

**BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN THE MATTER OF	)	
DOW CHEMICAL COMPANY	)	PETITION NO. IX-2004-1
	)	ORDER RESPONDING TO
	)	PETITIONER'S REQUEST THAT THE
MAJOR FACILITY REVIEW	)	ADMINISTRATOR OBJECT TO
PERMIT No. A0031,	)	ISSUANCE OF A STATE OPERATING
Issued by the Bay Area Air	)	PERMIT
Quality Management District	)	
_____	)	

**ORDER DENYING PETITION FOR OBJECTION TO PERMIT**

On December 1, 2003, the Bay Area Air Quality Management District, ("BAAQMD" or "District") issued a Major Facility Review Permit to Dow Chemical Company, Pittsburg, California ("Dow Permit" or "Permit"), pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507. On January 12, 2004, the United States Environmental Protection Agency ("EPA") received a petition from Communities for a Better Environment ("CBE" or "Petitioner") requesting that the EPA Administrator object to the issuance of the Dow Permit pursuant to Section 505(b)(2) of the Act, the federal implementing regulations found at 40 CFR part 70.8, and the District's Regulation 2-6-411.3 ("Petition").

The Petitioner alleges that EPA must object to the Dow Permit because BAAQMD denied Petitioner's request for a public hearing. EPA has fully reviewed the Petitioner's allegations. EPA finds that Petitioner has failed to demonstrate that the permit is not in compliance with the requirements of the CAA or that BAAQMD's denial of Petitioner's request for a public hearing resulted in, or may have resulted in, a deficiency in the Dow Permit. EPA also finds that a second opportunity for public comment initiated by BAAQMD on May 19, 2004 may address the issue raised by CBE in this Petition. Based on these reasons, I deny the Petitioner's request that I object to the issuance of the Dow Permit.

**I. STATUTORY AND REGULATORY FRAMEWORK**

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. In 1995, EPA granted interim approval to the title V operating permit program submitted by BAAQMD. 60 Fed. Reg. 32606 (June 23, 1995); 40 CFR part 70, Appendix A. Effective November 30, 2001, EPA granted full approval to BAAQMD's title V operating permit program. 66 Fed. Reg. 63503 (December 7, 2001).

Major stationary sources of air pollution and other sources covered by title V are required

to apply for an operating permit that includes applicable emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. See CAA §§ 502(a) and 504(a). The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as “applicable requirements”), but does require permits to contain monitoring, record keeping, reporting, and other conditions to assure compliance by sources with existing applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, permitting authorities, and the public to better understand the applicable requirements to which the source is subject and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under § 505(a) of the Act and 40 CFR § 70.8(a), permitting authorities are required to submit all operating permits proposed pursuant to title V to EPA for review. If EPA determines that a permit is not in compliance with applicable requirements or the requirements of 40 CFR part 70, EPA will object to the permit. If EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act and 40 CFR § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA’s 45-day review period, to object to the permit. To justify the exercise of an objection by EPA to a title V permit pursuant to section 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of part 70. The burden is on the petitioner to demonstrate that the permit is not in compliance with all applicable requirements by identifying the specific flaws in the permit. 42 U.S.C. §7661d(b)(2). See also, 40 C.F.R. §70.8(c)(1); New York Public Interest Research Group v. Whitman, 321 F.3d 316, 333 n.11 (2<sup>nd</sup> Cir. 2003).

Part 70 requires that a petition must be “based only on objections to the permit that were raised with reasonable specificity during the public comment period . . . unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period.” 40 CFR § 70.8(d). A public petition for review by the Administrator does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA’s 45-day review period and before receipt of the objection. If EPA objects to a permit in response to a petition and the permit has been issued, the permitting authority or EPA will modify, terminate, or revoke and reissue such a permit using the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

## **II. BACKGROUND**

The Dow Chemical Company facility (“Facility”) is located at 901 Loveridge Road in Pittsburg, California. According to the Statement of Basis prepared by the BAAQMD in preparation for the issuance of the Dow Permit, the Dow facility “is an integrated chemical plant utilizing styrene, butadiene, chlorine, anhydrous hydrogen fluoride, sulfur dioxide, potassium fluoride, methyl pyridine and dichloropropene in reactions to produce various products such as

latex, agricultural products, fumigants and antimicrobials. The Statement of Basis also states that the primary emissions from the facility are methylene chloride, sulfuryl fluoride, and Freon 22.

On October 10, 2003, the District published a notice inviting written public comment regarding the Dow Permit. Under the District's rules, the public notice started a simultaneous 30-day public comment period and a 45-day EPA review period. The notice, which is attached as Attachment 1, contained the following statement:

The District invites written comment on the above proposed permit. Comments must be received by November 14, 2003. The public may also request a public hearing for this permit. . . . Any request for information or for a public hearing should be directed to Bhagavan R. Krishnaswamy at (415) 749-4939.

