Western States Petroleum Association
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Bob Brown
Director, Bay Area Region

September 25, 2017

Mr. Greg Stone
Supervising Air Quality Engineer
Bay Area Air Quality Management District
375 Beale Street, Suite 600
San Francisco, CA 94105

via email at: **newrules@baaqmd.gov**

Re: Western States Petroleum Association Comments on Amendments to Regulation 2, Rule 1 and Regulation 2, Rule 2 Proposed by the Bay Area Air Quality Management District on August 23, 2017

Dear Mr. Stone:

The Western States Petroleum Association (WSPA) is a non-profit trade association representing twenty-six companies that explore for, produce, refine, transport and market petroleum, petroleum products, natural gas and other energy supplies in California, Arizona, Nevada, Oregon, and Washington. Our members in the Bay Area have operations and facilities regulated by the Bay Area Air Quality Management District (District).

In Attachment A, below, WSPA describes its legal and technical positions with respect to the amendments to Regulation 2, Rules 1 and 2 proposed by the District on August 23, 2017. WPSA also hereby incorporates by reference its prior comments on the Workshop Draft Amendments to Regulation 2, Rules 1 and 2, which were submitted to the District on June 26, 2017. We appreciate your consideration of WSPA's comments, and look forward to your responses.

Sincerely,

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ATTACHMENT A:
WSPA COMMENTS ON DRAFT AMENDMENTS TO RULES 2-1 AND 2-2

I. EXECUTIVE SUMMARY

WSPA supports the District's removal, in its August 23, 2017 drafts, of two proposed amendments that had appeared in previous versions of proposed amendments to Rules 2-1 and 2-2. First, the District is no longer proposing to add provisions to Rule 2-1 related to a refinery's crude slate. Second, the District is no longer proposing to lower the BACT threshold for GHG emissions in Rule 2-2 to 25,000 tpy. WSPA supports the District's decision to remove these two items from consideration. Indeed, the District's decision to eliminate these two provisions from consideration is compelled by law: the District lacks authority to regulate a refinery's crude slate, and recent legislative action preempts any attempt to lower the BACT threshold below the 75,000 tpy federal standard.

At the same time WSPA has a few continuing concerns with respect to the revisions proposed on August 23 and statements made in the District's accompanying Staff Report. First, the District alludes to using enforcement mechanisms to address a "significant crude slate change" at a refinery. But the District cannot enforce what it lacks the authority to regulate, and should revise the Staff Report to stay within its authority and avoid confusion by its enforcement staff. Second, AB 398 preempts all regulation of GHGs by the District, not just the regulation of CO_2. The preemption provisions in AB 398 were intended by the Legislature to prevent local air districts from interfering with the orderly implementation of the state-wide cap and trade program. The Air District should revise statements made in the Staff Report to the contrary and abide the will of the Legislature. Relatedly, the District is preempted by federal law from regulating certain interstate cargo carriers (marine vessels and trains) and should eliminate all provisions from Rule 2-2 that impose any requirements related to emissions from these cargo carriers.

In addition to the foregoing concerns, the District continues to violate the California Environmental Quality Act (CEQA) by segmenting its analysis of the suite of regulations that comprise the District's "Refinery Project." The District should undertake a comprehensive analysis under CEQA that encompasses Rules 2-1, 2-2, and the five additional rules recently adopted by the District that target refinery emissions, and additional rules under development. By continuing to segment its environmental analysis, the District is artificially minimizing the impacts of its rulemaking actions and depriving the public and regulated entities from a full and accurate accounting.

These and other issues are discussed more fully below.

II. COMMENTS ON RULE 2-1

WSPA supports the District's decision to remove crude slate provisions from the proposed amendments to Rule 2-1. The workshop version of Rule 2-1, as proposed by the District in early 2017, contained certain amendments to the District's new source review (NSR) program targeting a "significant crude slate change" at a petroleum refinery. In revisions to Rule 2-1 proposed on August 23, 2017, the District properly removed these crude slate provisions because, as explained in greater detail below, the earlier-

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proposed crude slate provisions are not supported by existing data and the District lacks authority to adopt them in the first place.[1]

As originally proposed, the District's revisions to Rule 2-1 would have attempted to impose NSR permitting requirements for any "significant crude slate change" at a petroleum refinery. But as explained by WSPA in its prior comments, the District lacks the authority to adopt such provisions, which are not necessary in any event given the lack of current evidence demonstrating a relationship between air emissions (which are regulated by the NSR program) and a refinery's crude slate (which is not regulated by the NSR program or any other requirement of the federal Clean Air Act or California law). In its Staff Report, the District acknowledges these issues, stating that the District has:

> [C]oncluded that the most appropriate path forward at this point is to defer action on the proposed crude slate provision in order to collect and assess more data enabling a better method for implementing the proposal. There are a number of important issues that need to be worked out, including issues such as how a "significant" crude slate change would be defined, the process and timing for obtaining District review and approval for such a change, and other important implementation issues. In particular, deferring final action at this stage will allow staff and stakeholders to review and evaluate additional information about the refineries' crude slates and how crude slate changes may relate to air emissions. . . . Taking the time for further evaluation will allow more data to be collected.

Bay Area Air Quality Management District, *Staff Report for Proposed Technical and Administrative Amendments to New source Review and Title V Programs*, at 24-25 (August, 2017) (hereinafter "August 2017 Staff Report"). Implicit in the District's statement is recognition of the fact that current data does not support a relationship between a refinery's crude slate and air emissions.

Given the lack of any demonstrated relationship between air emissions and a refinery's crude slate, along with the inability to determine what constitutes a "significant" change in crude slate for purposes of the NSR program, there is no demonstrated "necessity" for including crude slate provisions in the NSR program in general or Rule 2-1 in particular. And even if these barriers were removed, the District lacks authority to regulate a refinery's inputs or compel operational or physical changes that would "redefine" the source under the NSR program. The District's decision to remove its "significant crude slate change" language and provisions from Rule 2-1 is a correct and legally required course of action—and an action that WSPA supports.

While WSPA supports the District's decision to remove crude slate provisions from its proposed amendments to Rule 2-1, WSPA has serious concerns regarding statements the District has made regarding enforcement actions or initiatives based on a "significant crude slate change." In its August, 2017 Staff Report, the District indicates that it intends to enforce the very crude slate provisions that it has expressly *excluded* from its proposed amendments to Rule 2-1. These statements contradict the District's removal of crude slate provisions from Rule 2-1 and lack any legal basis. The District can only enforce validly adopted regulations. The District cannot use enforcement actions to regulate in areas where the District lacks the underlying legal authority to regulate in the first instance. Because the District lacks

[1] Under the California Health and Safety Code, prior to adopting a new or amended rule, the District must make six statutory findings: necessity; authority; clarity; consistency; nonduplication; and reference. Cal. Health & Safety Code § 40727.

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legal authority to regulate a refinery's crude slate, it cannot use crude slate changes – significant or otherwise – as the basis for investigations or enforcement against that refinery. WSPA strongly encourages the District to revise its Staff Report to avoid inconsistency and clearly state that with respect to all current regulations, no enforcement actions, investigations, or initiatives will be based on a refinery's crude slate.

1. <u>The District lacks authority and jurisdiction to regulate refinery inputs or feedstocks, including a refinery's crude slate.</u>

The District properly dropped its previously-proposed crude slate provisions as part of amendments to Rule 2-1 because it lacks authority to regulate a refinery's crude slate or other inputs. Under California law, the District has the authority to regulate air pollution, *i.e.*, emissions of air pollutants. Cal. Health & Safety Code § 40000. The District does not have the authority to regulate *inputs*—such as the specific types or attributes of crude oil blends that refineries process—and can regulate only the air *emissions* from a given facility. Because the previously-proposed crude slate provisions to Rule 2-1 would regulate a refinery's inputs (its crude slate and feedstocks), those provisions fall outside the District's authority and cannot lawfully be adopted by the District.[2]

Moreover, under the federal Clean Air Act, the EPA, and states cannot impose or even consider "controls" that would "redefine the source" when evaluating Best Available Control Technology (BACT) during the PSD/NSR permitting process. For example, courts have consistently rejected attempts to change power plants' fuel mixes through the NSR process (*i.e.*, by requiring more or less biomass, or a different kind of coal). *See, e.g.*, *Helping Hand Tools v. U.S. Environmental Protection Agency*, 848 F.3d 1185 (9th Cir. 2016); *Sierra Club v. EPA*, 499 F.3d 653, 655 (7th Cir. 2007) (requiring plant to accommodate shipments of low-sulfur coal from a more distant source would amount to requiring a redesign of the plant). As part of their basic design, refineries are designed to handle a specific range of crude blends, with the purpose of being able to produce certain end products through the facility's refining processes. Because the crude range is such an integral characteristic of a refinery's basic design and the products it makes, any attempt to impose a specific crude slate on a refinery would amount to a redefinition of the source—an outcome that is not allowed by the PSD/NSR program, EPA, or the courts. Without underlying legal authority to regulate crude slate changes, the District cannot adopt the type of crude slate provisions previously proposed as amendments to Rule 2-1, and the District was correct in its decision to remove these provisions from the amendments to Rule 2-1 it proposed on August 23, 2017.

