



Bay Area Air Quality Management District
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VIA EMAIL
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Victor Douglas

December 2, 2016

RE: Comments on the Scope and Content of the Notice of Preparation and Initial Study for Regulation 12: Miscellaneous Standards of Performance, Rule 16: Petroleum Refining Facility-Wide Emissions Limits (Rule 12-16)

Dear Mr. Douglas,

The Notice of Preparation and Initial Study for Rule 12-16¹ (“NOP/IS”) suffer from significant defects and omissions in violation of the California Environmental Quality Act (“CEQA”). In particular, the NOP/IS omit critical discussion of recently permitted or reasonably foreseeable Bay Area refinery expansion projects that provide those refineries with the ability to process more polluting and climate disrupting oil feedstock. As such, the NOP/IS fail to adequately capture the existing environmental setting, tainting any evaluation of Rule 12-16. The NOP/IS reach several faulty conclusions, particularly regarding how adoption of Rule 12-16 (hereafter also referenced as “Emission Caps”) might complement or conflict with the Bay Area Air Quality Management District’s (“Air District”) existing regulations and the State’s climate policies, in particular, AB197.

At the November 16 meeting of the Air District Board of Directors, the Board of Directors provided specific direction to staff to include all relevant factual information for the determination of whether any such conflicts exist, within the Draft Environmental Impact Report

¹ Including the accompanying October 2016 Draft Staff Report (“Staff Report”) which discusses several issues required for inclusion in the Draft Environmental Impact Report, as detailed throughout this comment.

for Rule 12-16 (“Draft EIR”). Adhering to the Board’s direction may remedy any similar defects in the Draft EIR as detailed further below.

I. The Draft EIR Must Include Discussion of Potential Conflicts with State and Regional Plans and Policies

CEQA Guidelines §15125(d) provides that an EIR *shall* discuss any inconsistencies between the proposed project and applicable general plans and regional plans. The Guidelines specifically state that such regional plans include “the applicable air quality attainment or maintenance plan or State Implementation Plan.” We emphasize that the Draft EIR must include such a discussion which, following Board direction, requires disclosure and analysis of the following.

(i) Consistency with the Clean Air Act

The Air District is designated nonattainment for the 2006 PM_{2.5} National Ambient Air Quality Standards (“NAAQS”). Recently, in August 2016, the Environmental Protection Agency (“EPA”) issued a final rule providing a limited approval and limited disapproval of revisions to Air District Regulation 2, Rules 1 and 2 (“2-1” and “2-2”).² The EPA concluded that Air District Rules 2-1 and 2-2 would become the federally enforceable New Source Review (“NSR”) program in the SIP for the Air District, subject to the Air District’s obligation to correct the rule deficiencies listed in the Federal Register.³ Notably, the EPA found that the Air District’s NSR regulations did not meet federal standards: “emission reductions intended to be used as offsets for new major sources or major modifications are only creditable if they are reductions of actual emissions, not reductions in the [potential to emit] of a source.”⁴ The federal provisions at issue include Clean Air Act §§ 173(a) and (c), the same provisions that the Staff Report suggests conflict with adoption of Rule 12-16.

Pursuant to the CEQA Guidelines, the Draft EIR must discuss any potential conflict. The Staff Report claims that there is a “significant argument” that Emission Caps would conflict with these federal provisions, but does not support that assertion with any facts or data.⁵

At a minimum, the Draft EIR must disclose relevant facts necessary for the Board and public to determine whether any such conflict exists. Such data must include: the amount of pollutant offsets, for PM₁₀, PM_{2.5}, SO_x and NO_x, that the Air District has allowed historically and foreseeably could allow in the future; whether any such offsets were granted subject to Rules 2-1 and 2-2 when those rules were applied less stringently than federal standards; and if so, whether Emission Caps may actually complement, rather than conflict with, achievement of the NAAQS. This discussion must also include a similar analysis of outstanding offsets held by refiners for previously permitted new or modified sources. Part II of this comment also details other relevant factual information required to make such an adequate determination regarding this alleged conflict.

² Federal EPA docket number EPA-R09-OAR-2015-0280, available at <https://www.regulations.gov/document?D=EPA-R09-OAR-2015-0280-0020>

³ *Id.*

⁴ *Id.*

⁵ Staff Report at 17.

