

West Valley Citizens Air Watch

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March 25, 2011

Bay Area Air Quality Management District (BAAQMD)

Thu Bui, BAAQMD

Board of Directors, BAAQMD

cc: Deborah Jordan, Director, Air Division, US EPA Region IX

Charles Aldred (AIR-5), US EPA Region IX

Re: West Valley Citizen Air Watch (WVCAW) Comments on the Proposed Title V Permit Renewal, Application #17947, Facility #A0017, Lehigh Southwest Cement Company (Lehigh)

Incorporated as a part of West Valley Citizens Air Watch public comments and No Toxic Air public comments is the Report by Alex J. Sagady being sent by separate e-mail today.

INTRODUCTION

The mission statement of the Bay Area Air Quality Management District (BAAQMD) is, *"To protect and improve public health, air quality, and the global climate."*

However, in reality the BAAQMD is an agency that issues **Permits to Pollute**. It appears to manage the air pollution to fit the industry not to ensure quality, healthful air to the public. We have no choice

but to breathe the air around us. It is making many of us sick. Much of this is due to the weak and lax regulations and regulatory processes of the BAAQMD and inadequate monitoring. We ask for this to be reversed. According to a presentation by Brian Bateman, Head Engineer of BAAQMD, the BAAQMD develops 70% of the rules and regulations under which they operate (the remainder are Federal and other regulations). These regulations can and should be strengthened as well as adequately monitored and enforced.

There is much latitude for the staff and/or the Board of Directors of the BAAQMD to propose or support changes to the 70% of the rules and regulations under which the BAAQMD operates which could and can be more in line with the mission by significantly reducing air pollution. At the same time, we want to acknowledge there are staff members of the BAAQMD who are attempting to fulfill that mission or who have that intention but are hampered by the rules and regulations, their superiors or for other reasons. We would like to encourage staff members who are knowledgeable regarding the rules and regulations, monitoring, etc, to take the initiative to make proposals directly to the BOD, rather than getting proposals filtered through the upper management.

Either we are going to actually move towards clean air and a clean earth or not. The toxic body burden of each person is too large and increases every year. We are asking the BAAQMD, both staff and BOD, to begin using your regulatory authority to make an actual and significant reduction in the air pollution.

Those of us who attended a BAAQMD BOD meeting in San Francisco around a year and a half ago were horrified when we heard residents of other communities tell the BOD about the highly inadequate, lax and unprotective regulation by the BAAQMD in additional areas of the air district and the resulting unacceptable amounts of pollution to which they are exposed: West Oakland, Bay View Hunter's Point, Berkeley, Richmond. These, and other communities such as ours, are left to twist slowly in the polluted wind; meanwhile, the polluting industries get a **Fast Pass to Pollute**.

Even when the facilities are documented as violating the weak rules and regulations, many violations go unresolved for years and then are "resolved" by a compromise of regulations or are given a meaningless miniscule "fine". We are specifically familiar with the poor regulation and monitoring of the Lehigh Southwest Cement Company kiln and quarry operations located in our community.

It appears that, for some pollutants, the BAAQMD configures the air permits based on the amount of pollution being emitted from the cement plant. So its statement, "Permit renewal can also be denied if a facility is found to be incapable of complying with its permit conditions," ("The Title V Permit Program in Your Community, What You Should Know", BAAQMD, p3), is a moving target. From our experience with the BAAQMD and the Lehigh Southwest Cement Company plant (formerly Hanson, formerly Kaiser), too often the BAAQMD appears to adjust the air pollution requirements and regulations to accommodate the amount of pollution from various TACs (Toxic Air Contaminants) according to the amount emitted, so that the amount tends to remain under the permitted amount.

Could this be true for the somewhat recent hexavalent chromium adjustment? Once the BAAQMD determined that the amount of hexavalent chromium being emitted from the Lehigh Southwest Cement Company kiln to be two times the previous modeled estimated amount, instead of requiring the plant to reduce that amount, it appears they may have set a new criteria. Therefore, the regulated amount allowed may track the amount emitted. That would not be protection of the public, if so, that would be accommodation of the industry's pollution, rather than the mission of protection of public health and the air.

