DRAFT

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Communities for a Better Environment
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Re: Comments on Reopening of Major Facility Review Permit,
Valero Refining Company, California (Facility No. B2626)

Dear Ms. Bloch:

Thank you for your letter dated September 22, 2005, providing comments on behalf of Communities for a Better Environment on the public draft for the proposed reopening of the Major Facility Review Permit for the Valero Refining Company, California. The District is now issuing the final permit for this reopening. The District has considered your comments in preparing the final permit, and has the following responses.

I. Flares—Monitoring for NSPS Subpart J

Comment 1: "EPA correctly concluded that the Permit must contain federally enforceable monitoring requirements to assure compliance with preexisting permit conditions or with NSPS Subpart J because, in the absence of the continuous monitors required under §§ 60.105(a)(3) and (4), the permits as proposed would "never actually trigger the H2S standard or the requirement to install monitors." (Valero Order, page 29)

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"In actuality, the District defies EPA's Order and proposes instead "to delete the [existing] prohibitory conditions" based on the District's unfounded assertions that "there is no requirement in Title V or the implementing regulations to impose such prohibitions." This assertion is directly contrary to EPA's express determination that Valero's Permit Condition 20806, #7 and NSPS Subpart J were "both federally enforceable applicable requirements." (Valero Order, page 30)

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"The District's response is inappropriate. EPA has spoken unambiguously and has had every opportunity to withhold, withdraw or to modify its Order. Moreover, EPA is not required to issue a guidance on every decision it makes. EPA's letter to the District of September 8, 2005, regarding the District's proposed draft permit revisions for the various Bay Area refineries, clearly indicates that the District's approach is unacceptable:

> "Withdrawal of the [EPA] memo issued on March 15, 2005, does not represent a change in EPA's position regarding monitoring required for affected flares at Chevron and Valero. BAAQMD's revised draft permits continue to lack the monitoring required by NSPS Subpart J. The BAAQMD needs to address this issue and should work with EPA to ensure that the permits for Chevron and Valero include adequate monitoring for flares subject to NSPS Subpart J in compliance with EPA's orders. (EPA September 8, 2005, Letter Enclosure 1, page 3)

"The District has been ordered to ensure that Valero complies with the federally enforceable H2S limit. The District is obliged to follow these orders and is not authorized to sidestep EPA's clear directives."

Response: The correspondence between BAAQMD and EPA reflects a difference of opinion regarding whether Title V monitoring is required for the H2S standard Subpart J as well as the conditions under which that standard applies. BAAQMD has attempted to articulate its position and rationale as clearly as possible in this exchange. The above comment from CBE generally does not address the substantive points in this disagreement. Rather, it merely asserts that EPA's orders must be complied with. As a general matter, the District agrees that EPA's orders must be complied with to the extent they are correct. Because the CBE comment does not raise new substantive arguments, no substantive response is required here. For a further understanding of these issues, the reader is referred to BAAQMD/EPA correspondence on these topics.

Regarding the deletion of the prohibitory condition, the relevant question is not whether these conditions were federally enforceable in the Title V Permits (they were), but rather whether such a prohibitory condition is required at all. The Statement of Basis sets for the District's rationale for why it believes it is not.

II. Flares—Design Review to Establish Flare Efficiency

Comment 2: "CBE hereby posits that EPA's orders with respect to the Chevron and ConocoPhillips Title V permits, which mandate that the District must conduct design review regarding flare efficiency rather than presume 90% control efficiency, is fully applicable to Valero's Title V permit as well. Numerous studies and data previously provided to the District by CBE demonstrate that the District provides no basis for the 90% efficiency conclusion implicit in the proposed removal of Valero's conditions related to flares. The District's miscellaneous operations rule, 8-2, applies to "***any*** *operation other than those* ***limited*** *by other rules in this Regulation 8 or Regulation 10*." Regulation 8-2 lists several exemptions from this rule. (*See* District Regulation 8-2-110 through 8-2-117.) Flares are not included among these exempted operations. Regulation 8 applies to the refinery flares as a matter of legal construction. Therefore, consistent with EPA's Orders, federally enforceable monitoring is required to ensure compliance with the 90% efficiency requirement for exempted operations, or federally enforceable Regulation 8-2 must apply to the flares."

