Responses to Public Comments

Reopening of Title V Major Facility Review Permit
Los Medanos Energy Center LLC
Los Medanos Energy Center
District Facility No. B1866

This document presents the responses of the Bay Area Air Quality Management District ("Air District" or "District") to comments received from members of the public on the District's reopening of the Title V Major Facility Review Permit ("permit") for the Los Medanos Energy Center ("LMEC") operated by Los Medanos Energy Center LLC ("Calpine").

The District originally issued the permit on September 1, 2001. The District is reopening it for the limited purposes of: (i) responding to certain issues raised by the United States Environmental Protection Agency in its May 24, 2004, Order Denying In Part And Granting In Part Petition For Objection To Permit ("Order"); (ii) adding three sources to the permit; (iii) removing obsolete conditions; (iv) responding to changes in federal turbine standards since the permit was originally issued; and (v) incorporating certain other minor corrections and changes. The District is not reopening the permit for other purposes.

The District published a public notice regarding the reopening of the permit on August 12, 2004, and solicited public comments on the issues involved in the reopening (*i.e.*, issues raised by EPA's Order and any changes to the permit), to be submitted by September 20, 2004. The District did not receive any comments on these issues during the comment period.

The District did receive a comment letter during the comment period,[1] but it raised unrelated issues separate from the issues that are the subject of the permit reopening. Because these comments do not address any issues involved in the reopening, the District is not obligated to consider or respond to them. Furthermore, a number of the comments pertained to changes made during an earlier modification to the permit (Application 7081, regarding emission limitations applicable during startup and tuning activities). These changes have already been the subject of public review and comment during that permit modification process. Comments on these issues are not appropriately considered in the context of this permit reopening.

Nevertheless, out of an abundance of caution, and in order to lay the issues raised to rest, the District has reviewed and analyzed all of the comments made by the commenter, and responds as set forth herein. For each comment received, this document provides the District's position with respect to the issues involved.

I. Compliance History

Comment I.a: The commenter questioned the statements made in the District's Engineering Evaluation that the facility is in compliance with all of its permit conditions, which the commenter considered to be inconsistent with the fact that the facility is currently subject to "an ongoing criminal investigation."

District Response: As the commenter is aware from communications with the District, the District has issued Notices of Violation ("NOVs") to this facility for several regulatory violations since it commenced operation. As the commenter is also aware from communications with the District, in each case the facility has addressed the problem involved and has come back into compliance. The fact that there have been certain violations in the past which have been addressed does not mean that the facility is currently out of compliance. Furthermore, the facility has not been cited for any violations occurring during the year

[1] The District received two versions of this letter by email from two members of the public whose interests are aligned in matters related to power plant permitting: Californians for Renewable Energy, Inc. (by its President, Mr. Michael Boyd), and Mr. Robert Sarvey. The two documents restated each other's comments virtually verbatim, and so form what is essentially a single set of comments. The District therefore considers these communications to be a single set of comments, and refers to the commenters collectively herein as "the commenter."

prior to the reopening, which is the time period the District normally uses for purposes of a compliance review for a Title V permit.

By the same token, the fact that the District has been investigating past violations and engaging in efforts to assess penalties for them is not inconsistent with the fact that the facility is currently in compliance with its permit conditions. It often takes a significant period of time to fully investigate a violation and then to negotiate an appropriate penalty for the violation with the facility operator (or to prosecute a lawsuit if negotiations break down). By contrast, the problem that caused the violation can usually be addressed relatively quickly. As a result, there is often a time lag during which the facility has come back into compliance, but the violation has not been finally resolved through negotiation or prosecution and collection of a penalty. That was the case here.

Finally, to the extent that this comment raised any real issue at all, the issue would now be moot. The District has recently entered into a Settlement Agreement to finally resolve all of the outstanding Notices of Violation associated with the facility. Calpine has agreed to pay a monetary penalty and to fund certain Supplemental Environmental Projects ("SEPs") in connection with violations at the Los Medanos Energy Center and two other facilities.

Comment I.b: The commenter criticized the District for undertaking this permit reopening while there are still outstanding past violations which the District has not resolved through final enforcement action (*i.e.*, settlement or litigation). The commenter stated that the District has refused to make public information regarding the District's investigation of such past violations and the District's efforts to collect penalties for them, rendering it "impossible to comment" on the reopening. The commenter suggested that the District postpone final action on the reopening until after such past violations are finally resolved through penalty action or otherwise.

