

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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| IN THE MATTER OF )                        | FACILITY No. B2626 |
| VALERO REFINING COMPANY-CALIFORNIA )      |                    |
| BENICIA REFINERY )                        |                    |
| BENICIA, CALIFORNIA )                     |                    |
| )   |                    |
| TITLE V PERMIT PROPOSED TO BE ISSUED BY ) |                    |
| THE BAY AREA AIR QUALITY MANAGEMENT )     |                    |
| DISTRICT )                                |                    |
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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO  
ISSUANCE OF A TITLE V PERMIT TO VALERO’S BENICIA REFINERY**

Pursuant to Clean Air Act (“CAA”) § 505(b)(2),<sup>1</sup> 40 C.F.R. § 70.8(d) and Bay Area Air Quality Management District (“BAAQMD” or “District”) Regulation 2-6-411, Valero Refining Company-California (“Valero”) hereby petitions the Administrator of the United States Environmental Protection Agency (“EPA”) to object to the District’s issuance of a Title V permit for Valero’s Benicia Refinery, located in Benicia, California (BAAQMD Facility No. B2626). The District is expected to issue a Title V permit for the Benicia Refinery on or before December 1, 2003. That permit will be based on a second draft permit that the District issued for public comment and EPA review in August 2003 (“Revised Draft Permit”). However, the Revised Draft Permit is not in compliance with “applicable requirements” (as defined at 40 C.F.R. § 70.2), the requirements of 40 C.F.R. Part 70 or the District’s approved Part 70 permitting program. Accordingly, pursuant to 40 C.F.R. § 70.8(c), the Administrator is *obligated* to object to its issuance as a final Title V permit.

<sup>1</sup> 42 U.S.C. § 7661d(b)(2). Parallel citations to CAA Title V (42 U.S.C. §§ 7661 et seq.) are hereafter omitted.

The Revised Draft Permit was received by EPA on August 13, 2003,<sup>2</sup> and EPA's 45-day review period expired on September 26, 2003.<sup>3</sup> Accordingly, this petition is timely submitted within 60 days after the close of EPA's 45-day review period. 40 C.F.R. § 70.8(d). CAA § 505(b)(2) obligates EPA to act on this petition within 60 days.

## I. BACKGROUND

### A. The permit review and comment process

**Initial Draft Permit.** In 1996, Valero submitted to the District its timely and complete Title V permit application for the Benicia Refinery. The District issued its initial draft of the Refinery's Title V permit ("Initial Draft Permit") for public comment on June 6, 2002. On July 10, 2002, the District held a public hearing regarding the Initial Draft Permit. Although the public comment period for the Initial Draft Permit was originally scheduled to end on August 9, 2002, the District subsequently extended the comment period to September 28, 2002, for a total public comment period of approximately 90 days.

During this first public comment period, Valero submitted written comments to the District consisting of more than 70 pages of detailed comments, accompanied by more than 500 pages of supplemental appendices and table mark-ups. These comments described over 1300 individual revisions needed to correct unjustified or impermissible conditions, ambiguous or duplicative provisions and requirements based on inaccurate, incomplete or outdated information (Valero's "September 2002 Comments;" copy attached as Exhibit B). Since submitting its September 2002 Comments, Valero has continued to work cooperatively with District staff to address outstanding issues.

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<sup>2</sup> See EPA Region IX Electronic Permit Submittal System, Permit Transmittal, Valero Refining Co. - California, updated September 16, 2003 at <http://yosemite.epa.gov/R9/AIR/EPSS.NSF/e0c49a10c792e06f8825657e007654a3/78c91a0d32c3bad286256d7b00839ff7?OpenDocument>. Cf. letter from Gerardo C. Rios, Chief, Air Permits Office, EPA, Region IX, to Steve Hill, BAAQMD, dated September 26, 2003, indicating that EPA received the permit on August 12, 2003. A copy of Mr. Rios's letter is attached as Exhibit A.

<sup>3</sup> See EPA Region IX Electronic Permit Submittal System, Permit Transmittal, Valero Refining Co. - California, updated September 16, 2003 at <http://yosemite.epa.gov/R9/AIR/EPSS.NSF/e0c49a10c792e06f8825657e007654a3/78c91a0d32c3bad286256d7b00839ff7?OpenDocument>.

