California Air Resources Board Guidance
New Source Review and Senate Bill 288
August 2004

I. BACKGROUND

The Protect California Air Act of 2003 (SB 288, Sher; Health and Safety Code sections 42500 through 42507, and Vehicle Code section 9250.11)[1] was enacted in response to federal regulations that weakened the federal New Source Review (NSR) program. The United States Environmental Protection Agency (EPA) amended the federal NSR regulations to reduce the circumstances under which existing stationary sources would be required to subject modifications to their facilities to review. If the revised federal program were to be implemented in California, the requirements for technological and operational emission controls and emission offsets that ensure that modified sources do not adversely affect air quality would be undermined. California's experience of requiring strict pollution controls and emission offsets for major modifications ensures that existing sources operate more cleanly over time as they modernize and expand. This also facilitates industrial growth in a manner consistent with the preservation and enhancement of existing air quality. The Protect California Air Act of 2003 (the Act) is intended to maintain California's technology-based program, prevent any weakening of the state's current NSR programs as a result of the federal amendments, and ensure progress towards attainment and maintenance of both state and national ambient air quality standards along with economic growth (sections 42501, 42502, and 42503).

II. INTRODUCTION

The Air Resources Board (ARB) is providing this guidance because it has a major role in implementing the Act; is the air pollution control agency for all purposes set forth in federal law; and is the agency charged with coordinating, encouraging, and reviewing the efforts of the air pollution control districts (Districts) as they affect air quality (sections 39500 and 39602). The Act requires the ARB to ensure that District NSR rules and regulations are equivalent to, or more stringent than, those that existed on December 30, 2002, and to promptly adopt rules necessary to establish equivalency if they are not (section 42504(a)). The Act also requires ARB approval, at a public hearing, of any amendments that the Districts adopt, in accordance with criteria set forth in the Act, that permissively weaken their NSR rules (section 42504(d)). Finally, the ARB is required to post specified information on our website in order to assist in interpreting District NSR rules and regulations in both nonattainment and attainment (i.e., "prevention of significant deterioration") areas (section 42506). This guidance supplements the information on our website and informs the

[1] One section of SB 288 amends the Vehicle Code to extend the authority of the SCAQMD to collect a $1.00 auto registration renewal fee until January 1, 2010. We are not addressing this provision here. All references are to the Health and Safety Code unless otherwise noted.

Districts, the public, and the owners/operators of stationary sources how the ARB interprets the major provisions of the Act.

III. PROVISIONS OF SB 288

The Protect California Air Act is essentially a "no backsliding" statute and establishes the rules and regulations that comprise a District's NSR program as of December 30, 2002, as the baseline against which any changes will be measured. Each District's existing NSR program consists of those NSR rules that the District had adopted as of December 30, 2002; that the ARB submitted to the EPA for inclusion in the state implementation plan (SIP); and that have been approved, or are pending approval, by the EPA.

The Act, except in defined and limited circumstances, generally provides that no District may amend its NSR rules to be less stringent that those that existed on December 30, 2002 (section 42504(a)). The Act clarifies this general prohibition by specifying the components or elements of a District's NSR rules to which it pertains (section 42504(b)). These elements are:

1. The applicability determination for NSR, i.e., the sources to which the NSR rules apply.
2. The definitions of "modification," "major modification," "routine maintenance," and "repair or replacement."
3. The calculation methodology, thresholds, or other procedures of new source review. We interpret this to include the methodology for determining baselines, calculating emission changes, and offset amounts required. Also, barring exceptions set forth in the statute, we interpret this to mean that the major source and major modification thresholds that were in place on December 30, 2002, may not be raised.
4. The definitions and requirements of NSR regulations, which, given the findings, declarations, and purpose of the Legislature in enacting SB 288, include requirements to obtain offsets.

The rule components listed above may not be amended if doing so would "exempt, relax, or reduce the obligations of a source" with regard to the following requirements (section 42504(b)(2)):

1. Any requirement to get a permit prior to construction.
2. Any requirement to apply best available control technology (BACT or Lowest Achievable Emission Rate, LAER, as appropriate).
3. Any requirement to perform an air quality impact analysis. (We believe the California Environmental Quality Act, CEQA, provides one means of doing this.)
4. Any requirement for monitoring, recordkeeping, and reporting if these would be less representative, enforceable, or publicly accessible.