District Response: As noted above, as of the close of the comment period, the District had entered into a settlement agreement to finally resolve all outstanding violations for this facility, under which Calpine agreed to pay a civil penalty and to fund SEPs. After the close of the comment period, and during the preparation of these Responses to Comments, Calpine's payment was received and the violations covered by the settlement were finally resolved. As a result, there are no longer any outstanding past violations.

Even if there were ongoing investigations, settlement negotiations, or litigation, that would not provide a reason to delay reopening the permit. The District has no legal authority to delay the reopening on such grounds, and in fact is mandated by EPA regulations to respond in a timely manner to EPA's Order requiring the reopening. Moreover, as a matter of policy, it is preferable to address any deficiencies identified in EPA's Order in an expeditious manner, and to resolve any issues relating to past violations through the enforcement and penalty assessment process, which may take longer. Delaying responding to EPA's Order while the settlement or litigation process is ongoing would not be in the public interest.

Finally, the fact that the District had not finally resolved the outstanding violations – and therefore could not publicly release sensitive enforcement-confidential documents – by the close of the public comment period did not render it "impossible to comment" on the permit reopening, as the commenter contends. The commenter requested detailed enforcement-sensitive information in a public records request, and the District replied that it could not provide such documents until the violations were finally settled.[2] But that does not mean that the commenter was unable to obtain sufficient information about the outstanding violations, and it did not hinder the commenter from commenting on them. To the contrary, the District informed the commenter of all of the violations, the date on which each violation took place, the regulatory provision that was violated in each case, and a brief summary description of each incident (*e.g.*, "Emission Excess for NOx," "Indicated excess not reported," *etc.*). In addition, the commenter also had a meeting with the California Energy Commission to discuss the violations – and what Calpine was doing to prevent recurrences – in even more detail. This information allowed the commenter to raise the ongoing compliance issue in a number of forums. The commenter testified on this issue before the California Energy Commission. The commenter also filed a complaint on this issue with the California Air Resources Board. The commenter has even offered the District its views on the appropriate way to settle

[2] Now that the violations are finally resolved, the District is providing the documents the commenter requested.

the violations. And the commenter was able to raise the issue during the comment period for this reopening, and in fact did so: it stated that the outstanding violations that were not finally resolved "draw into question the compliance statement on page 6 of the Engineering analysis which states that the project is in compliance with all its permit conditions how can this be so if the facility is the subject of a criminal investigation [sic]." It is disingenuous for the commenter to claim that it is "impossible to comment" on this issue when it has been commenting on it for so long.

II. Emissions During Startup and Tuning Activities

Comment II.a: The commenter raised a number of issues regarding statements made in the Engineering Evaluation for the most recent amendment to the permit (Application 7081), which addressed emissions during startups and tuning activities. The commenter noted that the Engineering Evaluation states that the turbine does not comply continuously with CO and NOx emission limitations while its combustors are being tuned. The commenter also stated that it had been informed by California Energy Commission personnel that the facility has exceeded its CO limits several times. The commenter questioned why the permit does not reflect the fact that the facility has exceeded these limits.

District Response: As noted above, Application 7081 has been processed and the associated permit modification has been finalized, and so it is inappropriate for the commenter to revisit these issues at this late date. Furthermore, the commenter's question is misplaced. Application 7081 sought to lengthen the time periods allowed for startup and tuning activities, because the facility found that the initial time limitations were not realistic and could not feasibly be complied with, as evidenced by the fact that the facility could not continuously comply. The applicable time periods were lengthened, and the facility has not had problems complying with them since. The commenter is therefore incorrect that the permit does not reflect earlier exceedances of the original startup and tuning limits; to the contrary, the current permit has been modified specifically to address them. Finally, as explained above, the fact that there may have been exceedances in the past does not mean that the facility is not currently in compliance; to the contrary, as mentioned, the facility has had no compliance problems since the modification came into effect.

Comment II.b: The commenter also questioned statements made in that Engineering Evaluation for Application 7081 that there will be no increase in CO and POC emission rates during steam turbine cold startups and combustor turning activities because the turbines are equipped with oxidation catalysts. The commenter submitted that this statement was inconsistent with other statements that the facility had not complied with applicable limitations during startups and tuning activities.

District Response: The commenter has apparently misunderstood the quoted statement. As explained above, the permit modification at issue in Application 7081 was to extend the time allowed for startups and tuning activities. Although the *time limits* for such activities were extended, the emission *rates* allowed during such activities (*i.e.*, pounds of emissions per hour) were not changed. The statement is therefore correct that emission rates during such activities will not increase. Moreover, emissions during such activities remain subject to the facility's limits on overall annual emissions, and there was no change to those limits, so Application 7081 did not result in any increase in overall emissions allowed under the permit.

