



South Coast Air Quality Management District

21865 Copley Drive, Diamond Bar, CA 91765-4178
(909) 396-2000 • www.aqmd.gov

General Counsel's Office
☎ 909.396.2302 ✉ bbaird@aqmd.gov

July 10, 2020

Via Email at katherine.rubin@ladwp.com

Katherine Rubin
Manager of Air and Wastewater Quality and Compliance
Los Angeles Department of Water and Power
P.O. Box 51111
Los Angeles, CA 90051-0100

Re: Your Letter Dated May 7, 2020 to Michael Morris, Planning and Rules Manager

Dear Ms. Rubin:

Thank you for your interest in rule development for the new source review (NSR) program for sources that will exit from the Regional Clean Air Incentives Market (RECLAIM) in the future. The South Coast AQMD staff shares your concern regarding potential adoption of an emissions increase test that would bring under NSR a variety of changes that do not cause an increase in emissions under existing South Coast AQMD rules. We are concerned that the past actual emissions to future potential emissions (PTE) test may categorize a number of changes as showing an emissions increase which in reality exists only on paper. At the same time, we are unable to support your suggestion that staff propose the use of a past-actual emissions to future projected actual emissions applicability test. We are concerned that adoption of the baseline actual emissions to future projected actual emissions test (NSR Reform) would constitute backsliding from our existing program and thereby violate SB 288 (Health & Safety Code 42500 et seq.) or Clean Air Act Section 110(l), [42 U.S.C. Section 7410(l)].

As a result, staff has developed a proposal that we believe avoids any backsliding and at the same time does not require the use of the past actual to future potential test that your agency is concerned about. This discussion pertains to proposed major modifications, since in the case of a new source, the baseline is always zero and the emissions increase is calculated based on the future potential to emit. Staff is considering recommending a two-step applicability test for determining whether major modifications result in an emissions increase. The first step is to apply the test under existing South Coast AQMD rules for major source modifications, which in most cases is pre-modification PTE to post-modification PTE. South Coast AQMD Rule

1306(d)(2). If the modification shows an emissions increase under this test, it will be subject to BACT. If it does not show an increase under this first test, it proceeds to the second test. This test compares baseline actual emissions to projected future actual emissions (NSR Reform test). If the modification shows an increase under this test, BACT will be required.¹

We believe that this method will satisfy EPA, because it ensures that any source that shows an emissions increase using the EPA-approved NSR Reform test will be subject to NSR applicability. We also believe it will not violate SB 288 because it keeps the existing test, and does not make it less stringent, but will instead add a second layer of review that will capture modifications that do not show an increase under the PTE to PTE test but do show an increase under the NSR Reform test, if there are any.

We hope that this proposal will be supported by stakeholders as a reasonable way of ensuring that there is no backsliding, while at the same time avoiding the need to adopt an applicability test that may capture modifications that do not involve any actual increase in emissions.

At the same time, we do not agree with the legal arguments made in your letter contending that it would not be backsliding to simply adopt the baseline actuals to projected future actuals test (NSR Reform test). Below we explain our position more fully. We will respond to your contentions in the order presented.

Background and Overview of Issues

This part of your letter asserts that the South Coast AQMD's NSR program is implemented through a delegation agreement rather than EPA-approved rules, so that EPA regulations have applied to power plants in the South Coast AQMD. You assert that EPA adopted a type of baseline actuals to projected future actuals applicability test for power plants in 1992 and that that regulation has governed power plants under the South Coast delegated program ever since then. This assertion is incorrect.

The South Coast AQMD's nonattainment NSR program, Regulation XIII, was largely adopted in its present form in June 1990 and approved by EPA in December 1996, although some rules have been amended or added since then. epa.gov/sips-ca/epa-approved-south-coast-air-district-regulations-california-sip#xiii The EPA power plant rule was promulgated in July, 1992. 57 Fed. Reg. 32314 (July 21, 1992).

The applicability test under Regulation XIII is PTE to PTE, or past actuals to future PTE if the source has never been subject to Regulation XIII or its predecessor Rule 213. Rule 1306(d)(2). aqmd.gov/home/rules-compliance/rules/scaqmd-rule-book. This rule was adopted and in effect prior to the 1992 power plant rule. Therefore, the 1992 power plant rulemaking has never governed nonattainment NSR in the South Coast. The current rulemaking is only concerned with nonattainment NSR, since RECLAIM only affects the nonattainment precursors NOx and potentially SOx. RECLAIM does not affect the District's PSD program.

¹ The test used for offsets will likely be different because EPA requires the past actuals to future potential to emit test for offsets. However, the offset obligation may be met by the program in the aggregate, rather than by each individual source, so the offset program may look different from EPA requirements once it is established.

In any event, the District's PSD program also has never included the 1992 regulation. The District currently has partial delegation for PSD. epa.gov/sites/production/files/2015-08/documents/south_coast_aqmd_psd_delegation_agreement.pdf. The delegation does not apply to a modification where the applicant wishes to use the NSR Reform applicability test. In such cases, the facility applies to EPA who handles the permit issuance. Delegation Agreement Section II 1. The delegation is based on and implemented through South Coast AQMD Regulation XVII. The applicability test under Regulation XVII for modifications is past actuals (2 years before application) to future potential to emit. Rule 1706(c)(1).

