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March 2, 2012

Comments on Proposed Amendments to
Regulations 2-1, 2-2, 2-4, and 2-6: Permits,
New Source Review, Emissions Banking, Major
Facility Review (Reg 2's)

Ms. Carol Lee
Senior Air Quality Engineer
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

Dear Ms. Lee:

Valero Refining Company – California (“Valero”) appreciates this opportunity to provide comments concerning the District’s proposed revisions to the provisions of Regulation 2 governing stationary source permits (the “Proposed Regulation 2 Revisions”). Valero owns and operates a petroleum refinery in Benicia, California, which is subject to the requirements of Regulation 2. Based upon our experience in addressing air permitting requirements under the current regulatory regime, we offer these comments in support of the revisions to Regulation 2 to promote both environmental protection objectives and efficient air permitting implementation.

Valero is in receipt of the District’s first draft proposed amendments dated January 23, 2012. Valero understands that during a February 27, 2012 meeting with CCEEB and Mr. Broadbent, the original deadline of March 2, 2012 was extended so that conceptual comments are now due by March 2, and technical comments are due March 26, 2012.

Valero appreciates the District’s understanding of the complexities involved with thorough and thoughtful review within the initial timeframe requested and we appreciate the extended comment period the District has offered and the technical workgroup meetings the District has sponsored. We feel these discussions have been very productive. Valero agrees with the comments submitted by WSPA as outlined in its March 2, 2012 letter, and we offer the following additional comments:

1. PSD Calculation Methodology

Utilizing Projected Actual Emissions (PAE) option in PSD calculations has an environmental benefit and should be an allowed PSD determination option. Utilizing the PAE calculation encourages modernization and associated energy reduction projects. It also allows facilities to replace equipment when like-in-kind equipment is no longer available. Modernization projects have associated benefits beyond calculated emissions

reductions which include improved efficiency, lower companion emissions, lower operating expenses, local economic stimulus, and jobs. Since overestimating emissions differentials would require offsets for unattainable actual emissions thresholds, overestimation of these emissions differentials could effectively keep an environmentally beneficial project from being implemented.

Valero strongly believes that the analysis presented in the attached discussion demonstrates both that the dual objectives of environmental protection and economic growth are served most effectively by clearly incorporating within Regulation 2 an actual-to-projected actual emission evaluation standard, and that the objectives and requirements of SB 288 are entirely consistent with this proposed regulatory amendment. If the District nonetheless interprets SB 288 to restrict the District's ability to revise Regulation 2 to apply the actual-to-projected actual methodology in NSR evaluations for all criteria pollutants, at a minimum, Regulation 2 should be amended to reflect the application of the actual-to-projected actual emission evaluation methodology for any pollutants that had not been expressly regulated under the District's NSR program as of December 31, 2002, notably including fine particulate matter, and, pending resolution of current federal litigation, greenhouse gas emissions.

2. Demand Growth Exclusion

Valero also requests through these comments that the District utilize the opportunity presented through the Proposed Regulation 2 Revision to clearly apply the "demand growth" exclusion to the evaluation of emission increases resulting from a modification to an existing stationary source. As recognized by EPA, it is the increase in emissions that *result from* a modification that should be considered in the evaluation of NSR applicability; increases in actual emissions that are unrelated to the modification, most commonly because of changes in business cycles, should not be attributed as an emission increase related to the modification.

3. Particulate Matter - PM10 and PM2.5

EPA has acknowledged that PM emissions include both condensable and non-condensable particulate matter (sometimes referenced as "front-half" and "back-half" particulate emissions). Further, EPA recognizes that the distinction between condensable and non-condensable PM is significant both evaluating regulatory applicability and in establishing emission limits. (Reference 40CFR 51.166(b)(49)(vi).

It is important that the proposed rules differentiate between non-condensable PM and condensable PM, and include front-half/back-half emissions compliance for new sources only after the effective date of this proposed rule amendment so as to not unintentionally place an existing source in jeopardy of exceeding emission limits that were established on the basis of non-condensable PM emissions only and do not account for the condensable fraction.

