Response to Public Comments on Proposed Technical and Administrative Amendments to New Source Review and Title V Permitting Regulations

Air District staff published drafts of the proposed amendments to Regulation 2, Rules 1, 2, 4 and 6, and invited interested members of the public to comment on them. This document summarizes the comments received and the responses of Air District staff.

Air District staff initially published drafts of the proposed amendments on August 24, 2017, and requested comments by September 25, 2015. Staff subsequently made certain revisions to the proposed amendments and re-published them to provide a further opportunity to comment on the additional changes. Staff provided a further comment period on the revised proposal through November 13, 2017. The Air District considered all comments received throughout this time period from August 24, 2017, through November 13, 2017.

Comments were received from 350 Bay Area (both in a comment letter submitted on the proposed amendments and in a similar letter to the Air District's Board of Directors on behalf of 350 Bay Area and other organizations); the Western States Petroleum Association (WSPA); the California Department of Transportation (CALTRANS); the California Air Resources Board (ARB); West Marin Standing Together (which supported the comments from 350 Bay Area); and Charles Davidson.

Summaries of the comments received, and Air District staff's responses, are provided below. (All of the comments are available in full on the Air District's website at www.baaqmd.gov/permits/permit-fee-rule.) The discussion first addresses comments on provisions included in the proposed amendments. The discussion then addresses comments that do not address anything in the proposed amendments, but are relevant to other related issues including certain provisions that Air District staff considered at the public workshop stage but are not proposing for final action at this time. Staff are continuing to work on those issues, and providing responses here will help further the ongoing discussion with interested members of the public in developing final proposals for consideration by the Board of Directors.

I. Comments on the Proposed Amendments

The Air District received the following comments on provisions included in the proposed amendments.

A. Comments on the Offsets Equivalence Demonstration

WPSA commented on the equivalence demonstration that the Air District undertakes each year to show that it is getting at least as many offsets under its NSR program as a whole as EPA would require under EPA's federal regulations. The Air District is required

to undertake this demonstration in order for EPA to be able to approve the District's offsets requirements, which take a slightly different approach in certain areas than EPA's federal requirements do. The Air District needs to make this demonstration to ensure that its approach is no less stringent than what EPA requires under the Clean Air Act. If for some reason the District is ever unable to demonstrate that its approach is at least as stringent, then major facilities will be required to follow EPA's federal approach for providing offsets when they undertake major modifications.

WSPA commented that if the Air District is ever unable to make the demonstration, then the District should bear the consequences of that failure and not regulated facilities. WSPA commented that the Air District should be obligated to come up with additional offsets to comply with EPA's requirements, instead of having the facilities seeking permits provide the additional offsets. WSPA also commented that the Air District should not go back and reopen previously issued permits to require sources that have already been permitted and built to provide additional offsets.

Air District staff responded to similar comments from WSPA during the workshop process and incorporate those responses here. As staff explained, in the unlikely event that the Air District cannot show that the District's offsets requirements are at least as stringent as EPA's, that would simply be an indication that, for a period of time, the Air District's offsets program has not been obtaining as many offsets as what EPA's federal regulations require. If and when that scenario ever came to pass, it would be entirely appropriate to require the facilities seeking permits for additional air pollution to provide the additional offsets for that pollution according to what EPA requires, instead of requiring the District to make up the difference. Regarding reopening previously issued permits, as staff explained during the workshop process, existing permits will not be affected in the event that the Air District cannot make the equivalency demonstration. EPA's federal requirements will apply only for *subsequent* major sources and major modifications. That is, only applicants seeking NSR permits for future projects would be required to provide any additional offsets in accordance with EPA's federal requirements. Previously issued permits will not be reopened.

B. Comments on Emissions Estimates Used in Calculating Emission Reduction Credits

WSPA raised a concern it raised earlier during the workshop process, that if the Air District uses inflated emissions estimates for some purposes, such as assessing permit fees, then the District should use the same inflated estimates for purposes of calculating the amount of emission reduction credits generated when a source is shut down. The Air District responded previously that the New Source Review program does not use inflated emissions estimates: all NSR analyses and determinations must be based on the best available information as to what a source's emissions actually are. WSPA stated that this response did not address its concerns. It suggested that the District incorporate specific language specifying that calculations of emission reduction credits under Regulation 2-2

should be based on the same data that the Air District has used for assessing fees and for emissions inventories submitted under Regulation 12-15.

