SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT

DRAFT STAFF REPORT

Proposed Amendments to Rule 2520 (Federally Mandated Operating Permits)

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I. SUMMARY

The San Joaquin Valley Air Pollution Control District (District) is proposing to amend District Rule 2520 (Federally Mandated Operating Permits) to:

- Remove Section 13.4 (Emergency Provisions) from the rule to align with revised U.S. Environmental Protection Agency's (EPAs) Title V regulation.
- Revise definitions for consistency with the Clean Air Act (CAA), federal regulations, and District Rule 2201 (New and Modified Stationary Source Review Rule).

II. BACKGROUND

The CAA is the comprehensive federal law that regulates air emissions from stationary and mobile sources. The EPA promulgated permitting regulations applicable to the operation of major and certain other sources of air pollutants under the Title V of the CAA in 1992 (57 Federal Register 32250). These regulations are codified in 40 CFR parts 70 and 71 which contain the requirements for state operating permit programs and the federal operating permit program respectively. The District's EPA-approved Title V program under 40 CFR part 70 was adopted in June 1995, and is incorporated in District Rule 2520 (Federally Mandated Operating Permits).

When the EPA finalized its Title V regulations for state operating permit programs (i.e. 40 CFR part 70) in 1992, the emergency affirmative defense provisions were included

as part of the Title V regulations. These provisions established an affirmative defense that sources could have asserted in enforcement cases brought for noncompliance with technology-based emission limitations in operating permits, provided that the exceedances occurred due to qualifying emergency circumstances.

In 2014, the D.C. Circuit vacated affirmative defense provisions contained in the EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) for the Portland cement industry, promulgated under CAA section 112; *NRDC v. EPA* decision (746 F.3d 1055). In the *NRDC* decision, the D.C. Circuit concluded that the EPA lacked the authority to create these affirmative defense provisions because they contradicted fundamental requirements of the CAA concerning the authority of courts to decide whether to assess civil penalties in CAA enforcement suits. However, given that the *NRDC* decision was not based on CAA section 112, rather was based on CAA sections 113 (federal enforcement) and 304 (citizen suits), which apply broadly to the enforcement of a wide range of CAA requirements, and addressed the legal basis for affirmative defense provisions, the EPA reevaluated its interpretation of the CAA with respect to affirmative defense provisions in Title V programs.

Consequently, on July 21, 2023, EPA published a final rule (Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program), effective on August 21, 2023, to remove the emergency affirmative defense provisions from the EPA's Title V operating permit program regulations (40 CFR 70 and 40 CFR 71) because they are inconsistent with the EPA's current interpretation of the enforcement structure of the CAA, in light of the said court decisions from the U.S. Court of Appeals for the D.C. Circuit. As a result of the EPA's action, it is now required for applicable state, local, and tribal permitting authorities to submit program revisions to the EPA to remove similar Title V affirmative defense provisions from their EPA-approved Title V programs, and to remove similar provisions from individual operating permits.

Upon implementation of this proposed amendment, any excess emissions during periods of emergencies may now be subject to enforcement or imposition of remedies under 40 CFR 70 and 40 CFR 71, contained in District Rule 2520.

III. PROPOSED AMENDMENTS

1. Removal of Title V Emergency Affirmative Defense Provisions from District's EPA-approved Title V Program

As discussed in Section II of this document, EPA has published a rule to remove the emergency affirmative defense provisions from their Title V operating permit program regulations. Consequently, to make conforming revisions to the District's

EPA-approved Title V program, the District is proposing to remove Section 13.4 (Emergency Provisions) from District Rule 2520.

2. Administrative Revisions

Additionally, as part of this rule amendment project, the District is proposing to make administrative revisions to Rule 2520 to improve rule language consistency with the CAA, federal regulations, and District Rule 2201. The proposed revisions will result in no change to the Title V permitting process or how the District administers the program.

The proposed revisions concern how the term "Title I" is used in the rule in reference to the CAA. The rationale for the changes are best understood by considering the connection between the regulatory framework established by Title I of the CAA and District Rule 2520 (and necessarily District Rule 2201).

Title I of the CAA contains four parts:

Part A – Air Quality and Emission Limitations
Part B – Ozone Protection (replaced by Title VI)
Part C – Prevention of Significant Deterioration of Air Quality
Part D – Plan Requirements for Nonattainment Areas

Parts C and D include pre-construction review and permitting requirements that apply to attainment pollutants and non-attainment pollutants, respectively. Together, they form the basis of the federal New Source Review (NSR) program, which applies to major sources of air pollution. Part C or the Prevention of Significant Deterioration (PSD) addresses *attainment* pollutants, and its implementing federal regulation is contained in 40 CFR 51.166 (or 40 CFR 52.21 for areas where EPA is administering the PSD permitting program). Part D outlines the requirements of the federal non-attainment NSR (NNSR) program, which addresses the pre-construction review and permitting requirements for *non-attainment* pollutants and their precursors. Its implementing federal regulation is contained in 40 CFR 51.165.

