10/6/17

Board of Directors
Bay Area Air Quality Management District
375 Beale St., Suite 600
San Francisco, CA 94105

Dear Directors,

350 Bay Area represents over 22,000 constituents of the Bay Area Air Quality Management District who are fighting for a stable climate future and demanding that our government take meaningful policy action to address the climate crisis at a scale commensurate with the problem. A major opportunity for such action is about to be wasted, as your staff forgoes originally proposed amendments to the agency's Permits Regulation and puts forward for your approval on October 18th a rule with no major changes to business-as-usual regarding climate protection. We submitted comments on staff's current proposal, but we think it important to highlight for the Board in clearer terms some of the major issues at play. We also discuss the impact of recent changes in the landscape of regional greenhouse gas regulation and the Air District's remaining authority in this area.

Background

The vast majority of Bay Area residents, the vast majority of Air District staff, and the vast majority of you who sit on the Air District's Board—which is to say, practically everyone in the region—have both an intellectual and a visceral understanding of the threat that human-caused global warming poses to all living beings on this planet and, indeed, to the very physical systems that support life as we know it.

Virtually all of us also understand that we as a human society are failing miserably to change our behavior enough to slow and halt, much less reverse, this climatic crisis. We know, for example, that the average temperature on Earth has already risen over 1°C since pre-industrial times, more than halfway to the internationally agreed tipping point into catastrophe. We also know that warming to date is already being found responsible for instigating or exacerbating some of the extreme weather phenomena that we have seen over the past few years, including the recent rash of Caribbean hurricanes, out of which that region is just beginning to dig, and from which the prospect of full recovery is unclear. Finally, we know very well that if we as a society fail to act in accordance with our intellectual, economic, and political capacity, we will be leaving the world in far, far worse condition than we inherited it. Our descendants will pay a terrible price in the future for our inaction today, perhaps even eventually the price of extinction.

With this as a backdrop, it is reasonable to expect that every person who has any relevant authority—be it the moral and experiential authority of a member of the public, the authority of knowledge held by educated and experienced BAAQMD staff, or the statutory authority of the BAAQMD Board of Directors—do what they can to bring that authority to bear for the purpose of curbing, then reducing, greenhouse gas (GHG) emissions through all policy avenues at hand. To shirk such action, or to make excuses for inaction, is to fail our roles in our participatory democracy *and* our prospective responsibility to future generations.

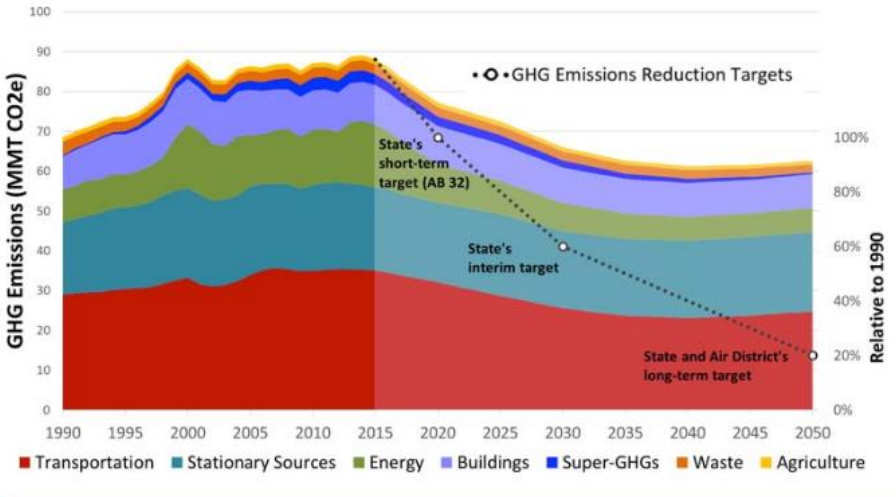
BAAQMD is Already Abandoning 2017 Clean Air Plan Commitments