During the February 28, 2012 technical workgroup meeting, The Avogadro Group, LLC discussed the issue of source test accuracy utilizing the EPA's required method for testing front and back-half PM. They stated that PM testing at low concentrations utilizing EPA Method 201A and 202 can produce a wide range of results. Additionally it was mentioned that the stack nozzle size must be increased from nominal 3 inches to 6 inches to accommodate testing equipment. This change will take some time to engineer and implement and is based on stack access and refractory configuration. Because

PM10 and PM2.5 emissions compliance will be based on this test, and we currently have no local sampling data on PM2.5 emissions, it is important that we better understand test accuracy issues prior regulating back-half emissions.

4. Cargo Carrier Emissions (Regs. 2-2-302, 303, 610):

Cargo carrier emissions are mobile source emissions and not required to be accounted for by the EPA when reviewing stationary source emissions potential. As such, we request that Cargo Carrier emissions offset requirements be omitted from this rule.

General Comments:

We offer the following comments to improve the outcome from the rule amendment process for improved working documents and work processes.

1. Streamlined Title V Permit Updates for properly permitted NSR Sources:

Valero recommends that the District revise Regulation 2 so that the NSR and Title V permitting processes have a defined connection so as to allow a properly permitted NSR source to become a minor permit amendment to Title V. Since both Reg. 2-2 and Reg. 2-6 are currently being rewritten, now is the time to address this issue. Specifically, the Regulation should be revised to streamline the process for existing and new stationary sources to incorporate into the current Title V air quality operating permit provisions of air quality construction permits previously issued by the Division, once the source has completed construction activity, demonstrated compliance with applicable standards (through performance testing or otherwise) and is therefore prepared to "operate" the relevant source or modified source. The Division currently implements Regulation 2 by requiring an existing stationary source to apply for a "significant permit revision" to its Title V permit to accomplish the transition of air quality construction permit terms and conditions into the existing Title V air quality operating permit. This process substantially delays the incorporation of such construction permit terms into the operating permit, and therefore undermines the primary objective of Title V air quality operating permit program – the identification in a single permit of all air quality requirements applicable to a facility.

The benefit to the District to implement this change is that actual performance falls under the reporting obligations of Title V. Sources not in the Title V permit are not subject to Title V deviation reporting requirements. An example of this is Valero's ULSD project, which was permitted in 2007, yet the applicable operating requirements were not incorporated into the facility's Title V permit until December 2010. The ULSD project was part of a larger NSR project that underwent full CEQA review and had an associated EIR. Therefore, ample opportunity has already been provided for comment by the public and EPA.

Expediting the amendment of the Title V air quality operating permit assists the permittee in its efforts to ensure continued compliance, by listing all currently applicable air quality requirements in a single permit, and eliminating or updating any conditions that may be superseded or revised by virtue of the construction permit. For the same reasons, expedited revision to the Title V operating permit assists the District in its evaluation of the relevant facility's compliance status. By simplifying the permit modification process, this proposed change would also reduce the resource burden imposed upon the District with respect to non-substantive, procedural permit actions,

and thereby allow the District to devote its limited resources to those issues most directly implicating environmental protection.

Federal regulations expressly afford the District the opportunity to process the incorporation of an air quality construction permit into a current Title V air quality operating permit through an administrative amendment or a minor operating permit modification, if certain procedural requirements are satisfied. Most notably, in processing an application for air quality construction permit and ultimately issuing the construction permit, the District must satisfy the minimum public participation requirements established by EPA for Title V permit issuance. To the extent that the District provides opportunity for public comments and, as appropriate, opportunity to request a public hearing, for issuance of an air quality construction permit, as well as providing sufficient public notice of the relevant provisions to be included in the air quality construction permit (and ultimately in the Title V permit), then the District need not proceed through an additional public participation process upon the transition of the construction permit into the Title V permit. An example of this is Valero's VIP Project ATC, which was issued after a full CEQA analysis and EIR which provided notice and opportunity for comment to the public and EPA. For this reason, depending upon the specifics of the permit transition process, the procedure may instead be satisfied by way of an administrative amendment or minor operating permit modification.

