

**BAAQMD Updates to NSR and Title V Permitting Rules
Regulation 2, Rules 1, 2, 4 & 6**

**RESPONSES TO COMMENTS FROM EPA REGION IX STAFF ON
SECOND DRAFT OF PROPOSED AMENDMENTS**

October 11, 2012

Over the past year, Staff of the Bay Area Air Quality Management District have been developing amendments to the District's New Source Review (NSR) and Title V permitting programs. These Proposed Amendments will update the District's NSR and Title V programs to address recent regulatory developments. The Proposed Amendments will revise certain provisions in District Regulation 2, Rules 1, 2, 4, and 6 in which the NSR and Title V programs are set forth.

Staff of EPA Region IX have generously agreed to review drafts of the Proposed Amendments that Air District Staff have developed and to offer comments and suggestions on them. The District will eventually be submitting the Proposed Amendments (through the Air Resources Board) to EPA for approval, and EPA will be statutorily required at that time to review them for consistency with Clean Air Act (CAA) requirements in order to approve them as part of California's CAA State Implementation Plan (SIP). In advance of that formal review, EPA Region IX Staff have reviewed drafts of the Proposed Amendments to identify potential areas where the Proposed Amendments need to be revised to ensure that they meet all Clean Air Act requirements and to otherwise offer suggestions on improving them. District Staff greatly appreciate the time and effort that EPA Region IX Staff have put into doing so. District Staff have carefully reviewed EPA Region IX Staff's comments in developing the final version of the Proposed Amendments and have made a number of changes as a result of them. EPA Region IX Staff's comments identified several areas where the District's drafts needed to be revised to satisfy the CAA, and they resulted in a greatly improved proposal.

This document explains District Staff's evaluation of EPA Region IX Staff's comments on the Second Draft of the Proposed Amendments, which the District published on May 25, 2012. These comments were provided in a letter from Gerardo Rios dated July 26, 2012.¹ The comments received are summarized below, along with District Staff's responses to each one. Per the organization in the comment letter, the responses address (i) Regulation 2, Rule 1; (ii) Regulation 2, Rule 2; and (iii) the definitions used in the District's NSR rules.

I. REGULATION 2, RULE 1

Comment I.1.a.: EPA Region IX Staff commented that the District should provide an analysis of any new or revised exemptions in Regulation 2, Rule 1 that will be provided through the Proposed Amendments

¹ EPA Region IX Staff's comment letter is available on the District's website for this rule development project at www.baaqmd.gov/Divisions/Engineering/Proposed-Reg-2-Changes.aspx.

(and also any previous revisions that EPA has not yet approved into the SIP). EPA Region IX Staff requested this analysis in connection with Section 110(l) of the Clean Air Act, which provides that EPA may not approve a SIP revision “if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . or any other applicable requirement of [the Act].” EPA Region IX Staff stated that “[s]ince new exemptions typically mean fewer sources are subject to permit and emission control requirements, the analysis must show how exempting these new sources will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act (See section 110(l) of the Act).”

Response: Air District Staff have prepared a Section 110(l) analysis of all new and revised exemptions that have been added to Regulation 2, Rule 1 since the last SIP-approved version. District Staff published this analysis in connection with the final version of the Proposed Amendments on September 26, 2012. A copy of the analysis is enclosed with these Responses, and it is also available on the District’s website at

www.baaqmd.gov/~media/Files/Engineering/Proposed%20Reg%20%20Changes/Public%20Hearing/CAA%20Section%20110%20Analysis%20of%20Reg%20%20Rule%201%20Exemption%20Provisions.ashx?la=en.

As explained in that document, there is nothing in any of the new or modified exemptions in Regulation 2, Rule 1 that would prevent approval of the District’s NSR rule as set forth in the Proposed Amendments under CAA Section 110(l).

Comment I.1.b.: EPA Region IX Staff commented on the provision in Section 2-1-502 stating that the burden of proof for establishing that a source qualifies for an exemption from District permitting lies with the person asserting the exemption. EPA Region IX Staff noted that the provision states that such person must provide “substantial credible evidence” to support the applicability of the exemption, and suggested that the provision should be “clarified” to state that credible evidence means “various types of records, such as purchase or usage records, or other documentation.” EPA Region IX Staff also suggested alternatively that the District should add specific language that “records must be maintained to provide credible evidence of the applicability and compliance with a stated exemption.” EPA Region IX Staff stated that providing this additional language would help “ensure these exempted sources are aware of the need to maintain appropriate documentation that can serve as ‘substantial credible [sic] evidence’”

Response: District Staff disagree that there is any significant potential that the owner/operator of an exempt source could be unaware of the need to maintain appropriate documentation or other evidence to support its claim for an exemption based on the current language in Section 2-1-502. The current language clearly indicates that the source must be prepared at any time to provide such evidence upon request by the APCO. This language is sufficient to put the owner/operator of an exempt source on notice that it must be prepared to present its evidence upon request – and thus, that it must maintain such evidence so that it can do so when requested. Being prepared to present evidence supporting the claim for exemption necessarily means maintaining the evidence such that it is ready to present upon request. Similarly, there is no need to “clarify” what is meant by the concept of “credible evidence”, which is intended to be a broad term that encompasses any information or evidence that can support the applicability of the exemption. The current language expresses the concept with sufficient clarity to

convey to regulated entities what is required, and there is no need to define this term further. EPA has taken this same position in other contexts, such as with the agency's "Credible Evidence Rule" in which EPA concluded that it did not need to further define the term "credible evidence".² Moreover, even if the term "credible evidence" did need to be defined more specifically, using open-ended terms such as "other documentation" and "appropriate documentation" would be of little use in doing so. The fact that EPA Region IX Staff have recommended such open-ended terms implicitly recognizes the fact that it would be inappropriate to be overly prescriptive in specifying that kinds of evidence must be provided to support the applicability of an exemption. The more appropriate approach is simply to specify that evidence must be provided to establish the existence of the exemption, and then leave it to be demonstrated on a case-by-case basis in each individual situation where this provision may be implicated whether the source's evidence adequately supports the exemption or not. For all of these reasons, District Staff disagree that the language in Section 2-1-502 regarding providing credible evidence to support claims for exemptions needs to be revised.

Comment I.2.a.: EPA Region IX Staff commented on the District's "modification" test in Section 2-1-234, which establishes the applicability of NSR requirements for "modified" sources. District Staff have discussed this issue in a number of contexts in the past, including most importantly in Section IV.E.2.b. of the May 25 Background Discussion document (pp. 59-63), in which District Staff sought EPA's input on the issue. EPA Region IX Staff responded that EPA will no longer be able to approve the District's current SIP-approved "modification" test based on increases in a source's "potential to emit" (PTE) air pollutants. Although EPA has approved such applicability tests in the past, EPA Region IX Staff stated that EPA will now require to the District to ensure that there will be no case in which a change at a source that constitutes a "major modification" as defined under 40 C.F.R. Section 51.165 or 51.166 – which are based on increases in actual historical emissions and not PTE – could escape NSR permitting under the District's "modification" definition. EPA Region IX Staff further stated that the placeholder language that District Staff circulated in the Second Draft of the proposed amendments regarding this issue would be acceptable for meeting this requirement (subject to additional comments addressed below).

Response: District Staff understand EPA Region IX Staff's position on this issue and have accordingly included the placeholder language from the Second Draft in the final version of the proposed amendments. This language will establish a "federal backstop" provision in Section 2-1-234 so that in the unlikely event that a change at a source could constitute a "major modification" under 40 C.F.R. Section 51.165 or 51.166 but not be a modification under the District's current test, the change will be brought within the definition of "modification" and NSR permitting requirements will apply. District

² See 62 Fed. Reg. 8314, 8322 (Feb. 24, 1997). In adopting that rule, EPA made clear that it did not agree with comments similar to those of EPA Region IX Staff here stating that the rule is "deficient for not providing an express regulatory definition of the term 'credible evidence' ". EPA disagreed and concluded that it would not be appropriate to provide a specific regulatory definition if this term, noting that Congress itself found it appropriate to use the term "credible evidence" in the Clean Air Act without needing to provide a specific statutory definition. See also *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1202 (D.C. Cir. 1998) (dismissing challenges to the credible evidence rule on jurisdictional grounds, and noting that "Nothing in the rule itself defines or limits the possible kinds of evidence encompassed within the phrase 'credible evidence.' ").

Staff appreciate EPA Region IX's feedback on this issue and acknowledgement that this language will be approvable under Sections 51.165 and 51.166.

District Staff remain concerned, however, that EPA Region IX is requiring the Bay Area Air District to revise its PTE-based "modification" definition, but is not requiring other California air district that also define "modification" based on increases in PTE to revise their definitions. If EPA Region IX believes that the District should no longer be allowed to define "modification" as a change that results in an increase in PTE, then it should not allow the other California air districts that define "modification" as a change that results in an increase in PTE to continue to use such a definition either. District Staff will continue to work with EPA Region IX Staff to ensure consistency in NSR implementation across all California air districts.

Comment I.2.b.: As noted above, EPA Region IX Staff stated that the "federal backstop" language that the District circulated with the second draft of the Proposed Amendments will satisfy EPA's requirements under 40 C.F.R. Sections 51.165 and 51.166. This "federal backstop" provision incorporates by reference the federal "major modification" definitions in those C.F.R. provisions. EPA Region IX Staff stated that to ensure that it is clear that all applicable provisions of the federal test must be used in applying this definition – and in particular the "NSR Reform" applicability provisions in Sections 51.165(a)(2)(A) through (F) and 51.166(a)(7)(i) through (vi) – the District should include specific reference to these provisions in the language in Section 2-1-234.