Permitting is the central function of the Air District. The agency's permitting actions set the limits of, and circumscribe the possibilities for, emissions control and protection of public health in the region. The EPA's "limited disapproval" in 2016 of BAAQMD's 2012 round of changes to its permitting regulations required that the Air District make some further alterations to the rule, notably including tightening its calculation procedures for modified sources. This rulemaking process provided the Air District with an opportunity to take a fresh look at its permit program; whether it accurately and adequately reflects the agency's stated commitments, plans, and policy visions; and in what ways it might be concurrently improved to eliminate any gaps in achievement that may persist. Indeed, the Air District's much-heralded 2017 Clean Air Plan, just adopted in April of this year, had already queued up a couple of permit program commitments for the agency: Control Measure SS9—to integrate significant crude slate changes into the permitting program—and Control Measure SS17—to integrate evaluation of GHGs from new and modified sources meaningfully into the permitting program.

Initial attempts at implementing those control measures were included in the version of the Permits Regulation released in May of this year. 350 Bay Area found the proposed amendments demonstrably weaker than necessary to meet adopted Air District commitments, and we submitted comments to that effect.

Yet, in the end, the Air District is withdrawing all relevant language and **reneging entirely on these key Clean Air Plan pledges**, choosing only to make rule changes that are "relatively minor, and are mostly technical and administrative in nature," generally only addressing GHGs in the rule amendments by adding more exemptions for them, inserting federal backstop requirements that will never be exceeded, and wholly squandering this opportunity to ensure that the agency's permitting actually implements its own policies and commitments to the public. This collective course of action would seem to indicate that the status quo vis-à-vis permitting is working just fine. Yet the Air District's own tracking of current and forecasted GHG emissions, overlaid with regional and state emission targets (reproduced below), illustrate clearly that this is not the case!

Figure 3-9. **Projected Bay Area GHG Emissions by Sector Based on State Policies (100-year GWP)**



No, the data clearly show that the status quo is not working just fine; rather, it is rendering our region and planet increasingly uninhabitable. It is, correspondingly, indefensible for the Air District to cancel or postpone action on these control measures.

The 2017 Clean Air Plan clearly states that even the *full implementation* of all its control measures would only achieve a fraction of the emission reductions necessary for our region to do our part to meet regional and state climate targets. Yet the Air District is already backing off on SS9 after industry pushback, saying that it needs more study. And the Air District is already backing off on SS17, and untold other control measures as yet unknown to the public, because of a misguided abdication of responsibility and authority (further expanded in the next section).

How does BAAQMD plan on making up this collective shortfall in emission control? Was the Regional Climate Protection Strategy that the Board of Directors called for in 2013 and that was included in the 2017 Clean Air Plan just a paper exercise? The public is counting on more than that.

BAAQMD Flatly Misuses AB 398 to Justify Inaction

Air District staff had the right idea on rulemaking, initially suggesting amendments to the Permits Regulation to implement the Clean Air Plan's published promises to the region. Between that time and the issuance of the final proposed amendments, however, unprecedented state legislation was passed by means of arm-twisting, threats, and even ridicule. To be sure, the legislation—AB 398—is a serious infringement on the Air District's regulatory authority, and one that we believe must be rectified in a future legislative session.

That serious infringement notwithstanding, Air District Counsel is misrepresenting the plain language and the import of this legislation as a near-universal justification to abdicate critically significant pieces of its regulatory responsibility and authority with respect to GHGs.

Air District Counsel has guided staff to assert on page 2 of the staff report for these amendments that: "recent legislation has restricted the Air District's legal authority to impose regulatory limits on CO_2 from sources subject to the state's Cap and Trade program." Statements to this effect are repeatedly scattered throughout the report.

This is the relevant preemption language in AB 398, Sec. 12 that applies to Air Districts (emphasis added):

> Section 38594 of the Health and Safety Code is amended to read:
> (a) Except as provided in subdivision (b), nothing in this division shall limit or expand the existing authority of any district.
> (b) **A district shall not adopt or implement an emission reduction rule for carbon dioxide from stationary sources that are also subject to a market-based compliance mechanism** adopted by the state board pursuant to subdivision (c) of Section 38562.
> (c) **Nothing in this section affects in any manner the authority of a district to adopt or implement**, as applicable, any of the following:
> (1) **A rule, regulation, standard, or requirement** authorized or required for a district to adopt under Division 26 (commencing with Section 39000) **for purposes other than to reduce carbon dioxide from sources subject to a market-based compliance mechanism** adopted by the state board pursuant to subdivision (c) of Section 38562.

