PILLSBURY WINTHROP LLP

50 FREMONT STREET SAN FRANCISCO, CA 94105-2228 415.983.1000 F: 415.983.1200
MAILING ADDRESS: P. O. BOX 7880 SAN FRANCISCO, CA 94120-7880

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David R. Farabee
Phone: 415.983.1124
david.farabee@pillsburywinthrop.com

HAND DELIVERED

Ms. Brenda Cabral
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

Re: Proposed Title V Permit Revision for ConocoPhillips San Francisco Refinery -- Facility A0016

Dear Ms. Cabral

On behalf of ChevronTexaco Products Company and Valero Refining Company, I am providing the following comments on the Bay Area Air Quality Management District's ("BAAQMD" or the "District") proposed minor revisions and administrative amendment to the Major Facility Review Permit ("Title V Permit") for the ConocoPhillips San Francisco Refinery (District Facility No. A0016). According to the District's Public Notice inviting comment on the proposed permit revisions, one of reasons for reopening the permit is "to make throughput conditions for furnaces in BAAQMD Condition 1694, part A.1., federally enforceable." Our view is that these conditions are not federally enforceable, and consequently that the District has improperly proposed to revise the permit to make these conditions federally enforceable. The basis for our position is set forth below.

In an October 8, 2004 letter to BAAQMD Air Pollution Control Officer Jack Broadbent, EPA Region 9 Air Division Director Deborah Jordan objected to various provisions of the Title V Operating Permit for ConocoPhillips. As pertinent here, EPA stated that "[t]he District has changed the designation for fuel limits that apply to many combustion sources from federally enforceable to not federally enforceable. . . . Limits created through prior NSR permits are federally enforceable Title V permit requirements" (citing a January 31, 1999 letter to CAPCOA President Doug Allard from John Seitz, Director of EPA's Office of Air Quality Planning and Standards).

By letter dated January 6, 2005, Mr. Broadbent responded to EPA, stating that the firing rate limits identified by EPA were intended to "clarify the status quo for purposes of determining compliance with the plantwide emission limit" under District Regulation 9,

Rule 10 (which is not included in the SIP), and were included in the permits for "administrative convenience." The District further stated that while the limits were "contained in permits issued pursuant to a SIP-approved program, [they] were not serving any purpose related to the SIP." Nevertheless, the letter also stated that:

> The District will issue a draft reopening of the ConocoPhillips permit that redesignates the conditions identified in the October 8 letter as federally enforceable. The District supports and wishes to preserve federal enforceability where it is appropriate. However, the District is concerned that the designation as federally enforceable of permit conditions that have no direct relationship to the SIP extends federal enforceability beyond its intended scope.

Consistent with Mr. Broadbent's January 6, 2005 letter, the District designated the referenced conditions as federally enforceable in the currently proposed permit revision.

We believe that the conditions identified in EPA's October 8, 2004 letter in fact are not federally enforceable, and should not be designated as such in ConocoPhillip's revised Title V permit. More broadly, inclusion of an otherwise non-federally enforceable emission limit or other requirement as a condition in a District-issued permit, whether for administrative convenience or otherwise, does not make that permit condition federally enforceable.

EPA actions pertinent to this issue date back to at least 1989. As part of EPA's action on the so-called "CMA Settlement", in a June 28, 1989 Federal Register notice (54 Fed. Reg. 27273) EPA reaffirmed its then-existing requirement that limits on a source's potential to emit, whether through permit conditions or other mechanisms, must be federally enforceable if they were to be recognized by EPA. In this notice, EPA defined "federally enforceable" for various provisions of the national new source review ("NSR") regulations (e.g., 40 C.F.R. §§ 51.166(b)(17), 52.21(b)(17)) and amended 40 C.F.R. § 52.23 (regarding violations of an applicable implementation plan) to add the phrase "any permit limitation or condition contained within an operating permit issued under an EPA-approved program that is incorporated into the State implementation plan" to the list of items with which failure to comply is considered a SIP violation. According to EPA, establishing a mechanism to provide for federal enforceability of state-imposed permit conditions created a "more fundamental way to minimize delay and expense" as compared to the previously existing means of obtaining federally enforceable emission limitations or control requirements for purposes of limiting potential to emit.

In the preamble to the June 28, 1989 notice, EPA specified five criteria that a state operating permit program would have to meet before permits issued under the program would be considered federally enforceable. The criteria were: SIP approval of the permit program; SIP imposition of a legal obligation that holders of state operating permits comply with the terms of those permits; emission limits imposed in the permits must be at least as stringent as existing federally enforceable requirements; operating permit limitations must be permanent, quantifiable and enforceable as a practical matter; and the permits must be issued subject to public participation, including opportunity for public and EPA review of draft permits. See 54 Fed. Reg. 27282. EPA emphasized that "States are free to continue issuing operating permits that do not meet the above requirements. However, such permits would not be 'federally enforceable' for NSR and other SIP purposes" (emphasis added). In addition, "EPA expects that States will, for purposes of clarity and administrative efficiency, indicate within the federally enforceable permits that they are being accorded such a status."

Subsequent to the national NSR rulemaking, on November 1, 1989, the District adopted an amended version of Regulation 2, Rule 1 that included three provisions pertinent to this analysis. These are section 2-1-302 (the requirement to have a Permit to Operate for any equipment that emits or may emit air contaminants), section 2-1-403 ("The APCO may impose any permit condition that he deems reasonably necessary to insure compliance with federal or California law or District regulations") and section 2-1-307 ("A person shall not operate any article, machine, equipment or other contrivance, for which a permit to operate has been issued, in violation of any permit condition imposed pursuant to 2-1-403").

