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October 10, 2006

VIA ELECTRONIC AND U.S. MAIL

Ms. Catherine Witherspoon
Executive Officer
California Air Resources Board
P.O. Box 2815
Sacramento, CA 95812

RE: Petition for public hearing on revisions to San Joaquin Valley Air Pollution
Control District new source review rule (Rule 2201)

Dear Ms. Witherspoon:

On September 21, 2006, the Governing Board of the San Joaquin Valley Unified Air Pollution Control District ("District") adopted revisions to the District's new source review rule (Rule 2201) adding a new exemption for agricultural sources to the rule's offset requirement. *See* District Rule 2201 section 4.6.9. This relaxation of the rule's offset requirements is in plain violation of Health and Safety Code § 42504(a). State law outlines procedural requirements in section 42504 of the Health and Safety Code whereby the state air resources board ("ARB") is required to evaluate revised or amended district new source review rules. This letter describes the illegal relaxation to the District's Rule 2201 and formally requests a public hearing under Health and Safety Code § 42504 to consider the reduction in stringency entailed by these revisions.

The September 21, 2006 Revision to Rule 2201 Violates Health and Safety Code § 42504(a)

Section 42504(a) provides flatly, "No air quality management district or air pollution control district may amend or revise its new source review rules or regulations to be less stringent than those that existed on December 30, 2002." Cal. Health & Safety Code § 42504(a). The law specifies that, "For purposes of this chapter, each district's 'existing new source review program' is comprised of those new source review rules and regulations . . . that have been adopted by the district governing board on or prior to December 30, 2002, that have been submitted to the U.S. Environmental Protection Agency by the state board for inclusion in the state implementation plan and are pending approval or have been approved by the U.S. Environmental Protection Agency." Cal. Health & Safety Code § 42505.

The District's new source review rule as it "existed" on December 30, 2002 did not include any exemption for agricultural sources. The District, in response to the U.S. Environmental Protection Agency's ("EPA") threat to impose federal sanctions under the Clean Air Act,

removed the new source review exemption for agricultural sources on December 19, 2002. *See* 68 Fed. Reg. 7330, 7331 (Feb. 13, 2003). ARB quickly reviewed these amendments and on December 23, 2002, submitted the revised rule for EPA approval. *Id.* EPA found the submittal to be complete on December 30, 2002. *Id.* Thus, there can be no dispute that the “existing new source review program” as defined in Health and Safety Code § 42505 did not include any exemption from the offset or other requirements of Rule 2201.

Likewise, there can be no dispute that the revisions adopted on September 21, 2006 make the District’s rules less stringent than those that existed on December 30, 2002. As ARB has explained, relaxations of district rule offset requirements are the type of relaxations prohibited by Health and Safety Code § 42504(a). *See* “California Air Resources Board Guidance, New Source Review and Senate Bill 288” (Aug. 2004, as amended April 2006) (“SB 288 Guidance”) (listing as an example of the kind of relaxations otherwise prohibited by section 42504(a), “Broadening the scope of exemptions from . . . offsets . . .”).

We raised these obvious legal problems to the District as comments on the draft rule. The District’s incredible response was that notwithstanding the language of the District’s rule as it existed on December 30, 2002, agricultural sources were not subject to offset requirements because state law at that time continued to include a permitting exemption for agricultural sources. Setting aside the audacity of the District’s attempt to hide behind a law that EPA and the federal courts had concluded violated the federal Clean Air Act, the District’s argument has no basis in the text of the Health and Safety Code. The plain language of sections 42504(a) and 42505 refers to the “*district’s*” rules and regulations and the rules and regulations “adopted by the *district governing board*.” It does not look for a comparison to state law; nor does it ask for an analysis of how the District was or was not implementing its adopted rules. The District makes no attempt to square its conclusion with the plain language of sections 42504(a) or 42505 or to claim that this language is somehow ambiguous – neither of which would be defensible claims in any event. The rule adopted by the District’s governing board on September 21, 2006 is less stringent than the rule adopted by the governing board on December 19, 2002. This is the end of the analysis under Health and Safety Code § 42504(a).

The September 21, 2006 Relaxations to Rule 2201 Are Not Otherwise Allowed Under Health and Safety Code § 42504(d)

Notwithstanding the broad anti-backsliding prohibition of section 42504(a), certain relaxations may be allowed in a limited number of situations. Cal. Health & Safety Code § 42504(d). Under section 42504(d), “a district may amend or revise a rule or regulation if [1] a district board, at the time the amendments or revisions are adopted, makes its decision based on substantial evidence in the record, [2] the amendments or revisions are submitted to and approved by the state board after a public hearing, and [3] each of the . . . conditions [in section 42504(d)(1) through (4)] is met . . .” Cal. Health & Safety Code § 42504(d). The

conditions outlined in section 42504(d)(1) provide a narrow set of justifications for revising the district new source review requirements. These include:

- (1) Replacing an existing rule that causes a risk to public health;
- (2) Replacing an existing rule that has been found unworkable due to engineering or other technical problems;
- (3) Replacing an existing rule that causes substantial hardship to a business, industry or category of sources;
- (4) Temporarily replacing a requirement in order to respond to an emergency; or
- (5) Replacing a rule in an area that is attaining the national ambient air quality standards if the change will not impair or impede the ability of the area to maintain these standards.