As described in the District's *Consolidated Responses to Comments on Refinery Title V Permits*,<sup>4</sup> the public also submitted numerous comments on the Initial Draft Permit.

**Revised Draft Permit.** On August 5, 2003, the District issued the Revised Draft Permit — a second draft of the Title V permit for the Benicia Refinery — and transmitted a copy of it to EPA for review.<sup>5</sup> According to EPA, the agency received the Revised Draft Permit on August 13, 2003, and EPA's comment period ended on September 26, 2003.<sup>6</sup> On September 26, 2003, EPA provided the District written comments on the proposed Title V permits for three of the Bay Area's refineries, including the Revised Draft Permit.<sup>7</sup> In its comment letter, EPA expressly stated that it did not object to the District's issuance of Title V permits to the refineries.<sup>8</sup>

On the same day that the District transmitted the Revised Draft Permit to EPA, the District also notified the public (including Valero) of the opportunity to comment on that permit.<sup>9</sup> The District's August 5 notice stated that the public comment period would end on September 15, 2003. Valero's copy of the Revised Draft Permit was dated August 5, 2003, was postmarked August 12, 2003 and was received by Valero a few days later. On or about September 12, 2003, the District extended the public comment deadline to September 22, 2003.

On September 22, 2003, Valero submitted to the District written comments on the Revised Draft Permit (Valero's "September 2003 Comments," copy attached as Exhibit F). Valero's comments included approximately 300 pages of detailed comments, citing over 350 individual revisions needed to correct the permit. Additionally, Valero submitted comments illustrating certain modifications that are necessary to make Sections II and IV of the Revised

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<sup>4</sup> BAAQMD, *Consolidated Responses to Comments on Refinery Title V Permits* ("Responses to Comments"), dated July 25, 2003. A copy of the District's *Responses to Comments* is attached as Exhibit C.

<sup>5</sup> See transmittal letter from William C. Norton, Executive Officer/Air Pollution Control Officer, BAAQMD, to Jack Broadbent, Director, Air Management Division, EPA, Region IX, dated August 5, 2003. A copy of Mr. Norton's transmittal letter is attached as Exhibit D.

<sup>6</sup> See footnote 3.

<sup>7</sup> See letter from Gerardo C. Rios, Chief, Air Permits Office, EPA, Region IX, to Steve Hill, BAAQMD, dated September 26, 2003.

<sup>8</sup> *Id.*

<sup>9</sup> See BAAQMD, *Corrected Public Notice Inviting Written Public Comments*, dated August 5, 2003, attached as Exhibit E.

Draft Permit consistent with applicable requirements. While some of Valero's September 2002 Comments had been addressed, not all of the errors in the Initial Draft Permit had been corrected, and many new issues had arisen in this new draft. On September 19, 2003, Valero also wrote to EPA (with a copy to the District) alerting the agency to Valero's serious concerns regarding the Revised Draft Permit.<sup>10</sup>

### **B. The District's December 1, 2003 deadline**

In December 2001, in response to public comments concerning potential deficiencies in the Title V permit program in California, EPA indicated that "a number of permitting authorities in California [had] not issued permits at the rate required by the CAA."<sup>11</sup> Due to "the sheer number" of permits that remained to be issued, EPA estimated that a period of up to two years was needed for permitting authorities to be in full compliance with the CAA.<sup>12</sup> At that time, EPA noted that it had received "commitments" from a number of California permitting authorities, including BAAQMD, committing to issue all outstanding Title V permits "as expeditiously as practicable, but no later than December 1, 2003."<sup>13</sup>

In May 2002, the District settled a lawsuit captioned *Our Children's Earth Foundation v. BAAQMD*, San Francisco Superior Court, Case No. CPF-02 500595. Consistent with the Title V permit issuance deadline included in the November 8, 2001 District commitment to EPA, the settlement agreement imposed on the District a December 1, 2003 deadline to issue all outstanding Title V permits. In recent months, the District has consistently indicated that it will issue all outstanding Title V permits by December 1, 2003, even though it will not have had a realistic opportunity to review and correct those permits in the two months following the close of the public comment period. As outlined in detail below, Valero is concerned that the pressure of the unrealistic December 1, 2003 deadline will cause the District to take action

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<sup>10</sup> See letter from Alfred Middleton, Director, Safety and Environment, Valero, to Wayne Nastri, Regional Administrator, EPA, Region IX, dated September 19, 2003. A copy of Mr. Middleton's letter is attached as Exhibit G.

