

650 Town Center Drive, 20th Floor
Costa Mesa, California 92626-1925
Tel: +1.714.540.1235 Fax: +1.714.755.8290
www.lw.com

LATHAM & WATKINS LLP

FIRM / AFFILIATE OFFICES

Beijing	Moscow
Boston	Munich
Brussels	New York
Century City	Orange County
Chicago	Paris
Dubai	Riyadh
Düsseldorf	San Diego
Frankfurt	San Francisco
Hamburg	Seoul
Hong Kong	Shanghai
Houston	Silicon Valley
London	Singapore
Los Angeles	Tokyo
Madrid	Washington, D.C.
Milan	

April 27, 2020

VIA EMAIL

Michael Krause
Manager, Planning and Rules
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

Re: SCAQMD Proposed Rule 1109.1

Dear Mr. Krause:

We are submitting these comments on behalf of the Western States Petroleum Association (“WSPA”) regarding Proposed Rule 1109.1 (“PR 1109.1”). WSPA is a non-profit trade association representing companies that explore for, produce, refine, transport and market petroleum, petroleum products, natural gas and other energy supplies in five western states, including California. WSPA has been an active participant in air quality planning issues for over 30 years. WSPA-member companies operate petroleum refineries in the South Coast Air Basin that will be impacted by PR 1109.1. These comments are based on the information provided in staff’s presentation for PAR 1109.1 Working Group Meeting #10 on February 18, 2020.

1. It is not appropriate to propose Best Available Retrofit Control Technology (“BARCT”) standards based on “emerging technology” in the context of PR 1109.1.

Some of staff’s proposed BARCT standards are based on “emerging technologies.” We understand “emerging technologies” to consist of control technologies that are not currently available on a commercial scale for the suggested applications, but which are anticipated to be available at some future date. Staff has asserted that “technology forcing” BARCT standards are permissible based on the California Supreme Court’s decision in *American Coatings Ass’n v. South Coast Air Quality Management District*, 54 Cal 4th 446 (2012) (“*American Coatings*”). This is the same case relied upon by staff in support of its position that BARCT standards may compel the replacement of basic equipment, a position that we disagree with as set forth in previous comment letters.

Staff's reliance on *American Coatings* to justify technology forcing standards in PR 1109.1 is misplaced due to the fundamental differences between PR 1109.1 and SCAQMD Rule 1113, which was the subject of the *American Coatings* case. Rule 1113 regulates architectural coatings and relies on reformulation over time to reduce the VOC content of the regulated coatings. Staff has also cited SCAQMD Rule 1111 as an example of a technology forcing BARCT rule. Rule 1111 applies to manufacturers, distributors, sellers, and installers of residential and commercial fan-type central furnaces, and prohibits manufacturing, supplying, selling, offering for sale, or installing furnaces that do not comply with the applicable emission limits and compliance dates. Thus, Rule 1111 is similar in structure to Rule 1113 – both rules are setting standards for a product (i.e., coatings and furnaces). Neither rule requires installation of emission control equipment or other physical modifications at the facility that would trigger new source review (“NSR”) permitting. In contrast, the landing rules currently under development would require physical modifications to the source, which would be subject to NSR permitting.

The Court's finding in *American Coatings* was entirely dependent upon the fact that the BARCT standard under review could be implemented without physical modifications to the source and NSR permitting. The Supreme Court very clearly distinguished that scenario from one in which the source was being modified and had to go through NSR permitting. With respect to the latter scenario, the Court found that emission control requirements, which the Court assumed would be based on Best Available Control Technology (“BACT”), were limited to currently known technology. The Court stated that “[b]est available control technology’ is limited to extant technology because BACT is a standard that defines what technology must be used when industry seeks permission for imminent new construction. BARCT standards, by contrast, are generally applicable rules that require full compliance at some future date, usually several years after a rule is adopted.” *American Coatings*, at 467 (citations omitted).

On its face, PR 1109.1 is a BARCT rule, but its implementation requires physical modification of the source which triggers NSR permitting. In that scenario, where “industry seeks permission for imminent new construction,” the *American Coatings* decision dictates that emission control requirements be limited to those that can be achieved with currently available technology.

2. Implementation of NO_x BARCT standards should not trigger BACT for PM.

Concerns have been raised that installation of selective catalytic reduction (“SCR”) to meet the proposed NO_x BARCT standards will lead to an increase of PM emissions as a result of ammonia slip, and that this increase will trigger BACT for PM, which could include sulfur removal. For the reasons set forth below, implementation of NO_x BARCT should not trigger BACT for PM.

a. PM_{2.5} is regulated exclusively under Rule 1325.

