

COMMUNITIES  
FOR A BETTER  
ENVIRONMENT  
established 1978



September 16, 2022

**VIA: ELECTRONIC MAIL ONLY** (mmorris@aqmd.gov)

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

**Re: Additional Comments on the Proposed Amendments to Regulation XIII (New Source Review) to Create Internal Minor and Major Source Emission Reduction Credit Banks**

Dear Mr. Morris:

The undersigned organizations submit these additional comments expressing our continued concerns about the South Coast AQMD's proposed internal emission reduction credit (ERCs) banks for minor sources (Mi-ERCs) and major source (Ma-ERCs). During the July 14, 2022, working group meeting, AQMD provided responses to comments we submitted on March 22, 2022. In that meeting, staff confirmed its continued path towards creating two new internal ERC banks using orphan shutdowns and reductions despite concerns raised by our organizations.

We appreciate staff for taking the time to provide responses to our previous comments. We also commend staff for considering parameters on when and where Mi-ERCs and Ma-ERCs can be used, particularly for some of the most high-polluting industries, such as petroleum refineries, that operate in overburdened communities. That said, we continue to encourage staff to focus on identifying opportunities for industry to generate ERCs in the open market (e.g., electrification of boilers and heaters, in addition to other industrial equipment).

As previously noted, the Air District's approach is problematic and will flood the region with a glut of cheap ERCs, which will allow polluting industries to expand operations at the expense of public health and undermine efforts to meet air quality standards. In fact, the South Coast AQMD has tried a similar approach in the past that the agency abandoned due to a range of legal and implementation challenges. As detailed below, the proposed internal banks approach warrants further scrutiny and should be abandoned. At the minimum, the Air District should consider the following concerns:

1. The proposed internal banks mirror repealed Rule 1309.2 that presented various issues that apply to the current proposal, including lack of documentation, surplus adjustment, and consistency with the state implementation plan.

2. The proposed minor source internal bank would waive essential record requirements meant to ensure that emissions offsets are surplus, permanent, quantifiable, and federally enforceable prior to use in the region.
3. The offset account has an excess number of orphan reduction and shutdown credits that should be retired to improve air quality in the region rather than redirected into the proposed internal minor and major source banks.
4. The sources of orphan reductions and shutdowns that would be used to seed the proposed internal minor and major source banks remains speculative, despite previous requests for more information.
5. The offset account already provides free credits to a range of polluters, not just essential services. The proposed internal minor and major source banks will create additional avenues for polluting industries to expand their operations.
6. The information available does not allow the public to understand whether the current surplus discounting method should be replaced with BARCT discounting to ensure credits are reduced based on the most stringent standard.
7. The proposed internal banks would cover a projected NOx offset gap of 400 pounds per day in the open market, but these banks would make available several tons per day of additional offsets beyond what is needed to address shortages.
8. The proposed minor and major source internal banks would have significant adverse environmental and public health impacts requiring adequate environmental review and sufficient mitigation measures.
9. The parameters to exclude certain industries and industries operating in overburdened communities from accessing the proposed internal minor and major source banks must be informed by affected communities, not politics and profits.
10. The small number of operators that have hoarded the vast majority of ERCs from the open market will continue to do so unless there are restrictions on the length of time and amount of ERCs facilities are allowed to hold.

\*\*\*

- 1. The proposed internal banks mirror repealed Rule 1309.2 that presented various issues that apply to the current proposal, including lack of documentation, surplus adjustment, and consistency with the state implementation plan.**

The South Coast AQMD's proposal to create internal ERC banks to address potential shortages in the open market has already been tried and failed. In 2002, the Air District adopted Rule 1309.2 to create an offset budget using surplus shutdowns that would be available to facilities

requiring offsets.<sup>1</sup> This offset budget would serve as “a ‘bank of last resort’ to sources subject to the SCAQMD’s NSR offset requirements but unable to obtain sufficient NO<sub>x</sub>, SO<sub>x</sub>, CO, or PM<sub>10</sub> ERCs to provide as emissions offsets on the open market.”<sup>2</sup>

