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

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF PROPOSED TITLE V PERMIT ISSUED TO SHELL MARTINEZ REFINING COMPANY, SHELL OIL PRODUCTS COMPANY FOR ITS PETROLEUM REFINERY LOCATED IN MARTINEZ, CALIFORNIA

ISSUED BY THE BAY AREA AIR QUALITY MANAGEMENT DISTRICT

Plumbers & 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, Petitioners

BAAQMD Application No. 16467

PETITION REQUESTING THE ADMINISTRATOR TO OBJECT TO THE PROPOSED ISSUANCE OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE SHELL MARTINEZ REFINERY

INTRODUCTION

The Clean Air Act's Title V program exists to provide a "comprehensive State air quality permitting system" and to create a permit that "assures compliance by the source with all applicable requirements." 40 C.F.R. 70.1(a); 40 C.F.R. 70.1(b). Shell Martinez Refining Company, Shell Oil Products Company's ("Shell") proposed Title V permit defies this purpose both by its plain terms and
by its omissions. The document fails to include all applicable requirements and distorts many of the
requirements it does include. By accepting Shell’s incomplete and inaccurate application without
performing its own compliance investigation, the permitting agency turned a blind eye to other
applicable requirements, such as preconstruction review, thereby issuing an inadequate Title V permit
to the company.

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

PETITIONERS

Petitioners Plumbers & 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 (“Petitioners”) construct and maintain
commercial, residential and industrial projects, primarily in the vicinity of Contra Costa County. They
are concerned with sustainable land use and development in Contra Costa County. Poorly operated
and environmentally detrimental projects may jeopardize future jobs by making it more difficult and
more expensive for business and industry to expand in the region, and by making it less desirable for
businesses to locate and people to live there. Continued degradation can, and has, caused construction
moratoria and other restrictions on growth in the County that, in turn, reduce future employment
opportunities. Additionally, workers themselves live in the communities that suffer the impacts of

1
http://yosemite.epa.gov/R9/AIR/EPSS.NSF/e0c49a10c792e06f8825657e007654a3/2331ea39437a600486256d7b00586c74
(1324a-041)
environmentally detrimental projects. Union members breathe the same polluted air that others 
breathe and suffer the same health and safety impacts. Finally, union members are concerned about 
projects that carry serious environmental risks without providing countervailing employment and 
economic benefits to local workers and communities. Therefore, Petitioners and their members have a 
strong interest in enforcing environmental laws such as the federal Clean Air Act\(^2\) ("CAA" or "the 
Act").

**APPLICANT – SHELL MARTINEZ REFINERY**

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

**GROUNDS FOR OBJECTION**

Petitioners request that the Administrator object to the Proposed Permit for the Shell refinery 
because, as explained below, it does not meet the requirements of 40 C.F.R., Part 70. In particular, the 
EPA has identified numerous applicable requirements that are not included in the Proposed Permit, 
Petitioners have identified numerous applicable requirements that are not included in the Permit, and 
various other inaccuracies and inconsistencies must be corrected before a final permit may be issued 
by the BAAQMD.

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

Under the Clean Air Act "If any permit contains provisions that are determined by the 
Administrator as not in compliance with the applicable requirements of this chapter, including the

\(^2\) 42 U.S.C. § 7401 et seq.
requirements of an applicable implementation plan, the Administrator shall . . . object to its issuance.”

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

The most important mandate of Title V is that permits issued under its authority contain “all applicable requirements.” 40 C.F.R. 70.1(a); 40 C.F.R. 70.1(b). Here, the EPA has identified numerous provisions in Shell’s proposed Title V permit that are not in compliance with all applicable requirements for the refinery. *See* Exhibit 1, Enclosure B, “EPA Comments on Proposed Shell Martinez Refinery Permit.” Specifically, the EPA found inconsistencies and omissions in Shell’s Proposed Permit for the following sources: Abatement Devices, Catalytic Cracking Unit, Combustion Units (CO Boilers), Cooling Towers, Electrostatic Precipitators, Flares, Fugitive Sources (Pressure Relief Valves, Pumps, Compressors), Hydrogen Plant, Loading Racks, Floating Roof Tanks, Tanks, Sulfur Treatment Emissions, Support Facilities, Grandfathered Units and Wastewater Treatment Systems. *See* id. EPA further found significant problems with the permit shields
contained in Proposed Permit. One type of shield EPA finds problematic in its comments are
“facility-wide shields, which apply to the entire refinery and prospectively to an unknown universe of
potential future new units.” Exhibit 1, Enclosure B, page 10. “Another facility-wide shield included
in the proposed permit consists of a very large list of sources exempted from the boiler NSPS [new
source performance standards] . . . without a specific reason.” Id. at 11. With respect to both types of
shields, the agency found that it “does not believe that 40 CFR, Subpart 70 allows either of these
shields.” Id. at 11. Finally, the agency found that the Proposed Permit’s monitoring provisions for
miscellaneous units are inadequate See id at 16-17. Petitioners do not waive any issues raised in the
by EPA’s comments by failing to mention them above, but merely highlight some of the most
egregious omissions.

