

BEFORE THE ADMINISTRATOR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

_____)	
IN THE MATTER OF)	FACILITY No. B3193
VALERO REFINING COMPANY-CALIFORNIA)	
BENICIA ASPHALT PLANT)	
BENICIA, CALIFORNIA)	
)	
TITLE V PERMIT PROPOSED TO BE ISSUED BY)	
THE BAY AREA AIR QUALITY MANAGEMENT)	
DISTRICT)	
_____)	

PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO

ISSUANCE OF A TITLE V PERMIT TO

VALERO REFINING COMPANY-CALIFORNIA’S BENICIA ASPHALT PLANT

Pursuant to 42 U.S.C. § 7661d(b)(2) of the Clean Air Act (“CAA”), 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 Asphalt Plant, located in Benicia, California (BAAQMD Facility No. B3193). The District is expected to issue a Title V permit for the Benicia Asphalt Plant 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 June 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 District regulations federally approved as components of the California State Implementation Plan. 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.

The Revised Draft Permit was received by EPA on July 3, 2003,¹ and EPA's 45-day review period expired on August 16, 2003.² 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). 42 U.S.C. § 7661d(b)(2) obligates EPA to act on this petition within 60 days.

I. BACKGROUND

A. The permit review and comment process

In 1997, the Benicia Asphalt Plant (then owned and operated by Huntway Refining Company) submitted to the District its timely and complete Title V permit application for the Benicia Asphalt Plant. The District issued its initial draft of the Asphalt Plant's Title V 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 8, 2002.

During this first public comment period, Valero submitted written comments to the District on September 6, 2002 – totaling approximately 45 pages of detailed comments (accompanied by approximately 235 pages of supplemental appendices and table mark-ups), and citing over 350 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.

In late June 2003, the District noticed a public comment period on the Revised Draft Permit — a second draft of the Title V permit for the Benicia Asphalt Plant — and transmitted a

¹ See letter from Gerardo C. Rios, Chief, Air Permits Office, EPA, Region IX, to William deBoisblanc, Director of Permit Services, BAAQMD, dated August 18, 2003. A copy of Mr. Rios's letter is attached as Exhibit A.

² See EPA Region IX Electronic Permit Submittal System Document Filer, Valero Benicia Asphalt Plant, updated October 2, 2003 at <http://yosemite.epa.gov/r9/air/epss.nsf/e0c49a10c792e06f8825657e007654a3/1866d5f53343cf3888256d56007b7bf2?OpenDocument&Highlight=0,valero>.

copy of it to EPA for review. According to EPA, the agency received the Revised Draft Permit on July 3, 2003, and EPA's comment period ended on August 16, 2003.³

The BAAQMD *Notice Inviting Written Public Comments*, dated June 26, 2003, notified the public (including Valero) of the opportunity to comment on the Revised Draft Permit.⁴ The District's June 26 notice stated that the public comment period would end on August 11, 2003. The District transmitted to Valero a copy of the Revised Draft Permit dated June 30, 2003, which was received by Valero on July 7, 2003.

On August 11, 2003, Valero submitted to the District written comments on the Revised Draft Permit (Valero's "August 2003 Comments;" copy attached as Exhibit C). Valero's comments included more than 100 pages of detailed comments citing approximately 335 individual revisions needed to correct the permit. In addition, Valero submitted comments illustrating certain modifications that are necessary to make Sections II and IV of the Revised Draft Permit consistent with applicable requirements. While some of Valero's earlier comments had been addressed, not all of the errors in the permit had been corrected, and many new issues had arisen in this new draft.

B. The District's 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."⁵ 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.⁶ At that time, EPA noted that it had received "commitments" from a number of California permitting

³ *Id.*

⁴ See BAAQMD *Notice Inviting Written Public Comments*, dated June 26, 2003, attached as Exhibit D.

⁵ 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 E.

⁶ *Id.*

authorities, including BAAQMD, committing to issue all outstanding Title V permits “as expeditiously as practicable, but no later than December 1, 2003.”⁷

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. All indications from the District have been that it will issue these permits, even though they will not have had a realistic opportunity to review and correct them. As outlined in detail below, Valero is concerned that as a result of the pressure of this unrealistic deadline, the District will take action on Title V permits, such as the Revised Draft Permit for the Benicia Asphalt Plant, that contain substantial errors and whose issuance on the current schedule would violate 40 C.F.R. Part 70.