Specifically, EPA's Title V operating permit regulations expressly provides that an administrative permit amendment may be used for a permit revision that:

Incorporates into the Part 70 permit the requirements from preconstruction review permits authorized under an EPA-approved program, provided that such a program meets procedural requirements substantially equivalent to the requirements of §§70.7 and 70.8 of this part that would be applicable to the change if it were subject to review as a permit modification, and compliance requirements substantially equivalent to those contained in §70.6 of this part.

40 CFR §70.7(d)(1)(v).

Therefore, the District's current process for incorporating applicable requirements into Title V permits can be streamlined by adding a provision stating that an administrative amendment process may be used to incorporate the operating provisions of new construction permits as applicable requirements in a Title V permit if opportunity for public participation in a manner consistent with the requirements of 40 CFR 70.7 has been provided previously, whether through a CEQA process or by any other means.

2. Permit Application in Process

We request that rule amendment language be added to allow permit applications to proceed based on the rule language that was in effect as of the date of the permit application submittal. If the rules change during the permitting process, it could cause project delays or cancellations based on additional permitting and compliance criteria that were not included with original project evaluations and designs.

3. Regulations must be crafted to work in concert with one another

This eliminates unintended prohibitions for permitting and meeting compliance obligations.

4. Avoiding Strict Rule Prohibitions

The requirements should be clearly defined without being overly prescriptive, which can reduce or eliminate the applicants' ability to comply. To the extent possible, avoid strict rule prohibitions without granting relief. Including rule language such as "*or as allowed by permit condition*" provides the ability for a permit writer to exercise his or her expertise and discretion to address source-specific operating scenarios that the rule makers never envisioned. An example of this is Valero's Flue Gas Scrubber Project allowance for short windows of maintenance to replace SCR catalyst during which the SCR is bypassed and the NOx limits are not enforceable. The alternative is a refinery-wide shutdown, which would result in significantly more emissions than an SCR bypass during periodic catalyst replacement. (Reference Valero Title V Permit Condition 20820.)

5. Consider New Rule Numbers for Proposed Regs 2-1 and 2-2

With the significance of the changes proposed in Regs. 2-1 and 2-2, both in terms of definition context and subpart renumbering, consider renumbering the amended regulations from, for example, Reg. 2-1 to Reg. 2-11 and Reg. 2-2 to Reg. 2-12. This will provide clarity when other documents reference these regulations.

We appreciate this opportunity to provide comments on the Proposed Regulation 2 revisions, and look forward to continued participation in the District's regulatory development process. Should you have any questions about these comments, please contact feel free to contact me at 707-745-7203.

Sincerely,



Susan K. Gustofson, P.E.
Staff Environmental Engineer

SKG/tac

Enclosure

ecc: Alexander (Sandy) Crockett, Assistant Counsel, BAAQMD
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Greg Stone, Manager, Air Quality Engineer, BAAQMD

PSD Calculation Methodologies
Projected Actual Emissions (PAE) and Potential to Emit (PTE)

Because the potential to emit of a regulated source reflects its maximum authorized emission rate, assuming operation at maximum capacity during every second of the year under "worst case" emission conditions, subject to enforceable limitations, a stationary source rarely exhibits annualized actual emissions that approach potential to emit rates. Therefore, even to the extent that a proposed modification is anticipated to result in no significant actual emission increase, or indeed even an actual emission decrease, the Division's interpretation of its current Regulation 2 Provision can result in a determination that a modification at a stationary source would result in a "significant net emission increase" solely because the facility has successfully maintained its prior emissions at levels materially below the maximum allowable (potential) emission rates. In other words, because the facility's historical actual emissions are sufficiently less than its potential emission rate, the comparison of its base line actual emissions to its future potential emissions typically exceeds the significance threshold, even when the proposed project would not cause *any* actual emission increase.