Air District staff disagree that it would be appropriate to require emissions estimates from any specific context to be used for NSR permitting purposes. If that were the case, it could potentially perpetuate faulty emissions estimates by requiring them to be used in the NSR context even if it has become clear that they are not longer valid. The better approach is to require emissions estimates to be based on the best information available, as is the case under the current rule. If the most recent estimates used in permit fee calculations or Regulation 12-15 reporting incorporate the best, most up-to-date data, then it will be appropriate to use those estimates. If better estimates have come to light based on more recent information, then it would be more appropriate to use that more recent information, instead of relying on outdated, incorrect estimates.

WSPA also stated that Air District staff "have increased estimates of fugitive emissions dramatically" with respect to petroleum refineries in the Bay Area. This comment seems misplaced. Air District staff have not estimated fugitive emissions from individual facilities or facility categories in connection with the proposed technical and administrative amendments to Regulation 2.

C. Comments on Regulatory Definitions

WSPA commented that the District should ensure that all definitions of terms in Rules 12-15, 12-16, 13-1, 2-1, and 2-2 are consistent with each other. It stated that if a definition is modified, the District should explain why the modification is necessary and why it does not apply in other refinery-related rules.

Air District staff agree in general that definitions should be consistent across different regulations to the extent possible, as staff explained in response to a similar comment by WSPA during the workshop process – although in some cases there will be sound reasons why differing definitions may be necessary. For example, where a similar term needs to function differently in the context of one regulation compared to how it functions in the context of another regulation, it may need to be defined differently in the two regulations. Air District staff have sought to maintain consistency across all District regulations as much as possible, however. All of the proposed revisions to definitions in Regulation 2 are explained in further detail in the Staff Report for the Proposed Amendments.

D. Identification of a Typographical Error in Section 2-2-229

ARB pointed out that in Section 2-2-229, the word "been" was inadvertently omitted in the phrase "… offsets have previously provided …." Staff have revised the language to correct this error. The provision now reads "… offsets have previously <u>been</u> provided …."

E. Comments on the CEQA Analysis

CALTRANS submitted comments suggesting that the Air District revise some of the language in the environmental and regulatory setting discussions in the Initial Study prepared for the proposed amendments under the California Environmental Quality Act (CEQA). With respect to the air quality analysis, the CALTRANS pointed out (i) that California has established ambient air quality standards for hydrogen sulfide and vinyl chloride, and so those pollutants should be added to the list of such pollutants in Table 3-1; (ii) that the pollutant referred to as "visibility reducing particles" was incorrectly referenced as just "visibility"; (iii) that the air quality discussion addresses only the primary National Ambient Air Quality Standards (NAAQS), and does not mention the secondary NAAQS; and (iv) that the primary NAAQS for PM_{10} was incorrectly stated in Table 3-1. With respect to the noise analysis, the commenter pointed out that traffic noise includes noise from a wide variety of different vehicle types. Air District staff agree that the Initial Study could be improved by correcting and/or clarifying the discussion with respect to these points. Air District staff addressed all of these points in the revised Initial Study published on October 12, 2017.

WSPA commented that the Air District is improperly "piecemealing" the proposed amendments under CEQA by not including them as part of a larger "strategy" to regulate emissions from Bay Area refineries. But independent rule development projects do not implicate CEQA "piecemealing" concerns where they serve different purposes and can be implemented independently of each other. That is the case here. The purpose of the proposed amendments is to make technical and administrative revisions to the Air District's permitting programs so that they can be fully approved by EPA, so that they will function efficiently, and so that they will conform to recent Supreme Court jurisprudence. That purpose is completely different from, and independent of, the purposes underlying any other Air District regulatory initiatives. And the proposed amendments to Regulation 2 can be and will be implemented completely independently of any other regulatory initiatives. As such, CEQA does not require the proposed amendments to be evaluated as part of the same common project as any other initiatives.

WSPA also stated that the Air District's analysis must be based on "creditable substantive evidence." The Initial Study is based on such evidence, and WSPA has not identified any area in which it contends that the Initial Study is lacking.