Response: As EPA has made clear in other contexts, there is no requirement that California air districts must use the "NSR Reform" applicability provisions in 40 C.F.R. Sections 51.165(a)(2)(A) through (F) and 51.166(a)(7)(i) through (vi) for their NSR programs.³ EPA Region IX Staff's comment is therefore incorrect that the District's "modification" test must specify that these federal provisions have to be used. District Staff have concluded that these provisions are an appropriate policy choice for the "federal backstop" test, however, and therefore drafted the "federal backstop" provision to be implemented using the federal applicability requirements – including the NSR Reform elements. The use of the federal applicability requirements was inherent in the language used in the second draft, which incorporated by reference the federal "major modification" definition under 40 C.F.R. Sections 51.165 and 51.166. This federal definition is implemented using the federal applicability provisions referred to in EPA Region IX Staff's comment, and so defining the District's "federal backstop" test based on the federal definition incorporates by reference the federal applicability methodologies used to implement the federal definition. That said, District Staff agree that it would be a good idea to state explicitly how this incorporation-by-reference principle works in the language of the "federal backstop" provision to guide readers in their interpretation of the provision. To do so, the final version of the Proposed Amendments adds additional language that explicitly cites the applicability provisions in

³ EPA reached this conclusion with respect to the NSR program of the Sacramento Metropolitan Air Quality Management District (SMAQMD). As EPA stated after reviewing SMAQMD's NSR regulations for consistency with EPA's NSR Reform provisions, "it is acceptable for SMAQMD to not incorporate the NSR Reform provisions into their SIP approved NSR programs . . ." SMAQMD Technical Support Document, *infra* note 14, at p. 17. The same rationale underlying EPA's conclusions regarding SMAQMD's NSR programs also applies to the District's NSR programs. See also Staff Report for the Proposed Amendments, pp. 103-105, for further discussion.

Sections 51.165(a)(2) and 51.166(a)(7) that EPA Region IX Staff referenced in this comment. As such, the language in the Proposed Amendments includes the appropriate citations for the federal applicability provisions, as requested by EPA Region IX Staff. This additional language also states explicitly that all provisions of the federal regulations that are applicable to the “major modification” definition – including the federal definitions of terms used in the “major modification” provision and the monitoring, recordkeeping and reporting requirements for the NSR Reform applicability provisions – are to be followed in applying the “federal backstop” test. This language will make it clear to all readers how the incorporation-by-reference of the federal “major modification” test is to be applied.

Comment I.2.c.: EPA Region IX Staff noted that the “modification” definition in Section 2-1-234 in the second draft of the Proposed Amendments referred to increases in “daily or annual” emissions. EPA Region IX Staff stated that the District should explain how daily emissions increases would constitute a “major modification” under the “federal backstop” provision, which is based on increases in annual emissions.

Response: The language referencing “daily or annual” emissions increases relates to the District’s existing modification test, which is based on increases in PTE. This language reflects the fact that an increase in either daily PTE (i.e., the maximum amount the source can emit in a day) or annual PTE (i.e., the maximum amount the source can emit in a year) will constitute a “modification” under the District’s existing test. To avoid any potential for confusion with the “federal backstop” provision, in the final version of the Proposed Amendments the “daily or annual” language has been moved from the general introductory language in Section 2-1-234 that is applicable to both tests into the PTE-increase test in subsection 2-1-234.1.

Comment I.3.: EPA Region IX Staff commented on the provision in proposed Section 2-1-603 for allowing alternative PM measurement methodologies when Methods 201/201A are not appropriate. EPA Region IX Staff asked that the use of such alternative measurement methodologies should be made subject to approval by EPA, not just by the District.

Response: District Staff have no objection to providing EPA an opportunity to review and approve of alternative measurement methodologies for PM emissions. The final version of the proposed amendments has added the requirement to obtain EPA approval as well as District approval. To ensure that this requirement can be implemented smoothly, District Staff ask that EPA Region IX Staff identify the appropriate contact person(s) who will handle review and approval of alternative measurement methodologies.

II. REGULATION 2, RULE 2

Comment II.1.a.: EPA Region IX Staff made a comment regarding the provision in 40 C.F.R. Section 51.165(a)(3)(ii)(J) describing how the amount of offsets required for a source under CAA Section 173(a)(1)(A) must be determined. That provision states that the amount of offsets required must be based on the difference between source’s “allowable emissions” (i.e., its potential to emit) and its “actual emissions” baseline. EPA Region IX Staff suggested that the District’s NSR rule does not do that.

They stated that the District’s rule “allows a PTE to PTE test for determining the amount of offsets for a Fully Offset Source . . .,” referring to the fact that once a source has provided offsets for the full amount of its potential to emit (PTE), then it needs to provide additional offsets for future modifications only to the extent that such modifications will result in a further increase in the source’s PTE. EPA Region IX Staff stated that such a rule would be allowable in situations where offsets have been provided within the past 5 years (i.e., “within the contemporaneous period as defined by your rules”), but not for periods beyond 5 years after the offsets have been provided. The comment suggested that 40 C.F.R. Section 51.165(a)(3)(ii)(J) establishes a 5-year time limit for relying on such offsets, and that if a source is modified after 5 years it must provide offsets all over again for the full amount of its maximum potential emissions (above its actual emissions baseline level).

Response: The amount of offsets required under the District’s NSR rule is calculated based on the difference between the source’s “allowable emissions” (i.e., its potential to emit) and its “actual emissions” baseline, as required by CAA Section 173(a)(1)(A) and 40 C.F.R. Section 51.165(a)(3)(ii)(J). This requirement is in Sections 2-2-302 and 2-2-303, which require the entire amount of a facility’s “cumulative increase” to be offset. The facility’s “cumulative increase” is determined according to the provisions in Sections 2-2-606 through 2-2-608, and it is the difference between (i) the facility’s actual emissions baseline based on its past operations and (ii) its maximum potential future emissions. (The “cumulative increase” determination procedures are also described further in Section IV.B.3.g.iv. of the Staff Report, pp. 106-112, which describe in more detail how the calculations work.) Under those provisions, the first time a facility is modified under the offsets requirements and has to provide offsets for its emissions increase, the amount of offsets required is the difference between its actual emissions before the modification and its full maximum potential to emit after the modification. Thereafter, for any subsequent modifications, additional offsets are required for any further increases in the facility’s potential to emit resulting from the modification. This calculation mechanism ensures that offsets will be provided for the facility’s full “cumulative increase” – that is, the difference between the facility’s actual emissions baseline and its maximum potential to emit. Offsetting the facility’s full “cumulative increase” in this manner satisfies the requirements of CAA Section 173(a)(1)(A) and 40 C.F.R. Section 51.165(a)(3)(ii)(J).

Under this “cumulative increase” methodology, once the facility has already provided offsets for its full potential to emit, it needs to provide further offsets for additional modifications only to the extent that such modifications will further increase its potential to emit – i.e., only to the extent that there will be additional “cumulative increase” resulting from the modification. The first part of EPA Region IX Staff’s comment appears to object to this situation, stating that “the revised draft rule allows a PTE to PTE test” in certain situations.⁴ But this is not a “PTE to PTE test” as EPA Region IX Staff seem to interpret it. To

⁴ Although this comment relates to the procedures used “to determine the amount of offsets required” for new and modified sources and how they comply with the offset obligation requirements under 40 C.F.R. 51.165(a)(3)(ii)(J), the comment provided a regulatory citation to Section 2-2-606.2 in the Second Draft, which contained the calculation procedures for determining the amount of emissions reductions that can be credited when an existing source is shut down or otherwise curtails operations. That is a separate issue and is not the subject of 40 C.F.R. Section 51.165(a)(3)(ii)(J), although many of the same principles of ensuring “no net increase” in emissions overall and remaining consistent with “Reasonable Further Progress” toward attainment are

the contrary, as explained above and in the Staff Report, it is a “cumulative increase” test based on the difference between the facility’s actual emissions baseline and its maximum potential emissions – that is, an “actual-to-potential” test as required by the Clean Air Act. The fact that once offsets have been provided for the facility’s “cumulative increase”, additional offsets are required only for further increases in “cumulative increase” (i.e., further increases in PTE) simply recognizes that once an emissions increase is offset by emission reductions elsewhere, those same emissions do not need to be offset a second time by additional reductions. The requirement to offset the full “cumulative increase” satisfies CAA Section 173(a)(1)(A) and 40 C.F.R. Section 51.165(a)(3)(ii)(J), and once those offsets have been provided NSR is satisfied without having to offset the emissions again later on.

Requiring additional reductions to offset emissions that have already been offset would constitute “double-counting” of those emissions, and there is nothing in CAA Section 173(a)(1)(A) or in 40 C.F.R. Section 51.165(a)(3)(ii)(J) that requires such “double-counting”. Section 173(a)(1)(A) requires that offsets need to be provided such that “total allowable emissions” from the proposed source and all other sources in the region will be sufficiently less than emissions from existing sources so as to ensure that “Reasonable Further Progress” will be achieved. It does not require that once offsets have been provided for such emissions consistent with “Reasonable Further Progress”, additional offsets need to be provided again for the same emissions. Section 51.165(a)(3)(ii)(J) further fleshes out this “reasonable further progress” requirement by stating that the total tonnage of emissions “that must be offset in accordance with section 173 of the Act” is based on the difference between “allowable emissions” (PTE) and “actual emissions”. That is, Section 51.165(a)(3)(ii)(J) provides that when establishing the amount of offsets required for a source, it is the full amount of the source’s PTE (over its actual emissions baseline) that must be offset – and not any other measure of emissions such as projected actual emissions.⁵ Section 51.165(a)(3)(ii)(J) does not require (either expressly or impliedly) that the same emissions to be offset a second time in order to ensure that the Clean Air Act’s “Reasonable Further

implicated. The District’s rules for calculating the amount of emission reductions that can be credited from shutdowns of existing sources are consistent with all of these principles and satisfy all of the requirements of CAA Section 173 and 40 C.F.R. Section 51.165. (See generally discussion of offsets and emission reduction credits in Staff Report, Section IV.B.1.c.i.-ii. (pp. 60-67) and Section IV.B.3.g.iii. (pp. 105-106).)

⁵ The regulatory history of Section 51.165(a)(3)(ii)(J) provides further evidence of how this provision works. Subsection (a)(3)(ii)(J) was added to Section 51.165 as part of EPA’s “NSR Reform” regulations in 2002, in which EPA revised the way in which emissions increases are measured for purposes of determining whether NSR requirements are triggered. (See 67 Fed. Reg. 80,186, 80,196 (Dec. 31, 2002).) EPA wanted to make clear that the revised NSR Reform methodologies were to be used for NSR applicability purposes only, and that once NSR was triggered, the existing pre-NSR Reform calculation methodologies (e.g., measuring increases based on PTE instead of projected actual emissions) are still used for applying NSR requirements such as offsets. As EPA explained in the NSR Reform rulemaking, the NSR Reform changes are used for determining applicability, but once NSR is triggered, “any determination of the amount of emissions offset that must be obtained by a major modification subject to the nonattainment NSR requirements under § 51.165(a) should be based on calculations using the existing definitions of ‘actual emissions’ and ‘allowable emissions.’” (67 Fed. Reg. at 80,196; see also generally discussions in Sections II.A. and II.C.8.) Subsection (a)(3)(ii)(J) was added to clarify that the amount of offsets was to be based on the pre-existing actual-to-potential test, not on the actual-to-projected-actual methodology that was adopted for NSR applicability purposes in the NSR Reform rule. It was never intended to require “double-counting” of a facility’s emissions for offset purposes, and it should not be interpreted that way.

