

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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| IN THE MATTER OF) | FACILITY NOS. B2758 & B2759 |
| TESORO REFINING AND MARKETING COMPANY) | |
| GOLDEN EAGLE REFINERY AND AMORCO) | |
| TERMINAL, MARTINEZ, CALIFORNIA) | |
|) | |
| TITLE V PERMIT PROPOSED TO BE ISSUED BY) | |
| THE BAY AREA AIR QUALITY MANAGEMENT) | |
| DISTRICT) | |
| _____) | |

**PETITION FOR EPA OBJECTION TO ISSUANCE OF A TITLE V PERMIT TO TESORO
REFINING AND MARKETING COMPANY’S GOLDEN EAGLE REFINERY AND
AMORCO TERMINAL**

Pursuant to 42 U.S.C. § 7661d(b)(2), 40 C.F.R. § 70.8(d) and Bay Area Air Quality Management District (“BAAQMD” or “District”) Regulation 2-6-411, Tesoro Refining and Marketing Company (“Tesoro”) hereby petitions the Administrator of the United States Environmental Protection Agency (“EPA”) to object to the District’s issuance of a Title V permit (“Permit”) for Tesoro’s Golden Eagle Refinery and Amorco Terminal (collectively, the “Facilities”), located in Martinez, California (BAAQMD Facility Nos. B2758 and B2759). As detailed more fully below, because the current version of the Permit fails to comply with “applicable requirements” of the Clean Air Act (“CAA”), the requirements of 40 C.F.R. Part 70 and the District’s approved Part 70 permitting program, EPA is obligated to object to its final issuance.

The District intends to issue the Permit by December 1, 2003, in an attempt to comply with a settlement agreement it entered in May 2002. Not only does this deadline not bind EPA, it cannot supersede or alter EPA’s *legal obligation* to object to a Title V permit that is not in compliance with applicable requirements or with 40 C.F.R. Part 70. EPA must object regardless of the deadline agreed to in the District’s settlement. An EPA objection before December 1, 2003 would prevent the District from issuing the Permit, notwithstanding the settlement agreement deadline, and allow a much-needed opportunity for the District and EPA to properly discharge their respective responsibilities concerning issuance of the final Title V permit to the Tesoro Facilities.

I. BACKGROUND

The District issued the Facilities' initial draft Title V permit ("Initial Draft Permit") for public comment in June 2002. In September 2002, Tesoro submitted more than 80 pages of detailed comments, citing over 700 instances of inapplicable requirements, vague or ambiguous conditions, inaccurate or outdated information and other errors and omissions on this deeply flawed Initial Draft Permit (the "September 2002 comments").¹

Tesoro continued to work cooperatively with District staff to address these significant errors. But on August 5, 2003, the District issued a second draft of the permit for EPA Region IX and public review (the "Revised Draft Permit") that inadequately addressed or flatly ignored numerous errors raised in Tesoro's September 2002 Comments, and raised a substantial number of additional issues.² The District simultaneously issued for public comment and EPA review revised draft permits for four other Bay Area refineries. Again, on September 22, 2003 – the final date for public comment on the Revised Draft Permit – Tesoro submitted extensive written comments cataloguing both the unresolved issues from the Initial Draft Permit and a host of other serious concerns with the Revised Draft Permit ("September 2003 Comments").³ Tesoro also alerted EPA to the substantial inaccuracies in the Revised Draft Permit.⁴

On September 26, 2003 – just *four days* after Tesoro submitted its comments and the last date of EPA's review period – EPA submitted consolidated written comments on Title V permits for the Bay Area refineries, including Tesoro's Revised Draft Permit.⁵ EPA noted several deficiencies in the Revised Draft Permit, acknowledged that it "did not have enough time to review each part of the three permits we are commenting on," and conceded that it was not able to review "substantial comments

¹ Letter from Alan A. Savage III (Tesoro) to Terry Carter (BAAQMD), dated Sept. 16, 2002 (attached as Exhibit 1). The September 2002 Comments are incorporated herein by reference as if set forth in full.

Please note that, in an effort to accommodate EPA and minimize the volume of Exhibits, Tesoro has not included a copy of the Initial Draft Permit or Revised Draft Permit with this Petition. However, for purposes of the administrative record, these documents and all other Tesoro, EPA and District documents cited herein are a part of Tesoro's Petition, and incorporated as if included in their entirety herein.

² See BAAQMD, *Notice of Hearing and Notice Inviting Written Public Comments*, dated Aug. 5, 2003 (attached as Exhibit 2).

³ Letter from Alan A. Savage III (Tesoro) to Steve A. Hill (BAAQMD), dated Sept. 22, 2003 (attached as Exhibit 3). The September 2003 Comments are incorporated herein by reference as if set forth in full.

⁴ Letter from Alan A. Savage III (Tesoro) to Jack Broadbent (EPA Region IX), dated Sept. 12, 2003 (attached as Exhibit 4). Tesoro's comments in its September 12, 2003 letter are incorporated herein by reference as if set forth in full.

⁵ Letter from Gerardo C. Rios (EPA Region IX) to Steve Hill (BAAQMD), dated Sept. 26, 2003 ("EPA Comments") (attached as Exhibit 5).

from the public and refineries . . . in the few days prior to the end of our review period.”⁶ Still, EPA declined to object to the Revised Draft Permit, noting District commitments to make future “improvements” and to propose “additional permit revisions in the near future.”⁷ Tesoro has not had an opportunity to discuss EPA’s comments with the District (some of which are incorrect or inapplicable themselves), nor does it appear that Tesoro will have such an opportunity. Rather, the District has indicated that it intends to wholesale adopt the vast majority of EPA’s comments and issue the final permit without further comment or review from Tesoro or other members of the public.

