Final ATC Determination and Response to Comments

This document explains the Bay Area Air Quality Management District's ("Air District") decision to reissue the Authority to Construct ("ATC") for the sources that comprise Chevron Richmond Refinery "Modernization Project." The Air District proposed reissuance of the ATC on December 24, 2014 by posting a Proposed ATC Determination, draft responsible agency CEQA findings, revised permit conditions, Engineering Evaluation Addendum, and other supporting documents on its website for a 30-day comment period. The only comment received was from Earthjustice. The Air District is today finalizing reissuance of the ATC as it was proposed. Readers are referred to the December 24, 2014 proposal and supporting documents for background. Responses to Earthjustice's January 26, 2015 comments are provided below.

1. Comment: In light of significant effects of the Chevron refinery on the surrounding community, it is crucial that the Air District follow proper permitting procedures to ensure that the public is adequately protected.

Response: As explained in more detail below, reissuance of the ATC follows the permit procedures set forth in Air District regulations. The fundamental purpose of the Air District's programs is to protect public health and the environment. However, Air District regulations also provide certain procedural rights to facilities applying for permits. These rights are enforceable in court against the Air District. The Air District does not have discretion to bypass these procedural rights, for instance, because emissions would be increasing. Here, the Air District permit, in combination with the City of Richmond's Conditional Use Permit, will ensure no net increase in pollutants from operation of the Modernization Project. The environmental effects of the project are addressed in detail in the Proposed ATC Determination.

2. Comment: The ATC has not continued in effect since issuance in 2008, as claimed by the Air District. The ATC expired for the following alternative reasons: A) the Air District established a September 19, 2012, date for expiration; B) Chevron failed to submit permit fees prior to the September 19, 2010, expiration date, and thus did not submit a complete application that is prerequisite to the permit "continu[ing] in effect" pursuant to 2-1-407; C) the Air District's interpretation of 2-1-407 is not sustainable because it conflicts with the requirements of 2-1-408 to affirmatively act on applications; and D) The ATC expired as a matter of federal law in 2010 because under the SIP-approved version of 2-1-407 the Air District was required to make a substantial use finding prior to expiration.

Response: Earthjustice advances several arguments asserting that the ATC did not continue in effect pursuant to 2-1-407. While the Air District believes these arguments are not persuasive, it is important to note at the outset that the action being taken by the Air District -- reissuance of the ATC -- does not depend on whether the ATC continued in effect since issuance. As explained in the Proposed ATC Determination, the Air District believes that the result reached through reissuance is the same as would be reached under 2-1-407, which provide for permits to "continue in effect" under certain circumstances. The discussion of 2-1-407 in the Proposed ATC Determination was thus offered as an alternative way to construe the procedural history of the Modernization ATC, but was not the primary justification for the proposed action. With this context in mind, Earthjustice's comments will be addressed in the order presented in its letter.

A) Comment: The ATC expired because Air District established a September 19, 2012, date for expiration.

Response: Earthjustice's argument appears to be that an ATC that has an expiration date cannot continue in effect pursuant to 2-1-407. This is plainly not the intention of 2-1-407, as Section 407 itself establishes that the term of any permit must be limited to two years. The relevant question is not whether the ATC had an expiration date, but whether Chevron took appropriate steps prior to that expiration date such that the ATC continued in effect.

B) Comment: Chevron failed to submit permit fees prior to the September 19, 2010 expiration date, and thus did not submit the complete application that is prerequisite to the permit continuing in effect pursuant to 2-1-407.

Response: Chevron submitted an application for renewal on September 15, 2010 which included a calculation of fees and a statement that fees would be submitted upon confirmation of the correct amount by the Air District. The Air District confirmed the correct fee amount on October 6, 2010, whereupon Chevron submitted the requested fees. The Air District believes Chevron substantially complied with the requirement to submit a complete application. Determining fees for a project of this scope is sometimes not straightforward. Chevron's approach was reasonable and consistent with how Air District permit fees are often addressed for large, complicated projects.

C) Comment: The Air District's interpretation of 2-1-407, under which the ATC continued in effect for several years, is not sustainable because it conflicts with the requirements of 2-1-408 to affirmatively act on applications.

Response: 2-1-408 requires the Air District to act on applications within 35 days of receipt of a complete application. 2-1-407 provides, among other things, that if the Air District does not act on a complete application for renewal, then the permit shall continue in effect. Earthjustice appears to argue that there is a tension between the two provisions that requires interpretation, and that the proper interpretation under these facts is that the permit did not continue in effect.

The Air District perceives no tension between sections 408 and 407. Section 408 requires the Air District to act promptly on complete applications, while Section 407 provides the facility that has a permit and wants to continue operating with protection should the Air District fail to act promptly. The relationship between section 408 and 407 is thus logical and complementary. There being no ambiguity in these provisions that would require interpretation, the period of time that a permit continues in effect pursuant to Section 407 is not a relevant consideration.

