GOLDEN GATE UNIVERSITY

ENVIRONMENTAL LAW AND JUSTICE CLINIC • SCHOOL OF LAW

October 29, 2001

Via Facsimile and U.S. Mail

Mr. Ted Hull, Air Quality Engineer
Permit Services Division
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

Re: Public Comments for Draft Title V Permits for California Oils, TriCities Waste Management, and Gas Recovery Systems

Dear Mr. Hull,

Thank you for providing the public an opportunity to comment on the proposed Title V Major Facility Review Permits. We are making these comments on behalf of the Environmental Law and Justice Clinic, Our Children's Earth, and Citizens' Committee to Complete the Refuge.

The Golden Gate University School of Law's Environmental Law and Justice Clinic ("ELJC") is a public-interest legal clinic that provides legal services and education on environmental justice issues to San Francisco Bay Area residents, community groups, and public-interest organizations.

Our Children's Earth ("OCE") is an organization dedicated to protecting the public, specifically children, from the health impacts of pollution and other environmental hazards and to improving environment for the public benefit.

The Citizens' Committee to Complete the Refuge ("CCCR") is an organization committed to saving the bay's remaining wetlands by working to place them under the protection of the Don Edwards San Francisco Bay National Wildlife Refuge, and to foster worldwide education regarding the value of all wetlands.

ELJC, OCE, and CCCR hereby submit joint comments on the Bay Area Air Quality Management District's ("District") proposed Title V Major Facility Review Permit for California Oils, Corp., Site #A0927 ("California Oils"); TriCities Waste Management, Site #A2246 ("TriCities"); and Gas Recovery Systems, Sites #B1669 and #B1670. ELJC and OCE's comments extend to all four Title V proposed permits, whereas CCCR's comments are specific to the TriCities facility's permit.

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I. Statement of Basis

A. The Proposed Permits Fail To Include a 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). To facilitate this purpose, Title V permits record in one document all of the air pollution control requirements that apply to the source. *Id.* A permit is meant to give 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 legal limits. Provisions have been included in the Title V permitting process to facilitate this purpose. Two such provisions, among others, are the statement of basis required in draft permits and the public comment period. The District's proposed permits lack a statement of basis as required by 40 C.F.R. § 70.7(a)(5), which in turn limits the public's ability to submit meaningful comments.

According to § 70.7(a)(5), every Title V draft permit must be accompanied by a "statement that sets forth the legal and factual basis for the draft permit conditions." The statement of basis "is an explanation of why the permit contains the provisions that it does and why it does not contain other provisions that might otherwise appear to be applicable. The purpose of the statement is to enable EPA and other interested parties to effectively review the permit by providing information regarding decisions made by the permitting authority in drafting the permit." Joan Cabreza, Air Permits, EPA Region X, Memorandum to Region 10 State and Local Air Pollution Agencies, Region 10 Questions & Answers #2: Title V Permit Development.

The statement of basis should therefore include:

(1) Detailed descriptions of the facility, emission units and control devices, and manufacturing processes 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, at 4. While the District-issued Title V permits are reviewed by Region 9, the Region 10 documents are a helpful guidance to which we urge the District to refer. To date, the District has never provided information in any of its draft permits that constitutes a sufficient statement of basis.

The District has previously stated 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* Letter dated September 4, 2001 to Kathryn Lewis & Lynne Saxton, ELJC from William de Boisblanc, Director of Permit Services, BAAQMD, p. 1.

However, the proposed permits for California Oils, TriCities, and Gas Recovery Systems do not fulfill the function of a statement of basis. The draft permits only state the applicable regulation for a source and do not provide any factual information about why that particular requirement is applicable, and why another requirement is not. Therefore, the public is not informed as to the District's rationale for imposing, or not imposing, permit requirements, which in turn make meaningful public comments very difficult to prepare.

Another source of guidance regarding the content of a statement of basis is in other areas of the Clean Air Act ("the Act") where a statement of basis is required. Recently, the United States Appellate Court, D.C. Circuit, held that the Act requires a notice of proposed rulemaking "be accompanied by a statement of its basis and purpose" and "include a summary of . . . the factual data on which the proposed rule is based." *Husqvarna Ab v. U.S. EPA*, 254 F.3d 195, 203 (D.C. Cir. 2001). The applicable regulation cited in *Husqvarna*, 42 U.S.C. § 7607(d)(3), states:

> The statement of basis and purpose shall include a summary of:
>
> A) The factual data on which the proposed rule is based;
> B) The methodology used in obtaining the data and in analyzing the data; and
> C) The major legal interpretations and policy considerations underlying the proposed rule.