The District’s issuance and EPA’s review of the Revised Draft Permit and the four other Bay Area refinery permits occurs in the context of a pre-existing commitment from the BAAQMD to issue all outstanding Title V permits no later than December 1, 2003. The District agreed to this deadline in its May 2002 settlement in *Our Children’s Earth Foundation v. BAAQMD*.⁸ The District has consistently said it will meet this deadline, even though it admittedly cannot review and correct five highly complex Bay Area refinery permits in the two months following the close of the public comment period. As outlined in detail below, Tesoro is concerned that, under the pressure of the unrealistic December 1, 2003 deadline, the District is rushing to issue the flawed Revised Draft Permit as the final Title V permit even though it fails to comply with CAA applicable requirements, 40 C.F.R. Part 70 and the District’s approved Part 70 program. As outlined in detail below, EPA is not legally permitted to approve a noncomplying permit on the District’s promise of future “revisions.” Rather, EPA must object to the Revised Draft Permit and require necessary revisions before it is issued as a final Title V permit.

II. EPA MUST OBJECT TO THE REVISED DRAFT PERMIT BECAUSE IT IS NOT IN COMPLIANCE WITH APPLICABLE REQUIREMENTS

A. EPA’s Mandatory Legal Duty to Object

Under the CAA, EPA “*shall* issue an objection [to the issuance of a Title V permit] . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the CAA],” or is not in compliance with the requirements of the Title V regulations.⁹

⁶ *Id.*, Encl. A, at 3 (Exh. 5).

⁷ *Id.* at 1 (Exh. 5).

⁸ S.F. Super. Ct. Case No. CPF-02 500595. A copy of this settlement is attached hereto as Exhibit 6.

⁹ 42 U.S.C. § 7661d(b)(2) (emphasis added); *see also* 40 C.F.R. § 70.8(c)(1) (“The Administrator *will* object to the issuance of any proposed permit determined not to be in compliance with applicable requirements or requirements under this part [70].”) (emphasis added).

Federal case law leaves no question that EPA has a *mandatory* duty to object to a Title V permit that does not comply with applicable requirements; refusal to object results in judicial remand of the petition to EPA.¹⁰ In *New York Pub. Int. Research Group v. Whitman* (“*NYPIRG*”), EPA denied a petition to enter objections to three proposed Title V permits, even though EPA conceded that the permits probably failed to comply with the requirements of 40 C.F.R. Part 70.¹¹ EPA contended that it was not required to object because the deficiencies in public notice were “harmless” and could have been remedied after the fact if the objecting parties had requested a hearing.¹²

The United States Court of Appeals for the Second Circuit held that, where EPA recognized deficiencies in a Title V permit that failed to comply with Title V or its regulations, it was not free to approve that permit. The Court made clear that such a situation does not involve any deference to “agency expertise” – under Title V, EPA simply “does not have discretion whether to object to draft permits once noncompliance has been demonstrated.”¹³

B. The Revised Draft Permit Fails to Comply With Applicable Requirements of the CAA

As Tesoro explained in detail in its September 2002 Comments, its September 2003 Comments, and its September 2003 letter to EPA,¹⁴ the Revised Draft Permit fails to comply with numerous “applicable requirements”¹⁵ under the CAA and Title V. In its written comments on the Revised Draft Permit, EPA also noted several provisions that failed to impose the correct applicable requirements.¹⁶ Indeed, as evidenced by the District’s September 25, 2003 letter to EPA concerning the Revised Draft Permit, even the *District* concedes that the Revised Draft Permit does not comply with CAA “applicable requirements,” but erroneously believes the Revised Draft Permit may be approved with these

¹⁰ See *New York Pub. Int. Research Group v. Whitman* (“*NYPIRG*”), 321 F.3d 316, 335 (2d Cir. 2003) (attached hereto as Exhibit 7).

¹¹ *NYPIRG*, 321 F.3d at 323-24 (Exh. 7).

¹² *Id.* at 324, 332 (Exh. 7).

¹³ *Id.* at 333-34 (Exh. 7).

¹⁴ See Exhibits 1, 3, and 4 for copies of Tesoro’s September 2002 Comments, September 2003 Comments and its September 2003 letter to EPA.

¹⁵ “Applicable requirements” are defined in Title V regulations to include, among other things, all provisions approved by EPA into the state implementation plan (SIP), federal new source performance standards (NSPS) and national emissions standards for hazardous air pollutants (NESHAPs). 40 C.F.R. § 70.2.

¹⁶ See, e.g., EPA Comments (Exh. 5), Encl. A at 1 (District required to “re-evaluate” permit conditions for flares to impose correct applicable requirements, and to submit information necessary to determine which requirements are applicable to which flares).

deficiencies and “fixed” later through a subsequent permit revision.¹⁷ Under these circumstances, EPA is required to object to the Revised Draft Permit; it has no legal discretion to do otherwise.

The sheer volume of erroneous, inapplicable and/or unjustified provisions prevents a detailed explanation of each one in the body of this Petition. Nevertheless, as outlined below, certain significant errors are representative of the fundamentally flawed nature of the Revised Draft Permit, and illustrate why EPA must object to its issuance.

1. Flares

The Revised Draft Permit contains several requirements inapplicable to various refinery flares. Table IV-X of the Revised Draft Permit incorrectly applies 40 C.F.R. Part 60, Subpart J to the Tank 691 Safety Flare (S943), the North Steam Flare (S944), the South Steam Flare (S945) and the West Air Flare (S1012).¹⁸ All of these flares were built before June 11, 1973 and have not been reconstructed or modified after that date. As such, they are expressly exempted from Subpart J.¹⁹ Application of Subpart J to these flares fails to comply with applicable requirements in the CAA regulations, and EPA is required to issue an objection demanding removal of Subpart J from the requirements specific to these flares.

Moreover, Table IV-U of the Revised Draft Permit improperly lists 40 C.F.R. Part 60, Subparts A and J; 40 C.F.R. Part 61, Subpart A; and 40 C.F.R. Part 63, Subparts A and CC as being applicable to the East Air Flare (S854), Emergency Flare (S992), and Ammonia Plant Flare (S1013).²⁰ These flares are not used as routine control devices, but are only used to combust “process upset gases or fuel gas that is released to the flare as a result of relief valve leakage or other emergency malfunctions.”²¹ Thus, these flares are exempted from the cited sulfur oxide standard of Subpart J. The cited provisions of Subpart CC of 40 C.F.R. Part 63 also do not apply because the refinery does not have any “Group 1 miscellaneous process vents” as defined in 40 C.F.R. Section 63.641, nor does it comply through the emissions averaging approach in 40 C.F.R. Section 63.653. Accordingly, the general provisions of 40

¹⁷ See letter from Peter Hess (BAAQMD) to Gerardo Rios (EPA Region IX) (“Hess Letter”), dated Sept. 25, 2003 (attached as Exhibit 8).

