BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of the Final Title V Operating Permit Issued to
Los Medanos Energy Center to operate an electricity generating power plant located in Pittsburg, California
Issued by the Bay Area Air Quality Management District

PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF THE TITLE V OPERATING PERMIT FOR LOS MEDANOS ENERGY CENTER

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 Foundation (“OCE”) and Califormians for Renewable Energy, Inc. (“CARE”) (collectively “Petitioners”) hereby petition the Administrator (“the Administrator”) of the United States Environmental Protection Agency (“U.S. EPA”) to object to issuance of the Title V Operating Permit for Los Medanos Energy Center. The permit was proposed to U.S. EPA by the Bay Area Air Quality Management District (“BAAQMD” or “District”) for EPA review in a letter to Jack Broadbent, Director, Air Management Division, U.S. EPA, dated June 28, 2001. This petition is filed within sixty days following the expiration of U.S. EPA’s 45-day review period, as required by section 505(b)(2) of the Act, 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 Los Medanos Energy Center’s proposed permit that were raised during
the public comment period provided by the Act. Comments on the draft permit are attached as Exhibit A for reference.¹

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, and OCE is active in issues concerning air quality in the Bay Area and throughout the State of California. In addition, OCE commented on the Los Medanos Energy Center’s proposed Title V permit. CARE’s mission is to provide professional and legal assistance to planning, conservation, and neighborhood groups on new energy projects in the State of California. CARE has offices located in Sunnyvale, California, and has members who live, work, pay taxes, and breathe the air in and around the Los Medanos Energy Center.

Petitioners request that the Administrator object to the final Title V permit for Los Medanos Energy Center because it does not comply with 40 C.F.R. Part 70. In particular:

1) The permit’s definition of “emergency” is broader than the definition allowed by 40 C.F.R. § 70.6(g);

2) The permit improperly includes variance relief provisions which are not federally enforceable;

3) The permit fails to include a statement of basis as required by 40 C.F.R. § 70.7(a)(5);

4) The permit contains permit conditions that are inadequate under 40 C.F.R. Part 70; and

5) Some of the changes OCE requested during the public comment period and agreed to by the BAAQMD were not incorporated into the final permit.

If the Administrator determines that a permit does not comply with legal requirements, he or she must object to its issuance. See 40 C.F.R. § 70.8(c)(1) (“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 of this part.”). The numerous and significant changes OCE requested during the public comment period and agreed to by the BAAQMD were not incorporated into the final permit.

¹ The original comments on the draft permit are attached to this petition for reference only. This petition does not raise all of the issues in the original comments on the draft permit.
violations of 40 C.F.R. Part 70 discussed below require the Administrator to object to the Title V permit issued to Los Medanos Energy Center.

**I. The Permit’s Definition of “Emergency” Is Broader than Is Allowed by 40 C.F.R. § 70.6(g).**

In Section I.H.1. the permit defines “breakdown” using the definitions provided in BAAQMD Regulation 1-208. However, the definition of “breakdown” in Regulation 1-208 is much broader than the federal definition of a breakdown, which is provided in 40 C.F.R. Part 70. In 40 C.F.R. § 70.6(g), EPA clearly defines emergencies as arising from “sudden and reasonably unforeseeable events . . . which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation.” The BAAQMD’s definition would allow Los Medanos to obtain breakdown relief in situations beyond those allowed under the Act.

In its response to Petitioners’ comments, BAAQMD states that EPA has approved its definition of breakdown, and that a facility is not provided relief from federal enforcement if the breakdown exceeds the scope of the Part 70 definition of emergency. *See* August 27, 2001 Letter to Ken Kloc from William de Boisblanc, Director of Permit Services, BAAQMD, p. 1, *Standard Conditions*, item 1 (“BAAQMD Response”); attached as Exhibit B. Under this permit term, a facility can assume that if it has an emergency within the definition of BAAQMD Regulation 1-208, it can get breakdown relief from BAAQMD under its permit, but the facility will not necessarily be protected from federal or citizen enforcement, and does not provide any justification for deviating from Title V regulations. This scheme creates unnecessary confusion and unwarranted potential defenses to federal citizen enforcement. The Administrator should object to the issuance of the Los Medanos Title V permit until the definition of emergency is changed to limit the allowance for emergency breakdown relief as defined in 40 C.F.R. § 70(g).