42 U.S.C. § 7607(d)(3). There is a strong analogy between the requirements of a draft permit and those of a draft rule; the purpose of both is to create a clear and informative document so interested parties can determine the applicable requirements and the reasons for those requirements upon which comments can be based.

As stated above in the Region 10 document, included in the draft permit's statement of basis should be a detailed description of the facility, its sources and abatement equipment, and its manufacturing processes. Currently, the District's proposed permits do not provide any information describing the facilities; at the most basic level, it cannot be derived from the permit what the facilities' even produce. It is understood that descriptions of the facility and its processes are in the facility's permit application. However, for the Title V permit to be a comprehensive document, these descriptions need to be included in the draft permit as well.

The U.S. EPA issued guidance on the incorporation of information from the permit application into the permit. *See* "White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program," U.S. Environmental Protection Agency Office of Air Quality Planning and Standards, March 5, 1996. To save time, cost, and to avoid overly burdensome endeavors, some information from the application may be incorporated by reference into the permit:

> Appropriate use of incorporation by reference in permits includes referencing of test method procedures, inspection and maintenance plans, and calculation methods for determining compliance. One of the key objectives Congress hoped to achieve in creating title V, however, was the issuance of comprehensive permits that clarify how sources must comply with applicable requirements. Permitting authorities should therefore balance the streamlining benefits achieved

through use of incorporation by reference with the need to issue comprehensive, unambiguous permits useful to all affected parties [].

Id. at 37. Descriptions of a facility, its source and abatement equipment, and is production processes are significantly different than test method procedures, inspection and maintenance plans, and calculation methods. Clearly, EPA did not intend such facility descriptions to be incorporated by reference into Title V permits, as it would undermine the goal of creating a comprehensive document.

ELJC, OCE, and CCCR request that the District include a complete statement of basis in the proposed permits for California Oils, TriCities, and Gas Recovery Systems in order to comply with part 70 requirements of the Title V permitting program.

B. Statement of Basis is Necessary to Understand the District's Permitting Decisions on Sources with Prior Violations and Complaints, Particularly in Light of the District's Position on Compliance Certification.

Currently, the draft permits created by the District do not include a statement of compliance and the District's compliance reports include limited information.

The District, in past responses to comments, has stated that it is not responsible for compliance certification. *See* Letter dated January 24, 2001 to Lynne Saxton, ELJC from William deBoisblanc, Director of Permit Services, BAAQMD, p.1 ("January 24, 2001 Letter"). The District's position is that compliance certification is the responsibility of the facility, and therefore a statement of compliance is only required in the facility-prepared permit application, and not required in the final permit. As such, the District deleted Regulation 2-6-409.9 (requiring a statement of compliance in the permit) from its regulations on May 2, 2001.

The District has said it "does believe that it is reasonable for the District to review compliance for each facility and prepare a report containing appropriate observations regarding compliance at the time of the initial Title V permit issuance." *See* January 24, 2001 Letter, p. 2.

Although the District claims it is not its responsibility to certify a facility's compliance, it is unquestionably the District's responsibility to ensure a facility's permit has the appropriate requirements to comply with the National Ambient Air Quality Standards ("NAAQS"), the State Implementation Plan ("SIP"), and the California Attainment Plan ("CAP"). For the public to participate in the permitting process and make meaningful comments, the District needs to include in the statement of basis its rationale for permitting decisions, particularly when a source has had prior violations or complaints.

For example, the California Oils draft permit needs to include information (i.e. a statement of basis) describing its odor control requirements. The District's compliance report states that between 9/1/00 and 9/1/01 California Oils had "seven alleged complaints of odor, of which one was confirmed." *See* Compliance and Enforcement Division Office Memorandum, Review of Compliance Record of California Oils Corp, from the Director of Enforcement, September 13, 2001 ("California Oils Compliance Report"). While we appreciate the District's efforts to make the compliance information available, the information in the reports is minimal. When compliance information is minimal, and a statement of basis is omitted from the proposed

permit, the public cannot determine if these odor complaints were properly investigated, what precipitated the complaints, whether monitoring requirements in the permit are sufficient, or whether more stringent odor controls are required. The purpose of a public comment period is to ensure meaningful public participation, but without the necessary legal and factual information the public cannot make effective and informed comments on draft permits.