<sup>11</sup> See letter from Jack P. Broadbent, Director, Air Division, EPA, Region IX, to Marc Chytilo, Law Office of Marc Chytilo, dated December 14, 2001. A copy of Mr. Broadbent's letter is attached as Exhibit H.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; see also letter from Ellen Garvey, Air Pollution Control Officer/Executive Officer, BAAQMD, to Jack Broadbent, Director, Air Division, EPA, Region IX, dated November 8, 2001. A copy of Ms. Garvey's letter is attached as Exhibit I.

on Title V permits, such as the Revised Draft Permit, that contain substantial errors and whose issuance on the current schedule would violate 40 C.F.R. Part 70.

### **C. EPA's obligation to object**

Under CAA § 505(b)(2), the Administrator *must* object to a draft Title V permit “if [a] petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the CAA].”<sup>14</sup> Accordingly, while the Administrator may have some discretion to determine whether a permit fails to comply with the requirements of Title V, he or she “does not have discretion whether to object to draft permits once noncompliance [with Title V] has been demonstrated.”<sup>15</sup>

## **II. THE REVISED DRAFT PERMIT IS NOT IN COMPLIANCE WITH APPLICABLE REQUIREMENTS**

### **A. Permit flaws identified by EPA**

In its September 26, 2003 comment letter to the District, EPA identified numerous specific errors and omissions in the Revised Draft Permit as well as in the draft permits for other Bay Area refineries. Nevertheless, EPA stated that it was not objecting to the refineries' permits because the District had committed to make a number of permit improvements and additional applicability determinations which are intended to resolve these issues.<sup>16</sup> In essence, EPA determined that the permits for the Bay Area refineries, including Valero's Benicia Refinery, were not in compliance with the requirements of Title V, but then failed to object to the permits. Since CAA § 505(b)(2) imposes on the Administrator a *mandatory* obligation to object to the issuance of a Title V permit once he or she determines that noncompliance has

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<sup>14</sup> See also 40 C.F.R. § 70.8, discussed in footnote 18.

<sup>15</sup> *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 334 (2nd Cir. 2003). There is an “important distinction between the discretionary part of the statute (whether the petition demonstrates non-compliance) [and] the nondiscretionary part (if such a demonstration is made, objection must follow).” *Id.* at 333.

<sup>16</sup> See footnote 7.

been demonstrated, the Administrator *must* object to issuance of the Revised Draft Permit as a final Title V permit.<sup>17</sup>

**B. Permit flaws identified by Valero**

The Revised Draft Permit is not in compliance with all “applicable requirements” as defined in 40 C.F.R. § 70.2 because it includes inapplicable requirements and also incorrectly describes and improperly applies applicable requirements. Although Valero has on multiple occasions notified the District of numerous significant permit errors and omissions, and has provided the District with information on correcting these problems, the Revised Draft Permit continues to suffer from these errors. Accordingly, pursuant to 40 C.F.R. § 70.8(c), the Administrator is *obligated* to object to the issuance of the Revised Draft Permit as a final Title V permit.<sup>18</sup>

Extensive details on the inaccuracies in the Initial Draft Permit and the Revised Draft Permit were provided to the District in Valero’s September 2002 Comments and September 2003 Comments, respectively. As noted above, copies of Valero’s September 2002 Comments and September 2003 Comments are attached as Exhibits B and F, respectively. These comments are incorporated as if fully set forth herein.

Examples of the inaccuracies that still remain in the Revised Draft Permit include (but are not limited to):

- failure to include applicable requirements related to three important refinery projects (i.e., the MTBE Phaseout Project, the Alkylation Unit Expansion and the Spare Tail Gas Hydrogenation Unit);
- failure to include all applicable federal requirements (e.g., failure to add 40 C.F.R. Part 63, Subpart UUU, NESHAP for Petroleum Refineries);

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<sup>17</sup> See footnotes 14 and 15.

