Appendix D: Regulation 9, Rule 14: Response to Comments

Comment 1:

The District adopted, proposed and planned the refinery strategy rules that will fundamentally rewrite the regulatory compliance obligations of an entire industry. Yet, the District's analysis insists on evaluating 12-15 and 9-14 separately. The District has admitted that all of the refinery strategy rules including refinery strategy rules to be adopted in the future are part and parcel of the same strategy to reduce refinery emissions, but the District has refused to consider the cumulative costs and other impacts of compliance with so many substantive new requirements at the same time. Nor has the District considered the resource constraints associated with developing multiple new compliance programs within the same extremely short timeframe; nor the economic feasibility of making so many expenditures within the same short timeframe; nor, why this comprehensive revision of the District's current, successful program is needed in the first place. The current versions of Regulations 12-15 and 9-14 and their Notices of Intent to Adopt do not even mention the Reduction Strategy. The regulations themselves are introduced as separate projects. The District needs to clearly identify the project and then assess the whole of the project, including its cumulative impacts. The District needs to explain why it changed its definition of the Refinery Strategy Project and whether Rules 12-15 and 9-14 are still part of the Refinery Strategy. The objectives stated for Rules 12-15 and 9-14 are misleading because they are limited to a specific aspect of the overall Reduction Strategy and do not included any analysis of their relationship to the larger strategy.

WSPA - P6, p2 & p3; P55, p6; P55, p3 & p4; P58, p2.

Response:

Regarding segmentation or piecemealing, the Air District believes the manner in which it has considered and adopted rules implementing the Board of Directors' October 2014 Refinery Strategy Resolution does not constitute piecemealing for two primary reasons. First, because the Refinery Strategy Resolution was not itself a CEQA project, it follows that rules implementing it are not susceptible to being piecemealed as part of a larger CEQA project. Second, under established judicial precedent, because each rule implementing the Refinery Strategy Resolution has independent utility, analyzing these rules separately is appropriate, and does not constitute piecemealing.

Before addressing WSPA's CEQA argument, it is useful to put this issue into proper context. WSPA's comments characterize the Refinery Strategy as qualitatively different from the Air District's historic approach to regulating refinery emissions. The Air District

believes this is inaccurate and misleading. While it is true that the Air District's Board of Directors has recently prompted an acceleration of rule development efforts related to refineries, the Air District's approach to rulemaking and the methodologies used are no different than in the past, and the rules themselves have the same independent utility as rules pre-dating the Refinery Strategy. The difference in rulemaking activity undertaken pursuant to the Refinery Strategy is at most quantitative over a given period of time, but there is no qualitative difference that would indicate the larger policy effort referred to as the "Refinery Strategy" is itself a CEQA project.

For almost 50 years, virtually since its inception as an agency, the Air District has been adopting rules applicable to Bay Area refineries. Prior to 2015, at least 22 rules developed, adopted, and from time to time amended by the Air District were applicable to refineries, while another 4 rules developed by the federal EPA have been incorporated into Air District rules and are enforced by the Air District.

Notwithstanding this extensive historical effort, regulation of refinery emissions was neither complete nor static prior to the Board of Director's 2014 adoption of the Refinery Strategy. This is evident, for instance, in the 2010 Clean Air Plan. The Clean Air Plan is a periodically updated document that functions in a manner roughly analogous to a scoping document for rulemaking efforts the Air District anticipates over the next few years. The 2010 Plan identified various measures affecting (among other sources) refineries. Some of these measures were later identified as possible components of the Refinery Strategy.

2010 Clean Air Plan Stationary Source Measure 8 – addressing reduction of SO_2 from petroleum coke calcining – was later identified as a component of the Refinery Strategy and, as Regulation 9, Rule 14 (Rule 9-14). 2010 Clean Air Plan Stationary Source Measure 10 -- contemplating further NOx reductions to refinery boilers and heaters – has been considered as a possible component of the Refinery Strategy but is still in development. Stationary Source Measure 18 -- "Revisions to the Hot Spots Air Toxics Program" -- would entail enhancement of the Air District's hot spots program in a manner similar to that proposed in December, 2015 for what would have been new Regulation 12, Rule 16 (12-16), and is still under consideration for refineries as well as other stationary sources. Rule 12-15 was not identified in the 2010 Plan, but was included as "Action Item 4" in the Air District's 2012 Work Plan (a list, required pursuant to Health & Safety Code Section 40923 of regulations planned for adoption in the coming year).