The New Source Review permitting program described in Rule 2-2, which is at the core of federal, state, and regional pollution regulation, is decidedly *not* an emission reduction rule. The purpose of pre-construction review and the issuance of operating permits, such as under federal New Source Review (NSR), federal

Prevention of Significant Deterioration (PSD), or non-federal NSR programs is to curb increases in emissions from new and modified sources by imposing Best Available Control Technology (BACT) so as to ***restrict emission increases*** from those sources, not to achieve "emission reductions" as such. The normal result of NSR and PSD permitting is to place a cap on previously nonexistent emissions (i.e., emissions from *new* sources, and *new* emissions from modified sources) through enforceable permit conditions. Emission reduction rules, on the other hand, are those commonly referred to as Best Available Retrofit Technology (BARCT) rules. Both the public at large and the Board of Directors, which is responsible for adopting the Air District's regulatory programs, deserve to have this important distinction made explicit, yet it appears that agency staff is obfuscating this clear legal and categorical division.

On its face, the plain language of Health and Safety Code (H&SC) §38594 clearly establishes its purpose as restricting Air District authority to ***reduce*** CO_2 emissions from sources subject to California's Cap and Trade program. There is no explicit prohibition in this new legislative language on an air district's authority to limit emissions from *new* sources, and *new* emissions from modified sources. **Indeed, in clear distinction with the language and the purpose of H&SC §38594, the goal and the purpose of NSR permitting is to allow the operation of a new or modified source that will emit pollution that *wasn't emitted before*, not to impose restrictions on—or require emission reductions from—already-existing sources that are, or will predictably become, subject to a market-based compliance mechanism intended to limit the emission of carbon dioxide from existing stationary sources.**

If the foregoing is true, or likely true, or even possibly true, then the public deserves better from this agency. BAAQMD is tasked with protecting the public's health from unnecessary air pollution, and it cannot shirk its public duty to control the emission of greenhouse gases from new sources—**which are not subject to the legislature's recent restriction on air district action to control carbon dioxide emissions from certain categories of existing sources.**

Rather, BAAQMD should fully incorporate the review of proposed *increases* in GHG emissions from proposed new or modified sources into its permit program. If, by taking such an action, BAAQMD is put in the position of testing the meaning and applicability of H&SC §38594, so be it. The public will never know what the preemption language of this statute really means unless the Air District asserts its proper authority. If a legal challenge on this one narrow point is brought, the courts have broad authority to review and make a final decision on the extent of the applicability of the new statutory language.

In this regard, the Board of Directors should note that the language of H&SC §38594 actually **allows** the Air District to include carbon dioxide in its NSR rule. Again, AB 398 clearly states that:

> (c) Nothing in this section affects in any manner the authority of a district to adopt or implement, as applicable, any of the following:
> (1) A rule, regulation, standard or requirement . . . for purposes other than to reduce carbon dioxide from sources subject to a market-based compliance mechanism adopted by the state board pursuant to subdivision (c) of Section 38562.

Because the District's NSR rule is *not* an "emission reduction" rule, but is, rather, a rule to prevent emission increases from new stationary sources, there can be no basis for Air District staff to convincingly argue that the District's NSR rule is somehow preempted from addressing ***increases*** in carbon dioxide emissions from new or modified sources. If the Air District's authority in this area and others is not tested, but is instead ceded without either due diligence or the necessary courage that a regulatory agency can and should manifest in protecting the interests of its constituents, then BAAQMD will have failed its constituents and will have effectively repudiated its own long-declared mission and oft-stated commitments to take necessary action to protect the global climate.

Given the deep gap between our GHG emissions and where they need to be, the immeasurable negative consequences that will arise if that gap is not addressed, and the clear distinction between the kind of "emission *reduction* rule" from *existing* sources that is prohibited by AB 398 and the role the Air District's permit program plays in limiting emissions *increases* from *new and modified* sources, it is indefensible for the Air District to take a pass on this key issue. Failing to apply sensible and feasible NSR requirements to curb *new* emissions of carbon dioxide from new or modified stationary sources will serve as the worst kind of irresponsible cowardice that a regulatory agency could demonstrate.

