

**Bay Area Air Quality Management District**

**939 Ellis Street  
San Francisco, CA 94109**

**Proposed Amendments to  
Regulation 2 (Permits), Rule 1 (General Requirements)**

**Draft Staff Report**

**May 2, 2005**

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# **DRAFT STAFF REPORT**

## **Proposed Amendments to Regulation 2 (Permits) Rule 1 (General Requirements)**

### **Summary**

Regulation 2 (Permits), Rule 1 (General Requirements) requires any person seeking to construct or modify any source of air pollution to first obtain an authority to construct (AC) from the District. Regulation 2, Rule 1, Section 407 provides for an initial term of two years for an AC, with an option for renewal for an additional term of two years. The section states that an AC expires after two years, or, if renewed, after four years. In most cases, projects are constructed within the initial two-year term. The renewal provisions, however, do not clearly specify the renewal procedure to be followed in all cases and do not address various situations that may require renewal after four years.

The proposed amendments to Regulation 2 (Permits), Rule 1 (General Requirements), Section 407 are intended to clarify the procedure to be followed by the holder of an AC for any renewal. In addition, the amendments are intended to address situations where the District would want to renew an AC beyond the current four-year limit. One type of situation involves a project with a construction period longer than four years for which an environmental impact report (EIR) explicitly described and analyzed this longer construction period. A second type of situation involves an AC under which construction has proceeded to a point at which, under circumstances defined in case law, the holder of the AC would acquire certain “vested rights” to proceed with the project. The District’s current renewal provisions already recognize that vested rights considerations compel AC renewal in some circumstances by stating that an AC expires after two years unless “substantial use” of the AC has begun. The proposed amendments would allow the District to renew an AC beyond four years in both the EIR and vested rights situations.

The proposed amendments are similar to a proposal originally included in, but withdrawn from, amendments considered and adopted by the BAAQMD Board of Directors in December 2004. That proposal, however, only addressed renewals involving an EIR covering a long-term project. The proposal was withdrawn to add procedural provisions and to address vested rights situations. The earlier version of the proposal was discussed, along with the other amendments that went to the Board in December 2004, at a workshop on October 12, 2004. Because the current proposal is a narrow technical revision of the previous proposal, it was made available for public review through a request for comment procedure. Comments were accepted during the period from April 7, 2005 to April 29, 2005. One comment was received during this comment period. The comment and the District’s response are included in this report.

### **Background**

On December 21, 2004, the BAAQMD Board of Directors approved a set of amendments to the District’s permit rules. The primary purpose of the amendments was to lower the threshold at

which emission offsets must be provided for a new or modified source at a facility. Offsets ensure that a new pollution source does not result in an overall net increase in pollution. The Board adopted the new District offset requirements to comply with California Air Resources Board ozone transport regulations. A second purpose of the December 21, 2004 amendments was to make miscellaneous changes to the permit rules, primarily to clarify existing requirements.

During the rule development process for the December amendments, the District proposed an amendment to Regulation 2, Rule 1 to address renewal of ACs in one type of situation where the current four-year limit on the term of an AC conflicted with environmental review considerations. The language proposed at that time would have allowed renewal of the AC for a project covered by an environmental impact report (EIR) that addressed construction over a period longer than the four years available under the current rule. That proposal was withdrawn, however, when it was recognized that it did not also address problems with the four-year limit as applied to an AC under which substantial work has been done so that, at the end of four years, the holder of the AC has acquired vested rights to complete the project. In withdrawing the proposal, the District also sought to add language clarifying the procedure to be followed for renewals. District staff proposed to bring new language to the Board in 2005.

## Proposed Amendments

The proposed amendments to Regulation 2, Rule 1, Section 407 are as follows:

- 2-1-407 Permit Expiration of Authority to Construct:** An authority to construct shall expire two years after the date of issuance, unless ~~substantial use of the authority has begun~~ the authority to construct has been renewed. Upon receipt of a written request and any required fees prior to the expiration of the authority to construct, the APCO shall renew the authority to construct in writing if the APCO determines that the renewal complies with this section and that the holder of the authority to construct is not violating any provision or condition of the authority. If the APCO does not act on such a request prior to expiration of the authority to construct, the authority shall remain in effect until the APCO has acted to approve or deny the renewal request. ~~However~~
- 407.1 The following requirements shall apply to renewals:
- 1.1 Except as provided in Sections 2-1-407.2 and 407.3, an authority to construct may be renewed one time for an additional two years;
  - 1.2 Except for renewals pursuant to Section 2-1-407.3, renewal is contingent upon subject to meeting the current BACT and offset requirements of Regulation 2-2-301, 302 and 303, upon receipt of a written request from the applicant and written approval thereof by the APCO prior to the expiration of the initial authority to construct; and
  - 1.3 Except as provided in Sections 2-1-407.2 and 407.3, an authority to construct that has not expired after two years, due to substantial use or renewal, been renewed shall expire after four years after the date of original issuance.
- 407.2 If the authority to construct was issued pursuant to an environmental impact report (EIR) that explicitly covered a construction period longer than four years, the authority to construct shall, upon request by the applicant, be renewed for additional two-year terms throughout the construction period covered by the EIR.
- 407.3 If substantial use of the authority to construct has begun, either during the initial term or during a renewal term, the authority to construct shall, upon request by the applicant, be renewed for additional two-year terms until the permit to operate is

issued, or, if a term of less than two years is requested, for such term as is requested.

The proposed amendments make the following changes or clarifications in the AC renewal provisions:

- Clarify that a renewal request is required for each renewal;
- Provide that the term of the AC is extended for the time necessary for the APCO to consider renewal if the APCO fails to act on the request before expiration;
- Retain the current 4-year limit on the term of an AC for most projects;
- Allow an AC for a longer-term project covered by an EIR to be renewed beyond 4 years;
- Allow an AC that has been substantially used to be renewed beyond 4 years;
- Clarify prerequisites for renewal.

Each of the changes is briefly discussed below.

### **Requirement for Renewal Request**

Under the existing provisions, a request is required before an AC is “renewed.” The rule is unclear, however, about how an AC for which substantial use has occurred is handled. The rule states that an AC expires after two years “unless substantial use of the authority has begun,” but does not provide a procedure for making this determination. The proposed amendments require a request for all renewals, thus providing a mechanism for the APCO to consider whether an AC has been substantially used and for granting a renewal on that basis.

### **Extension of Time to Consider Renewal Request**

The proposed amendments ensure that the AC does not expire during the time that the APCO is considering and acting upon a renewal request. Under the existing language, if the APCO fails to act in time, the AC expires, potentially adding unnecessary work and complication to the renewal process. In addition, the existing provisions potentially put unnecessary time pressure on a renewal request, which has some potential to rush decisions where the APCO would otherwise wish to obtain additional information.

### **Retention of Four-Year Limit for Most ACs**

In 1998, Section 2-1-407 was amended to add the final sentence in the existing section, thereby imposing a four-year limit on the life of an authority to construct. The effect of the 1998 amendment was to preclude any additional renewal of an AC beyond the two-year renewal term allowed by the section. Most projects for which a permit is issued by the District are completed within four years, and, in practice, the limit poses few problems. The limit encourages prompt use of the AC and provides for finality in those situations where an AC is not used.

**Allowance for Renewal Beyond Four Years for Long-Term Projects Covered by an EIR**

For a project consisting of a series of related actions taken over time, the California Environmental Quality Act (CEQA) requires that the impacts of these actions be considered together. With the current four-year limit, the developer of such a project faces two alternatives: delay applying for a District permit for those components that will not be completed within four years, or reapply for a new permit at a later date. The first choice results in piecemealing of the project, which is contrary to CEQA's mandate to consider the "whole of an action<sup>1</sup>." In addition, it results in uncertainty concerning project design, with components of the project considered separately. The second choice results in a duplicate permitting process, with resulting administrative inefficiency and expense.

The proposed amendments would allow the District to renew the AC for such a project past four years from the date of original issuance. Under the amendments, requirements for offset and BACT adjustments would apply to the project to ensure that elements of the project completed later in the construction process comply with the latest requirements. BACT and offset adjustments would not apply, however, to the extent that work proceeds to a point that vested rights arise for the project or for elements of the project. In such a case, the AC holder could seek renewal pursuant to the renewal option for projects with vested rights.

**Allowance for Renewal Beyond Four Years for Projects with Vested Rights**

The proposed amendments are also intended to ensure that District provisions conform to state law regarding vested rights. The current Section 2-1-407 states that an AC expires after two years "unless substantial use of the authority has begun." This language was included to recognize that substantial use of an AC gives rise to vested rights that would preclude the District from refusing to renew the permit. The term "substantial use" is defined in Section 2-1-227 as "... one or more of the following: purchase or acquisition of the equipment that constitutes the source; ongoing construction activities other than grading or installation of utilities or foundations; a contract or commitment to complete construction of the source within two years."

