuance of any proposed permit” if the EPA determines it
5 violates an applicable requirement) (emphasis added). In the *NYPIRG* case, the petitioner’s claim that
6 the public notice procedure was flawed formed an adequate basis to force the EPA to object to the
7 permit. *NYPIRG v. EPA*, 321 F.3d at 332-333. In response to the EPA’s claim that the inadequate
8 public notice procedure constituted “harmless error” -- a determination the agency claimed to be
9 within its discretion -- the Court explained that “this argument blurs the important distinction between
10 the discretionary part of the statute (whether the petition demonstrates non-compliance) with the non-
11 discretionary part (if such a demonstration is made, objection must follow).” *NYPIRG v. EPA*, 321
12 F.3d at 333. In short, when the EPA finds that a proposed permit fails to comply with Title V, the
13 agency *must* object to that permit. *Id.*

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15
16 The most important mandate of Title V is that permits issued under its authority contain “all
17 applicable requirements.” 40 C.F.R. 70.1(a); 40 C.F.R. 70.1(b). Here, the EPA has identified
18 numerous provisions in Conoco’s proposed Title V permit that are not in compliance with applicable
19 requirements for the refinery. *See* Exhibit 1, Enclosure A, “EPA Comments on Conoco Phillips
20 Refinery Permit.” Specifically, the EPA found inconsistencies and omissions in Conoco’s Proposed
21 Permit for the following sources: Abatement Devices, Combustion Units, Cooling Towers, Fugitive
22 Sources (Pressure Relief Valves, Pumps, Compressors), Hydrogen Plant, Loading Racks, Floating
23 Roof Tanks, and Tanks. *See id.* EPA further found that Regulation 9-1-313.2 is incorrectly marked
24 as non-federally enforceable throughout the permit and that the Statement of Basis incorrectly states
25 that the permits may be revised through a variance or an administrative change. *See id.* Petitioners
26 do not waive any issues raised in the EPA’s attached comments by failing to mention them above, but
27
28

1 merely highlight some of the most egregious omissions.

2 In light of the EPA's explicit findings that the Proposed Permit failed to include all applicable
3 limits, the agency had a *non-discretionary* duty to object to Conoco's proposed permit by the end of
4 its 45-day review period, September 26, 2003. Clean Air Act, § 505(b)(1); *see also* 40 C.F.R. §
5 70.8(c); *see also NYPIRG v. EPA*, 321 F.3d at 333. Because the EPA failed to perform this
6 nondiscretionary duty, Petitioners submit this petition to request that EPA cure this deficiency and
7 object to the Proposed Permit at this time.
8

9 **B. BY THE DISTRICT'S OWN ADMISSION, CONOCO'S PERMIT IS NOT IN**
10 **COMPLIANCE WITH TITLE V, REQUIRING OBJECTION BY THE EPA**

11 The Clean Air Act states that the EPA "*shall* issue an objection within [60 days] if the
12 petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements
13 of this chapter." *See* Clean Air Act, § 505(b)(2); 42 U.S.C. § 7661(d) (b)(2) (emphasis added). As
14 explained below, Petitioners and other commenters demonstrated that Conoco's Proposed Permit is
15 not in compliance with the requirements of the Clean Air Act during the public comment period
16 provided by the District. In response, the District admitted to the existence of several permit
17 inadequacies while ignoring most of the issues raised by Petitioners during the public comment period.
18 Based on the District's admissions alone, the EPA *must* object to Conoco's Proposed Permit. *See id.*

19 While the District did address some of the issues raised by Petitioners and other commenters in
20 the Proposed Permit, the vast majority of Petitioners' concerns remain uncured. For that reason,
21 Petitioners incorporate by reference all the issues raised during the District's public comment period as
22 additional bases for this petition. Two sets of comments submitted by Petitioners in response to the
23 draft and proposed permits are attached to this letter as Exhibits 2 and 3. Comments submitted by
24 Communities for a Better Environment and Our Children's Earth are incorporated into this petition by
25 reference and attached hereto as Exhibits 5-8.

26 Although the various comments provide an in-depth discussion of inadequacies in the
27 Proposed Permit, a summary of some of the issues raised in those comments is provided below.
28

1 Petitioners do not waive any issues raised in the prior comments by failing to mention them below,
2 but merely highlight some of the most egregious omissions.

3 **1. The District Admits that Conoco's Permit Is Not Supported By a**
4 **Complete Application**

5 EPA's regulations provide specific criteria for determining the adequacy of a facility's
6 application. *See, generally*, 40 C.F.R. § 70.5(c). Those informational requirements include, but are not
7 limited to, a list of all sources in the permit application, stack discharge points, description of fuels,
8 fuel use, raw materials, production rates and operating schedules, detailed information on air pollution
9 control equipment and monitoring devices, dates when emission sources and air pollution control
10 equipment were last installed and modified, calculations, input assumptions to the calculations and
11 sufficiently detailed process production rate and throughput capacities which would be required to
12 support other quantitative aspects of the facility's application, emission estimates from all significant
13 sources, and a compliance statement. *See id.* In its Response to Comments on the Draft Permit
14 (Exhibit 4, p.9-11), the BAAQMD admits that these requirements for application adequacy were not
15 observed in the Proposed Permit. The agency dismisses commenters' concerns related to permit
16 adequacy simply by stating that an incomplete application does not affect the adequacy of the permit.
17 Of course, as explained in our September 22, 2003 comments, attached as Exhibit 3, application
18 adequacy requirements are separate and independent provisions of the Title V program that require
19 strict compliance.