The PM that is created as a result of ammonia slip is PM_{2.5}. PM_{2.5} is regulated exclusively under Rule 1325. As stated in the June 2011 Staff Report supporting adoption of

Rule 1325, “Rule 1325 applies only to PM_{2.5} and its precursors and is the only New Source Review Rule affecting PM_{2.5}. The remainder of Regulation XIII does not apply to PM_{2.5}.” (p. 4). Rule 1325 requires installation of federal Lowest Achievable Emission Rate (“LAER”) control technology (essentially equivalent to California BACT), for “major modifications” at “major polluting facilities.” A “major polluting facility” is one that emits 70 tons per year (tpy) or more of PM_{2.5}. A “major modification” is one that results in a “significant” increase in emissions, which means an increase of 10 tpy or more of PM_{2.5} or 40 tpy or more of a PM_{2.5} precursor (NO_x, SO₂, VOC and ammonia).

If the source is not a “major polluting facility” or the modification is not a “major modification,” installation of LAER is not required. Note that, in the case of precursor emissions, such as ammonia, the threshold is 40 tpy. The 10 tpy threshold for PM_{2.5} applies only to directly emitted PM_{2.5}, not secondary PM_{2.5}. Any other interpretation would render the precursor thresholds meaningless, since secondary PM_{2.5} would always exceed 10 tpy well before ammonia emissions reached 40 tpy. Under accepted canons of statutory interpretation, every word and every provision is to be given effect, and none should be ignored. Further, no provision should be given an interpretation that causes it to have no consequence. Thus, in the context of SCR installations, unless ammonia emissions are 40 tpy or more, Rule 1325 does not require installation of LAER/BACT.

Because PM_{2.5} is only regulated under Rule 1325, it is not appropriate to impose requirements under the authority of other provisions in Regulation XIII as a result of increases of PM_{2.5} emissions, including secondary PM_{2.5} resulting from ammonia slip.

- b. Ammonia is not regulated as a precursor under Regulation XIII, with the exception of Rule 1325.

As stated above, ammonia is regulated as a PM_{2.5} precursor under Rule 1325, which establishes a 40 tpy threshold for requiring installation of LAER. Direct emissions of ammonia are also regulated under the remainder of Regulation XIII, but not as a precursor.

As stated in Rule 1301(a): “In addition to nonattainment air contaminants, this regulation will also limit emission increases of ammonia . . . from new, modified or relocated facilities by requiring use of Best Available Control Technology (BACT).” Consistent with the forgoing, Rule 1303(a)(1) states: “The Executive Officer or designee shall deny the Permit to Construct for any . . . new or modified source which results in an emission increase of any nonattainment air contaminant any ozone depleting compound, or ammonia unless BACT is employed for the new or relocated source or for the actual modification to an existing source.” Finally, the term “non-attainment air contaminant” is defined in Rule 1302(z) as “. . . any air contaminant for which there is a national or state ambient air quality standard, or precursors to such air contaminant, which . . .” has been designated as non-attainment by CARB or USEPA.

Since the term “nonattainment air contaminant” encompasses precursors, if the intent was to regulate ammonia as a precursor, there would have been no need to specifically identify ammonia in Rules 1301(a) and 1303(a)(1). The fact that ammonia is specifically identified in the rules indicates that the intent was to limit direct emissions of ammonia, as opposed to regulating

ammonia as a precursor. Because ammonia is being controlled for the purpose of reducing ammonia emissions per se, and not for whatever role ammonia may play in the formation of PM_{2.5} (which is addressed in Rule 1325), the BACT requirement in Rule 1303 applies only to the direct emissions of ammonia (i.e., an ammonia slip limit). However, in the context of installing SCR, it is not appropriate to impose ammonia BACT since the source of ammonia is Control Equipment (see Section 2.d below).

c. The BACT requirement does not extend to the combustion source.

Even if ammonia was regulated as a PM_{2.5} precursor under Rule 1303, the scope of the PM BACT analysis is limited to the SCR unit and does not extend to the combustion source.

Rule 1303(a)(1) states: “The Executive Officer or designee shall deny the Permit to Construct for any . . . *new or modified source which results in an emission increase* . . . unless BACT is employed for the new . . . source or for the actual modification to an existing source.” (emphasis added). Rule 1302(ao) defines “source” as “any permitted individual unit, piece of equipment, article machine, process, contrivance, or combination thereof, which may emit *or* control an air contaminant.” (emphasis added). Thus, there are two types of “sources” – those that emit air contaminants, and those that control emissions. These two types of sources are defined in Rule 102 as “Basic Equipment” which is “. . . any article, machine, equipment or contrivance which *causes* the issuance of air contaminants” and “Control Equipment” which is “. . . air pollution control equipment which *eliminates, reduces or controls* the issuance of air contaminants.” (emphasis added).

