



**Linda S. Adams**  
Secretary for  
Environmental Protection

# Air Resources Board

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**Arnold Schwarzenegger**  
Governor

May 30, 2007

Brent Newell  
Center on Race, Poverty and the Environment  
450 Geary Street, Suite 500  
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Dear Mr. Newell:

The Office of Legal Affairs of the Air Resources Board (ARB or Board) has completed its review of your petition, dated October 18, 2006, requesting ARB to conduct a public hearing to review September 21, 2006 amendments adopted by the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD or District) to its Rules 2020 ("Exemptions") and 2201 ("New and Modified Stationary Source Review Rule." Your Petition asserts that two elements of the amendments constitute impermissible weakenings of the District's new source review (NSR) rule. Amendments to NSR rules that make them less stringent than the rule as it existed on December 30, 2002, are generally prohibited by Senate Bill 288 (Stats 2003 ch 476, Sher), the Protect California Air Act of 2003, which enacted Health and Safety Code (HSC) sections 42500-42507. We have also considered your letter of December 21, 2006, in which you offer your interpretation of provisions of SB 288 and SB 700 (Stats 2003 ch 479, Flores)

As enacted by SB 288, HSC section 42504(a) establishes a mechanism under which ARB may conduct a hearing to review whether a district's amendments to its NSR rule meet SB 288 criteria. There are no provisions for petitions requesting ARB to conduct a HSC section 42504(a) hearing to review a district's NSR rule amendments. As discussed below, I have concluded that the challenged amendments do not violate SB 288 as a matter of law and therefore do not trigger a need for an ARB hearing. If such a hearing were to be conducted, based on the information we have received I would advise the Board that as a matter of law the challenged amendments do not weaken the District's NSR rule. Nevertheless, if you wish we are prepared in this particular instance to schedule a hearing by our Board at which you could present the basis for your position that the Board should find that adoption of the amendments violated SB 288.

As you know, SB 700 was enacted both to remove the exemption from permit requirements for agricultural sources of air pollution and to impose numerous substantive and procedural control requirements on agricultural sources and air

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pollution control agencies. The bill became effective January 1, 2004 and offers many opportunities for interpretation of its provisions. SB 288 was enacted the same day as SB 700 and was chaptered first. It is important to note that public agencies may exercise only those powers given to them by law. (See *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105; *Sierra Club v. Cal. Coastal Com.* (2005) 34 Cal.4th 839, and 3 Sutherland Statutory Construction sec. 65:2 (6th ed.)). Thus if the Legislature enacts a law that has the effect of directly prohibiting a district from taking certain actions under its NSR rule, those prohibitions apply to the district whether or not the district has amended its rule to conform to the statutory prohibition.

### **The Challenged Amendment to Rule 2201**

Federal NSR regulates the construction and modification of sources that result in significant increases in emissions of air pollutants such as volatile organic compounds, oxides of nitrogen, and particulate matter. Along with requiring the use of highly effective emission controls by the new or modified source, federal NSR requires that all new emissions from the source be offset by emission reductions from other sources in the area.

The District's September 21, 2006 amendments to Rule 2201 added section 4.6.9, which provides that agricultural sources are not required to provide emission offsets to mitigate pollution from new and modified sources "to the extent provided by California Health and Safety Code, section 42301.18(c)." HSC section 42301.18(c), in turn, which was added to the Health and Safety Code by SB 700, provides:

(c) A district may not require an agricultural source to obtain emission 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.

We first had occasion to consider whether this amendment violated SB 288 in our review of an October 10, 2006 letter from Paul Cort on behalf of Earthjustice petitioning ARB to conduct an SB 288 hearing on the amendment. In a December 18, 2006 letter from Executive Officer Catherine Witherspoon, ARB denied the petition on the ground that the amendment simply references a provision of State law, and accordingly does not constitute a weakening of Rule 2201 in contravention of state law. We noted that the underlying issue raised by the petitioners was the District's interpretation of HSC section 42301.18(c), rather than the District's adding the reference to state law, and that the disputed interpretation was not cognizable under SB 288. Your December 21, 2006 letter asks ARB to explain our interpretation of HSC section 42301.18(c), and why incorporation of that provision into Rule 2201 does not constitute an impermissible weakening of the rule in violation of SB 288.

