

May 7, 2020

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

Dear Mr. Morris:

Subject: Preliminary Comments on New Source Review Permitting
Rules for Modifications of Major Stationary Sources under
SCAQMD Regulations XIII and XVII

The Los Angeles Department of Water Power (LADWP) is submitting the following comments on amendments to the New Source Review (NSR) rules that the South Coast Air Quality Management District (SCAQMD) is developing for stationary sources that will exit from the Regional Clean Air Incentives Market (RECLAIM) program. Although many important NSR permitting issues have been identified during the meetings of the NSR Regulation XIII Working Group, our comments in this letter are focused on one issue of special importance to LADWP: the establishment of an emissions increase test for determining whether modifications undertaken at existing electric generating facilities exiting RECLAIM will trigger the NSR permitting rules under the Regulation XIII. LADWP respectfully submits these written comments to provide early stakeholder input on several important legal and technical issues that SCAQMD should consider in developing its proposed amendments to the NSR Regulation XIII on this key issue.

Background and Overview of Issues

SCAQMD is authorized to issue NSR permits for major stationary sources located in the South Coast Air Basin (SCAB) under a "delegation agreement" established with the U.S. Environmental Protection Agency (EPA), rather than pursuant to a "fully approved" NSR permit program. Under this agreement, SCAQMD must issue all of its NSR permits in coordination with EPA Region 9, and those permits must comply with the federal NSR regulations codified at 40 C.F.R. Part 51, as well as the local air permitting regulations codified in the SCAQMD Rule Book at Regulation XIII and Regulation XVII. Thus, there

are two levels of NSR permit review that apply to major stationary sources located in the SCAB – the federal NSR regulations and SCAQMD’s local permitting regulations.

The discussion below examines SCAQMD’s authority to establish rules for determining whether non-excluded physical or operational changes (*i.e.*, modifications) undertaken at existing major sources trigger the NSR permitting requirements under both the federal and local NSR applicability rules.

This examination focuses on a number of important regulatory issues that have been discussed during the recent meetings of the NSR Regulation XIII Working Group. In particular, SCAQMD has indicated at these meetings that it may not be able to use an emission increase test based on comparing (1) a unit’s baseline actual emissions prior to the modification to (2) the unit’s projected future actual emissions after the modification. Referred to as the Baseline Actual Emissions-to-Projected Actual Emissions Increase Test, SCAQMD expressed concerns that this emissions increase test might run afoul of Senate Bill 288 (SB 288), which is entitled the “Protect California Air Act of 2003” and codified at §§ 42500-42507 of the California Health and Safety Code. Among other things, SB 288 imposed an anti-backsliding prohibition that states, “No air quality management district or air pollution control district may amend or revise its regulations to be less stringent than those that existed on December 30, 2002.”

Another issue identified by SCAQMD during the working group meetings was the legal constraint that is imposed on state and local regulatory authorities by section 110(l) of the Clean Air Act (CAA). Section 110(l) provides: “The [EPA] Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of this chapter.” SCAQMD raised concerns that this provision may preclude it from adopting a Baseline Actual Emissions-to-Projected Actual Emissions Increase Test because that test may be less stringent than the current emissions increase tests used by SCAQMD for determining whether modifications at major stationary sources trigger the NSR permitting requirements. The current RECLAIM rules on NSR applicability establish a “potential to emit” (PTE) emission increase test that compares a unit’s hourly PTE levels prior to and after a modification is completed at an existing RECLAIM facility.¹ Similarly, SCAQMD Rule XIII employs for non-RECLAIM air pollutants a PTE-to-PTE Emission Increase Test, although the PTE is measured on a daily basis, as opposed to an hourly basis.²

LADWP policy concerns relate to the fact that SCAQMD’s interpretation could effectively require SCAQMD to adopt a Baseline Actual Emissions-to-PTE Emission Increase Test for determining NSR applicability, which compares historical baseline actual emissions to future PTE for existing electric generating facilities. The use of a

¹ See SCAQMD Rule 2005(d).

² See SCAQMD Rule 1306(d)(2).

