



## California Council for Environmental and Economic Balance

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December 2, 2016

Mr. Victor Douglas  
BAAQMD  
375 Beale Street, Suite 600  
San Francisco, CA 94105

RE: Proposed Regulation 11, Rule 18 and Regulation 12, Rule 16

Dear Mr. Douglas,

We appreciate the opportunity to submit these comments on behalf of the California Council for Environmental and Economic Balance. CCEEB is a non-profit and non-partisan coalition of business, labor, and public leaders that advances strategies for a sound economy and a healthy environment. We have many members that operate facilities in the air basin and are subject to proposed Regulation 11, Rule 18 (Reg. 11-18). CCEEB has been active in this rulemaking since July, and we thank staff for expanding its outreach to stakeholders over the past couple of months. Reg. 11-18 is a significant new rule and will likely have significant compliance costs for many businesses. We offer a number of initial questions and suggestions on Reg. 11-18 below, and look forward to working with staff to further refine this rule.

In terms of proposed Regulation 12, Rule 16 (Reg. 12-16), CCEEB must repeat our concerns as stated in our letter to you from September 9, 2016, and we include by reference those comments here. Additionally, CCEEB agrees with analysis in the draft staff report that calls into question the District's authority to implement Reg. 12-16. We include in our comments here more details about our reasoning for this position.

### **Comments on Regulation 11, Rule 18**

#### Clarify Authority in Staff Report

In meetings with stakeholders, staff has explained that Reg. 11-18 is not based on District authority under AB 2588, the Air Toxics "Hot Spots" Information and Assessment Act (1987), and as such, it differs from the statewide program codified in Sections 44300-44394 of the California Health and Safety Code. CCEEB asks that staff clarify its authority for Reg. 11-18 and identify the relevant state and federal codes, particularly those sections related to establishing Best Available Retrofit Control Technology for Toxics (TBARCT). We note that other air districts in California continue to regulate existing facilities under AB 2588,

based on regularly updated emission inventories and health risk assessments (HRAs), in addition to review of new and modified sources under New Source Review.<sup>1</sup>

#### Provide Opportunity for Facilities to Conduct HRAs and Enhance Review Process

The October 14, 2016 Initial Study for Reg. 11-18 indicates the District will use independent contractors to conduct HRAs due to a lack of staff resources necessary to carry out this work. CCEEB recommends that Reg. 11-18 be revised to provide an opportunity for facility operators to voluntarily conduct and submit HRAs for the purposes of complying with the rule. Any facility-submitted HRA would follow District HRA guidelines and be subject to review and approval by District staff. The advantages of facility-submitted HRAs are efficiency and accuracy; facility operators will have detailed knowledge of and data on equipment, operations, emissions monitoring and modeling, inventory reporting, emission factors, proximity of workers and nearby residents (“receptors”), and local meteorology. Such facility-specific information would help facilitate the efficient and accurate preparation of HRAs. Should staff find it necessary to reject a submitted HRA, the District could require the facility to resubmit the HRA with amendments.

Allowing facilities to conduct and submit HRAs is a standard practice. For example, Regulation 2-5-401 requires a permit applicant to submit an HRA, following the District’s HRA guidelines. Similarly, under AB 2588, the state Legislature requires facilities to submit HRAs (H.&S.C. Section 44360(b)(1)). CCEEB believes that facility-submitted HRAs would in no way diminish the stringency or transparency of Reg. 11-18; rather, it would increase transparency, streamline the review process, and focus staff resources on reviewing HRAs or preparing HRAs for only those that choose to have the District do this analysis. Additionally, the BAAQMD could submit HRAs to the Office of Environmental Health Hazard Assessment (OEHHA) for review and comment, as is done under AB 2588 and H.&S.C. Section 44361.

#### Need Process to Reconcile Potential Disputes over Risk Reduction Plan Disapprovals

CCEEB wishes to work with staff to develop a dispute resolution process in cases when a facility needs to challenge or question a final action to disapprove a risk reduction plan. While we hope such instances would be rare in occurrence, CCEEB believes a dispute resolution mechanism is warranted given the unclear process to be used to make TBARCT determinations and the current lack of guidance available on what would be considered TBARCT for new and modified sources.