The frequent statements by the BAAQMD and the regulated industries that they are in compliance with regulations, even if that were so, gives the general public the false impression that everything is ok and that they are being protected from harmful pollutants. This is just not the case.

From what we have noticed in the Proposed Permit, there are too many instances in which the BAAQMD appears to either be doing the job for the Applicant or accepting a Title V Application from the Applicant which is incomplete. For example: . This is another facet of the BAAQMD's failure to adequately regulate.

The Bay Area remains out of attainment for the California 8 hour and 1 hour Ozone and particulate Matter PM10 and PM2.5 standards, and for the Federal 8 hour Ozone and 24 hour PM2.5 standards.

http://hank.baaqmd.gov/pln/air_quality/ambient_air_quality.htm It is the responsibility of the BAAQMD to put in place rules and regulations and monitoring that bring the Bay Area into compliance.

From the BAAQMD Clean Air Plan (we wish), "The effective date of the designation is December 14, 2009 and the Air District has three years to develop a plan, called a State Implementation Plan (SIP), that demonstrates the Bay Area will achieve the revised standard by December 14, 2014. The SIP for the new PM2.5 standard must be submitted to the U.S. EPA by December 14, 2012." There is a lot of staff time and paper work going on, but will we ever see actual results of pollution being lowered? We have a very low confidence level based on our experience regarding Lehigh and our knowledge of other areas the BAAQMD regulates.

The population of Santa Clara County is 1.7 million people. The population of the surrounding greater San Francisco Bay Area is millions more. Both areas are affected by the pollution from the Lehigh kiln which washes up and down the peninsula with the winds and further. The Lehigh kiln produces and releases a prodigious amount of toxic pollutants, criteria pollutants and green house gases. Because of the dense population which receives this

pollution and is affected by it, the plant should be required to have more stringent regulation and reductions of pollution. Instead, the regulations allow for huge amounts of pollution to rain down on this large population. We ask that the Title V permit conditions be greatly strengthened to reflect the seriousness of the effects on this large population and to greatly reduce the pollution allowed to be emitted from the cement plant and its operations.

SPECIFIC COMMENTS

1) While it is unclear whether EPA is doing a concurrent review of this Title V permit, the District's January 10, 2011 letter to EPA suggests that the District plans to deal with public and EPA comments only in its final permit, which is inappropriate, as set forth in the letter submitted by EarthJustice to BAAQMD on our behalf on November 20, 2009. (See Attachment #4 below)

2) STATEMENT of Basis pg 118 exempts CEQA review under Regulation 2-1-312.10 "Applications to deposit emission reductions in the emissions bank pursuant to Regulation 2, Rule 4 or Regulation 2, Rule 9."

"Condition. These emission reduction credits shall only be used to offset emission increases at quarries or mineral processing operations. (Basis: Regulation 2-4-302.1)"
Recommendation. This recommendation is regarding issuing a conditional banking certificate for the following total amount to the permanent shutdown of the Mineral Aggregate Plant at the facility.

We do not agree with BAAQMD's determination that this project has no potential for causing a significant adverse environmental impact and is therefore exempt from CEQA. Changes resulting from this project could result in significant environmental impacts, but without compliance with CEQA, we the community have no way of understanding or evaluating those impacts. For example, BAAQMD admits that the project will significantly increase the use of petroleum coke at the facility, yet claims that since the fuel may come in by train instead of by diesel trucks, truck emissions may be reduced. This is entirely beside the point. Increased rail use could result in a whole new set of adverse impacts and these impacts must be reviewed. As another example, BAAQMD also claims (on page 163 of the statement of basis) that the project is exempt from CEQA because it is "undertaken for the sole purpose of bringing an existing facility into compliance with newly adopted regulatory requirements of the District or of any other local, state or federal agency." Yet adding controls to meet the upcoming NESHAP 40 CFR 60, Subpart LLL for Portland Cement may lead to new environmental impacts such as increased toxic waste or increased water use that should be evaluated under CEQA. It is important that the full range of environmental impacts from this project be evaluated. BAAQMD must comply with CEQA and do an Environmental Impact Report.