<sup>18</sup> “The Administrator *will object* to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part.” 40 C.F.R. § 70.8(c)(1) (emphasis added).

- errors in referring to federally enforceable District regulations as not federally enforceable, and vice versa (e.g., referring to various sections of BAAQMD Regulation 9, Rule 10 as federally enforceable);
- inclusion of non-applicable federal regulations (e.g., overbroad references to federal regulatory requirements, including but not limited references to 40 C.F.R. Part 61, Subpart FF, NESHAP for Benzene Waste Operations);
- failure to include applicable District regulations (e.g., conditions implementing Regulation 12, Rule 11)
- failure to identify certain sources (in Table IIA) as grandfathered (i.e., sources not subject to District New Source Review regulations);
- inclusion of an erroneous condition (in Section I.J.1) that exceedance of maximum allowable capacity of a grandfathered source specified in Table IIA constitutes a violation.
- inclusion in Section II (Equipment) and Section IV (Source Specific Applicable Requirements) of equipment that no longer exists;
- inclusion of obsolete permit conditions (e.g., source testing requirements that are no longer relevant for furnaces in Section IV (Applicable Requirements)); and
- inclusion of new onerous and unreasonable conditions (e.g., notification to the District for all startups and shutdowns of all sources).

Once the Title V permit is issued, even erroneous terms and conditions will be considered federally enforceable requirements, and although they are errors, under Section I.F. of the permit the Benicia Refinery will be required to immediately report non-compliance with these erroneous conditions.<sup>19</sup> It will be nearly impossible for EPA, the District or the public to

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<sup>19</sup> Section I.F., Standard Conditions, Monitoring Reports, of the Revised Draft Permit states, in relevant part:  
 “. . . all instances of non-compliance with the permit shall be reported in writing to the District’s Compliance and Enforcement Division within 10 calendar days of the discovery of the incident. Within 30 calendar days of the discovery of any incident of non-compliance, the facility shall

assess the Refinery's actual compliance with valid applicable requirements and permit conditions due to these extensive inaccuracies. Therefore, because the permit includes numerous significant errors and does not assure compliance with applicable requirements, the Administrator *must* object to issuance of the Revised Draft Permit as a final Title V permit.<sup>20</sup>

### **III. THE REVISED DRAFT PERMIT IS NOT IN COMPLIANCE WITH THE REQUIREMENTS OF 40 C.F.R. PART 70**

#### **A. The purpose of staggered review periods**

CAA § 505(b)(1), 40 C.F.R. § 70.8(c) and BAAQMD Regulation 2-6-411 provide EPA with a 45-day period to review a proposed Title V permit. Under 40 C.F.R. §§ 70.7(h) and 70.8(b)(1), and BAAQMD Regulation 2-6-412, the public and affected states have at least a 30-day review period. EPA has explained that the staggered public and EPA review periods were established to ensure that EPA has adequate time to consider all public and affected state comments before determining whether to object to a proposed permit. Specifically, EPA has provided the following explanation of the staggered review periods:

#### **During the issuance process, can a permitting authority give notice to EPA, affected States, and the public simultaneously?**

Yes, provided EPA has a reasonable opportunity to review any comments received from the public and affected States. The minimum public comment period is 30 days and the EPA review period is 45 days. This would only allow EPA 15 days additional review after public and affected State review, assuming the permitting authority does not provide for a longer public comment period. *Fifteen days may not be sufficient depending on the complexity of the permit.* To provide for a longer EPA period for reviewing the results of public comment, the permitting authority could vary the beginning of EPA's review resulting in less overlap of EPA and public review where more EPA review after public comment would likely be needed.

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submit a written report including the probable cause of non-compliance and any corrective or preventative actions.”

<sup>20</sup> See footnote 18.



*Questions and Answers On The Requirements Of Operating Permits Program Regulations* (July 7, 1993), § 7.6, #1 (emphasis added). The sensible sequence ensured by the staggered review process could not occur here because the EPA review period (extending to September 26, 2003)<sup>21</sup> ended just **four days** after the close of the public comment period (extending to September 22, 2003).