20 Next, under the implementing regulations for Title V, applicants must certify the accuracy of
21 the information contained in their applications. 40 C.F.R. § 70.5 (d). Petitioners discussed the
22 Refinery's failure to provide legally compliant certifications in their draft permits as a problem that
23 renders Conoco's application legally inadequate. See Petitioners' September 22, 2003 Comments,
24 Exhibit 3. This defect has not been cured.

25 Finally, as explained in Petitioners attached comments, the public process for the permit was
26 fundamentally flawed. Specifically, in violation of 40 C.F.R. § 70.7(h)(2), the District refused
27 Petitioners access to all documents relevant to the permitting action. And, in violation of 40 CFR §
28 70.2 and 40 CFR § 70.8(c)(3), the District failed to provide the public and the EPA with a copy of the

61. ci documents

1 Permit it proposes to make final. Instead, the District merely provided the public with a draft of the
2 permit, which is subject to change, according to the EPA's own admission: "We understand that the
3 District intends to propose additional refinery Title V permit revisions in the near future, and we will
4 continue working cooperatively with the District during these revisions." See Exhibit 1, October 31,
5 2003 letter from Gerardo C. Rios to Mr. Steve Hill. These flaws in the public process are strikingly
6 similar to the *NYPIRG* case where the petitioner was denied an adequate opportunity to request a
7 public hearing. The EPA's admission of this flaw was sufficient to require the agency to object in that
8 case. *NYPIRG v. EPA*, 321 F.3d 316, 333 (2003).

9 **2. The District Admits that the Bay Area Refinery Permits Do Not**
10 **Incorporate The Correct HAP Standard**

11 The District's Responses admit that under BAAQMD Rule 2-6-210, the significance thresholds
12 for Hazardous Air Pollutants (HAPs) is 400 pounds per day, but that the Proposed Permit incorrectly
13 lists the significance threshold for those pollutants at 1000 pounds per day. Exhibit 4 at 9. As a result
14 of this mistake, the District failed to require the listing of all significant sources of HAPs in Conoco's
15 Proposed Permit. The Responses fail to provide an explanation for this inconsistency and further fail
16 to correct this mistake. This District-admitted inconsistency with Title V means that the EPA must
17 object to Conoco's permit. See Clean Air Act, § 505(b)(2); 42 U.S.C. § 7661(d) (b)(2).

18 **3. The District Admits that the Proposed Permit Does Not Assure**
19 **"Continuous Compliance," In Violation of Title V**

20 Part 70 creates a legal distinction between continuous compliance and intermittent compliance.
21 As part of the requirements for compliance certification, Part 70 permits must include the "status of
22 compliance with the terms and conditions of the permit for the period covered by the certification,
23 including whether compliance during the period was continuous or intermittent." 40 CFR 70.6
24 (c)(5)(C). Non-continuous compliance therefore affects the compliance status of the source under Part
25 70.

26 Furthermore, the courts have made clear that Title V requires continuous compliance. "[Title
27 V's] monitoring and testing requirements ensure that sources *continuously* comply with emission
28 standards." *Utility Air Regulatory Group v. Environmental Protection Agency*, 320 F.3d 272, 275

1 (D.C. Cir. 2003) (emphasis added).

2 In its Response to Comments, the District admits that “[c]ompliance by the refineries with all
3 District and federal air regulations will not be continuous.” See Exhibit 4, p.15. The District further
4 states that the Proposed Permit can assure only “reasonable intermittent compliance” with the
5 applicable requirements for the refinery, rather than consistent compliance with applicable
6 requirements. See *id.* Because the District admits that the Proposed Permit does not ensure
7 continuous compliance with emission standards, the EPA must object to the Proposed Permit for
8 failing to include all applicable requirements.

9 **4. The District Admits That the Proposed Permit Does Not Contain a**
10 **Schedule of Compliance for Conoco’s Odor-Related Violations**

11 Petitioners’ original comments noted that the District did not provide a schedule of compliance
12 for odor-related violations from the Conoco Refinery that culminated into orders of abatement. See
13 Exhibit 2. In response, the District offered the following nonsensical explanation: “The order of
14 abatement does not constitute a compliance plan, because it does not authorize violations of the
15 underlying applicable requirements . . . In other words, the order does not impose new requirements.”
16 See Exhibit 4 at p.17. Regardless of whether the order imposes new requirements, the Proposed
17 Permit must include a schedule of compliance for the violations that underlie that order. 40 CFR §
18 70.5(c)(8)(i)(C). Based on this admitted deficiency alone, the EPA must object to the Proposed
19 Permit.

