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Hand Delivered

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

Re: Comment on ConocoPhillips' Title V Permit

Dear Ms. Cabral

I am writing on behalf of ConocoPhillips Company to provide comments on BAAQMD's proposed revisions to ConocoPhillips' Title V permit, as announced in BAAQMD's public notice issued February 1, 2005.

ConocoPhillips' current Title V permit references permit condition 1694, part A.1 ("Condition 1694.A.1") in a number of tables in Sections IV and VII of the permit. For each reference, there is an "N" in the "federal enforceability" column. BAAQMD is currently proposing to change each "N" to a "Y" to make Condition 1694.A.1 federally enforceable. BAAQMD should not make the proposed change, and should mark Condition 1694.A.1 in section VI of the Title V permit with an asterisk to indicate that it is not federally enforceable.

Summary

BAAQMD's own analysis concludes that Condition 1694.A.1 should not be federally enforceable. BAAQMD nonetheless proposes to designate that condition as federally enforceable based on its interpretation of EPA's October 8, 2004 objection/reopening as requiring terms that were placed in ConocoPhillips' permit to operate for "administrative convenience" to be designated as federally enforceable. In this case, however, BAAQMD has an alternative that is required by state law and consistent with EPA policy. As described in more detail below, California law prohibits BAAQMD from designating state-only conditions as federally enforceable if there is a feasible alternative. BAAQMD's Manual of Procedures (which has been approved by EPA as part of BAAQMD's Title V program) provides such a feasible alternative by requiring BAAQMD to mark non-federally enforceable permit conditions with an asterisk in the



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Title V permit. EPA policy also allows this approach. Therefore, it would be erroneous for BAAQMD to finalize its proposed revisions.

Discussion

(1) Condition 1694.A.1 contains daily firing rate limits for a number of heaters at ConocoPhillips' Rodeo refinery. BAAQMD first created the firing rate limits in Condition 1694.A.1 in 1999 to implement BAAQMD Regulation 9-10, which regulates NOx emissions from refinery heaters. The relevant provisions of BAAQMD Regulation 9-10 are state-only requirements that are not part of the federal SIP. BAAQMD acknowledges that Condition 1694.A.1 is not federally enforceable and should not be considered as such. BAAQMD's October 6, 2004, letter to EPA stated:

"District Response: The District has amended the draft response to comments document to provide additional justification for labeling the condition non-federally enforceable. The condition was imposed pursuant to state law authority not present in the District's approved SIP and is therefore not federally enforceable." *(Letter from Jack Broadbent, BAAQMD, to Deborah Jordan, EPA Region 9, Attach p.6 (Oct. 6, 2004).)*

BAAQMD's January 6, 2005 letter contained a more detailed analysis, but reached the same conclusion, stating that the limits contained in Condition 1694.A.1 "were originally imposed to implement a non-federally enforceable rule that was not then and is still not in the SIP." *(Letter from Jack Broadbent, BAAQMD, to Deborah Jordan, EPA Region 9, p. 3 (Jan. 6, 2005).)* ConocoPhillips agrees with BAAQMD that the limits in Condition 1694.A.1 were not based on any federal requirement and therefore should not be designated as federally enforceable.

(2) State law prohibits BAAQMD from designating permit conditions as federally enforceable if there is a feasible alternative. In particular, § 42301.12(a) of the Health and Safety Code requires:

"(a) Any district permit system or permit provision established by a district board to meet the requirements of Title V shall, consistent with federal law, minimize the regulatory burden on Title V sources and the district and **shall meet** the following criteria: . . .

(3) Identify in the permit, to the greatest extent feasible, permit conditions which are federally enforceable and those which are



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not federally enforceable. A district shall make that identification by either of the following means:

(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 and the permitting district has not determined that the request does not meet all applicable federal requirements and guidelines.

(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.” (*Emphasis added.*)

As required by this provision, all Title V permit provisions shall “minimize the regulatory burden on Title V sources” by identifying conditions as state only “to the greatest extent feasible.” This is also good policy to avoid imposing requirements on ConocoPhillips that do not apply to it. Therefore, if the District has a feasible means of designating Condition 1694.A.1 as a state-only requirement, it is required to do so.

(3) Consistent with state law, EPA guidance also allows BAAQMD to designate permit conditions as state-only. For example, White Paper #1 states:

“Likewise, the State will also need to identify provisions from NSR permits that are not required under Federal law because they are unrelated to the purposes of the NSR program. . . . Where the State retains such conditions, it would draft the part 70 permit to specify that they are State-only conditions and incorporate them into the Part 70 permit as such.” (*EPA, White Paper for Streamlined Development of Part 70 Permit Applications, p. 14 (July 10, 1995).*)

This is repeated in the March 31, 1999, memorandum from John Seitz that EPA references in its October 8, 2004 objection/reopening:

“[I]f a State does not want a SIP provision or SIP-approved permit condition to be listed on the Federal side of the Title V permit, it must take appropriate steps to delete those conditions from its SIP or SIP-approved permit.” (*Memorandum from John Seitz, p. 2 (Mar. 31, 1999).*)



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Thus, EPA guidance expressly allows BAAQMD to designate permit conditions as state-only enforceable.¹

(4) BAAQMD has a feasible alternative. In particular, BAAQMD has an existing EPA-approved process for designating Title V permit conditions as state-only, even though those permit conditions appear in the refinery's permit to operate. BAAQMD's Manual of Procedures, which is approved by EPA as part of BAAQMD's Title V permit program and is binding on both BAAQMD and EPA, states:

“Conditions that are not federally enforceable **will be** marked with an asterisk. Requirements that are not federally enforceable **shall be** designated as such in the permit tables. The permit condition section will contain the following language: ‘Any condition that is preceded by an asterisk is not federally enforceable.’” (*BAAQMD, Manual of Procedures, Volume II, Part 3, p. 3-22 (emphasis added).*)

Indeed, ConocoPhillips' current Title V permit already contains an example of this approach in permit condition 20989. BAAQMD's existing approved process is a “feasible alternative” to designating all permit conditions as federally enforceable, so BAAQMD is required by state law to use this process.

* * * * *

Note that EPA's October 8, 2004 objection/reopening does not necessarily require a different approach because it was based on incomplete information and provides BAAQMD with discretion to apply the comment according to its terms. In particular, it does not specifically direct BAAQMD to redesignate Condition 1694.A.1. as federally enforceable, but instead states generally that “limits created through prior NSR permits are federally enforceable Title V permit requirements.” Whether EPA's statement is true or not, the general comment leaves BAAQMD discretion to determine that the limits in Condition 1694.A.1 were in fact, not created through prior NSR permits (as BAAQMD has already determined).



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Thank you very much for your consideration of ConocoPhillips' views on this issue. We would be pleased to provide additional information or clarification if you have any questions.

Very truly yours,

J. Michael Rockett

Attachments

cc: Mr. Steve Hill, BAAQMD
Ms. Valerie Uyeda
Siegmond Shyu, Esq.