BAAQMD received no public comments on the Dow Permit. Petitioner requested a hearing on November 11, 2003. (Petitioner did not include with its Petition any direct evidence of its request for a hearing. EPA obtained a copy of CBE's request from BAAQMD. Attachment 2.) In a letter dated November 20, 2003, BAAQMD denied Petitioner's request, stating: "Your letter did not offer any reasons for your request, nor did it mention any permit issues that would benefit from discussion in a hearing format. The District did not receive any other requests for a public hearing." Attachment 3. BAAQMD's November 20, 2003 letter also stated: "Lacking a persuasive justification for a hearing, and the resulting delay, the Air Pollution Control Office has determined that the public interest is best served by issuing this permit and initiating the monitoring and reporting procedures it contains." Id.

EPA Region IX submitted comments to BAAQMD on November 24, 2003, but did not object to the proposed permit. CBE's Petition was received by Region IX on January 14, 2004. As EPA calculates the period for the public to petition the Administrator to object to a permit as if the 30-day public comment and 45-day EPA review periods had run sequentially, Petitioner had 135 days after the issuance of a draft permit to submit a petition.<sup>1</sup> Given that the Petition was filed with EPA on January 14, 2004, I find that it was timely filed. I also find that the Petition is appropriately based on objections that were raised with reasonable specificity during the comment period or that arose after the public comment period expired.

### **III. ISSUE RAISED BY PETITIONER**

The Petitioner raises a single issue: whether BAAQMD improperly denied Petitioner's request for a public hearing. As Petitioner frames its concern, "the permit was not issued in compliance with the Clean Air Act's public participation requirements." Petition at 2. Petitioner cites the Clean Air Act for the proposition that the statute requires an "opportunity for public comment and a hearing." Id. (citing 42 U.S.C. 7661a(b)(6)). Petitioner also cites EPA's

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<sup>1</sup>This 135-day period to petition the Administrator is based on a 30-day District public notice and comment period, a 45-day EPA review period and the 60-day period for a person to file a petition to object with EPA.

regulations as requiring state operating permit programs to “provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit.” Id. (citing 40 C.F.R. §70.7(h)). Petitioner further cites New York Public Interest Research Group v. Whitman, 321 F.3d 316 (2<sup>nd</sup> Cir. 2003) (“NYPIRG”), for the proposition that “a failure to provide notice of a public opportunity for comment and a hearing constitutes grounds for objection.” Petition at 2 (citing NYPIRG, 321 F.3d 316, 332 no.10). Petitioner concludes, “Despite the federal mandate, BAAQMD rejected CBE’s request for a public hearing on the Dow Title V permit.” Id.

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as CBE’s claim, EPA considers whether the petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit’s content. See 42 U.S.C. §7661d(b)(2) (objection required “if the Petitioner demonstrates ... that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]”); 40 C.F.R. §70.8(c)(1). For the reasons set forth below, I find that CBE has not demonstrated that BAAQMD’s denial of CBE’s request for a public hearing on the draft Dow permit resulted in, or may have resulted in, a deficiency in the permit’s content.

#### A. BAAQMD Issued a Public Notice Offering an Opportunity to Request a Public Hearing

Petitioner’s reliance on NYPIRG suggests that Petitioner contends that BAAQMD did not provide an opportunity for a hearing. The permitting authority in the NYPIRG case failed to provide adequate public notice of the permit. Id. In this case, BAAQMD issued a public notice for the Dow Permit. Petitioner does not dispute this point and in fact included the public notice as an attachment to its Petition. Further, the public notice for the Dow Permit specifically states that the public may request a hearing and provides contact information for the public to make such requests, consistent with EPA’s regulations. See 40 C.F.R. §70.7(h)(2). Petitioner does not claim that the notice was deficient. Thus, unlike the facts before the court in the NYPIRG decision, there is no issue in this instance that the notice issued by BAAQMD in connection with the District’s issuance of the Dow Permit did not occur or was defective or inadequate. Therefore, Petitioner’s reliance on NYPIRG is misplaced because BAAQMD’s notice for the Dow Permit clearly provided an adequate opportunity for the public to request a hearing.

#### B. Petitioner’s Request For a Hearing Did Not Confer a “Right” to a Hearing

The principal focus of Petitioner’s argument appears to be that once Petitioner made a timely request for a hearing, BAAQMD had no discretion to decide whether to grant or deny the request, but was required by federal law to grant the request. For example, Petitioner complains, “BAAQMD apparently construed this provision [referring to 42 U.S.C. §7661a(b)] to mean that the requirement to offer a public hearing ends at the notice phase and that is it not required to actually offer, or grant a public hearing. BAAQMD made a sham offer.” Petition at 3.