20 **C. PETITIONERS HAVE SHOWN THAT CONOCO’S PERMIT IS NOT IN**
21 **COMPLIANCE WITH TITLE V, REQUIRING OBJECTION BY THE EPA**

22 **1. The Proposed Permit Does Not Cure Conoco’s Failure to Obtain All**
23 **Legally-Required Preconstruction Review Permits**

24 According to the EPA’s own interpretation of its Title V regulations:

25 Under 40 CFR § 70.1(b), “all sources subject to Title V must have a permit to operate
26 that assures compliance by the source with applicable requirements.” Applicable
27 requirements are defined in 40 CFR § 70.2 to include: “(1) any standard or other
28 requirement provided for in the applicable implementation plan approved or
promulgated by EPA through rulemaking under Title I of the [Clean Air] Act”
Such applicable requirements include the requirement to obtain preconstruction

1 *permits that comply with preconstruction review requirements under the Act, EPA*
2 *regulations, and State Implementation Plans (“SIPs”). See generally CAA § §*
3 *110(a)(2)(C), 160-169, &173; 40 CFR §§ 51.160-66 & 52.21.*

4 *In the Matter of Pacific Coast Building Products, Order Responding to Petitioner’s Request That the*
5 *Administrator Object to the Issuance of a State Operating Permit, p.7 (December 10, 1999) (emphasis*
6 *added).*

7 As Petitioners discussed in their attached comments, there are a number of sources at the
8 Conoco refinery for which the District has allowed “administrative increases” in firing rates. For
9 grandfathered sources, the Proposed Permit allows dramatic increases in throughput levels without
10 subjecting those sources to the Clean Air Act’s New Source Review requirements. These
11 preconstruction review anomalies must be resolved in Conoco’s Title V permit. Rather than
12 investigate and resolve Conoco’s failure to obtain the required preconstruction review permits, the
13 District simply responded with the following: “there is *no advantage* to holding the Title V permit in
14 abeyance while compliance issues are investigated and resolved.” Exhibit 4 at 6 (emphasis added). Of
15 course, the advantage would be that a proper permit would comply with the law and would require
16 Conoco to install the proper pollution control technology – one of the fundamental goals of the Clean
17 Air Act. As explained in Petitioners’ attached comments (Exhibits 2 and 3), resolution of those
18 compliance issues is a basic condition of permit adequacy under the Clean Air Act. 40 C.F.R. §
19 70.5(c)(8)(iii)(C). Petitioners therefore reiterate the need to resolve all areas of noncompliance with
20 the preconstruction review provisions of the Clean Air Act identified in their attached comments on
21 Conoco’s draft and proposed Title V permit. Because of EPA’s clear position requiring the resolution
22 of all preconstruction review requirements as a condition of Title V permit adequacy as quoted above,
23 the EPA must object to the Proposed Permit.

24 **2. The Proposed Permit Does Not Assure Compliance with the Clean Air** 25 **Act’s New Source Review Requirements**

26 Under the Clean Air Act’s Title V program the District must create a permit that “assures
27 compliance by the source with all applicable requirements.” 40 C.F.R. 70.1(a); 40 C.F.R. 70.1(b). As
28 Petitioners mentioned in their original comments, (attached hereto as Exhibit 2), the District offers
“thresholds” for grandfathered units that are baseless. Oddly, the language in the proposed permit is

1 even more ambiguous than the language contained in the draft permit. In the draft permit, the
2 throughput levels were meant to be presumptive limits, thereby providing at least some level of
3 predictability with respect to enforcement action. Still, as we explained in our original comments, the
4 unjustified increases in throughput levels trigger the Act's New Source Review ("NSR") provisions,
5 since they carry the potential for significant emission increases from the refineries. Because the
6 District failed to impose NSR requirements associated with the inflated throughput levels, those
7 comments still stand.

8 3. EPA Must Object Based on Deficiencies Raised By Other Commenters

9 During the public comment period on the draft and proposed permits, Communities for a Better
10 Environment and Our Children's Earth submitted comments detailing deficiencies in both versions.
11 Commenters and the District provided the EPA with copies of those comments during the public
12 comment period. Petitioners incorporate all issues raised in those comments, attached hereto as
13 Exhibits 5-8, as independent grounds for this petition.

14 CONCLUSION

15 Based on the significant deficiencies in Conoco's Proposed Permit as discussed above,
16 Petitioners respectfully petition the EPA to perform its non-discretionary duty to object to the Permit.

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18 Respectfully submitted,

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20 Dated: November 24, 2003

ADAMS BROADWELL JOSEPH & CARDOZO
A Professional Corporation

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22 By: 

Daniel L. Cardozo
Richard T. Drury
Suma Peesapati

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24 Attorneys for Petitioners Plumbers and
25 Steamfitters Union Local 342, Heat and Frost
26 Insulators/Asbestos Workers Local 16, the
27 International Brotherhood of Electrical Workers
28 Local 302, the Boilermakers Union Local 549 and
the Laborers Union Local 324