In the SCR installation scenario, the combustion source is an existing source (Basic Equipment), and the SCR unit is a new source (Control Equipment). The Basic Equipment is not a “*new or modified source which results in an emission increase,*” subject to the BACT requirement in Rule 1303(a)(1). It is not “new,” it is not “modified,” and its potential to emit is not increased relative to what it was prior to installation of the SCR unit. Therefore, the BACT requirement does not apply to the Basic Equipment, and it is not appropriate to require installation of PM BACT controls or to otherwise limit PM emissions from the Basic Equipment.

Some might argue that the SCR unit and the combustion source are not separate sources, but together constitute a single modified source. We believe that this interpretation is incorrect because it runs contrary to the definition of “source,” which is “any permitted *individual* unit, piece of equipment, article machine, process, contrivance, or combination thereof, which may emit *or* control an air contaminant.” (emphasis added). This interpretation also ignores the distinction established in District rules between Basic Equipment and Control Equipment.

However, even if one were to adopt this interpretation, it does not change the conclusion that the scope of the BACT analysis does not extend to the combustion source. In the case of a modified source, Rule 1304(a)(1) requires that BACT be employed “for *the actual modification* to an existing source.” (emphasis added). In this case, the “*actual modification*” is limited to installation of the SCR unit, and the remainder of the combustion source is not being modified in any way that could result in an emission increase. Therefore, the scope of the BACT analysis does not extend to the combustion source.

d. The BACT requirement does not apply to Control Equipment.

District permitting staff appears to take the position that increases of ammonia emissions in excess of one pound per day may trigger BACT requirements for ammonia pursuant to Rule 1303(a). However, the BACT requirement in Rule 1303(a) does not apply to control equipment such as SCR.

Rule 1303(a)(1) regulates new or modified “sources.” Rule 1302(ao) defines “source” as “any permitted individual unit, piece of equipment, article machine, process, contrivance, or combination thereof, which may emit *or* control an air contaminant.” (emphasis added). Thus, there are two types of “sources” – those that emit air contaminants, and those that control emissions. These two types of sources are defined in Rule 102 as “Basic Equipment” which is “. . . any article, machine, equipment or contrivance which *causes* the issuance of air contaminants” and “Control Equipment” which is “. . . air pollution control equipment which *eliminates, reduces or controls* the issuance of air contaminants.” (emphasis added).

Rule 1301(b)(1) states: “The provisions of this regulation shall apply to the installation of a new source and to the modification of an existing source *which may cause* the issuance of any nonattainment air contaminant, any ODC, or ammonia at any facility.” (emphasis added). Thus, the BACT requirement in Rule 1303 applies to sources that *cause* emissions – i.e., Basic Equipment, as distinct from Control Equipment that *eliminates, reduces or controls* emissions – i.e., Control Equipment. Therefore, the BACT requirement does not apply to Control Equipment such as SCR units.

e. The determination of whether or not a PM “Emission Increase” has occurred must include consideration of the NOx reductions.

The BACT requirement in Rule 1303(a)(1) is only triggered when there is an increase in potential to emit. As noted above, we fundamentally disagree with the suggestion that a potential increase in ammonia slip emissions associated with an SCR unit could even trigger BACT review. However, if one was to consider potential formation of secondary particulate matter, they would need to consider all of the potential secondary particulate effects - both positive and negative. And for an SCR system, the mass of NOx reductions yielded by SCR control would more than completely offset the potential increase from ammonia slip emissions.

Therefore, there will not be an increase in secondary PM emissions, and BACT to control those emissions would not be triggered even if ammonia was regulated as a precursor under Rule 1303.

3. The District should comprehensively assess impacts if it intends to sunset the SOx RECLAIM program.

Staff has suggested that it is considering conducting a BARCT assessment for the purpose of replacing the SOx RECLAIM program with a command and control regime, as it is doing with the NOx RECLAIM program. WSPA opposes this proposal for several important

reasons. The current effort to sunset the NO_x RECLAIM program and adopt replacement landing rules, including PR 1109.1, is an extension of Control Measure CMB-05 from the 2016 Air Quality Management Plan (AQMP). CMB-05, Further NO_x Reductions from RECLAIM Assessment, was exclusively a NO_x emission control measure.¹ The Board has not considered the full impacts of sunsetting NO_x RECLAIM, much less the impacts of sunsetting both the NO_x and SO_x RECLAIM programs in the near future. Replacement of the NO_x RECLAIM program with new or revised landing rules is a significant undertaking, involving many complex issues that were not identified or adequately thought through before the decision was made to replace the program, such as how to address NSR. Finally, for the reasons explained above, it is not necessary to sunset the SO_x RECLAIM program in order to address the co-pollutant effects that may result from implementation of the new NO_x BARCT rules.