The California Oils' draft permit also needs to contain factual information regarding the permits for its storage tanks. The California Oils' compliance report also states that a Notice of Violation ("NOV") was issued for failure to have operating permits for six storage tanks. *See* California Oils Compliance Report. In the draft permit, source 34 and 36 (storage tanks) are not included in the list of source specific applicable requirements. Without a statement of basis, and therefore a statement of the District's rationale for determining requirements, the public is unable to determine whether this omission is an oversight, an appropriate omission, or a potential significant omission from the permit.

The draft permit for Gas Recovery Systems, Site #A1670, should have a statement of basis for the source that received a Notice of Violation issued between September 1, 2000 and September 1, 2001. *See* Compliance and Enforcement Division Office Memorandum, Review of Compliance Record of Gas Recovery Systems, Site #A1670, from the Director of Enforcement, September 24, 2001. As previously stated, the purpose of a statement of basis is to provide the District's rationale when it made permitting decisions. The District's compliance report for Gas Recovery Systems does not state the reasons for the issuance of the NOV. For the public to effectively review the permit, it is necessary to know what decisions were made regarding the source that was subject to the NOV, and the District's rationale for making those decisions.

Without a statement of basis the public is left with no rationale for the District's permit conditions and is unable to adequately review the permit. In the absence of a statement of basis, the permits for California Oils, TriCities, and Gas Recovery Systems violate Part 70 requirements. ELJC, OCE, and CCCR request that the proposed Title V permits be amended to include a legally and factually sufficient statement of basis.

II. Emergency Provisions

The Emergency Provisions of the proposed permits for California Oils, TriCities, and Gas Recovery Systems should be amended to conform with 40 C.F.R. §70.6(g). Specifically, the definition of "emergency" should be narrowed, the requisite evidentiary showing to receive emergency relief should be narrowed, and the proposed permits should state that emergency relief is only allowed for exceedances from technology-based emission standards.

First, the proposed permits' definition of "emergency" is broader than is allowed by 40 C.F.R. § 70.6(g). Each of the proposed permits define "breakdown" as provided in District 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." District regulation 1-208 defines a breakdown as "[a]ny unforeseeable failure or malfunction of any air pollution control equipment or operating equipment which causes a violation of any emission

standard." The District's definition would allow California Oils, TriCities, and Gas Recovery Systems to obtain breakdown relief in situations beyond those allowed under the Clean Air Act.

In a District response to previous Title V public comments, the District stated 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* Letter dated August 27, 2001 to Ken Kloc, ELJC from William de Boisblanc, Director of Permit Services, BAAQMD, p. 1, *Standard Conditions*, item 1.

Under this permit term, a facility can assume that if it has an emergency within the definition of the District Regulation 1-208, it can get breakdown relief from the District under its permit, but the facility will not necessarily be protected from federal or citizen enforcement, and the permit 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 definition of emergency should be changed to limit the allowance for emergency breakdown relief as defined in 40 C.F.R. § 70.6(g).

Second, the District omits some federal requirements as to what a facility needs to show in order to receive emergency breakdown relief from violations of emission limitations due to an emergency. Federal regulations require the facility to submit evidence to receive relief from enforcement of emission limit violations due to an emergency. "The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence." 40 C.F.R. § 70.6(g)(3). The District requires only that the facility submit "sufficient information" for the Air Pollution Control Officer ("APCO") to determine whether a breakdown occurred. *See* District Regulations 1-112, 1-431, and 1-432. The District should require facilities to meet the same evidentiary showing required by federal regulations.

Federal regulations also require the facility to show that "[d]uring the period of the emergency the [facility] took all reasonable steps to minimize levels of emissions that exceeded the emission standards. 40 C.F.R. § 70.6(g)(3)(iii). District regulations do not require this showing. *See* District Regulations 1-431, and 1-432. The proposed permits for California Oils, TriCities, and Gas Recovery Systems need to state all the requirements the facilities must show if they are to receive emergency breakdown relief.

Third, the proposed permits should state that each facility only has a defense from enforcement if the emission limitation exceeded due to the emergency is a technology-based standard, as opposed to a health-based standard. "An emergency constitutes an affirmative defense to an action brought for non-compliance with . . . technology-based emission limitations." 40 C.F.R. § 70.6(g)(2). U.S. EPA provides the following definition of "technology-based standards":

> By technology based standards, EPA means those standards, the stringency of which are based on determinations of what is technologically feasible, considering relevant factors. The fact that technology-based standards contribute to the attainment of the health-based NAAQS or help protect public health from toxic air pollutants does not change their character as technology-based standards.