(ii) Consistency with the State’s Climate Policies

We are pleased that during the November 14 Scoping meeting, Air District staff clarified that the Draft EIR would discuss and evaluate any potential conflicts between Emission Caps and the State’s Climate policies. Those policies include: AB32 and its successor legislation SB32 and AB197.

California’s recent adoption of SB32 codifies ambitious climate change goals requiring the state to reduce greenhouse gas emissions to 40% below 1990 levels by 2030.⁶ The passage of SB32 (and its ambitious greenhouse gas reduction targets) was contingent on the enactment of companion legislation — AB 197.⁷ AB197 was introduced to provide greater legislative oversight in developing and adopting methodologies to reduce climate change pollution. This is significant because AB197 calls for specific measures that make the Air District’s⁸ promulgation of refinery greenhouse gas caps an essential component to achieving the state’s more aggressive climate change pollution targets.

Importantly, SB32 paired with AB197 calls for a marked change in how California will achieve its more ambitious climate change pollution reduction goals. SB32 and AB197 require that the state “achieve the more stringent GHG emission reductions in a manner that benefits the state’s most disadvantaged communities and is transparent and accountable to the public and the Legislature.”⁹ AB197 requires regulators to consider and address climate change and related pollution impacts on California’s disadvantaged communities by considering the social costs of greenhouse gas emissions and implementing equitable solutions to mitigate the problem.¹⁰ For example, while some regions of the state can afford to put more Teslas on the road, other regions that are disproportionately burdened by greenhouse gas and toxic polluting industries cannot. AB197 addresses this problem head-on by requiring regulators to prioritize the implementation of regulations that result in direct emissions reduction at large stationary sources in order to protect the state’s most impacted and disadvantaged communities.¹¹ In other words, the Legislature expressly conditioned passage of SB32 on adoption of companion legislation—AB 197—that favors “command-and-control” regulation over market-based and incentive programs for large stationary sources like refineries when necessary to cause actual emission reductions in disadvantaged communities.¹² The bill’s analysis even acknowledges that direct regulation is necessary in such communities and must be prioritized to achieve statewide limits while mechanisms such as cap-and-trade may operate as backstops to achieve excess reductions.¹³

The Staff Report conveys concerns that a greenhouse gas emission cap on refineries would conflict with California’s greenhouse gas cap-and-trade and the Air District’s own criteria

⁶ Senate Bill No. 32: Global Warming Solutions Act of 2006: emissions limit (extends AB 32 and sets 2030 greenhouse gas emissions targets), available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB32.

⁷ SB32 specifies that “it shall become operative only if AB 197 is enacted...”

⁸ Air districts have primary authority over regulation of stationary source air pollution.

⁹ SB 32 Sec. 1 (d); *see also* AB 197 Sec. 1 (c), (e).

¹⁰ AB 197 Sec. 5.

¹¹ *Id.*

¹² AB 197, Bill Analysis, Aug. 2016, available at http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0151-0200/ab_197_cfa_20160824_113105_asm_floor.html.

¹³ *Id.*

pollutant trading program. The report lacks any justification for this assertion. Also, the Staff Report states that the Board may not be able to justify the necessity of a greenhouse gas cap approach because other jurisdictions have not adopted one.¹⁴ However, the Air District need not look to other jurisdictions for the authority to regulate greenhouse gas or other pollutant emissions.

The Staff Report also asserts that it would be difficult for the Air District to explain the benefit of capping greenhouse gas emissions because they are not localized health concerns.¹⁵ However, data exists to the contrary. As one example, a recent University of Southern California study documents that local pollution from refineries has recently increased and underscores the potential health benefits of direct greenhouse gas reduction regulation.¹⁶ The Staff's argument about localized health concerns is indeed a red herring. The momentum behind AB197's passage precisely counters this argument. AB197 explicitly acknowledges the need to consider the social, health and economic costs on disadvantaged communities as the basis for compelling direct regulation of greenhouse gas and local pollution specifically within the refinery sector.

The Staff Report is simply devoid of any discussion of the new regulatory landscape within which ARB and the Air District will be operating. It fails to mention SB32, AB197, its emphasis on equitable climate change solutions that protect California's disadvantaged communities, and its prioritization of direct emission reduction controls on the largest greenhouse gas polluting sources, in particular, the refinery sector.