The South Coast AQMD’s proposed internal banks will not only have significant impacts on air quality and the health of residents in the region but would also raise several concerns the U.S. EPA had with Rule 1309.2.<sup>3</sup> In particular, U.S. EPA identified and raised various issues with Rule 1309.2 that are present in the Air District’s current internal banks proposal, including (1) availability of existing records associated with past reductions; (2) the surplus adjustment at time of use for credits in the tracking system; and (3) consistency with assumptions in the SIP.<sup>4</sup>

These issues remain prevalent in the South Coast AQMD’s current proposal and staff has not fully grappled with these issues. In particular, staff has not fully addressed how it will deal with surplus adjustments and consistency with the SIP assumptions. Additionally, in the current proposal, orphan reductions and shutdowns without records will be used to seed the proposed minor source bank. Staff has not addressed how this record exemption complies with essential record requirements needed to ensure offsets are surplus, permanent, quantifiable, and federally enforceable.

Given U.S. EPA concerns, on February 5, 2010, the South Coast AQMD Governing Board repealed Rule 1309.2. Now, South Coast AQMD proposes to bring this failed approach back from the dead, ignoring issues previously raised by U.S. EPA that remain a concern under the current internal banks proposal. The Air District is recreating an approach that would harm public health and undermine its mission to clean our air. History cannot repeat itself. The AQMD should explore alternatives that avoid flooding the region with cheap, suspect ERCs.

**2. The proposed minor source internal bank would waive essential record requirements meant to ensure that emissions offsets are surplus, permanent, quantifiable, and federally enforceable prior to use in the region.**

The U.S. EPA requires that ERCs be “surplus, permanent, quantifiable, and federally

---

<sup>1</sup> South Coast Air Quality Mgmt. Dist., *Initial Study: Re-Adoption of Proposed Rule 1315 – Federal New Source Review Tracking System, and Adoption of Proposed Amendments to Rule 1309.2 – Offset Budget* 1-11 (Mar. 2009), <http://www.aqmd.gov/docs/default-source/ceqa/documents/aqmd-projects/2011/re-adoption-of-proposed-rule-1315/volume-iv.pdf> (Appendix B to 4 Final Program Environmental Assessment for Re-Adoption of Proposed Rule 1315 (Jan. 2011)).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Mitch Haimov, South Coast Air Quality Mgmt. Dist., *Staff Report: Proposed Rule 1315 – Federal New Source Review Tracking System* 5 (Jan. 2011), <http://www.aqmd.gov/docs/default-source/Agendas/Governing-Board/2011/2011-feb4-026.pdf?sfvrsn=2> (Attachment E to Governing Board Meeting Agenda No. 20 (Jan. 7, 2011)).

enforceable.”<sup>5</sup> Upon U.S. EPA’s request, the South Coast AQMD developed Rule 1315 (Federal New Source Review Tracking System) specifying how the Air District would track debits and credits in the current offset bank.<sup>6</sup> Rule 1315 requires that the South Coast AQMD Executive Officer “track and verify” the emissions reductions being credited into the Air District’s offset account from orphan shutdowns, orphan reductions, and excess reductions above federal NSR requirements.<sup>7</sup>

Accordingly, the South Coast AQMD’s proposal to waive record requirements for Mi-ERCs is arbitrary and inconsistent with U.S. EPA requirements and the Air District’s rules that all offsets be verified and quantified, which requires documentation.<sup>8</sup> Importantly, these Mi-ERCs would not only be available to minor sources, but would also be available to major sources.<sup>9</sup> Consequently, some of the largest polluters would have access to additional ERCs beyond those currently in the open market and being proposed under the internal major source bank.