¹⁸ Revised Draft Permit at 102-104.

¹⁹ See 40 C.F.R. § 60.100(b) (Subpart J applies only to fuel gas combustion devices commencing construction or modification after June 11, 1973).

²⁰ Revised Draft Permit at 95-97.

²¹ See 40 C.F.R. § 60.104(a)(1) (exempting such flares from sulfur oxide standard).

C.F.R. Part 63, Subpart A and 40 C.F.R. Part 61, Subpart A (except 40 C.F.R. Section 63.13) also do not apply because there is no other corresponding standard in those parts applicable to the flares.

In its comments, EPA even *concedes* that the Revised Draft Permit either misapplies or, at best, lacks information sufficient to justify, the requirements listed as applicable to the refinery's flares:

We understand that the District intends to re-evaluate the permit conditions for flares and impose the correct applicable requirements in the permits. We believe that the revised Statement of Basis for each permit must document the reasons for each applicability determination, including but not limited to NSPS Subparts A (including 60.18) and J; 40 C.F.R. part 63 subpart CC; and each of the Reg 8 Rules (Reg 8-2, Reg 8-18, Reg 8-28, etc). To document these determinations, the District must identify what sources are controlled by each flare, the basis for any NSPS or other non-applicability determination, and whether they are used for routine flaring or emergencies and upsets only.²²

EPA's acknowledgement of these permit deficiencies and of the lack of information sufficient for it to adequately review the Revised Draft Permit *mandates* an objection to correct these issues.²³

2. Throughput Limits

The Revised Draft Permit imposes incorrect throughput rates on the Amorco Terminal (#S55), and related crude oil tanks (#S19, S21, S30, S49, S50).²⁴ The District claims that it is authorized to impose such limits on these grandfathered sources as a way "to facilitate a determination of whether a modification has occurred as defined in [District] Regulation 2-1-234.3."²⁵

The Revised Draft Permit misapplies this regulation. Regulation 2-1-234.3 states, in relevant part, that potential "modification" of a grandfathered source is based on a determination of whether emissions have increased over the source's "highest attainable design capacity."²⁶ The Amorco Terminal's design capacity is 70,080,000 bbl/year (not 31,060,000 bbl/year as the Revised Draft Permit states), based on the design flow rate of the transfer pumps from the Terminal to the Refinery. The design capacities of each of the listed tanks are tied to the design capacity of the Terminal itself; because the tanks are interchangeable and share the combined throughput of the Terminal, they collectively have a design capacity equal to the Terminal-wide 70,080,000 bbl/year. Thus, the Revised Draft Permit fails

²² EPA Comments, Encl. A, at 1 (Exh. 5).

²³ See 42 U.S.C. § 7661d(b)(2); 40 C.F.R. Section 70.8(c)(1); *NYPIRG*, 321 F.3d at 335 (Exh. 7).

²⁴ See Revised Draft Permit at 36, Table II-C; see also September 2003 Comments, Tab A, at 1 (Exh. 3).

²⁵ Revised Draft Permit at 6.

²⁶ District Reg. 2-1-234.3.1.1.

to comply with Regulation 2-1-234.3 (an “applicable requirement” in the SIP), and EPA must make a permit objection requiring the combined throughput for these sources to be corrected.²⁷

3. Misapplication of Petroleum Refinery Regulations to the Amorco Terminal

Table IV-A of the Revised Draft Permit incorrectly lists 40 C.F.R. Part 60, Subpart A; Part 61, Subparts A and FF; and Part 63, Subparts A and CC as being “applicable” to the Amorco Terminal (B2759).²⁸ These provisions apply only to a “petroleum refinery” and do not apply to the Amorco Terminal. Subpart A of Part 60 applies only if another NSPS in Part 60 applied to the Terminal. Because no other NSPS applies to the Terminal, Subpart A similarly is inapplicable. Subpart FF of 40 C.F.R. Part 61, in relevant part, applies only to “petroleum refineries.”²⁹ If Subpart FF of 40 C.F.R. Part 61 does not apply, Subpart A of Part 61 (the general requirements for sources covered by a source-specific NESHAP) also does not apply. And as Tesoro explained in its September 2002 comments to the District,³⁰ 40 C.F.R. Part 63, Subpart CC applies only to “petroleum refining process units” and other specified emission points within a petroleum refinery.³¹ The Terminal is neither a “petroleum refinery” nor a “petroleum refining process unit” or other listed emission point as defined in Subpart CC.³² Thus, by its terms, Subpart CC is not an “applicable requirement” to the Terminal, and by reference, nor is 40 C.F.R. Part A applicable to the Terminal. EPA therefore is required to object and demand their removal from Table IV-A of the Revised Draft Permit.

4. API Separator Not Subject to 40 C.F.R. Part 63, Subpart VV

Table IV-O of the Revised Draft Permit improperly applies 40 C.F.R. Part 61, Subpart A and 40 C.F.R. Part 63, Subpart VV to the API Oil-Water separator (S819). Section 63.1040 of 40 C.F.R. states that Subpart VV applies only to those oil-water separators “for which another subpart of 40 C.F.R. parts 60, 61, or 63 references the use of this subpart for such air emissions control.”³³ No other subpart applicable to the API Oil-Water Separator in 40 C.F.R. part 60, 61 or 63 references 40 C.F.R. Part, 63

²⁷ The Revised Draft Permit also incorrectly imposes throughput limitations on other sources that do not accurately reflect design capacity. These sources include Tank #S664 [throughput should be 12,800,000 bbl/year], Tank #S739 [throughput should be 1,689,000 bbl/year], the API Separator (S831) [throughput should be 133,255,000 bbl/year], the No. 7 Boiler (S901) [throughput should be 668 mmbtu/hour] and Tank #S54 [throughput should be 375,000 bbl/year]. See Revised Draft Permit at 12, 14, 15, 16 & 36.