Baseline Actual Emissions-to-PTE Emission Increase Test will have significant adverse regulatory and permitting repercussions, without achieving any significant corresponding air quality or environmental gains. In particular, a large number of routine and other insignificant physical or operational changes typically undertaken at electric generating facilities will trigger NSR under this emission increase test. As a result, owners or operators of these facilities potentially will be forced to meet all of the applicable NSR permitting requirements for a large number of projects having *de minimis* impacts on air quality and the environment. In addition to an extensive and lengthy public review process, these NSR requirements include obligations to complete a stringent technology review for “best available control technology” (BACT) and obtain emission offsets for any potential emission increase in nonattainment air pollutants. In effect, the use of a Baseline Actual Emissions-to-PTE Emission Increase Test will impose considerable resource burdens on both SCAQMD and facility owners and operators to implement these NSR permitting requirements on a large number of routine projects having *de minimis* air quality and environmental impacts.

Our legal concerns relate to the fact that neither of the two legal limitations identified by SCAQMD necessarily requires the application of a Baseline Actual Emissions-to-PTE Emission Increase Test to determine NSR applicability in the case of physical or operational changes undertaken at existing electric generating facilities. Rather, SCAQMD has the discretion under federal and state law to make NSR applicability determinations for such existing facilities based on a Baseline Actual Emissions-to-Future Projected Actual Emissions Increase Test. Notably, EPA codified this more practical emissions increase test for electric generating facilities into federal NSR regulations in July 1992 (more than a full 10 years prior to the applicability date for the “anti-backsliding” prohibition established by SB 288) and, as a result, this test has applied for many years to electric generating facilities in the SCAB through SCAQMD’s NSR delegated program.³

Furthermore, one key element of this actual-to-future-actual emission test established in July 1992 is the “demand increase” exclusion that allows for the exclusion of those emissions increases that are attributable to demand increases and unrelated to the proposed modification in the case of electric generating facilities.⁴ The use of this methodology assures that the NSR permitting requirements will not be triggered in the case of those projects undertaken at existing electric generating facilities that do not result in a future projected actual emission increase and therefore do not have significant impacts on local air quality and the environment.

Federal NSR Regulations

³ These rules for projecting future actual emissions, including the “demand growth” exclusion, are codified at 40 C.F.R. Part 51, Appendix S (II) (A) (24) for NSR-nonattainment air pollutants and 40 C.F.R. § 52.21(b)(41) for attainment air pollutants and greenhouse gases (GHGs).

⁴ These rules for projecting future actual emissions, including the “demand growth” exclusion, are now codified at 40 C.F.R. Part 51, Appendix S (II) (A) (24) for NSR-nonattainment air pollutants and 40 C.F.R. § 52.21(b)(41) for attainment air pollutants and GHGs.

EPA has established separate NSR permitting regulations for air pollutants that have been designated as “nonattainment” and “attainment” for a particular area or location. In the case of electric generating facilities in the SCAB, these regulations establish a Baseline Actual Emissions-to-Projected Actual Emissions Increase Test. As noted above, this test compares past actual emission levels during a historic baseline period to future actual emission levels that are projected for the affected facility after the implementation of the project.⁵ In making this emission comparison, the rules in each case require that the facility’s projected future actual emissions be calculated based on “the maximum annual rate, in tons per year,” that the facility “is projected to emit a NSR-regulated pollutant” during a five-year period after completion of the project at the particular facility. Furthermore, in making this projection, the owner or operator is allowed to exclude that portion of the facility’s post-change emissions that the facility “could have accommodated” during the consecutive 24-month period used to establish the baseline actual emissions, including those emissions attributable to “increased utilization due to product demand growth.”⁶

Notably, EPA initially adopted the rules for performing the emission increase test, including the “demand growth” exclusion, for all electric generating facilities pursuant to a final rule issued on July 21, 1992.⁷ This date is 10 years prior to the applicability date for the “anti-backsliding” prohibition that was established by SB 288. SB 288 bars SCAQMD and other air districts in California from adopting amendments to the current NSR regulations that would make them less stringent than such rules that existed on December 30, 2002. Since the “demand growth” exclusion existed as a provision of the federal NSR regulations well before the applicability date for SB 288, there is no doubt that this emissions increase test (with the “demand growth” exclusion) is a valid and legally effective provision that can be used for determining whether a modification undertaken at any electric generating facility triggers the NSR permitting requirements under the applicable federal NSR regulations through SCAQMD’s delegated NSR permit program.