Though the literal effect of the current rule language is that an AC that has been substantially used does not expire and therefore does not require renewal, it is unclear whether the language was intended to have this meaning or, instead, was intended to mean that such an AC would be renewed. Under either interpretation, however, the 1998 addition of the four-year limit on the life of an AC creates a potential conflict for those ACs that have been substantially used. If the four-year limit is applied to such an AC, the limit is inconsistent with California vested rights case law. The proposed amendments therefore make it clear that renewals beyond four years are required if an AC has been substantially used.

Other air districts typically renew or otherwise extend an AC when the AC has been substantially used. The South Coast AQMD administrative procedures, for example, provide for

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<sup>1</sup> CEQA Guidelines, Cal. Code Regs., tit. 14, § 15378.

extensions when construction has started, when construction will extend over more than one year, and when the project is delayed<sup>2</sup>.

### **Prerequisites for AC Renewal**

The current rule states that renewal for a second two-year term is contingent on compliance with current BACT and offset requirements. Under the current language, this requirement does not apply to an AC that has been substantially used because the AC does not expire after the first two-year term and therefore does not require renewal. Because the current rule does not allow renewals after four years for any AC, it does not address BACT and offset adjustment after four years. The proposed amendments clarify that BACT and offset adjustment apply to all renewals except those based on substantial use of an AC.

BACT and offset adjustment should not apply to renewal of an AC that has been substantially used for both practical and legal reasons. As a practical matter, the holder of an AC that has been “substantially used” is already constructing the project or has contractually obligated itself to construct the project as proposed. It would make no practical sense to make any adjustment to such a project upon renewal of the AC. More importantly, however, it would violate due process rights of the AC holder to require modification of the project after substantial funds and effort have been expended to build the project as proposed.

The proposed amendments explicitly require compliance with the terms of the existing AC as a prerequisite to renewal. This provision is added to provide an additional remedy in those relatively rare situations where an AC holder does not build in conformance with the AC. The December 2004 amendments to the permit rules explicitly required an AC holder to build in conformance with the AC. Prior to that amendment, the APCO’s authority was limited to refusing to issue a permit to operate, but, in those rare cases where the permit was issued before the nonconformity was discovered, the APCO had very limited options.

Finally, any required fees must be paid before an AC will be renewed. Currently, no fee is required for renewal. One recommendation of the 2005 Cost Recovery Study was to implement fees to cover District costs in reviewing and issuing AC renewals. Any fee proposal will be addressed when the District proposes revisions to Regulation 3, Fees.

### **Socioeconomic Impacts of Rulemaking**

Section 40728.5, subdivision (a) of the California Health and Safety Code (H&SC) requires districts to assess the socioeconomic impacts of amendments to regulations that, “...will significantly affect air quality or emissions limitations, that agency shall, to the extent data are available, perform an assessment of the socioeconomic impacts of the adoption, amendment, or repeal of the rule or regulation.”

The District has determined that this section of the Health and Safety Code is not applicable to the proposed amendment. The proposed amendment will not significantly affect air quality or emissions limitations.

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<sup>2</sup> South Coast AQMD, Certified Permitting Professional Program Reference Manual, § 3-7.2.1 (May 2003).

Under Health and Safety Code § 40920.6, the District is required to perform an incremental cost analysis for any proposed best available retrofit control technology rule. If applicable to this proposed rulemaking activity, the District is required to: (1) identify one or more control options achieving the emission reduction objectives for the proposed rule, (2) determine the cost effectiveness for each option, and (3) calculate the incremental cost effectiveness for each option. To determine incremental costs, the District must “calculate the difference in the dollar costs divided by the difference in the emission reduction potentials between each progressively more stringent potential control option as compared to the next less expensive control option.”

The District has determined that this section of the Health and Safety Code is not applicable to the proposed amendments. The rules being amended are not best available retrofit control technology rules.

### **Regulatory Impacts**

Health and Safety Code Section 40727.2 imposes requirements on the adoption, amendment, or repeal of air district regulations. The law requires a district to identify existing federal and district air pollution control requirements for the equipment or source type affected by the proposed change in district rules. The district must then note any differences between these existing requirements and the requirements imposed by the proposed change. Where the district proposal does not impose a new emission limit or standard, make an existing emission limit or standard more stringent, or impose new or more stringent monitoring, reporting, or recordkeeping requirements, the district may simply note this fact and avoid additional analysis.

These proposed amendments do not impose a new standard, make an existing standard more stringent, or impose new or more stringent monitoring, reporting, or recordkeeping requirements.

