March 19, 2018

Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Alexis Strauss, Acting Regional Administrator
U.S. Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

Re: Petition Requesting the Administrator Object to the Issuance of the Renewal Title V Major Facility Review Permit Issued to the Phillips 66 – San Francisco Refinery

Dear Administrator Pruitt and Regional Administrator Strauss:

On behalf of Communities for a Better Environment (CBE), San Francisco Baykeeper, Center for Biological Diversity, Friends of the Earth, Stand.earth, and Sierra Club ("Petitioners"), enclosed please find a petition requesting that the EPA object to the Renewal Title V Major Facility Review Permit issued to the Phillips 66 San Francisco Refinery by the Bay Area Air Quality Management District, which increases the source capacity limits for two hydrocracking units.

Petitioners file this petition because the permit is in violation of the Clean Air Act. The initial administrative deadline for EPA to comment or object ended on January 17, 2018; EPA did not comment. This petition is timely filed within 60 days of the close of EPA's comment period.

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Petitioners ask that EPA grant this petition within the 60 days allowed for review. Petitioners believe that the issues presented require the Administrator to object and that the impact of this approval on the community of Rodeo and other communities plagued with pollution throughout the region requires immediate action.

Respectfully Submitted,

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CC via US Mail:

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BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of the	
RENEWAL TITLE V MAJOR FACILITY REVIEW PERMIT	Petition to Object Pursuant to CAA § 505(b)(2)
Issued to Phillips 66 – San Francisco Refinery	Facility ID #A0016
Issued by the Bay Area Air Quality Management District	

PETITION REQUESTING THE ADMINISTRATOR OBJECT TO THE ISSUANCE OF THE RENEWAL TITLE V MAJOR FACILITY REVIEW PERMIT ISSUED TO THE PHILLIPS 66 – SAN FRANCISCO REFINERY

Pursuant to Clean Air Act § 505(b)(2) and 40 C.F.R. § 70.8(d), Communities for a Better Environment, Center for Biological Diversity, Friends of the Earth, San Francisco Baykeeper, Sierra Club, and Stand.earth ("Petitioners") hereby petition the Administrator of the United States Environmental Protection Agency ("EPA") to object to the issuance of the renewal Title V Major Facility Review Permit ("Renewal Title V Permit") to Phillips 66 – San Francisco Refinery ("Phillips 66 Refinery"), in Rodeo, California, Facility #A0016. The Renewal Title V Permit was issued by the Bay Area Air Quality Management District ("BAAQMD" or "District") on January 25, 2018.

The Administrator must object to the issuance of the Renewal Title V Permit because it violates the federal Clean Air Act ("CAA") by approving an increase in source capacity limits for Hydrocracking Units 240 and 246 without legal or factual basis. The Administrator must also object to the Renewal Title V Permit because the District did not provide adequate notice regarding the approved increases and therefore denied the public the opportunity to meaningfully participate in the permit review process and object to the approval during the public comment period. The Administrator should modify, revoke, or terminate the Renewal Title V Permit so

that it does not include the increased source capacity limits. To the extent Phillips 66 intends to pursue the increase in source capacity limits, the Administrator should require notice and public comment, and responses to comments, prior to reissuance.

INTRODUCTION

The Clean Air Act Title V permitting program offers an opportunity for concerned community members to learn what air quality requirements apply to a facility, and whether the facility is complying with those requirements. Title V meets its objective of public accountability by consolidating all information on a source of pollution into a single permitting document available to the public. The permit must contain several components to comply with the CAA, such as the operational requirements and limitations on a source, as well as monitoring, record keeping, and reporting requirements that assure compliance and accountability. Title V further achieves these objectives by allowing any member of the public to petition the EPA Administrator to object to the issuance of a Title V permit that does not comply with CAA standards.

The January 25, 2018 Renewal Title V Permit issued to the Phillips 66 Refinery violates the CAA because it approved increases to capacity limits for two of the facility's hydrocracking units without any factual or legal support, and without public notice. The District's unsubstantiated approval has prevented Petitioners, the EPA, and the public, from reviewing critical information on emission sources that process highly hazardous materials detrimental to members of the community and the environment.