The overlap between the 2010 Clean Air Plan, the 2012 Work Plan, and the current Refinery Strategy effort is tangible evidence of the continuity of the Air District's efforts to reduce refinery emissions before and after the Board of Director's 2014 adoption of the Refinery Strategy. WSPA has not argued that the cumulative historic effort to

regulate refinery emissions is a unified CEQA project such that evaluating each rule separately constitutes piecemealing. Such an argument would advocate for the impossible, namely, that the Air District should have at some point in the past foreseen and analyzed under CEQA the future of refinery regulation. WSPA's piecemealing argument appears to go back only to the October 2014 Board Resolution. The question begged by WSPA's argument is, what distinguishes the current regulatory effort conducted under the "Refinery Strategy" moniker from the decades of continual regulatory development that preceded it?

The Air District believes the answer to this question highlights one of the errors in WSPA's reasoning. In the midst of the Air District's continuous effort to regulate refinery emissions, the Board of Directors in 2014 set a policy goal of achieving a 20% reduction in certain emissions by the year 2020. WSPA seems to be arguing that this policy pronouncement was transformative from a CEQA standpoint, and sets the current regulatory effort apart from the historic and ongoing effort as a discrete CEQA project that cannot be piecemealed.

The Air District believes there is no legal merit to this attempt to characterize a policy statement with no legal significance as an action having significance under CEQA. The mere fact the various rules now being considered for adoption to regulate refinery emissions would be steps towards achievement of a policy goal set by the Board of Director's does not make these contemplated rules a single CEQA project susceptible to piecemealing.

The Air District's legal analysis starts with the proposition that if what distinguishes the current rulemaking effort from the historic and ongoing effort to reduce refinery emissions is the existence of the of the 2014 Refinery Strategy Board Resolution, and if the Board Resolution was not itself a CEQA project, then there is no larger CEQA project encompassing the current rulemaking effort that could be susceptible to piecemealing. Put another way, if the 2014 Board Resolution has no significance under CEQA, then it did not have potential to change the CEQA significance of anything else, including the rules identified as making progress towards the policy goal announced in the resolution.

The 2014 Board Resolution was a statement by the Air District Board of Directors setting an aspirational goal to achieve a certain degree of emissions reductions from refineries within a certain period of time. The Resolution expressly states this as a "goal." Indeed, it is in the nature of a board resolution as an instrument that it can do no more. A resolution is the expression by the members of the Air District governing board of a position or sense. It has no regulatory effect, and is neither a necessary nor sufficient basis for any subsequent action that might have regulatory effect.

A “project,” for CEQA purposes, is “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” The Refinery Strategy Board Resolution fails to meet this definition because it is not an “activity” at all. The Air District has found no cases holding that an action such as a Board resolution setting a policy goal is a project subject to CEQA. Unlike, say, a general plan for land development or an agreement to allocate funds, the Refinery Strategy Board resolution was not a legal or functional prerequisite to further rulemaking.

WSPA may be arguing that, although the 2014 Refinery Strategy Board Resolution is not itself a project, it was reasonably foreseeable that rules implementing it would be adopted, and that this foreseeability is enough to create a larger CEQA project corresponding to the Refinery Strategy effort. However, as explained above, it was foreseeable that additional rules regulating refinery emissions would be developed by the Air District even without the Board Resolution. Such rules were in development prior to the Board Resolution, and some of these rules later became identified as part of the Refinery Strategy.

Even if, hypothetically, the rules comprising the Refinery Strategy were in some sense authorized by a prior regulatory action, separate CEQA analysis of each rule would still be proper because each rule has independent utility. See, e.g., *Del Mar Terrace Conservancy, Inc. v. City Council of the City of San Diego,* 10 Cal.App. 4th 712 (1992). Air District rules generally have independent utility because each operates independently of the others to reduce emissions from a specific operation, and because the emissions reduction from each rule advances the goal of reducing emissions regardless of whether another rule is adopted. With one exception, each rule that has been adopted or considered in the context of the Refinery Strategy has independent utility in this sense.

Two of the rules considered in the context of the Refinery Strategy arguably did have a functional interdependence. As it was proposed in late 2015, draft Rule 12-16 would have depended in part on information required pursuant to draft Rule 12-15. For this reason, the Air District analyzed these draft rules together in a single EIR. Rule 12-16 has since been taken back for re-examination, while Rule 12-15, as now proposed, has been significantly revised since the 2015 version, with links to Rule 12-16 removed. The information required by currently-proposed Rule 12-15 will be relevant to implementation of a wide variety of existing Air District rules, in addition to possibly informing future regulatory efforts.