Petitioner also states, “Since CBE has demonstrated that BAAQMD failed to comply with the Clean Air Act Title V requirement to provide the right to a public hearing, EPA is must (sic) object to the permit.” Petitioner provides no legal support or analysis to support its claim that it has a “right” to a public hearing. In fact, a “right” to a public hearing would be contrary to EPA’s interpretation of the Act, EPA’s implementing regulations for title V, and the Agency’s long-established view that a hearing may not be appropriate for every title V permit.

The Act requires state operating permit programs to provide “[a]dequate, streamlined, and reasonable procedures . . . for public notice, including offering an opportunity for public comment and a hearing.” 42 U.S.C. §7611a(b)(6). EPA has interpreted this language to mean that state programs must notify the public of the opportunity to request a hearing, but not that a hearing must be held in response to every request. For instance, section 70.7(h)(2) refers to hearings that “may be held.” 40 C.F.R. §70.7(h)(2). EPA’s preamble to the final Part 70 rule stated, “Section 70.7 makes clear that all permit proceedings . . . must provide adequate procedures for public participation. For this purpose, public participation includes: notice, an opportunity for public comment, and a hearing where appropriate.” 57 Fed. Reg. 32,250, 32290 (July 21, 1992) (emphasis added). Moreover, in a response to a public comment that Georgia should revise its title V program to say that the State would “grant a hearing if requested,” EPA replied, “Public hearings are not automatically mandated by 40 C.F.R. Part 70.”<sup>2</sup> See also In Re Sirmos Division of Bromante Corp., Petition No. II-2002-03, at 7 (May 24, 2004) (stating that “neither the CAA nor EPA’s implementing regulations require a permitting authority to hold a hearing when one is requested” but that “the CAA and applicable regulations require only that [permitting authorities] offer an opportunity for a public hearing”).

BAAQMD’s federally-approved title V program incorporates the District’s discretion to hold a hearing into the public participation process. Section 6 of the District’s Manual of Procedures, “Public Participation and EPA Review,” provides: “Depending on the nature of the written comments received or a request by a member of the public, the APCO [Air Pollution Control Officer] may decide to hold a public hearing to receive oral comments in advance of taking action on the proposed permit.” Manual of Procedures, 6.1.1 (Feb. 1, 1995) (emphasis added).<sup>3</sup> The Manual of Procedures further refers to the discretionary nature of the District’s ability to grant or deny requests for hearings: “If a public hearing is deemed necessary, all persons submitting written comments will be given advance notice of the date and time of the public hearing.” Id. Thus, BAAQMD’s title V program does not provide the public with a “right” to a hearing; rather, the program clearly allows the APCO to make a decision whether to

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<sup>2</sup> EPA’s Response to Comments from Georgia Center for Law in the Public Interest on Georgia’s Title V Operating Permits Program is posted on our website at: <http://www.epa.gov/air/oaqps/permits/response/ga-gapirg.pdf>

<sup>3</sup> EPA approved Volume II, Part 3 of BAAQMD’s Manual of Procedures as part of the District’s title V program. See 59 Fed. Reg. 60939, 60940 (Nov. 29, 1994); 60 Fed. Reg. 32603 (June 23, 1995); 66 Fed. Reg. 63505 (Dec. 7, 2001).

hold a hearing depending on the “nature” of the request and whether the APCO believes a hearing is “necessary.” Petitioner’s claim that it was automatically entitled to a hearing is inconsistent with title V of the Act, its implementing regulations and BAAQMD’s federally-approved title V program.

### C. CBE Has Not Demonstrated That BAAQMD Failed To Reasonably Exercise Its Discretion in Denying CBE’s Request for a Hearing on the Draft Dow Permit

EPA’s interpretation of the Act that a public hearing may not be appropriate for every title V permit necessarily incorporates the notion that permitting authorities have discretion whether to grant a request for a hearing or not. Presumably because Petitioner believes BAAQMD had no discretion to deny a hearing, Petitioner makes no argument as to whether BAAQMD reasonably exercised its discretion in denying CBE’s request. EPA nevertheless believes that addressing this issue is important and relevant in responding to Petitioner’s concerns. Although EPA’s part 70 regulations (which address the minimum criteria for approvable state operating permit programs) are silent on a permitting authority’s discretion in granting or denying a request for a public hearing, one can look to EPA’s part 71 regulations (which set the criteria for federal operating permit programs) for some guidance: “The permitting authority shall hold a hearing whenever it finds on the basis of requests, a significant degree of public interest in a draft permit.” 40 C.F.R. §71.11(f)(1). Although EPA is not applying the federal criteria to state operating programs, those criteria are discussed here as examples.