Response: The District will not revise the proposed permit to include the requested monitoring because Regulation 8-2 is not applicable to refinery flares. First, Regulation 8, Rule 2 does not apply to refinery flares because the term "miscellaneous operation" was never intended to include refinery flares. This applicability determination does not rely on the exemption in Regulation 8-1-110.3. Rather it is based on the general scope of Regulation 8, Rule 2 as supported by a review of the regulatory history and other considerations discussed below.

In its original form, the limit now included in Regulation 8, Rule 2 clearly did not apply to refinery flares. The (then) Bay Area Air Pollution Control District adopted Regulation 3 – the predecessor to Regulation 8, Rule 2 and others – on January 4, 1967. In its original form, Regulation 3 set a standard of 300 ppm total carbon for any organic emission from a *source operation* (former § 3101). A "source operation" was defined (former § 2035) as "the last operation preceding the emission of an air contaminant, which operation (a) results in the separation of the air contaminant from the process materials or in the conversion of these process materials into air contaminants, as in the case of combustion of fuel; and (b) is not an air pollution abatement operation." A refinery flare is not an operation that separates or converts process materials into air contaminants rather its function is to reduce or abate the amount of contaminants in gases that would otherwise be emitted directly into the atmosphere. Accordingly, refinery flares were not subject to the limit in Regulation 3, and the limit was never enforced against flares.

Regulation 3 also included the predecessor to the exemption now contained in Regulation 8-1-110.3 (former § 1215). The exemption provided a mechanism for exempting certain *source operations* from the 300 ppm total carbon limit. Specifically, section 1215 included an exemption for any source operation or group of source operations that achieved an 85% reduction in reactive organic gas emissions. Because a refinery flare was not a source operation, however, this exemption had no relevance for these devices.

Subsequent rulemakings did not include any discussion or analysis of expanding the scope of Regulation 8, Rule 2 to include refinery flares. When Regulation 3 was recodified in 1980 into various Regulation 8 provisions including Regulation 8, Rule 2, the applicability language was revised. The term "source operation" and its definition were deleted. In their place, the regulation now refers to *miscellaneous operations*. The term "miscellaneous operations" was very broadly defined to include "[a]ny operation other than those limited by the other Rules of this Regulation 8 and the Rules of Regulation 10." While this amendment provides a basis for an argument that the scope of Regulation 8, Rule 2 was expanded to include flares, there is nothing in the rulemaking record to support this claim. If this had been an intended result of the recodification of Regulation 3 or any subsequent amendments to the provisions affecting the applicability of the limit in 8-2, some analysis of the cost and impact of that regulatory impact would have occurred. That there has been no discussion or analysis of the costs or impacts of expanding the scope of the emissions limit in Regulation 8, Rule 2 or the exemption in Regulation 8-1-110.3 to include refinery flares is a strong indication that this was not intended. Flares are safety devices and any regulation of these devices would have been

controversial, as the recent flare control rulemaking demonstrates. Safety and costs are weighty issues, and one would expect them to be addressed in any rulemaking that implicated them.

Further support for the District's determination that Regulation 8, Rule 2 was never intended to apply to refinery flares is that the means of demonstrating compliance with the limit in Regulation 8, Rule 2, as set out in Section 8-2-601, cannot be used for these devices. It can reasonably be assumed that the District would provide a specific means of determining compliance with Regulation 8, Rule 2 for flares if these sources were expected to comply with the rule.

Last year the District adopted the flare control rule, Regulation 12, Rule 12. As a part of the rulemaking, the District amended Regulation 8, Rule 2 to clarify that it does not apply to refinery flares. As explained in the Staff Report and other documents for this rulemaking, the amendment to Regulation 8, Rule 2 was intended to reflect existing law. While this clarification was not strictly necessary, the District determined that it would be best to spell out the regulatory structure for refinery flares to avoid the apparent confusion regarding the scope of Regulation 8, Rule 2 as evidenced by the issues raised in the context of the Title V permitting for Bay Area refineries.