2. <u>Crude slate provisions in the previously-proposed amendments to Rule 2-1 were not justified and failed to satisfy the H&S Code's "necessity" requirement.</u>

The District's initial proposal of crude slate NSR requirements in Rule 2-1 was premised only on generalized "concerns" regarding crude slate changes at refineries, rather than any particularized or documented relationship between such crude slate changes and air emissions. As explained in WSPA's

[2] Attempts to do so may also run afoul of the commerce clause of the U.S. Constitution, which prohibits certain state-level interference with interstate commerce. Because crude oil and other refinery feedstocks are in interstate commerce, any attempts to regulate in this area are subject to scrutiny under the commerce clause.

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previous comments, such generalized "concerns" cannot satisfy the District's obligation to justify the necessity of regulatory provisions aimed at a refinery's crude slate. [3]

Even if it had the underlying legal authority and jurisdiction to regulate in this area (which, as explained above, it does not), the District has not demonstrated that changes in the crude slate processed by a refinery increase refinery air emissions. In fact, the District is currently investigating that very premise with the data it is collecting under Rule 12-15's reporting requirements. The final Staff Report to Rule 12-15 explained that the requirement for refineries to provide the District with crude slate and non-crude feedstock information would "enable the Air District to determine whether there is a correlation between changes in crude slate and feedstock changes and increases in emissions" and that "determination of a correlation (or lack thereof) will help the Air District decide whether such changes should be addressed in future regulations." Final Staff Report for Rule 12-15 (April 2016), at 17.

The District correctly recognized this important issue in deciding to remove crude slate provisions from its proposed amendments to Rule 2-1. As the District points out:

> [D]eferring final action at this stage will allow staff and stakeholders to review and evaluate additional information about the refineries' crude slates and how crude slate changes may relate to air emissions. The Petroleum Refining Emissions Tracking Rule (Regulation 12, Rule 15) requires refineries to submit crude slate information to the District, but that requirement has only recently taken effect and the District has been receiving the information only for a short period of time. Taking the time for further evaluation will allow more data to be collected.

August 2017 Staff Report, at 25 (emphasis added). Given the lack of any demonstrated relationship between a refinery's crude slate and air emissions, the District cannot demonstrate that regulation of a refinery's crude slate is necessary to reduce air emissions.

The District also appears to recognize that a refinery's crude slate has a certain degree of "normal variability" that make it "difficult to determine how much of a change signals a 'significant' change in crude slate."[4] August 2017 Staff Report, at 25. The issue of significance is an important one, and one that the District's previous proposal did not adequately address.[5] *See generally* WSPA Comments, June 26, 2017.

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[3] WSPA and its members have repeatedly raised their concerns with the District's lack of justification and authority for regulating crude slate changes. WSPA incorporates those comments by reference here. *See* WSPA Comment Letter on Proposed Reg. 6-5, 8-18, 9-14, 11-10, 12-15, and 12-16 (Nov. 23, 2015); WSPA Comment Letter on Draft Project Description for Regulation 12, Rule 16 and Regulation 11, Rule 18 (September 9, 2016); WSPA Comment Letter on Proposed Reg. 12-16 and 11-18 (Nov. 29, 2016); WSPA Comment Letter on Proposed Reg. 12-16 and Draft EIR for Rules 12-16 and 11-18 (May 8, 2017); WSPA Comment Letter on Proposed Reg. 9-14 and 12-15 (Feb. 22, 2016); WSPA Comment Letter on Proposed Reg. 12-15 (Apr. 8, 2016); WSPA Comment Letter on Proposed Reg 13-1 (Apr. 21, 2017); WSPA Comment Letter on Proposed Reg. 12-16 and Draft EIR for Rules 12-16 and 11-18 (May 8, 2017) and the amended Rule 12-16 (June 12, 2017); WSPA Comment Letter on Workshop Drafts of Proposed Reg. 2-1 and 2-1 (June 26, 2017).