²⁸ Revised Draft Permit at 49-52; see also September 2003 Comments, Tab A, at 2 (Exh. 3).

²⁹ 40 C.F.R. § 61.340(a).

³⁰ September 2002 Comments at 8 (Comment #82) (Exh. 1).

³¹ See 40 C.F.R. § 63.640(a).

³² See 40 C.F.R. §§ 63.640(a), 63.641.

³³ 40 C.F.R. § 63.1040.

Subpart VV.³⁴ Thus, Subpart VV does not apply to the API Oil-Water Separator, and inclusion of this inapplicable requirement in the Revised Draft Permit mandates an EPA objection.

5. Incorrect NOx Limits for Heaters #S912 and #S926

Condition #18372 of the Revised Draft Permit³⁵ imposes incorrect NOx limits on Heaters S912 (0.028 lb/mmbtu) and S926 (0.025 lb/mmbtu), in violation of the applicable requirements in BAAQMD Regulation 9-10.³⁶ As the District knows, this permit condition was issued based on the vendor design limits for the retrofitted ultra-low NOx burners (“ULNB”) on these units. Source testing results submitted to the District demonstrated a 0.031 lb/mmbtu limit for both heaters – a value reflected in the facility’s most recent Regulation 9-10 NOx Compliance Plan. The District still has not updated Condition #19372 to reflect this information. Accordingly, EPA must object to the Revised Draft Permit and require the District to revise this condition to reflect the appropriate limit authorized under Regulation 9-10 and the facility’s NOx Compliance Plan.

Once a final Title V permit is issued, even erroneous permit terms and conditions become federally enforceable requirements. Under Section I.F. of the Revised Draft Permit, Tesoro will be required immediately to report non-compliance with these erroneous conditions.³⁷ It will be nearly impossible for Tesoro to determine what it needs to comply with, and extremely difficult for EPA, the District or the public to assess Tesoro’s actual compliance with valid applicable requirements and conditions. Because of these numerous errors and failures to comply with applicable requirements, EPA must object to issuance of the Revised Draft Permit as a final Title V permit.

³⁴ The only other sections from 40 C.F.R. Parts 60, 61 or 63 referenced in the Revised Draft Permit as being applicable to the API Oil-Water Separator are Sections 60.692-3, 60.693-2, and 60.694 in Part 60 (Subpart QQQ) and Sections 61.01, 61.04, 61.05, 61.07, 61.09, 61.10, 61.12, 61.13, 61.14 and 61.19 of 40 C.F.R. Part 61, Subpart A. None of these sections reference Subpart VV.

³⁵ Revised Draft Permit at 691-92, #4.

³⁶ See, e.g., District Regs. 9-10-301, 9-10-501.

³⁷ Section I.F., Standard Conditions, Monitoring Reports, of the Revised Draft Permit states, in relevant part:

“ . . . all instances of non-compliance with the permit shall be reported in writing to the District’s Compliance and Enforcement Division within 10 calendar days of the discovery of the incident. Within 30 calendar days of the discovery of any incident of non-compliance, the facility shall submit a written report including the probable cause of non-compliance and any corrective or preventative actions.”

C. EPA's Comments on the Revised Draft Permit Impose Additional Inapplicable Requirements

In its letter declining to object to the Revised Draft Permit, EPA provided the District with its preliminary comments on the Revised Draft Permit.³⁸ The District has indicated its willingness to accept and incorporate virtually all of EPA's comments, even though Tesoro has had no opportunity to discuss these comments with EPA or the District.³⁹ Near-wholesale incorporation of EPA's comments is particularly troubling given that these comments also impose inapplicable requirements in contravention of CAA and Title V mandates.

For example, EPA states that BAAQMD Regulation 8-2 should be applied to cooling towers at the Golden Eagle Refinery. However, pursuant to BAAQMD Regulation 8-2-114, cooling towers are specifically exempted from Regulation 8-2.⁴⁰ EPA also recommends that BAAQMD Regulation 9-1-304 be applied to the No. 5 Boiler (S903).⁴¹ This is the Coker CO Boiler, and as such, subject to BAAQMD Regulation 9-1-310.1 – *not* Regulation 9-1-304.

These and other unsupported EPA comments constitute inapplicable requirements that must not be adopted into Tesoro's final Title V permit. EPA is required to object to the Permit and remedy these errors in EPA's comments before the Revised Draft Permit may be finalized.

III. EPA MUST OBJECT TO THE REVISED DRAFT PERMIT BECAUSE ITS REVIEW IS PREMATURE AND FAILS TO COMPLY WITH 40 C.F.R. PART 70

A. The Revised Draft Permit is Not a "Proposed Permit," and its Submittal to EPA Violates 40 C.F.R. § 70.8(a)

In August 2003, the District prematurely submitted a "draft permit" to EPA for review, rather than a "proposed permit" as required under 40 C.F.R. Part 70. Because EPA's review of a proposed permit is to be the final review in the Title V permitting process, the District should have completed all substantive revisions to the Revised Draft Permit before forwarding it for EPA review. This established procedure was not followed here. The District forwarded an inaccurate, incomplete

³⁸ See EPA Comments (Exh. 5).

³⁹ See Hess Letter (Exh. 8).

⁴⁰ The inapplicable requirements potentially imposed on the Facilities in light of EPA's comments noted in the Petition are not an exhaustive list. Tesoro provides them simply as exemplars of the problems posed by the District's virtually wholesale adoption of EPA's comments.

⁴¹ See EPA Comments, Encl. B at 1 (Exh. 5).

Revised Draft Permit to EPA with the stated intention to revise it considerably – even after issuance.⁴² As a result, EPA was unable to meet its mandated obligation to determine whether the Revised Draft Permit is “in compliance with applicable requirements [and] requirements under this part.”⁴³ Accordingly, EPA’s review was premature and EPA is *obligated* to object to final issuance of the Revised Draft permit.