#### Explain Interaction of New Source Review Rules with Reg. 11-18

The District’s New Source Review rules (Regs. 2-1, 2-2 and 2-5) require new or modified sources to apply for a project permit. Under Regulation 2, Rule 5 (Reg. 2-5), any source

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<sup>1</sup> From the October 2016 Draft Staff Report (page 28): “The Air District adopted its Air Toxics New Source Review program at about the same time it started its activities to assess existing facilities under the Hot Spots Act. As a result, sources that existed in the late 1980’s have been reviewed under the Hot Spots program and sources that were constructed or modified after the late 1980s have been reviewed under the Toxics NSR program.”

with an estimated risk greater than 1-in-a-million and/or a chronic hazard index greater than 2.0 would be required to apply Best Available Control Technology for Toxics (TBACT).

Proposed Reg. 11-18 would require an existing facility to reduce risks below 10-in-a-million. To do so, a facility would likely need to apply for an NSR permit for a new or modified source, which in turn could trigger TBACT requirements. If a facility could not reduce below the Reg. 11-18 risk action levels, it would be required to install Best Available Retrofit Control Technology for Toxics (TBARCT) on all “significant sources,” which, by definition, would also trigger TBACT under Reg. 2-5. We ask staff to explain how this process would work in practice, and to clarify whether a significant source would need to apply TBARCT, TBACT, or both.

#### Establish a Technical Working Group and Define TBARCT as Part of Rulemaking

CCEEB reiterates our request that the District establish a technical working group to help advise staff in developing a process to make TBARCT determinations and in defining TBARCT for specific sources. We believe such an effort is being planned, and thank staff for considering our past comments.

We also repeat our request that TBARCT be defined as part of the Reg. 11-18 rulemaking, as we see this as necessary for preparing the socioeconomic analysis as required by state H.&S.C. Section 40728.5, including analyses to determine the range of probable costs, the impact of the rule on regional employment and the economy, the availability of cost-effective alternatives, and the emission or risk reduction potential of the rule. Moreover, understanding what would be considered TBARCT helps inform regulated businesses as to what would be required under Reg. 11-18 and what compliance options would be available to them, which in turn could prompt useful public participation and comments on the draft rule. This is especially important given that Reg. 11-18 is remarkable both in terms of the total number of facilities affected as well as the many different facility types that will become subject to the rule.

In addition, we note that the current unavailability of TBARCT guidelines discourages early actions to reduce risk. Facilities that take early action and install risk reduction technologies voluntarily in attempt to decrease risk below the notification thresholds could be burdened with additional cost if these reductions turn out later not to meet the TBARCT standard.

More generally, CCEEB believes that the District should allow adequate time to develop sound, scientifically based rules, and to conduct a fair and transparent public participation process. Conversely, we are concerned if rules are rushed to hearings before staff has fully developed implementation details and compliance pathways.

#### Modify Reference to MACT in Definition of TBARCT

Reg. 11-18 defines TBARCT as the most stringent of certain retrofit emission controls, including, “[t]he most stringent emission control for a source type or category specified as

MACT by U.S. EPA...” Reg. 11-18-204.4. “MACT” is simply defined as “[a]n emission standard promulgated by U.S. EPA pursuant to Section 112(d) of the Clean Air Act.” [Reg. 11-18-212.] However, for many source categories that could be subject to Reg. 11-18, EPA has promulgated both new source and existing source MACT standards under Section 112(d) of the Clean Air Act. Clearly, the District’s intent is that TBARCT can be no less stringent than an existing source MACT standard. However, TBARCT cannot and should not be defined in reference to new source MACT standards, which may be unachievable, infeasible, or prohibitively costly for existing sources subject to TBACT. CCEEB would ask that the District revise the definition to clarify that, for existing sources that have not previously been subject to the new source MACT standard promulgated by EPA for that source type or category, TBARCT shall be no less stringent than any relevant existing source MACT standard.

#### Provide Public Information Templates as Part of Staff Report

The draft staff report indicates that the District will provide facility information to the public via email notices, social media, the District’s website, opt-in mailings, and community meetings. However, the draft report does not describe how these communications will be managed or what content will be provided. Risk communication is an important but too often contentious subject; context is key.