As the District noted in its *Responses to Comments*, Title V permits for refineries in the Bay Area, including Valero's Benicia Refinery, will be extremely complex.<sup>22</sup> As EPA explained in the statement quoted above, EPA needs a significant amount of time to review a complex permit following the public comment period. This period should be well more than fifteen days, and certainly more than four. With less complicated Title V permits an abbreviated interval for EPA review after the public comment period would generally present no impediment to the fair and informed completion of EPA's review function. In those more ordinary cases, the permitting authority will have tendered to EPA a proposed permit which is in virtually final form and is likely to spark very little new or significant public comment.

In contrast, here the Revised Draft Permit is not only a very lengthy (i.e., 659-page), complex document, it also is far from final in its content. The Revised Draft Permit prompted detailed public comments from two public organizations (totaling approximately 75 pages), as well as Valero's extensive comments (totaling more than 300 pages) citing over 350 needed revisions. Given the comments submitted on the Initial Draft Permit and the District's awareness of active public participation in this process, the District should have expected extensive comments on the Revised Draft Permit. In this predictable situation, instead of prematurely submitting the Revised Draft Permit to EPA and thereby defeating the whole purpose of the staggered review periods, the District should have provided EPA a longer period for reviewing the Revised Draft Permit in light of information submitted during the public comment period.

Further, the magnitude and complexity of EPA's review process were compounded because EPA was required to simultaneously review four other Bay Area refinery draft Title V permits

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<sup>21</sup> See footnote 3.

<sup>22</sup> See *Responses to Comments* (attached as Exhibit C), p. 71 ("Given the magnitude and complexity of these permits, ..."); see also the Revised Draft Permit, currently 659 pages in length.

at the time it was reviewing the Revised Draft Permit.<sup>23</sup> Ultimately, EPA chose to comment on only three of the five drafts, stating that it was “unable to review” the permits for two of the Bay Area’s refineries.<sup>24</sup> Even for the three permits it did review, EPA acknowledged that it did not “have enough time to review each part of the three permits that [it was] commenting on.”<sup>25</sup> Valero’s Revised Draft Permit was one of those permits.

EPA’s admission that it had insufficient time to review the Revised Draft Permit is itself sufficient reason for EPA to be obligated to object to its issuance. Moreover, the result of the abbreviated review period that the District allowed EPA is that, in at least two specific respects, explained in Sections III.B and III.C below, the Revised Draft Permit is not in compliance with the requirements of 40 C.F.R. Part 70. Consequently, the Administrator is *obligated* to object to issuance of the permit.<sup>26</sup>

**B. The Revised Draft Permit does not comply with 40 C.F.R. § 70.8(a)**

In submitting the Revised Draft Permit to EPA on August 13, 2003, the District did not submit a “proposed permit” in compliance with 40 C.F.R. § 70.8(a). Accordingly, the Revised Draft Permit fails to comply with the requirements of 40 C.F.R. Part 70, and the Administrator is *obligated* to object to issuance of that permit as a final Title V permit.<sup>27</sup>

The District is required to provide the Administrator a copy of each “proposed permit.” 40 C.F.R. § 70.8(a). “Proposed permit” is defined as “the version of a permit that the permitting authority proposes to issue.” 40 C.F.R. § 70.2. In other words, the District should have completed all substantive revisions to the permit before providing a copy to the Administrator, and EPA’s review of a proposed permit is to be the final review in the Title V permitting process. The inclusion of applicable requirements in the permit must be completed by the District in order for EPA to determine whether the permit is “in compliance with applicable requirements [and] requirements under this part.” 40 C.F.R. § 70.8(c)(1).

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<sup>23</sup> See footnote 7.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at p.3 of Enclosure A.

<sup>26</sup> See footnote 18.