SCAQMD NSR Regulations

SCAQMD has adopted local regulations for the implementation of the NSR permitting program in the SCAB. The following analysis indicates that SCAQMD has authority under its local rules to determine NSR applicability based on a Baseline Actual Emissions-to-Projected Actual Emissions Increase Test. Given that separate local permitting rules apply for different air pollutants, a review of each separate set of SCAQMD rules is necessary to document SCAQMD’s authority to apply this emission increase test for electric generating facilities exiting the RECLAIM program.

⁵ See 40 C.F.R. Part 51, Appendix S (IV) (I) (iii) (regulations for NSR-nonattainment air pollutants); 40 C.F.R. § 52.21(a)(2)(c) (regulations for attainment air pollutants and GHGs).

⁶ See 40 C.F.R. Part 51, Appendix S (II) (A) (24)(ii)(c) (regulations for NSR-nonattainment air pollutants); 40 C.F.R. § 52.21(b)(41)(ii)(c) (regulations for attainment air pollutants and GHGs).

⁷ 57 Fed. Reg. 32,314 (July 21, 1992).

PM_{2.5} Emissions: SCAQMD Rule 1325 establishes the NSR regulations for emissions of PM_{2.5} and its precursors from major stationary sources located in PM_{2.5} nonattainment areas within the SCAB. Adopted in 2007 and amended in 2011 (dates that are well after the December 30, 2002 deadline set by SB 288), these regulations authorize the use of an emission increase test that involves a comparison of past baseline actual emissions prior to the modification to projected actual emissions in the future after the change.⁸

In addition, SCAQMD Rule 1325(b)(10) contains a definition of the term “projected actual emissions” that expressly allows for the use of the “demand increase” exclusion in projecting a unit’s future actual emissions under a Baseline Actual Emissions-to-Projected Actual Emissions Increase Test. In particular, the demand increase exclusion provides that the facility owner or operator “shall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit’s emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth.”⁹

SCAQMD’s adoption of these NSR applicability rules for PM_{2.5} clearly evidences that neither one of the anti-backsliding prohibitions in SB 288 and CAA section 110(l) prevents SCAQMD from using a Baseline Actual Emissions-to-Projected Actual Emissions Increase Test (with the demand increase exclusion) for determining whether modifications undertaken at existing electric generating facilities and other major stationary sources trigger NSR.

Greenhouse Gas (GHG) Emissions: The NSR permitting regulations for GHG emissions are set forth in SCAQMD Rule 1714, which was initially adopted in 2010 and amended in 2019. Notably, subsection (c) of Rule 1714 incorporates by reference almost all of the NSR permitting provisions contained in the federal NSR regulations codified at 40 C.F.R. Part 52.21 for attainment air pollutants, including the provisions for determining NSR applicability based on a Baseline Actual Emissions-to-Projected Actual Emissions Increase Test.¹⁰ In so doing, Rule 1714 specifically incorporates the “demand growth” exclusion that is set forth in 40 C.F.R. Part 52.21(b)(41)(ii)(c). Again, SCAQMD’s regulations provide electric generating facilities and other facilities exiting RECLAIM with explicit authority to apply the Baseline Actual Emissions-to-Projected Actual Emissions Increase Test for purposes of determining NSR applicability for GHG emissions.

Other NSR-Regulated Air Pollutants: SCAQMD is not precluded from adopting a Baseline Actual Emissions-to-Projected Actual Emissions Increase Test for determining

⁸ See SCAQMD Rule 1325 (d).

⁹ SCAQMD Rule 1325(b)(10)(C).

¹⁰ SCAQMD Rule 1714(c).