Finally, WSPA also stated that the Air District must consider a reasonable range of alternatives. CEQA requires lead agencies to consider alternatives to a proposed project that will avoid or substantially lessen any significant environmental impacts. Here, the proposed amendments will not have any significant environmental impacts, so by definition there cannot be any alternatives to consider that would avoid or substantially lessen any such impacts.

II. Comments on Other Issues Not Included In The Proposed Amendments

The Air District also received a number of comments on things that are *not* included as part of the proposed amendments. These comments are not related to the technical and administrative amendments Air District staff are proposing for Regulation 2, and so they have no direct bearing on what the Board of Directors will be considering at the December 6th hearing. Air District staff are nonetheless providing responses to these comments, as they address important issues that staff have considered during the rule development process and will be continuing to engage in in the coming months. Air District staff look forward to continued discussions with the commenters on these issues.

A. Comments on Requiring "Best Available Control Technology" for New and Modified Sources of CO_2 Emissions Subject to Cap-and-Trade Regulations

The first area of comments concerned a proposal that Air District staff developed for the public workshops under which the District would lower the threshold at which new and modified sources would be required to use "Best Available Control Technology" (BACT) to control their greenhouse gas emissions. The current threshold is 75,000 tpy CO_2e, and staff proposed to reduce it to 25,000 tpy CO_2e. After the public workshops, however, the Legislature enacted legislation referred to as AB 398 that preempts the District's authority to impose emission reduction rules for CO_2 emissions sources subject to the state's "Cap and Trade" program. Since virtually all of the greenhouse gas emissions that would be subject to this requirement are CO_2 emissions, and since virtually all of the sources that would be subject to it are subject to Cap and Trade, the Air District is now legally prohibited from adopting such a regulation – at least in the form that District staff developed it for the June public workshops. Air District staff are therefore not proposing final action on the revised BACT threshold at this time, although staff will continue to evaluate the potential to address greenhouse gas emissions through the District's permitting regulations without violating AB 398.

350 Bay Area and related commenters stated that the Air District should still go forward with the proposal – and in fact should implement even more stringent New Source Review requirements – notwithstanding AB 398. These commenters contended that AB 398 does not prohibit the Air District from requiring BACT from *new and modified* CO_2 emissions sources subject to Cap and Trade, which is what the New Source Review program applies to, because (according to the commenters) the legislation only prohibits Air District regulation of *existing* sources. The commenters' theory is that AB 398 prohibits only "emission reduction rules," and that regulations aimed at new and modified sources do not "reduce" emissions, they simply limit the increases in emissions that would otherwise occur from the new or modified sources. The commenters therefore contend that the reference to "emission reduction rules" in AB 398 demonstrates that the legislature intended the preemption to apply only to regulation of existing sources, not new or modified sources.

Air District staff have serious concerns regarding the legal viability of this theory, and staff do not (at least at this point) believe that the courts would agree with it. Regulations addressing emissions from new and modified sources can be thought of as simply limiting the amount of new emissions that would otherwise occur, but they can equally well be thought of as *reductions* in what the new or modified source would otherwise emit without using the BACT control technology. And this is in fact how BACT requirements have historically been referred to in the New Source Review program. For example, the Clean Air Act defines BACT as "the maximum degree of *reduction* of each pollutant subject to regulation…." (CAA § 169(3), 42 U.S.C. § 7479(3) (emphasis added).) Even the commenters themselves use this terminology in their comment letter, stating that a very stringent BACT requirement "would be able to achieve potential *reductions*" in greenhouse gas emissions. (305 Bay Area Comment Letter, p. 9, § IV.B.2. (emphasis added).) Given this history in the NSR program, Air District staff disagree that there is a colorable argument that the legislature intended to exclude BACT from the scope of "emission reduction rules" preempted by AB 398. Moreover, Air District staff have not found anything in the legislative history of AB 398 that that would support such a distinction; to the contrary, the legislative history suggests that the Legislature intended the preemption provision to be a broad one. And there is nothing immediately obvious in the underlying purpose of the Legislation to suggest distinguishing between rules affecting existing sources and rules affecting only new and modified sources. The stated intent of the preemption was to ensure that sources subject to Cap and Trade would have only one set of regulatory requirements to comply with – the Cap and Trade regulations – and would not have to comply with other, potentially conflicting, requirements adopted by local air districts. This legislative purpose applies equally strongly with respect to new and modified sources as it does with respect to existing sources. For all of these reasons, Air District staff have concluded (preliminarily at least) that AB 398 preempts the Air District's ability to implement the revised BACT requirement as proposed at the June 2017 public workshops – although staff welcome further discussion and engagement on these issues with the commenters and other interested parties as staff continue to evaluate the potential for appropriate ways to address greenhouse gases under Regulation 2.