<sup>27</sup> *Id.*

In contrast to a “proposed permit” ready for EPA review, a “draft permit” is “the version of a permit for which the permitting authority offers public participation under § 70.7(h) or affected State review under § 70.8 of this part.” 40 C.F.R. § 70.2. Thus, a draft permit plainly contemplates further revision.<sup>28</sup> As noted above, in ordinary cases the more or less simultaneous publication of a “draft permit” for public comment and submission of the same document as a “proposed permit” for final EPA review presents no legal or practical problem. If a draft permit is essentially complete and unlikely to trigger any more substantial or substantive public comment, the distinction between the two forms of the permit is of little real significance. However, with a permit as seriously in flux and in dispute as the Revised Draft Permit, the distinction is of great importance and cannot be overlooked. If a so-called “proposed” permit really is a draft, EPA has been provided not with a complete permit ready for final review, but with a moving target that EPA cannot adequately evaluate as the law requires.

As evidenced by the District’s August 5, 2003 public notice, in this instance the District was clearly contemplating further, substantial revision of the permit because the notice states that the District “invites written comment” on the Revised Draft Permit and identifies new conditions in the permit for public comment.<sup>29</sup> Equally or even more indicative of the District’s recognition that the Revised Draft Permit was not fully and finally formed was its decision to offer the public approximately 45 days to comment on the permit, rather than the legal minimum of 30. Apparently, the District anticipated, perhaps based on the public attention the refinery Title V permits had received thus far, that the public, including Valero, would need extra time to analyze this Revised Draft Permit and would have lengthy and detailed points to raise.

In addition, based on discussions Valero has had with District staff, Valero understands that the District is still attempting to resolve many of the significant concerns Valero raised in its (i) September 2002 Comments, (ii) subsequent discussions with the District and (iii) September 2003 Comments. EPA has noted that the District is “committed” to make

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<sup>28</sup> Although the District labeled the Revised Draft Permit a “Proposed Major Facility Review Permit,” that designation does not ensure that the permit in fact complies with the definition of a “proposed permit” under 40 C.F.R. § 70.2.

<sup>29</sup> See footnote 9.

changes to the Revised Draft Permit following the public comment period.<sup>30</sup> In fact, the District has indicated to Valero that it intends to make further revisions to Valero's Title V permit *after* its issuance. This plan to make belated corrections is gravely problematic for the reasons stated in this petition.

Furthermore, the District's approach also ignores its own *Manual of Procedures*, which is an approved and enforceable element of BAAQMD's Title V operating permit program.<sup>31</sup> The District's *Manual of Procedures* requires that the District withdraw a permit from EPA review and resubmit a revised permit to EPA, restarting the 45-day review period, if public comments lead to substantial changes to a permit that has already been submitted to EPA.<sup>32</sup> The lawful course for the District to follow is to make the "substantial changes" needed in this permit and to proceed as required by the *Manual of Procedures*. If an extension of the settlement agreement deadline (referenced in Section I.B above) is needed in order to comply with this procedure, the District should secure the necessary time. An EPA objection to the Revised Draft Permit would prevent the District from issuing the permit as a final permit until the District complies with its own procedures.

In sum, the District did not provide EPA with the required final version of the permit that would lawfully constitute a proposed permit, but instead sent EPA a draft permit that was not complete and contained numerous inaccuracies. Following expected substantial changes to the Refinery's permit, the District is not, to our knowledge, planning to resubmit the permit to EPA for an additional 45-day review period. Accordingly, EPA was not allowed to fulfill its mandate to review a "proposed permit" for compliance with applicable requirements. See CAA § 505(b)(1); 40 C.F.R. § 70.8. The District's failure to make the proper submission

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<sup>30</sup> See footnote 7.

<sup>31</sup> 66 Fed. Reg. 53140, 53146 (October 10, 2001); BAAQMD Regulation 2-6-601. See also letter from Laurence G. Chaset, Senior Assistant Counsel, BAAQMD, to Kara Christenson, Assistant Regional Counsel, EPA, Region IX, dated July 5, 1994 ("I trust that the foregoing provides you with all the information you need to enable you to understand that the District's [Manual of Procedures] is a document with legal status and 'enforceability' at a par with that of the District's Rules and Regulations."). A copy of Mr. Chaset's letter is attached as Exhibit J.