The Air District's NSR Program—Then & Now

In the late 1970's, the District's NSR program was essentially intended to assure nothing more than that a new source of air contaminants would not result in a violation of an applicable ambient air quality standard at ground level. In other words, the Air District's original NSR program was predicated on the notion that "dilution is the solution to pollution." A proposed new source (even a very large one) would be acceptable and could be permitted if simply employing a tall stack abetted by enough air flow to push the new emissions sufficiently high in the atmosphere. When faced with this substandard rule, the California Air Resources Board challenged the Air District's rule and ultimately persuaded the agency to adopt a version of the Model NSR Rule that ARB had initially developed for (and ultimately imposed on) the South Coast Air Quality Management District.

That ARB Model NSR Rule incorporated the notions that any emission increase above a certain threshold would be required to install BACT and that any emission increase above a higher threshold would have to be offset by emission reductions from existing sources at a ratio of greater than one-to-one. Only by the implementation of an NSR rule mandating the implementation of BACT by new sources and the provision of emission offsets for larger emission increases could the public be protected from significant increases in ambient air pollution, which—even if they were not directly responsible for causing an ground-level air quality standard violation—would significantly contribute to the deterioration of regional air quality.

ARB's concern was especially important in connection with the then-prevalent air quality violations of the ozone standard, because new sources did not emit ozone. Rather, their emissions of volatile organic compounds and oxides of nitrogen would cook in the sunlight and result in bad air quality (and ozone standard violations) 50 miles or more downwind, without there being any direct way at the time to track those violations back to the sources of the precursor emissions.

The problem with carbon dioxide is virtually identical to the problem 40 years ago, with BAAQMD's failure to cap emissions from new sources that could not be shown to directly cause an air quality standard violation, except that now the problem is global rather than merely regional. Capping new emissions of carbon dioxide is an essential element of our society's efforts to control climate change, and such caps do not constitute "emission reduction rules" in the classic sense. The purpose of the NSR rule since 40 years ago has been to prevent or minimize *increases* in emissions from new or modified sources; it is not to *reduce* emissions from existing sources. Indeed, these two aspects of air pollution control are complementary, but they are necessarily directed at different classes of sources and have different purposes and rationales.

Emission reduction rules are necessary to reduce existing, typically permitted levels of emissions from existing sources. For example, to move toward attainment of the ozone standard, the District adopted a broad range of rules directed at numerous specific source categories of the emissions of volatile organic compounds. The "emission reduction" rules specifically called out in H&SC §38594(b) are precisely the sorts of rules that the District adopted for many years to address emissions of volatile organic compounds from existing sources,

except that—in the case of carbon dioxide emissions from existing sources—ARB is engaged in implementing a market-based compliance mechanism (rather than a source category by source category set of command and control rules) that is intended to result in decreases in such emissions from existing sources.

Although NSR rules intended to limit emission *increases* from new or modified sources are a necessary complement to efforts to reduce emissions from existing sources, the purpose, effect, and methodology used in the implementation of NSR are entirely different from the manner in which emission reduction rules function. It is deceptive for the Air District to attempt to conflate the very different purposes, functions, and methodologies of NSR to those of traditional command and control emission reduction rules. Yet, by refusing to include increases in carbon dioxide emissions from new or modified sources in its revised NSR rule, BAAQMD is misleading the public by falsely analogizing its NSR program to its entirely separate efforts to develop source-category-specific emission reduction rules. Such deception should not be countenanced by the Board of Directors.