**II. The Permit Improperly Includes State Variance Relief Provisions.**

Section I.H.2. of the permit provides that “[t]he holder of the permit may seek relief from enforcement action for a violation of any of the terms and conditions of this permit by applying to the District’s Hearing Board for a variance pursuant to” state law (California Health & Safety
Code § 42350). First, variance relief issued by BAAQMD under state law does not qualify as emergency breakdown relief authorized by the Title V provisions of the Act, and therefore should not be included in the emergency breakdown relief provisions.

Second, BAAQMD’s variance program is a creature of state law. Variance relief should not be included in a federally enforceable permit. In fact, in 1997 U.S. EPA corrected several State Implementation Plans (“SIP”), including California’s, to remove the variance provisions which had been erroneously included in each of the SIPs. See 62 Fed. Reg. 34,641 (June 27, 1997). Any reference to variance relief available under state law should be removed from the Los Medanos Title V permit.

A variance from a SIP requirement allows for a SIP modification without the U.S. EPA review. The Act prohibits States and U.S. EPA from revising the SIP by issuing an “order, suspension, plan revision or other action modifying any requirement of an applicable implementation plan” without a plan promulgation or revision. See 42 U.S.C. § 7410(i). Each time the BAAQMD Hearing Board issues a variance from a SIP requirement, the Hearing Board is granting a facility a waiver from SIP requirements without revising or promulgating a new plan. Granting a variance to a SIP requirement is analogous to granting a permit with an exemption from a SIP requirement. When granting a variance from a SIP requirement, the responsible agency is failing to require compliance with the SIP and condoning current and future SIP non-compliance by sources by ensuring immunity from enforcement. In effect, every time the Hearing Board grants a facility a variance from a SIP requirement without modifying the SIP it is violating section 110(i) of the Act, 42 U.S.C. § 7410(i).

Further, variances issued under state law have the potential to affect attainment of air quality standards because they authorize emissions in excess of the applicable emission limits. The issuance of variances by BAAQMD, in many cases, allows the polluting facility to get a waiver from the federally enforceable requirements contained in their Title V permit. While the facility, in theory, remains subject to federal and citizen enforcement, in reality, citizens and even EPA cannot enforce against every facility that receives a variance. EPA review and approval is necessary to ensure that variances will not jeopardize attainment and maintenance or
ambient air quality standards. See 42 U.S.C. § 7410(i). A Title V permit should not contain provisions that allow a facility to obtain a waiver from federally enforceable requirements which could result in an increase in emissions without EPA review.

Finally, including the variance provisions into the permit is highly confusing to the regulated community and the public. While the facility’s Title V permit states that it is not immune from federal enforcement (Section I.H.3.), the variance orders from the Hearing Board do not include such a statement. The facility therefore often has no idea that the variance it has obtained does not grant the facility any immunity from federal citizen or EPA enforcement. The Administrator should object to the issuance of any Title V permit containing references to state variance relief.

III. Failure to Include a Statement of Basis as Required by 40 C.F.R. § 70.7(a)(5).

The Administrator must object to the Title V permit issued to Los Medanos Energy Center because it lacks a statement of basis as required by 40 C.F.R. § 70.7(a)(5). According to § 70.7(a)(5), every Title V permit must be accompanied by a “statement that sets forth the legal and factual basis for the draft permit conditions.” Without a statement of basis, it is virtually impossible for the public to evaluate BAAQMD’s periodic monitoring requirements (or lack thereof), among other things, and to prepare effective comments during the 30-day public comment period.

According to U.S. EPA Region 10 the statement of basis should include:

(1) Detailed descriptions of the facility, emission units and control devices, and manufacturing processes including identifying information like serial numbers that may not be appropriate for inclusion in the enforceable permit;

(2) Justification for streamlining of any applicable requirements including a detailed comparison of stringency;

(3) Explanations for actions including documentation of compliance with one time NSPS requirements (e.g. initial source test requirements) and emission caps; and

(4) Basis for periodic monitoring, including appropriate calculations, especially when periodic monitoring is less stringent than would be expected.
See Elizabeth Waddell, Region 10 Permit Review, May 27, 1998 ("Region 10 Permit Review"), at 4. BAAQMD has never provided information in any of its permits that would constitute a statement of basis, and did not do so with the Los Medanos permit.