NSR applicability in the case of other air pollutants regulated under the NSR program. The adoption of such a test for other nonattainment air pollutants under Regulation XIII and attainment air pollutants under SCAQMD Regulation XVII would be no different from – and therefore fully consistent with – the actions that SCAQMD took to adopt the Baseline Actual Emissions-to-Projected Actual Emissions Increase Test for PM_{2.5} under the nonattainment NSR program and GHG emissions under the attainment NSR program. Just as in the case of PM_{2.5} and GHG emissions, SCAQMD would be adopting a test for electric generating facilities that EPA had adopted in July 1992 and began to apply to all affected electric generating facilities within the SCAB under EPA’s delegated program, over a decade prior to the start date of the anti-backsliding prohibition imposed by SB 288.

As a result, a Baseline Actual Emissions-to-Projected Actual Emissions test is not a new interpretation or policy for the NSR permit program, therefore it is not subject to the SB 288 anti-backsliding prohibition. Most importantly, SCAQMD has effectively confirmed this fact by adopting, as described above, the Baseline Actual Emissions-to-Projected Actual Emissions Increase Test in its separate NSR regulations for PM_{2.5} emissions (Rule 1325 adopted in June 2011) and GHG emissions (Rule 1714 adopted in November 2010) that apply to stationary sources located in the SCAB.

Scope of Limitation Imposed by CAA Section 110(l)

CAA section 110(l) does not preclude SCAQMD from adopting a Baseline Actual Emissions-to-Projected Actual Emissions Increase Test for determining NSR applicability. Any such concerns that SCAQMD has identified in NSR Working Group meetings are unfounded for the following reasons.

First, the CAA only bars EPA from approving a revision of state implementation plan (SIP) if that SIP revision will “interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement” under the CAA.¹¹ This provision of the CAA is therefore not an absolute prohibition against the adoption of all SIP revisions that may relax existing SIP requirements. Rather, it gives the agency broad discretion to approve a SIP revision “unless the agency finds it will make air quality worse.”¹²

Section 110(l) of the CAA does not prescribe a specific methodology for determining whether the new SIP provision interferes with attainment or reasonable further progress. As a result, courts have accorded EPA considerable deference in making such determinations¹³ and have held that such deference is consistent with the

¹¹ CAA § 110(l), 42 U.S.C. § 7410(l).

¹² *Alabama Env'l Council v. EPA*, 711 F.3d 1277, 1293 (11th Cir. 2013) (quoting 73 Fed. Reg. 60957, 60960 (Oct. 15, 2008)).

¹³ See, e.g., *Galveston-Houston Ass'n for Smog Prevention (GHASP) v. EPA*, 289 Fed. Appx. 745 (5th Cir. 2008) (upholding non-interference determination based on modeling of competing control strategies after noting that EPA’s scientific determinations are entitled to deference).

fundamental premise underlying the CAA that “states have primary responsibility for ensuring that NAAQS are met.”¹⁴ States can show that a SIP revision will not “interfere” with attainment in various ways, including identifying substitute equivalent emission reductions to compensate for any emission increases associated with changes in a SIP-approved program.¹⁵

Second, EPA has historically approved SIP revisions that generally preserve status quo air quality and section 110(l) does not absolutely bar each and every potential change that might be viewed as relaxations of existing SIP provisions. For example, in recently approving revisions to the Michigan SIP, EPA explained that it “does not interpret section 110(l) to require a full attainment or maintenance demonstration before any changes to a SIP may be approved” and that it is appropriate to approve SIP revision under section 110(l) so long as EPA finds it will at least preserve status quo air quality.¹⁶ A similar determination was made in approving revisions applicable to a local air district in Nevada. In this case, EPA concluded that Nevada can “relax its SIP provisions if the state can attain or maintain the NAAQS and meet any applicable reasonable further progress goals or other specific requirements.”¹⁷

Conclusion

LADWP believes that SCAQMD’s concerns regarding SB 288 and CAA section 110(l) can be addressed. Neither requirement bars SCAQMD from adopting a Baseline Actual Emissions-to-Projected Actual Emissions Increase Test. As noted above, this emission

¹⁴ See, e.g., *Alabama Env’l Council*, 711 F.3d at 1293 (quoting *Kentucky Resources Council, Inc. v. EPA*, 467 F.3d 986, 996 (6th Cir. 2006) (*Kentucky Resources*)).