The District's initial delegation agreement with EPA for PSD was signed in 1997. From that time until 2003, the District handled PSD modifications using the Regulation XVII test. After NSR Reform was adopted on December 31, 2002, the District returned the PSD program to EPA for handling because the District believed the NSR Reform test was a relaxation and did not want to implement this test, due in part to the demand exclusion provision that is also part of the 1992 power plant rule. Thereafter, it was realized that the test for new facilities was the same for both Regulation XVII and NSR Reform so the District re-assumed delegation for new facilities. Most recently the delegation agreement was revised to allow South Coast to issue PSD modifications using the Regulation XVII test if the applicant did not insist on using the NSR Reform test. Therefore, the District has never issued any permit modifications using either the NSR Reform test or the 1992 test for power plants. It is possible that EPA issued some modifications using the 1992 test during the time since that rule was adopted and before the first delegation agreement was signed in 1997. However, this only applies to PSD modifications; nonattainment NSR has never used the 1992 power plant test.

Federal NSR Regulations

You point out that EPA adopted the 1992 regulations for power plants more than 10 years before SB 288 was adopted. SB 288 prohibits the air districts from amending their NSR regulations to be less stringent than they were on December 30, 2002 (the day before NSR Reform was promulgated.) Health & Safety Code Section 42500 et seq. You argue that since the 1992 federal power plant NSR applicability test regulations, including the demand growth exclusion, existed well before the applicability date of SB 288, using that test cannot constitute backsliding as prohibited by SB 288. We disagree. As explained above, the 1992 power plant regulation has never been a part of the District's NSR nonattainment rules (or PSD rules for that matter.) SB 288 compares a proposed amendment to the District rules as they existed on December 30, 2002, to see if the proposed rule is less stringent. Health & Safety Code Section 42504(a). It does not compare the proposed rule to existing EPA rules. In fact, the entire purpose of SB 288 was to prevent Districts from amending their rules to incorporate the federal NSR Reform. Health & Safety Code Section 42501(d)-(g).

SCAQMD NSR Regulations

You point out that South Coast AQMD rules adopted subsequent to SB 288 include the NSR Reform test for applicability, citing Rule 1325, applicable to PM_{2.5} emissions, and Rule 1714, applicable to greenhouse gas emissions. You then conclude that if we could use the NSR Reform

test in these two rules, it must not be a violation of SB 288 to use that test with regard to the rest of Regulation XIII and the other pollutants such as NOx. We disagree. Neither of these rules made the existing NSR program less stringent. Rule 1325 was adopted in 2011 to apply to a newly-identified pollutant, PM2.5. Although PM2.5 had previously been regulated as part of PM10 under the nonattainment provisions of Regulation XIII, the District imposed additional requirements in Rule 1325, principally offsets for PM2.5 increases exceeding certain thresholds. It did not relax any existing PM10 requirements. Since it did not make the existing program less stringent, it did not violate SB 288. The same analysis applies to Rule 1714. That rule imposed additional requirements relative to greenhouse gases to the PSD program. It did not make the existing NSR rules less stringent and thus did not violate SB 288.

Thus, it is simply incorrect to say that applying the NSR Reform test to other pollutants would be no different than applying it to these new pollutants. For GHGs and PM2.5, the new rules were a strengthening of the existing program. In contrast, we believe adopting NSR Reform in place of the existing nonattainment NSR applicability tests would make the existing program less stringent and violate SB 288. In fact, that was the exact reason SB 288 was adopted to prevent districts from adopting the new NSR Reform.

Scope of Limitations Imposed by CAA Section 110(l)

Finally, you contend that CAA Section 110(l) does not present any obstacle to approval of an amendment that would adopt the NSR Reform applicability test. We recognize that an amendment may pass muster even if it contains one section that is a relaxation as long as overall, it does not interfere with attainment or any other provision of the CAA. But we disagree with your analysis of the test that would be applied by EPA and the courts reviewing any EPA action. You assert that the courts have upheld EPA SIP approvals that generally preserve the status quo. However, this is not the case in the Ninth Circuit. That court has held that EPA may not approve a revision under the “noninterference” standard merely by saying the revision does not relax the existing SIP. *Hall v. EPA*, 273 F. 3d 1146 (9th Cir. 2001). We do not conclude that Section 110(l) would necessarily preclude any amendment using the NSR Reform test, but merely contend that it is a factor to keep in mind and may well present an obstacle to approval.

Conclusion

Thank you for your interest and involvement in this important rulemaking process. We hope that your organization can support the proposal we discuss in the first part of this letter. Should you have any questions or wish to discuss this further, please contact Susan Nakamura, snakamura@aqmd.gov, 909-396-3105, or Barbara Baird, bbaird@aqmd.gov, 909-396-2302.

Sincerely,



Barbara Baird
Chief Deputy Counsel