Unnecessary application of NSR provisions can adversely affect operational efficiencies and environmental objectives for several reasons. First, the structure of a rigid "actual-to-potential" emission evaluation creates the perverse incentive for stationary sources to maximize actual emission rates up to levels approaching maximum authorized levels. In other words, a facility would be "penalized" by restricting actual emissions to the greatest extent practical during routine operations, because the facility is more likely to trigger NSR applicability when proposing to modify an existing source. By contrast, if the facility maintains actual emission rates as close as practicable to maximum allowable rates, it minimizes the possibility that a proposed modification could trigger the burdensome and time-consuming requirements of NSR. Therefore, the actual-to-potential test creates a disincentive, as a regulatory matter, to further restrict emissions.¹

Second, over the course of its life-cycle, most stationary sources will be afforded opportunities to improve the efficiency of existing operations. Through developments in technology and improvements in equipment systems, facilities can implement changes at existing operations to enable production to be achieved at higher levels without increasing emission rates, inventory consumption or operating costs, or maintain current production rates while lowering emissions, raw material consumption and operating costs. In many cases, the economic benefits to the Facility of such enhanced efficiencies may be relatively limited. To the extent that pursuit (through source "modification") of these enhanced efficiencies would impose significant additional burden (in the form of extended permitting, more stringent controls and increased capital or operating costs), the facility is substantially less likely to implement such efficiencies. The application of the "actual-to-potential" emission increase methodology will typically result in a determination that a modification implemented to improve operating efficiencies results in a "significant net emission increase," notwithstanding that the project will

¹ Valero routinely operates its Refinery and relevant emission sources in a manner reflective of its commitment to environmental protection, and therefore consistently attempts to minimize emissions (and its overall impact on the environment) associated with its refining operations. Our comments therefore are not intended to suggest that Valero will make its operational decisions based solely upon specific regulatory standards. However, in adopting and imposing regulatory requirements, we believe that the District should select the option that tracks the best public policy factors and maximizes incentives for desired conduct, consistent with public benefit.

result in no material actual emission increase, or potentially even an actual emission decrease, of relevant pollutants. A determination of NSR applicability can result in the application of additional control obligations and a substantially longer permitting process. Where the benefits of such operational efficiencies are limited, NSR applicability can, by itself, dictate the decision not to pursue such projects.

In response to these points, it has been argued that a facility that anticipates that its proposed modification will not result in any material actual emission increase can simply accept reduced permit limits, consistent with its projected actual future emission rates, in order to avoid NSR, through so-called "synthetic minor" permitting. This suggestion, however, completely ignores the implications of this "permitting strategy" relative to the current authorization for operating ranges for the facility. Specifically, absent the proposed source modification, the facility is authorized to engage in various operating activities and operating levels corresponding to emission rates currently authorized by applicable permit terms. Although the facility may have not recently elected to utilize this range of flexibility, it presumably secured its permits with the objective of ensuring necessary operational flexibility to remain economically competitive and address variable market, technology or other developments. The election to accept a substantial *reduction* in allowable emission limits (through a synthetic minor permit) would require the facility to surrender this important operational flexibility secured and authorized through the permitting process. Maintaining the current operational flexibility would (in most cases) be substantially more significant to the facility's economic interests than improvements to operational efficiencies at the same facility. Further, limiting this flexibility by accepting a synthetic minor permit also can have adverse public policy consequences because it can limit a facility's ability to increase production rates within existing permit limits to prevent regional shortages that can result under unforeseen circumstances due to, for example, production outages at other facilities...

These disincentives to implementation of operational efficiencies can be addressed by revising Regulation 2 to clearly provide that the determination of the net emission increase resulting from a proposed modification of a stationary source shall be calculated by comparing the source's baseline actual emission rate (before the modification) with its projected actual emission rate following the modification (an "actual-to-projected actual" emission evaluation). This proposed emission evaluation is not only authorized by the CAA, it is directly consistent with federal implementation of the NSR program by the United States Environmental Protection Agency ("EPA").