Progress” mandate is fully implemented. Thus, fundamentally, what these rules require is that the full amount of a source’s PTE must be offset, over its actual emissions baseline, such that Reasonable Further Progress will be ensured – and the District’s requirement that a facility offset its full “cumulative increase” does exactly that. What they do not require is “double counting” of emissions increase and the provision of additional offsets where a facility has already fully offset its full PTE.

Indeed, the second part of EPA Region IX Staff’s comment recognizes that this interpretation is the correct one. EPA Region IX Staff actually endorse the District’s “cumulative increase” approach as consistent with CAA Section 173(a)(1)(A) and 40 C.F.R. Section 51.165(a)(3)(ii)(J), describing it as “appropriate and reasonable”. District Staff agree with this part of the comment, and take it as evidence that EPA Region IX staff understand that it does not make any practical or policy sense – and is not required under the CAA’s NSR requirements – to require additional offsets a second time for emissions increase that have already been offset consistent with Reasonable Further Progress.

The one caveat is that EPA Region IX Staff would like the District to establish a 5-year limitation on the facility’s ability to rely on offsets that were previously provided. That is, EPA Region IX Staff would not engage in “double-counting” of emissions increases in the “cumulative increase” determination for the first 5 years after offsets are provided; in that situation, they would require additional offsets for future modifications only where the modification results in a further increase in PTE. Beyond 5 years, however, EPA Region IX Staff would throw out this methodology and require additional offsets even where there is no further increase in PTE. That is, after 5 years (the “contemporaneous” period defined in the District’s rule), EPA Region IX Staff would have the District require offsets again for the same emissions potential that the facility offset earlier. The amount of additional offsets that they would require would be the difference between the PTE and the facility’s actual emissions at the time of the modification, even if that PTE has already been offset.

District Staff disagree that starting to require double-counting of emissions increase for offset purposes after 5 years (or any other time limit) is appropriate or required under CAA Section 173 and 40 C.F.R. Section 51.165(a)(3)(ii)(J). Nowhere do either of those legal authorities mention anything about a 5-year cut-off, or any other time limit on how long offsets can be relied on before additional offsets need to be provided again for the same emissions. They establish a single methodology for determining the amount of offsets required, which does not require “double-counting” of emissions increases as explained above. They do not create a second methodology to be applied after 5 years have elapsed.

Furthermore, in addition to not being required legally, double-counting a facility’s emissions in this manner for offsets purposes would be highly problematic as a practical matter. An example helps illustrate this point. Take a “peaker” power plant that is used to address short-term “peaks” in electricity demand (e.g., on hot summer afternoons when air conditioning use is heavy). Such facilities are normally operated at less than their full annual maximum capacity. If such a peaker plant has maximum annual potential emissions of 100 tons per year of a non-attainment pollutant, it would be required to provide 100 tons per year (or more) of offsets when it is first permitted. But as a peaker plant, its actual emissions may only be 10 tons per year when it is built and operated. If the facility undertakes a modification to install new equipment that will not increase its overall capacity or its

maximum annual emissions of 100 tons per year, the Clean Air Act would not require any additional offsets to be provided. The facility's maximum 100-ton annual emissions have already been offset by emission reductions obtained from other sources, and so no additional reductions would be needed to ensure "no net increase" region-wide and "Reasonable Further Progress" towards attainment. This is how the District's current EPA-approved NSR rule would address this situation. It is also how EPA Region IX Staff would treat this situation under the interpretation expressed in their comment – for the first 5 years. After 5 years, however, EPA Region IX would require the facility to provide an additional 90 tpy of offsets (the difference between its 10 tpy actual emissions rate at the time the modification is made and its 100 tpy maximum potential emissions), even though the facility has already provided offsets for the entire 100 tons that it could possibly emit in one year. And if the facility made subsequent modifications in the future after further intervals of over 5 years, it would be required to provide an additional 90 tpy each time it did so. The facility could end up being required to provide offsets in an amount many times the maximum amount of emissions it could legally emit. This would not be an appropriate or reasonable outcome, and would not make for sound regulatory policy.

For all of these reasons, District Staff disagree that the District's rules requiring offsets for the full amount of a facility's "cumulative increase" are inconsistent with the Clean Air Act's offset and "reasonable further progress" requirements. The District's current rules work this way, as do the NSR rules of other California air districts, and EPA has never had a problem in approving any of these programs in the past. District Staff disagree with EPA Region IX Staff's comment that these rules must be changed to prevent facilities from continuing to rely on existing offsets that they have provided in the past after 5 years go by. There is nothing in CAA Section 173 or 40 C.F.R. Section 51.165(a)(3)(ii)(J) that requires "double-counting" of emissions increases for purposes of calculating offsets requirements, as EPA Region IX Staff seem to agree at least for an initial 5-year period; and there is nothing that purports to establish a different methodology requiring "double-counting" after 5 years have elapsed. Nothing in the plain language of these provisions requires such a rule, and to the extent that there is any ambiguity in that plain language, District Staff submit that EPA should not interpret them to require such a rule for all of the policy reasons outlined above.

Comment II.1.b: EPA Region IX Staff commented on language in the Second Draft of Section 2-2-606 regarding enforceable contractual provisions in a written agreement made for the benefit of the District. EPA Region IX Staff stated that the District should not include this language.

Response: District Staff had originally included the referenced language based upon an earlier request by EPA Region IX Staff. District Staff have no objection to removing it now, and it has been deleted in the final version of the Proposed Amendments.

Comment II.1.c: EPA Region IX Staff commented on the language in the District's provisions for the "surplus adjustment" (also referred to by District Staff as the "RACT adjustment") made in calculations for emission reductions to ensure that reductions are credited only to the extent that they are in excess of what is legally required. EPA Region IX Staff stated that the language about adjusting for "District rules and regulations" should be expanded to include "applicable federal and District rules and regulations".

Response: The final version of the Proposed Amendments includes this additional language in the three places where the surplus adjustment is addressed, in Sections 2-2-603.6, 2-2-605.2, and 2-2-606.2.2. Any emissions reductions need to be in excess of what is required by federal regulations in order to be credited.

Comment II.1.d.: EPA Region IX Staff also commented on the language in the District’s provision for making the surplus adjustment for purposes of determining whether a modification will be a “PSD Project” in proposed Section 2-2-603.6. EPA Region IX Staff inquired into the basis for this provision. They noted that 40 C.F.R. Section 51.166(b)(47)(ii)(c) states that the surplus adjustment does not need to take into account any MACT standards (unless the state has taken credit for them in an attainment demonstration or attainment plan). They stated that the District’s surplus adjustment should be consistent with this provision.

Response: The reason why the District’s NSR rule includes this provision for PSD Projects is that for all other situations the surplus adjustment is actually more stringent than what is required under the federal NSR regulations. That is, for purposes other than determining whether a modification is a “PSD project”, any emission reductions may need to be adjusted downwards to reflect additional emissions limitations beyond the minimum requirements of the federal program. For PSD purposes, however, the District does not make the surplus adjustment for any additional limitations beyond what is required under the federal program. The language referred to in EPA Region IX Staff’s comment in the second draft of the Proposed Amendments was somewhat confusing on this point, and EPA Region IX Staff are not the only ones who have been unclear on its purpose. To address any potential for confusion, the final version of the Proposed Amendments uses revised language that makes clear how the surplus adjustment works for PSD Projects. For determining whether a modification is a “PSD Project,” the surplus adjustment must be made so credit is not granted for reductions that were required anyway under regulatory requirements, but it does not include any further downward adjustment beyond what is required under the federal program as set forth in 40 C.F.R. Section 51.166(b)(47)(i)(b) and (b)(47)(ii)(b) & (c). This revision will ensure that the provision is clear and that it is fully consistent with EPA’s NSR program requirements.

Comment II.4.a.:⁶ EPA Region IX Staff commented on the language in Section 2-2-404 regarding the purpose of holding a public hearing on proposed NSR permits. EPA Region IX Staff commented that the language should recognize the fact that the District accepts written comment at a public hearing, not just verbal comment.

Response: The District accepts both written comment and verbal comment at public hearings. The language used in the Second Draft of the proposed amendments addressed this point in the provision specifying that if a public hearing is scheduled, the comment period for accepting written comments must be extended at least through the public hearing. District Staff have also added the language

⁶ The numbering in this comment letter skipped numbers II.2 and II.3. For clarity, this document uses the same numbering as the comment letter.

suggested by EPA recognizing that the purpose of the public hearing is to accept comments of all types, both verbal and written.

Comment II.4.b.: EPA Region IX Staff noted that under 40 C.F.R. Section 51.166(q)(2), permits implementing PSD requirements must be processed and a final determination made within one year of receipt of a complete application. EPA Region IX Staff commented that the time for final action in Section 2-2-404 should address this maximum time limitation. EPA Region IX Staff stated that the provisions for the timing of final decision on a permit implementing PSD requirements should specify that the final decision should be made within one year, unless a longer time period is necessary and consented to by the applicant.

Response: The final version of the proposed amendments specifies that for a PSD Project, the final decision must be made within 1 year of receipt of a complete application (unless a longer time period is necessary and is consented to by the applicant).

Comment II.4.c.: EPA Region IX Staff commented that under 40 C.F.R. Section 51.166(q)(2)(iv), notice of proposed permits implementing PSD requirements must be provided to Indian Governing Bodies whose lands may be affected. The comment noted that there are two such tribes within the jurisdiction of the Air District, Lytton Rancheria and Federated Indians of Graton Rancheria.

Response: The final version of the Proposed Amendments adds a provision that the notice of proposed issuance of a permit under Section 2-2-404 must also be sent to any Indian Governing Body whose lands may be affected. It also adds a definition of “Indian Governing Body” that mirrors the federal definition of that term in 40 C.F.R. Section 51.166.

Comment II.5.a.: EPA Region IX Staff commented that the District should explain the basis for the emission thresholds used in Section 2-2-404 below which NSR permits are exempt from the rule’s public notice and comment requirements. EPA Region IX Staff noted that permits involving *de minimis* emissions increases – i.e., increases that are not “significant” – can be exempted from NSR requirement under the principles set forth in *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). EPA Region IX Staff stated that the District should explain how the thresholds used for the District’s public notice and comment requirements are consistent with these principles. EPA Region IX Staff cited the NSR notice-and-comment requirements in 40 C.F.R. Section 51.161(a)-(d), which apply to all NSR permits, although they directed their comments at permits “minor new sources and minor modifications”, which District Staff understand to be sources and modifications with emissions below the “major source” and “major modification” applicability thresholds in 40 C.F.R. Sections 51.165 and 51.166.