Although none of these points is definitive in and of itself, taken together they comprise a compelling case for the District's determination that Regulation 8, Rule 2 was never intended to apply to refinery flares. The District is bound by its purpose in adopting the regulation; the District may not, and EPA cannot order the District to, enforce or apply a regulation – even one approved for inclusion in the State Implementation Plan – inconsistent with its intended purpose. Thus, the District has no authority to include this rule as an applicable requirement or to require a design review to establish qualification for the exemption from the rule under Regulation 8-1-110.3 as directed by EPA.

Second, the flares at this facility are not subject to Regulation 8, Rule 2 because they are subject to a rule in Regulation 10. Regulation 8, Rule 2 applies to miscellaneous operations, which do not include operations limited by any other rule in Regulation 8 or any rule in Regulation 10. Certain refinery flares, including the flares at this facility, are subject to 40 CFR Part 60, which includes Subpart J. This federal regulation has been incorporated by reference in Regulation 10; consequently a flare subject to Subpart J is also subject to a Regulation 10 rule. The flares at this facility will be certified for compliance with Subpart J, which includes an acceptance of Subpart J applicability, in accordance with the provisions of the Consent Decree filed in the U.S. District Court, Western District of Texas in United States v. Valero Refining Company. Because the flares are limited by a Regulation 10 rule, Regulation 8, Rule 2 does not apply to these devices.

Finally, even if Regulation 8, Rule 2 did apply to refinery flares, the District continues to maintain that these devices are designed and operated so that they would meet the conditions of the exemption under Regulation 8-1-110.3 and that monitoring to ensure these conditions are met is unnecessary. In fact, previously, in issuing the permit, the

District determined that on the basis of available information, refinery flares when properly operated easily meet a 90% reduction efficiency. The District explained that the design of the flares has been dictated by requirements of another agency charged with ensuring the protection of refinery workers but that a properly operating flare so designed will consistently meet the 90% reduction efficiency by a significant margin. The District does not believe that there is any benefit to be realized by performing a design review, particularly now that all Bay Area refineries have submitted Flare Minimization Plans as required by Regulation 12, Rule 12, Flares at Petroleum Refineries.

The Order further provides that the permit lacks periodic monitoring for compliance with permit conditions added to ensure that flares are properly operated. The District also has no authority to take this action. In response to concerns previously raised by EPA about the need to ensure the flares will meet the conditions for the exemption from Regulation 8, Rule 2 under Regulation 8-1-110.3, the District added permit conditions to ensure the flares are operated in a manner consistent with the operational parameters assumed in determining that they would qualify for the exemption. Although the permit conditions were not necessary to ensure compliance with an applicable requirement, they were identified as federally enforceable; this was in error. If the District had retained these conditions, the permit would have been modified to reflect this conclusion. Because Regulation 8, Rule 2 does not apply to refinery flares and the exemption in Regulation 8-1-110.3 is, therefore, irrelevant for these devices, these conditions are not necessary or authorized and must be deleted. And because the conditions have been deleted, the issue of adding periodic monitoring to ensure compliance with the permit conditions is moot.

III. Compliance with EPA Order

Comment 3: "The District recently adopted a precedent-setting flare control rule that it now proposes to undermine. We urge the District once again to stand up to refinery pressure and protect the rights of the communities who live near oil refineries. At minimum, the District has the responsibility to comply with EPA's Valero Order and revise this permit to include all applicable requirements."

Response: The Title V permit in no way undermines the flare control rule. The flare control rule continues to apply to affected sources, and nothing in the permit conflicts with the rule. The refineries, like CBE, have offered comments and arguments in support of their interpretation of requirements. The District has carefully considered the opinions offered by all parties, and where it has found the arguments persuasive, has modified its own position.

The District is obligated to make its own applicability determinations and to explain them in its statement of basis. The District complies with EPA's Orders when it supplements the record to justify its determination.

Again, thank you for your comments. If you have any questions about this action, please call me at (415) 749-4653.

Sincerely,

DRAFT

Brian Bateman
Director of Engineering

Enclosures
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