



Linda S. Adams  
Secretary for  
Environmental Protection

# Air Resources Board

Robert F. Sawyer, Ph.D., Chair  
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Arnold Schwarzenegger  
Governor

August 3, 2006

Mr. Seyed Sadredin, Executive Director  
San Joaquin Valley Air Pollution Control District  
1990 East Gettysburg  
Fresno, California 93726-0244

Dear Mr. Sadredin:

The purpose of this letter is to transmit our final comments on your "Response and Action Plan" to address opportunities for improvement identified in our program evaluation for the San Joaquin Valley Unified Air Pollution Control District (District). You may recall that, in our April 25, 2006, letter to you, we indicated that there were several areas we wanted to provide you with additional comments. Our comments are related to Variance Hearing Board procedures, minor issues related to implementation of the District's New Source Review Rule, and some suggestions to further improve the Air Toxics "Hot Spots" Program. ARB staff has already taken the opportunity to discuss the enclosed comments with District program managers.

Overall, we are very encouraged with the District's positive response to the program evaluation recommendations. Implementation of these recommendations will help improve public health in the San Joaquin Valley. Please keep us informed on the implementation of the District's Action Plan by submitting a progress report on various action items by January 31, 2007. On items such as revision of cost effectiveness factors for best available control technology determinations, we would like to be informed of District proposals as they are being developed to allow us to provide input and comments in a timely manner.

If you have any questions, please contact me at (916) 324-8167 or Jorge Fernandez at (916) 445-7800.

Sincerely,

Robert D. Fletcher, Chief  
Stationary Source Division

Enclosure

cc: Jorge L. Fernandez, Chief  
Program Evaluation Branch

*The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website: <http://www.arb.ca.gov>.*

California Environmental Protection Agency

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bcc: Bob Barham, SSD  
Bill Loscutoff, MLD  
James Ryden, ED  
Linda Murchison, PTSD  
Leslie Krinsk, OLA  
Hardip Judge, SSD

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Response detail ltr.doc

## **ARB Comments on District Response and Action Plan**

Comments below are related to Variance Hearing Board procedures, minor issues related to implementation of the District's New Source Review Rule, and some suggestions to further improve the Air Toxics "Hot Spots" Program. ARB staff has discussed these comments with District program managers.

- I. Compliance – Variance Hearing Board, discussed with Morgan Lambert  
(for any questions on this matter, contact Vickie McGrath at (916) 324-7343)

*ARB Recommendation (Sec. A.10): Northern and Southern Zone Hearing Boards should make the findings required by HSC section 42352 at the hearing. It is essential for the District to ensure that hearing procedures do not give the impression, or allow for, a variance to be considered in a pro forma or cursory manner by the very panel that is charged with an independent and impartial review of the matter.*

District Response: The members of the District's three Hearing Boards are busy professionals who have volunteered to take on this responsibility. It is difficult to find people willing to serve, especially for the medical, legal and engineering positions. Accordingly, the practice of the Hearing Boards in most cases is to adopt and incorporate by reference the findings that are outlined in the staff report. This not only saves time at the hearings, but is fully authorized by case law. (See, for example, *Dore v. County of Ventura* (1994) 23 Cal.App.3d 320). In cases where there is disagreement over the ability to make the findings, or if the complexity of the case warrants it, board members are advised at the hearing to go over each individual finding.

The Hearing Boards have been advised that they can discuss findings individually or adopt by reference. The District will continue to leave the choice to the individual Hearing Boards.

ARB Staff Comment:

ARB upholds its position to the original finding in Section A.10 of the program evaluation report.

Health and Safety Code statutes require that the Hearing Board is to make the findings required to grant the variance and include the reasons for the decision in the written order.

The Hearing Board is referenced in all statutes of the Health and Safety Code regarding the issuance of variances. When the Hearing Boards choose to "adopt and incorporate by reference" the required findings it is understood that the findings were not addressed or discussed at the hearing as required by state law.

1) While the case law cited by the District approved incorporation of the staff findings in the case at issue there, we prefer to follow the California Supreme Court's holding in *Topanga Association for a Scenic Community* (1974)11 Cal.3d 506, that an administrative board must render findings sufficient to enable the parties and the reviewing court--or, in this case, the ARB--to ascertain the basis of the Hearing Board's action. Findings that parrot the statute or are otherwise merely conclusory do not "bridge the analytic gap" between the raw evidence and the ultimate Hearing Board decision and variance order. In order to carry out our review function responsibly, we require the findings to indicate the relevant sub-conclusions and the evidence that support their decision, facilitating orderly and easy analysis and review of the variance proceedings. We need to be able to ascertain the Hearing Board's mode of analysis beyond mere acceptance of the conclusory findings of one of the parties to the proceeding. To paraphrase the Supreme Court, the ARB does not want to be forced to grope through the record to determine whether some combination of credible evidentiary items support the Hearing Board decision to grant the variance. We require the Hearing Board to supply us with a record that shows us how it arrived at its decision.

2) While we recognize that in some circumstances it would be appropriate and acceptable to cite findings made by District staff, we need to see some evidence of independent deliberation and "ownership" of the findings by the Hearing Board. This is especially true because unlike the staff reports prepared in the cases cited by the District, the staff reports prepared for a case before the Hearing Board represent documents of one party to a contested case where the Hearing Board is performing a quasi-judicial function. That is, the District staff is not staff of the Hearing Board, but staff of the executive branch of the District--the APCO--who are appearing as a party before the Hearing Board opposite the petitioner who is applying for the variance. While the Hearing Board must clearly elicit information from the parties and can incorporate any evidence or testimony presented to it in arriving at and supporting its decision, it is independently responsible for its decision. The ARB must be able to see the detailed facts supporting the Hearing Board decision as well as its reasoned analysis.