The commenters also stated that the Air District should at least impose BACT requirements for GHG sources that are not subject to Cap and Trade requirements and are therefore not subject to the AB 398 preemption – for example, small or medium-sized sources below the Cap and Trade applicability thresholds. This is one of the areas that Air District staff intend to consider for regulation going forward. These sources are not subject to AB 398 preemption, as the commenters pointed out, and so there may be opportunities to achieve meaningful greenhouse gas emission reductions from these sources under the NSR permit program, by applying BACT requirements or otherwise. There are a number of questions that would need to be answered before any regulation could be proposed, however, such as whether there are any effective greenhouse gas control technologies that can be used to achieve emission reductions at these sources, and whether the cumulative magnitude of the emission reductions that could be obtained makes regulating them worthwhile, as compared to other source categories where the Air

District could target its limited resources. Air District staff look forward to engaging with the commenters and other interested parties in evaluating these issues.

Finally, the commenters also pointed out that the limitations on federal regulatory authority under the Clean Air Act as addressed in the Supreme Court's *UARG v. EPA* case do not restrict the Air District's authority to regulate under state law. The commenters note that the federal Clean Air Act requirements are simply minimum requirements, and they do not prohibit the Air District from adopting requirements under state law that are more stringent.

Air District staff agree in general with the commenters' summary of the applicable legal principles regarding the Air District's authority under state law. However, EPA Region 9 staff have made clear that EPA will not approve any greenhouse gas regulations more stringent than what the Supreme Court articulated in *UARG v. EPA* as part of the federally-enforceable State Implementation Plan (SIP). Thus, the Air District needs to revise its SIP-approved regulations to conform to *UARG v. EPA*, although it remains free to go beyond that in non-SIP-approved regulations in accordance with state law. That is exactly what Air District staff initially proposed in connection with lowering the BACT threshold from the 75,000 tpy CO_2e authorized under federal law to 25,000 tpy CO_2e: Staff's proposal was to keep the current 75,000 tpy CO_2e limit in the SIP-approved regulation, and to put the lower 25,000 tpy CO_2e threshold into a separate "state-only" provision that would not be submitted to EPA for SIP approval. The Air District's ability to adopt the 25,000 tpy CO_2e BACT requirement under state law was subsequently preempted by AB 398, as explained above. But nothing prohibits the Air District from implementing other greenhouse gas requirements in its NSR program that are consistent with AB 398, even if they are more stringent than what the Clean Air Act requires under the Supreme Court's decision in *UARG v. EPA*. This is what Air District staff will be evaluating going forward. The Air District could adopt such regulations, it just would not be able to submit them to EAP for SIP approval.

Contrasting 350 Bay Area's very narrow reading of the AB 398 preemption provision, WSPA commented that AB 398 should be read very broadly to preempt Air District regulation of *all* greenhouse gases, not just CO_2. But this position is contrary to the clear and express language of AB 398, which states that a local air district may not adopt an "emission reduction rule for *carbon dioxide*" – not for any larger set of greenhouse gases. If the Legislature intended to preempt regulation of other greenhouse gases besides CO_2, it would have said so. Air District staff continue to maintain that the District retains the authority to regulate non-CO_2 greenhouse gas emissions from sources subject to Cap and Trade, and staff intend to continue evaluating whether any such regulations may be appropriate as part of their further efforts under Regulation 2. There is nothing in the language of the preemption provision to suggest that AB 398 restricts the Air District's authority in these areas.

