BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of the Proposed Title V Operating Permit Issued to
Valero Benicia Asphalt Plant to operate a petroleum refinery located in Benicia, California
Issued by the Bay Area Air Quality Management District

PETITION REQUESTING THE ADMINISTRATOR TO OBJECT TO ISSUANCE OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE VALERO BENICIA ASPHALT PLANT

INTRODUCTION

Pursuant to section 505(b)(2) of the Clean Air Act (the “Act”), 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d), Our Children’s Earth (“OCE” or “Petitioner”) hereby petitions the Administrator (“Administrator”) of the United States Environmental Protection Agency (“EPA”) to object to issuance of the proposed Title V Operating Permit for Valero Benicia Asphalt Plant (“Valero Asphalt”) Facility #B3193, Permit Application #17468 (“proposed Title V permit”).


1 Available at http://yosemite.epa.gov/R9/AIR/EPSS.NSF/6924c72e5ea10d5e882561b100685e04/fde2bd099 d0299fe88256d56007eea39/$FILE/B3193EPA6-30-03.pdf (last accessed October 10, 2003).
2003. This petition is timely because it is filed within sixty days of the expiration of EPA’s 45-day review period, as required by section 505(b)(2) of the Act. See 42 U.S.C. § 7661d(b)(2).

The Administrator must grant or deny this petition within sixty days after it is filed. See id. In compliance with section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), this petition is based on objections to the Valero Asphalt proposed Title V permit that were raised during the public comment period or on grounds that arose after the public comment period.\(^3\)

**PETITIONER – OUR CHILDREN’S EARTH**

Petitioner OCE is an organization dedicated to protecting the public, especially children, from the health impacts of pollution and other environmental hazards and to improve environmental quality for the public benefit. OCE has members who live, work, recreate and breathe air in the San Francisco Bay Area, including Benicia, California, where Valero Asphalt is located. OCE is active in issues concerning air quality in the Bay Area and throughout the State of California.

**APPLICANT – VALERO ASPHALT**

Valero Asphalt is a petroleum refinery that primarily produces asphalt from crude oil. See Permit Evaluation & Statement of Basis for Major Facility Review Permit (“Statement of Basis”), Valero Benicia Asphalt Plant, Facility #B3193 at 3, available at http://www.baaqmd.gov/pmt/t5/t5publicnotices/B3193SOBepareview-1.pdf (last accessed October 10, 2003). The manufacturing operations at Valero Asphalt produce by-products that include naphtha, kerosene, and gas oil. Id. at 4. While Valero Asphalt has a separate Title V permit, Valero Refining Company and Valero Asphalt are considered to be the same facility for purposes of the Clean Air Act and Valero Asphalt is subject to several requirements to which Valero Refining is subject. Id. at 8.

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\(^2\) See http://yosemite.epa.gov/R9/AIR/EPSS.NSF/e0c49a10c792e06f8825657e007654a3/78c91a0d32c3bad286256d7b00839ff?OpenDocument (last accessed October 10, 2003).

\(^3\) Valero Asphalt’s draft Title V permit was first issued by the District in June 2002, and it held a public hearing on July 10, 2002. The District made changes to the draft permit sufficient to require an additional public comment period and reissued another draft for public comment on June 26, 2003. Petitioner submitted comments on the draft Title V permit on August 9, 2002 and August 11, 2003, which are attached as Exhibits A and B for reference. This petition does not raise all of the issues identified in the comments.
GROUND FOR OBJECTIONS

Petitioner requests that the Administrator object to the proposed Title V permit for Valero Asphalt because it does not comply with 40 C.F.R. Part 70. In particular:

1) The proposed Title V permit does not assure compliance with all applicable requirements as required by 40 C.F.R. §§ 70.6(a)(1), 70.6(c), and 70.7(a)(1)(iv) because the District has determined that the facility cannot continuously comply with the terms of the proposed permit but has not otherwise assured compliance through, for example, imposition of a compliance schedule;

2) The District cannot possibly assure compliance with its superficial compliance review; and

3) EPA found noncompliance in the proposed Title V permit but failed to object as required by 42 U.S.C. § 7661d (b)(1) and 40 C.F.R. § 70.8(c)(1).