3) We understand that service on the Hearing Board is pro bono and may involve significant commitments of time. We also believe it to be an honor to serve on such a democratic, community-based endeavor. With the large and varied population in your District, and citizen interest in clean air, we are sure that advertising or other efforts by the District will yield an exemplary candidate base from which the governing board may select Hearing Board members. If you require assistance filling these positions, please feel free to ask us for assistance.

II. Permitting – Implementation of NSR Rule, discussed with David Warner  
*(for any questions on this matter, contact Mike Waugh at (916) 445-6018)*

ARB Recommendation related to Section B.2 of the program evaluation report

ARB staff continues to believe it is good air quality practice to treat replacements of entire emissions units as new installations subject to District New Source Review requirements, including best available control technology (BACT). The replacement of a whole piece of pollutant-emitting equipment presents an opportunity to require that the new equipment be the cleanest possible. Otherwise, the practice of allowing an entire emissions unit to be substituted out as a routine replacement could result in repeated replacement of existing equipment with rebuilt equipment and represent a lost opportunity for continued progress in reducing emissions as technologies improve over time.

ARB Recommendation related to Section B.3 of the program evaluation report

ARB staff supports the District's plan to analyze the consistency of Policy APR 1305 on "small emitters" with respect to its New Source Review rule, due to the fact that the policy requires that these sources only meet achieved-in-practice BACT. We look forward to reviewing the results of this analysis.

ARB Recommendation related to Section B.4 of the program evaluation report

ARB staff is very pleased with the District's commitment to take specific actions regarding our recommendations related to BACT determinations. As stated in the District's Action Plan, the District will convene a workgroup in 2006 to review cost-effectiveness thresholds; develop improvements to update BACT guidelines; formalize a process to cross-reference other BACT clearinghouses and link them to the District website; and review implementation of "class and category of source" as it relates to the type of business. We look forward to reviewing the results of these actions.

III. Air Toxics “Hot Spots” Program, discussed with Leland Villalvazo  
(for any questions on this matter, contact Chris Halm at (916) 323-4865)

*ARB Recommendation (Section E): The District should complete inventory reports for these last remaining Phase III facilities (less than 10 tons/yr) and submit them to ARB. The District should continue to describe any change in a facility’s prioritization score or health risk assessment in their annual “Hot Spots” report, and when possible, update the emission inventory to reflect the change in status. The District should complete the screening health risk assessments for industry-wide facilities and, when necessary, require public notification for facilities with a risk above the notification threshold, as they have done for the other “Hot Spots” facilities.*

District Response: The District has identified Gasoline Stations, Auto Bodies, Graphic Arts, Dry Cleaners, and Bulk Terminal as Phase III (industry wide facilities) and is in the process of collecting data for these facilities. The District will calculate emissions and prioritization scores using CAPCOA-approved guideline documents, when available.

ARB Staff Comment:

The District now publishes their “Hot Spots” Annual Reports on their web page, which is a significant improvement. However, the San Joaquin District’s list of facilities does not include industrywide facilities here: [http://www.valleyair.org/busind/pto/Tox\\_Resources/Prior-HRASummary.pdf](http://www.valleyair.org/busind/pto/Tox_Resources/Prior-HRASummary.pdf) . The District should provide the public with a list of all sources subject to “Hot Spots” and their status in the program, including industrywide facilities and other permitted facilities (subject to H&S 44344.5).

*ARB Recommendation (Section E): The District should continue to describe any change in a facility’s prioritization score or health risk assessment in their annual “Hot Spots” report, and when possible, update the emission inventory to reflect the change in status.*

District Response: The District will submit updated toxic reports with the emissions inventory on September 15 of each given year. This will include updates to any previous years data. The “Hot Spots” program does not require a facility to update its report if there are reductions in emissions.

ARB Staff Comment:

The District should work closely with ARB to ensure that reductions in toxics are reflected in their inventory, even if the District believes this is not a program requirement.

*ARB Recommendation (Section E): The District should complete the screening health risk assessments for industry-wide facilities and, when necessary, require*

*public notification for facilities with a risk above the notification threshold, as they have done for the other “Hot Spots” facilities.*

District Response: Facilities meeting the requirements of 44344.5 section (b), as stated in the Health and Safety Code, are meeting the requirements of the “Hot Spots” program. It requires the District to perform a HRA on their potential to emit, ensure a facility is not a significant risk and issue a permit. The “Emissions Inventory Criteria & Guidelines Report” document also requires facilities to comply with the requirements of Section V.C., Update Reporting Requirements for “Intermediate Level” Facilities. The District tracks each facility and any subsequent modifications through the permitting program. As part of the permitting process, the District performs HRAs to determine increases in risk to ensure that the facility does not become a significant risk as required by H&S 44344.5 section (b).

The District will require notifications for industry wide facilities upon the finalization of CAPCOA HRA/Public Notice guideline documents.

ARB Staff Comment:

There already exists a 163-page CAPCOA Industrywide Public Notification Guidelines (October 1992), which provides guidance to districts regarding how public notification may be conducted. The document is available on the web here: <http://www.arb.ca.gov/ab2588/RRAP-IWRA/pubnotif.pdf>. ARB staff is not aware of any additional guideline document that is being prepared. The District should make ARB aware of any additional guidance that is needed.

The “Hot Spots” program provides the public with “right-to-know” information about significant risk facilities. The District has an obligation to make this information available to the public.