Thus, Title I of the CAA includes the framework for both PSD and NNSR programs broadly. The District implements PSD requirements through District Rule 2410 (Prevention of Significant Deterioration), and implements NNSR as well as its minor source permitting through District Rule 2201. Currently, Rule 2520 uses the term "Title I Modification" to refer to a major modification under NNSR. Instead of having a standalone definition, Rule 2520 refers to the definition in Rule 2201. However, District Rule 2201 no longer defines or uses the term "Title I Modification". Instead, Rule 2201 defines and uses the term "Federal Major Modification" with reference to 40 CFR 51.165. Therefore, one of the purposes of the proposed amendments is to

ensure Rule 2520 uses consistent cross references and language. The term "Title I Modification" will be replaced with "Federal Major Modification" in the rule.

The following paragraphs address the specific revisions made by section.

- Section 3.12 – Federal Major Modification Definition

  The District is proposing to include the definition of "Federal Major Modification" in Section 3.12. As discussed below, the term "Federal Major Modification" replaces the term "Title I Modification." This proposed amendment provides consistency between District rules and federal regulations.

  The "Federal Major Modification" definition will cite District Rule 2201 to codify the District's practice of utilizing Rule 1020 (Definitions) or Rule 2201 (New and Modified Stationary Source Review Rule) for any definition not explicitly included in District rules.

- Section 3.31 – Title I Modification Definition

  The District is proposing to remove the definition of "Title I Modification" (currently Section 3.31), and replace it with the term "Federal Major Modification" (defined in Section 3.12 above) with reference to District Rule 2201 and federal regulations.

IV. RULE DEVELOPMENT PROCESS

The District conducted a public process for amending Rule 2520. Information about public meetings was shared with members of the public, affected sources, and other interested stakeholders. Workshop announcements and public notices were provided in both English and Spanish.

As part of the rule development process, the District conducted a public workshop on March 21, 2024, to present, discuss, and take comments on the proposed amendments to Rule 2520. Throughout this development process, District staff solicited feedback and comments from the public. No comments were received from the public, affected sources, or interested parties during the public outreach and workshop process, the comment period following the workshop, or the comment period following the public hearing notification.

The proposed amended rule was published for a minimum 30-day public review and comment period on April 16, 2024, prior to the public hearing to consider the adoption of the amended rule by the District Governing Board.

V. COST EFFECTIVENESS AND SOCIOECONOMIC IMPACT ANALYSIS

Pursuant to CH&SC Section 40920.6(a), the District is required to analyze the cost effectiveness of new rules or rule amendments that implement Best Available Retrofit Control Technology (BARCT). The proposed amendments do not add BARCT requirements and therefore are not subject to the cost effectiveness analysis mandate.

Additionally, CH&SC Section 40728.5(a) requires the District to analyze the socioeconomic impacts of any proposed rule amendment that significantly affects air quality or strengthens an emission limitation. The proposed amendments have neither effect; therefore, the proposed amendments are not subject to the socioeconomic analysis mandate.

VI. RULE CONSISTENCY ANALYSIS

Pursuant to CH&SC Section 40727.2 (g), a rule consistency analysis of the proposed rule is required if the proposed rule strengthens emission limits or imposes more stringent monitoring, reporting, or recordkeeping requirements. The proposed rule does not strengthen emission limits or impose more stringent monitoring, reporting, or recordkeeping requirements; therefore, a rule consistency analysis is not required.

VII. ENVIRONMENTAL ASSESSMENT

According to Section 15061 (b)(3) of the California Environmental Quality Act (CEQA) Guidelines, a project is exempt from CEQA if, “(t)he activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.” As such, substantial evidence supports the District’s assessment that this rule amendments project will not have any significant adverse effects on the environment.

Furthermore, this rule amendments project is an action taken by a regulatory agency, the San Joaquin Valley Air Pollution Control District, as authorized by state law to assure the maintenance, restoration, enhancement, or protection of air quality in the San Joaquin Valley where the regulatory process involves procedures for protection of air quality. CEQA Guidelines §15308 (Actions by Regulatory Agencies for Protection of the Environment), provides a categorical exemption for “actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities

and relaxation of standards allowing environmental degradation are not included in this exemption." No construction activities or relaxation of standards are included in this rule amendments project.

Therefore, for all the above reasons, this rule amendment project is exempt from CEQA. Pursuant to Section 15062 of the CEQA Guidelines, District staff will file a Notice of Exemption upon Governing Board approval.