The large and significant increases in petroleum coke and coal proposed in this application should certainly trigger a CEQA process. (see following)

We do not see what this has to do with excepting this Title V from CEQA review. It is the cement kiln that is being regulated under this Title V not the already shutdown Mineral Aggregate Plant. If this is the basis for CEQA exemption, we question the exemption.

3) The proposed permit indicates that the amount of coal burned for fuel could rise to 29 tons/hour from the previously permitted 20 tons per hour of coal or a mixture of coal plus petroleum coke, or petroleum coke. (pages 200,238,437). We object to that increase. A good reason in itself for a CEQA review.

Even more shocking, the Statement of Basis, page 111, states, "36 tons/hour of coal" and page 112 "27 tons/hour" of petroleum coke!

Why is this huge increase in tons of fuel use per hour being allowed by the BAAQMD. A regulatory agency that gave Title V permit renewals to this Facility while the EPA found them to be significantly out of compliance with NOx and SOx for over a decade. (EPA NOV, March, 2010, below)

4) The proposed permit indicates that the petroleum coke, which is currently being used as 100% of the fuel according to our last communication with the air district on which fuel is being burned, will not be tested for content. Instead, the exhaust from the kiln will be tested yearly for content. This is unacceptable.

Instead we ask that each shipment of petroleum coke be tested for heavy metals, including vanadium, selenium, hexavalent chromium, cadmium, mercury, sulphur and radioactive materials. We also ask that the amounts per ton of petroleum coke for each metal and other substances be posted. If radiation is found, further tests to determine which elements are present. We ask that this information be posted to the baaqmd web site. We ask that no petroleum coke be used which contains detectable radioactive elements.

While our concern is, of course, what pollutants and in what amounts are actually being emitted from the kiln exhaust, it continues to be critical to test the components of the petroleum coke before it is put into the kiln, both what they are and the amounts. Petroleum coke is a waste product of oil refining and is second only to the sludge on the bottom of the refining pile as a waste product. Therefore it concentrates heavy metals and, if there are radioactive components, concentrates those as well. The communities have a right to know if radioactive elements are present in the petroleum coke, which ones and to what concentration. Testing the petroleum coke itself, will give us a better indication of that and we doubt that a radiation monitor will be put on the stack with adequate sensitivity to detect what is being released into our air and lungs.

5) In addition, we ask that the CEMS required by the EPA's new NESHAP rule should be reporting daily on the BAAQMD web site. They should be calibrated on a regular maintenance basis of 4 times per year by either an air district expert, or a state certified expert, not by Lehigh. This should be an unannounced inspection. The results to be made public on a timely basis of no more than one month after the calibration and inspection.

6) The Proposed Permit, states, "5000 tons/day import Clinker if kiln is down for more than 45 days in last 366 days" We strongly object to importation of clinker and ask that it be stricken from the Permit. (pages 262,306,326,439,440,448,449,450,462,535,538)

7) The only regulated limit is for diesel cement trucks and diesel hydrated lime trucks but not for diesel aggregate or other diesel trucks. Both are diesel trucks emitting toxic diesel fumes as identified by the State of California. There are numerous homes within 500 feet of the road which leads to the Lehigh plant and operations. According to the proposed permit, "The owner/operator ... shall not load out more than its percent maximum throughput of current trucks, a maximum of 70,000 cement trucks loaded to capacities." That in itself is a huge amount of diesel trucks and air pollution. As Lehigh continues to mine areas less rich in limestone, the number of aggregate trucks has the potential to increase substantially. As the limestone percentage decreases, the portion of aggregates may increase. We ask for a limit in the permit on the total number of diesel trucks transporting ALL materials. Furthermore, if the increase in coal referred to above is approved, there would be even more trucks/rail cars running through Cupertino. The Lehigh operations are currently permitted to operate 24 hours/7days per week as are the diesel trucks.