**3. The offset account has an excess number of orphan reduction and shutdown credits that should be retired to improve air quality in the region rather than redirected into the proposed internal minor and major source banks.**

During the July 14, 2022, working group meeting, Air District staff provided data showing the internal bank has an excess number of credits. In response to comments noting that credits should be retired to help the region achieve air quality standards, staff noted that “retirement of orphan reductions and shutdowns would *eventually* make the Internal Bank insolvent.”<sup>10</sup> However, Air District staff’s proposal to pause depositing orphan credits and to siphon new credits into the proposed internal minor and major source banks confirms the bank has an excess amount of credits.

The South Coast AQMD’s proposal would make the current problem of excess orphan credits worse by creating a glut of cheap credits for some of the largest polluters in the region. The solution to a potential shortage in the open market should not involve the use of orphan shutdowns and reduction credits. For these reasons, we reiterate the need to retire or at a

---

<sup>5</sup> 40 CFR § 51.165(a)(3)(ii)(C)(1); *see also* South Coast Air Quality Mgmt. Dist., RECLAIM Transition Plan, at 4-3 (Dec. 2020, Draft Version 2.0), <http://www.aqmd.gov/docs/default-source/rule-book/Proposed-Rules/regx111/reclaim-transition-plan-draft-version-2-0.pdf?sfvrsn=6>.

<sup>6</sup> Haimov, *supra* note 4, at 5–6.

<sup>7</sup> Rule 1315(c)(3)(A).

<sup>8</sup> South Coast Air Quality Mgmt. Dist., PowerPoint Presentation at Jul. 14, 2022, RECLAIM Transition/Regulation XIII – New Source Review Working Group Meeting, at 5, 8, <http://www.aqmd.gov/docs/default-source/rule-book/Proposed-Rules/regx111/nsr---wgm-july-2022-final.pdf?sfvrsn=6> [hereinafter July 2022 Working Group Meeting].

<sup>9</sup> South Coast Air Quality Mgmt. Dist., PowerPoint Presentation at Feb. 10, 2022, RECLAIM Transition/Regulation XIII – New Source Review Working Group Meeting, at 9, <http://www.aqmd.gov/docs/default-source/rule-book/Proposed-Rules/regx111/nsr-wgm-february-2022-final.pdf?sfvrsn=6>.

<sup>10</sup> July 2022 Working Group Meeting at 11.

minimum temporarily stop capturing orphan shutdown and reduction credits given that the South Coast Air Basin remains in extreme non-attainment for ozone.

**4. The sources of orphan reductions and shutdowns that would be used to seed the proposed internal minor and major source banks remains speculative, despite previous requests for more information.**

As noted in previous comments, polluting industries cannot claim ERCs for emission decreases due to compliance with an existing or proposed rule, and the South Coast AQMD also cannot capture these unclaimed decreases as orphan reductions. Staff agreed with this comment. Air District staff, however, failed to elaborate on the sources of orphan reductions and shutdowns that would be used to seed the proposed internal banks. The Air District should provide more information on what sources it assumes or expects will generate orphan credits, particularly orphan shutdowns.

**5. The offset account already provides free credits to a range of polluters, not just essential public services. The proposed internal minor source bank will create additional avenues for polluting industries to start or expand their operations.**

During the July 14, 2022, Air District staff argued that the internal bank provides ERCs to “essential public services” and therefore orphan credits should not be retired.<sup>11</sup> However, the fact is that many polluters with access to this internal bank are not essential public services. Under Rule 1304, new or modified facilities with a potential to emit less than four tons per year of VOCs or nitrogen oxides are exempt from offsetting requirements.<sup>12</sup> Thus, the Air District allows these “low emissions” sources to operate without having to generate or secure ERCs in the open market.<sup>13</sup>

These “low emissions” sources should be required to offset their emissions, which would help address the Air District’s concerns that retiring orphan credits would result in an offset shortage for essential public services. Instead, the proposed minor source bank would add another avenue for these “low emissions” polluters to start or expand their operations by piecemealing projects. Rather than provide polluters with a free pass to increase emissions in the region, the Air District should be requiring that all polluters make investments to reduce emissions.