Only in these limited circumstances can a district change a provision of its local new source review rules to be less stringent than the provision as it existed on December 30, 2002.

Because the District argues that the changes to Rule 2201 are not relaxations, the District makes no attempt to justify the relaxations based on the criteria in section 42504(d), nor could it. The only justification offered by the District is that this revision is compelled by Health and Safety Code § 42301.18(c), added by Senate Bill 700 (Florez) in 2003. Section 42301.18(c) provides:

A district may not require an agricultural source to obtain emissions offsets for criteria pollutants for that source if emission reductions from that source would not meet the criteria for real, permanent, quantifiable, and enforceable emission reductions.

The District claims that “Because there are no criteria for verifying that offsets generated by agricultural sources are permanent, quantifiable and surplus,¹ the District does not allow such sources to generate offsets at this time. Thus, under SB 700, the District is prohibited from requiring offsets for these sources.” Draft Staff Report: Rules 2020 and 2201, Attachment A, at 2 (Aug. 17, 2006).

The District’s analysis of the plain language of the Health and Safety Code is again painfully flawed. Section 42301.18(c) does not ask whether or not the District has “criteria” for verifying offsets. The “criteria” for determining whether emission reductions are permanent, quantifiable and enforceable already exist in the law for all air pollution sources and are well understood. What the District lacks is not the “criteria” but a regulatory protocol to

¹ We assume the District meant to include “enforceable” instead of “surplus” to match the language of section 42301.18(c).

streamline assessments and verification of whether these longstanding criteria are met. Section 42301.18(c), however, does not require such protocols.²

The question in section 42301.18(c) is whether emission reductions from agricultural sources satisfy the real, permanent, quantifiable, and enforceable criteria in order to be creditable. The District has clearly already answered this question in the affirmative by seeking state implementation plan approval for its Agricultural Conservation Management Practices Program (Rule 4550) and its Confined Animal Facilities Rule (Rule 4570). In order to receive credit in a state implementation plan, the reductions must be real, quantifiable, permanent, and enforceable. *See, e.g.*, Clean Air Act § 110(a)(2) (requirements for emission limitations); *see also* 40 CFR Part 51, App V (completeness criteria for state implementation plan submittals). The District cannot hide behind the fact that it has yet to adopt a rule expressly allowing offsets in order to claim that these emission reductions do not meet the generic criteria identified in section 42301.18(c). The Health and Safety Code does not say the District must “allow” these sources to generate offsets; it only asks whether emission reductions meet the specified criteria. The District cannot deny that these criteria are met without admitting that its rules are defective.

Having refused to admit that the rule change is a relaxation under Health and Safety Code § 42504(a) and, therefore, having ignored the circumstances allowing for relaxations under Health and Safety Code § 42504(d), the District has given ARB no option but to reject these rule revisions. The state board should disapprove these changes to Rule 2201 in accordance with the procedures outlined below.

Required State Action

SB 288 outlines two important roles for the state board in overseeing changes to district new source review requirements. Both, by necessity, require the state board to evaluate and make findings on the stringency of changes to district new source review rules. Section 42504(a) provides, “If the state board finds, after a public hearing, that a district’s rules or regulations are not equivalent to or more stringent than the rules or regulations that existed on December 30, 2002, the state board shall promptly adopt for that district rules or regulations that may be necessary to establish equivalency, consistent with subdivision (b).” Cal. Health & Safety Code § 42504(a). This section is intended to cover inadvertent relaxations resulting from district changes to the new source review regulations and allows for the state board to fix these problems. *See* SB 288 Guidance at 5. By contrast, section 42504(d) covers deliberate

² The District refers to implementation guidance issued by the California Air Pollution Control Officers Association that concluded offsets will not be required for agricultural sources “until the local district has adopted the needed regulations (to allow banking of ag [sic] reductions), and EPA has approved those regulations and incorporated them into the SIP.” Draft Staff Report: Rules 2020 and 2201, Attachment B, at 4 (Aug. 17, 2006) (quoting guidance without citation). This conclusion, of course, is of no legal weight and has no basis in the statute. There is no requirement for such banking regulations, let alone approval by EPA. While these rules would certainly be beneficial, delays in adopting such rules cannot be used to avoid requiring offsets from agricultural sources.

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relaxations adopted by a district and calls on the state board only to approve or disapprove the changes. Here, the state board must disapprove the September 21, 2006 changes to Rule 2201.

The state board should hold a public hearing in accordance with Health and Safety Code §§ 42504(a) and (d) promptly upon receipt of the September 21, 2006 revisions to Rule 2201. In calling for the public hearing, the state board should propose to find that the changes to section 4.6 of Rule 2201 constitute a relaxation of the District's new source review regulations as they existed on December 30, 2002 as prohibited by Health and Safety Code § 42504(a), and that such relaxation must be disapproved because it fails to meet the criteria provided in Health and Safety Code § 42504(d).

Thank you for your attention to this important matter. We look forward to your prompt action. If you have any questions, please do not hesitate to call me at (510) 550-6777.

Sincerely,



Paul Cort
Staff Attorney

Cc: Tom Jennings, Chief Counsel, ARB
Seyed Sadredin, Air Pollution Control Officer, SJVUAPCD
Deborah Jordan, Air Division Director, U.S. EPA