<sup>32</sup> See BAAQMD *Manual of Procedures*, Vol. II, Part 3 § 6.1.2, implementing BAAQMD Regulation 2-6 ("If the proposed permit has been submitted to EPA, and substantial changes are made due to public comments, the APCO shall withdraw the permit from EPA review, and resubmit a revised proposed permit to EPA, restarting the 45-day review period.").

violates 40 C.F.R. § 70.8(a) and *requires* the Administrator to object to the District’s issuance of a final Title V permit to Valero.

**C. The Revised Draft Permit does not comply with 40 C.F.R. § 70.8(c)**

40 C.F.R. § 70.8(c) sets forth grounds for EPA to object to the issuance of a Title V permit. Subsection (c)(1) generally requires the Administrator to object if he or she determines that a permit is not in compliance with applicable requirements or requirements under 40 C.F.R. Part 70. 40 C.F.R. § 70.8(c)(1). Subsection (c)(3) delineates three somewhat more specific grounds on which the Administrator must object based on failure to follow proper procedures for issuing a permit. 40 C.F.R. § 70.8(c)(3). Accordingly, a permitting authority’s failure to comply with the obligations of § 70.8(c)(3) is a failure to comply with the requirements of Part 70 — a failure to which EPA is *obligated* to object pursuant to § 70.8(c)(1).

During the Title V permit review process for the Benicia Refinery, the District not only failed to provide EPA with a copy of a “proposed permit” as explained above, but also failed “to submit [to EPA] any information necessary to review adequately” the Revised Draft Permit. Such a submission is required by 40 C.F.R. § 70.8(c)(3)(ii).

Our Children’s Earth, Communities for a Better Environment and Valero submitted their respective comments on the Revised Draft Permit to the District on Monday, September 22, 2003.<sup>33</sup> Even if those comments were immediately transmitted to EPA, the agency could not have adequately reviewed the Revised Draft Permit in light of all of these comments by Friday, September 26, 2003 — the close of its 45-day review period. In fact, EPA stated on September 26 (the final day of EPA’s comment period) that it had received substantial comments from the public and Valero earlier in that week, and was “not able to review [those comments] in the few days prior to the end of [its] review period.”<sup>34</sup>

As the District has recognized, the magnitude and complexity of the Benicia Refinery’s Title V permit are such that it is impossible for the District to finalize the permit without

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<sup>33</sup> Nothing in this petition should be considered as an endorsement or reiteration by Valero of views expressed by other commenters.

<sup>34</sup> See footnote 7, at p.3 of Enclosure A. EPA’s comments did not discuss the hundreds of inaccuracies raised by Valero in its September 2003 Comments and alleged by the other commenters.

substantial input from Valero.<sup>35</sup> Similarly, EPA’s review of the Revised Draft Permit cannot be performed without full and fair attention to input from Valero. Accordingly, review of Valero’s comments was absolutely necessary for EPA to discharge its obligation to adequately review the Benicia Refinery’s Title V permit. In this regard, Valero is not presently asserting a legal error related to *what* information the District submitted to EPA. The problem arises with regard to *when* the submittal was made, relative to the District’s obligation to make the submission necessary to enable EPA “to review adequately” the pending permit. As noted above, the District provided more time than required, about 45 days, for public comments. Ironically, the schedule the District created by the timing of its submission of the Revised Draft Permit to EPA essentially guaranteed that the comments received during that generous opportunity for public review could be given little, if any, attention by EPA.

Additionally, the District’s July 25, 2003 *Responses to Comments* did not provide EPA with the benefit of even Valero’s comments on the Initial Draft Permit since that document did not reflect Valero’s September 2002 Comments.<sup>36</sup> EPA also did not have the benefit of the District’s final response to comments received during the initial review period because the *Responses to Comments* were “provided in draft form to assist reviewers in understanding updates and corrections that are the basis of the re-proposed refinery Title V permits. The responses set forth represent the efforts of District staff to date to respond to comments received during the first public comment period. This document will be finalized when the Title V permits are finalized. The content of District response may change prior to that time.”<sup>37</sup>

By failing to submit to EPA all “information necessary to review [the proposed permit] adequately,”<sup>38</sup> the District failed to comply with the mandatory obligations of 40 C.F.R. § 70.8(c)(3). The District failed to timely submit to EPA all documents and information

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<sup>35</sup> See *Responses to Comments* (attached as Exhibit C), at p. 71 (“Given the magnitude and complexity of these permits, it is impossible for District staff to prepare complete permits without the substantial support and input of the applicants.”).