A. Existing Capacity Limits for Hydrocracking Unit 240 and Unit 246

Emission sources at the Phillips 66 Refinery include, among others, two hydrocracking units that are identified in Table II-A of its Renewal Title V Permit as the U240 Unicracking Unit ("U240 Hydrocracking Unit") and the U246 High Pressure Reactor Train ("U246 Hydrocracking Unit").[1] The Renewal Title V Permit, as shown in Table II-A, increased the U240 Hydrocracking Unit maximum allowable capacity limit to 65,000 barrels per day, and increased

[1] **Exhibit A**, *Final Major Facility Review Permit issued to Phillips 66 – San Francisco Refinery, Facility #A0016* ("2018 Title V Permit"), Table II-A (Jan 25, 2018) at 11, 13.

the U246 Hydrocracking Unit maximum allowable capacity limit from a *daily maximum* to a *twelve-month average* of 23,000 barrels per day.[2]

Prior to these revised limits, the facility's previous Title V permit limited the U240 hydrocracking unit to 42,000 barrels per day, and limited the U246 hydrocracking unit to 23,000 barrels per day.[3] In fact, the U240 and U246 hydrocracking units combined were limited to a total of 65,000 barrels per day, consistent with Permit Condition 22965.[4] As such, the U240 and U246 hydrocracking units combined has effectively been approved to now process up to 88,000 barrels per day on average, exceeding the 65,000 barrels per day limit in Condition 22965.[5]

While the District undeniably approved the maximum capacity limits for the refinery's hydrocracking units, the District simultaneously expressed that it would not process the permit application related to limit increases for U240 and U246 in this Renewal Title V Permit process.[6] The only discussion related to changes in the permitted capacities for U240 and U246 stated that a request for a much smaller increase would not be processed in the Renewal Title V Permit and indicated consistency with Condition 22965.[7] However, no discussion of the apparent conflict between the increased capacity limits at the U240 and U246 hydrocracking units and Condition 22965, or estimate of the emissions associated with those increased capacity limits, was included in the materials provided during the public review and comment period.

B. Hydrocracking Can Drive Significant Environmental Impacts

Hydrocracking is essentially aggressive hydrogen-addition cracking. A high-hazard process that operates at high temperatures and very high pressures, hydrocracking converts gas oil into lighter oils for gasoline, diesel, and jet fuel production in hydrotreating, naphtha reforming, and other downstream processes. Gas oil is one of the heaviest, most contaminated,

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2 *Id*.; *see also* redlined changes in **Exhibit B**, *Draft Major Facility Review Permit issued to Phillips 66 – San Francisco Refinery, Facility #A0016* ("Draft 2018 Title V Permit"), Table II-A at 11, 13.

3 **Exhibit C**, *Final Major Facility Review Permit issued to Phillips 66 – San Francisco Refinery, Facility #A0016*, Table II-A – Permitted Sources ("2014 Title V Permit") (Aug 1, 2014) at 11, 13.

4 *Id*. at 544; *see also* **Exhibit D**, *Permit Evaluation and Statement of Basis* for Draft 2018 Title V Permit ("Statement of Basis") (November 2017) at 85 (noting the 65,000 barrels per day limit on Source S-307 for U240, which includes the amount of gas oil that can be processed at both U240 and U246).

5 **Exhibit A**, 2018 Title V Permit at 503; *see also* **Exhibit D**, Statement of Basis at 85.

6 **Exhibit D**, Statement of Basis at 5-6.

7 *Id*. at 6 ("Application 27954 is a request to increase the throughput through S307 U240 Unicracking Unit and S434 Heavy Gas Oil Hydrocracker by 4,000 barrels per day above the existing 65,000 barrels per day permit limit.); *See also Id.* at 85 (regarding Condition 22965).

and most hydrogen-deficient oil streams produced by crude distillation and coking. The fuel combustion and chemical reaction energy to heat, pressurize, power, and produce hydrogen for the additional gas oil hydrocracking, as approved by the Renewal Title V Permit, would increase routine and episodic air pollutant emissions substantially.

Hydrocracking is also the only way this facility converts the gas oil it produces in its crude distillation and coking units into lighter engine fuel feedstocks. The facility has no capacity to convert gas oil by fluid catalytic cracking.[8] Each barrel of its gas oil hydrocracking capacity represents roughly two to three barrels of crude capacity.[9] This is because the gas oil volume produced by crude distillation and coking is only about one-third to one-half of the crude volume refined, at typical distillation and coking yields reported for crude oils matching the facility's target crude slate. Implementing the approved gas oil conversion increase thus has the potential to de-bottleneck and increase processing rates at many sources across the facility, further increasing both routine and episodic air pollution hazards.