In promulgating revisions to its NSR regulations in order to, among other things, apply the "actual-to-projected actual" emission increase method, EPA identified and discussed the foregoing considerations as supportive of the actual-to-projected actual test. *See, e.g., 67 Fed. Reg. 80186* (December 31, 2002). For example, EPA responded to petitions filed by interested parties for reconsideration of these NSR regulatory revisions. EPA specifically noted in the context of its response that "the previous NSR Rule [which included the actual-to-potential emission evaluation requirement] imposed barriers to environmentally beneficial projects and created incentives to keep emissions high." U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, *Technical Support Document for the Prevention of Significant Deterioration (PSD) and Nonattainment Area New Source Review (NSR): Reconsideration*, EPA-456/R-03-005 (October 30, 2003) ("*EPA Technical Support Document on Reconsideration*"), at p.101. Therefore, EPA directly and clearly concluded that the actual-to-potential test served to create disincentives to projects that would likely provide environmental benefits.

For this reason, and contrary to conflicting suggestions, the *Protect California Air Act of 2003*, commonly referred to as SB 288, does not restrict the District from clearly incorporating an actual-to-projected actual emission evaluation within Regulation 2. According to both express statutory language and statements of legislative intent, SB 288 is intended to restrict local air quality districts from *weakening* air quality protection standards in effect as of the date of the legislation. Specifically, Section 42504(a) of SB 288 clarifies that no air quality management district or pollution control district may revise its NSR regulations “to be less stringent than those that existing on December 30, 2002.” In providing further clarity through the statement of legislative intent, the Legislature specifically identified “the purposes of the bill to include the need to attain and maintain ambient air quality standards by the earliest practicable date, [and] to protect public health and welfare from the adverse effects of air pollution.” These statements clearly reflect that the statute is intended to limit local regulatory revisions that would result in an increase in actual emissions (and associated ambient impacts) that would otherwise have been prohibited under existing local air quality standards. For the reasons discussed above, reliance upon an actual-to-projected actual emission evaluation standard ensures that the actual impact to the environment must be considered in determining NSR applicability.

EPA specifically addressed this issue in promulgating the actual-to-projected actual emission test, among other NSR regulatory revisions, in 2002:

We believe that the environment will not be adversely affected by these changes and in some respects will benefit from these changes. The new [actual-to-projected actual] test will remove disincentives that discourage sources from making the types of changes that improve operating efficiency, implement pollution prevention projects and result in other environmentally beneficial changes. Moreover, the end result is that State and Local reviewing authorities can appropriately focus their limited resources on those activities that could cause a real and significant increase in pollution.

67 Fed. Reg. 80251.

In addition, prior to promulgating the revisions to NSR, EPA undertook an analysis of the environmental impact of its proposed regulatory changes, including implementation of the actual-to-projected actual emissions test, and concluded through the analysis that “the actual-to-projected actual test is likely to be environmentally beneficial.” U.S. Environmental Protection Agency, *Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rules* (November 21, 2002), at p.2. It is true that EPA’s analysis concludes that the environmental benefit of the actual-to-projected actual test, when compared to the actual-to-potential test, is modest. However, SB 288 does not mandate that local air districts may revise their previously-existing NSR regulations only to the extent that such revisions clearly provide *significant* environmental benefits; indeed, the California statute does not require a showing that the proposed regulatory change provides any relative environmental benefit. Instead, SB 288 restricts revisions of local NSR regulations only to the extent that such revisions would *weaken* the environmental protection afforded by the existing standards. As evaluated by EPA, the actual-to-projected actual evaluation clearly does not lessen the environmental protection afforded under NSR relative to the actual-to-potential test.