Comment II.c: The commenter criticized the District's assessment of NO_2 emissions. The commenter stated that NO_2 impacts were evaluated based on a 300 lb/tuning period limitation, whereas the facility is now seeking a 600 lb/tuning period limitation for startups and tuning activities.

District Response: The commenter has identified an error in the referenced table in the Engineering Evaluation for Application 7081, but the commenter is incorrect in asserting that this undermines the District's assessment of NO_2 emissions. The table incorrectly used the old figure of 300 lbs/tuning period, instead of the updated figure of 600 lbs/tuning period resulting from the fact that the time limit allowed for tuning was doubled. But as explained above, although the time limit was doubled, and hence the overall mass emission limit was doubled, the emission *rate* during such activities was not changed. The impact analysis that the commenter refers to is based on a review of emission rates, and so the inadvertent error with respect to overall mass of emissions is irrelevant. The emission rate that was used was the same, regardless of the error. Furthermore, the correct figure of 600 lbs/tuning period is correctly stated in the permit, and so this inadvertent error in the Engineering Evaluation is immaterial for this reason as well.

III. CEQA

Comment III.a: The commenter stated that the District incorrectly determined that the permit reopening is exempt from the environmental review requirements of the California Environmental Quality Act ("CEQA"). The commenter submitted that this permit reopening is part of a pattern of piecemeal revision of individual permit conditions to evade the requirements of CEQA.

District Response: The current permit reopening is clearly exempt from CEQA under District Regulation 2-1-311, which exempts from CEQA permitting actions that satisfy the "no net emissions increase" provisions of Regulation 2, Rule 2. There will be no net emissions increase as a result of the permit reopening, and so the District's action in reopening the permit is exempt from CEQA.

Furthermore, the facility has been through a full CEQA-equivalent review of environmental impacts, undertaken by the District and the California Energy Commission in connection with the initial siting and permitting of the facility. The current permit reopening will not alter any of the environmental impacts associated with the facility, and so there would be no purpose to be served by undertaking an additional CEQA review process. The commenter is incorrect in contending that the District is attempting to evade CEQA requirements through this permit reopening.

Comment III.b: The commenter criticized the District for not undertaking an analysis of all major air emission sources in the vicinity of the facility, which the commenter claimed should be part of a CEQA environmental review.

District Response: A cumulative impact analysis was undertaken for this facility in connection with the initial siting and permitting of this facility referred to above. As there will be no increase in emissions from the current permit reopening, there can be no increase in the facility's contribution to any cumulative impacts. The commenter has provided no reason to undertake an additional cumulative impacts analysis under these circumstances, and the District is not aware of any. A further cumulative impacts analysis is not warranted.

IV. Request For Public Hearing

Comment IV.a: The commenter requested that the District hold a public hearing on the permit reopening.

District Response: The District does not believe that a public hearing would be warranted, for multiple reasons.

First, the commenter has not provided any explanation of any benefit that would be achieved by holding a public hearing, and the District is aware of none. The commenter did allude to its claim that it cannot comment on the permit reopening until it receives all of the enforcement-confidential documents that are the subject of its Public Records Act request. But even assuming that this contention were true (and it is not, as explained above), it would not provide a reason to hold a public hearing. Even if the District were required to await the completion of the enforcement process and the release of additional documents in order to reopen the permit, as the commenter contends, doing so would not necessarily require a public hearing. In such a situation, the commenter could submit its comments in writing; the commenter has not suggested any reason why it would need a public hearing to do so, and the District is not aware of any. Even if the alleged need for additional documentation were relevant to the issue of delaying action on the reopening, it is simply not relevant whatsoever to the question of whether a public hearing is warranted.

Second, there is a significant countervailing public interest that counsels against holding a public hearing where it is not warranted. The District has been required to reopen the permit in response to EPA's Order, and the District does not believe it appropriate to delay unnecessarily in responding to that Order. Holding a public hearing would cause a significant delay in doing so. Where the circumstances do not warrant holding a public hearing, this would undermine the public interest in having the District respond promptly to EPA's order.

And finally, the commenter's request was the only request for a public hearing received by the District. (Indeed, the commenter's submission was the only communication of any kind that the District received from the public, and as explained above, it does not even address any of the issues raised by the reopening.)

In light of all of these circumstances, the District therefore finds that there is not a significant degree of public interest in the reopening that would warrant a public hearing, and denies the commenter's request.