Notably, Phillips 66 has concurrently proposed to increase its permitted oil import capacity over its wharf, further demonstrating the potential that the subject action is part of a plant-wide expansion.[10] The marine terminal part of its expansion plan would increase tanker emissions and oil spill hazards along the Pacific coast and in the San Francisco Bay. Moreover, environmental review of Phillips 66's recently rejected rail spur proposal at the Arroyo Grande facility of the San Francisco Refinery showed that Phillips 66's target oil source is diluted bitumen from Canadian tar sands.[11] Bitumen sinks in water when spilled and requires more fuel combustion energy to refine. Enabling more of it to be imported and refined at the San Francisco Refinery in Rodeo would further increase oil spill and refinery emission hazards in the region.

The higher hydrocracking limits approved for the Phillips 66 Refinery will significantly increase risks to human health and the environment. The State's Office of Environmental Health

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8 **Exhibit A**, 2018 Title V Permit at 8-14 (Table II-A – Permitted Sources); *See also* **Exhibit D**, Statement of Basis at 20 ("Phillips 66 does not have any catalytic crackers.").

9 A barrel (of oil) is a volume of 42 U.S. gallons.

10 **Exhibit D**, Statement of Basis at 5, 6 (regarding requests to increase the marine terminal permit limit for crude oil from 51,182 barrels per day to 101,182 barrels per day).

11 Phillips 66 Company Rail Spur Extension And Crude Unloading Project Final Environmental Impact Report, SCH #2013071028, Section 2.0 – Project Description, at 2-34, (https://www.slocounty.ca.gov/getattachment/2e629318-e3e4-4f28-97df-f81343774c22/Phillips-Rail-Spur-FEIR.aspx).

Hazard Assessment has already identified Rodeo and its surrounding communities as bearing a concentrated and disproportionate burden of health hazards resulting from various pollution sources, including the Phillips 66 Refinery.[12] These communities are owed the opportunity to review critical information on emission resources that process highly hazardous materials that can impact their health. Prior to the permitted increase challenged here, the EPA and the public should at a minimum have had the opportunity to review, analyze, and comment on these increased risks.

PETITIONERS

Petitioner Communities for a Better Environment ("CBE") is a non-profit environmental justice organization committed to the rights of urban low-income communities and communities of color in California who are disproportionately impacted by environmental hazards. CBE has worked in Rodeo for numerous years on environmental justice issues, and its members include residents who are affected by the Phillips 66 – San Francisco Refinery. CBE engaged around initial issuance of the Title V permit for the Phillips 66 – San Francisco Refinery (then ConocoPhillips), and is closely analyzing the refinery's latest project efforts.

Petitioner Center for Biological Diversity is a non-profit corporation with offices in San Francisco, Los Angeles, and elsewhere throughout California and the United States. The Center is actively involved in environmental protection issues throughout California and North America and has over 63,000 members and more than 1.3 million online activists, including many throughout California and in the Bay Area. The Center's mission includes protecting and restoring habitat and populations of imperiled species, reducing greenhouse gas pollution to preserve a safe climate, and protecting air quality, water quality, and public health. The Center's members and staff include individuals who regularly live, work, recreate and visit the areas surrounding the Phillips 66 refinery.

Petitioner Friends of the Earth, founded by David Brower in 1969, fights to protect our environment and create a healthy and just world. We are more than 1.5 million members and activists across all 50 states working to make this vision a reality. We are part of the Friends of

[12] According to the California's multi-faceted burdens tool, CalEnviroScreen 3.0, the community suffers from a greater combination of pollution and other environmental stressors than 80% of the state. It is in the 98th percentile statewide for asthma, and 92nd percentile statewide for low birth weight. Not surprisingly, it is also majority people of color. California Environmental Protection Agency, Office of Environmental Health Hazard Assessment, 2017, CalEnviroScreen 3.0, (https://oehha.ca.gov/calenviroscreen/maps-data).

the Earth International Federation, a network in 74 countries working for social and environmental justice. Together we speak truth to power and expose those who endanger the health of people and the planet for corporate profit. To accomplish our mission, Friends of the Earth is working at the nexus of environmental protection, economic justice and social justice to fundamentally transform the way our country and the world value people and the environment. Our current campaigns focus on promoting clean energy and solutions to climate change, ensuring the food we eat and products we use are sustainable and safe for our health and the environment, and protecting marine ecosystems and the people who live and work near them.