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In addition, you ask us to reconcile the denial of the Earthjustice petition in light of HSC section 39011.5, added as part of SB 700, which had not been cited in Mr. Cort's letter. HSC section 39011.5 provides in part:

\* \* \* \*

(b) Any district rule or regulation affecting stationary sources on agricultural operations adopted on or before January 1, 2004, is applicable to an agricultural source.

(c) Nothing in this section limits the authority of a district to regulate a source, including, but not limited to, a stationary source that is an agricultural source, over which it otherwise has jurisdiction pursuant to this division [26] or pursuant to the federal Clean Air Act . . . or any rules or regulations adopted pursuant to that act that were in effect on or before January 1, 2003 . . . .

SB 700's enactment of HSC section 42301.18(c) on its face imposes an effective limitation on the offset requirements of any California air district, regardless of the requirements in the District's NSR rule. However, you appear to take the position that since the District's NSR rule on or before January 1, 2003 applied by its terms to agricultural sources, HSC section 39011.5 trumps HSC section 42301.18(c) in the case of the District. You indicate that the decision in *Association of Irrigated Residents v. Fred Schakel Dairy*, 2005 U.S. LEXIS 36769 (E.D. Cal. 2005) supports your position. There the Court held that the December 19, 2002 version of the District's NSR rule applied to the defendant dairy operation, citing HSC section 39011.5(b) and (c).

### **The Challenged Amendment to Rule 2020**

Your October 18, 2006, petition also requested the ARB to hold a public hearing to consider the San Joaquin Valley APCD's September 21, 2006 amendments to Rule 2020, which added section 6.20 to exempt specified agricultural sources from District permit requirements. As amended on September 21, 2006, section 6 of Rule 2020 provides:

#### **6.0 District Exempt Source Categories**

Except as required by Section 5.0, no Authority to Construct or Permit to Operate shall be required for an emission unit specified below. All other equipment within that source category shall require an [Authority to Construct (ATC)] or [Permit to Operate (PTO)].

\* \* \* \*

6.20. Agricultural sources, but only to the extent provided by California Health and Safety Code section 42301.16.

Enacted as part of SB 700, HSC section 42301.16 permits a district to exempt specified agricultural sources from permit requirements – including NSR requirements – if certain criteria are met. Thus a confined animal facility (CAF) that is required to obtain the special operating permit provided for CAFs in section 40724.6 may be exempt from NSR permit requirements if the District finds, at a public hearing, that a permit [other than the CAF permit] is “not necessary to impose or enforce” emission limits for criteria pollutants and that requiring another permit from the CAFs “would impose a burden on those sources that is significantly more burdensome than permits required for similar sources of air pollution.” In addition, section 42301.16(c) exempts entirely from the permit requirements “an agricultural source of air pollution with actual emissions that are less than one-half of any applicable emissions threshold for a major source in the district, for any air contaminant [except fugitive dust],” unless the District specifically finds that the source is not subject to the CAF permit requirement of section 40724.6; that a permit is necessary to impose or enforce emission reductions of criteria pollutants for which the District is nonattainment; and that the requirement to obtain a permit is not significantly more burdensome than it is for other similar sources of air pollution. (Permits are required for any agricultural source that must obtain a permit under the federal Clean Air Act; see section 42301.16(a)).

Your analysis relies in large part on your construction of HSC section 39011.5(b) and (c):

Notwithstanding other provisions in SB 700, section 39011.5 specifically requires agricultural sources’ compliance with the December 19, 2002 versions of Rules 2020 and 2201. Nor does SB 700 limit the authority of the District to regulate agricultural sources under the December 19, 2002 versions of Rules 2020 or 2201. The Legislature could not have spoken more clearly on this issue: agricultural sources must comply with the December 19, 2002 versions of Rules 2020 and 2201 and the District has the authority to mandate such compliance.

Petition at 5-6.

**The Requirements of SB 288**

The key SB 288 restrictions on districts amending their NSR rules are contained in the four subsections of HSC section 42504.

HSC section 42504(a) provides:

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. 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 the rules or regulations that may be necessary to establish equivalency, consistent with subdivision (b).

This provision sets forth an overall equivalency requirement that allows a district to relax one NSR element only as long as one or more other elements are sufficiently strengthened to result in overall equivalent stringency. We interpret this broadly-worded provision to include offset requirements and to apply on a programmatic basis. For example, a district would not be allowed to relax NSR offset requirements if the overall effect of the district's amendments would render the NSR rules less stringent in the aggregate.