B. Comments on Effectively Enforcing the Air District's NSR Requirements for Changes in Refinery Crude Slates

A second area of comments concerned a proposal that Air District staff are developing to enhance the District's ability to enforce its New Source Review regulations when petroleum refineries change their crude slates. This proposal would require refineries to notify the Air District and obtain approval before making any significant change in crude slate. This would give the Air District an opportunity to review the change and ensure that the refinery is not making any modification in connection with the change that would require a New Source Review permit – and to require that the refinery go through the permitting process and obtain a permit if one is required. Air District staff published proposed regulatory language to implement this requirement for the public workshops in June of 2017, and a number of commenters submitted comments on it. Staff subsequently concluded that further evaluation of the best way to implement this requirement is needed, however, and so staff are not proposing final action at this point. Staff are proposing final action at this time only on the technical and administrative amendments that need to be adopted immediately in order to avoid the threat of sanctions by EPA for not having a fully approved New Source Review program. But staff will continue to work on developing the crude slate NSR enforcement provision and look forward to engaging with all interested stakeholders in order to finalize a proposal for consideration by the Board of Directors.

WSPA commented that the Air District cannot go forward with the crude slate enforcement proposal at all, stating that the District's regulatory authority is limited to regulating air emissions from refineries, not what kinds of crude oils refineries can process. But the proposal *is* squarely a provision regulating air emissions, not a regulation of what kinds of crude oils a refinery can process. The purpose of the proposal is to ensure that the Air District can effectively implement and enforce its New Source Review rules, which are indisputably emissions control rules. It would not restrict or specify what types of crudes a refinery can process, it would require only that refineries submit information regarding their crude slates and crude oil processing operations so that the Air District can establish that they are complying with the applicable New Source Review rules. As long as refineries comply with applicable New Source Review air pollution requirements, they will remain free to process the crude slates that they deem most appropriate for their particular operation (subject to compliance with all other applicable regulatory requirements, of course).

WSPA also commented that there is no need for any regulatory revisions to ensure that the Air District can adequately enforce its NSR requirements, because there is no demonstrated connection between any changes in refinery crude slates and increases in emissions that would be subject to NSR. Air District staff disagree with this comment, and maintain that changes in crude slates can definitely lead to emissions increases in certain situations – for example, if a refinery changes to a heavier or sourer crude source. Air District staff are interested in evaluating the connection between the two in more detail, however, which is part of the reason why staff are deferring final action on the crude slate

provisions at this time. Air District staff look forward to working with WSPA and its members, as well as other interested members of the public, in finalizing a regulatory proposal for consideration by the Board of Directors.

WSPA also commented that the proposal to require pre-approval from the District before making a significant change in crude slate would impermissibly "redefine the source" by requiring refineries to construct or operate their equipment in a manner that is at odds with the fundamental design and purpose for which the equipment was proposed. Air District staff disagree. Requiring Air District pre-approval for a significant change in crude slate as an "alteration" under Regulation 2-1-233 would not require a refinery to do anything differently with respect to its equipment *at all*, let alone do anything that would require it to change the equipment's fundamental design and purpose. Moreover, to the extent that a refinery has to make an NSR "modification" to its operations under Regulation 2-1-234 in order to accommodate the change in crude slate, the "redefining the source" doctrine referenced in the comment letter will be applicable to the NSR permitting process and will ensure that the District does not "redefine the source" in the manner WSPA says it is concerned about.

Finally, WSPA also commented that the Air District cannot take any enforcement action with respect to a change in crude slate at a refinery absent some underlying basis in the regulations. Air District staff agree with this comment as a general principle, but again stress that the purpose and motivation for this entire initiative is to ensure that the *existing* NSR regulations are enforced effectively. If a refinery needs to make a physical change to or change in the method of operation of its equipment in order to accommodate new crude slates, and that change increases emissions above the threshold levels set forth in Regulation 2-1-234, that change is a "modification" and must go through the NSR permitting process under Regulation 2-2. If Air District staff discover information suggesting that a refinery has done so in connection with moving to a new crude slate without getting an NSR permit, the Air District will take appropriate enforcement action over the resulting violation of Regulation 2-2. As Air District staff made clear in the Staff Report, such enforcement action would be action to enforce the existing provisions of Regulation 2-2, not any attempt to regulate the refinery's choice of crude slate or to enforce some unwritten regulatory requirement that has not been adopted by the Board of Directors.