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

B. BY THE DISTRICT’S OWN ADMISSION, SHELL’S PERMIT IS NOT IN
COMPLIANCE WITH TITLE V, REQUIRING OBJECTION BY THE EPA

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

While the District did address some of the issues raised by Petitioners and other commenters in the Proposed Permit, the vast majority of Petitioners’ concerns remain uncured. For that reason, Petitioners incorporate by reference all the issues raised during the public comment period as the basis for this petition. Two sets of comments submitted by Petitioners in response to the draft and proposed permits are attached to this letter as Exhibits 2 and 3. Comments submitted by other groups are attached as Exhibits 6-9 and incorporated into this petition by reference.

Although the various comments provide an in-depth discussion of inadequacies in the Proposed Permit, a summary of some of the issues raised in those comments is provided below. Petitioners do not waive any issues raised in the prior comments by failing to mention them below, but merely highlight some of the most egregious omissions.

1. The District Admits that Shell’s Permit Is Not Supported By a Complete Application

EPA’s regulations provide specific criteria for determining the adequacy of a facility’s application. See, generally, 40 C.F.R. § 70.5(c). Those informational requirements include, but are not limited to, 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. See id. In its Response to Comments on the Draft Permit (Exhibit 4, p. 9-11), the BAAQMD admits that Shell failed to comply with these requirements for application adequacy. The agency dismisses commenters’ concerns related to permit adequacy simply by stating that an incomplete application does not affect the adequacy of the permit. Of course, as explained by Petitioners’ September 22, 2003 comments, attached as Exhibit 3, application adequacy requirements are separate and independent provisions of the Title V program that demand strict
adherence.

Next, under the implementing regulations for Title V, applicants must certify the accuracy of the information contained in their applications. 40 C.F.R. § 70.5 (d). Petitioners discussed the refinery’s failure to provide legally compliant certifications in their draft permits as a problem that renders Shell’s application legally inadequate. See Petitioners’ September 22, 2003 Comments, attached as Exhibit 3. This deficiency remains uncured.

Finally, as explained in Petitioners’ attached comments, the public process for the permit was fundamentally flawed. Specifically, in violation of 40 C.F.R. § 70.7(h)(2), the District refused Petitioners access to all documents relevant to the permitting action. And, in violation of 40 CFR § 70.2 and 40 CFR § 70.8(c)(3), the District failed to provide the public and the EPA with a copy of the Permit it proposes to make final. Instead, the District merely provided the public with a draft of the permit, which is subject to change, according to the EPA’s own admission: “We understand that the District intends to propose additional refinery Title V permit revisions in the near future, and we will continue working cooperatively with the District during these revisions.” See Exhibit 1, October 31, 2003 letter from Gerardo C. Rios to Mr. Steve Hill. These flaws in the public process are strikingly similar to the NYPIRG case where the petitioner was denied an adequate opportunity to request a public hearing. The EPA’s admission of this flaw was sufficient to require the agency to object in that case. NYPIRG v. EPA, 321 F.3d 316, 333 (2003). Just as in the NYPIRG case, the EPA’s acknowledgement of deficiencies in the public process is sufficient to trigger the agency’s non-discretionary duty to object to the permit.

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

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

3. The District Admits that the Proposed Permit Does Not Assure
   “Continuous Compliance,” In Violation of Title V

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

Furthermore, the courts have made clear that Title V requires continuous compliance. “[Title V’s] monitoring and testing requirements ensure that sources continuously comply with emission standards.” Utility Air Regulatory Group v. Environmental Protection Agency, 320 F.3d 272, 275 (D.C. Cir. 2003) (emphasis added).

