December 27, 2001

Lynn Saxton and Nicole Rainville
Golden Gate University
Environmental Law and Justice Clinic
School of Law
536 Mission Street
San Francisco, CA 94105-2968

ALAMEDA COUNTY
Roberta Cooper
Scott Haggerty
(Vice-Chairperson)
Nate Miley
Shelia Young

CONTRA COSTA COUNTY
Mark DeSaulnier
Mark Ross
Gayle Uilkema

MARIN COUNTY
Harold C. Brown, Jr.

NAPA COUNTY
Brad Wagenknecht

SAN FRANCISCO COUNTY
Chris Daly
Tony Hall
Leland Yee

SAN MATEO COUNTY
Jerry Hill
Marland Townsend
(Secretary)

SANTA CLARA COUNTY
Randy Attaway
(Chairperson)
Liz Kniss
Julia Miller
Dena Mossar

SOLANO COUNTY
William Carroll

SONOMA COUNTY
Tim Smith
Pamela Torliatt

Ellen Garvey
Executive Officer/
Air Pollution Control Officer

Subject: Public Comment on Title V permits for:

California Oils	**Facility A0927**
Tricities	**Facility A2246**
GRS	**Facility B1669**
GRS	**Facility B1670**

Dear Ms. Saxton and Ms. Rainville:

Thank you for your letter of October 29, 2001, commenting on the above permits. The response to each item in your letter is in the same order presented in your letter. Each of the permits is for an existing facility that has had a District permit for many years. To the extent that your letter identified general concerns regarding Title V permits, the District has addressed those concerns as subheadings. Where your letter identified specific issues with one of these permits, we have also addressed those issues.

I. Statement of Basis
A. The proposed permits fail to include a statement of basis.

Page 2, Paragraph 1
Your comments contend that the District provides no statement of basis for the Title V permits. This is not correct. The Permit Evaluation and the permit itself comprise the statement of basis.

Page 2, Paragraph 2
Region X's guidance is not binding in Region X, much less Region IX. Furthermore, Ms. Cabreza's understanding of the purpose of the statement of basis is in error. The target audience of the statement of basis is EPA, not the public. It is, however, available to the public to assist its review of the permit.

Page 2, Paragraphs 3 and 4
A description is included on the front page of every permit, and additional detailed information is included on the source and abatement device list. This information constitutes a detailed description. Please note that part 70 does not require a source list or facility description in the permit.

Our permit evaluation contains a full discussion of any streamlining under the permit shield section. The specific permits at issue here have no permit shields and therefore, no streamlining.

.

All permits state the nature of the business on the front page. For the three landfills, this information is clearly sufficient. The permit evaluation for California Oils contains a description of the California Oils operation.

The results of past permitting actions are reflected in the current District permits for each source. Neither Title V of the Clean Air Act nor Part 70 require a permitting authority to provide a detailed discussion of historical permitting decisions unless there is some clear indication that a problem exists in the current permit. Therefore, it is not necessary to discuss obsolete requirements in the evaluations.

Any emissions caps would be contained in the case-by-case permit conditions and have a basis identified.

Page 2, Paragraph 5, and Page 3, Paragraph 1
The District's letter of September 4, 2001, states that we do not prepare a separate document entitled "statement of basis." However, in that same letter the District pointed out that, in general, the statement of basis is contained in the permit itself through the use of extensive citations. In addition, a permit evaluation is prepared for each permit. In this permit evaluation the District addresses questions that are not readily addressed in the permits themselves.

Again, a "statement of basis" is not primarily intended to inform the public. It is primarily intended to facilitate EPA's review of the draft permit. The District staff is available to assist the public in their review of the permit by answering pertinent questions.