Petitioner San Francisco Baykeeper ("Baykeeper") has worked for more than 25 years to stop pollution in San Francisco Bay and has more than five thousand members and supporters who use and enjoy the environmental, recreational, and aesthetic qualities of San Francisco Bay and its surrounding tributaries and ecosystems. San Francisco Bay is a treasure of the Bay Area, and the heart of our landscape, communities, and economy. Oil spills pose one of the primary threats to a healthy Bay, and environmental impacts from increased marine terminal activity directly threaten Baykeeper's core mission of a Bay that is free from pollution, safe for recreation, surrounded by healthy beaches, and ready for a future of sea level rise and scarce resources. Baykeeper is one of 200 Waterkeeper organizations working for clean water around the world. Baykeeper is a founding member of the international Waterkeeper Alliance and was the first Waterkeeper on the West Coast. Baykeeper also works with 12 Waterkeepers across California and the California Coastkeeper Alliance.

Petitioner Stand.earth (formerly ForestEthics) was founded nearly twenty years ago by a group of dedicated people who were working day in and day out to solve a big problem: What do you do when the health and foundation of communities and their environment are being undermined? Stand.earth's campaigns challenge destructive corporate and governmental practices, demand accountability, and create solutions that protect the forests and the stable climate required to keep our planet – and us – thriving. An unstable climate isn't good for anyone. We're already seeing the ugly effects of record-breaking temperatures, increased storm damage, displaced populations, and declining ecosystems as the result of climate change. The time is now to take swift action to stave off even greater disruption. Solutions to climate change are realistic, popular, and have enormous benefits. But first, we must overcome resistance from

corporate and governmental forces that are motivated to continue to use outdated polluting supplies of fossil energy.

Petitioner Sierra Club is a national nonprofit organization with 67 chapters and over 635,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club has over 147,000 members in the state of California, including approximately 38,151 members in the San Francisco Bay Chapter and 2,157 members in the chapter's West Contra Costa Group which includes Rodeo. The Sierra Club's concerns encompass the causes and impacts of climate change. The Sierra Club is particularly concerned about our nation's dependence on dirty fossil fuels, such as crude oil, the emissions from which are exacerbating climate change, and its impacts on communities throughout the nation, and in particular on California communities and low income disadvantaged communities disproportionately burdened by toxic industrial pollution from the extraction, movement, refining, and consumption of crude oil. The Sierra Club seeks out opportunities to stem our nation's dependence on harmful fossil fuels, including advocating against projects that will exacerbate the harms associated with the proliferation of fossil fuels, in particular risky infrastructure projects for transporting hazardous crude.

PROCEDURAL BACKGROUND

On February 26, 2016, Phillips 66 submitted an application for a second renewal of the Refinery's Title V operating permit to the District.[13] On November 16, 2017, the District completed its evaluation of the renewal application and declared its preliminary decision to issue the Renewal Title V Permit.[14] Although Petitioners are identified as interested parties regarding the Phillips 66 San Francisco Refinery, none of these organizations has a record of receiving actual notice on the proposed Renewal Title V Permit, as required by 40 C.F.R. 70.7(h)(1).

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[13] The Refinery obtained its initial Title V operating permit on December 1, 2003. On February 26, 2016, Phillips 66 submitted Application No. 27798 requesting a second renewal of that initial Title V Permit. *See* **Exhibit D**, Statement of Basis at 3.

[14] BAAQMD Letter to Elizabeth Adams, Acting Director for the Air Division, EPA, from Damian Breen, November 16, 2017. (http://www.baaqmd.gov/~/media/files/engineering/title-v-permits/a0016/a0016_11_2017 _renewal_proposed _epa_ltr_01-pdf.pdf?la=en).