Consistent with this analysis, SB 288 has been characterized, including by the California Air Resources Board (“CARB”), as a general “anti-backsliding” directive relative to regulatory requirements in effect as of December 31, 2002. The federal CAA similarly includes specific

“anti-backsliding” provisions, specifically relevant to the pursuit of attainment with ambient air quality standards (which, of course, is the objective of NSR). In several contexts, federal courts have interpreted the scope of, and requirements imposed under, the anti-backsliding provisions of the CAA; in no case has a Court found a regulatory change from the actual-to-potential emission evaluation test to the actual-to-projected actual test to constitute backsliding.

The D.C. Circuit Court of Appeals evaluated multiple challenges to EPA’s NSR regulatory revisions (a/k/a “NSR Reform”) in *State of New York v. EPA*, 413 F.3d 3 (D.C.Cir. 2005). In that case, environmental and state petitioners challenged certain provisions of the NSR Reform rules as inconsistent with the CAA, because they allegedly reduced environmental protection. It is noteworthy that these petitioners did not even specifically challenge EPA’s decision to transition from the actual-to-potential evaluation method to **the** actual-to-projected actual test. Instead, *industry* petitioners challenged the actual-to-projected actual emissions test on the grounds that it was *too stringent* relative to their assertion that the CAA required application of a potential-to-potential test. The Court disagreed with the industry group and sustained this provision of the revised federal NSR regulation.

In evaluating EPA’s assessment of the proper methodology for determining NSR applicability, the Court also gave deference to EPA’s determination on the record that its revised approach toward NSR applicability evaluations would be at least as protective of the environment as the prior rule. Although the Court struck down certain provisions of NSR Reform as inconsistent with the environmental protection objectives of the CAA, the Court’s decision did not undercut EPA’s actual-to-projected actual test; instead, the Court merely agreed with the environmental petitioners that EPA must strengthen its recordkeeping requirements for affected sources to demonstrate compliance with the actual-to-projected actual test.

States challenging NSR reform in *State of New York* argued that the “anti-backsliding” provisions of the CAA prohibited EPA from implementing the NSR Reform regulatory changes, because such changes would allegedly result in less stringent NSR requirements, and therefore lessen air quality benefits. Once again, it is noteworthy that this group did not specifically raise the actual-to-projected actual test within its anti-backsliding challenge in this context. Further, the Court did not agree that the state government petitioners in *State of New York* had identified sufficient information on the record that NSR Reform resulted in a lessening of the stringency of NSR.

The D.C. Circuit Court of Appeals also considered “anti-backsliding” provisions of the CAA in *South Coast Air Quality Management District vs. EPA*, 472 F.3d 882 (2006). The SCAQMD case related to EPA’s regulatory transition from the former 1-hour national ambient air quality standard (“NAAQS”) for ground-level ozone to the new 8-hour ozone NAAQS. The EPA directed that states could eliminate from state implementation plans (“SIPs”) provisions that had been applicable to areas classified as in serious or severe nonattainment with the 1-hour ozone NAAQS, if the classification of nonattainment for the same area under the new 8-hour ozone NAAQS could result in different (arguably less stringent) requirements. In agreeing with the state/local government and environmental petitioners that the anti-backsliding provisions of the CAA prevented EPA from allowing states to relax SIP requirements relevant to the 1-hour ozone NAAQS, the Court determined that certain regulatory provisions must be maintained for each nonattainment area until it demonstrated attainment with the 1-hour NAAQS, even if the areas would be subject to a less stringent ozone nonattainment classification under the revised NAAQS. The Court then identified specific statutory requirements that could not be relaxed without causing the type of “backsliding” prohibited by

the CAA. The Court's analysis did *not* extend the anti-backsliding mandate of the CAA to any issue regarding the actual-to-potential versus actual-to-projected actual emissions test.