HSC section 42504(b) supplements this general prohibition against weakening NSR rules and regulations by delineating four elements which cannot be revised if the revisions would "exempt, relax, or reduce the obligations of a stationary source. . . ." These elements are listed in section 42504(b)(1):

- (A) The applicability determination for new source review.
- (B) The definition of modification, major modification, routine maintenance, or repair or replacement.
- (C) The calculation methodology, thresholds or other procedures of new source review.
- (D) Any definitions or requirements of the new source review regulations.

HSC section 42504(b)(2) provides that the rule components listed above may not be amended if doing so would "exempt, relax, or reduce the obligations of a source" with regard to the following requirements:

- (A) Any requirements to obtain new source review or other permits to construct, prior to commencement of construction.
- (B) Any requirements for best available control technology (BACT).

(C) Any requirements for air quality impact analysis.

(D) Any requirements for recordkeeping, monitoring and reporting in a manner that would make recordkeeping, monitoring, or reporting less representative, enforceable, or publicly accessible.

(E) Any requirements for regulating any air pollutant covered by the new source review rules and regulations.

(F) Any requirements for public participation, including a public comment period, public notification, public hearing, or other opportunities or forms of public participation, prior to issuance of permits to construct.

HSC section 42504(c) provides,

In amending or revising its new source review rules or regulations, a district may change any of the items in paragraph (1) of subdivision (b) only if the change is more stringent than the new source review rules or regulations that existed on December 30, 2002.

Finally, notwithstanding the general anti-backsliding provision set forth in HSC section 42504(a) and the source-specific prohibitions set forth in HSC section 42504(b), SB 288 allows revisions that may result in less stringent district NSR rules under the carefully circumscribed circumstances described in HSC section 42504(d). The rule amendment must be accomplished at a public hearing based upon substantial evidence in the record and the district must submit the amendment(s) to the ARB for approval at a public hearing in order to ensure that the several conditions for such rule revisions have been met. Since the SJVUAPCD has not attempted to invoke HSC section 42504(d) with respect to the amendments covered by your Petition, I do not list the conditions here.

### **Applying SB 288 to the Challenged District Actions**

#### **The Amendment to Rule 2201 Referencing HSC Section 42301.18(c)**

The challenged amendments to Rule 2201 pertain to offset requirements, which are not included in the list of requirements in HSC section 42504(b)(2). We accordingly evaluate them under the equivalency requirements of HSC section 42504(a).

As state law, HSC section 42301.18(c) on its face prohibits every district in the state from requiring offsets from an agricultural source "if emission reductions from that source would not meet the criteria for real, permanent, quantifiable, and enforceable emission reductions" – regardless of any requirements to the contrary in a particular

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district's NSR rule. The SJVUAPCD's amendment to Rule 2201 simply acknowledges the existence of HSC section 42301.18(c). The effect of 42301.18(c) on the District's NSR program before and after the September 21, 2006 amendment to Rule 2201 was exactly the same. If the Legislature were to repeal HSC section 42301.18(c), the District's amendment would have no effect on the District's NSR program. This is because all the amendment does is acknowledge the existence of the state law; it does not change how HSC section 42301.18(c) applies to the District's NSR program. I accordingly conclude that the District's September 16, 2006 amendment to Rule 2201 does not constitute a weakening of the District's NSR rules under HSC section 42504(a) or (b).

You assert, however, that the clear and unambiguous limitation imposed on all districts by HSC 42301.18(c) does not apply to the SJVUAPCD because HSC section 39011.5(b) and (c) grandfathers in the District's December 19, 2002 version of its NSR rule and immunizes that rule from any restrictions SB 700 imposes on District NSR programs. I cannot agree. First, HSC section 39011.5(c) clearly does not have this effect. Since it starts out "Nothing in this section limits the authority of a district to regulate . . .," its only effect is to assure that the District's NSR rule is not diminished by HSC section 39011.5. However, the issue here is not whether HSC section 39011.5 limits the effect of the District's NSR rule, but whether HSC section 42301.18(c) limits the effect of the rule.