### **Environmental Impacts of the Rulemaking**

Pursuant to the California Environmental Quality Act (Public Resources Code section 21000 et seq.), the District is the Lead Agency for the described project. The District has determined that these proposed amendments to Regulation 2, Rule 1 are exempt from provisions of the California Environmental Quality Act (Public Resources Code Section 21000 et seq.) pursuant to State CEQA Guidelines, Sections 15061, subd. (b)(3). The proposed amendments are administrative in nature, and do not in themselves affect air emissions from any sources or operations subject to the rule. The amendments do not change requirements that would be imposed. For ACs that are renewed because the project is covered by an EIR that addresses construction over more than four years, the proposed amendments do not change any air quality requirements that would be imposed. In addition, the amendments remove any incentives to piecemealing of a project that may exist in the current four-year limit and promote CEQA’s mandate to consider the “whole of an action” in analyzing environmental impacts. For an AC that is renewed based on substantial use, the proposed amendments do not change the effect of the rule unless the AC is renewed beyond four years after original issuance. But renewal under these circumstances is compelled by existing law. As a result, the effect of the existing rule and the amended rule are the same, assuming that the District rule is considered in the context of other applicable law, and assuming

compliance with that law. It can therefore be seen with certainty that there is no possibility that these proposed amendments will have a significant environmental impact.

## **Compliance with SB 288**

In 2003, California Senate Bill 288 added sections 42500 through 42507 to the Health and Safety Code. The new provisions state that amendments to California air district NSR rules must not lessen the stringency of the rules as a whole. Additionally, certain parts of the rules (applicability determination, definitions, calculation methodologies and thresholds) may not be changed to exempt, relax or reduce the obligations of a stationary source for certain requirements (obligation to obtain a permit, application of BACT, air quality impact analysis, monitoring requirements, regulation of pollutants, and public participation) unless certain findings are made.

The proposed amendments provide for extension of ACs beyond four years in two circumstances discussed above. For projects covered by an EIR that addresses construction over a period longer than four years, any renewal is contingent upon compliance with BACT and offset requirements. The renewal provision therefore changes no regulatory requirements for these projects. The proposed amendments also allow extension of an AC beyond four years if the AC holder has acquired vested rights through substantial use of the AC. Because this result is compelled by existing law, the amendment makes no change in the effect of District regulations when taken together with the body of existing law. As a result, the District concludes that the proposed amendments do not reduce the stringency of the NSR rules in any respect, and are therefore in compliance with the requirements of Health and Safety Code § 42504.

## **Statutory Findings**

Pursuant to Section 40727 of the California Health and Safety Code (H&SC), regulatory amendments must meet findings of necessity, authority, clarity, consistency, non-duplication, and reference. The proposed amendments are:

- Necessary to clarify procedures for renewal of Authorities to Construct;
- Authorized by H&SC Sections 40000, 40001, 40702, 40725 through 40728, 40918, and 42300 *et seq.*, 42 USC §7410, 42 USC §7503;
- Written or displayed so that their meaning can be easily understood by the persons directly affected by them;
- Consistent with other District rules, and not in conflict with state or federal law;
- Non-duplicative of other statutes, rules, or regulations.

## **Conclusion**

The proposed amendments have met all legal noticing requirements and have been discussed with interested parties. District staff recommends adoption of the amendments as proposed.

## Comments and Responses

- 1. Some projects require, in addition to the air permit, other regulatory permits, which the applicant has to wait for many years before s/he can obtain it. Occasionally the AC expires before all of the project's permits are issued. For projects that require multiple permits, we suggest that Section 407 would include a language to accommodate these projects. We suggest that the expiration date of the AC would be two (2) years after all required project permits are issued by the other regulatory agencies. The applicant must submit to the BAAQMD a written evidence of the other regulatory agencies permit decisions. <Wahbeh, Evergreen Oil. 4/21/05>**

*The District disagrees with the proposal for several reasons. First, the current limits are reasonable. The vast majority of all projects for which the District grants an AC are completed within the 4 years allowed, and many of these projects require multiple approvals. Where an applicant not falling within one of the two exceptions cannot secure all approvals, the applicant need only resubmit the application. Second, because the proposal would set an indefinite term, it would eliminate the current rule's biennial review for BACT and offset requirements and would therefore violate SB288. Third, the current limits provides multiple benefits to the District and the public. They encourage serious applications and prompt action on those applications. They avoid creation of a large District inventory of inactive proposals. They also provide for administrative finality. Fourth, the proposal would be difficult to administer. It would base the term of an AC on the actions of other agencies and would require the District to track and review actions on the project by other agencies.*