We ask for limits to be placed on the operating hours of these large noisy trucks with toxic emissions running through our streets. We ask for the nighttime hours to be finally disallowed in the permit. Of note, the truck route directly passes in front of two sensitive receptors, Monarch Christian Preschool and Sunnyview Retirement Community. (pages 54,62,102,105,233,234,465,487,498,504..."290 hydrated lime trucks per year, 70,000 total cement and hydrated lime trucks per year")

8) The Lehigh plant is one of the largest cement plant emitters of mercury in the USA. (See various EPA documents and the EPA TRI data). If the kiln continues to operate, we ask the BAAQMD to actually enforce the mercury emission cap of 55 lbs of mercury per 1 million tons of clinker, as per the EPA's NESHAP Rule which is in the proposed Title V Permit. We ask that no exemption be given further down the line, that there be no amendment to the Title V Permit requirement cap of 55 lbs of mercury per 1 million tons of clinker which would allow more mercury to be released into the air.

9) Due to the high level of mercury occurring in the Lehigh limestone deposits which are baking in the kiln, releasing the mercury; and due to the fact that since 1939 up to just recently there has been no air pollution controls for the mercury; therefore almost all the mercury in is mercury emitted out through the bag house vents directly into the air as a gas (BAAQMD)/ therefore huge amounts of neurotoxic mercury have been accumulating locally. Mercury is an element. It does not degrade. It does not go away. It is persistent. This cumulative fact and cumulative effects of mercury requires acknowledgement in the Title V permit and demonstrates why emissions of anymore additional mercury is not acceptable.

While Lehigh and the BAAQMD claim there is now some pollution controls for the mercury, as of very recently, that unfortunately does nothing for the accumulated mercury. And it does not reduce the mercury to 55 lbs per 1 million tons of clinker as per the new EPA NESHAP rule, nor does it eliminate mercury from being entirely emitted. Therefore mercury is still accumulating on top of the mercury accumulated since 1939 and if the kiln continues to operation, will still be accumulating and adding to the toxic overload and burden of a potent neurotoxin which the Santa Clara County Medical Association has stated is toxic in any amount.

As a component of the limestone, the mercury is sequestered in the ground. By baking the limestone laden mercury in the kiln, it is releasing the mercury into the environment and there it stays and gets moved around and around and never goes away.

In addition, Lehigh claims, as does BAAQMD who have accepted their claims, that they have reduced the amount of mercury being emitted into the air by 20%. Yet there is NO monitoring of mercury emissions; therefore, there is no proof to back up this claim.

10) Since the clinker contains mercury and Lehigh states it is now processing more mercury back in the cement, the bags of cement now contain more mercury than before. This appears to be an additional hazard to those workers and do-it-your-selfers who mix the dry cement powder themselves and who will therefore breathe it in. At minimum, this needs to be acknowledged in the Title V, in the HMDS, and on the bags of cement. Why is the air district allowing this method of "reducing" the mercury? it is merely moving it.

11) There is a continual and continuing problem of dust in our neighborhoods from the Lehigh operations. These are sometimes being reported by community members, but there is also a high level of discouragement in reporting these and other nuisances due to the non-responsiveness of the outcomes. We see a large plum being emitted from Lehigh on a regular basis, including in the morning. The response is that it is vapor. We know the difference between "vapor" and small particulates. Vapor does not appear tan or brown.

In addition, there is often an unacceptable level of noise. This is reported and people are told it is a County issue. So we are asking the BAAQMD to put noise requirements into the Title V permit in an enforceable protocol.