Under 40 C.F.R. Section 70.8(a), the District is required to provide EPA a copy of each “proposed permit.”⁴⁴ “Proposed permit” is defined as “the version of a permit that the permitting authority proposes to issue.”⁴⁵ In contrast to a “proposed permit” ready for EPA review, a “draft permit” is “the version of a permit for which the permitting authority offers public participation under § 70.7(h) or affected State review under § 70.8 of this part.”⁴⁶ Thus, a draft permit plainly contemplates further revision.⁴⁷

The District’s own words and actions confirm that the Revised Draft Permit is just that – a “draft permit.” First, the District indicated to both EPA⁴⁸ and Tesoro⁴⁹ that it will further revise the Revised Draft Permit both before and after its issuance. Second, EPA premised its decision not to object to the Revised Draft Permit on the District’s commitment to make changes following the public comment period.⁵⁰ This “fix it later” approach is gravely problematic for the reasons stated in this Petition, and requires EPA’s objection.

Furthermore, the District’s submittal of a “draft permit” to EPA ignores its own *Manual of Procedures*, which is an approved and enforceable element of BAAQMD’s Title V operating permit program.⁵¹ The District’s *Manual of Procedures* requires that the District withdraw a permit from EPA review and resubmit a revised permit to EPA, restarting the 45-day review period, if public comments lead to

⁴² See Hess Letter (Exh. 8).

⁴³ See 40 C.F.R. § 70.8(c)(1).

⁴⁴ 40 C.F.R. § 70.8(a).

⁴⁵ 40 C.F.R. § 70.2.

⁴⁶ *Id.*

⁴⁷ Although the District labeled the Revised Draft Permit a “Proposed Major Facility Review Permit,” that designation does not ensure that the Revised Draft Permit in fact complies with the definition of a “proposed permit” under 40 C.F.R. § 70.2.

⁴⁸ See Hess Letter (Exh. 8).

⁴⁹ Tesoro participated in the October 29, 2003 WSPA Title V Workgroup Meeting, during which Steve Hill (BAAQMD) stated that inaccuracies concerning flares (Subpart J applicability) and Regulation 9-10, among others, would not be corrected in the Permit the District intends to issue Tesoro on December 1.

⁵⁰ See EPA Comments (Exh. 5).

⁵¹ 66 Fed. Reg. 53140, 53146 (October 10, 2001).

substantial changes to a permit that has already been submitted to EPA.⁵² The lawful course for the District to follow is to make the “substantial changes” needed in this Revised Draft Permit and to proceed as required by the *Manual of Procedures*. EPA’s objection to the Revised Draft Permit would prevent the District from issuing a final Title V permit until the District complies with its own procedures.

In sum, the District sent EPA an incomplete, inaccurate Revised Draft Permit. Following expected substantial changes to this flawed draft, the District is not going to resubmit it to EPA for further review. Nor has Tesoro had any opportunity to analyze EPA’s September 26, 2003 comments and discuss them with the District. Instead, we understand the District simply will adopt most of EPA’s comments wholesale – without additional opportunity for public review or comment – and issue a final Title V permit directly. As noted in Section II.C. and Section IV of this Petition, EPA’s comments are inaccurate or incomplete, and if adopted would impose either additional inapplicable requirements or new requirements in contravention of CAA and Title V mandates.

By its actions, the District has violated 40 C.F.R. § 70.8(a) and has prevented EPA from fulfilling its mandate to review a “proposed permit” for compliance with applicable requirements.⁵³ The Revised Draft Permit is rife with errors and inconsistencies that prevent it from complying with CAA applicable requirements. Accordingly, EPA has no choice but to object to its issuance.

B. The Lack of Staggered Review Periods Violates 40 C.F.R. § 70.8(c)(3)

The District’s premature submittal of the Revised Draft Permit to EPA for review has resulted in additional non-compliance with mandated EPA review requirements. EPA has a minimum of 45 days to review a proposed Title V permit.⁵⁴ The public and affected states have at least a 30–day review period.⁵⁵ According to EPA guidance, the staggered public and EPA review periods were established to ensure that EPA has adequate time to consider all public and affected state comments *before* determining whether to object to a proposed permit. Specifically, EPA has provided the following explanation of the staggered review periods:

⁵² See BAAQMD *Manual of Procedures*, Vol. II, Part 3 § 6.1.2, implementing BAAQMD Regulation 2-6 (“If the proposed permit has been submitted to EPA, and substantial changes are made due to public comments, the APCO shall withdraw the permit from EPA review, and resubmit a revised proposed permit to EPA, restarting the 45-day review period.”).

⁵³ See 42 U.S.C. § 7661d(b)(1); 40 C.F.R. § 70.8.

⁵⁴ 42 U.S.C. § 7661d; 40 C.F.R. § 70.8(c); BAAQMD Regulation 2-6-411.

⁵⁵ 40 C.F.R. §§ 70.7(h) & 70.8(b)(1); BAAQMD Regulation 2-6-412.

During the issuance process, can a permitting authority give notice to EPA, affected States, and the public simultaneously?

Yes, provided EPA has a reasonable opportunity to review any comments received from the public and affected States. The minimum public comment period is 30 days and the EPA review period is 45 days. This would only allow EPA 15 days additional review after public and affected State review, assuming the permitting authority does not provide for a longer public comment period. *Fifteen days may not be sufficient depending on the complexity of the permit.* To provide for a longer EPA period for reviewing the results of public comment, the permitting authority could vary the beginning of EPA's review resulting in less overlap of EPA and public review where more EPA review after public comment would likely be needed.⁵⁶

In this case, the EPA review period ended just four days after the close of the public comment period.⁵⁷ Thus, there was essentially no staggered review. Indeed, EPA admits that it had insufficient time to adequately review the Revised Draft Permit and that it did not even consider public comments on the Revised Draft Permit as part of its review.⁵⁸

Further, as the District noted in its *Responses to Comments*, the Revised Draft Permit is extremely complex.⁵⁹ As EPA explained, a complex permit review makes it essential that EPA have more time for review following conclusion of the public comment period rather than essentially no time for review. Thus, because EPA was unable to conduct an adequate review and meet its obligation to ensure the Revised Draft Permit meets all applicable requirements,⁶⁰ EPA must object to its issuance.

⁵⁶ *Questions and Answers On The Requirements Of Operating Permits Program Regulations* (July 7, 1993) (“*Questions and Answers*”), § 7.6, #1 (emphasis added) (attached hereto as Exhibit 9).