[4] The previously-proposed amendments to Rule 2-1 were not clearly written, as required by the California Health & Safety Code, particularly with respect to the procedure for requesting a "significant crude slate change" as an "alteration." That lack of clarity would have made the rules difficult to implement as a practical matter and run afoul of the H&S Code requirements to demonstrate clarity in rulemaking actions.

[5] To the extent that crude slate changes are significant enough to qualify as "alterations" or "modifications," they are already expressly regulated under the District's current NSR rules. In the event that a crude slate change is significant enough to

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Ultimately, WSPA believes that ongoing data collection and study efforts will affirm a lack of nexus between air emissions and a refinery's crude slate. Existing crude oil supplies on the market already provide a high degree of variability in crude slate composition, and the availability of "new" crude sources is not a new phenomenon in the context of the crude oil market. Refineries have for years been blending "traditional" and "new" crude oil sources to meet their design parameters. And yet, the District's emissions inventory continues to decline. The District has itself acknowledged on a number of occasions that existing ambient monitoring data and emissions inventories demonstrate that refinery emissions have consistently decreased over time and that air quality in the Bay Area has improved. *See, e.g.*, Staff Report to Rules 12-16 and 11-18 (April 2017 Version), at 14. Accordingly, because any changes refineries are currently making to the crude slates that they process do not appear to be correlated to increases in refinery emissions, regulation of a refinery's crude slate by the District is unwarranted and unnecessary.

3. <u>The District cannot use crude slate changes as the basis for NSR enforcement when it lacks the authority to regulate a refinery's crude slate in the first instance, and the District should correct contrary statements made in the August 2017 Staff Report.</u>

WSPA has serious concerns regarding statements made in the District's August, 2017 Staff Report with respect to the enforcement of NSR requirements. As explained above, WSPA supports the removal of crude slate provisions from the proposed amendments to Rule 2-1. However, it appears from the Staff Report that the District nonetheless intends to enforce the very crude slate provisions that is has expressly *excluded* from Rule 2-1. The District cannot enforce requirements that do not have any underlying basis in regulation, and any attempt to do so would constitute an impermissible end-run around the District's lack of justification and authority to adopt crude slate provisions in the first place.

In the Staff Report, the District states that:

> Air District staff will continue to use existing enforcement tools to focus on refinery crude slate changes to help detect and prevent any non-compliance with NSR requirements. Specifically, District staff will continue to review monthly crude slate reports providing information on the attributes of the crude that each refinery processes each month under Regulation 12-15-408. If District staff find significant changes in the crude attributes suggesting that the refinery has changed its crude slate in a significant way, and if there are indications that the refinery may have undertaken a modification in order to accommodate the change, District inspectors and engineering staff will conduct an investigation to determine whether any violations of any NSR permitting requirements have occurred.

While WSPA does not dispute the ability and obligation of the District to enforce its validly-adopted regulations, as explained above the District *has no authority* to enforce NSR requirements with respect to crude slate changes. Moreover, the District has not demonstrated any relationship between crude slate changes and air emissions—the very reason the District has removed crude slate provisions from its proposed amendments to Rule 2-1. And, finally, the District's use of the term "significant" in the

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potentially affect air emissions, it would already be regulated as a "modification" or "alteration." This fails to satisfy H&S Code provisions requiring a demonstration of non-duplication.

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enforcement context suffers from the same lack of clarity and precision that it does in the regulatory context, as explained above and in WSPA's June 26 comments.

The District's statements regarding enforcement are entirely inconsistent with its statements in the regulatory context. Worse, they lack a valid legal foundation and undermine the District's ongoing efforts to study the relationship (if any) between a refinery's crude slate and air emissions. Unless and until the District demonstrates a causal relationship between a significant crude slate change and air emissions, and a legal basis for regulating crude slate changes, there is no need and no basis for either regulation of a refinery's crude slate or enforcement based on a significant crude slate change.

WSPA is concerned that, given the above statements in the Staff Report, District enforcement staff may end up, in practice, attempting to enforce the very type of NSR provision that the District has expressly removed from consideration in its proposed amendments to Rule 2-1. To avoid inconsistent treatment by regulatory and enforcement staff, as well as to stay within the bounds of what the District may legally enforce (*i.e.*, validly adopted regulatory requirements with underlying legal authority), WSPA urges the District to remove its statements in the Staff Report related to NSR enforcement based on crude slate changes and clarify that, with respect to the current revisions to Rule 2-1, no NSR enforcement can or will occur based on crude slate changes alone.