12) In order to adequately monitor the kilns emissions with CEMS (continuous emission monitors) as required in the EPA's new NESHAP rule and for other pollutants, a central stack which emasses all the emissions from the kiln together is necessary. While the Statement of Basis for proposed Title V contains the wording, "New tall stack." The only specifications for it appear to be that it be 2 channels and that it have two trains of sensors. it is completely unclear what is meant by 2 channels and by two trains of sensors and whether that is adequate or not. Will there be two identical set of CEMS for the pollutants required to be measured and monitored by the CEMS in the new EPA NESHAP rule. This is completely inadequate for disclosure for the public to comment upon and for enforcement. The criteria for the placement of the new stack, it's height (at least 175') and many other specifics for the stack are necessary to be detailed in the permit in order to be enforceable. We ask that these specifics be incorporated into the Title V Permit requirements.

13) We ask that Lehigh be regulated and monitored to prove they are not exceeding their 1.6 million tons of clinker per year. We ask that a specific method to do so be incorporated as a part of the Title V. Right now due to the economy (as stated by BAAQMD), they are not operating a full capacity. However, if they do return to full capacity, they need to be strictly monitored to ensure they do not exceed the permitted amount of 1/6 million tons of clinker per year.

According to the March 9, 2010, Notice of Violation (NOV) issued to Lehigh by the EPA, "This NOV/FOV concerns a series of physical modifications made to the Facility from 1996 through 1999. Lehigh subsequently operated the Facility with the modified equipment which resulted in a significant net emission increases. As a result, the projects, either individually or in the aggregate, caused an increase in the production of cement and an increase in emissions of air pollutants to the atmosphere from the Facility." Since it appears that Lehigh exceeded it's regulated production, and increased their pollution levels (probably including many pollutants in addition to NOx and SOx), they made additional profit from additional pollution.

This is not acceptable and is evidence of poor regulation and monitoring by the BAAQMD over a long period. We ask for much better and adequate monitoring and enforcement. Otherwise it is completely inappropriate for the BAAQMD to be regulating this cement plant and the huge amount of fossil fuel it uses (20 tons or more per hour) and the huge amounts of pollution it produces and spews into the air we breathe.

14) We object to any open storage piles of petroleum coke or coal. According to the Statement of Basis, "Lehigh did not want to over-water the fuel material storage piles for fear that the run off water might flow into the Permanente Creek, and the wet fuels and raw materials may result in the use of more energy." However, during the rainy season it is very likely that materials would enter the Creek. We oppose this until a proper EIR can be done and all alternatives are explored. The permit

should not allow Lehigh to store fuels or any potentially hazardous or dangerous or polluting materials outside. There are numerous homes in close proximity, Santa Clara County gets much of its drinking water from local ground water, and Permanente Creek which is affected by the Lehigh operations and is located adjacent to the plant, flows into San Francisco Bay.

In addition, we are disturbed to read about and object to , "S-607 the stockpile area #2 (1", 1/4" aggregates and slag) at the entrance's gate is new." The operation continues to be accommodated by the BAAQMD to add additional pollution. We were told last year by BAAQMD that the operation does not use, "steel slag". What is this slag being used for? Is it steel slag? If so, that was the source of this slag? What are its components? Does it contain hexavalent chromium? Is it being used in the kiln? This concerns us greatly. (page 129 statement of basis)

In addition, the Toxic Screening Analysis section states that a risk screening analysis is not required with this application since emissions of toxic compounds are below the health risk screening analysis trigger levels in Reg 2-5-112. This is unacceptable piecemeal screening analysis. Taking this one area of materials on its own to determine risk. This area and materials are a part of an overall hugely polluting, toxic emitting operation. While the chart does not list hexavalent chromium, it also does not appear that it was tested for. (page 132, statement of basis)

Also, the Statement of Basis page 126 states that S-607 Storage Piles Area #2 contains aggregate.

This is a quarry product, not part of the cement plant. This storage should not be permitted in this area. There is no map of this area, as such the borders are not defined and can move into other areas as we have seen many times before. **There is no reclamation plan for this area, this storage should not be allowed. Does any regulation mean anything in reality?**

Also, petroleum coke is being stored and there is potential runoff containing these pollutants.