Pursuant to 40 C.F.R. 70.7(h)(4), the 30-day period for public comments on the proposed Renewal Title V Permit ended on December 31, 2017, and the District received no public comments.[15] The EPA's 45-day review period concluded on January 17, 2018.[16] The EPA did not object to the proposed Renewal Title V Permit or otherwise submit substantive comments to the District.[17] On January 25, 2018, the District issued a final Renewal Title V Permit to Phillips 66, which included increases to the permitted capacity for U240 and U246.[18]

Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance if the EPA determines that the proposed permit is not in compliance with the applicable requirements under the CAA.[19] If the EPA does not object to a permit on its own initiative, any person may petition the Administrator, within 60 days of the expiration of the EPA's 45-day review period, to object to the permit.[20] Since the EPA did not object to the proposed Renewal Title V Permit, Petitioners now request that the Administrator object to the permit.

This Petition was timely filed within the 60-day statutory period, as required by CAA § 505(b)(2), following the conclusion of the EPA's review period, which ended on January 17, 2018.[21]

GROUNDS FOR OBJECTION

The CAA requires the Administrator to issue an objection if a petitioner demonstrates that a Title V permit is not in compliance with the requirements of the Act.[22] Moreover, the District may only issue a final Title V permit if the terms and conditions of the permit "provide for compliance with all applicable requirements and the requirements of [Part 70]."[23]

Petitioners request the Administrator object to the Renewal Title V Permit because it does not comply with the Clean Air Act and 40 C.F.R. Part 70. In this petition, Petitioners demonstrate that the District improperly and unlawfully issued a Renewal Title V Permit because

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15 BAAQMD Letter to Matt Lakin, Acting Director for the Air Division, EPA, from Damian Breen, dated January 25, 2018. (http://www.baaqmd.gov/~/media/files/engineering/title-v-permits/a0016/a0016_1_25_2018_renewal_final_epa_ltr_01-pdf.pdf?la=en). For reasons discussed in this Petition, Petitioners did not provide public comments on the proposed Renewal Title V Permit.

16 *Id*.

17 *Id*.

18 *Id*. The final Renewal Title V Permit reviewed and approved Applications 27798, 21850, 22672, 26487, 27532, 27560, 28688.

19 42 U.S.C.A. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c).

20 42 U.S.C.A. § 7661d(b)(2).

21 This Petition was filed on March 19, 2018.

22 42 U.S.C.A. § 7661d(b)(1).

23 40 C.F.R.§ 70.7(a)(l)(iv).

it included an approval of permitted capacity increases for U240 and U246 without providing adequate notice to the public and without a legal or factual basis for the approval.

A. Impracticability of Raising Objections During the Comment Period

As a threshold matter, the CAA provides that a Title V petition to the Administrator:

> "[S]hall be based only on objections . . . that were raised . . . during the public comment period . . . (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period.)"[24]

Petitioners acknowledge that they did not raise objections during the public comment period. It was impracticable, however, for Petitioners or any member of the public or reviewing agency, to raise objections during the public comment period because the District failed to provide substantive notice of its proposed Renewal Title V Permit and because the grounds for objecting to the substantive change in the Renewal Title V Permit arose after such period.

In the draft Renewal Title V Permit that was provided for public comment, the District specifically wrote that it would not be reviewing an application requesting increases in capacity limits for the facility's hydrocracking units. Petitioners are extremely concerned about these increases in capacity limits for the hydrocracking units. Because the draft permit stated that no increases in the processing capacity of the hydrocracking units would be considered in the Renewal Title V Permit, Petitioners had no reason to make public comments to the draft.

Petitioners first received notice that the capacity limit increases were being considered when they reviewed the final Renewal Title V Permit. The District issued the final Renewal Title V Permit on January 25, 2018, after conclusion of EPA's review and after the public comment period. Because the comment period concluded before it was possible for Petitioners to learn of the increases in capacity limits, it was impracticable, indeed impossible, to raise concerns during the comment period. Therefore, the CAA requirement limiting Petitioners to objections raised during the comment period does not bar this petition.

[24] 42 U.S.C.A. § 7661d(b)(2) (emphasis added).