CBE’s Petition fails to demonstrate that its request for a public hearing in connection with the Dow Permit was supported by significant public interest. As noted above, the Petition does not include a copy of CBE’s request for a hearing; therefore, the Petition is not supported by any basis for a hearing that might have been contained in CBE’s request to BAAQMD. Furthermore, after reviewing a copy of the request obtained from BAAQMD, EPA finds that the request itself failed to demonstrate that a hearing on this permit was warranted due to significant public interest. Moreover, the Petition does not allude to or describe the submittal of any comments from the public or any other requests for a hearing. Therefore, EPA finds that the Petition is not supported by any such comments or requests.

Additionally, CBE’s Petition fails to demonstrate that the reasons BAAQMD provided for denying CBE’s request for a hearing were inadequate or inappropriate. BAAQMD’s letter dated November 20, 2003 provided three bases for denying CBE’s request for a hearing: the request did not provide any reasons for the request; the request did not explain how a hearing would increase public awareness or understanding of the permits; and the District did not receive any other requests for a public hearing. CBE’s Petition does not raise or dispute any of these reasons. EPA therefore finds that the Petition fails to establish that the reasons identified by BAAQMD for denying CBE’s request for a hearing were inappropriate.

Finally, EPA finds, based on information in the record, that BAAQMD could reasonably determine that there was a lack of “a persuasive justification for a hearing.” Attachment 3. In a

letter dated December 1, 2003, Jack P. Broadbent, Executive Officer for BAAQMD, informed Deborah Jordan, Acting Director, Air Division, U.S.EPA, that BAAQMD intended to issue the Dow Permit. The letter further informed EPA that no comments were received from the general public. Attachment 4. This letter supports a determination that BAAQMD reasonably exercised its discretion in denying CBE's request for a hearing as BAAQMD could have reasonably concluded that there was a lack of significant public interest regarding the Permit.

The lack of public comment also supports a finding that BAAQMD reasonably determined that given the lack of significant public interest in the Dow Permit, "the public interest is best served by issuing this permit and initiating the monitoring and reporting procedures it contains." Attachment D. The District evidently considered the interests of the general public in having a final permit against a single organization's request for a public hearing. Furthermore, the record shows that the District issued the Dow Permit on December 1, 2003, which was just a few weeks after the close of the public comment period. This timing is consistent with its stated rationale of serving the public interest by initiating monitoring and reporting requirements contained in the permit. Based on these facts, EPA finds that BAAQMD reasonably exercised its discretion in denying Petitioner's request for a hearing and Petitioner has failed to demonstrate otherwise.

Because the Petition fails to demonstrate that BAAQMD's denial of Petitioner's request for a hearing resulted in, or may have resulted in, a deficiency in the Dow Permit, I deny CBE's Petition to object to the Dow Permit.

#### D. Petitioner's Allegation May Be Moot

On May 19, 2004, BAAQMD published a public notice regarding the Dow Permit offering the public the opportunity to submit comments or request a hearing regarding certain changes to the permit. Attachment D. Petitioner's failure to specify the reasons underlying its request for a hearing either in the Petition or in its November 11, 2003 request to BAAQMD makes it difficult to determine whether this public comment period will provide a satisfactory resolution to its complaint. Nevertheless, I find that this second public comment period will provide some opportunity for Petitioner to present comments and make another request for a hearing regarding the Dow Permit.

**IV. CONCLUSION**

For the reasons set forth above and pursuant to Section 505(b)(2) of the Clean Air Act, I hereby deny Petitioner's request that the Administrator object to the issuance of the Dow Permit.

July 2, 2004  
Date

*Signed by*  
Michael O. Leavitt  
Administrator



## List of Attachments

1. BAAQMD Public Notice, dated October 10, 2003, regarding the title V permit for the Dow Chemical Company facility in Pittsburg, California.
2. Electronic mail communication dated November 11, 2003 from Jessie Warner, Legal Intern, CBE, to Tamiko Endow, BAAQMD requesting public hearing.
3. Letter dated November 20, 2003 from Steve Hill, Manager, Permit Evaluation, BAAQMD to Jessie Warner, Legal Intern, CBE denying request for a hearing.
4. Letter dated December 1, 2003 from Jack P. Broadbent, Executive Officer for BAAQMD, to Deborah Jordan, Acting Director, Air Division, U.S.EPA, regarding BAAQMD's issuance of the Dow Permit.