Storage areas are mentioned, but not where and what, 3.9 acres.

<http://www.baaqmd.gov/Divisions/Engineering/Title-V-Permit-Programs/Title-V-Permits/Santa-Clara/A0017/Lehigh-Southwest-Cement-Company.aspx>

15) On March 9, 2010, the EPA issued an NOV to Lehigh alleging violations of the Prevention of Significant Deterioration requirements of the CAA by performing modifications at its Cupertino cement plant that increased air emissions without applying for the correct permit and using

appropriate air pollution control technology. under Section 113(a)(1) of the Clean air Act (CAA). The NOV identifies increases in NOx and SO2 air emissions and production capacity resulting from the modifications. (see Attachment #1)

The failure of baaqmd to find the violations found by the EPA and the NOx and SOx exceedences for over a decade unfortunately give credence to the failure of the BAAQMD to be an adequate regulator of this or any cement plant. And also point out their failure to bring forward adequate and appropriate Title V Permits for this plant.

The Lafarge plant and the CEMEX Fairborn plant both were issued similar NOVs at the beginning of 2010 by the EPA.

We ask that, as in the Lafarge plant, the SCR system be required in this Proposed Title V permit to be installed at the Lehigh plant. This is the updated technology. Due to the Lehigh plants NOx and SO2 exceedances and the lax regulations and monitoring of the plant by the BAAQMD and the large emissions from the plant of NOx and SO2, it is long past time to require strict and meaningful pollution controls on NOx and SO2.

"Lafarge has agreed to install the first-ever SCR system at a cement plant in the United States. In addition, Lafarge has also agreed to install seven selective non-catalytic reduction (SNCR) systems at long dry cement kilns. This is among the first application of this technology to this type of kiln in the United States. Lafarge will also install CEMS at all of their cement kilns."

A minimum would be to install a SNCR system. But that is now the old technology. So instead we ask for the SCR system to be required to be installed as a part of the Title V Permit. We ask that the planning for this installation be started in the next few months with a completion date of December 2012.

(16) A New Source Review investigation regarding recent actions, equipment and processes should be completed before a new Title V Permit is issued as well as an investigation into Prevention of Significant Deterioration potentials. For example, what were the modifications made to equipment to enable 100% petroleum coke to begin to be burned in 2007, from the previous mix of mostly coal and a small amount of petroleum coke? Did these modifications undergo a NSR? Did they undergo PSD investigations? If so, were these adequate?

(17) "Minor" amendments to the Title V do not give the public the opportunity to review these amendments in the overall context of the Proposed Title V permit renewal. This process of on-going Minor amendments to the Title V, including without notifying the public is not an open process, nor is it acceptable. While we understand that there can be instances when this will be needed, it too many times appears to or could be used to avoid a public notification process and a public comment process. For example the application for a "Minor" amendment to the previous Title V to greatly increase the amount of petroleum coke allowed to be burned per hour by 7 tons per hour! We understand that recently an application for a new or modified mill was pulled, so not in the Title V for public review, yet it was also indicated by the BAAQMD that it would be resubmitted at a later date. Therefore no public review?

18) We have been unsuccessfully asking for an analysis of relevant samples of rocks in the quarry by a State Certified Geologist for years in order to determine whether there is asbestos or asbestos like components in the rocks in the quarry. We ask this be a requirement in the Title V Permit.

GENERAL COMMENTS

Toxic Hot Spot Program, Boundaries and HRA:

The Toxic Hot Spot Program requires a threshold that is completely inadequate to support health. The boundaries of 1,000 ft. for determining risk triggers are much too small. There are numerous schools, nursing homes, retirement communities close to the LSWCC plant, yet they are not taken into consideration in this narrowly confined boundary. The Health Risk Assessment is not health protective. It does not take into account either cumulative effects nor synergistic interactions of the various HAPS, VOCS, TACS, etc. both among themselves and within the body interactions with body processes and chemistry. There are many pollutants which have no set level of acceptability as they are toxic in any miniscule amounts, such as various dioxins. So when the BAAQMD says that certain pollutants are only present in small amounts, that is only 1/2 of the story, the other half is that they are highly toxic, teratogenic, mutagenic, etc. in miniscule amounts. In addition, the HRA only takes into account (and not adequately at that) individual cancer causing agents.