<sup>36</sup> See *Responses to Comments* (attached as Exhibit C), at p. 2 (“This document addresses comments received during the public comment period from entities *other than* the refineries.” (emphasis added)).

<sup>37</sup> *Responses to Comments*, at p. 1.

<sup>38</sup> 40 C.F.R. § 70.8(c)(3)(ii).

necessary to allow EPA to review the permit “adequately,” precluding any opportunity for EPA’s full and thoughtful consideration of critical and extensive information from the applicant and other members of the public. On that basis, 40 C.F.R. § 70.8(c) *requires* that the Administrator object to the District’s issuance of a final Title V permit to Valero.

#### **IV. ERRORS IN THE REVISED DRAFT PERMIT WILL TRIGGER TIME-CONSUMING AND EXPENSIVE LEGAL PROCEEDINGS**

Without significant revisions to correct the numerous errors and omissions described in this petition, issuance of the Revised Draft Permit as the Title V permit for the Benicia Refinery will inevitably result in multiple legal challenges at the local, state and federal levels. The District has acknowledged generally that “[i]ssuance of the Title V permit will enhance enforcement in various ways, including through higher penalty authority for violations of applicable requirement[s], [and] the availability of citizen enforcement in federal court.”<sup>39</sup> The District has also emphasized that citizens groups are actively following and participating in the District’s Title V permitting process.<sup>40</sup> An inaccurate and inadequately reviewed Title V permit thus would compound enforcement issues, for Valero would be required by its permit to report non-compliance with the permit and could easily and immediately be forced to defend claims of alleged non-compliance with incorrect and inappropriate permit conditions.

With this grave prospect looming before Valero if permit issuance is not delayed to allow proper review, Valero’s statutory and due process rights would be infringed. Thus, Valero would be forced to seek judicial relief to prohibit issuance of the permit or to stay imposition of the final permit conditions. Additionally, following permit issuance, Valero would be compelled to appeal to the District Hearing Board to seek correction of the numerous final permit inaccuracies. All of these legal avenues, as well as others Valero might have to follow

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<sup>39</sup> *Responses to Comments* (attached as Exhibit C), at p. 5.

<sup>40</sup> As noted numerous times by the District, the interests of citizens’ groups are expansive and well exceed the proper scope of public review in the Title V process. *See, e.g., Responses to Comments* (attached as Exhibit C), at p. 13 (“It is the opinion of staff that in many cases the public reviewers sought information that was not directly relevant to a Title V issuance (e.g., information about how applicable requirements were derived) and that the District staff did not review when drafting the permit.”); p. 7 (“two environmental groups and a law firm representing certain labor unions . . . collectively requested, ‘all permit files as far back as your records go . . .’”).

(e.g., pursuant to CAA §§ 304, 307 and 505(b)(2)), would be time consuming and expensive for all parties involved — EPA, the District and Valero. Unfortunately, Valero has no other recourse unless and until its concerns are adequately addressed.

The least disruptive and most efficient means for addressing those concerns now is for EPA to immediately discharge its duty to object on the basis of the demonstration in this petition that the Revised Draft Permit is not in compliance with statutory and regulatory requirements. An EPA objection would take precedence over the impending December 1, 2003 settlement agreement deadline (referenced in Section I.B above) and allow a much-needed opportunity for the District and EPA to properly discharge their respective responsibilities concerning issuance of a Title V permit to Valero's Benicia Refinery.

## **V. CONCLUSION**

For the reasons explained above, the Administrator is *obligated* to object to the District's issuance of a Title V permit for Valero's Benicia Refinery pursuant to CAA § 505(b)(2), 40 C.F.R. § 70.8(c)-(d) and BAAQMD Regulation 2-6-411, and must do so within 60 days of receiving this petition. Valero respectfully petitions the Administrator to make such objection prior to December 1, 2003, to prevent the District from issuing an erroneous and unlawful Title V permit.



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