In its Response to Comments, the District admits that “[c]ompliance by the refineries with all District and federal air regulations will not be continuous.” See Exhibit 4, p.15. The District further states that the Proposed Permit can assure only “reasonable intermittent compliance” with the applicable requirements for the refinery, rather than consistent compliance with applicable requirements. See id. The District’s position is especially troubling given the episodes of noncompliance detailed in Petitioners’ attached comments and those that have occurred at the Refinery in the recent past. Attached is a list of pending and resolved Notice of Violations for the Refinery during 2001, 2002 and 2003, as reported by the District. See Exhibit 5. As that list demonstrates, at just one of the Refinery’s sources, (Source # 1,426) Shell experienced 19 violations of District rules during years 2001 and 2002. See id. The attached list provides evidence that a number of sources have experienced more than 5 violations over the past few years. In spite of these serious noncompliance issues, the District refuses to ensure that the Proposed Permit will ensure continuous compliance with all applicable requirements. Because the Proposed Permit does not ensure continuous compliance with emission standards, the EPA must object to the Proposed Permit for failing to include all applicable requirements.
C. PETITIONERS HAVE SHOWN THAT SHELL’S PERMIT IS NOT IN COMPLIANCE WITH TITLE V, REQUIRING OBJECTION BY THE EPA

1. The Proposed Permit Must Cure Any Failure to Obtain All Legally-Required Preconstruction Review Permits

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

Under 40 CFR § 70.1(b), “all sources subject to Title V must have a permit to operate that assures compliance by the source with applicable requirements.” Applicable requirements are defined in 40 CFR § 70.2 to include:“(1) any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under Title I of the [Clean Air] Act . . . .” Such applicable requirements include the requirement to obtain preconstruction permits that comply with preconstruction review requirements under the Act, EPA regulations, and State Implementation Plans (“SIPs”). See generally CAA §§ 110(a)(2)(C), 160-169, &173; 40 CFR §§ 51.160-66 & 52.21.

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

Rather than investigate and resolve Shell’s failure to obtain the required preconstruction review permits described in the attached comments and in the section below, the District simply responded with the following: “there is no advantage to holding the Title V permit in abeyance while compliance issues are investigated and resolved.” Exhibit 4 at 6 (emphasis added). Of course, the advantage would be that a proper permit would comply with the law and would require Chevron to install the proper pollution control technology – one of the fundamental goals of the Clean Air Act. As explained in Petitioners’ attached comments (Exhibits 2 and 3), resolution of those compliance issues is a basic condition of permit adequacy under the Clean Air Act. 40 C.F.R. § 70.5(c)(8)(iii)(C).

Petitioners therefore reiterate the need to resolve all areas of noncompliance with the preconstruction review provisions of the Clean Air Act identified in their attached comments on Shell’s draft and proposed Title V permit. Because of EPA’s clear position requiring the resolution of all preconstruction review requirements as a condition of Title V permit adequacy as quoted above, the EPA must object to the Proposed Permit.
2. **The Proposed Permit Does Not Assure Compliance with the Clean Air Act’s New Source Review Requirements**

Under the Clean Air Act’s Title V program the District must create a permit that “assures compliance by the source with all applicable requirements.” 40 C.F.R. 70.1(a); 40 C.F.R. 70.1(b). As EPA found in its attached comments, for grandfathered sources, the Proposed Permit allows dramatic increases in throughput levels without subjecting those sources to the Clean Air Act’s New Source Review requirements. The EPA specifically wrote that with respect to throughput limits on grandfathered sources, the permit does not make clear that those limits are not to be “relied upon to avoid NSR applicability.” See Exhibit 1, Enclosure B, page 14. To highlight a few issues Petitioners discussed in their original comments on this issue, Shell increased emissions from a CO Boiler in 1998, flares in 1997 and from Process Drains in 2000 without applying the Act’s Prevention of Significant Deterioration and New Source Review provisions. See Exhibit 2. These preconstruction review anomalies must be resolved in Shell’s Title V permit.

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

During the public comment period on the draft and proposed permits, Communities for a Better Environment and Our Children’s Earth submitted comments detailing deficiencies in both versions. Commenters and the District provided the EPA with copies of those comments during the public comment period. Petitioners have attached those comments (Exhibits 6-9) and incorporate all issues raised in those comments as independent grounds for this petition.
CONCLUSION

Based on the significant deficiencies in Shell’s Proposed Permit as discussed above, Petitioners respectfully petition the EPA to perform its non-discretionary duty to object to that Proposed Permit.

Respectfully submitted,

Dated: November 24, 2003

ADAMS BROADWELL JOSEPH & CARDOZO
A Professional Corporation

By:

Daniel L. Cardozo
Richard T. Drury
Suma Peesapati

Attorneys for Petitioners 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