III. **COMMENTS ON RULE 2-2**

The workshop version of Rule 2-2, as proposed by the District in early 2017, contained amendments that would have lowered the triggering threshold for Best Available Control Technology (BACT), for greenhouse gas (GHG) emissions, from 75,000 tpy (CO_2e) to 25,000 tpy (CO_2e). WSPA supports the District's decision to revert to the proper 75,000 tpy threshold. The previously-proposed change was not necessary or justified, was inconsistent with federal requirements, and failed to meet H&S Code requirements to justify the necessity of regulatory actions. *See* Cal. Health & Safety Code § 40727. Moreover, it was recently preempted by an act of the California Legislature.

1. The District correctly eliminated consideration of lower BACT thresholds because it lacks the authority to adopt such amendments to Rule 2-2.

The federal BACT threshold for GHG emissions is 75,000 tpy, and EPA has criticized 30,000 tpy CO_2e permitting thresholds as too stringent for the federal NSR program. The District's initial proposal to lower its BACT threshold to 25,000 tpy was contrary to and inconsistent with the federal program and not based on any evidence that lowering the threshold would actually have a meaningful impact on GHG emissions.

Importantly, the California Legislature's recent enactment of AB 398 also operates to bar the District's actions. Section 38594(b) of AB 398 expressly preempts a local air district from adopting or implementing "an emission reduction rule for carbon dioxide from stationary sources" if that source is already subject to California's cap-and-trade program (AB 32). The District correctly recognized the broad preemptive effect of this provision in its August 2017 Staff Report, observing that:

> the California Legislature adopted AB 398, which added a new provision to the Health and Safety Code prohibiting the District from adopting any regulation to control CO2

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> emissions from any sources subject to California's cap-and-trade regulations. The legislation amends Health & Safety Code section 38594 to state that "[a] district shall not adopt or implement an emission reduction rule for carbon dioxide from stationary sources that are also subject to [cap-and-trade]." This language effectively prohibits the District from moving forward and adopting the reduced BACT threshold for greenhouse gases that was proposed at the public workshop stage, since nearly all stationary sources with emissions over 25,000 tpy that could be subject to NSR permitting are subject to the cap-and-trade regulations, and because the bulk of their greenhouse gas emissions are CO2.

August 2017 Staff Report, at 26 (emphasis added). Following the enactment of AB 398, the District correctly determined that it was required to eliminate its proposal to reduce the BACT threshold to 25,000 tpy. WSPA agrees that AB 398 preempts the District's efforts to lower the permitting threshold below the 75,000 tpy level established by EPA under the federal Clean Air Act.

2. AB 398 preempts all GHG regulation by the District for sources covered by California's cap and trade program.

When it adopted AB 398, the Legislature included preemption language aimed at the District's regulation of "carbon dioxide" when the source of those emissions is already covered by the cap and trade program. It is plain that the Legislature intended to preempt such actions to prevent interference with and undermining of the existing state-wide program. And given the context, it is also clear that the Legislature intended to preempt regulation of non-CO_2 GHGs when such regulation would interfere with California's cap and trade program.

While admitting that AB 398 (i) preempts the District "from adopting any regulation to control CO2 emissions," and (ii) "prohibits the District from moving forward and adopting the reduced BACT threshold for greenhouse gases", the District incorrectly asserts that AB 398 does not interfere with or preempt its ability to regulate non-CO_2 GHGs. August 2017 Staff Report, at 26-27. WSPA disagrees.

AB 32, AB 398, and California's cap and trade program are all concerned with GHG emissions in general, not just CO_2 emissions. The underlying intent of the preemption provisions in AB 398 is to prevent local air districts from interfering with and undermining the broader, state-level (and now international) GHG emissions reduction program. The structure of the programs, and their origins, reinforce this point.

AB 32 and the California cap and trade program do not just regulate CO_2 emissions, but encompass a well-mixed group of seven GHGs that includes:

1. Carbon dioxide (CO_2)
2. Methane (CH_4)
3. Nitrous oxide (N_2O)
4. Hydrofluorocarbons (HFCs)
5. Perfluorocarbons (PFCs)
6. Sulfur hexafluoride (SF_6)
7. Nitrogen trifluoride (NF_3)

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See H&S Code § 95802(a)(171) (defining GHGs to include the above gasses). When adopting AB 32, the California Legislature established an economy-wide regulatory scheme for GHG emissions *in general*, not just CO_2 emissions. And when enacting AB 398, the Legislature intended to preempt local air district regulations that would interfere with the orderly implementation of AB 32 and the state-wide cap and trade program.