The need to regulate GHGs today is even more compelling than the reasons the Air District provided when it began to incorporate air toxic evaluation in its NSR program about 30 years ago. In this context, the process BAAQMD used at that time is instructive: Air toxics were regulated for 30 years simply by the inclusion of minimal language establishing a toxics policy, without an explicit standard or procedure set forth in the NSR rule. **The public and the Board need to understand the implications of this innovative action the Air District took in the 1980s, and the Board needs to be asking staff and itself why such leadership is not being employed toward the GHG pollutants that impact the planet's life-support systems with such comprehensive, destructive power.**

The Air District's Remaining Authority over GHGs

In 2013, the Air District Board of Directors voted for a Resolution Adopting a Greenhouse Gas Reduction Goal and Commitment to Develop a Regional Climate Protection Strategy (2013 Climate Resolution). The findings stated in the 2013 Climate Resolution made a profound case for urgent action and, in effect, laid the groundwork and justification for Air District action to regulate GHGs through programs *of its own design*, not mandated by federal or state requirements. Furthermore, the urgency of regulating GHG emissions established by the 2013 Climate Resolution supports the conclusion that the standard of maximum allowable increases in global temperature correlates with the massive emission reductions needed to achieve it.

While AB 398 removed the Air District's capacity to "adopt or implement an emission reduction rule for carbon dioxide from stationary sources that are also subject to" the state's cap-and-trade program, its authority over rampant GHG over-pollution in the Bay Area remains strong. Its responsibility to solve this problem remains weighty. Yet BAAQMD seems to have an unclear perspective on both its capacity for remaining action and the necessity of taking it.

We can think of GHG regulation by the Air District as four legs of a stool:

1. Reducing CO_2 from sources subject to the state's cap-and-trade program;
2. Preventing increases of CO_2 from sources subject to the state's cap-and-trade program;
3. Reducing other GHG pollutants from sources subject to the state's cap-and-trade program; and
4. Reducing all GHGs from sources that are not subject to the state's cap-and-trade program.

While AB 398 misguidedly cut off the first leg of the stool—an infringement on local pollution control that we believe must be repaired in a future legislative session, and a handicap toward effective implementation of important environmental justice legislation like AB 197—the stool is still left with three legs. Obviously, with only three legs left, BAAQMD's regulatory strategy on GHGs must rely even more heavily on those remaining

planks in order to meet its very steep—but critically necessary—climate targets. Yet the Air District is acting like the legislature took away the agency's stool entirely and that the regulators can just go home.

The Air District graph we included on page 2 of this letter makes crystal clear that regulators, to the contrary, need to step it up like never before. It's time for the Air District to get serious about the three-legged stool business. Additional to what we have covered previously in this letter, we suggest below some further actions that the agency must take in this area in order to avoid vacating its remaining responsibility and authority over out-of-control climate pollution. Many of these actions should be implemented in this revision of the Permits Regulation. If it must be delayed and reworked for that to occur, so be it. The public and the Board of Directors cannot let this rulemaking opportunity pass.

i. Non-attainment

The Air District's permit program currently addresses GHGs in the regulatory framework of the federal PSD (Prevention of Significant Deterioration) program. The usage of the PSD standard explicitly suggests that there is an allowable level that such GHG pollution may increase in the region. Yet the Air District's 2017 Clean Air Plan clearly shows that regional GHG emissions need to be reduced from about 85 MMT/year (in 2015) to about 15 MMT/year and lays out in detail a range of grim present and future impacts that such pollution is having and will have on public health in the region. Significant damages to public health and costs for infrastructure adaptation will be incurred even if this emission reduction goal is met.

It is clear, then, that incorporating GHGs into the PSD program, while imposed by EPA, is an inadequate framework for regulating these pollutants. The Air District has, in effect, made a reasonable case that GHGs should instead be regulated as non-attainment pollutants under NSR. The Air District has the statutory discretion to do so, even as it also incorporates the federal PSD backstop for GHGs. It also has the moral and scientific basis to take such action. Such a designation would make clear that we are grossly out of attainment with the GHG emission levels necessary for a two-thirds chance to hold climatic warming to 2°C and that the objective is to keep the problem from getting worse. A non-attainment approach would naturally lead the Air District to design a regulatory program that as a first step prohibits increases in GHG emissions as it also works toward achieving the necessary reductions, as described by the Clean Air Plan and as directed by the Board when it adopted the 2013 Climate Resolution.

Indeed, the Air District's action in 2013 establishes the logic of regarding GHGs as non-attainment pollutants, deserving of stringent trigger levels for permitting, and the imposition of BACT to both curb increases and propagate the use of the best control strategies as they evolve. State action has suggested a similar understanding of GHG emissions and what the allowable standard is. We already emit GHGs well over the standard needed to keep the rise in global temperature to below 2°C.