5. Any requirement for regulating any air pollutant covered by the NSR rules. (The ARB interprets this to include the requirement to obtain offsets.)
6. Any requirement for public participation prior to permit issuance.

Districts may amend their NSR rules, including revisions to the elements of the rules described above, if the amendments do not relax source obligations with regard to the listed requirements, or if the amendments make the rules more stringent (section 42504(c)).

Notwithstanding the general anti-backsliding provision set forth in section 42504(a), as clarified in section 42504(b), the Act allows revisions that may provide less stringent District NSR rules under carefully circumscribed circumstances. The rule amendment must be accomplished at a public hearing based upon substantial evidence in the record (which is not a change from existing rulemaking law) (section 42504(d)). The District must submit the amendment(s) to the ARB for approval at a public hearing in order to ensure that the criteria for such rule revisions have been met (section 42504(d)). Each of the following conditions applies (section 42504(d) (1) through (4)).

First, the rule must do one of the following (section 42504(d)(1)):

1. Replace a rule that allowed risk from exposure to a toxic material with a more protective rule or regulation; or
2. Replace a technologically unworkable rule; or
3. Replace a rule that causes a substantial hardship to business with an amended rule that meets all of the following criteria:
   a) it is narrowly tailored to relieve the hardship;
   b) the District will provide offsets for any increases in emissions;
   c) the offsets are real, surplus, quantifiable, verifiable, enforceable, and occur no more than 3 years prior to or after the increase; and
   d) information regarding the offsets is publicly available; or
4. Is temporary and necessary to respond to an emergency; or
5. Will not impede continued maintenance of all national ambient air quality standards (NAAQS) or progress towards attainment of the state ambient air quality standards. (This exception applies only in Districts that are attaining all NAAQS.)

Second, the amended rule must not exempt, relax, or reduce the obligation of the source to obtain a permit or apply BACT/LAER (section 42504(d)(2)).

Third, the amended rule must be consistent with ARB guidance regarding environmental justice and with Division 26 of the Health and Safety Code (section 42504(d)(3) and (4)). The ARB has approved several guidance documents pertaining to environmental justice (EJ) and maintains an EJ website at www.arb.ca.gov/ch/programs/ej/ej.htm. Consistency with Division 26 means that the process by which a rule is revised, and the substance of that revision, comply with both the procedural and substantive provisions pertaining to air

pollution control in California, as set forth in Division 26 of the Health and Safety Code, commencing with section 39000.

IV. AMENDMENTS TO NSR RULES

Districts may want to amend their NSR rules and regulations for a variety of reasons. For example, promulgation of the new area classifications for the federal 8-hour ambient air quality standard for ozone – and the planned revocation of the federal 1-hour ozone standard – will change the federal attainment status of most Districts, raising the thresholds for facility emissions that will constitute a "major source" or a "major modification" under federal law, and will change the federally-applicable offset ratio. Some Districts may want to amend their NSR rules to specifically reference agricultural sources that recently became subject to permitting pursuant to Senate Bill 700 (stats. 2003, ch. 479). Also, some Districts may want to update their rules to add new definitions or require new monitoring methods or calculation procedures. In addition, a group of Districts is working with the EPA to establish the "equivalency" of their NSR programs with the EPA base program established under the federal amendments published December 31, 2002, for PSD and nonattainment areas in order to avoid major substantive rule changes.

Whether or not District NSR program changes will comply with SB 288 depends upon the individual rule proposals. Through the ARB's existing process, review of District rules, including NSR rule revisions, will continue on a case-by-case basis. The ARB will also respond to specific issues that a District may raise about its proposed revisions to its NSR program. While rule review is fact-specific and will require comparison with the Districts' December 30, 2002, NSR programs and the criteria set forth in the Act, the following general legal observations may be useful to the Districts, the public, and the owners/operators of stationary sources.