Therefore, because SB 288 can properly be characterized as establishing an "anti-backsliding" standard relative to California's local air quality NSR rules, it is noteworthy that the federal courts have not determined that any change in NSR emission evaluation methodology (from an actual-to-potential to an actual-to-projected actual evaluation) constitutes "backsliding" subject to the federal statutory limitation. In the same manner, SB 288 should not be interpreted to restrict the District from revising Regulation 2 to clarify that the actual-to-projected actual emissions evaluation method shall be used to assess the emissions increase resulting from a modification to an existing stationary source, for purposes of evaluating NSR applicability.

For the foregoing reasons the objective and intent of SB 288 would not restrict the District from clearly incorporating the actual-to-protected actual test into the NSR provisions of Regulation 2. The specific language of SB 288 is also consistent with this interpretation.

First, at several places within the statute, the Legislature identifies specific potential changes to NSR requirements that were implicated by EPA regulatory activity or could result from regulatory changes that reduce the "stringency" of existing local standards. Notably, Section 42501(f) of SB 288 expressly states that EPA's then-proposal to define "routine maintenance, repair and replacement" would, if finalized, "significantly worsen [air quality considerations]." Section 42501(f). Separately, SB 288 expressly directs, at Section 42502(c), that local air districts should preserve California's BACT and offsets ratios, notwithstanding any change by EPA in NAAQS or attainment designations. Indeed, the Legislature's specific analysis in this context foreshadowed the anti-backsliding challenge raised before the Court in *SCAQMD*. By contrast, SB 288 does not similarly identify the actual-to-potential emissions test for NSR evaluation as among the specifically-identified regulatory programs that warranted preservation.

Instead, SB 288 identifies, at Section 42504(b), certain categories of NSR regulatory provisions that shall not be amended by local air districts, if such revisions would "exempt, relax or reduce the obligations of a stationary source." While this enumerated list of categories extends to applicability determinations, specific definitions, and calculation methodologies and thresholds, the list does not expressly relate to the application of the actual-to-potential emissions test.

Further, even to the extent that Section 42504(b) should be interpreted to apply to a proposed revision of the District's regulation to clearly incorporate an actual-to-projected actual evaluation of emission increases resulting from proposed modifications, the provisions of Section 42504(b) do not constitute an absolute prohibition against regulatory revision. Instead, when read in conjunction with the more general objectives of Section 42504(a), any specific proposed regulatory change potentially implicated by Section 42504(b) would only be restricted by SB 288 to the extent that the revised regulation would not result in at least "equivalent" air quality protection. EPA's extensive analysis of its NSR Reform package, including specifically relative to its promulgation of an actual-to-projected actual emissions test for determining the emission increase resulting from a modification, demonstrates that the actual-to-projected emission increase methodology not only avoids adverse environmental impact, but would actually provide environmental benefit. As EPA expressly concluded, "the actual-to-projected actual applicability test to measure emission increases from [modified or replaced emission units] . . . will encourage sources to undertake projects that will improve efficiency and reduce

overall emission from these emission units. *EPA Technical Support Document on Reconsideration*, at 96-97.

CARB has issued several guidance regarding implementation of SB 288. One such guidance suggests that the limitations on local district NSR revision imposed through SB 288 may be implicated by a regulatory change by a local air district from the actual-to-potential method to the actual-to-projected actual method. For the reasons discussed above, to the extent that CARB would conclude that SB 288 dictates that the District's revision of Regulation 2 -- to clearly utilize the actual-to-projected actual method for evaluating emission increases from a proposed modification -- would be prohibited by SB 288, we respectfully disagree. We believe that both the language and stated intent of SB 288 clarify that the statute limits revisions to local air district NSR regulations only to the extent that such revisions would result in "backsliding" of air quality protection and otherwise weaken the pre-existing NSR standards. Available evidence demonstrates that reliance on the actual-to-projected actual evaluation methodology would be at least equivalent to implementation of the actual-to-potential test, and would likely result in relative air quality benefits. Because the CARB guidance, as a matter of law, cannot constitute a binding interpretation of the statute, any provision of the guidance that is inconsistent with the objectives or language of SB 288 itself, should not be followed.