**6. The information available does not allow the public to understand whether the current surplus discounting method should be replaced with BARCT discounting to ensure credits are reduced based on the most stringent standard.**

During the July 14, 2022, working group meeting, Air District staff proposed that it apply best available retrofit control technology (BARCT) discounting based on applicable rules rather than

---

<sup>11</sup> *Id.*

<sup>12</sup> Rule 1304(d).

<sup>13</sup> July 2022 Working Group Meeting at 10.

equipment specific reductions.<sup>14</sup> The South Coast AQMD found that in at least 24 categories BARCT limits were more stringent than Best Available Control Technology (BACT) currently used to discount ERCs under Rule 1306.<sup>15</sup> In contrast, only seven equipment categories had BACT limits more stringent than BARCT.<sup>16</sup>

However, at the September 8, 2022, working group meeting, Air District staff commented that it would abandon a BARCT discount approach because it did not appear to make ERCs *more accessible* or *tradeable*. The point of discounting is not to ensure ERCs are available. Rather, discounting is to ensure that credits are not releasing excess emissions than what is allowed under current standards and control technology. Air District staff did not elaborate on its finding or present data showing that the proposed BARCT discounting approach would not result in significant reductions.

As previously noted, the South Coast AQMD must use the most stringent equipment-specific standard to discount ERCs. For transparency and to ensure that community members can understand the reasons for the Air District's decision to abandon this approach, the agency should provide its analysis. Without this information, the public is left to speculate, and the Air District's sudden shift seems arbitrary and capricious given that it acknowledged several key benefits to changing the current discounting approach.

**7. The proposed internal banks would cover a projected NOx offset gap of 400 pounds per day in the open market, but these banks would make available several tons per day of additional offsets beyond what is needed to address shortages.**

The Air District estimated that there are about 800 pounds per day of NOx ERCs available in the open market and that “based on a demand from RECLAIM facilities of 1,000 pounds per day, the current supply of NOx ERCs of 800 pounds per day . . . could potentially be depleted in less than a year.”<sup>17</sup> The Air District now asserts that annual demand would be 1,200 pounds per day of NOx offsets, which would create a 400 pounds per day shortage in the open market.<sup>18</sup> To address these ERC shortages, the agency proposes these internal minor and major source banks.

According to Air District staff, the proposed internal banks would generate about 2.6 *tons* per day of NOx offsets in the minor source bank and 1 *ton* per day of NOx offsets in the major source bank by 2026.<sup>19</sup> The amount of offsets that would be made available is substantially more than what is necessary to close the purported gap South Coast AQMD cites as the reason for the creation of these banks. The agency fails to provide analysis and information explaining why such a large amount of credits is needed to address shortages in the open market.

---

<sup>14</sup> *Id.* at 24.

<sup>15</sup> *Id.* at 25.

<sup>16</sup> *Id.*

<sup>17</sup> RECLAIM Transition Plan at 4-5.

<sup>18</sup> July 2022 Working Group Meeting at 15.

<sup>19</sup> July 2022 Working Group Meeting at 13.

**8. The proposed minor and major source internal banks would have significant adverse environmental and public health impacts requiring adequate environmental review and sufficient mitigation measures.**

If the Air District decides to proceed with its approach, staff must conduct a thorough environmental impacts assessment. CEQA Guidelines require the preparation of an assessment to ensure the adoption of a regulatory program would avoid significant adverse effects on the environment.<sup>20</sup> Additionally, South Coast AQMD's rule adoption procedures direct the agency to provide an environmental assessment prior to rule adoption.<sup>21</sup> This assessment is critical given that offset programs have been shown to inflict negative environmental harms.