B. Failure to Provide Substantive Notice

The Renewal Title V Permit was improperly issued because the District did not provide substantive notice to the public concerning the increase in capacity limits for the U240 and U246 hydrocracking units, as required by 40 C.F.R. § 70.7(h)(2). By giving notice that it **did not** intend to approve changes to the Refinery's hydrocracking units, the District affirmatively thwarted Clean Air Act requirements to provide notice of the activities involved in the permit action and emissions change. As a result, the District also failed to provide the public 30 days to comment on the proposed Renewal Title V permit.[25]

Under the Clean Air Act, an agency must follow specific procedures to ensure the public notice and comment requirements are met prior to issuance of a Title V permit. These procedures include providing the public with specific information on which to base its evaluation and comments. Notice must include "the activity or activities involved in the permit action…" as well as "the emissions change involved in any permit modification…."[26] The notice must also identify where the public can obtain all "materials available to the permitting authority … that are relevant to the permit decision…."[27] The agency must make such materials available for public comment for at least 30 days.[28] The District has adopted a parallel regulation, which requires that the notice "include information about the operation to be permitted," as well as "any proposed change in emissions…."[29]

Public notice and comment serve vital functions under the Clean Air Act, not only providing the public the opportunity to assess changes to facilities under federal law, and voice its concerns, but also ensuring the agencies have the benefit of the public's insights.[30] Where

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[25] In addition to not receiving substantive notice, Petitioners also did not receive the BAAQMD's "Notice Inviting Written Public Comment," dated November 16, 2017. As noted in the Procedural Background, Petitioners are interested parties regarding the Phillips 66 San Francisco Refinery, but have no record of receiving actual notice of the District's proposal to renew Phillips 66 Refinery's Title V Permit.

[26] 40 C.F.R. § 70.7(h)(2).

[27] *Id.*

[28] 40 C.F.R. § 70.7(h)(4).

[29] BAAQMD Regulation 2-6-412.2, at 16 (http://www.baaqmd.gov/~/media/files/planning-and-research/rules-and-regs/reg-02/rg0206.pdf?la=en).

[30] *See, e.g. In Re: Russell City Energy Ctr*., 14 E.A.D. 159, 171 (E.P.A. July 29, 2008) ("[T]he essence of the alleged "harm" from the procedural violation is not simply its potential impact on the final permit decision, but rather the deprivation of the public's opportunity to have its views considered by the permitting agency.*"); In Re: Indeck-Elwood, LLC*, 13 E.A.D. 126, 141 (E.P.A. Sept. 27, 2006) ("Condition 9 clearly changes the substance of the PSD permit, allowing for construction of a facility that is physically different than the one permitted, and which may potentially have different emission characteristics. In our view, Condition 9 is thus appropriately seen as a

agencies fail to comply with the mandatory public participation requirements, EPA may and should grant petitions for review and finds deficient notice. As EPA has explained, a state permitting agency may only issue a Title V permit if, among other things, it "'has complied with the requirements for public participation under [40 C.F.R. § 70.7(h)].' 40 C.F.R. § 70.7(a)(1)(ii); *see also* 40 C.F.R. § 70.7(e)(4)(ii) (requiring state programs to provide that significant permit modifications meet the public participation requirements of part 70).'"[31] EPA specifically identified the 40 C.F.R. section 70.7(h)(2) requirement that a public notice specify "'the emissions change involved in any permit modification.'"[32] For example, where the New Hampshire Department of Environmental Services ("NH DES") gave notice of a permit modification to allow burning construction debris in a wood burning plant, but failed to provide information on emissions increases, the notice was deficient.[33] Whether or not the emissions increases would constitute a non-major modification, NH DES was required to provide the public with emissions increase information.[34]

Further, EPA has granted petitions for review when relevant supporting materials for a permit were not provided to the public. EPA noted that Title V regulations "require that public notice shall include information to enable the public to obtain copies of 'the permit draft, the application, all relevant supporting materials … and all other materials available to the permitting authority that are relevant to the permit decision.' 40 C.F.R. § 70.7(h)(2)."[35] Thus, where the Wisconsin Department of Natural Resources ("WDNR") referred to and relied on four inspection plans of a coal-fired power plant in granting a Title V permit, EPA found that these plans should have been available for review during the Title V public comment process.[36] Since the plans were absent from both the permit application and the final permit, EPA granted the

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significant addition to the permit that, at a minimum, raises substantial new questions about the permit, and therefore IEPA should have reopened or extended the comment period to subject this condition to public comment. … Accordingly, we conclude that the permit is defective with respect to permit Condition 9. The permit is therefore remanded on this issue. On remand, IEPA must either remove Condition 9 from the permit, or reopen the record and provide the public with an opportunity to comment on this issue and provide a response to any such comments received.")