That leaves HSC section 39011.5(b), which, as noted above, provides "Any district rule or regulation affecting stationary sources on agricultural operations adopted on or before January 1, 2004, is applicable to an agricultural source." The Legislature included this subsection for a simple reason – to clarify the applicability of district prohibitory and permit rules that were adopted when former HSC section 42310(e) (repealed by SB 700) prohibited districts from requiring a permit for any equipment used in agricultural operations. Under HSC section 39011.5(b), as soon as SB 700 became effective January 1, 2004, the District could as a matter of state law require NSR permits from new and modified agricultural sources. (In accordance with HSC section 42301.18(a), agricultural sources that existed before January 1, 2004, were to be permitted as existing sources.) Otherwise there could be some validity to the assertion raised by the dairy in the *Fred Shackel Dairy* case that following enactment of SB 700 the District's NSR rule was not applicable to an agricultural source that received its use permit from the county in 2003 when former HSC section 42310(e) was still in effect. Based on the terms of HSC section 39011.5(b), the *Fred Shackel Dairy* court rejected that assertion.

Given the Legislature's obvious interest in enacting HSC section 39011.5(b) for the limited purpose of assuring that the District was not altogether precluded from administering its NSR rule after enactment of SB 700, there is no reason to give the

provision an interpretation so expansive that it nullifies other provisions of SB 700 as they apply to the District. Certainly the *Fred Shackel Dairy* court did not interpret HSC section 39011.5(b) so broadly. On the contrary, the Court noted that HSC section 42301.16(c) allows the District to require a permit for agricultural sources with actual emissions of less than half the major source threshold only after certain findings are made, but dismissed defendants' reliance on the provision because "[t]here are no allegations that support an influence that the Dairy 'actually emits' less than one-half of the threshold quantities." (Order at p. 21). The court would not have had to reach the factual issue had it believed that HSC section 39011.5(b) made HSC section 42301.16(c) inapplicable in the SJVUAPCD. Moreover, there is no indication in the Court's discussion of other SB 700 provisions such as HSC 42301.16(a) and (b) that section 39011.5(b) makes those SB 700 provisions inapplicable to the District's NSR rule as in effect December 19, 2002. (Order at 21)

HSC section 42301.18(c) imposes specific conditions that districts must meet before they require a permit in specific circumstances. HSC section 39011.5(b), on the other hand, states a more general requirement regarding the applicability of district NSR rules adopted before SB 700 became effective. A general statutory provision is normally controlled by a specific provision relating to a particular subject. (See *People v. Superior Court*, 28 Cal. 4th 798 (2002), *Miller v. Superior Court*, 21 Cal. 4th 883 (1999).) Had the Legislature included language that the preexisting NSR requirements applied "notwithstanding" the specific limits imposed by SB 700 on all district NSR programs, then section 39011.5(b) could be read as nullifying those specific limits in the case of the SJVUAPCD's NSR rule. In the absence of such language, and given the reasonableness of according the statutory language a more limited effect that does not partially nullify other specific statutory conditions enacted by SB 700, we have concluded as a matter of law that HSC section 39011.5(b) does not exempt the District's NSR program from the requirements of HSC section 42301.18(c).

With respect to our interpretation of HSC section 42301.18(c), we believe that section 42301.18(c) does not ask whether or not the District has a regulatory protocol to verify whether ERC's offered by agricultural source are creditable, but rather sets forth the objective, generic criteria that must be satisfied by an agricultural source seeking credits for its emission reductions. If the proffered reductions were real (i.e. surplus to required reductions), quantifiable, and enforceable, then the source would be able to use (or bank) them as credits and the District may, therefore, require the source to provide offsets. The use of the subjunctive "would not meet" is critical in interpreting this provision; it focuses the inquiry on whether the emission reductions meet the generic criteria that the U.S. EPA and the ARB and air districts have, since 1976, required of sources in order for the reductions to "count" for purposes of attaining ambient standards and to qualify for use as offsets. The existence of a District rule allowing such offsets to be generated is not germane to determining whether emission

reductions from a given agricultural source “would” meet the criteria for real, permanent, quantifiable, and enforceable.

### **The Amendment to Rule 2020**

The amendments to Rule 2020 provide for the exemption of agricultural sources from District requirements to obtain an Authority to Operate or a Permit to Operate in certain circumstances – “only to the extent provided by [HSC] section 42301.16.” This falls under HSC section 42504(b)(2)(A) as it is a change to a requirement to obtain a permit to construct. We accordingly review the amendments under HSC section 42504(b) to determine whether they “exempt, relax, or reduce the obligations of any stationary source” in the District.