1. The Proposed Title V Permit Does Not Assure Compliance with All Applicable Requirements as Required by 40 C.F.R. §§ 70.6(a)(1), 70.6(c), and 70.7(a)(1)(iv) Because the District Has Determined that the Facility Cannot Continuously Comply with the Terms of the Proposed Permit

The District has the duty to assure that a facility is in compliance with the terms of its Title V permit before it is issued. See 40 C.F.R. § 70.7(a)(1)(iv). All permits must contain specific requirements for certifying compliance. See id. § 70.6(c)(5). The certification must include information regarding whether compliance was “continuous” or “intermittent,” as well as “such other facts the [District] may require to determine the compliance status of the source.” See id. §§ 70.6(c)(5)(iii)(C) & (D). Part 70 contains multiple requirements for assuring compliance with applicable requirements. See, e.g., id. §§ 70.6(a)(1), 70.6(c). Specifically, a Title V permit may only be issued if “the conditions of the permit provide for compliance with all applicable requirements.” See id. § 70.7(a)(1)(iv).

To assure compliance with all applicable requirements, every Title V permit must comply with the provisions of 40 C.F.R. § 70.6(c). Thus, all Title V permits must contain a compliance plan consistent with 40 C.F.R. § 70.5(c)(8). See id. § 70.6(c)(3). A compliance plan must include a certified statement of the current compliance status of each source and a statement
regarding the source’s future ability to comply with all applicable requirements that will become effective during the permit term. *Id.* § 70.5(c)(8)(iii); BAAQMD Reg. 2-6-409.10. For sources not in compliance at the time of permit issuance, the statement must include a schedule of compliance. *See* 40 C.F.R. § 70.5(c)(8)(iii). “Such a schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements.” *Id.* § 70.5(c)(8)(iii); *see also* 42 U.S.C. § 7661(3). In addition, if the current monitoring at the facility is insufficient to detect non-compliance, monitoring, recordkeeping and recording requirements should be added to the permit to assure compliance with applicable requirements. *See* 40 C.F.R. § 70.6(c)(1).

The proposed Valero Asphalt Title V permit, with its accompanying documents, demonstrates that the District cannot assure compliance at the facility. In fact, the District concluded that only “*reasonable intermittent compliance* can be assured at this facility.” *See Review of Compliance Record – Valero Asphalt, July 17, 2001* (“Compliance Record”) (emphasis added), attached as Exhibit C; *see also* Statement of Basis at 15. For the reasons discussed below, this assurance of intermittent compliance is equivalent to an assurance of non-compliance, and because the proposed permit does not include a compliance plan and other provisions to assure compliance, the permit violates Title V requirements.

The District’s use of the terms “reasonable” and “intermittent” to modify the term “compliance” does not assure continuous compliance and therefore is inconsistent with the law. As legislative history demonstrates, Congress intended Title V permits to “assure prompt and *continuing* compliance with applicable requirements of the Act.” *See* 136 Cong. Rec. S16,895, S16,943 (1990) (emphasis added); *see also* Utility Air Regulatory Group v. U.S. EPA, 320 F.3d 272, 275 (D.C. Cir. 2003) (the purpose for inserting monitoring and testing requirements into a Title V permit is to “ensure that sources continuously comply with emission standards”). The term “intermittent” ordinarily means “stopping and starting at intervals” and is synonymous with
“occasional, periodic, [and] sporadic.” Webster’s II New Riverside University Dictionary. Thus, the District’s assurance of “intermittent compliance” can only mean noncompliance.4

Indeed, the District has conceded that its assurance of “reasonable intermittent compliance” is equivalent to an assurance of noncompliance. See Draft District Consolidated Response to Comments on Refinery Title V Permits, July 25, 2003 (“Dist. Refinery Comments”), at 15, available at http://www.baaqmd.gov/pmt/t5/Refinery2003/response.doc (last accessed October 10, 2003) (stating that “occasional events of non-compliance can be predicted with a high degree of certainty” and “compliance by the refineries with all District and federal air regulations will not be continuous”).5 However, the plain language of Title V and its regulations require compliance with the terms of the permit, not “intermittent” compliance.

In a mistaken attempt to justify the sufficiency of assuring “intermittent” compliance, the District points to the fact that the term “intermittent” can be used in compliance certifications. See Dist. Refinery Comments at 15. Indeed, federal regulations require Title V compliance certifications to include information regarding the compliance status of each source and to specify whether compliance was “continuous” or “intermittent.” See 40 C.F.R. §§ 70.6(c)(5)(iii)(C); 71.6(c)(5)(iii)(C); see also 42 U.S.C. § 7414(a)(3)(D). However, “intermittent” compliance is not sanctioned by the Act. To the contrary, any instance of non-compliance is considered a violation. See 40 C.F.R. § 70.6(a)(6)(i). In fact, EPA’s use of the term “intermittent” to specify a source’s compliance in compliance certifications is intended to

4 The District claims that the Compliance Record is not its only assessment of compliance at the facility. See Response to Comments for Proposed Major Facility Permit for Valero Benicia Asphalt Plant – Facility #B3193, June 30, 2003, at 1, attached as Exhibit D. However, the Statement of Basis for Valero Asphalt refers only to the Compliance Report for its justification that “intermittent” compliance can be assured at the facility. See Statement of Basis at 15, 37. Furthermore, the District’s determination of “intermittent” compliance indicates that instances of noncompliance will occur. Unless the determination is incorrect, the fact that the Compliance Record is only one part of the District’s compliance assessment is irrelevant.