As WSPA points out, the Air District sought to combine various Refinery Strategy rules together into common CEQA documents. In each of these combined CEQA analyses it was noted that rules were being combined for administrative convenience only, and that

that no inference was created that the rules were functionally interdependent. WSPA in its comments cites these various bundling actions as evidence of piecemealing. But this argument simply assumes what it seeks to prove. If there is no larger CEQA project encompassing these various rules, then the significance of combining them in one CEQA document is a purely administrative. Nor is it otherwise legally improper to combine distinct CEQA projects into one CEQA document. See, *Neighbors of Cavitt Ranch v. County of Placer,* 106 Cal. App. 4th 1092 (2003).

WSPA's statement that "planned rules will fundamentally rewrite the regulatory compliance obligations of an entire industry" hints at an argument that the extent of this regulatory effort somehow creates a CEQA project larger than the individual rules. As an aside, the Air District believes WSPA's statement is hyperbole. More importantly, such an argument, which implies that the Air District should be able to predict the economic impact of yet-to-be-adopted rules on an industry and compare it to some threshold of significance, does not fit within any recognized CEQA doctrine. CEQA is concerned with effects on the environment, not socioeconomic effects on industry sectors.

Legal arguments aside, it is unclear what WSPA believes would serve as a practical solution to its complaint. If, for instance, CEQA analysis should have been completed prior to the Board announcing the 20% reduction policy goal, such an analysis would have been pure speculation. Analysis of an emissions reduction figure is an empty exercise unless the details of how those reductions will be achieved are known. The Refinery Strategy Board Resolution was a directive to staff to attempt to develop such details. It is implausible that CEQA requires the governing board of a public agency to conduct a CEQA study prior to issuing such a directive to its staff.

Alternatively, WSPA may be implying that, at some point subsequent to the Refinery Strategy Board Resolution, the Air District was obligated to conduct a CEQA study regarding the totality of its efforts to reach the 20% reduction goal. The main practical difficulty with this idea is that the draft rules and rule concepts considered in the context of the Refinery Strategy effort have been in continual flux as new information and analysis (much of it coming from the public and the refineries themselves) has emerged. This iterative process of proposing ideas, soliciting feedback, and revising proposals is of course entirely appropriate for development of a single rule. This iterative nature is multiplied as additional rules are developed during the same time frame. With several rules simultaneously under consideration, an attempt to conduct CEQA analysis on the totality of such an effort would result in an endless loop of revision and recirculation of CEQA documents, effectively foreclosing the adoption of any rules under consideration.

Comment 2:

Regarding IS/ND for 9-14, the District adds language regarding the purpose of the project that is not in the proposed Rule. The Rule states in section 9-14-101: "Description: The purpose of this rule is to limit sulfur dioxide (SO_2) emissions from the thermal processing of petroleum coke." However, the IS/ND states in Section 2.1 states: The proposed project consists of a new rule to control sulfur dioxide (SO_2), particulate matter (PM) and particulate matter less than 2.5 microns equivalent aerodynamic diameter ($PM_{2.5}$) from coke calcining facilities in the Bay Area. The proposed project would implement Regulation 9, Rule 14: Petroleum Coke Calcining Operations and regulate emissions of SO_2, which can also lead to the secondary formation of $PM_{2.5}$." There is not mention of PM in the actual rule. This is confusing to the public and does not properly reflect what is in the rule. Section 2.2 of the IS/ND states: "The Bay Area is a nonattainment area for PM_{10} or $PM_{2.5}$." That is not correct. The Bay Area District is already in attainment with NAAQS and AAQS for SO_2 and NAAQS for $PM_{2.5}$. The District merely has not submitted the necessary paperwork to the EPA in order to have the area formally designated as attainment. Indeed, the District has cited the existing ambient air quality to justify not regulating other non-refinery sources of $PM_{2.5}$ emissions "Because the Bay Area does not have any $PM_{2.5}$ levels that exceed the standards, by definition there are no sources of $PM_{2.5}$ precursors that currently contribute significantly or otherwise to any $PM_{2.5}$ levels that exceed the standards." Letter from J. Karas, BAAQMD to G. Rios, EPA Region 9 (Dec. 22, 2014).