A key issue is determining the applicability of HSC section 42301.16 to the District’s NSR rule. For the reasons described above in the discussion of the amendments to Rule 2201, I have concluded that HSC section 39011.5 does not affect the applicability of HSC section 42301.16 to the District’s NSR rule. As a state law applying to district permit requirements, HSC section 42301.16 applies to the District’s permit program whether or not the District adopts an exemption from its Authority to Construct or Permit to Operate requirements for “agricultural sources, but only to the extent provided by California Health and Safety Code section 42301.16.” But the issue regarding the amendment to Rule 2020 is more nuanced than the issue regarding the amendment to Rule 2201. The amendment to Rule 2201 clearly carved out an exemption only to the extent the exemption was otherwise required by law. With the amendment to Rule 2020, it is necessary to evaluate the effect of the amendment by determining whether there is any difference in the District’s mandate and authority before and after the amendment was adopted.

We first consider the effect of HSC section 42301.16(b), which mandates permits for all agricultural sources unless a district makes all of the three specified findings in (b)(1)-(3) or a permit is not required under HSC section 42301.16(c). Thus while the District’s amendment is couched as a blanket permit exemption for agricultural sources “to the extent provided” in HSC section 42301.16, section 42301.16(b) “flips” that with the result that a permit remains mandated unless either the section 42301.16(b) or the section 42301.16(c) exception applies.<sup>1</sup>

With respect to agricultural sources that have been issued a confined animal feeding operation permit under HSC section 40724.6 and trigger the other two findings listed in section 42301.16(b), the statutory language indicates just that a permit is no longer

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<sup>1</sup> The blanket permit requirement in HSC section 42301.16(b) for agricultural sources except as otherwise provided makes the provisions of HSC section 42301.16(a) irrelevant for purpose of an SB 288 analysis.

required for these sources. Since the literal language only removes the mandate, a district theoretically may remain able to require a permit for these sources if it wishes to do so. If this were to be the case, the amendment impermissibly weakens the District's NSR rule because the amendment changes a District default requirement for a permit to a default exemption from a permit for sources for which the three findings can be made. However, the context indicates that the legislative intent was to prohibit Districts from requiring ordinary permits for a source for which the District makes the three findings, and thus the effect of section 42301.16(b) is the same with or without the challenged amendment.

HSC section 42301.16(c) prohibits the District from requiring a permit for an agricultural source "with actual emissions that are less than one-half of any applicable emissions source for a major source in the district "(excluding fugitive dust) prior to making the three findings listed in section 42301.16(c)(1)-(3). Because of the "flipping" effect of HSC section 42301.16(b) both before and after the District's challenged amendment the District is obligated to require a permit for the smaller sources, but only if it makes the three specified findings. We accordingly find that the challenged amendment does not in practice exempt, relax, or reduce the obligations of a smaller source that falls under HSC section 42301.16(c). In combination with the above analysis regarding the effect of HSC section 42301.16(b), this means that the challenged District amendment does not violate SB 288 because it does not weaken the District's NSR rule or effect an actual exemption, relaxation or reduction of the obligations of a source. Due to the existence of HSC section 42301.16 the applicable requirements for sources were not changed by the adoption of the challenged amendments.

### **Conclusion**

After considering the effect of the challenged amendments, I have concluded that they do not cause the District's NSR rule to be less stringent than the rule was on December 30, 2002 because they do not change the effect of the state law requirements and limitations enacted by SB 700. Consequently, should a public hearing before our Board occur on this matter, based on the information now before me I would advise the Board of my opinion that, as a matter of law, the challenged amendments do not weaken the District's NSR rule or otherwise violate SB 288.

Notwithstanding my conclusions, we are prepared to schedule a hearing by the ARB Governing Board hearing on your Petition if you so desire. Please let us know if you wish to pursue that course of action. In the meantime, you have any questions about ARB's legal analysis please contact me at (916) 323-9606 or Ms. Leslie Krinsk, Senior

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Staff Counsel at (805) 473-7325. For technical questions about the District's NSR rule, please contact Mr. Chris Gallenstein, Staff Air Pollution Specialist in the Stationary Source Division at (916) 324-8017.

Sincerely,

/s/

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