The permit evaluations address the following items:

- Monitoring decisions in cases where the applicable requirements do not require monitoring.
- Streamlining which is included in the Permit Shield Section, Part B.
- Under the heading of "Alignment of Information in Application and Proposed permit" the evaluation offers information on any differences in the source list between the application and permit. Also, other differences may be explained.
- Alternate Operating Scenarios
- Compliance Status

Page 3, Paragraphs 2 and 3
Your letter misstates the holding in *Husqvarna Ab v. USEPA*. The language from that decision quoted in your letter is actually a portion of the D.C. Circuit's recitation of Husqvarna's contentions to the effect that there was procedural error because EPA had not met the statutory requirements for rulemaking. The D.C. Circuit reviewed these contentions and stated "[w]e find these claims without merit." The applicability of the statute referred to in *Husqvarna* (42 U.S.C. §7607(d)(3)) was not at issue and your letter thus misstates the D.C. Circuit's holding. 42 U.S.C. section 7607(d)(3) imposes requirements on EPA when it engages in rulemaking. No such requirements exist for the documentation associated with Title V permits. The discussion in *Husqvarna* is thus wholly inapposite to the issue raised in your letter. Moreover, there is a substantial difference between the justification needed to impose new, coercive requirements (rulemaking) and the essentially administrative task of compiling existing applicable requirements (Title V permit issuance).

Page 3, Paragraph 4
Again, we disagree with your conclusory statement that the facilities are inadequately described. The title page of the permit states the nature of the facility and the source list in each permit is very detailed. The descriptions are thus sufficient. Note that 40 CFR § 70.6, Permit Content, does not include a requirement that there be a detailed description of the facility. As you point out, the facility description is part of the permit application and is available to the public.

Page 3, Paragraph 5 and Page 4, Paragraph 1
The District has used the guidance in White Paper 2 for Improved Implementation of the Part 70 Operating Permits Program (White Paper 2) in the use of citations of requirements throughout the permit, instead of reprinting entire requirements or "rephrasing" the requirements. This is permissible as long as the requirements are otherwise available to the public. The District's permits do not refer to the applications. The material quoted from White Paper 2 in your letter is thus irrelevant.

Page 4, Paragraph 2
The District has provided all of the information required in a statement of basis that complies with all Part 70 requirements. We are unable to glean from your general and conclusory comments any element required by Part 70 that is absent from the District's permits and associated reports. The only specific element that you request is a description of the facility, which is not required.

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 of Certification

Page 4, Paragraphs 3, 4, 5
The District reiterates that it is not responsible for certifying compliance for facilities.

Page 4, Paragraph 6
The District's permits contain all applicable requirements. In this regard, the permits are more comprehensive than is required. Contrary to your assertions, meaningful public participation does not require that the District explain each and every decision made regarding permits. The Title V permit consolidates existing applicable requirements. The origin of each requirement is identified in the District's Title V permits. The permit evaluation explains changes from existing requirements. Because historical permitting decisions are not subject to challenge or review, there is no purpose served by researching and explaining each such decision. To the extent that applicability determinations are not clear, those determinations may be clarified by request.

Page 4, Paragraph 7
The issue you raise regarding odor control requirements is an example of the kind of information that can be efficiently resolved by speaking to staff. The odor control requirements contained in the California Oils permit are non-federally enforceable generally applicable requirements. Regulation 7, Odorous Substances, is cited in Section III of the California Oils permit. All District Title V permits have this citation. The complaints you refer to in your letter are a matter of enforcement and do not rise to the level requiring a change in the permit.

Page 5, Paragraph 1
Your comment on the six storage tanks in the California Oils permit is amply answered in the permit evaluation, which reflects that these 6 meal silos were permitted after the original Title V application was submitted.

Sources S-34 and S-36 are included in Table IV-N, Table VII-I, and Condition 13055 of the California Oils permit. You may have overlooked them.

With respect to your contentions regarding the notice of violation (NOV) for the source at Gas Recovery Systems, Facility B1670, the NOV has no bearing on the permitting decisions related to that facility. NOVs typically reflect intermittent non-compliance that is corrected by the facility owner/operator. NOVs affect permitting decisions only when they reflect a condition that requires a change in permitting or a schedule of compliance that includes action items and deadlines to achieve compliance.

In summary, the statement of basis that is provided is sufficient for EPA to review the draft permit. It is provided to the public as additional information that may be useful. It is not intended to answer every question that might be asked about a permit. It is intended to answer most of them and document the most important decisions made in preparation of the permit.

Emergency Provisions

The District's emergency provisions accurately describe the requirements and procedures for seeking District enforcement discretion. These provisions also accurately point out that no relief from federal enforcement will result. The District's emergency provisions are entirely consistent with 40 CFR Part 70 and are explicitly allowed pursuant to 40 CFR §70.6(g)(5). These provisions are neither confusing nor ambiguous.