Precautionary Principle:

We ask the BAAQMD to adopt the Precautionary Principle in which it is the responsibility of the industry to prove that a substance will not be harmful and reverse the burden put on agencies and communities to prove a substance is harmful. Time and again a substance or process which is not proven to be harmful is released into the environment, does its harm for 20 years or longer until it gets so burdensome that it is finally regulated at all, then many more years or decades until its regulations even begin, if at all, to reflect its actual detrimental impacts. Meanwhile, children, the environment, the atmosphere has been sickened or degraded.

CONCLUSION

Our understanding of a permitting process is that the Proposed Title V Permit process would be intended to have the BAAQMD firstly determine whether or not the facility will get a renewed or new Title V permit. It appears pretty obvious that a fresh look is not being taken at whether or not to renew or issue a new permit, and instead a predetermined assumption of renewal or of issuing a new permit is behind the Proposed Title V Permit document. We ask the BAAQMD to actually consider whether or not a new or renewed Title V permit should be issued to Lehigh. Only after that, should any details of a Title V permit be put up for consideration.

Thank you,

Joyce M Eden, Karen Del Compare, Tim Brand on behalf of West Valley Citizens Air Watch

Barry Chang, President, No Toxic Air and Board of Directors, No Toxic Air on behalf of No Toxic Air

Attachment #1: EPA NOV issued to Lehigh Southwest dated March 9, 2010

<http://www.airwatch.us/documents/20100411175106263.pdf>

Attachment #2: EPA, January 21, 2010, LaFarge Plant Clean Air Act Settlement

http://www.epa.gov/aging/press/epanews/2010/2010_0121_2.htm

Attachment #3: EPA, February 10, 2011, CEMEX Fairborn Plant Clean Air Act Settlement

<http://www.epa.gov/compliance/resources/cases/civil/caa/cemexfairborn.html>

Attachment #4: Last two paragraphs from the letter EarthJustice sent BAAQMD, November 9, 2009

To the extent the District believes EPA's formal review has in fact ended and the clock for petitioning EPA under section 505(b)(2) of the Clean Air Act has commenced, such an interpretation of the statutory and regulatory provisions governing public review has been rejected as illegal in *Sierra Club v. Whitman*, Case No. 01-01991 (ESH) (D.D.C Jan. 30, 2002) (enclosed). As the court explained, the draft permit released for public comments cannot also be treated as the proposed permit as defined in the federal regulations: "Because a permitting authority must afford an opportunity for public comment on permits it intends to issue, 40 C.F.R. § 70.7(h), the document submitted to EPA the day after it was made available to the public . . . could not have been a candidate for a 'final permit.'" *Id.* at 17. Such an approach calls into question the adequacy of the title V permitting program as a whole. As the *Sierra Club* court concluded:

A procedure that allows for simultaneous permit review by the public and the EPA provides little time to address public comments that may raise serious questions about a draft permit. Such a process also signals the irrelevance of public input, which clearly contravenes the intent of Title V.

Id. at 17-18.

While the use of such concurrent review might be excused in situations where there is no public participation, it is a gross abuse of the process in cases such as this where public opposition is significant and the draft permit suffers from serious defects. We ask that the District and EPA confirm in writing that the current version of the permit, for which the District received extensive public comments after EPA's September 25, 2009 letter, is, in fact, only the "draft"

version, that the District will prepare a revised “proposed” version for review before issuing the final permit, and that EPA’s formal review period on the “proposed” permit will commence upon receipt of this revised version of the permit. We also ask that when EPA’s formal review period does commence that the public be given timely notice detailing EPA’s process for review of the proposed permit, opportunities for public participation, and deadlines for petitioning EPA.