Response: Proposed Section 2-2-404 requires public notice and comment for all permits subject to what EPA refers to as “major NSR” requirements (i.e., 40 C.F.R. Sections 51.165 and 51.166), and also for all other non-“major” permits that will involve a “significant” increase in emissions as defined in Section 2-2-227.2. Proposed Section 2-2-404 therefore requires public notice and comment for all NSR permits, except those that will involve only *de minimis* emissions increases as EPA has defined them under the *Alabama Power v. Costle* doctrine. The Proposed Amendments will therefore satisfy 40 C.F.R. Section 51.161.

District Staff explained the basis for establishing the notice-and-comment threshold in Section 2-2-404 using EPA's *de minimis* "significance" thresholds in Section IV.B.3.c. of the Staff Report (at pp. 87-88). As explained there, the NSR "significance" thresholds are the levels that EPA has established as being *de minimis* for NSR purposes under in *Alabama Power v. Costle*. EPA has determined that emissions increases below these thresholds are sufficiently inconsequential in terms of their impact on compliance with the NAAQS that it would not be worth subjecting them to NSR permitting requirements given the administrative burdens that would be involved. EPA set forth the basis for these *de minimis* significance levels in detail in the rulemaking it conducted in response to the remand from the D.C. Circuit in the *Alabama Power v. Costle*, explaining how these thresholds satisfy the *de minimis* principles articulated in that case.⁷ For the same reasons relied on by EPA, the Proposed Amendments use these levels as the *de minimis* thresholds below which District NSR permits will be exempt from the public notice and comment requirements.

Moreover, in addition relying on the *de minimis* analysis that EPA promulgated to apply generally in all areas of the country, District Staff also conducted a further analysis specific to the San Francisco Bay Area to determine the extent of the emissions increases that would be exempted using EPA's "significance" thresholds. As explained in the Staff Report, that analysis showed that the total combined emissions increases from all permits issued by the District each year with net emissions increases below these thresholds across the entire Bay Area – i.e., the cumulative emissions increase that would be exempted under the thresholds – would be only 0.02% to 0.34% of the region's total emissions inventory (depending on the pollutant involved and the year reviewed). This Bay Area-specific analysis further demonstrates that the additional burdens of providing public notice and an opportunity to comment for such permits would not be warranted, given the *de minimis* extent of the emissions increases involved. (Please see the Staff Report discussion for further details regarding these analyses.) This Bay Area-specific analysis further supports the conclusion that the District's exemption of such permits from the notice-and-comment requirements is consistent with the principles expressed in *Alabama Power v. Costle*.

Finally, it is also worth noting that EPA Region IX Staff have apparently accepted the use of these thresholds as satisfying the requirements of 40 C.F.R. Section 51.161 for NSR permits involving "major sources" and "major modifications".⁸ EPA has accepted the use of these thresholds under Section

⁷ See 45 Fed. Reg. 52,676 (Aug. 7, 1980), and in particular Section XI ("*De Minimis* Exemptions"). This rulemaking contemplated the levels at which emissions increases are *de minimis* in the context of exempting them from the air quality impacts analysis requirements of the PSD program. But the same rationales that EPA relied on there – that emissions increases below the NSR "significance" levels do not have any significant potential to cause or contribute to a NAAQS exceedance that the administrative burden of subjecting them to this requirement is not warranted in light of the NAAQS protection purposes of the NSR program – apply in the same way to other NSR requirements such as public notice and comment. If the emissions increase associated with a permit will have only a *de minimis* impact on compliance with the NAAQS, then the benefit from soliciting public input on the effects of such emissions is minimal and the additional burdens of the notice-and-comment process are not warranted.

⁸ 40 C.F.R. Section 51.161 establishes notice-and-comment requirements that apply generally to all NSR permits. These are the applicable notice-and-comment requirements for what EPA calls "minor new sources and minor modifications", and they are also the applicable notice-and-comment requirements for "major sources" and "major modifications" subject to the Non-Attainment NSR requirements in 40 C.F.R. Section 51.165. Since the

51.161 in the past for such permits in approving NSR permitting programs, and EPA Region IX Staff did not voice any objection to continuing to do so under the Proposed Amendments – their comment was directed specifically at non-“major” sources and modifications. If the use of these *de minimis* thresholds is acceptable for satisfying Section 51.161 for “major sources” and “major modifications”, then by the same token it should be acceptable to satisfy Section 51.161 for non-“major” sources and modifications as well.

Comment II.5.b.: EPA Region IX Staff commented that under 40 C.F.R. Section 51.160(f), the District’s NSR rules must discuss the air quality data and modeling that will be used to implement the District’s NSR permitting requirements. EPA Region IX Staff stated that “[t]here are several approaches the District can take to make this demonstration,” including (i) dispersion modeling for new and modified sources that will result in a “significant net increase in emissions” to demonstrate that the emissions increases involved will not cause or contribute to a NAAQS exceedance; and (ii) demonstrating that emissions increases from new and modified sources are accounted for in emissions growth projections demonstrating attainment of the NAAQS.

Response: Although this comment cites 40 C.F.R. Section 51.160(f), which specifies the air quality models that must be used in implementing NSR, District Staff understand that EPA Region IX Staff’s concern is how the District’s NSR program will comply with the provisions of 40 C.F.R. Sections 51.160(a)(2) and 51.160(b)(2), which state that the SIP must set forth legally enforceable procedures that enable the District (i) to determine whether construction or modification of a source will interfere with attainment or maintenance of the NAAQS (Section 51.160(a)(2)) and (ii) to prevent construction or modification of the source if it will interfere with attainment or maintenance (Section 51.160(b)(2)). District Staff understand this to be EPA Region IX Staff’s concern based on discussions with Region IX Staff and on the language in the comment regarding “NAAQS Compliance”, which is the subject of Sections 51.160(a)(2) and (b)(2), not Section 51.160(f).

District Staff explained in detail how the District’s NSR rule satisfies the requirements of 40 C.F.R. Sections 51.160(a)(2) and 51.160(b)(2) in Section IV.B.3.a. of the Staff Report (pp. 83-86). As explained there, the District’s NSR Rule contains both features that EPA Region IX Staff identified as “alternatives” for implementing the Section 51.160(a)(2)-(b)(2) requirements.

The primary means through which the District has always implemented the Section 51.160(a)(2)-(b)(2) requirements is by ensuring that all new and modified sources comply with the District’s comprehensive regulatory programs, which fully satisfy all Clean Air Act requirements to ensure that the Bay Area’s air will attain and maintain the NAAQS. The District (and its sister agencies) have made all necessary demonstrations required under the Clean Air Act that the Bay Area will attain and maintain the NAAQS through their regulatory approaches to control air pollution.⁹ And these attainment and maintenance

same regulatory requirement applies for both categories of NSR permits, the same *de minimis* thresholds should be appropriate for both categories of NSR permits.

⁹ As noted in the Staff Report discussion, for PM_{2.5} the District is in the process of satisfying its attainment and maintenance requirements by obtaining EPA review and approval of its “Clean Data Finding”, PM_{2.5} emissions inventory, and related documentation. District Staff anticipate that EPA will approve the District’s submission on

obligations have been satisfied even with the fact that there will be a certain amount of emissions growth from new and modified sources under the District's NSR program (both from permitted NSR sources and from exempt stationary sources). Compliance with the SIP – and all other elements of the District's comprehensive regulatory programs – is ensured through Section 2-1-304, which prohibits the District from issuing a permit for any source that does not comply. And compliance with these requirements will ensure that any emissions increases from new and modified sources will be consistent with achieving attainment and maintenance. In short, it is the District's SIP-approved regulatory program that ensures that all CAA attainment and maintenance requirements will be satisfied, and it is compliance with this SIP-approved regulatory program that ensures that new and modified sources will not “interfere with the attainment or maintenance of a national standard.”¹⁰

In addition, the Proposed Amendments also include modeling requirements that will require all new and modified sources that will result in a significant net increase of any pollutant for which a NAAQS has been established to demonstrate through modeling that such emissions will not cause or contribute to a NAAQS exceedance. This is essentially the same type of modeling demonstration required for PSD permitting under 40 C.F.R. Section 51.166, but it will apply to all sources (not just to “major sources” and “major modifications” as defined under that Section); and it will apply to all pollutants for which a NAAQS has been established, not just attainment/unclassified pollutants. This requirement will be an independent source-specific demonstration that new and modified sources will not interfere with attainment or maintenance, over and above the guarantees provided through compliance with the District's comprehensive regulatory program.

This modeling requirement, which is in proposed Section 2-2-308, will apply to all NSR permits with net emissions increases greater than the *de minimis* thresholds established by EPA under the *Alabama Power v. Costle* doctrine. As discussed in connection with Comment No. II.5.a. above, and also in detail in the Staff Report, these thresholds are the levels at which EPA has determined that the potential for causing or contributing to any NAAQS exceedance is not significant enough to warrant conducting a modeling analysis, given the administrative burdens involved in doing so. For the same reasons that EPA has concluded that emissions increases below these significance thresholds are *de minimis* under the principles expressed in *Alabama Power* and can appropriately be excluded from NSR modeling requirements, District Staff have similarly concluded that they can be excluded from the modeling requirement in Proposed Section 2-2-308. Furthermore, in addition this *de minimis* justification that EPA has adopted generally for all areas throughout the country, District Staff also conducted an analysis specific to the Bay Area to determine the extent of emissions from new and modified NSR sources that would be exempted from modeling under these thresholds. That analysis found that the total emissions increases from all permits involving net emissions increases below these thresholds that the District

this issue, which will complete the District's satisfaction of all applicable requirements regarding attainment and maintenance.

¹⁰ As EPA has observed, “[b]y definition, any fully approved SIP has independently assured RFP and attainment.” (Requirements for Implementation Plans; Air Quality New Source Review, Final Rule, 54 Fed. Reg. 27,286 (June 28, 1989).) New and modified sources that comply with the requirements of a fully approved SIP – as will be ensured by District regulations – will therefore by definition not interfere with RFP and attainment.

issues each year throughout the entire Bay Area would amount to only 0.02% to 0.34% of the regions total emissions inventory. This analysis further supports the conclusion that such emissions are truly *de minimis* under the principles expressed in *Alabama Power* and can appropriately be exempted from the modeling requirement and the administrative burdens that would be involved.