⁵⁷ The public comment period ended on September 22, 2003; EPA's review period ended on September 26, 2003. *See* Section I *supra*.

⁵⁸ *See* EPA Comments (Exh. 5), Encl. A at 3 (noting “EPA has received substantial comments from the public and the refineries earlier this week that we were not able to review in the few days prior to the end of our review period,” and “[w]e were not able to review all of the thousands of pages of the Bay Area's proposed refinery permits during our 45-day review period, nor did we have enough time to review each part of the three permits that we are commenting on.”)

⁵⁹ *See BAAQMD's Consolidated Responses to Comments on Refinery Title V Permits* (“*Consolidated Responses*”), p. 71 (“Given the magnitude and complexity of these permits, ...”). Due to their length, the *Consolidated Responses* are not attached hereto, but are part of EPA's administrative record and incorporated herein by reference. *See also* Revised Draft Permit, currently 501 pages in length.

⁶⁰ 40 C.F.R. § 70.8(c).

C. Contrary to CAA and BAAQMD Requirements, EPA and the District Failed to Consider Public Comment

EPA also is required to object when the permitting agency fails to follow proper procedures for issuing a permit.⁶¹ The CAA and BAAQMD regulations require public notice and comment as part of the Title V permit issuance process.⁶² This requirement includes not just the collection of public comments, but also the review of comments and appropriate revisions in light of the comments – all *before* permit issuance.⁶³

Regardless of this mandate, the public comment review process has been cast aside in this case. The Revised Draft Permit flatly ignores many of Tesoro's September 2002 Comments and does not even consider Tesoro's September 2003 Comments. This is particularly disturbing given the District's acknowledgement that, in light of the magnitude and complexity of the Revised Draft Permit, it is impossible for the District to finalize it without substantial input from Tesoro.⁶⁴ Further, the Revised Draft Permit does not consider the host of other public comment submitted in September 2003.⁶⁵

EPA also was unable to consider the extensive public comments in its review of the Revised Draft Permit.⁶⁶ First, EPA did not have the benefit of Tesoro's 2002 Comments or any District response to the Comments in reviewing the Revised Draft Permit.⁶⁷ Second, EPA did not have benefit of the September 2003 public comment (including Tesoro's September 2003 Comments) in reviewing the

⁶¹ 40 C.F.R. § 70.8(c)(1) and § 70.8(c)(3).

⁶² 42 U.S.C.7661b(e); 40 C.F.R. § 70.7(h); BAAQMD Reg. 2 Rule 6 § 410.1, § 412

⁶³ See, e.g., *Questions and Answers*, § 7.6, #1 (Exh. 9).

⁶⁴ See *Consolidated Responses* at p. 71 ("Given the magnitude and complexity of these permits, it is impossible for District staff to prepare complete permits without the substantial support and input of the applicants.")

⁶⁵ Several hundred pages of public comments were sent to the District in September 2003 in addition to Tesoro's comments, including comments from Golden Gate University (on behalf of Our Children's Earth, Sierra Club, and CALPIRG), CBE, and Adams & Broadwell. Nothing in this Petition should be considered as an endorsement or reiteration by Tesoro of views expressed by other commenters.

⁶⁶ See EPA Comments, Encl. A at 3 (Exh. 5).

⁶⁷ EPA did not get Tesoro's September 2002 Comments until Tesoro learned that EPA had not seen the comments and forwarded them to EPA in mid-September 2003. Further, the District's July 25, 2003 *Consolidated Responses* did not provide EPA with the benefit of even Tesoro's September 2002 Comments on the Initial Draft Permit since that document did not provide responses to any refinery submitted comments. See *Consolidated Responses* at 2 ("This document addresses comments received during the comment period from entities other than the refineries."). EPA also did not have the benefit of the District's final response to comments received during the initial review period because the *Consolidated Responses* were "provided in draft form to assist reviewers in understanding updates and corrections that are the basis of the re-proposed refinery Title V permits. The responses set forth represent the efforts of District staff to date to respond to comments received during the first public comment period. This document will be finalized when the Title V permits are finalized." *Id.* at 1.

Revised Draft Permit.⁶⁸ The several hundred pages of public comment on the Revised Draft Permit were sent to the District on Monday, September 22, 2003. Even if these comments were immediately transmitted to EPA, with only four days to consider them, the agency could not have adequately reviewed the Revised Draft Permit in light of these hundreds of pages comments by Friday, September 26, 2003 — the final day of EPA’s review period. In fact, EPA admits that it was “not able to review [the substantial comments from the public (including Tesoro)] in the few days prior to the end of [its] review period.”⁶⁹

EPA’s and the District’s failure to consider public comments makes a sham of the public notice and comment requirement and mandates that EPA object to issuance of the Revised Draft Permit as the a final Title V permit.⁷⁰

D. The District’s Statement of Basis Fails to Provide a Legal and Factual Basis for Several Conditions in the Revised Draft Permit as Required by 40 C.F.R. § 70.7(a)(5)

As part of the Title V permit issuance process, 40 C.F.R. § 70.7(a)(5) mandates that the District “provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions).” The District’s Statement of Basis does not meet this requirement. In many cases, it fails to provide an adequate justification, or *any* explanation, for why applicable requirements were included in or omitted from the Revised Draft Permit. For example, the Statement of Basis offers no explanation, no facts and no citation to legal authority to justify why the throughputs of the Amorco Terminal and its related tanks are limited to numbers well below design capacity.⁷¹ It does not explain why 40 C.F.R. Part 63, Subpart CC (Petroleum Refinery MACT) is purportedly “applicable” to the Amorco Terminal.⁷² And as EPA’s comments recognize, it has provided neither the factual nor the legal basis for applying 40 C.F.R. Part

⁶⁸ Indeed, EPA did not receive Tesoro’s September 2003 Comments until Tesoro itself sent EPA a copy on November 14, 2003.

⁶⁹ See EPA Comments, Encl. A at 3 (Exh. 5).