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

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.⁸

Extensive details on the inaccuracies in the initial draft permit and the Revised Draft Permit were provided in Valero’s September 2002 Comments and August 2003 Comments, respectively. As noted above, copies of Valero’s September 2002 Comments and August

⁷ *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 F.

⁸ “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).

2003 Comments are attached as Exhibits B and C, 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):

- inclusion in Section II (Equipment) and Section IV (Source Specific Applicable Requirements) of equipment that no longer exists and therefore cannot have any applicable requirements;
- failure to include all applicable federal requirements (e.g., failure to add citations to 40 C.F.R. Part 61 Subpart FF, Benzene Waste Operations);
- errors in referring to federally enforceable District regulations as not federally enforceable, and vice versa (e.g., referring to various sections of District Regulation 8, Rule 5);
- inclusion of non-applicable federal regulations (e.g., overbroad references to federal regulatory requirements);
- inclusion of non-applicable District regulations (e.g., erroneous citations to various sections of Regulation 8, Rule 5);
- inclusion of permit condition requirements that do not match current permit conditions and/or District regulations (e.g., monitoring, recordkeeping and throughput requirements for floating roof tanks in Section VII (Applicable Limits & Compliance Monitoring Requirements));
- failure to appropriately and accurately incorporate the NO_x requirements as set forth in Regulation 9, Rule 10; and
- failure to include a permit shield for all subsumed requirements in accordance with EPA guidance.

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 Asphalt Plant will be required to immediately report non-compliance with these erroneous conditions.⁹ It will be nearly impossible for EPA, the District or the public to assess the Asphalt Plant'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.

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

42 U.S.C. § 7661d, 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,

⁹ 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 submit a written report including the probable cause of non-compliance and any corrective or preventative actions.”

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.

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 August 16, 2003)¹⁰ ended just **five days** after the public comment period (extending to August 11, 2003).¹¹

The Title V permit for Valero's Benicia Asphalt Plant will be extremely complex.¹² As EPA explained in the statement quoted above, EPA needs more time to review a complex permit following the public comment period, well more than fifteen days — and certainly more than five. With less complicated Title V permits, of course, an abbreviated interval for EPA review after the public comment period has ended presents 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 large, complex document, it also is far from final in its content. The Revised Draft Permit prompted detailed public comments from four public organizations (totaling about 35 pages), as well as Valero's extensive comments (totaling over 100 pages) on about 335 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 this Revised Draft

¹⁰ See EPA Region IX Electronic Permit Submittal System, Document Filer, Valero Benicia Asphalt Plant, updated October 2, 2003 at <http://yosemite.epa.gov/r9/air/epss.nsf/e0c49a10c792e06f8825657e007654a3/1866d5f53343cf3888256d56007b7bf2?OpenDocument&Highlight=0,valero>.

¹¹ *Id.*

¹² See Valero Revised Draft Permit, currently 254 pages in length.

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 results of the public comment period. Accordingly, in at least two specific respects, as explained in Sections II.B and II.C below, the Revised Draft Permit is not in compliance with the requirements of 40 C.F.R. Part 70, and the Administrator is obligated to object to its issuance in final form.

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

In submitting the Revised Draft Permit to EPA (which received it on July 3, 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 the Revised Draft Permit as a final Title V permit.

Pursuant to 40 C.F.R. § 70.8(a), the District is required to provide the Administrator a copy of each “proposed permit.” “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 be finished with all substantive revisions to the permit, 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 be able to determine whether the permit is “in compliance with applicable requirements [and] requirements under this part.” 40 C.F.R. § 70.8(c)(1).

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. A draft permit thus plainly contemplates further revision.¹³ 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 an earlier draft permit and the public comments on it have led to a later version which is

¹³ Although the District labeled the June 30 submission a “proposed permit,” that designation does not automatically mean that it complies with the definition of a “proposed permit” under 40 C.F.R. § 70.2.

essentially complete and unlikely to trigger any more 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 this 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 accurately evaluate as the law requires.