5 Although the District made the statement in the context of another refinery, Shell Martinez Refinery, Facility #A0011, this concession is relevant here because it was made in response to OCE’s public comments objecting to the District’s assurance of “reasonable intermittent compliance” there.
require the facility to explicitly identify instances of noncompliance. Thus, the District’s reliance on the use of the term “intermittent” in the context of compliance certifications is misplaced and inconsistent with the law.

Even so, the proposed permit might have complied with the Act had it contained provisions to address noncompliance issues – such as through compliance plans or additional monitoring requirements. See 40 C.F.R. §§ 70.5(c)(8) & 70.6(c)(3). However, the proposed permit fails to include such measures. In fact, the proposed Title V permit’s failure to include a compliance plan is inconsistent with the District’s own policy, which requires a schedule of compliance for a “facility [that] is out of compliance at the time of permit issuance.” See Response to Public Comment on Title V Permit for Crown, Cork and Seal (“Crown Response”), January 24, 2001, available at http://www.baaqmd.gov/pmt/t5/t5publicnotices/b0989res.pdf, and attached as Exhibit E.

2. The District Cannot Possibly Assure Compliance with its Superficial Compliance Review

The Compliance Record fails to include the most recent compliance information, including Valero Asphalt’s current compliance status, as the review only covers the period between June 15, 2000 and June 15, 2001. Thus the review ignores the possibility of violations and episodes that could have occurred in the two years since June 2001. Moreover, this superficial “review” fails to describe or even evaluate the types of enforcement-related incidents occurring during the review period and the reasons they occurred. The review simply

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

7 In contrast, the District has assured “ongoing compliance” at other Title V facilities. See Review of Compliance Record for City of Palo Alto, Facility #A2721; Cypress Amloc Land Company, Facility #A1364; Hanson Permatene Cement, Facility #A0017; Owens Corning Santa Clara Plant, Facility #A0041; Potrero Hills Landfill, Facility #A2039; Redwood Landfill, Facility #A1179; San Jose/Santa Clara Water Pollution Control District, Facility #A0778; West Contra Costa Landfill, Facility #A1840; and Waste Management of Alameda County, Facility #A2066, available at http://www.baaqmd.gov/pmt/t5/t5publicnotices/ t5publicnotices.asp (last accessed October 9, 2003). The assurance of “ongoing” compliance at other facilities provides further confirmation that “intermittent” compliance can only mean noncompliance.
enumerates the incidents without assessing whether these represent compliance problems requiring a compliance plan or additional monitoring. While neither the permitting agency nor EPA should necessarily have to review or assess a facility’s entire compliance history for Title V purposes, a thorough review of the facility’s current and recent compliance history is necessary to determine whether compliance can be assured.

3. EPA Should Have Objected as Required by 42 U.S.C. § 7661d (b)(1) and 40 C.F.R. § 70.8(c)(1) as EPA Has Found Noncompliance

The Administrator is required to object to the issuance of a Title V permit that is not in compliance with the applicable requirements of the Clean Air Act. See 42 U.S.C. § 7661d (b)(1); 40 C.F.R. § 70.8(c)(1); see also NYPIRG v. Whitman, 321 F.3d 316, 333, fn. 12 (2d Cir. 2003) (“the Administrator is required to object to permits that violate the Clean Air Act,” citing 136 Cong. Rec. S16,895, S16,944 (1990)). Here, EPA Region 9, which has been delegated authority to object to Title V permits by the Administrator, identified problems and deficiencies in the proposed Title V permit and requested that the District make the suggested changes to the permit before finalizing it. See Letter to William deBoisblanc, Director of Permit Services, BAAQMD, August 18, 2003, attached as Exhibit F. While concluding that there are deficiencies in the permit and requesting that the District make changes to the permit prior to finalizing it, EPA failed to object to the permit as required by the Clean Air Act and Part 70. Therefore, the Administrator is required to object to the permit at least on the basis of the deficiencies identified in the August 18, 2003 letter to the District because EPA has already determined that the permit violated the Act.
CONCLUSION

Because of the violations of 40 C.F.R. Part 70 identified in this petition, the Administrator must object to the proposed Title V permit for the Valero Benicia Asphalt Plant.

Dated: October 13, 2003

Respectfully submitted,

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