This agency should therefore take the appropriate corresponding action: namely, to impose BACT and offset requirements on proposed increases in carbon dioxide emissions that would trigger NSR thresholds.

Proposed Rules 2-1 and 2-2 do not adhere to Board and Air District commitments as expressed in both the 2013 Climate Resolution and the 2017 Clean Air Plan just adopted. If the Air District moves forward without adopting a "no net increase" approach despite being so wildly out of attainment with the implied GHG standard, it exposes a lack of seriousness about doing its part to protect the global climate, as commanded in the Air District's mission statement. Intellectual honesty requires the use of the non-attainment framework for GHG pollution, not the PSD standard.

ii. Reducing other GHG pollutants from sources subject to the state's cap-and-trade program

Air District staff acknowledge in their staff report on these rule amendments that GHGs other than carbon dioxide play an important role in regional emissions, yet neglect to move forward with the long-overdue task of integrating them into the permitting program for large sources without providing any sound argument.

Staff presented to the Climate Protection Committee on September 21st about its Basin-Wide Methane Strategy—an omnibus control measure from the 2017 Clean Air Plan—and has repeatedly highlighted the importance of black carbon and other super-GHGs. **Now is the time to include evaluation of GHGs into the standard permitting process for large sources, and there is no debate about GHGs other than CO_2.**

iii. Reducing all GHGs from sources that are not subject to the state's cap-and-trade program

Even given—for the sake of argument—the maximalist interpretation of AB 398 proffered by BAAQMD staff in their report on the proposed amendments to the Permits Regulation, the agency is still simply ignoring in this rulemaking the many small and medium-sized permitted sources that *do* emit GHGs but are *not* subject to the Cap and Trade program. No one believes these emissions to be affected by AB 398. **These small and medium-sized sources have cumulative impacts and cannot be overlooked.**

The Air District's Climate Protection Program dates back to 2005. In that time, the Air District has taken very little permit-related regulatory action on GHGs. It is long past time for the District to set a meaningful BACT threshold for GHG emissions. Setting this threshold will not marginally increase the number of permits the Air District must issue, and the consideration of GHGs in permit evaluations is not burdensome. By taking this approach, the Air District would be able to achieve cumulative reductions from small and medium-sized sources without an onerous permitting load.

Our GHG emissions are already far, far above what they need to be to prevent a range of legitimately catastrophic eventualities. In reality, setting a low BACT threshold for GHGs is a minor change to Air District business, as most permit applications are routine. Changes to BACT determinations evolve very slowly. That said, setting a low programmatic BACT threshold allows for the newest information to be incorporated when it becomes available.

Conclusion

Serious action by the Air District to address our GHG pollution crisis on the front end—i.e., through its permitting program—is long overdue. The Permits Regulation must be overhauled to provide a complete framework to limit GHG emission increases from new and modified sources. AB 398 provides no excuse at all for inaction on this matter. In addition, non-CO_2 GHG emissions and GHG emissions from non-cap-and-trade sources cannot be ignored and must be addressed.

The Air District must take this opportunity to step up its regulatory action, not dial it back. The Board of Directors must hold itself and its staff accountable to the cold, hard data in front of us all. Thank you so much for your attention on these important matters and for your continued service to the region.

Sincere regards, on behalf of 22,000 members of 350 Bay Area,

Jed Holtzman Senior Policy Analyst	Janet Stromberg Bay Climate Action Plan Lead	Larry Chaset Attorney at Law Sustainable Energy Futures

Other organizational signatories follow.

Zoë Cina-Sklar
Amazon Watch

Nancy Rieser
Crockett-Rodeo United to Defend the Environment

Gary Graham Hughes, Senior California Advocacy Campaigner
Friends of the Earth - US

Kathy Kerridge
Good Neighbor Steering Committee of Benicia

Pennie Opal Plant, Co-Founder
Idle No More SF Bay

Todd Snyder
Indivisible SF

Rev. Will McGarvey, Executive Director
Interfaith Council of Contra Costa County

Bob Harlow, Co-Leader, Environmental Working Group
Mill Valley Community Action Network

Steve Nadel
Sunflower Alliance

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