31 *Bioenergy LLC*, Petition No. I-2003-01, (Order Partially Granting and Partially Denying Petition For Objection To Permit, October 1, 2006), at 9.

32 *Id*.

33 *Id.* at 9-10.

34 *Id.*

35 *Alliant Energy WPL Edgewater Generating Station*, Petition Number V-2009-02, (Order Granting In Part And Denying In Part Petition For Objection To Permit, August 17, 2010), at 12.

36 *Id*. at 12-14.

petition and required WDNR to terminate, modify, or revoke and reissue the title V renewal permit.[37]

In November 2017, the District sent notice to the EPA of its draft Renewal Title V Permit and accompanying initial Permit Evaluation and Statement of Basis ("Statement of Basis").[38] The Statement of Basis includes a small table indicating specific pending applications that would not be considered in the Renewal Title V Permit. Application #27954, requesting to increase capacity limits for the U240 and U246 hydrocracking units, is one of the applications the District stated would "not be processed with the Title V permit renewal because they have not been issued or commenced construction."[39] Yet the final Renewal Title V Permit reflects changes to the capacity limits for those same hydrocracking units – U240 and U246.[40]

The District also did not provide, nor include with its Permit Evaluation and Statement of Basis, any factual or legal background or analysis to support its decision to increase the capacity limits for U240 and U246. While the District's Statement of Basis purports to have attached engineering evaluations for **all** the NSR applications in the Renewal Title V Permit, it did not include any engineering evaluations addressing the increased limits for the U240 and U246 hydrocracking units.[41] Had there been evaluations or other supporting materials, Petitioners might have been able to discern at the very least that there was a discrepancy between the District's explicit intention not to review the application requesting to increase limits for the hydrocracking units and supporting materials that would imply quite the opposite. Without any supportive documents, however, there was no reason for Petitioners to provide public comment for an application that would be reviewed in a future permitting process.

The District's issuance of the Renewal Title V Permit without adequate notice deprived the public, and Petitioners, of notice and an opportunity to comment. Because of the lack of substantive notice, Petitioners were not able to raise objections specifically on the capacity limit

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37 *Id.*

38 Letter to Elizabeth Adams, Acting Director for the Air Division, EPA, from Damian Breen, November 16, 2017. (http://www.baaqmd.gov/~/media/files/engineering/title-v-permits/a0016/a0016_11_2017_renewal_proposed_epa_ltr_01-pdf.pdf?la=en).

39 **Exhibit D**, Statement of Basis at 5.

40 *See, supra,* Introduction, A. Existing Capacity Limits for Hydrocracking Unit 240 and Unit 246.

41 **Exhibit D**, Statement of Basis at 5; *See also, id.* at 61 (Appendix B – BAAQMD Engineering Evaluation Reports Table*).*

increases for the U240 and U246 hydrocracking units. The Administrator must object to the final Renewal Title V permit based on the District's failure to comply with notice requirements.

C. Deficient Statement of Basis

The EPA must also object to the Renewal Title V Permit because the permit approves the increase in capacity limits for U240 and U246 without analysis or a legal or factual basis, as required by the CAA.[42] Pursuant to CAA regulations, the permitting authority "shall 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)."[43] Indeed, a statement of basis "is more than just a short form of the permit" and "should highlight elements that EPA and the public would find important to review."[44] Further, the statement of basis should "include a discussion of the decision-making that went into the development of the Title V permit and provide the permitting authority, the public, and EPA a record of the applicability and technical issues surrounding the issuance of the permit."[45] The District has also adopted a parallel regulation, which requires preparation of a statement that sets forth the legal and factual basis for the draft permit conditions when issuing a majority facility review permit.[46]

The capacity limits for U240 and U246 reflected in the final Renewal Title V Permit are higher than the previous limits approved in the 2014 Title V Permit.[47] However, the Statement of Basis provides no information or analysis to support the significant change in the limits permitted by the District. Rather, the Statement of Basis notes that Application #27954 ("hydrocracking units application"), regarding U240 and U246, would "not be processed with the Title V permit renewal because they have not been issued or commenced construction."[48] This is significant because it emphasizes the deficiency of the Statement of Basis, not only for its failure in providing a rationale for the permitted increases, but also by presenting misleading

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42 40 CFR 70.7(a)(5).