In 2011, South Coast AQMD prepared a Draft Program Environmental Assessment (PEA) to analyze the potential environmental impacts of Rule 1315. The PEA concluded the “[p]roject would generate significant adverse direct and indirect project-specific and cumulatively considerable air quality, visibility, and greenhouse gas impacts,”<sup>22</sup> and “no feasible changes or alterations to the Project would mitigate or avoid the significant adverse indirect project-specific and cumulative impacts identified.”<sup>23</sup> These internal banks will likely have similar or worse environmental impacts.

**9. The parameters to exclude certain industries and those operating in overburdened communities from accessing the proposed internal minor and major source banks must be informed by affected communities, not politics and profits.**

We commend Air District staff for considering limitations on access to these internal banks based on industry type and location. In particular, we appreciate the exclusion of petroleum related facilities and industry areas designated as AB 617 communities that already experience significant pollution burdens. We hope the agency will flesh out the details of these restrictions and commit firmly to prioritizing public health and air quality over political and economic interests that for too long have allowed for expansions and increased pollution in these areas.

Moreover, although polluters have argued that these credits are needed for facility “modernization,” that is just a euphemism for expansion. In fact, Air District staff acknowledged at the July 14, 2022, working group meeting that these offsets are needed primarily for throughput increases and other expansions in the region. Accordingly, if the agency proceeds down this path, it must, at a minimum, set limits on the types of operations and location of sources that will have access to these credit banks for pollutants like NO<sub>x</sub> and VOCs that have a range of localized health impacts.

---

<sup>20</sup> See, e.g., 14 Cal. Code Regs. §§ 15250, 15251, 15252.

<sup>21</sup> Rule 110(c).

<sup>22</sup> South Coast Air Quality Mgmt. Dist., *Statement of Findings, Statement of Overriding Considerations and Mitigation Monitoring Program 7* (Jan. 2011), <http://www.aqmd.gov/docs/default-source/Agendas/Governing-Board/2011/2011-feb4-026.pdf?sfvrsn=2> (Attachment C-1 to Governing Board Meeting Agenda No. 20 (Jan. 7, 2011)).

<sup>23</sup> *Id.* at 14.

**10. The small number of operators that have hoarded the vast majority of ERCs from the open market will continue to do so unless there are restrictions on the length of time and amount of ERCs facilities are allowed to hold.**

As stated in previous comments, according to the South Coast AQMD's assessment, one major reason for the limited ERCs in the open market is that a small number of facilities have amassed significant quantities of credits, with some holding onto ERCs for over ten years.<sup>24</sup> Given that 5 out of 36 facilities hold 80 percent of NOx ERCs and another 5 out of 64 facilities hold 66 percent of PM10 credits, Air District staff should cap the amount of ERCs a facility can hold at a time and require the sale, transfer, or use of credits before a specified length of time.

This approach would increase ERCs and promote trading in the open market and avoid having to create the proposed internal banks. Additionally, we appreciate Air District's staff concurrence with our organizations that facilities holding ERCs in the open market must use those first before accessing the proposed internal banks. We commend the agency for seriously considering limits to prevent facilities hoarding credits from exploiting these proposed internal banks. We look forward to reviewing the details of these limits and hope staff will consider these other proposed reforms.

\*\*\*

We thank Air District staff for providing a response to comments our organizations submitted and for continued engagement throughout this process. We welcome the opportunity to discuss the issues outlined in this letter in more details and would appreciate a response from the Air District regarding our concerns.

Sincerely,

Oscar Espino-Padron, Attorney  
Shana E. Emile, Attorney  
Earthjustice

Jan Victor Andasan, Community Organizer  
East Yard Communities for Environmental  
Justice

Alison Hahm, Staff Attorney  
Communities for a Better Environment

Maya Golden-Krasner, Senior Attorney  
Climate Law Institute  
Center for Biological Diversity

Nicole Levin, Campaign Representative  
Beyond Dirty Fuels Campaign  
Sierra Club

cc: Michael Krause, Assistant Deputy Executive Officer (mkrause@aqmd.gov)

---

<sup>24</sup> RECLAIM Transition Plan at 4-6.