Although 40 CFR §70.6(g), Emergency Provisions, is under the "permit content" section of Part 70, Part 70 does not direct the permitting authority to include the provisions in the permit. Section 70.6(g) provides a means by which the permit holder may establish an affirmative defense in an action brought for non-compliance with a technology based emission limitation. The District's breakdown procedure directs the permit holder to notify the District during a breakdown if the permit holder is seeking relief from enforcement. This notice sets up one of the requirements for the Part 70 affirmative defense. To establish the affirmative defense, the permit holder would also have to comply with the other 3 elements set forth in Section 70.6(g).

In any case, the affirmative defense provided for in Part 70 is available to a permit holder even if the permit does not contain EPA's emergency provisions. If established, the affirmative defense might relieve the permit holder from liability in an EPA or citizen enforcement action. The District provisions provide for the relief that is available from the District in accordance with 40 CFR § 70.6(g)(5).

Variance

Standard Condition I.H.2 allows permit holders to seek variance relief in accordance with state law. Neither the Federal Clean Air Act nor Part 70 limits the right of California permit holders to

seek a variance from District or state enforcement. However, Standard Condition I.3 makes it clear that obtaining a variance does not protect a permit holder from EPA enforcement.

Because the District permit includes not only the federal Clean Air Act requirements, but also the state and District requirements, the permit must include the variance provisions.

Your letter refers to a “federally enforceable permit.” There are no “federally enforceable permits,” only federally enforceable requirements. The variance provisions in the permits are not federally enforceable requirements.

The District’s permits contain all of the federal Clean Air Act requirements, the state requirements, and the local requirements. The reason that the District’s Title V permits contain all of these applicable requirements is, to quote your letter, to “…give members of the public, regulators, and the source a clear picture of what the facility is required to do…” The District’s permits also give the public, regulators, and the facility a clear picture of any privileges and rights that the facility might have with respect to those applicable requirements.

EPA and the public are informed about the District Hearing Board’s issuance of variances except for emergency variances. Every hearing notice is sent to EPA and the Air Resources Board. Every hearing on a variance that would last longer than 90 days is noticed in the newspaper at least 30 days prior to the date of the hearing. Notice of the hearings is also on the District’s website under the Hearing Board Calendar.

EPA is notified of every hearing, and therefore, has ample opportunity to decide whether to take enforcement action on any variance that is granted. EPA also receives reports of all the variances in California that last more than 90 days from the California Air Resources Board on a monthly basis. EPA has the option to take enforcement action even if the District Hearing Board has granted a variance. The District’s permit makes this abundantly clear. Since this information is not readily available elsewhere, it is necessary that it be included in the permit.

You are mistaken regarding your characterization of a variance as a “SIP modification.” A variance is an exercise of enforcement discretion that follows procedures required by state law. Federal rules do not alter those state law procedures. A variance differs from a SIP modification in that a SIP modification would become, in essence, federal law and thus preclude federal enforcement.

Ensuring Compliance and Enforceability

The phrase “District-approved log” is part of the District’s standard recordkeeping condition. The District’s experience is that this language has been adequate.

In practice, the required records are generally very simple. Most, if not all, parameters to be recorded are already collected and recorded by the operators. The District’s experience is that compliance is more consistent when the facility is allowed to develop log formats that are compatible with existing records. All such records are subject to inspector review. The purpose of retaining the authority to approve the log format is to allow the inspectors to compel facilities to make any necessary improvements to recordkeeping.

Monitoring and Recordkeeping Provisions

Standard condition I.F requires that "reports of all required monitoring shall be submitted to the District at least once every 6 months…" Your statement that the permit "…fails to make clear that monitoring reports are required for all of the conditions for which monitoring is performed…" is incorrect.

The specific monitoring requirements are detailed in Table VII. The District, US EPA, the permit holder, and the public are thus all made aware of the monitoring and reporting requirements contained in the permit.

The District has issued the above Title V permits. As promised, I will send a copy of this response to EPA. Thank you for your comments.

If you have any questions about these issues, please call me at (415) 749-4704.

Very truly yours,

William de Boisblanc
Director, Permit Services

WDB:BFC:blg

cc: Jack Broadbent, Environmental Protection Agency

h:\pub_data\titlev\permit\sites\a2246\tricities ggu lettter.doc