BAAQMD did not respond to OCE’s comment that the permit should include a statement of basis. See Exhibit A, p. 2 & 3. Instead BAAQMD’s response states that the permit is adequate. See Exhibit B, BAAQMD’s Response to Comments, p. 2 & 4. BAAQMD has previously stated that it does not prepare separate statements of basis for Title V permits because the statement of basis is “contained in each permit within the citations of the applicable requirements, and where the citations are not sufficient, such as citations of the case-by-case permit conditions, by adding the basis for the case-by-case permit conditions.” See September 4, 2001 Letter to Kathryn Lewis & Lynne Saxton from William de Boisblanc, Director of Permit Services, BAAQMD, p. 1 attached as Exhibit C.

The purpose of the statement is to enable citizens and EPA to effectively review the permit by providing information regarding decisions made by the permitting authority in drafting the permit. The Los Medanos permit fails to include this section, or one similar to it, and instead sets forth in a general manner the governing law while leaving out altogether the factual basis for the draft permit conditions. No reasonable member of the public could conclude that information provided in the Los Medanos permit suffices as the statement of basis.

The purpose of a Title V permit is to reduce violations of air pollution laws and improve enforcement of those laws. 57 Fed. Reg. 32250, 32251 (July 21, 1992). Title V permits do this by recording in one document all of the air pollution control requirements that apply to the source. Id. This gives members of the public, regulators, and the source a clear picture of what the facility is required to do to keep its air pollution under the legal limits. Without a statement of basis the public is left with no rationale for the District’s permit conditions and is unable to

\[\text{For example, in Tables VII-A through E, the permit does not require monitoring for opacity, filterable particulate, or PM limits. Also, for source S-2, BAAQMD proposes no SO}_2 \text{ monitoring. 40 C.F.R. § 70.6(a)(3) requires “monitoring sufficient to yield reliable data from the relevant time periods that are representative of the source’s compliance” and § 70.6(c)(1) requires all Title V permits to contain “testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.” Without}\]
adequately review the permit. In the absence of a statement of basis, the final permit for Los 
Medanos Energy Center violates Part 70 requirements. The Administrator must object to the 
issuance of the final permit and insist that BAAQMD draft a new permit that includes a 
statement of basis.

IV. Inadequate Permit Conditions

According to the Clean Air Act, conditions in a Title V permit must be enforceable. See 
42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(b); 57 Fed. Reg. at 32268. Therefore a permit condition 
must make it possible to determine whether the facility is complying with the condition. 
Currently, some of the permit conditions in the Los Medanos permit remain unenforceable.

Condition 22 appears to defer the development of a number of permit conditions related 
to transient, non-steady state conditions to a time after approval of the Title V permit. For 
example, Condition 22(f) states that the operator shall submit a plan to BAAQMD and EPA to 
minimize emissions during transient, non-steady state conditions within 15 months from the end 
of the commissioning period. Condition 22 is presently unenforceable and must be deleted from 
the permit. A reasonable set of conditions should be defined which can be amended once the 
facility collects better data. When the facility collects the data it should request an administrative 
permit amendment from BAAQMD, as is allowed by 40 C.F.R. § 70.7(d).

The Administrator must object to the issuance of the final Title V permit for Los 
Medanos Energy Center until it complies with the requirements of Part 70.

V. BAAQMD Failed to Incorporate Agreed to Changes Into the Permit.

Some of the changes OCE requested during the public comment period and agreed to by 
the BAAQMD were not incorporated into the final permit. Petitioners requested that 
recordkeeping be required for SIP Regulation 4 (Air Pollution Episode Plan) in Table III on page 
eleven of the permit to ensure that the stipulated abatement strategies are implemented during air 
pollution episodes. BAAQMD agreed to make the requested changes. See Exhibit B, Response 
to Comments, p. 2, Generally Applicable and Source-Specific Applicable Requirements, item 2.

Further explanation in the form of a statement of basis, the public has no information as to why monitoring is not 
required.
BAAQMD, however, failed to do so. Petitioners also requested that NOx be included in the list of regulated emissions under Condition 36. BAAQMD responded to the request by stating that “Condition 36 applies to regulated air pollutants that are not monitored with CEMs. Since the NOx emissions are measured directly with a CEM, a calculation is not necessary. The reference to Condition 23 refers to the POC emission limit only. To clarify this, letters have been added to the start-up emission limits of condition 23 and the reference in condition 36 has been revised accordingly.” The final permit does not appear to contain the changes to which BAAQMD committed. The Administrator should object to the issuance of the final Title V permit for Los Medanos Energy Center until the agreed upon changes are incorporated into the permit.

VI. Conclusion

In light of the numerous and significant violations of 40 C.F.R. Part 70 identified in this petition, the Administrator must object to the Title V permit for the Los Medanos Energy Center.

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Respectfully submitted,

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