D) Comment: The ATC expired as a matter of federal law in 2010 because under the SIP-approved version of 2-1-407, the Air District would have been required to make a substantial use finding prior to expiration.

Response: The Air District must follow its currently adopted regulations regardless of whether they differ from a previous, SIP-approved, version. However, under these facts, the SIP-approved version of 2-1-407 yields the same result as the currently adopted version. The SIP-approved version provides that an ATC shall expire after two years "unless substantial use of the authority has begun." Under this earlier version of 2-1-407, the exception from expiration for substantial use requires no approval from the Air District. It would therefore have been irrelevant, under the earlier SIP-approved version, when or whether the Air District had made a finding of substantial use, or indeed whether Chevron had submitted an application for renewal on this basis. The currently-adopted version of 2-1-407 is more stringent in that it requires an application for renewal based on substantial use.

Earthjustice also asserts that the Air District's February 3, 2012 finding of substantial use is invalid because no activity occurred on the project after the EIR was invalidated in 2009. Earthjustice's argument appears to be that substantial use does not exist unless there is a continuity of activity.

Earthjustice cites no authority for its interpretation of "substantial use." 2-1-407.3 provides that an ATC may be renewed if substantial use of the ATC has begun "either during the initial term or during a renewal term." It follows from the plain language regulation that substantial use may be periodic and/or discontinuous.

3. Comment: The Air District erred in its determination that the application was complete on September 19, 2008 for purposes of reissuing the ATC. Under the District's regulations, an application is not complete until an EIR is certified. Therefore, application completeness should have been deemed to occur after the certification of the 2014 EIR.

Response: These comments relate to the Air District's reissuance of the ATC based on the application as it was deemed complete on September 19, 2008. From this it followed, pursuant to 2-1-409, that the standards to be incorporated in the ATC were those in effect in September 2008.

Earthjustice cites 2-1-408.1 for the proposition that an application is not complete until an EIR for the project is certified. 2-1-408.1 prohibits the Air District from taking final action on a permit until there is either a final EIR or a Negative Declaration for the project. "Final action" is obviously distinct and subsequent to the finding that an application is complete. Application completeness is defined in 2-1-202, and includes "CEQA-related information that satisfies the requirements of Section 2-1-426." Section 426.2.6 provides that where, as here, an agency other than the Air District is the CEQA lead agency, an application may be complete if it includes "a commitment in writing from another agency that it has assumed the role of lead agency for the project in question." Consistent Section 426.2.6, the Air District's standard application form requires the applicant to describe how another public agency will be complying with CEQA in connection with the project.

Insofar as Earthjustice asserts that the Air District failed to consider the 2014 EIR in reissuing the ATC, the Air District believes the record demonstrates the contrary to be true. Consistent with its intent as expressed in a February 3, 2012 letter as well as its obligation under the October 2014 settlement agreement with CBE, the Air District took the 2014 EIR into consideration in reissuing the ATC for the Chevron Modernization Project. These considerations are described in the Proposed ATC Determination and in the Air District's responsible agency CEQA findings supporting reissuance of the ATC.

4. Comment: Issuance of the ATC based on standards applicable at the time the application was deemed complete is contrary to *Sierra Club v. Environmental Protection Agency*, 762 F.3d 971, 980 (9th Cir. 2014), which requires that permits be issued in consideration of current air quality standards.

Response: The Sierra Club decision cited by Earthjustice was based on specific language in the federal Clean Air Act which the Court interpreted to require EPA, when issuing a PSD permit, to apply regulations in effect at the time of permit issuance. The Court also observed that regulations allowing for

"grandfathering" (i.e., basing permit decisions based on regulations in effect at the time of application completeness) would be permissible under the federal Clean Air Act.

Reissuance of the ATC is occurring under the Air District's permitting regulations, not the federal PSD program at issue in *Sierra Club*. In issuing an ATC, the Air District is not bound by the federal Clean Air Act. More importantly, since the Air District's regulations differ in important respects from the federal statutory language before the Court in *Sierra Club*, the 9th Circuit holding is not on point even as persuasive authority. The relevant Air District regulation is 2-1-409, which provides that "[t]he decision as to whether an authority to construct shall be granted or denied shall be based on federal, state and District BACT, offset, TBACT, and project risk regulations or standards in force on the date the application is declared by the [District] to be complete." Earthjustice claims that this provision requires consideration of standards applicable at the time of permit issuance. The Air District disagrees, and believes the issue is resolved by the plain language of 2-1-409 requiring consideration of standards applicable at the time of application completeness.

Even if, hypothetically, the regulations governing ATC issuance required consideration of standards applicable at the time of permit issuance, the standards referred to by Earthjustice as having changed since 2008 would not be relevant. National Ambient Air Quality Standards are generally not implemented through individual permit actions. Federal PSD permit requirements do not apply to the Modernization Project, for the reasons stated in the Proposed ATC Determination. Finally, the Modernization Project is not a "major modification" for PM10 or PM2.5, so the federal requirements cited by Earthjustice do not apply.