Comment II.6.: EPA Region IX Staff noted that the District’s provisions for making permit application information available for public review and inspection reference the fact that the District is subject to the California Public Records Act. The provision involved (section 2-2-405 in the Proposed Amendments, which is substantively the same as existing Section 2-2-406 in the District’s current EPA-approved regulations in the California State Implementation Plan) acknowledges that in making information available, the District is bound as a state agency to consider trade secret claims in accordance with the requirements of the California Government Code. EPA Region IX Staff commented that the District should either (i) provide “an analysis” comparing the provisions of the California Public Records Act and Section 114(c) of the Clean Air Act (which sets forth requirements for EPA’s handling of public records and trade secret information); or (ii) add language that the APCO should follow CAA Section 114(c) in evaluating claims of trade secret under Regulation 2, Rule 2.

Response: The Air District is a governmental agency of the State of California, and as a matter of law it is therefore subject to the requirements of the California Public Records Act as set forth in the California Government Code. The District cannot adopt regulations directing or authorizing the APCO (or District Staff acting on the APCO’s behalf) to act in any manner that is inconsistent with State Law. District Staff disagree that it would be appropriate to include a reference to considering the provisions applicable to EPA’s handling of public records under Section 114(c) of the Clean Air Act, because it could cause confusion among District Staff regarding whether they should follow California law or some other potentially inconsistent requirements. District Staff have always followed the requirements of California law in implementing the District’s permit programs – as they are legally bound to do – and it would not be appropriate to adopt language suggesting that they should do otherwise.

That said, District Staff do not envision any circumstance in which the provisions applicable to the APCO for addressing trade secret information under the California Public Records Act would differ in any way from the procedures that apply to the EPA Administrator under Section 114(c). Section 114(c) requires the EPA Administrator to consider trade secret claims in the same manner that the California Public Records Act requires the APCO to consider trade secret claims, and there is no reason to believe that any trade secrets would be handled any differently under the California Public Records Act than they would under the CAA provisions in Section 114(c). Moreover, there is no indication that any requirements of the California Public Records Act could be inconsistent in any way with implementing the Clean Air Act’s requirements for NSR programs. California has been successfully implementing NSR for many years under the Clean Air Act, and the California Public Records Act has never been an impediment to doing so. EPA has approved California air district NSR programs throughout the state for decades, and has never raised any concern that the California Public Records Act – which applies to all air districts in the state, not just the Bay Area District – could somehow create an inconsistency that would undermine the air districts’ ability to properly implement NSR. If EPA Region IX Staff now feel that they have concerns about potential inconsistencies between the Public Records Act and any federal

NSR requirements, District Staff would be happy to participate in a discussion of such concerns. The issue of potential conflicts between the California Public Records Act and the federal Clean Air Act would obviously be an issue of statewide importance, however. District Staff therefore suggest that any such discussion should be held at a statewide level, under the auspices of a state-wide entity such as CAPCOA or ARB. If EPA is going to take the position that the Public Records Act prevents California from implementing NSR programs under the Clean Air Act, that is an issue that will affect all of California's air districts – and one that will have to be addressed by the California Legislature, which is the only body with the power to amend that statute. District Staff suggest that EPA Region IX Staff should carefully consider the ramifications of taking such a position, and that such consideration would be aided by input from all of the agencies that would potentially be affected.

Comment II.7.: EPA Region IX Staff pointed out that the provisions in the second draft of the Proposed Amendments for addressing potential visibility impacts in Class I Areas for non-attainment pollutants in accordance with 40 C.F.R. Section 51.307(b)(2) applied to major modifications to existing major facilities only, but not to new major facilities.

Response: District Staff have corrected this oversight in the final version of the Proposed Amendments. Sections 2-2-307 (the Class I Areas impact analysis requirement), 2-2-401.4 (application requirements for projects subject to the Class I Area impact analysis requirement), and 2-2-402 (notice requirements for permit applications subject to the Class I Area impact analysis requirements) now reference both new major facilities for non-attainment pollutants as well as major modifications to existing major facilities for such pollutants.

Comment II.8.: EPA Region IX Staff commented on the provision in Section 2-2-407.2 in the Proposed Amendments that requires the District, before issuing a permit to operate for a source, to ensure that all emission reductions being relied on to satisfy offsets requirements for the source are actually being implemented. EPA Region IX Staff pointed out that for modified sources, such emission reductions must be in effect by the time the modified source begins operation, except for replacement sources for which the reductions must take effect by the end of a “shakedown” period not to exceed 180 days. EPA commented that the District should revise the provisions for modified sources other than replacement sources in subsection 407.2.2. in the Second Draft of the proposed amendments to address this requirement.

Response: District Staff have corrected this oversight in the final version of the Proposed Amendments. Subsection 407.2 now provides that for a modified source the reductions must be in effect by the time the modified source commences operation, with the exception of a “replacement unit” as defined in 40 C.F.R. Section 51.165(a)(1)(xxi), in which case the reduction must be in effect within 90 days after the source commences operation.

III. DEFINITIONS

Comment III.1.: EPA Region IX Staff noted that EPA's SIP approval regulations in 40 C.F.R. Sections 51.165(a)(1) and 51.166(b) require either: (i) that the District's NSR rule use EPA's definitions as set forth

in Sections 51.165(a)(1) and 51.166(b); or (ii) if the District's rule uses different definitions, that the applicable definitions under the District's rule are at least as stringent as EPA's definitions in all respects. In this regard, EPA Region IX Staff made two general comments regarding the District's definitions used for implementing the provisions of its NSR rule in the Proposed Amendments.

EPA Region IX Staff's first general comment concerned provisions where the District incorporates federal requirements by reference (e.g., federal PSD requirements). EPA Region IX Staff stated that in such situation, the District's rule must specifically define every term used in the federal requirement that is incorporated by reference. EPA Region IX Staff stated that the District cannot rely on the fact that, as a matter of law, the federal requirement being incorporated is interpreted according to the federal definitions that apply to it. EPA Region IX Staff stated that if the District's rule incorporates a federal requirement by reference, then it must also provide a specific definition for every term used in that federal requirement in the District's own rule (either directly or through further incorporation-by-reference of a federal definition).

EPA Region IX Staff's second general comment was that the District's NSR rule cannot rely on the commonly understood meaning of a term as defined in the dictionary (what the comment letter referred to as "the general dictionary definition"). EPA Region IX Staff stated that the District's NSR rule must include a specific regulatory definition for each term listed in 40 C.F.R. Sections 51.165(a)(1) and 51.166(b).

Based on these comments, EPA Region IX Staff stated generally that the District must provide a specific regulatory definition for each term listed in 40 C.F.R. Subpart I, unless the term is not used in the District's NSR rule. EPA Region IX Staff stated that such definitions must be provided either by including an explicit regulatory definition in the District's NSR rule, or by incorporating the federal C.F.R. definition by reference. EPA stated that such definitions must be provided for each of the specific terms identified in the subsequent Comments Nos. III.2 through III.14.

Response: District Staff have addressed each of the specific terms identified in Comments Nos. III.2 through III.14. The reasons why the District's NSR rule under the final version of the Proposed Amendments will satisfy all of EPA's requirements in 40 C.F.R. Sections 51.165 and 51.166 are explained below for each specific term. The Proposed Amendments will satisfy these requirements for the specific reasons explained there, notwithstanding anything in this general comment.

As a general matter, however, District Staff note that EPA Region IX Staff's interpretation of what is required of the District's regulatory definitions under the Clean Air Act and 40 C.F.R. Part 51, Subpart I is incorrect on these two preliminary observations.

First, with respect to incorporation-by-reference, EPA Region IX Staff's comment reflects a misunderstanding of how incorporation by reference works. Where a federal requirement is incorporated by reference, it is interpreted and implemented according to all associated federal regulatory provisions that apply to it, including definitions. This is inherent as a matter of law in the concept of incorporation by reference. If an agency references a requirement from some other body of regulation and specifies that it will implement that requirement as if it were the agency's own, then it

must implement that requirement according to all applicable provisions from the other body of regulation from which the requirement is drawn. This includes all of the definitions, applicability terms, and other related provisions set forth in the referenced regulations that direct how the incorporated requirement is to be implemented. With respect to the District's incorporation of federal definitions in particular, if the District references a federal definition set forth in the Code of Federal Regulations and specifies that the District will use that definition as its own, then that federal definition applies under the District's regulations. If that federal definition, in turn, specifies that that it is to be interpreted using terms that are themselves further defined in the Code of Federal Regulations, then those further sub-definitions similarly apply under the District's regulations through the incorporation-by-reference. This is how incorporation-by-reference works legally, and it is how courts routinely interpret definitions that are incorporated by reference from another body of regulation.¹¹ Indeed, this is precisely the function of using incorporation-by-reference as a tool in crafting regulatory language: It allows an agency to import provisions from another, related body of regulation without having to specify each and every detail from that other body of regulation in the agency's own regulations.

EPA has itself recognized how this principle works in approving other California air districts' NSR regulations that have used an incorporation-by-reference approach. For example, EPA has approved of the CAPCOA model of incorporation-by-reference of the federal PSD requirements that simply refers to the relevant provisions in 40 C.F.R. Section 52.21. The definitions in Section 52.21 that these rules incorporate by reference rely on a number of sub-definitions outside of Section 52.21, and EPA has never required that these associated sub-definitions have to be specifically incorporated by reference themselves. For example, Section 52.21(b)(49), the definition of "subject to regulation", relies for its interpretation on the federal definition of "greenhouse gas" in 40 C.F.R. § 86.1818-12(a).¹² EPA did not require these other air districts to adopt their own specific definitions of "greenhouse gas", because it recognized that the incorporation-by-reference of "subject to regulation" in Section 52.21(b)(49) brings

¹¹ For example, the federal Sentencing Guidelines have incorporated by reference the definition "aggravated felony" in the Immigration and Nationality Act (18 U.S.C. § 1101). The definition of "aggravated felony" in the Immigration and Nationality Act uses the term "crime of violence", which is in turn defined by further incorporation-by-reference to the federal penal code in 18 U.S.C. § 16. The Ninth Circuit has made clear that in such a situation, the incorporation in the Sentencing Guidelines by reference to the Immigration and Nationality Act definition also incorporates the sub-definition of "crime of violence" as further defined by reference to 18 U.S.C. § 16. See, e.g., *United States v. Gomez-Leon*, 545 F.3d 777, 789 and fn. 9 (9th Cir. 2008). The same principle applies when the District incorporates by reference a federal definition, which is defined in turn using further sub-definitions.