See 59 Fed. Reg. 45530, 45559 n. 7 (August 31, 1995). U.S. EPA's Region 10 explains that:

> SIP requirements, such as an opacity limit or grain loading standard, are health-based standards, not technology-based standards because they are proposed by state and approved by EPA for the purposes of maintaining the NAAQS, which are health-based standards. Examples of technology-based emission limits include best available control technology standards, lowest achievable emission rate standards, maximum achievable control technology standards under 40 C.F.R. part 653, and new source performance standards under 40 C.F.R. part 60.

See Memorandum from Joan Cabreza, "Region 10 Questions and Answers #2: Title V Permit Development," Mar. 19, 1996, p. 6.

ELJC, OCE, and CCCR request the proposed permits for California Oils, TriCities, and Gas Recovery Systems be amended to conform with 40 C.F.R. §70.7(g) requirements.

III. Variance

The proposed permits improperly include state variance relief provisions. Each of the four proposed permits provide 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 the District under state law does not qualify as emergency breakdown relief because variance relief is not authorized by the Title V provisions of the Act. Also, variance relief is given for both technology-based and health-based standards, while emergency breakdown relief is only applicable for technology-based standards. Therefore variance relief should not be included in the emergency breakdown relief provisions of the permits.

Second, the District'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 SIPs, including California's, to remove the variance provisions that had been erroneously included in each SIP. *See* 62 Fed. Reg. 34,641 (June 27, 1997). Any reference to variance relief available under state law should be removed from the California Oils, TriCities, and Gas Recovery Systems proposed Title V permits.

A variance from a SIP requirement allows for a SIP modification without the requisite 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 District issues a variance from a SIP requirement, it is granting the facility a waiver from SIP requirements without revising or promulgating a new plan. Granting a variance from 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 ensuring immunity from enforcement. In effect, every time the District 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 the District, 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 of 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 that 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 facilities' Title V permits state that they are not immune from federal enforcement, the variance orders from the District do not include such a statement. Therefore the facility often has no idea that the variance it obtained does not grant it any immunity from federal citizen or EPA enforcement. The Title V permits should not contain references to state variance relief.

IV. Ensuring Compliance and Enforceability

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. We are concerned that the proposed permit contains language that may render the permit terms potentially unenforceable. For example, language such as "shall keep records ... in a District approved log" is employed several times. In order to ensure enforceability by the public and other interested parties, the permit must either list the recording options that are acceptable to the District (rather than providing that the recording be done in a "District approved log") or specify exactly what the facility must do to comply with the requirement. ELJC, OCE, and CCCR request that the District either attach a sample log that would be acceptable to the District or otherwise change the proposed permit language to ensure enforceability. If the District attaches a sample, the public would also have an opportunity to comment on its sufficiency.

V. Monitoring and Record Keeping Provisions

A Title V permit must require the permitted facility to perform monitoring and record keeping that is sufficient to provide a reasonable assurance that the permitted facility is complying with the law. Specifically, all Title V Major Facility Review Permits are legally required to incorporate all applicable record keeping requirements, and, where applicable, records of required monitoring must include the following:

1) The date, time, and place of sampling or measurements;
2) The dates analyses were performed;
3) The company or entity that performed the analyses;
4) The analytical techniques or methods used;
5) The results of such analyses; and
6) The operating conditions existing at the time of sampling or measurement.

40 C.F.R. § 70.6(a)(3)(ii)(A). Reports of all required monitoring must be submitted at least every six months. Reports are required to identify all instances of deviations from permit requirements and must be certified by a responsible official. *See* 40 C.F.R. § 70.6(a)(3)(iii)(A); District Regulation 2-6-502.

While the proposed permits contain language requiring the submission of six month monitoring reports and identification of instances of deviations, the proposed permits fail to make clear that monitoring reports are required for all of the conditions for which monitoring is performed. In other words, language should be included in the Section VII, "Applicable Limits & Compliance Monitoring Requirements," of each permit, identifying the monitoring reports required and included in the six month monitoring reports. We suggest language such as the following: "The source is required to comply with the following monitoring requirements and include such reports in the six month monitoring reports." Such language is necessary to ensure that the District, U.S. EPA, permit holder and the public are aware of the monitoring and reporting requirements in the permit.

Thank you for the your time in considering our concerns. If you have any questions, please contact Lynne Saxton, Marcie Keever, or Helen Kang at (415) 442-6647.

Sincerely,

Lynne Saxton*
Nicole Rainville*

* Lynne Saxton and Nicole Rainville are certified students under the State Bar Rules governing the Practical Training of Law Students, working under the supervision of Helen H. Kang, pursuant to the PTLS rules.