If staff nevertheless determines to move forward with replacement of the SO_x RECLAIM program to address issues that have arisen in connection with replacement of the NO_x program, the current NO_x RECLAIM sunset rulemaking activities should be suspended pending a comprehensive CEQA analysis to determine the full range of costs, benefits, and consequences associated with the expanded scope of the undertaking.

4. NO_x limits alone do not constitute a proposed BARCT standard, and must be accompanied by other essential elements of the proposed standard, such as schedule, averaging times, ammonia slip, etc.

Staff has focused almost exclusively on identifying NO_x concentration limits that it characterizes as proposed BARCT standards even though none of the other elements required for an emission standard, such as schedule, averaging times, and ammonia slip, have been identified. It is impossible to conclude whether or not a proposed NO_x concentration level standard is achievable without evaluating all of the elements of the proposed standard.

5. Ammonia limits must be addressed in Rule 1109.1 and not deferred to permitting.

As discussed above, SCR is expected to be the most common control technology for achieving compliance with PR 1109.1. To address potential impacts associated with increases in particulate emissions due to ammonia slip, staff established limits on ammonia slip in some of the landing rules that have already been approved by the Governing Board. More recently, however, staff has decided not to include ammonia slip limits in other landing rules, including PR 1109.1, and to address ammonia slip as a new source review issue during the permitting process. This decision to “punt” the ammonia slip issue to permitting means that in its evaluation of what is currently being achieved for NO_x, staff is failing to take into account the impact that subsequently imposed ammonia slip limits will have on the ability to achieve the proposed NO_x standards. This approach ignores the inherent trade-off between these two pollutants and may result in combinations of emission limits that are not achievable, or not at the costs identified by staff.

¹ SCAQMD, Final 2016 AQMP, main document and Appendix IV-A, page IV-A-67.

BARCT is defined as “an emission limitation that is based on the maximum degree of reduction achievable, taking into account environmental, energy, and economic impacts by each class or category of source.” Staff cannot fully address the environmental, energy and economic impacts of its proposed BARCT standards if it fails to take ammonia slip into consideration during the standard setting process. Even if staff were to impose ammonia slip limits through permit conditions, as opposed to including them in the rule, the ammonia emissions are still being driven by the proposed NO_x BARCT standards and must be taken into consideration during the rulemaking process.

Finally, if the District believes that implementation of the NO_x BARCT controls will, in fact, trigger the requirement to install PM BACT controls, the costs associated with the PM controls must be included in the cost-effectiveness analysis for the NO_x BARCT controls.

6. PR 1109.1 should address the availability of AECPs.

Early in the RECLAIM transition process, industry advocated for alternatives to equipment-by-equipment BARCT standards. California Health & Safety Section 40920.6(f) provides for this flexibility and states that districts “...shall allow alternative means of producing equivalent emission reductions at an equal or lesser dollar amount per ton reduced...” Following are some of the key constructs that industry recommends for consideration in the development of alternative emission compliance plans (AECPs). Other approaches may be appropriate as well.

a. Scope and Applicability.

Facilities under the same ownership should be eligible to be considered as one entity for compliance purposes. SCAQMD Rule 2002 provides appropriate language to define “same ownership” that could be incorporated into landing rules, including proposed Rule 1109.1:

For the purposes of this rule, same ownership is generally defined as facilities and their subsidiaries or facilities that share the same Board of Directors or shares the same parent corporation.

b. Form of the AECPs.

At a minimum, Rule 1109.1 should provide for mass-based caps covering all facilities under the same ownership as one acceptable form of AECPs. The rule should also provide for flexibility that allows facilities to propose the best form of AECP for their specific operations. To establish the baseline for a facility cap, facilities should be able to evaluate each unit under the same ownership for the previous five years (e.g., 2015 – 2019) to choose the appropriate production baseline year for each piece of equipment.

LATHAM & WATKINS^{LLP}

c. BARCT Targets.

AECPs should include emission reduction targets equivalent to the 2015 NOx shave requirements through 2022. Additional target(s) beyond 2022 could be established based on the BARCT concentration requirements and timeline promulgated in PR 1109.1. The BARCT limits for each piece of equipment would be converted to mass limits based on the selected baseline year and then summed for the entire group of facilities to establish the total annual emissions cap. Future amendments to PR 1109.1 to reflect advances in BARCT would be treated similarly via a reduction in the emissions cap in the AERP.

Thank you for your attention to these comments. If you would like to discuss our concerns, please contact me at (714) 755-8105 or by email at michael.carroll@lw.com.

Sincerely,



Michael J. Carroll
of LATHAM & WATKINS LLP

cc: Wayne Nastri
Phil Fine
Susan Nakamura
Barbara Baird
WSPA