As evidenced by the District’s June 26, 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.¹⁴ 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.¹⁵

In sum, the District did not provide EPA with the required final version that would lawfully constitute a proposed permit, but instead sent EPA a draft permit that still was not completed and contained numerous inaccuracies. EPA was not allowed to fulfill its mandate to review a “proposed permit” for compliance with applicable requirements. *See* 42 U.S.C. § 7661d(b)(1); 40 C.F.R. § 70.8. The District’s failure to make the proper submission violates

¹⁴ *See BAAQMD Notice Inviting Written Public Comments*, dated June 26, 2003.

¹⁵ The District has indicated its intention to make further revisions to this Title V permit but only 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 has been approved by EPA as part of BAAQMD’s Title V operating permit program and is fully enforceable. BAAQMD Manual of Procedures, Vol. II, Part 3 § 6.1.2, implementing BAAQMD Regulation 2-6, states: “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.” 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 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 BAAQMD from issuing it as a final permit until the District complies with its procedures.

40 C.F.R. § 70.8(a) and requires the Administrator to object to the issuance of the Revised Draft Permit as a final Title V permit.

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 Asphalt Plant, 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). The Sierra Club and Western States Petroleum Association submitted comments on the Revised Draft Permit to the District on August 6 and 8, 2003, respectively. Our Children's Earth, Good Neighbor Steering Committee and Valero submitted their respective comments to the District on Monday, August 11, 2003.¹⁶ Even if the 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 the close of the 45-day review period on Saturday, August 16, 2003. In fact, it appears that EPA had nearly finalized its comments prior to receiving comments from Valero and the public.¹⁷ EPA's comments made no reference to, nor were they based on, the

¹⁶ Nothing this petition should be understood as the endorsement or reiteration by Valero of views expressed by other commenters.

¹⁷ E-mail correspondence between Ed Pike, EPA and Steve Hill, BAAQMD Air Quality Engineering Manager, dated August 8, 2003 through August 14, 2003, demonstrates that EPA had drafted six of its eight comments prior to receiving the public comments. The remaining two comments do not appear to have been generated based on public comments. The e-mail correspondence is attached as Exhibit G.

hundreds of inaccuracies raised by Valero and the other commenters in their August 2003 Comments.¹⁸

Obviously Valero is not now 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 extra time, about 45 days, for public comments. Ironically, however, 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 the public could be given little, if any, close attention by EPA.

By failing to submit to EPA all "information necessary to review [the permit] adequately,"¹⁹ the District failed to comply with the mandatory obligations of 40 C.F.R. § 70.8(c)(3). Absent a submission by the District to EPA that allows EPA to review the permit "adequately" by providing an opportunity for EPA's full and thoughtful consideration of critical and extensive information from the applicant and other members of the public, 40 C.F.R. § 70.8(c) requires that the Administrator object to the issuance of the Revised Draft Permit as a final Title V permit.

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 inevitably will result in multiple legal challenges at the local, state and federal levels, including a possible constitutional challenge to the permitting process itself. 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

¹⁸ See letter from Gerardo C. Rios, Chief Air Permits Office, U.S. EPA, Region IX, referenced in footnote 1.

¹⁹ 40 C.F.R. § 70.8(c)(3)(ii).

enforcement in federal court.”²⁰ The District also has emphasized that citizens groups are actively following and participating in the District’s Title V permitting process.²¹ 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 will be infringed. Thus, Valero will 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 will 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 (e.g., pursuant to 42 U.S.C. §§ 7604, 7607 and 7661d(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 immediately to 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 settlement agreement deadline and allow a much-needed opportunity for the District and EPA to properly complete the discharge of their respective responsibilities concerning issuance of a Title V permit to the Benicia Asphalt Plant.

²⁰ See BAAQMD’s *Consolidated Responses to Comments on Refinery Title V Permits* (“*Responses to Comments*”), dated July 25, 2003, p. 5.

²¹ As noted numerous times by the District, the interests of the citizens groups are expansive and well exceed the proper scope of public review in the Title V process. See e.g., *Responses to Comments*, 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 . . .’”).

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 Asphalt Plant pursuant to 42 U.S.C. § 7661d(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.

DATED: October 14, 2003

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