⁷⁰ 40 C.F.R. § 70.8(c); see, e.g., *Action on Smoking and Health v. Civil Aeronautics Board*, 699 F.2d 1209, 1216 (D.C. Circ. 1983) (stating that under the Administrative Procedures Act, where notice and comment is required, while the agency is not required to respond to every comment, it must “respond in a reasoned manner to the comments received”).

⁷¹ See Revised Draft Permit at 36, Table II-C.

⁷² *Id.* at 46-47.

60, Subparts A and J; 40 C.F.R. Part 61, Subpart A; and 40 C.F.R. Part 63, Subparts A and CC to the refinery's various flares.⁷³

Failing to adequately justify or explain proposed permit conditions in the Statement of Basis is a direct violation of 40 C.F.R. § 70.7(a)(5). Moreover, this absence of needed Statement of Basis information compounds non-compliance with Part 70 requirements because EPA does not have all "information necessary to review [the proposed permit] adequately" as mandated by 40 C.F.R. § 70.8(c)(3)(ii).

Recognizing the non-compliance with Part 70 requirements, EPA Region IX has repeatedly objected to proposed Title V permits based on the failure to provide a sufficient legal and factual basis of draft permit conditions in the Statement of Basis.⁷⁴ Likewise, here, EPA must object to the Revised Draft Permit because of the same non-compliance.

E. The Revised Draft Permit's Procedural Deficiencies Are Not Cured by District Commitment to Make Changes After Permit Issuance

The District apparently believes it can cure certain deficiencies identified by EPA, including errors resulting in noncompliance with applicable requirements, in a revision to occur after its December 1, 2003 issuance of the Facilities' final Title V Permit.⁷⁵ However, this commitment to correct errors in the future does not satisfy the legal mandate to issue a permit that meets applicable requirements in the *first* place,⁷⁶ nor does it alleviate EPA's obligation to object to issuance of a fundamentally flawed permit.⁷⁷ Rather, EPA must object and direct the District to make necessary changes now, *before* final issuance of the Revised Draft Permit as the final Permit.

IV. EPA MUST OBJECT BASED ON THE DISTRICT'S MISUSE OF THE REVISED DRAFT PERMIT TO APPLY NEW SUBSTANTIVE REQUIREMENTS

A fundamental premise of Title V is that it "does not impose substantive new requirements."⁷⁸ "Title V permits do not impose additional requirements on sources but, to facilitate compliance, consolidate

⁷³ *Id.* at 95-97, 102-104; see EPA Comments, Encl. A, at 1 (Exh. 5).

⁷⁴ See, e.g., Letter from Jack P. Broadbent (EPA Region IX) to Nancy Wrona (Ariz. DEQ), dated Mar. 20, 2002; Letter from Amy K. Zimpfer (EPA Region IX) to Thomas Paxson, P.E. (Kern County APCD), dated Dec. 28, 2000; Letter from David P. Howekamp (EPA Region IX) to Charles Fryxell (Mojave Desert AQMD), dated Apr. 9, 1999; Letter from David P. Howekamp (EPA Region IX) to Wayne Morgan (North Coast Unified APCD), dated Nov. 17, 1997. Copies of these objection letters are attached as Exhibit 10.

⁷⁵ See Hess Letter (Exh. 8).

⁷⁶ See 40 C.F.R. § 70.7(a)(iv).

⁷⁷ See 40 C.F.R. § 70.8(c)(1), (c)(3).

⁷⁸ 40 C.F.R. § 70.1(b).

all applicable requirements in a single document.”⁷⁹ Title V permits may include monitoring, reporting and recordkeeping provisions designed to ensure compliance with existing applicable substantive requirements, but cannot be used to alter or add underlying substantive requirements (e.g., emissions limits, throughput limits, etc.).⁸⁰

The Revised Draft Permit imposes several new substantive requirements on Tesoro, in violation of Title V regulations and EPA guidance. As discussed above in Section II.B., the Revised Draft Permit improperly imposes new 40 C.F.R. Part 60, Subpart J requirements on flares that are expressly exempt from those requirements, in violation of Title V and Subpart J. The Revised Draft Permit also imposes a host of new NSPS and NESHAP requirements on other flares (S854, S992 and S1013) that are only used to combust gases resulting from process upsets or emergency malfunctions. These provisions not only are inapplicable to the flares in question, they also constitute new substantive requirements on the flares in direct contravention of Title V mandates.

Also, Table II-A of the Revised Draft Permit mandates strict new substantive throughput requirements on grandfathered units such as the Amorco Terminal (#S55), and its related crude oil tanks (#S19, S21, S30, S49, S50). These throughput limits have been and should continue to be based on design capacity under Rule 2-1-234.3; the Revised Draft Permit does not provide the District an opportunity to ignore this rule and impose rigorous new substantive requirements that it would otherwise be barred from imposing.

The remainder of Table II-A of the Revised Draft Permit imposes new throughput limits on grandfathered sources that have not previously had such limits. While the District claims that the limits (i) “are for reporting purposes only”; (ii) are “intended to facilitate a determination of whether a modification has occurred as defined in Rule 2-1-234.3”;⁸¹ and (iii) if exceeded, are not per se a violation of the Permit conditions because Tesoro would have an opportunity to demonstrate a different baseline for determining if a modification has occurred;⁸² the language of the Revised Draft Permit does not support the District’s claims. In an effort to resolve this impasse, Tesoro notified the District that it was willing to accept such presumptive “limits” provided clarifying language was added

⁷⁹ *NYPIRG*, 321 F.3d at 320 (Exh. 7).

⁸⁰ See 42 U.S.C. § 7661c (contents of Title V permits); White Paper for Streamlined Development of Part 70 Permit Applications, U.S. EPA Office of Air Quality Planning and Standards, July 10, 1995, at 1 (“[O]perating permits and their accompanying applications should be vehicles for defining existing compliance obligations rather than for imposing new requirements or accomplishing other objectives.”).

⁸¹ Revised Draft Permit at 6.

⁸² *Id.*; see also *Consolidated Responses* at 27-28.

that reflected the District's claims.⁸³ To date, the District has failed to add the clarifying language, but rather, has left the impermissibly vague throughput limits for grandfathered sources. Further, as discussed above in Section II.B., the Revised Draft Permit lists several inapplicable requirements that, if not removed, would constitute impermissible new substantive requirements. Because imposing such new substantive requirements in the absence of a reconstruction or modification flatly violates the applicable requirements of the CAA and Title V, EPA is required to object to issuance of the Revised Draft Permit and mandate removal of the new substantive requirements.

