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April 23, 2008

Mr. Jon Adams
Director of Compliance
San Joaquin Valley Unified Air Pollution Control District
1990 E. Gettysburg Avenue
Fresno CA 93726

Re: Comments on Draft COM 2020, dated Dec. 24, 2007

Dear Mr. Adams:

I represent Seneca Resources. Your draft policy on compliance inspection procedures and guidelines—COM 2020, dated December 24, 2007—is a step in the right direction, but doesn't go the whole distance. Consistency in enforcement is a laudable goal, but is not the only goal that the policy should serve.

- The paramount goal of a routine compliance inspection is to accurately determine whether the source has been operating in compliance with the terms of its permit (and any extrinsic District rules). Because the inspection is concerned with more than simply obtaining an arbitrary snapshot of a source operation on a particular day, it is important to foster conditions that are likely to provide a representative picture. The policy could do more in this regard.

- Fairness is a more important goal than consistency: for example, no one would agree that a process that is consistently unfair is desirable. There are areas in which the draft policy, if implemented, may be unfair as applied to unannounced inspections.

- Efficiency—not wasting the resources of the District or the permit-holder—should also be an important goal. Here, too, there are areas in which the draft policy does not do enough.

Unannounced Inspections in General

What is really needed here is not another policy, but a *rule*.

The draft policy assumes that the District inspectors already have the legal authority to conduct unannounced inspections in any way at any time, and attempts to mandate unannounced inspections while imposing some limitations on how and when they are conducted. The assumption is of questionable validity. The usual authorities on which the District staff rely—Health and Safety Code section 41510[1] and District rule 1070[2]—are silent concerning unannounced inspections conducted at arbitrary times.

Every Title V PTO contains four provisions prescribed by section 9.13.2 of Rule 2520, which in turn took the provisions verbatim from 40 C.F.R. section 70.6(c)(2):

> [Each permit shall include the following elements:] Inspection and entry requirements that require that, upon presentation of credentials and other documents that may be required by law, the permittee shall allow an authorized representative of the District to perform the following:
>
> 9.13.2.1 Enter upon the permittee's premises where a permitted source is located or emissions related activity is conducted, or where records must be kept under condition of the permit;
>
> 9.13.2.2 Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit;
>
> 9.13.2.3 Inspect at reasonable times any facilities, equipment, practices, or operations regulated or required under the permit; and
>
> 9.13.2.4 Sample or monitor at reasonable times substances or parameters for the purpose of assuring compliance with the permit or applicable requirements.

Insofar as we are aware, these provisions appear in every Title V PTO the District issues. District staff frequently rely on section 9.13.2.1—presumably because it says nothing about

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[1] "For the purpose of enforcing or administering any state or local law, order, regulation, or rule relating to air pollution, the executive officer of the state board or any air pollution control officer having jurisdiction, or an authorized representative of such officer, upon presentation of his credentials or, if necessary under the circumstances, after obtaining an inspection warrant pursuant to Title 13 (commencing with Section 1822.50), Part 3 of the Code of Civil Procedure, shall have the right of entry to any premises on which an air pollution emission source is located for the purpose of inspecting such source, including securing samples of emissions therefrom, or any records required to be maintained in connection therewith by the state board or any district."

[2] "3.0 District Inspections [¶] Inspections shall be made by the enforcement agency for the purpose of obtaining information necessary to determine whether air pollution sources are in compliance with applicable rules and regulations. [¶] 4.0 District Authority [¶] The District also has the authority to require record keeping, to make inspections and to conduct tests of air pollution sources."

conducting an inspection at a reasonable time—in addition to rule 1070 and Health and Safety Code section 41510 in issuing NOVs to Title V sources when the staff considers that its inspector has been denied access to conduct an unannounced and warrantless inspection. However, section 9.13.2.1 does not authorize unannounced inspections. The provision is a consent to entry; it is a defense to a trespass claim. The specific reasons for an inspector to enter the source operation's premises are governed by the three remaining clauses, which expressly limit inspections and other activities to reasonable times and say nothing about unannounced inspections. A source's failure to accommodate an unannounced inspection that comes at an unreasonable time is not a permit violation.

Thus, District inspectors have no express authority, by statute or rule, to require sources to submit to unannounced compliance inspections, whether under Title V or otherwise, and their implicit authority to do so may be limited to Title V sources and to reasonable times. What is really needed is an amendment to rule 1070, rather than a policy document that has not been vetted and subjected to the public airing that District rules require, and which is only lawful if it is *not* a de facto rule.

§ I.D.1.a.

An EPA memorandum written in September 1984 explained that the justification for unannounced inspections "is based on the belief that [unannounced inspections] are more representative of normal operating conditions." (http://www.epa.gov/Compliance/resources/policies/civil/caa/stationary/unann-insp-rpt.pdf.) Section 1.D.1.a. tells the inspector to "[c]onduct the inspection when the source is normally in operation." The sentence has two possible meanings: (1) as a general rule, conduct inspections when a source is operating, or (2) conduct inspections when the source is in normal operation. In keeping with the overall purpose of a compliance inspection, the sentence should read, "Conduct the inspection when the source is in normal operation." This is an important principle that District inspectors sometimes overlook. The final policy should not only correct the ambiguity, but add a logical corollary. Under the introductory paragraph to Section 1.D., inconvenience to an inspector is not sufficient reason to override the principle that an inspection should provide a representative picture of a source's normal operation. Therefore, if an inspector learns that a source is not in normal operation on the day of an unannounced inspection, the inspection should be postponed to a later date when the source *is* in normal operation.