Facilities have a direct and significant interest in how their operations are viewed by their neighbors, and many have ongoing community outreach and public relations efforts. The District should be sensitive to this dynamic, and avoid risk communication that is confusing or unduly politicizes toxic risks. It is also critical that the District put risks from air toxics into context so that it is readily and clearly understood.

CCEEB requests that staff provide templates for how toxic risks from facilities will be described and communicated, such as through an appendix to the staff report. We also request that staff include in this simple background information, including but not limited to the degree to which risks from air toxics have been steadily decreasing in the air basin, the proportionate contribution of different source types (mobile, stationary, and area) to ambient risks, as well as an explanation of the difference between background or ambient risk and risk from a single, local source.

Finally, CCEEB recommends that facility information be limited to only those facilities above risk action levels, and that only final, District-approved documents be released. This helps interested public focus on facilities with the highest risks, rather than having to sort through documents for a 1000+ facilities, many of which may not pose real public health concerns. At a minimum, we ask staff to remove reference to draft HRAs since the preparation, review, and approval of HRAs follow strict, objective scientific guidelines and are not meant to be changeable or subjective based on public comments.

### How Would APCO Shorten Risk Reduction Plan Time Periods?

Reg. 11-18-402.2 states that the APCO may shorten the three-year time period allowed to implement risk reduction plans if (a) the APCO finds that it is “technically feasible and economically practicable,” or (b) the facility is in a CARE designated area and exceeds a significant risk threshold (i.e., either a cancer risk threshold of 1-in-a-million, a chronic HI of 0.20, or an acute HI of 0.20). CCEEB asks staff to clarify how the APCO would determine what is “technically feasible and economically practicable,” and how or on what basis the APCO would determine the appropriate time period.

For facilities in CARE communities, how short would the time period be, and would it be the same for all facilities in those areas? Would the APCO use discretion, shortening the time period for some facilities but not others, or in some communities but not others, and if so, what criteria would these decisions be based on? What if a facility in a CARE community could not reduce risks in the shortened time period? Would an extension be needed? We note that CARE designations closely follow transportation corridors, congestion, and emissions of air toxics and other pollutants from mobile sources, particularly diesel particulate matter. In many cases, the incremental contribution of a stationary source facility could be de minimis.

### What Would Prompt an Updated Risk Reduction Plan?

Reg. 11-18-405 gives the APCO the authority to require the facility to update its risk reduction plan “if information becomes available...regarding the health risks posed by a facility or emissions reduction technologies that may be used by a facility that would significantly impact health risks...” We ask staff to clarify this section in the rule and in the staff report. Specifically, we ask staff to explain what new information it is anticipating in regards to health risks. For example, is the concern that actual health risks are above what was estimated in the emissions inventory and HRA? And if so, what level of an increase would prompt the APCO to act? What happens if the increase was due to an increase in production but still within permit limits and the facility was on track to meet all Reg. 11-18 requirements?

In terms of “emission reduction technologies,” does this mean that the APCO could force a facility to change its plan whenever a new control technology or risk reduction measure becomes available? What if risk reduction projects were already underway? What time period would be given to the facility, or would the clock restart after the updated plan was approved? Would the District determine economic impacts based just on the updated plan, or would it calculate total costs for the initial approved plan plus added costs for updating the plan? Could the APCO apply Reg. 11-18-405 multiple times, so that a facility was caught continuously updating a plan (and investing in risk reduction projects) whenever new technologies became available? What if the facility demonstrates that it will get below the risk reduction threshold in the time provided – could it then dispute the requirement to update its plan or seek a variance from the Hearing Board? CCEEB has serious concerns with this language as written and would like to better understand what is intended.

### CEQA Analysis Should Include the Original 25-in-a-million Alternative

In July, staff presented a proposal for Board approval that set a first phase of Reg. 11-18 with a risk reduction threshold of 25-in-a-million. While we recognize that staff has revised its proposal and is no longer recommending the phased approach in the draft rule, we ask again that the 25-in-a-million option be included in the CEQA analysis as an alternative and that it be used to compare compliance costs and incremental health benefits, and to establish reasonable cost ranges in the socioeconomic report.