Further, EPA's comments, if wholesale accepted by the District and incorporated into the final Title V permit, will improperly impose additional new requirements on Tesoro in direct contravention of Title V's prohibition against inclusion of new requirements in a Title V permit. For example, in its comments, EPA states that the District should include as a permit condition the requirement to continuously run the flare gas recovery compressors irrespective of the fact that there is no regulation or existing permit condition that requires continuous compressor operation.⁸⁴ EPA also erroneously accepts an inaccurate comment made by Our Children's Earth Foundation regarding the rebuilding of Boiler No. 5, and the unsupported statement that such rebuilding resulted in a greater than 100 tons per year NOx increase. Based on its acceptance of these inaccurate and unfounded statements, with absolutely no basis, EPA "strongly recommend[s] imposing any applicable requirements that were triggered by this change."⁸⁵ EPA had no basis to accept this comment from Our Children's Earth, and more fundamentally, neither EPA nor the District has legal authority to impose new substantive conditions in the Title V permit.⁸⁶

V. ERRORS IN THE REVISED DRAFT PERMIT WILL TRIGGER UNNECESSARY TIME-CONSUMING AND EXPENSIVE LEGAL PROCEEDINGS

Without significant revisions to correct the numerous errors and omissions described in this Petition, issuance of the Revised Draft Permit as a final Title V permit for the Tesoro Facilities will inevitably result in numerous and potentially senseless legal challenges at the local, state and federal levels. Given the active involvement of citizen groups in this permit process, as the District has

⁸³ See September 2003 Comments, Tab B, at 1-2 at (Exh. 3).

⁸⁴ See EPA Comments, Encl. A at 1, Encl. B at 1 (Exh. 5).

⁸⁵ See EPA Comments, Encl. B, at 2 (Exh. 5).

⁸⁶ The new requirements potentially imposed on the Facilities in light of EPA's comments noted in the Petition are not an exhaustive list. Tesoro provides them simply as exemplars of the inappropriate new conditions imposed on the Facilities based on the District's near-wholesale incorporation of EPA's comments.

acknowledged, citizen suit enforcement – sooner rather than later – is likely.⁸⁷ An inaccurate and inadequately reviewed Title V Permit will compound enforcement issues, as Tesoro will be required to report apparent non-compliance with incorrect and inappropriate conditions and will be forced to defend claims of alleged non-compliance with such conditions.

If the Revised Draft Permit is issued in its current state, Tesoro will face numerous compliance issues ranging from impracticable timing for reporting requirements, to immediate non-compliance with inapplicable provisions. For example, as discussed above in Section II.B.1, the Revised Draft Permit incorrectly applies 40 C.F.R. Part 60, Subpart J to Tesoro's flares. In order to meet Subpart J for a fuel gas combustion device, a facility needs to meet a limit of 162-ppm H₂S averaged over 3 hours. The facility also must monitor the stream continuously using an instrument that meets the standards of EPA or receive approval for an alternative monitoring plan. Because Tesoro does not currently have a continuous monitor or an alternative monitoring plan, it therefore would not meet the monitoring requirement and could be subjected to immediate enforcement for noncompliance. Under certain operational conditions, the refinery also could exceed the 162-ppm standard, creating an additional, immediate noncompliance issue based on a requirement that does not apply to Tesoro.

As discussed above, the District intends to issue the Revised Draft Permit as a final Title V permit by December 1, 2003, in an attempt to comply with the settlement agreement in the *Our Children's Earth Foundation* litigation. Not only does this deadline not bind EPA, it cannot supersede or alter EPA's legal obligation to object to a Title V permit that fails to comply with CAA applicable requirements, 40 C.F.R. Part 70 and the District's approved Part 70 program. Rather, EPA must object regardless of the deadline agreed to in the District's settlement.

The least disruptive, most efficient and legally mandated means for EPA to address the plethora of concerns with the Revised Draft Permit is to immediately object to its issuance. An EPA objection before December 1, 2003 would prevent the District from issuing the Revised Draft Permit as a final permit,⁸⁸ notwithstanding the settlement agreement deadline, and allow a much-needed opportunity for

⁸⁷ See e.g., *Consolidated Responses*, at 5 ("Issuance of the Title V permit will enhance enforcement in various ways, including through higher penalty authority for violations of applicable requirement[s], [and] the availability of citizen enforcement in federal court."); at 13 ("It is the opinion of staff that in many cases the public reviewers sought information that was not directly relevant to a Title V issuance (e.g., information about how applicable requirements were derived) and that the District staff did not review when drafting the permit"); and at 7 ("two environmental groups and a law firm representing certain labor unions . . . collectively requested, 'all permit files as far back as your records go.'").

⁸⁸ 40 C.F.R. § 70.8(d) (if EPA objects as a result of a public petition, "the permitting authority shall not issue the permit until EPA's objection has been resolved").

the District and EPA to properly discharge their respective responsibilities concerning issuance of a final Title V permit to Tesoro's Golden Eagle Refinery and Amorco Terminal.⁸⁹

VI. CONCLUSION

For the reasons explained above, EPA is *obligated* to object to the District's issuance of the Revised Draft Permit as the final Title V Permit for Tesoro's Golden Eagle Refinery and Amorco Terminal pursuant to 42 U.S.C. § 7661d(b)(2), 40 C.F.R. § 70.8(c)-(d) and BAAQMD Regulation 2-6-411, and must do so within 60 days of receiving this Petition. Tesoro respectfully petitions that EPA make such objection prior to December 1, 2003, to prevent the District from issuing an erroneous and unlawful final Title V permit.

DATED: November __, 2003

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⁸⁹ If EPA waits until after the Revised Draft Permit has been issued as a final Title V permit to enter an objection, in response to this Petition, EPA would need to reopen the final Permit. Thus, a delayed objections will only cause further delay in the issuance of a valid Title V permit. *See* 40 C.F.R. § 70.8(d).