As the District admits, AB 398 was "developed under Control Measure SS17," which in turn includes the six of the foregoing GHGs (it excludes NF_3). Similarly, EPA and federal Clean Air Act regulations consistently target the same group of six "well mixed" greenhouse gases and treat them as a single "pollutant" for regulatory purposes. *See, e.g.*, EPA, *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66496, at 66497 (Dec. 15, 2009) (defining GHGs to include "the mix of six long-lived and directly-emitted greenhouse gases: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6)."). Both EPA and CARB have consistently treated the above seven (or six, in the case of EPA) gasses as a single air pollutant and regulate them in a unitary fashion. For example, both EPA and the cap and trade program convert emissions of non-CO_2 emissions into a "CO_2 equivalent" (or CO_2e) using conversion factors based on the warming potential of each gas. For example, methane has a greater greenhouse effect than CO_2, such that each ton of methane emissions equals 25 tons of CO_2 emissions for accounting and compliance purposes.[6] These mathematical conversions allow consistent accounting and treatment of all GHG emissions as a single common pollutant (CO_2e) across a given regulatory program, but are not intended to eliminate or ignore non-CO_2 emissions.

This context—in which all GHG emissions are reduced to a single, common CO_2–based metric—underscores the interrelated nature of GHGs regulated by CARB and the cap and trade program. Combined with the underlying purpose of the preemption clause in AB 398—to prevent interference with the cap and trade program—it is clear that AB 398 preempts <u>all</u> District action with respect to any GHG regulated by AB 32 and the cap and trade program—not just CO_2, as the District asserts in the Staff Report.

3. <u>The District lacks authority to regulate cargo carrier emissions and cannot compel refineries to do so by proxy.</u>

Proposed provisions in Rule 2-2 that would require refineries to provide cargo carrier emissions are preempted by federal law. Federal law can preempt state or local action expressly, by occupying the field, or when state or local action would conflict with the federal law. Here, federal law preempts any state or local regulation of ships and trains, and the District cannot compel refineries to regulate by proxy when the District itself lacks authority to regulate.

The Interstate Commerce Commission Termination Act (ICCTA) includes an express preemption clause that grants the federal Surface Transportation Board (STB) "exclusive" jurisdiction over "transportation by rail carriers" and the "operation" of rail "facilities, even if the tracks are located, or intended to be located, entirely in one State." (49 U.S.C. § 10501(b)(1)-(2).) The STB's exclusive jurisdiction over rail carriers and related operations is "exclusive and preempt the remedies provided under Federal or State

[6] CARB and regulated entities in California calculate carbon dioxide equivalent values using the IPCC's Global Warming Potential values, available at https://www.arb.ca.gov/cc/inventory/background/gwp.htm#transition.

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law." (49 U.S.C. § 10501(b).) This plain Congressional preemption of state and local laws was affirmed by the Ninth Circuit, which held that the "ICCTA 'preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation.'" (*Assn. of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.* (9th Cir. 2010) 622 F.3d 1094, 1098 (internal citation omitted).) In *Assn. of Am. Railroads* the Ninth Circuit considered whether three rules adopted by the South Coast Air Quality Management District ran afoul of the ICCTA. (*Id.* at 1096-97.) One of the rules at issue imposed emissions limits on idling trains, while the other two rules imposed various related "reporting requirements" on railyard operators. (*Id.* at 1096.) The Ninth Circuit held that the ICCTA preempted the air district's regulations because they are aimed "directly [at] railroad activity, requiring the railroads to reduce emissions and to provide . . . specific reports on their emissions and inventory." (*Id.* at 1098.)

The District also lacks authority to regulate emissions or require reporting from marine vessels. Marine vessels are regulated by Section 209(e)(2) of the federal Clean Air Act, which requires California to obtain authorization from the EPA in advance of adopting any "standards and other requirements relating to the control of emissions" from marine vessels. (42 U.S.C. § 7543(e)(2)(A).) This is a special status conferred on California by the Clean Air Act; no other state is given a commensurate ability (nor are local air districts), and Clean Air Act Section 209 contains additional express preemption provisions that underscore Congressional intent to preempt a wide range of state action aimed at mobile sources except in defined, narrow circumstances—and then only with EPA's permission. (*See generally* 42 U.S.C. § 7543.) When ARB adopted marine vessel emissions standards without seeking EPA authorization, the Ninth Circuit held that its actions were preempted and barred by Section 209 of the Clean Air Act. (*Pacific Merchant Shipping Assn. v. Goldstene* (9th Cir. 2008) 517 F.3d 1108.) No such authorization was sought here, and the District lacks any independent authority to regulate marine vessel emissions.