¹² 40 C.F.R. Section 52.21 also contains additional examples of federal requirements outside of Section 52.21 that are incorporated simply by reference to that Section, without needing to be specifically defined in an air district's NSR rule. For example, Section 52.21(b)(49)'s definition of "subject to regulation" relies for its interpretation on EPA's conversion values for global warming potentials in 40 C.F.R. Part 98, subpart A, Table A-1. Similarly, the definition of "baseline actual emissions" in Section 52.21(b)(48)(ii)(c) includes a provision establishing how the "surplus adjustment" must be applied that relies on provisions of 40 C.F.R. Part 63. When an air district incorporates the definitions in Section 52.21 by reference, all of these other federal provisions that apply for implementing these federal definitions are similarly incorporated by reference – even if they are not explicitly spelled out in the district's rule. EPA's approval of other air districts' use of this approach illustrates the principle of how incorporation-by-reference works.

the sub-definition of “greenhouse gas” along with it – and that “subject to regulation” will be defined using the sub-definition in 40 C.F.R. § 86.1818-12(a) without the need for the district to adopt (or incorporate by reference) its own specific definition of “greenhouse gas”. EPA’s own treatment of this issue with respect to other California air districts belies the assertion in this comment that the District needs to provide further sub-definitions for terms that are used in federal definitions that it is incorporating by reference.

Second, the comment is also incorrect that the District cannot rely on the generally accepted dictionary definition of a term in implementing its regulations where no specific regulatory definition is provided for that term. All regulations – including those of EPA itself – necessarily rely on many terms that do not have explicit definitions set forth in specific regulatory provisions. As a matter of law, in these cases where there is no specific statutory or regulatory definition provided for a term, the term is defined according to its generally accepted meaning as described in the dictionary.¹³ As long as the generally accepted dictionary definition is sufficiently clear and sufficiently stringent, it is completely appropriate to rely on such a definition and there is no need to define it further in an explicit regulatory provision. EPA has recognized this situation in many similar contexts. When the agency adopted its “credible evidence” rule, for example, it found that the generally accepted dictionary definition of the term “credible evidence” was sufficient, without a specific regulatory definition. The agency disagreed with commenters who argued that the term needed to be defined in the rule, explaining that the rule is not “deficient for not providing an express regulatory definition of the term ‘credible evidence’—a term which Congress itself inserted, without definition, into the Act.” (See 62 Fed. Reg. 8314, 8322 (Feb. 24, 1997)). Similarly, EPA recently approved the Non-Attainment NSR rule (Rule 214) of the Sacramento Metropolitan Air Quality Management District (SMAQMD), which relies on what EPA called the “common usage definition” of the term “construction”, instead of specifying an explicit regulatory definition. EPA noted that 40 C.F.R. Section 51.165(a)(1) lists a definition for “construction” and that SMAQMD’s rule does not contain one, but it concluded that “EPA believes the common usage definition of this term is adequate for the purposes of determining the requirements of Rule 214.”¹⁴ EPA’s recent approval of SMAQMD’s use of “common usage definitions” for terms defined in 40 C.F.R. Section

¹³ See, e.g., *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 31 (1979) (“[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”); *Secretary of Labor v. Doyle*, 675 F.3d 187, 204 (3d Cir. 2012) (“[I]n the absence of specific statutory or regulatory guidance, [a term] should be given its ordinary meaning . . .” (citation omitted)); *In re Luna*, 406 F.3d 1199 (10th Cir. 2005) (considering dictionary definition of undefined term); *Hull v. United States*, 146 F.3d 235, 238 (4th Cir. 1998) (interpreting a term “as that term is readily understood” under its dictionary definition “in the absence of a statutory or regulatory definition”); *Martin v. Commercial Sec. Co.*, 539 F.2d 521, 524 (5th Cir. 1976) (a word “should be accorded its ordinary meaning absent a specific technical meaning or legislative definition . . .”) (citation omitted).

¹⁴ See Technical Support Document for EPA’s Notice of Proposed Rulemaking for the California State Implementation Plan for the Sacramento Metropolitan Air Quality Management District, Rule 214 - Federal New Source Review, Rule 203 - Prevention of Significant Deterioration (May 5, 2011), at p. 6. EPA partially approved Rule 214 and partially disapproved it; the treatment of the term “construction” as referenced above was not part of the partial disapproval. See Revisions to the California State Implementation Plan, Sacramento Metropolitan Air Quality Management District, Final Rule, 76 Fed. Reg. 43,183 (July 20, 2011).

51.165(a)(1) belies Region IX staff's suggestion that doing so is somehow inappropriate under EPA's NSR approval regulations.

Notwithstanding these points, the District has addressed each of EPA Region IX Staff's comments on specific terms, as outlined below.

Comment III.2.: EPA Region IX Staff commented that the District's NSR rule must include a specific definition of the term "commence" that is equivalent to the definitions set forth in 40 C.F.R. Section 51.165(a)(1)(xvi) and 40 C.F.R. Section 51.166(b)(9) (and in Section 169(2)(A) of the Clean Air Act). EPA Region IX Staff noted that these provisions state that, as applied to construction of a major source or major modification, "commence" means either commencing actual construction or obtaining all federal air permits and entering into contracts for the construction. EPA Region IX Staff stated that Section 165 of the Clean Air Act requires subject facilities to obtain a PSD permit before engaging in either of these activities (i.e., before beginning actual construct and before getting permits and entering into contracts for construction). EPA Region IX further stated that Section 173(a) of the Clean Air Act requires subject facilities to provide sufficient offsets before engaging in either of these activities (i.e., before beginning actual construct and before getting permits and entering into contracts for construction). EPA Region IX Staff stated that the District's NSR rule must include a specific definition of "commence" (i) to establish when a facility can commence construction and (ii) to ensure that offsets are provided before a facility commences construction (i.e., before getting permits and entering into contracts for construction and before beginning actual construction).

Response: The District's NSR rule under the Proposed Amendments does not use the term "commence", either in relation to construction of new major facilities and major modifications to major facilities or in any other context. As EPA Region IX Staff noted in Comment III.1., 40 C.F.R. Sections 51.165(a)(1) and 51.166(b) do not require a term to be defined if "the term is not used in the rule". The issue is thus moot with respect to this term. How one defines this term will not make any difference to how the District implements its NSR program, as the NSR rules do not use the term at all. Providing a definition for this term in the District's NSR rule would simply take up space without serving any purpose.

Furthermore, even though the issue is moot, it is worth noting that this comment is apparently based on a misunderstanding of how the Clean Air Act works with regard to when a facility may commence construction and operation. The comment appears to be based on a belief that subject facilities must obtain their PSD permit under CAA Section 165, and must provide offsets under Section 173(a), before they can even enter into contracts to build a new or modified source. This is not the case.

The "commence" definition serves a specific and limited purpose under the NSR program. It is explicitly defined in the Statute to refer only to "commence" in the context of construction (not operation) for purposes of PSD requirements under Part C of Title I. (See CAA § 169(2)(A).) It serves to create a "grandfathering" exemption from PSD permitting requirements for projects that had were permitted and under contract as of August 7, 1977 (the effective date of the statutory PSD permit requirement in Section 165, which was added in the CAA Amendments of 1977), but had not actually begun

construction by then. This grandfathering provision is specified in the first clause in the PSD requirement in Section 165(a), which establishes that the PSD requirements apply to major facilities “on which construction is commenced after August 7, 1977.” For facilities that “commenced” construction before that date – i.e., facilities that either actually began construction or had all of their federal permits and had entered into contracts for the construction work – the PSD requirement in Section 165 did not apply. For any facilities that did not “commence” construction before that date, the PSD requirement applies and a PSD permit must be obtained before the facility “may be constructed”.

EPA Region IX Staff appear to have misinterpreted these provisions to mean that PSD permits must be obtained under Section 165 and offsets must be provided per Section 173(a)(1) before a facility can “commence” construction under this definition – that is, before it can even enter into binding contracts for the construction work. This is not correct.

With respect to offsets, the Clean Air Act is clear that offsets must be obtained “by the time the source is to commence operation.” (CAA § 173(a)(1)(A).) This requirement does not implicate the “commence” definition in Section 169(2)(A) for two reasons. First, under the plain language of Section 169, the definitions in that section apply only for purposes of Part C of Title I – the PSD requirements – and not for the offsets requirements, which are part of the Non-Attainment NSR requirements in Part D of Title I. And second, even if the Section 169 definitions did apply to Part D requirements, the definition of “commence” in Section 169(2)(A) is explicitly limited to the context of “construction” of a major facility, not to “operation” of such facility. This definition by its own terms does not apply to any requirements for “operation” of a major facility, such as the offsets requirements in Section 173(a)(1). There is nothing in the Clean Air Act or in EPA’s NSR regulations that requires offsets to be provided before construction can “commence” under this definition. Indeed, EPA Region IX Staff’s comments actually recognize this point in Comment No. II.8, in which EPA Region IX Staff correctly state that “offsets must be required prior to commencing operation.”¹⁵

With respect to obtaining a PSD permit, the Clean Air Act is clear that the PSD permit must be obtained before a facility “may be constructed”. (CAA § 165(a).) This requirement refers to actual construction. There is no requirement to obtain a permit before “construction is commenced” – i.e., before permits are obtained and contracts are entered into as contemplated by the definition in Section 169(2)(A). As noted above, the language about facilities on which “construction is commenced” was used to create a grandfathering exemption for facilities that were permitted and under contract before August 7, 1977, but had not yet begun actual construction by that date. That is why Section 165(a) states that “[n]o major emitting facility on which construction is commenced after August 7, 1977, may be constructed . . .” without a PSD permit. The “on which construction is commenced” clause creates the grandfathering exemption by establishing that facilities that had permits and contracts before that date were not subject to the requirements. For facilities that are not subject to that grandfathering provision, the “may be constructed” language establishes the type of activity that is prohibited unless a PSD permit is obtained. The activity that requires the permit is simply “construction”, not “commencement” of construction as defined in Section 169(2)(A).

¹⁵ Comment Letter at p. 9 (emphasis added).