By contrast, 350 Bay Area and related commenters suggested that any change in crude slate is *already* subject to the Air District's permit requirements in the manner that District staff are contemplating. These commenters stated that any change in a refinery's crude slate constitutes a "physical change or change in the method of operations" of the refinery, which is either a "modification" if the change increases emissions above the thresholds stated in Regulation 2-1-234, or an "alteration" if it does not. This is not how the current regulations apply, however, which is why Air District staff are working on revising them. Specifically, facilities can switch to processing different types of feedstocks or raw materials that they are designed and permitted to handle without it being a "physical

change or change in the method of operation" under the regulations. Many facilities process a range of different feedstocks and raw materials, reflecting the reality that many industries experience natural fluctuations in the constituents or makeup of the raw materials they use. If a facility is designed and permitted to handle a range of materials, the facility can process materials within this range without having to get a permit revision; processing one type of material does not lock the facility in to processing only that one type of material going forward. This is how the New Source Review program has been designed and implemented, both nationally and within the Bay Area. And this is the reason why the Air District is proposing to change its regulations, so that facilities will be required to get Air District pre-approval before changing their feedstocks, even though such a change does not otherwise constitute a "physical change or change in the method of operation" of the refinery.

350 Bay Area also suggested that in order to address concerns around crude slate changes and the potential for emissions increases associated with them, the Air District should require refineries to document their crude slate compositions, calculate emissions based on their crude slate profile averaged over each month, and report those emissions to the District. Air District staff agree that, in general, tracking and documenting crude slate compositions and emissions appear to be the best approaches to addressing this issue. Some of these suggestions are already incorporated into the Air District's Petroleum Refining Emissions Tracking rule, Regulation 12-15, and Air District staff will be exploring how to implement them further in going forward with its proposal on addressing crude slate changes under Regulation 2.

In addition, Charles Davidson stated that if refineries switch to processing significant amounts of heavier or more sulfurous crude slates, they have the potential to implement "modifications" with sufficient emissions increases to trigger the "Prevention of Significant Deterioration" permitting requirements in Regulation 2-2. Air District staff agree with this comment, which is part of the reason why staff have been working on this crude slate enforcement proposal. Further information and analysis is required to ascertain the best approach to implementing the proposal, however, as noted above. Air District staff look forward to working with the commenter on these issues going forward.

C. Comments on Existing Regulatory Provisions Requiring Facilities to Offset Emissions Associated With Cargo Deliveries

Finally, WSPA also commented on the Air District's existing regulations that require facilities to offset emissions associated with the cargo carriers that serve the facility (i.e., ships and trains that deliver raw materials or other products). WSPA stated that the Air District lacks the legal authority to regulate these emissions and suggested that the District should remove all such provisions from Regulation 2-2. WSPA said that these offset requirements are preempted by the Interstate Commerce Commission Termination Act with respect to emissions from railroad cargo carriers serving the facility, and are preempted by Section 209 of the Clean Air Act with respect to emissions from ship cargo carriers serving the facility.

As Air District staff explained in response to similar comments at the workshop stage, the District is not proposing any changes to any requirements of District regulations related to offsetting a facility's emissions increases resulting from cargo carriers. The District has for many years required facilities to provide offsets for emissions from their cargo carriers when they install a new source or modify an existing source. California's other air districts have done so for years as well. District staff are not proposing to change these longstanding regulations in the proposed amendments.

Regarding the substance of WSPA's comments about federal preemption, these longstanding offset requirements do not attempt to regulate or manage rail or ship operations, and so they do not implicate any preemption concerns. Rail carriers and shipping operators are not subject to the offsets requirements themselves, and they remain free to operate in whatever manner they find most appropriate, subject to applicable regulatory requirements, regardless of the offset requirements. What the Air District's offset provisions do is require *stationary-source* facilities, which are indisputably subject to Air District regulatory jurisdiction, to offset any criteria pollutant emissions increases that will result when they install new sources or modify existing sources. If a facility is going to increase emissions within the Bay Area as a result of such a new or modified source – including increases that will result from cargo carriers serving the source – then the District has the authority to require the facility to provide offsets for those increased emissions. Doing so is important and necessary to ensure that the facility is not causing any net emissions increase as a result of installing its new or modified source, including cargo carrier emissions that occur as a direct result of the installation of the source. This authority is well-settled under California air pollution law and is not preempted by any federal laws or regulations, as demonstrated by the offsets provisions that the Air District and its sister California air districts have been implementing for many years without objection.