In short, any regulation adopted by the District to regulate cargo carriers at refineries would be preempted by federal law and facially invalid. To the extent they purport to impose any regulatory requirements on refineries, the District should eliminate the "to and fro" emissions offset requirements for cargo carriers from Rule 2-2.

4. <u>The District should reconsider certain proposed revisions and other aspects of Rule 2-2.</u>

Offsetting provisions

As an additional matter—if it does elect to retain cargo carrier provisions, notwithstanding an apparent lack of authority to do so—the District should clarify and improve emissions offset provisions contained in Rule 2-2. Most importantly, the District should <u>not</u> remove the language in the current version of Section 2-2-412 providing that the District will make up any shortfall in emission reduction credits by providing credits from the Small Facility Banking Account or by obtaining the credits itself. The District is legally obligated to review and approve the required offsets obtained for any new or modified source at the time of permitting. The District is further required to submit by March 1 of every year a demonstration that those credits are valid and sufficient. If the District fails to submit such a demonstration, that failure falls on the District, not on the individual facilities that obtained the required offsets, submitted them, obtained the District's approval, and have been operating in good faith based on that approval.

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Further, it is unclear how the District proposes to implement the adjustment process proposed in Section 2-2-412. The proposed rule states that if there is an offsets shortfall situation for a pollutant, the District will "adjust the offsets submitted for that pollutant in connection with any subsequent permitting of a new 'major stationary source' as defined in 40 C.F.R. section 51.165(a)(1)(iv) or 'major modification' as defined in 40 C.F.R. section 51.165(a)(1)(v) to the extent that any of the developments listed in subsections 412.1 through 412.3 have occurred between the time the offset credit was generated and the time the offset credit is used." This would suggest that the District intends to require extra offsets from the next source that is permitted. However, the Workshop Draft explains that "if there is a shortfall situation, then the APCO will apply a surplus adjustment at the time any offsets are used, until such time as the shortfall is remedied[,]" which implies that the adjustment will relate back to the original offsets submitted by the originally permitted source. Workshop Draft, at 31. The District needs to clarify how it expects for this process to be implemented.

Emissions estimates and crediting

If the District requires the inflation of estimates of actual emissions (e.g., for purposes of assessing fees to facilities, conducting health risk assessments, etc.), then those same, inflated estimates should be used for assessing the amount of credit given to the refinery if it were to reduce those emissions. WSPA made this comment previously. See WSPA's June 26 comments on Regulations 2-1 and 2-2, at p. 11. In response, the District stated that this would be the case and that "the best available information on a source's actual emissions during the relevant period should be used"; however, the District's August 23 revisions to Rule 2-2 do not contain appropriate language to ensure that outcome.

Reductions from inflated emissions estimates do not meet the requirement of being "real" as required by the proposed language for 2-2-605.1. To address this issue and ensure that both emissions "inflation" and emissions credits are treated equally, WSPA asks the District to add a new section, 2-2-605.3, as follows:

> "Calculations of emissions credits should be based on the same emission calculation procedures that the District has used to assess fees to the source. For refineries, calculations of emissions credits are also allowed to be based on the same emission calculation procedures that were used for the most recent emissions inventory submittal approved by the District under Regulation 12 Rule 15, Section 12-15-404.4."

Fugitive Emissions

WSPA previously has pointed out that District staff have increased estimates of fugitive emissions dramatically. The joint guidelines developed by air districts and ARB are being ignored; we see this in the statement that components handling heavy liquids "are not included in component counts used for the quantification of fugitive emissions"[7]. In addition, staff is assigning very high emissions to those same components based on factors from a study published in 1980[8] which are demonstrably different from more recent data that have been collected at Bay Area refineries. The District should correct these errors

[7] CAPCOA and CARB, "California Implementation Guidelines for Estimating Mass Emissions of Fugitive Hydrocarbon Leaks at Petroleum Facilities", February 1999, p. 23.
[8] BAAQMD, "Petroleum Refinery Emissions Inventory Guidelines", draft, May 2017, Section 3.2, Table 3.2-1 (the table of factors referred to in Note 3 is from an EPA study published in 1980).