The language at issue in Section 165(a) could certainly be stated more clearly, and this may be the source of EPA Region IX Staff's confusion. But EPA has unambiguously endorsed this reading of how PSD permitting works – that a PSD permit is not required until construction is actually begun, not at the time that permits are obtained and contracts are entered into under the definition of “commence” in Section 169(2)(A) – in its NSR implementation regulations. EPA's regulations clearly establish that a state's NSR program must require that “[n]o new major stationary source of major modification to which the [PSD requirements] apply shall begin actual construction without a permit . . .” (40 C.F.R. § 51.166(a)(7)(iii) (emphasis added); *see also* 40 C.F.R. § 52.21(a)(2)(iii) (same provision for EPA's federal PSD program).) These provisions demonstrate as a matter of law the error in EPA Region IX Staff's assertion that facilities must obtain a PSD permit before entering into contracts under the definition of “commence” in Section 169(2)(A).

The District's NSR rule under the Proposed Amendments will satisfy both of the NSR requirements referenced in EPA Region IX Staff's comment. It will require facilities subject to offsets requirements to ensure that the required emission reductions are in place “by the time the source is to commence operation,” as required by CAA Section 173(a)(1)(A); and it will require facilities subject to the PSD requirements to obtain a permit before they “may be constructed”, as required by CAA Section 165(a). The rule does not need to utilize the term “commence” as set forth in the definitions in 40 C.F.R. Sections 51.165(a)(1) and 51.166(b) in order to do so.

Comment III.3.: EPA Region IX Staff commented that under 40 C.F.R. Sections 51.165(a)(1) and 51.166(b), the District's NSR rule must include a specific definition of the term “begin actual construction”. EPA Region IX Staff explained that “ ‘begin actual construction’ is generally the initiation of physical on-site construction activities.” EPA Region IX Staff explained that it is necessary to define the beginning of actual construction in order to differentiate actual construction from the term “commence construction”, which as discussed above includes simply obtaining permits and entering into contracts for construction, even where actual construction is not begun.

Response: The District's NSR rule does not use the term “begin actual construction”. As EPA Region IX Staff noted in Comment III.1., 40 C.F.R. Sections 51.165(a)(1) and 51.166(b) do not require a term to be defined if “the term is not used in the rule”. The issue is moot with respect to this term. How one defines this term will not make any difference to how the District implements its NSR program, as the NSR rules do not use the term at all. Providing a definition for this term in the District's NSR rule would simply take up space without serving any purpose.

Moreover, the District's NSR rule has no need to differentiate between (i) commencing “actual” construction and (ii) commencing construction in the sense of obtaining permits and entering into contracts, which is the terminology used in connection with the PSD grandfathering provisions discussed above. EPA's definitions need to differentiate between these two because “commencing” construction under the provisions of CAA Sections 165 and 169(2)(A) does not mean commencing actual construction. As the comment notes, EPA needs to use two different terms to differentiate between these two different concepts. The District's NSR rule does not use the term “commence” in connection with construction in the way that the federal CAA does under Sections 165 and 169(2)(A), and so the

District's rule does not need to have a specific definition for "begin actual construction". The District's NSR rule satisfies all of EPA's NSR requirements as set forth in the Proposed Amendments, and there is no need to add a definition of this term to ensure that it will be adequately implemented.

Comment III.4.: EPA Region IX Staff commented that the District's NSR rule must include a specific definition of the terms "baseline concentration", "major source baseline date", and "baseline area".

Response: These three terms are important terms used in implementing the PSD source impact analysis requirements in accordance with 40 C.F.R. Section 51.166(k) (for state programs) and 40 C.F.R. Section 52.21(k) (for the federal program). Under the proposed amendments, the District's rule will incorporate this requirement by reference in Section 2-2-305. This incorporation by reference in Section 2-1-305 explicitly incorporates all of the federal requirements for such analyses that apply under Section 52.21(k), which includes the use of the baseline concepts referenced in this comment as defined in the federal regulations. In addition, Section 2-2-103 also provides further authority that these definitions must be used, stating that where federal PSD requirements such as this are incorporated by reference, all applicable federal definitions must be used. This Section 2-2-103 incorporation-by-reference provision explicitly includes (without limitation) the federal definitions of "baseline concentration", "major source baseline date", and "baseline area". EPA Region IX Staff agreed in Comment No. III.1. that it is appropriate to address such definitions through incorporation-by-reference.

Comment III.5.: EPA Region IX Staff commented that the District's NSR rule must include a specific definition of the term "subject to regulation".

Response: This term is used in EPA's federal PSD regulations. It is not used in the District's NSR rule directly, and as EPA Region IX Staff noted in Comment III.1., 40 C.F.R. Sections 51.165(a)(1) and 51.166(b) do not require a term to be defined if "the term is not used in the rule". The issue is therefore moot with respect to this term. The term will be of course be important in terms of implementation of the federal PSD provisions that the District will be incorporating by reference, and where it is used in those federal PSD provisions it will be defined according to the C.F.R. definition that applies to those provisions. This incorporation by reference is set forth in the specific PSD provisions in Sections 2-2-304 through 2-2-307, which specify that these PSD requirements will be subject to all applicable federal PSD requirements that apply under the federal program (which includes the federal definitions); and it is also specified in the PSD incorporation-by-reference provision in Section 2-2-103, which specifies that for the PSD requirements all federal requirements including the federal definitions are incorporated by reference. This Section 2-2-103 incorporation-by-reference provision explicitly includes (without limitation) the federal definition of "subject to regulation".

Comment III.6: EPA Region IX Staff commented that the District must include a definition for "replacement unit" that is equivalent to EPA's federal definition in 40 C.F.R. Sections 51.165(a)(1)(xxi) and 51.166(b)(32). EPA Region IX Staff suggested that this term is implicated in Section 2-1-232, which establishes that certain sources need to be permitted as new sources – i.e., as if they had never been in existence before and are being permitted for the first time under current regulatory standards.

Response: EPA's NSR regulations do not include a generic definition for the term "replacement". What they do include is a definition for the specific term "replacement unit", in 40 C.F.R. Sections 51.165(a)(1)(xxi) and 51.166(b)(32). The District's NSR rule under the Proposed Amendments adequately addresses this term.

As EPA recently noted in approving SMAQMD's NSR rule, the term "replacement unit" is only used "to allow special treatment of such sources when determining whether a proposed project will result in a major modification." EPA approved SMAQMD's rule, even though it did not include a specific definition of "replacement unit", because the rule uses a definition of "Federal Major Modification" that incorporates by reference the federal "major modification" test and all of the federal definitions used in that test, including the "replacement unit" definition.¹⁶ The District's NSR rule under the Proposed Amendments incorporates the federal "major modification" test, and so it will satisfy EPA's NSR requirements in the same way. The proposed amendments add Section 2-1-234.2, the "federal backstop" test for determining whether a change is a modification. This "federal backstop" provision will ensure that any change that is a "major modification" under EPA's federal test will also be treated as a modification and subject to NSR requirements under the District's rule. This "federal backstop" provision explicitly incorporates by reference all of the federal definitions in 40 C.F.R. Sections 51.165(a)(1) and 51.166(b), including the definition of "replacement unit". As with EPA's treatment of SMAQMD's rule, incorporation by reference will satisfy those sections' requirements with respect to this definition.

In addition, the District is also incorporating the federal definition of "replacement unit" in its provisions for determining when emissions reductions must be in effect for a source subject to offsets requirements under Section 2-2-302 and 2-2-303. Federal NSR requirements mandate that offsetting emission reductions must be in effect by the time a source commences operation. For sources that are "replacement units" and require a "shakedown" period when they begin operations, however, the source is deemed not to begin operations until the end of the "shakedown" period, a period not to exceed 180 days. The District's NSR rule under the Proposed Amendments will allow up to 90 days for "replacement units" to allow for this shakedown period. This 90-day period is provided for "replacement units" under Sections 2-2-206 and 2-2-407.2, and in both places the federal definition in 40 C.F.R. Section 165(a)(1)(xxi) is incorporated by reference.

Finally, with respect to Section 2-1-232, this provision does not use the term "replacement unit". As such, 40 C.F.R. Sections 51.165(a)(1)(xxi) and 51.166(b)(32) do not apply. Section 2-1-232 concerns certain situations where the District requires changes involving existing sources to be permitted as if they were entirely new sources. There is nothing in the District's treatment of such sources that is inconsistent with EPA's NSR requirements in any way, and there is no requirement that the District must use EPA's specific term "replacement unit" in its treatment of such sources. There is no reason why Section 2-1-232 is not approvable under EPA's NSR regulations.

¹⁶ See EPA Technical Support Document, *supra* note 14, at p. 7.

Comment III.7.: In Comment No. 4.c. above, EPA Region IX Staff noted that the District’s provisions for public notice and comment for permits implementing PSD provisions should ensure that notice is provided to Indian Governing Bodies whose lands may be affected. EPA Region IX Staff commented that in providing for such notice, the District should include a definition of “Indian Governing Body” that is consistent with EPA’s definition in 40 C.F.R. Sections 51.165(a)(1) and 51.166(b)(9).

Response: The final version of the Proposed Amendments adds a definition of “Indian Governing Body”, which mirrors EPA’s definition in 40 C.F.R. Section 51.166(b)(9), in Section 2-2-216. This definition will ensure that the notice provision is implemented consistent with EPA’s PSD requirements.¹⁷

Comment III.8.: EPA Region IX Staff commented on the definition of “contemporaneous” in proposed Section 2-2-206. This definition establishes that an event is “contemporaneous” with an application for a permit to construct or operate a source if the event occurs (i) within 5 years before a permit application, or (ii) on or after the date of the permit application, but prior to initial operation of the source. EPA stated that the District should insert the word “and”, so that the language would also cover events that occur within 5 years before the date of the permit application and on or after the date of the permit application but prior to initial operation. EPA Region IX Staff’s comment stated that unless the District makes this change, the District’s definition will not be “consistent with the federal definition in 40 C.F.R. 51.165(a)(1) and 51.166(b)(9).”

Response: It is physically impossible for an event to occur both before the date of a permit application and on or after the date of a permit application. If an event occurs on or after a date certain, by definition it cannot also occur before that date.

Moreover, there is nothing in 40 C.F.R. Sections 51.165(a)(1) and 51.166(b)(9) that requires the District to specify that an event is contemporaneous if it occurs before “and/or” after the date of the application. EPA Region IX Staff’s comments did not identify anything in those provisions that would require such language, and District Staff did not find any upon their own review. Simply specifying that the event occurs before “or” after the date of application (and meets the other time limitations set forth in the definition) satisfies all requirements in 40 C.F.R. Sections 51.165 and 51.166.