Notwithstanding the Staff Report's omissions, the underlying purpose of AB197, that the state's climate change programs are not shared equally by all Californians, places an especially heavy burden on the Air District to address this problem. This is particularly true given that almost a third of the state's oil refineries are located in the Bay Area, and that the health and safety of Bay Area communities have long suffered disproportionately from the region's refinery pollution problems. Unfortunately, absent direct regulation of the refinery sector, the greenhouse gas and local pollution problems from refineries are only expected to worsen with the anticipated importation of more carbon intensive, low quality crudes such as Canadian tar sands.¹⁷

While ARB has primary authority over regulation of mobile sources of pollution, under the Federal Clean Air Act and state law, California's Air Districts have primary regulatory authority over stationary sources of air pollution.¹⁸ Indeed, the enactment of SB32 and AB197 does not change this. Additionally, the courts have long affirmed air district authority to regulate

¹⁴ *Id.* at 17.

¹⁵ *Id.* at 20.

¹⁶ Cushing, L, Wander, M, Morello-Frosch, R, Pastor, M, Zhu, A, Sadd, J, "A Preliminary Environmental Equity Assessment of California's Cap-and-Trade Program," University of California, Berkeley, University of Southern California, San Francisco State University, Occidental College, Sept. 2016, available at http://cal.streetsblog.org/wp-content/uploads/sites/13/2016/09/Climate_Equity_Brief_CA_Cap_and_Trade_Sept2016_FINAL.pdf.

¹⁷ "Next Frontier for Dangerous Tar Sands Cargo: California," Natural Resources Defense Council, Issue Brief, April 2015, at 2, available at <https://www.nrdc.org/sites/default/files/west-coast-tar-sands-threat-ca-FS.pdf> (tar sands process at California refineries could grow from 50,000 bpd to 650,000 bpd by 2040).

¹⁸ *Ultramar, Inc. v. South Coast Air Quality Management Dist.* (1993) 17 Cal.App.4th 689, 708, citing *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal. 3d 408; *Orange County Air Pollution Control Dist. v. Public Util. Comm.* (1971) 4 Cal.3d 945, 948 (emphasis in original); Cal. Health and Safety Code § 40000.

air pollutants from large industrial stationary sources more stringently than the state and/or federal government, even pollutants not regulated by the state.¹⁹

CEQA requires the Draft EIR to evaluate Rule 12-16 in the context of SB32 and AB197, including how it complements these state policies and any potential inconsistencies. ARB will soon complete its Scoping Plan for implementation of SB32 targets, followed by promulgation of regulations to achieve those targets. As such, ARB's plan may be extremely relevant to the Draft EIR discussion. Moreover, that discussion must also include relevant factual information as discussed in the next section of this comment.

II. The Draft EIR Must Include Factual Information Relevant to Determine Potential Legal Conflicts

The following defects in the NOP/IS prejudice any adequate evaluation of Rule 12-16, particularly with regard to the potential conflicts noted above. Adherence to Board direction, and the CEQA Guidelines as noted below, could remedy these defects in the Draft EIR.

(i) The Draft EIR Must Include an Adequate Description of the Environmental Setting

CEQA Guidelines § 15125(c) provides that “[k]nowledge of the regional setting is critical to the assessment of environmental impacts [and] [s]pecial emphasis should be placed on environmental resources that are rare or unique to the region.” The courts have affirmed this principle, holding that the absence of accurate and complete information regarding the project setting precludes the adequate investigation and discussion of the environmental impacts of the project.²⁰ The NOP/IS fail to outline the environmental setting in three significant respects: a current regional crude shift to a lower quality, and more polluting, oil feedstock; the disproportionate impact of such increased pollution on local low-income communities of color; and finally, how that impact is emphasized by the contrast of growing foreign exports of fuel and decreasing domestic consumption.

(a) The Draft EIR Must Include Recent and Proposed Bay Area Refinery Expansion Projects in its Discussion of the Environmental Setting

First, since at least 2012, the Air District has acknowledged the influx of lower quality oils into the Bay Area and admitted the occurrence of “increased emissions of air contaminants” and emission increases as a result of “accidents related to the increased corrosiveness of lower quality crudes.”²¹ The Air District has since permitted at least three refinery expansion projects that enable those refineries to process and refine lower quality crude oil feedstocks.²² Other

¹⁹ *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal. 3d 408, 418; *Ultramar, Inc. v. South Coast Air Quality Management Dist.* (1993) 17 Cal.App.4th 689, 707.

²⁰ *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713.