Moreover, a comprehensive review of the entire CARB guidance allows an interpretation that is consistent with SB 288. The CARB guidance specifically characterizes Section 42504(a) as imposing a general "anti-backsliding" provision relative to the air quality protection standards in effect as of the date of the legislation. In addition, the guidance further clarifies that SB 288 would restrict any proposed elimination or dilution of regulatory standards that might otherwise result from EPA's transition from the 1-hour ozone NAAQs to the 8-hour NAAQs, where certain areas would no longer be classified as serious or severe ozone nonattainment areas. This analysis within the guidance is entirely consistent with the Court's decision in the *SCAQMD* case. Specifically, CARB discusses SB 288 as imposing restrictions on the same types of regulatory changes found objectionable by the Court in *SCAQMD*. The proposed incorporation of an actual-to-projected actual emissions evaluation within Regulation 2 is in no way implicated by these specific anti-backsliding interpretations. Finally, in this context, the CARB guidance also recognizes the objective of SB 288 to ensure "overall program equivalency" through any revisions to a local air district NSR program. As detailed at length above, EPA has demonstrated that an actual-to-projected actual emission evaluation method ensures at least "equivalency" relative to the actual-to-potential test method with respect to air quality protection.

In evaluating the scope and extent of SB 288, it is also important to recognize that the Legislature sought to simultaneously preserve economic growth while ensuring continued environmental protection. Among the specific listed objectives of the statute identified in Section 42503, SB 288 is intended to "ensure that economic growth will occur in a manner consistent with the preservation of existing clean air resources." CARB has similarly recognized this objective of the statute. As specifically discussed above, and as separately analyzed by EPA, implementation of the actual-to-projected actual evaluation method for analyzing the increase in emissions resulting from a modification appropriately balances environmental objectives and economic growth. This methodology encourages implementation of projects designed to improve the efficiency of the existing operation, where such modification will not result in any material increase in actual emissions. Of course, only *actual* emission increases can cause degradation in air quality. The District should therefore revise Regulation 2 to expressly utilize the actual-to-projected actual methodology for evaluating emission increases,

in order to promote projects that will not cause any significant *actual* emission increase, but will support economic growth and operating efficiencies.

The District's permitting regulations did not expressly include NSR provisions applicable to particulate matter with diameter of less than 2.5 microns ("PM2.5") and greenhouse gas ("GHG") emissions as of December 31, 2002. Because no such regulatory scheme even existed as of the effective date of SB 288, the statute cannot be interpreted to limit the development and application of NSR standards for these pollutants, to the extent that they would be regulated in the future under District-based NSR requirements. Therefore, the District can clearly revise Regulation 2 to apply an actual-to-projected actual emission evaluation method to PM2.5 and GHG emissions for purposes of evaluating NSR applicability.

The application of the actual-to-projected actual emissions evaluation methodology to at least PM2.5 and GHG emission increases associated with proposed modifications of existing major stationary sources would likely promote implementation of projects that enhance operational efficiencies, and thereby secure increased production without corresponding increased emission rates, or possibly even decreases in emissions. Therefore, both environmental protection and economic growth objectives would be fostered by this approach.

This analysis is particularly compelling with respect to GHG emissions. Indeed, EPA has not even established NAAQS applicable to GHG emissions; therefore, it is not even possible to contend that SB 288 could be interpreted to limit the District's revision of any regulation governing NSR analysis related to GHG emissions. In fact, the absence of underlying NAAQS for GHGs calls into question the legal basis for the application of any NSR-related standards for these pollutants. The United States Circuit Court for the District of Columbia Circuit is currently evaluating these legal considerations and will likely render its opinion concerning the legal basis for applying NSR to GHG emissions within the next several months. See *Coalition for Responsible Regulation v. EPA*, D.C. Cir., No. 10-1092, oral argument 2/29/12; *American Chemistry Counsel v. EPA*, D.C. Cir., No. 10-1167, oral argument 2/29/12.