WSPA - P57, p2 - p3

Response:

The rulemaking record, including the Staff Report, is very clear that the purpose of the rule is to reduce the emission of SO_2, a precursor to the formation of $PM_{2.5}$, and that reducing the emission of SO_2 will also result in the reduction of associated formation and emission of $PM_{2.5}$.

Although the Bay Area currently has a "clean data finding" from US EPA for the $PM_{2.5}$ NAAQS, it has not been designated as being in attainment status for $PM_{2.5}$. More urgently, the Bay Area continues to be a nonattainment area for the state $PM_{2.5}$ standard. Further, Air District staff has long held that ambient $PM_{2.5}$ concentrations remain the driver for air pollution-based health impacts in the Bay Area. For these reasons, the Air District is obligated to take action to further reduce emissions of $PM_{2.5}$ and its precursors in order to attain and maintain compliance with both state and federal $PM_{2.5}$ standards.

Moreover, the Air District's proposal to regulate the SO_2 emissions of the Phillips 66 Petroleum Coke Calcining Facility is reasonable. The Phillips 66 Petroleum Coke

Calcining Facility is the top SO_2 emitter in the Bay Area, and thus, it is a significant industrial contributor to PM formation in the Bay Area. The facility annually emits over 1,400 tons per year of SO_2. By way of comparison, California Health and Safety Code section 40918, subdivision (a)(2), authorizes air districts with moderate air pollution to require the use of best available retrofit control technology (BARCT) for stationary sources permitted to emit 250 tons per year or more of a criteria pollutant.

Finally, the Air District does not agree with WSPA's characterization of the meaning of the excerpt from the Karas letter to EPA Region 9 of December 22, 2014. That letter was specifically about federal new source review requirements and is not relevant to determinations of the necessity of Best Available Retrofit Control Technology rules such as Rule 9-14.

Comment 3:

The District is ignoring its reason for the adoption of the Refinery Strategy Rules in December 2015. The District is now asserting that Rules 12-15 and 9-14 do not have a larger purpose and that they are separate rules that affect refinery operations and emissions, and yet the District states that the purpose is to lower certain emissions within the District's jurisdiction.

WSPA - P59, p3.

Response:

Please see the discussion above regarding piecemealing and segmentation.

Comment 4:

A commenter inquired whether there was a distance from an industrial facility fence-line within which the presence of homes or schools would trigger consideration of the impact of emissions on receptors.

C. Davidson, P1 p8.

Response:

Any consideration of residential impacts would only occur if there were an emissions increase. Therefore, since the requirements in this rule will result only in emissions decrease, the Air District did not consider residential impacts.

Comment 5:

A commenter states that previously permitted cogeneration facilities would cause a reduction in the temperature of the Carbon Plant's acid stream that could result in an increase in the production of sulfuric acid and acid rain, which the commenter notes that the IS/ND and proposed Regulation 9, Rule 14 do not address.

C. Davidson, P2 p4 & p9.

Response:

The Air District recognizes that the commenter is concerned about the reduction in stream temperature due to the installation of the heat recovery system a number of years ago; however, that change is not relevant to this regulation. This Rule will reduce SO_2 emissions at the source, and thus, sulfuric acid emissions.

Comment 6:

A commenter questioned whether the Carbon Plant's use of greater amounts of Sodium Bicarbonate would appreciably reduce emissions of SO_x.

C. Davidson P2, p7.

Response:

Staff estimates of the cost to reduce SO_2 emissions are based on the higher sodium bicarbonate injection rate. This is justified by studies conducted by vendors of air pollution control equipment. However, it is important to note that Rule 9-14 would impose an emission limit, but would not require the use of a specific control technology. In addition, the Carbon Plant's SO_2 emissions will be monitored by Continuous Emission Monitors. Thus, it remains up to the facility to identify the means by which to reduce its SO_2 emissions in order to comply with the requirements in Rule 9-14.

Comment 7:

A commenter asks why the Air District did not conclude that a semi-dry scrubber would be cost effective.

C. Davidson P1, p9; P2, p8.

Response:

In accordance with California Health and Safety Code section 40728.5, the Air District performed a study of the socioeconomic impacts of Rule 9-14, which examined the impacts on the Phillips 66 Carbon Plant of three different methods of reducing SO_2 emissions. Each method, including the installation of a semi-dry scrubbing system, was demonstrated to have substantial economic impacts. Due to the economic conditions of this particular facility, staff believes that the proposed rule reflects the highest level of emissions control that is economically feasible.