V. THE ARB'S ROLE IN IMPLEMENTING SB 288

Proposed revisions to District NSR programs will be reviewed in the context of the letter and the spirit of the Act. Revisions that do not weaken the NSR rules and regulations will not require ARB approval. However, because the ARB is required to establish "equivalent" NSR rules if Districts inadvertently weaken theirs, consultation with the ARB on all revisions, especially revisions that may represent "close calls," is advised. Some proposals, such as the addition of agricultural sources, the requirement for continuous emission monitors (CEMs), or the restriction of offsets for volatile organic compounds (VOC) to those that are less toxic, are clearly not contrary to SB 288. Others, such as raising the thresholds for "major sources" and "major modifications," or reducing the offset ratio without providing legally enforceable, compensating mitigation, are weakenings that are permissible only under the carefully limited circumstances described in Health and Safety Code section 42504.

While some NSR program changes do not directly contradict any of the criteria set forth in section 42504, they may allow or enable rule weakenings that could not occur "but for" the revision. The ARB's view is that such indirect backsliding is not permitted by the Act. The following amendments are examples of revisions whose approval, if proposed, would be questionable under the Act unless the criteria in section 42504(d) are met:

- Changes to procedures (or the application of such procedures to a particular source) for calculating emission changes at major versus non-major stationary sources that will affect the determination of the applicability of NSR requirements.
- Changes to the definitions or thresholds of "major source" or "major modification" to correspond with the new federal 8-hour ozone classification of a district, which would reduce the number of sources subject to federal NSR.
- Decreases in offset ratios due to a change in a district's federal 8-hour ozone classification.
- Changes that allow the substitution of state BACT for federal LAER, unless they are demonstrated to be equivalent.
- Changes to calculation procedures that will allow sources to calculate higher baseline emissions and/or lower post-project emissions in order to avoid NSR or reduce a source's obligations under NSR, e.g., supply fewer offsets without equivalent mitigation.
    - As a specific example of the above point, changes to calculation procedures, such as changing the calculation of emission increases from the "actual-to-potential" method to the "potential-to-potential" method or the "actual-to-projected-actual" method, especially if this will change the determination of BACT applicability or the applicability of other NSR requirements.
    - Changes that correct technical errors or make calculations more accurate are not considered weakenings.
- Broadening the scope of exemptions from, or changing the thresholds for applicability of, BACT/LAER, offsets, or other NSR requirements.
- Changes to definitions, thresholds, or calculation procedures that will reduce or eliminate the time allowed for public comment on a proposed modification.
- Changes to definitions, thresholds, or calculation procedures that would eliminate the need to perform an air quality impact analysis.
- Changes to the requirement that "surplus" must be verified at the time of use of the offsets.

The Act permits the rule revisions listed above if the amendment complies with the criteria set forth in section 42504(d), as explained above on page 3. However, no weakening may be allowed if it will exempt or reduce the obligation of any source to obtain a permit or to meet BACT/LAER requirements, or to contradict other provisions of Division 26 of the Health and Safety Code or the ARB's Environmental Justice guidelines.

VI. CONCLUSION AND CONTACTS

California's experience under the NSR program adopted, implemented, and enforced by the air pollution control and air quality management districts demonstrates that existing sources of air pollution operate more cleanly over time by applying state-of-the-art emission controls whenever they are overhauled and upgraded. New sources, too, are required to be built to operate as cleanly as possible and to mitigate their excess emissions, allowing for both industrial growth and better air quality. The provisions in Senate Bill 288 further the State's commitment to maintain the proven effectiveness of the State's existing air pollution programs and to maintain the air quality gains that have been accomplished through years of steady effort and technological innovation.

We hope this guidance will help Districts, source operators, and the public understand the provisions of SB 288 from a practical standpoint. Our intent is to facilitate compliance with the letter and spirit of the Protect California Air Act, while recognizing the needed flexibility to allow District NSR programs to continue to be innovative, effective, and efficient. Please direct technical comments and questions about the guidance to Beverly Werner, Manager, Project Assessment Branch, Regulatory Assistance Section, (916) 322-3984, bwerner@arb.ca.gov and legal questions to Leslie M. Krinsk, Senior Staff Counsel, (805) 473-7325, lkrinsk@arb.ca.gov.