²¹ BAAQMD Regulatory Concept Paper, Petroleum Refining Emissions Tracking Rule, Draft, October 15, 2012, citing The U.S. Oil Refining Industry: Background in Changing Markets and Fuel Policies” (Nov. 22, 2010), available at http://www.baaqmd.gov/~media/files/planning-and-research/rules-and-regs/workshops/2013/1215_dr_rpt032113.pdf?la=en.

²² In 2013, the Air District permitted the Kinder Morgan Richmond Terminal Crude by Rail Project; in 2014, the Chevron Richmond Refinery Modernization Project; in 2015, the Phillips 66 Rodeo Refinery Propane Recovery Project.

similar expansion projects in the Bay Area are currently proposed, such as the Nustar Shore Terminals LLC Selby Terminal Crude Oil Project.

Ample evidence²³ illustrates that these expansion projects allow each respective refinery to have the flexibility to refine a broader range of crude oil feedstocks. These are the very “update[s]” or “modif[ications]” the Staff Report notes are required to process “crude oil from different sources.”²⁴ Those new and different sources include a greater quantity of cost-advantaged and extreme polluting and climate disrupting feedstocks, such as tar sands diluted bitumen.

Nevertheless, the NOP/IS diminish the impact of these refinery expansion projects throughout the Bay Area, making only brief and cursory references. To the contrary, pursuant to CEQA Guidelines § 15125(c), the Draft EIR description of the environmental setting must disclose each permitted, proposed, and foreseeable refinery infrastructure expansion—or “update”—and whether, and if so by how much, each expansion may allow the respective refinery to process a greater quantity of more climate disrupting and polluting crude oil feedstock.

(b) The Draft EIR Environmental Setting Must Include an Assessment of the Local and Disproportionate Impact of Refinery Pollution

As noted in the November 11, 2016 comment on the NOP/IS submitted by CBE and other organizations, there is abundant evidence that refinery emissions disproportionately impact nearby low-income communities of color. We have illustrated several examples, including elevated indoor PM_{2.5} exposures in the homes of low-income residents of color in Richmond, increased exposure to ultra-fine PM from refinery sources, and elevated concentrations of emissions during episodic emissions from incidents such as the August 2012 Chevron Richmond Refinery fire.

The NOP/IS, however, suggests that there is no such local impact of refinery pollution. The Staff Report even suggests that PM_{2.5} exposure is a regional, not a local, problem. The Staff Report arrives at its faulty conclusion by relying upon only regional, or ambient, air quality data. Indeed, the air monitors that account for such measurements are located in San Pablo, Concord, Vallejo, San Rafael, San Jose, East Oakland, Livermore, San Francisco, Napa and Gilroy—none of which are home to a Bay Area refinery. The Draft EIR must instead include an adequate assessment of the local impact of refinery pollution, and in particular, on low-income communities of color that have historically faced such a disproportionate burden.

In assessing this local impact, it is also imperative to consider the cumulative impact of increased pollution on these already overburdened communities. Additionally, in so doing, the current environmental setting should also include data and documented vulnerability factors for these communities from existing mapping tools, such as CalEnviroScreen version 2.0.

²³ See prior comments submitted by CBE on 10/21/15, 11/23/15 and 6/10/16.

²⁴ Staff Report at 8.

(c) The Draft EIR Environmental Setting Must Include Discussion of the Trend Toward Increased Exports from Bay Area Refineries

The NOP/IS states that “the Air District does not have the authority to *directly* address concerns about ... the final destination of refined products.”²⁵ However, much like the Air District’s inability to directly regulate hazards at refineries balanced by its ability to address such concerns through regulating resulting episodic spikes in emissions,²⁶ the Draft EIR must also discuss recent increasing exports from Bay Area refineries. These facts are directly relevant to and will inform any environmental and economic analysis of Rule 12-16.

As noted in our prior comments, adoption of Emission Caps would not significantly limit Bay Area refiners’ production, which is currently at approximately 97.7% of capacity. Data also show that Bay Area refineries are producing more gasoline and diesel products than necessary to satisfy local demand, as well as an increasing trend to export such products to foreign countries.²⁷ Whether or not the Air District can directly regulate this practice that over-burdens low-income communities of color in our State, with no net benefit to the State, the Draft EIR must still discuss this increasing trend. Such a discussion is relevant to analysis of environmental impacts as well as any socio-economic analysis and must be included in the current environmental setting.