¹⁵ See, e.g., *Indiana v. EPA*, 796 F.3d 803, 811-13 (7th Cir. 2015) (upholding EPA’s approval of SIP revision after finding that substitute emission reductions more than offset increased emissions associated with the program change); *Kentucky Resources Council*, 467 F.3d at 996-99 (containing detailed analysis of adequacy of substitute control measures). See also, *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 858 (5th Cir. 2013) (ruling that, in disapproving a plan, EPA must provide reasoning supporting its conclusion that the disapproved provision would interfere with an applicable requirement of the CAA); *Texas v. EPA*, 690 F.3d 670, 677-78 (5th Cir. 2012) (holding that EPA’s reason for rejecting Texas’s SIP revision for adopting a Flexible NSR Permit Program was arbitrary and capricious because EPA failed to show interference with any applicable requirement under the CAA, particularly given that the Flexible Permit Program affirmatively required compliance with non-attainment review and with Texas’s Prevention of Significant Deterioration permitting program).

¹⁶ *Air Plan Approval; Michigan; Minor New Source Review*, 83 Fed. Reg. 44,493 (Aug. 31, 2018). See *Kentucky Resources Council, Inc. v. EPA*, 467 F.3d 986 (6th Cir. 2006); *GHASP v. EPA*, No. 06-61030 (5th Cir. Aug. 13, 2008); see also, e.g., 70 FR 53 (Jan. 3, 2005), 70 FR 28429 (May 18, 2005) (proposed and final rules, upheld in *Kentucky Resources*, 467 F.3d at 996, which discuss EPA’s interpretation of section 110(l)).

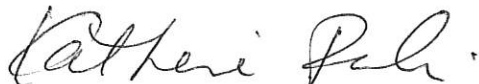
¹⁷ *In Approval and Promulgation of Implementation Plans; NSR; State of Nevada, Clark County Department of Air Quality and Environmental Management*, 69 Fed. Reg. 54,006, 54,011-12 (Sept. 7, 2004). See also *Approval and Promulgation of Air Quality Implementation Plans; Wisconsin; NSR Reform Regulations, Rule AM-06-04*, 73 Fed. Reg. 76,564 (Dec. 17, 2008) (EPA approving certain revisions to Wisconsin’s PSD and non-attainment NSR construction permit programs submitted by Wisconsin in 2006, citing Nevada decision 69 Fed. Reg. 54,011-54012).

Mr. Michael Morris
Page 8
May 7, 2020

increase test has been in existence for electric generating facilities since at least July 1992, well before the applicability date for the “anti-backsliding” prohibition established by SB 288 and, as a result, this test has applied for many years to electric generating facilities in the SCAB through SCAQMD’s NSR delegated program. Furthermore, SCAQMD has incorporated the Baseline Actual Emissions-to-Projected Actual Emissions Increase Test into its own separate local NSR regulations for PM_{2.5} emissions (Rule 1325 adopted in June 2011) and GHG emissions (Rule 1714 adopted in November 2010) that apply to stationary sources located in the SCAB. Finally, the adoption of this actual-to-actual emission increase test would not necessarily be a less stringent test than the current PTE-to-PTE test and therefore does not constitute a relaxation that might “interfere with any applicable requirement concerning attainment and reasonable further progress” under CAA section 110(l). Rather, all evidence indicates that a NSR permit program with a Baseline Actual Emissions-to-Projected Actual Emissions Increase Test – particularly when combined with California’s regime of more stringent emissions control requirements¹⁸ – would generally preserve status quo air quality and therefore would not be in violation of section 110(l) of the CAA.

LADWP appreciates the opportunity to provide comments on this important NSR issue. If you have questions or would like additional information, please contact me at katherine.rubin@ladwp.com or (213) 367-0436, or Andrea Villarin, of my staff, at andrea.villarin@ladwp.com or (213) 598-1883.

Sincerely,



Katherine Rubin
Manager of Air and Wastewater Quality and Compliance

AV:aeh
c: Ms. Andrea Villarin

¹⁸ One notable example are the requirements of Assembly Bill 617 for SCAQMD and other air districts to adopt and implement new performance standards based on “best available retrofit control technology” (BARCT) for all industrial sources subject to the AB 32 Cap-and-Trade Program. These new BARCT performance standards will achieve significant additional emissions control requirements on these major source categories of air pollutants.