On September 15, 1995, the U.S. Court of Appeals for the D.C. Circuit vacated the June 28, 1989 NSR regulations (Chemical Manufacturers Association v. EPA, Case Nos. 89-1514 to 89-1516, unpublished order). The court's order eliminated the legal effectiveness of the definition of "federally enforceable" and the new provision of section 52.23 that were added in 1989 (even though the text still appears in the CFR), and EPA has not yet completed any rulemaking to reinstate the vacated provisions. Indeed, EPA recognized in a December 31, 2002 NSR rulemaking notice that the 1989 federal enforceability provisions are not in effect (67 Fed. Reg. 80185, 80191). With the vacature of these provisions, there is no basis under EPA's national NSR regulations for conditions included in state operating permits to be considered federally enforceable.[1]

[1] Note that in his January 31, 1999 letter mentioned above, Mr. Seitz relied on the language in 40 C.F.R. § 52.23 that was vacated in 1995.

EPA approved the November 1989 version of the District's Regulation 2, Rule 1 as part of the California SIP on January 26, 1999 (64 Fed. Reg. 3850; effective February 25, 1999). Since this approval was more than three years after the federal enforceability regulations were vacated, it cannot be interpreted as implementing those regulations. We also note that since this SIP approval was not effective until February 25, 1999, permit conditions first imposed in operating permits issued before that date would not be federally enforceable in any event.

Even if EPA might nevertheless maintain that its 1999 SIP approval of Regulation 2, Rule 1 establishes federal enforceability of conditions in operating permits issued under that rule, that position would be inconsistent with other EPA policy statements. As noted above, in connection with the June 1989 NSR rulemaking EPA listed five criteria for federally enforceable state operating permit programs. Under an EPA policy stated in a June 29, 1990 Federal Register notice, "State operating permits will be considered federally enforceable if issued pursuant to permitting programs that meet [the] five specified criteria. Furthermore, the operating permit program must first be approved by USEPA as meeting these criteria before USEPA will consider such permits to be federally enforceable. Although USEPA approved [Illinois'] operating permit program . . ., it has yet to approve it as meeting the criteria of [EPA's] June 28, 1989 policy statement. . . . Consequently, USEPA does not recognize State operating permits in Illinois as being federally enforceable." 55 Fed. Reg. 26813, 26824 (June 29, 1990). Nothing in EPA's 1999 SIP approval of BAAQMD Regulation 2, Rule 1 even mentioned the 1989 federal enforceability criteria for state operating permit programs, much less concluded that the rule met those criteria. Even assuming that the other requirements were satisfied (which we do not concede), the District does not require notice or participation for its issuance of operating permits, and it does not include federal enforceability notations in those permits. Accordingly, non-federal conditions included in District-issued operating permits cannot be considered federally enforceable for that reason alone.

Finally, the District frequently includes in facility permits terms and conditions intended to "ensure compliance with, and the enforceability of, district rules and regulations applicable to the article, machine, equipment or contrivance for which the permit was issued." See, Health and Safety Code § 42301(e). Like EPA's national Title V operating permit rules in 40 C.F.R. Part 70, the California Health and Safety Code recognizes that although Title V permit conditions generally will be federally enforceable, there will be permit conditions that are not federally enforceable. Health and Safety Code § 42301.12 states in pertinent part:

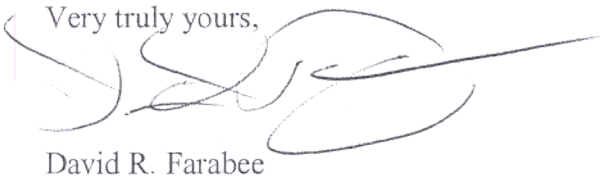
> [The District shall] identify in the permit, to the greatest extent feasible, terms and conditions which are federally enforceable and those which are not federally enforceable [by]:
>
> > (A) Identifying in the permit the terms and conditions that are federally enforceable because they are imposed pursuant to a federal requirement or because the source has requested the terms and conditions and federal enforceability thereof . . . [or];
> >
> > (B) Identifying in the permit the terms and conditions which are imposed pursuant to state law or district rules and are not federally enforceable. Districts may further identify those terms and conditions of the permit which are not federally enforceable, but which have been included in the permit to enforce district rules adopted by the district to meet federal requirements.

Nothing in these provisions demonstrates any intention to make permit conditions federally enforceable simply because those conditions are included in state operating permits as authorized by Health and Safety Code § 42301(e). To the contrary, the District is directed to identify to the greatest extent feasible those terms and conditions that are not federally enforceable. Since the District has previously, and correctly, identified the pertinent firing rate limits as not federally enforceable, such an identification clearly is feasible.

For the reasons set forth above, we conclude that where an otherwise non-federally enforceable emission limit or other condition is included in a District-issued permit, EPA cannot treat those limits and conditions as federally enforceable simply because the conditions appeared in such a permit. Accordingly, the throughput conditions for furnaces in BAAQMD Condition 1694, part A.1. should be identified as not federally enforceable in the revised Title V Major Facility Review Permit for the ConocoPhillips San Francisco Refinery.

Thank you for your consideration of these comments.

Very truly yours,



David R. Farabee

cc: Mr. Steve Hill
Adan Schwartz, Esq.

Ms. Tery Lizarraga
Mr. Al Middleton