43 *Id.*

44 *Los Medanos Energy Center*, Permit No. B1866, (Order Denying In Part and Granting In Part Petition For Objection to Permit, May 24, 2004) at 10.

45 EPA Memorandum regarding *Implementation Guidance on Annual Compliance Certification Reporting and Statement of Basis Requirements for Title V Operating Permits*, dated April 30, 2014, Attachment 2 at 2 (https://www.epa.gov/sites/production/files/2015-08/documents/20140430.pdf).

46 BAAQMD Regulation 2-6-427, at 20 (http://www.baaqmd.gov/~/media/files/planning-and-research/rules-and-regs/reg-02/rg0206.pdf?la=en).

47 See footnote 2 and 3, *supra*.

48 **Exhibit D**, Statement of Basis at 5.

information contrary to what is shown in the final Renewal Title V Permit. Indeed, as discussed above, permits to expand hydrocracking capacity demand comprehensive and supportive analysis due to the hazardous materials it processes. No such analysis can be in the Statement of Basis.

Lastly, the District failed to include with its Statement of Basis any factual or legal supporting materials to address the increase of capacity limits for U240 and U246. There were also no estimates of the emissions associated with the increased limits. Although the Statement of Basis indicated that it had attached "engineering evaluations for all the NSR applications to be included with the Title V permit renewal," it did not include any engineering evaluations related to the increased capacity limits for the hydrocracking units.[49] The Statement of Basis should have included a discussion of the decision-making that went into allowing the increase in the capacity limits and attached materials, such as engineering evaluations, to support the decision for the increase. Instead, the incomplete permit record leaves the EPA and the public with nothing to review pertaining to the hydrocracking units.

In addition to Title V-specific requirements, agencies have a general duty to base their decisions on facts in the record. Agency action that is not based on facts in the record is arbitrary and capricious. An agency cannot determine impacts of a project without a record and evidence to support its conclusion.[50] For example, in *Richardson*, the court refused deference where the record was silent on the source of a conclusion that aquifer contamination impacts would be "minimal."[51] Here, the District asserts it included, and therefore relied on, the engineering evaluations for each permit in the Renewal Title V permit.[52] The engineering evaluations for other permits are, in fact, included, but the evaluation for the approved change in capacity limits for U240 and U246 is not. Approving the Renewal Title V permit without the engineering evaluation for the increase in capacity limits for Units 240 and 246 is arbitrary and capricious.

The Statement of Basis "should be as complete as possible, not only for the public and inspectors' benefit, but to assure that future generations of permit writers are able to understand

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49 *Id*. at 5 ("The engineering evaluations for all the NSR applications to be included with the Title V permit renewal are attached to this statement of basis."); *See also* Appendix B – BAAQMD Engineering Evaluation Reports Table, **Exhibit D**, Statement of Basis at 61. As described above, BAAQMD independently violated the notice requirement by stating engineering reports were included, and failing to include them.

50 *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 715 (10th Cir. 2009).

51 *Id*. *See also Or. Natural Desert Ass'n*, 531 F.3d 1114, 1142 (9th Cir. 2008) ("We cannot defer to a void.").

52 **Exhibit D**, Statement of Basis at 5.

what occurred in past permitting actions."[53] The draft Renewal Title V Permit reflecting the change in capacity limits, along with the finalized limits in the final Renewal Title V Permit, require a complete record from the Statement of Basis and relevant documentation. Without such a complete record, Petitioners are unable to understand and assess exactly how the limits were proposed in a draft permit and later approved in a final permit. The Statement of Basis accompanying this Renewal Title V Permit is noncompliant with the CAA. The Administrator must therefore object to the issuance of the Renewal Title V Permit.

CONCLUSION

The grounds for objection discussed above demonstrate that the issued Renewal Title V Permit is noncompliant with Clean Air Act requirements. The Administrator is therefore obligated to object to this Permit and should modify, revoke, or terminate the Renewal Title V Permit.

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Respectfully submitted,

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[53] *Doe Run Company Buick Mine and Mill*, Petition No. VII-1999-001, (Order Granting In Part and Denying In Part Petition For Objection to Permit, July 31, 2002) at 25.

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