Considerations of fairness and efficiency also support this conclusion. It isn't fair to judge a source's normal level of compliance based on an abnormal situation, and it wastes resources when the permit-holder and the District have to engage in extended bouts of interrogation and explanation following an inspection that should have taken place on a different date. Unless an abnormal condition is itself a violation, the inspection should be rescheduled.

§ I.D.1.c.

Under section 1.D.1.c., an inspector must inform the source that unannounced inspections are required—by what authority? The inspection policy itself does not create a binding legal re-

quirement for unannounced inspections. The policy is not a rule and therefore cannot bind the source; if the policy is lawful, it can only be binding on the inspector. And as previously discussed, neither rule 1070 nor Health and Safety Code section 41510, nor section 9.13.2.1 of rule 2520 authorizes, much less requires, unannounced inspections.

Section I.D.1.c. instructs inspectors to "[d]etermine who can conduct the inspection if the normal contact is not available." The syntax is wrong: the *inspector* is conducting the inspection. What I.D.1.c. is getting at is that, assuming the inspector has previously complied with section I.D.1.b. and the normal contact is still unavailable, the inspector must determine who *is* available from the source operation to accompany the inspector on the inspection. An inspector should never conduct a routine compliance inspection without being accompanied by a representative of the source who can answer the inspector's questions, ensure that safety requirements are observed, and make an informed record of the inspection. Not just any source employee can adequately perform this function. Whenever an inspection goes forward in the absence of an appropriate source representative, the principles of fairness and efficiency are both impacted. NOVs may be issued in error, without complete knowledge of the circumstances, requiring wasteful rounds of allegation and explanation. Therefore, if there is no one present at the facility on the day of the inspection who can knowledgeably accompany the inspector, the inspection should be rescheduled, and, pursuant to section I.D.1.e., the inspector should be prepared to go on to the next facility. It is not a permit violation.

§ I.D.2.a.

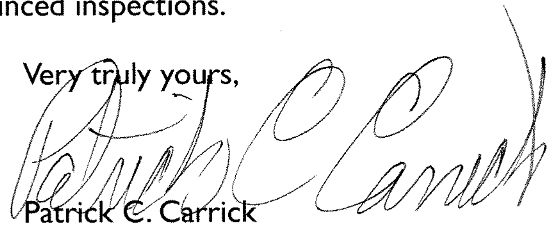
This section recognizes that an unannounced inspection cannot be one-size-fits-all without violating fairness and efficiency. The section applies to inspections of continuously-operating unmanned facilities and to those facilities that are not staffed "with someone who can facilitate the inspection". "Facilitate" means to make a process easier—presumably for the inspector—which is not enough. Fairness and efficiency dictate that if the inspector knows that a sparsely-manned facility does not have someone on hand who can answer the inspector's questions, ensure that safety requirements are observed, and make an informed record of the inspection, section I.D.2.a. should apply. A number of Seneca's facilities fall into this category.

Subparagraph i. tells the inspector to "[c]ontact the source the day of the inspection and set a time for that day." Based on the District's inspections of Seneca's facilities, that instruction gives the inspector too much leeway. In actual practice, District inspectors have given Seneca's EHS Manager, whose office is in Bakersfield, less than an hour's advance warning of an inspection, requiring him to immediately stop whatever he is doing, wherever he is doing it, so that he can drive 30 miles or so to meet the inspector. The District has issued an NOV to Seneca when its EHS Manager has been unable to conform to the inspector's timetable. This sort of notice may technically be "same day" notice, but is virtually no notice at all. It defeats the policy's expressed intent to ensure that an inspector provides "good customer service." It violates the important goals of fairness and efficiency. If the inspector knows that the facility is in a location that is remote from the facility contact who can "facilitate" the inspection, it is incumbent upon the inspector to give reasonable advance notice tailored to the particular circumstances. Oth-

erwise, the inspection does not occur at a reasonable time, and there can be no permit violation if the contact is unable to meet the inspector.

Finally, the third sentence of subparagraph i.—"An exception to this exists for some sources that have *nothing that can be changed before the inspection, and no records to check*"—suggests that the real purpose of unannounced inspections is to thwart cheating, which conveys the unfortunate impression that the compliance staff view the District's "customers" purely as adversaries who must not be allowed the opportunity to cheat. One can only wonder how much a source could actually cover up or invent with, say, 24 hours' advance notice of an inspection. We need an objective approach to the District's inspection protocols, which is what the rule-making process is designed to provide. We need a well-thought-out *rule* that has been exposed to all of the stakeholders, and which takes all stakeholders' views into account. The draft policy is a step in the right direction, but a better step is to propose an amendment to rule 1070 that formally addresses these issues. Otherwise, we all run the risk that a court may one day have the last word on the permissible bounds of the District's unannounced inspections.

Very truly yours,



Patrick C. Carrick

cc: Tim Alburger
Catherine Redmond, Esq.