### **Comments on Regulation 12, Rule 16**

#### District Staff Are Correct that Reg. 12-16 Would Be Inconsistent with District's Authority

The draft staff report provides staff's analysis that the fixed numeric caps on refinery emissions proposed by draft Regulation 12, Rule 16 are inconsistent with the requirements of the federal Clean Air Act (CAA) and California law. [*Draft Staff Report, Draft Regulation 12, Rule 16: Petroleum Refining Facility-Wide Emissions Limits and Draft Regulation 11, Rule 18: Reduction of Risks from Air Toxic Emissions at Existing Facilities*, Oct. 2016 ("draft staff report"), pages 17-20.]

In particular, staff notes that both the CAA and California law require permitting programs that allow for criteria pollutant emissions to increase at one location so long as those emissions are offset by reductions elsewhere. *Id.* at 17. CCEEB agrees with staff's analysis of this inconsistency. Additionally, by essentially imposing a construction moratorium upon refinery expansion when none is authorized or warranted under the CAA, Reg. 12-16 would stand as an obstacle to the accomplishment and execution of the full purposes of the objectives of Congress in enacting the CAA and designing a program for controlling emissions from new and modified sources. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

As the draft staff report indicates, proposed Reg. 12-16 would address pollutants of primarily regional or global concern by limiting those pollutants from one particular sector, even though the concentrations of criteria pollutants are roughly the same in refinery communities as in other urbanized areas of the region. *See* draft staff report at page 18. California law imposes several requirements for new rules, including that the air district demonstrate the rule's "necessity" (Cal. Health & Saf. Code § 40727(b)(1)). The District would be challenged to demonstrate the necessity of a rule targeting an individual sector and its emissions, when the impacts from that sector are, as staff acknowledges, indistinguishable on a regional scale from those of other sectors. In light of the regional and global impacts associated with the emissions targeted by Reg. 12-16, CCEEB also agrees that the theoretical co-benefits associated with regulating criteria and greenhouse gas (GHG) emissions, so as to limit localized refinery communities' exposure to pollution (*see* draft staff report at page 20), cannot provide legal justification for such a rule.

CCEEB also agrees with staff that the Reg. 12-16 caps on GHG emissions would fail to satisfy state law because facility-specific caps are fundamentally inconsistent with the Air Resources Board Cap-and-Trade Program. See draft staff report at page 19. The State's Cap-and-Trade Program has been carefully designed to achieve the maximum technologically feasible and cost-effective reductions in GHG emissions through use of market forces, while also minimizing emissions leakage. See Cal. Health & Saf. Code §§ 38562(a), (b)(8). Placing caps on facilities in the Bay Area would frustrate the efficiency goals of the Cap-and-Trade Program, as recognized by District staff. See draft staff report at page 19 ("There is a fundamental inconsistency between a 'cap and trade' program that by its nature contemplates changeable caps versus one that fixes caps at one level, in that the latter has the potential to frustrate the efficiency goals of the former."). It would also potentially result in emissions leakage to sources elsewhere in the state or out-of-state, thus achieving no net reduction in GHG emissions. Even assuming the District were legislatively delegated the authority to promulgate such a rule, doing so would run afoul of the requirement that district rules must be consistent and in harmony with existing State law (see *id.* § 40727(b)(4)), and not be arbitrary, capricious, or without a reasonable or rational basis. See *S. Cal. Gas Co. v. S. Coast Air Quality Mgmt. Dist.*, 200 Cal. App. 4th 251, 267-68 (2011).

CCEEB thanks staff for considering our comments on proposed Regulations 11-18 and 12-16 and we look forward to seeing your response. We also appreciate recent staff efforts to notify and engage potentially affected industry on Reg. 11-18, and we continue to support a full public participation process for rule development. CCEEB is committed to working with the staff and the Board of the District in refining Reg. 11-18 and addressing the questions and concerns we outline in this letter. Please contact me or Janet Whittick of CCEEB at any time should you have questions or wish to discuss our comments further. I can be reached at (415) 512-7890 ext. 115 or [billq@cceeb.org](mailto:billq@cceeb.org); Ms. Whittick is available at ext. 111 or [janetw@cceeb.org](mailto:janetw@cceeb.org).

Sincerely,



Bill Quinn

CCEEB Chief Operating Officer and Bay Area Partnership Project Manager

cc: Mr. Jaime Williams, BAAQMD  
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Ms. Janet Whittick, CCEEB