Moreover, the Staff Report asserts that adoption of Emission Caps may create similar economic impacts as the temporary closure of the ExxonMobil Torrance Refinery in 2015. The Staff Report does so without detailing any supporting data; instead, the Draft EIR must address the current production capacities of the Bay Area refineries in the environmental setting, the destination of those products, and whether such an assertion of similar economic impact is even plausible in the context of Rule 12-16. This disclosure is necessary to dispel any superficial arguments of “leakage,” and for an evaluation of any perceived conflicts between Emission Caps and cap-and-trade and other related provisions of AB 32.

Similarly, the Staff Report has prematurely determined that Rule 12-16 may have significant economic impacts in the event that either refineries choose to make improvements and increase production above current capacity, or demand for gasoline or diesel products increases in California.²⁸ Those determinations, however, may be properly made only following an adequate description of the environmental setting as noted above.

Accordingly, the environmental setting must also note all measures that the Air District has already established to decrease refinery-wide pollution by approximately 15%. Specifically, the Draft EIR must address how refinery emissions may increase beyond the Emission Caps given that already-required 15% reduction, and under what current or future foreseeable refinery modification scenarios, such as a switch to a more polluting crude oil feedstock, Emission Caps could cause the need for expensive pollution control equipment.

²⁵ Staff Report at 24 (emphasis added).

²⁶ See *supra*, BAAQMD Regulatory Concept Paper, October 2012.

²⁷ See prior comments submitted by CBE on 10/21/15, 11/23/15 and 6/10/16.

²⁸ Staff Report at 25.

(ii) The Draft EIR Must Include an Adequate Discussion of Foreseeable Changes to the Environmental Setting in its Discussion of the No Project Alternative

The CEQA Guidelines have explicitly rejected the notion that the "no project" alternative may simply reflect current conditions as assessed in an EIR's environmental setting, or even maintenance of such status quo. Rather, CEQA Guidelines § 15126.6(e) provides that a "no project" alternative must address "what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure." Further, the Guidelines continue to elaborate upon how the "no project" alternative should proceed in this specific instance:

When the project is the revision of ... a regulatory plan, policy or ongoing operation, the "no project" alternative will be the continuation of the existing plan, policy or operation into the future ... the projected impacts of the proposed plan or alternative plans would be compared to the impacts that would occur under the existing plan.²⁹

Therefore, the Draft EIR "no project" alternative must not only outline foreseeable changes to the environmental setting, but also evaluate how the Air District's current regulations, without Rule 12-16, could protect public health given those changes, particularly with regard to any disproportionate impact on low-income communities of color. This requires full disclosure and evaluation of the foreseeable climate and local pollution impacts that could result from the several Bay Area refinery expansion projects that enable the refining of lower quality oil feedstocks, and also, how the Air District's regulations with and without Rule 12-16 can reduce such impacts. Necessarily, this also requires a discussion of the "infrastructure inertia" created by the commitment to major capital refinery investments in process changes to enable more refining of more climate-disrupting feedstocks for the foreseeable future. The "no project" alternative also should discuss potential conflicts between these projects and the State's climate policies, including an analysis of the opportunity cost of a sustainable energy future.

Finally, the NOP/IS apparently creates a false choice between Rules 12-16 and 11-18. Whilst Rule 11-18 targets various toxic air contaminants, it does not target, as Rule 12-16 does, GHGs and PM_{2.5}. Moreover, the number of sources potentially affected by Rule 11-18 stands in stark contrast to the few affected by Rule 12-16. Each rule considers a significantly different range and source of pollutants. In fact, CEQA requires that an alternative "feasibly accomplish most of the basic objectives" of the proposed project.³⁰ Aside from the clear public health benefits of both rules, it is hard to imagine a single basic objective common to both Rules 12-16 and 11-18. We have consistently requested Air District staff to sever environmental review of the two proposals, but at a minimum, consideration of one as an alternative to the other simply does not make sense and violates CEQA.

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²⁹ CEQA Guidelines § 15126.6(e)(2)(3)(A).

³⁰ CEQA Guidelines § 15126.6(e).

III. Conclusion

The NOP/IS mischaracterize or omit information relevant to the determination of how Rule 12-16 complements the requirements of the Clean Air Act and the State's climate policies. Adherence to the Air District Board's November 16 direction, and the CEQA Guidelines as noted above, may remedy these errors in the Draft EIR for Rule 12-16.

Respectfully Submitted,

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