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by adhering to joint guidelines and using appropriate emissions factors, not inflated estimates from a 1980 study that does not accurately reflect emissions from modern refinery facilities.

IV. COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The California Environmental Quality Act requires the District to consider the whole of the action; both direct and indirect environmental impacts from the entire project. Public Resources Code, § 21000 *et seq.* CEQA is further implemented by the CEQA Guidelines, Title 14, California Code of Regulations, § 15000 *et seq.* Rules 2-1 and 2-2 are being considered for environmental review. The District should prepare an EIR that will also review and compare the cumulative impacts of these rules with the recently adopted and planned rules which are part of a suite of regulations identified by the District as the Petroleum Refinery Emissions Reduction Strategy. The combined suite of regulations is part of a larger plan to reduce purported refinery emissions in the Bay Area by at least 20% within just a few years.

As discussed above, pursuant to Rule 12-15's crude slate reporting requirements, the District is currently investigating whether changes in the crude slate processed by refineries increase emissions. The District cross-references this data collection in the August 2017 Staff Report. Meanwhile, Rule 12-15 is also clearly linked to the District's rulemaking efforts for Rules 12-16, 11-18 and 13-1, all of which are in some way connected to the "concerns" that the District has expressed with respect to crude slate changes. In fact, Rules 12-15 and 12-16 were originally reviewed together in an EIR that was abandoned by the District. It is clear that all of these rules are designed to be implemented together toward the same 20% reduction goal and, therefore, should be analyzed together to assess individual and cumulative environmental impacts.

CEQA prohibits "segmenting" projects to create the appearance of a lesser degree of impact. To date, the District has consistently segmented and limited its analyses to individual rules, excluding consideration of the rules it has recently adopted as part of the "Refinery Strategy" (Rules 6-5, 8-18, 11-10, 12-15 and 9-14) and the rules currently under development (Rule 12-16, 13-1, Reg. 2-1, Reg. 2-2) pursuant to this same strategy. WSPA has previously commented upon these segmenting and piecemeal issues, and WSPA incorporates those comments by reference here.[9] Without a true analysis of the whole project, it is impossible to quantify and understand the magnitude of the impact the adopted and proposed changes will have on the environment.

The District cannot piecemeal the analysis of environmental impacts from the Petroleum Refinery Emissions Reduction project that are clearly derived to work toward the common goal of a 20% reduction target. Furthermore, the District must ensure that its analysis and findings are based upon creditable substantive evidence, that a reasonable range of alternatives are considered, that the project decisions

[9] *See* WSPA Comment Letter on Proposed Reg. 6-5, 8-18, 9-14, 11-10, 12-15, and 12-16 (Nov. 23, 2015); Marne S. Sussman (Pillsbury Winthrop Shaw Pittman LLP), letter to Honorable Chair Mar, and Members of the Board of Directors, Bay Area Air Quality Management District, "Re: Legal Issues Pertaining to Refinery Emission Cap Option for Proposed Regulation 12-16" (July 19, 2016); WSPA Comment Letter on Draft Project Description for Regulation 12, Rule 16 and Regulation 11, Rule 18 (September 9, 2016); WSPA Comment Letter on Proposed Reg. 12-16 and 11-18 (Nov. 29, 2016); WSPA Comment Letter on Proposed Reg. 12-16 and Draft EIR for Rules 12-16 and 11-18 (May 8, 2017); WSPA Comment Letter on Proposed Reg. 9-14 and 12-15 (Feb. 22, 2016); WSPA Comment Letter on Proposed Reg. 12-15 (Apr. 8, 2016); WSPA Comment Letter on Proposed Reg 13-1 (Apr. 21, 2017); WSPA Comment Letter on Proposed Reg. 12-16 and Draft EIR for Rules 12-16 and 11-18 (May 8, 2017) and the amended Rule 12-16 (June 12, 2017).

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meet the purpose and need, significant impacts are avoided or mitigated and that the whole of the action is identified and analyzed. Lastly, the District must ensure that the definitions for terms presented in Rules 12-15, 12-16, 13-1, 2-1 and 2-2 are consistent. If a definition is in fact modified, then the District needs to explain why the modification is necessary and why that modification does not apply in other refinery related rules. In conclusion, the District should not adopt the mitigated declaration and should properly comply with CEQA.

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