Comment III.9.: EPA Region IX Staff commented on the language in the District’s definition of “potential to emit” in Section 2-1-217 stating that a limitation on a source’s emissions will be counted for purposes of establishing a source’s potential to emit if it is “enforceable by the District or EPA.” EPA Region IX Staff stated that a limit that is “enforceable by the District alone is not sufficient.” EPA Region IX Staff stated that the District should revise this definition to require that a limitation can be counted only if it is “enforceable by both the District and EPA” (among several other alternative suggestions).

¹⁷ Note also that EPA Region IX Staff’s citation to a definition in 40 C.F.R. Section 51.165(a)(1) for Non-Attainment NSR requirements is incorrect. EPA’s notice requirements for Indian Governing Bodies applies only for the PSD provisions, and not for notice for NSR permits for other purposes pursuant to 40 C.F.R. Section 51.161. There is no definition of “Indian Governing Body” in Section 51.165(a)(1), nor any other reference to this term in Section 51.165.

Response: EPA Region IX Staff are incorrect in their understanding that a limitation on a source's emissions must be enforceable by EPA in order to be credited for purposes of establishing a source's potential to emit under the Clean Air Act. This principle has been clearly established by the United States Court of Appeals for the District of Columbia Circuit in *National Mining Ass'n v. EPA*, 59 F.3d 1351 (D.C. Cir. 1995). The D.C. Circuit held in that case that EPA must allow conditions that are enforceable by the permitting agency under State law, but that are not part of the SIP and thus not enforceable by EPA in federal court, to be used in establishing a source's potential to emit. (*See id.* at 1361-65.) Indeed, EPA Region IX Staff's comment implicitly acknowledges this point, as it notes that a limitation does not necessarily need to be "federally enforceable" as long as it is "legally and practically enforceable" – i.e., enforceable by the District. This is precisely the language that EPA now uses in the wake of the National Mining case to recognize that an enforceable limitation on a source's emissions can be credited even if it is not enforceable by EPA.¹⁸

Of course, it has always been the District's intent that if a limitation is enforceable by both the District and EPA – the situation contemplated by the language EPA Region IX Staff suggested – then the limitation is enforceable for purposes of establishing the source's potential to emit. District Staff intended the language about enforceability by "the District or EPA" to cover this scenario. To avoid any potential for any confusion on this point, the final version of the Proposed Amendments clarifies that a limitation can be counted if it is enforceable "by the District or EPA (or both)." This revision will ensure that in the situation addressed by EPA Region IX Staff's proposed language, where a limitation "is enforceable by the District and EPA", is covered by the District's definition. This revision will address EPA Region IX Staff's comment, notwithstanding the misunderstanding surrounding the legal requirements for enforceability of emissions limitations used in establishing a source's potential to emit in the wake of the National Mining case.

Comment III.10.: EPA Region IX Staff commented that the District must include a definition for the term "secondary emissions". EPA Region IX Staff noted that EPA's PSD regulations in 40 C.F.R. Section 51.166(b)(18) provides a definition for this term.

Response: The final version of the Proposed Amendments does not use the term "secondary emissions", and so it does not provide a definition for this term. As EPA Region IX Staff noted generally in Comment III.1, the District's NSR rule does not need to include a definitions listed in in Section 51.166(b) where "the term is not used in the rule" (among other reasons).

This point notwithstanding, it is worth noting the purpose of this definition in EPA's PSD regulations in 40 C.F.R. Section 51.166(b)(18) and pointing out that the District's PSD provisions fully satisfy it without the need for an explicit definition of this term. The reason why EPA's PSD regulations provide a definition for this term is because the PSD Source Impact Analysis required under 40 C.F.R. Sections 51.166(k) and 52.21(k) must evaluate the source's emissions as well as any "secondary emissions". That is the only element of NSR permitting that addresses secondary emissions. The Proposed Amendments will address the Source Impact Analysis requirement by incorporating EPA's requirements under 40

¹⁸ See EPA Interim Policy on Federal Enforceability Requirement for Limitations on Potential to Emit (Jan. 1996).

C.F.R. Section 52.21(k) by reference, and in doing so incorporate all of the federal requirements applicable to such analyses including the requirement to evaluate secondary emissions. As explained above, this incorporation by reference incorporates all of the applicable federal regulatory provisions associated with the source impact analysis requirement, including the definitions. This is implicit as a matter of law, and it is further clear from the text in proposed Section 2-2-305, which states explicitly that the analysis “shall be prepared according to and shall satisfy all of the requirements applicable to PSD source impact analyses for federal PSD permitting under 40 C.F.R. Section 52.21(k),” which includes consideration of “secondary emissions” as noted above. Furthermore, to the extent that there could be any ambiguity on this point notwithstanding this explicit language, the final version of the Proposed Amendments also adds a further provision in Section 2-2-103 regarding incorporation by reference, which states that where federal PSD requirements are incorporated by reference, all associated procedures, definitions and other regulatory provisions in the Code of Federal Regulations shall be followed and applied, which includes the requirement to consider secondary emissions. This provision in Section 2-1-103 also states explicitly that all federal definitions apply, and it specifically references the federal definition of “secondary emissions” in 40 C.F.R. Section 52.21(b)(18) in this regard (which is identical to the definition in Section 51.166(b)(18) cited in the comment). Thus, there can be no dispute that the District’s PSD provisions explicitly require secondary emissions to be included in the PSD Source Impact Analysis, and that the federal definition of “secondary emissions” applies for this purpose. The District’s NSR rule fully satisfies all federal requirements for SIP approval with regard to secondary emissions, how they are addressed under the PSD requirements, and how they are defined.

Comment III.11.: EPA Region IX Staff commented that the District should include a definition of the term “portable”. EPA Region IX Staff stated that a specific regulatory definition should be provided in the rule “to provide clarity and enforceability”.

Response: EPA’s regulations do not require that the District’s NSR rule must contain a specific regulatory definition for the term “portable”. Specifically, there is nothing in any of the definitional provisions in 40 C.F.R. Sections 51.165(a)(1) or 51.166(b) setting forth a definition of this term or requiring that a state’s NSR program contain one. To the contrary, EPA’s NSR regulations allow states to rely on the dictionary definition for this word, which is what the District’s NSR rule will do under the proposed amendments. Indeed, EPA’s own regulations rely on the dictionary definition without needing to provide a specific regulatory definition. (See, e.g., 40 C.F.R. §§ 51.166(i)(1)(iii), 52.21(i)(1)(viii).) EPA’s treatment of this term under the agency’s own NSR regulations demonstrates that use of the dictionary definition provides sufficient clarity and enforceability. For all of these reasons, the District does not need to include a specific regulatory definition of “portable” in its NSR rule in order for the rule to be approvable under CAA Section 110 or 40 C.F.R. Part 51, subpart I.

Comment III.12.: EPA Region IX Staff commented that the District should include a definition of the term “shutdown”. EPA Region IX Staff stated that a specific regulatory definition should be provided in the rule “to provide clarity and enforceability”.

Response: EPA’s regulations do not require that the District’s NSR rule must contain a specific regulatory definition for the term “shutdown”. Specifically, there is nothing in any of the definitional provisions in

40 C.F.R. Sections 51.165(a)(1) or 51.166(b) setting forth a definition of this term or requiring that a state's NSR program contain one. To the contrary, EPA's NSR regulations allow states to rely on the dictionary definition for this word, which is what the District's NSR rule will do under the proposed amendments. Indeed, EPA's own regulations rely on the dictionary definition without needing to provide a specific regulatory definition. (See, e.g., 40 C.F.R. §§ 51.165(a)(1)(xxviii), 51.165(a)(1)(xxxv), 51.165(a)(3)(ii)(C), 51.166(b)(37), 51.166(b)(40), 51.166(b)(47), 52.21(b)(41), 52.21(b)(48), etc.) EPA's treatment of this term under the agency's own NSR regulations demonstrates that use of the dictionary definition provides sufficient clarity and enforceability. For all of these reasons, the District does not need to include a specific regulatory definition of "shutdown" in its NSR rule in order for the rule to be approvable under CAA Section 110 or 40 C.F.R. Part 51, subpart I.

Comment III.13.: EPA Region IX Staff stated that the District's definition of the term "Regulated Air Pollutant" in District regulation 2-1-218 "is not consistent with the federal definition in 40 C.F.R. 51.165(a)(1)(xxxvii) and 40 C.F.R. 51.166(b)(49)." EPA Region IX Staff suggested that the District should specify in the definition of "regulated air pollutant" that the term refers to pollutants that are subject to "a Federal and California Clean Air Act regulation".

Response: Contrary to the assertions in this comment, EPA's NSR regulations do not use the term "Regulated Air Pollutant" and do not include a definition of this term. The cited provisions in 40 C.F.R. 51.165(a)(1)(xxxvii) and 40 C.F.R. 51.166(b)(49) are definitions of a different term "Regulated NSR Pollutant". In the only place where the District's regulations use this term "Regulated NSR Pollutant", the District's regulations define it explicitly by reference to the federal definition in 40 C.F.R. Section 52.21(b)(49). This definition by reference to the Code of Federal Regulations provision by definition cannot be inconsistent with any federal requirements for this term.

With respect to the District's general definition of "Regulated Air Pollutant" in Section 2-1-218, the intent behind this definition was to identify pollutants for which a regulation has been adopted, not to inquire into the identity of the agency that adopted it or the specific legal authority under which it was adopted. The final version in the Proposed Amendments therefore removed the language regarding regulations adopted or implemented by the District, and simply refers to pollutants that are subject to a regulation. This revision will address EPA's suggestion that the term be defined to include pollutants that are subject to "Federal and California Clean Air Act regulations." All such pollutants will be included within the definition set forth in Section 2-1-218 in the final version of the Proposed Amendments.

Comment III.14.: EPA Region IX Staff commented that the "federal backstop" provision in proposed Section 2-1-234.2 should incorporate the federal definitions used the applicability procedures in 40 C.F.R. Sections 51.165(a)(2) and 51.166(a)(7), including "baseline actual emissions" and "projected actual emissions".

Response: As explained above in connection with Comment No. I.2.b., the final version of the Proposed Amendments is adding language that explicitly states that all applicable provisions in Sections 51.165 and 51.166 must be followed in implementing proposed Section 2-1-234.2. This language also explicitly states that all of the federal definitions in 40 C.F.R. Sections 51.165(a)(1) and 51.166(b) must be

followed in implementing this provision, which include the definitions of “baseline actual emissions” and “projected actual emissions” and all other relevant definitions. This incorporation by reference addresses EPA Region IX Staff’s comment regarding these terms.