March 21, 2023

By Certified Mail, Return Receipt Requested

Samir Sheikh, Executive Director/APCO
San Joaquin Valley Unified Air Pollution Control District
1990 E. Gettysburg Avenue
Fresno, CA 93726

Governing Board
c/o Clerk of the Governing Board
San Joaquin Valley Unified Air Pollution Control District
1990 E. Gettysburg Avenue
Fresno, CA 93726

Re: Clean Air Act Notice of Intent to Sue for Violations of Rule 2201; Annual Offset Equivalency Demonstration and Pre-baseline ERC Cap Tracking System.

Dear Mr. Sheikh and the Governing Board of the San Joaquin Valley Unified Air Pollution Control District:

The Central Valley Air Quality Coalition, Committee for a Better Arvin, Committee for a Better Shafter, Delano Guardians, and Social and Environmental Entrepreneurs (SEE), Inc. (collectively "Valley EJ Organizations") give notice to the San Joaquin Valley Unified Air Pollution Control District and the Governing Board of the San Joaquin Valley Unified Air

Pollution Control District (collectively "the District") of Valley EJ Organizations' intent to sue the District for its violations of District Rule 2201. The District submitted annual Offset Equivalency Reports to the U.S. Environmental Protection Agency ("EPA") that violate Rule 2201 and failed to implement mandatory remedies. Valley EJ Organizations send this notice pursuant to section 304(b) of the Clean Air Act ("Act"), 42 U.S.C. § 7604(b), and 40 C.F.R. §§ 54.2 and 54.3. At the conclusion of the 60-day notice period, Valley EJ Organizations intend to file suit under section 304(a)(1) of the Act, 42 U.S.C. § 7604(a)(1), to prosecute the District's violation of an emission standard or limitation. If you wish to discuss this matter short of litigation, please direct all future correspondence to Valley EJ Organizations' attorneys.

BACKGROUND

1. San Joaquin Valley Air Quality

Ozone and PM2.5 pollution cause a public health crisis in the San Joaquin Valley, which ranks among the most polluted air basins in the United States. Short-term exposure to ozone irritates lung tissue, decreases lung function, exacerbates respiratory disease such as asthma and Chronic Obstructive Pulmonary Disease (COPD), increases susceptibility to respiratory infections such as pneumonia, all of which contribute to an increased likelihood of emergency department visits and hospitalizations. Short-term exposure to ozone also increases the risk of premature death, especially among older adults. Long-term exposure to ozone causes asthma in children, decreases lung function, damages the airways, leads to development of COPD, and increases allergic responses.[1]

Short-term exposure to PM2.5 pollution causes premature death, decreases lung function, exacerbates respiratory disease such as asthma, and causes increased hospital admissions. Long-term exposure causes development of asthma in children, decreased lung function growth in children, increased risk of death from cardiovascular disease, and increased risk of death from heart attacks.[2]

According to the American Lung Association, counties in the San Joaquin Valley air basin rank among the worst in the United States for ozone. Kern, Tulare, and Fresno are the fourth, fifth, and sixth most ozone-polluted counties in the United States, respectively.[3] The Valley cities of Bakersfield, Visalia, and Fresno-Madera-Hanford rank as the second, third, and

[1] AMERICAN LUNG ASSOCIATION STATE OF THE AIR 2022 at 24-25, available at https://www.lung.org/getmedia/74b3d3d3-88d1-4335-95d8-c4e47d0282c1/sota-2022.pdf.

[2] *Id*. at 21-23.

[3] *Id*. at 19.

fourth most ozone-polluted cities, respectively.[4] For short-term exposure to PM2.5, the Valley counties of Fresno, Kern, and Kings rank as the first, third, and fourth most PM2.5-polluted counties, respectively.[5] With respect to long-term exposures, Kern, Kings, Tulare, Fresno, and Stanislaus rank as the second, third, fourth, seventh and eighth most PM2.5-polluted counties, respectively.[6]

Ground-level ozone is formed by a reaction between nitrogen oxides ("NOx") and volatile organic compounds ("VOC") in the presence of heat and sunlight. Unlike ozone in the upper atmosphere which is formed naturally and protects the Earth from ultraviolet radiation, ozone at ground level is primarily formed from anthropogenic pollution. PM2.5 is both a directly emitted pollutant and forms secondarily in the atmosphere by the precursor pollutants NOx, ammonia, sulfur oxides, and VOC.

The U.S. Environmental Protection Agency ("EPA") has classified the San Joaquin Valley as an extreme nonattainment area for the 2008 8-hour ozone National Ambient Air Quality Standard ("NAAQS" or "standard") and an extreme nonattainment area for the 2015 8-hour ozone standard. The Valley has not attained the 1997 8-hour ozone standard. The EPA has classified the Valley as a serious nonattainment area for the 1997 24-hour and annual standard, for the 2006 24-hour standard, and for the 2012 annual standard.

The Valley has "long been 'an area with some of the worst air quality in the United States,' and it has repeatedly failed to meet air quality standards." *Association of Irritated Residents v. U.S. Environmental Protection Agency*, 10 F.4th 937, 944 (9th Cir. 2021) (quoting *Committee for a Better Arvin v. EPA*, 786 F.3d 1169, 1173 (9th Cir. 2015)). The EPA has found that the Valley has failed to attain several National Ambient Air Quality Standards by their respective deadlines. *See* 66 Fed. Reg. 56476 (Nov. 8, 2001) (1-hour ozone standard failure to attain by 1999); 67 Fed. Reg. 48039 (July 23, 2002) (PM-10 standard failure to attain by 2001); 76 Fed. Reg. 82133 (December 30, 2011) (1-hour ozone standard failure to attain by 2010); 81 Fed. Reg. 84481 (November 23, 2016) (1997 24-hour and annual PM2.5 standards failure to attain by 2015); 86 Fed. Reg. 67329 (Nov. 26, 2021) (disapproving 1997 annual PM2.5 implementation plan because of failure to attain the standard by December 31, 2020). Moreover, ozone levels remain well above the 1997 8-hour ozone standard with progress towards attainment plateauing. EPA data show design values for 2018-2020 and 2019-2021 remaining flat at 0.93, well above the 0.84 design value necessary to attain the standard by 2024.

[4] *Id*. at 38.

[5] *Id*. at 19.

[6] *Id*.

2. District and Federal Nonattainment New Source Review

The District implements stationary source permitting requirements imposed by California law and the federal Clean Air Act. California law requires new and modified stationary sources to obtain approval from the District in the form of an Authority to Construct ("ATC") permit, install Best Available Control Technology ("BACT"), and offset emissions increases from new or modified sources after BACT has been installed. Similarly, the federal Clean Air Act also requires new and modified sources to obtain permits through a permitting program called nonattainment New Source Review mandated in areas that do not meet federal ambient air quality standards. A stationary source subject to nonattainment NSR must install BACT and offset emissions increases. To differentiate the two programs, regulators refer to the state law program as "District NSR" and the federal program as "federal NSR."

The emission offsetting requirement is generally referred to as "offsets" and a source must obtain and provide offsets in the form of Emission Reduction Credits ("ERC"), the currency for offsets. The amount of offsets a source must provide depends on whether the source is subject to District NSR or federal NSR, and also the nonattainment classification of the air basin. To generate an ERC, an emission reduction must be real, quantifiable, surplus, permanent, and enforceable. These ERC criteria ensure the integrity of an ERC program and ultimately ensure that the District's NSR program complies with state law and the Clean Air Act.

Some differences exist between District NSR and federal NSR. One significant difference is that federal NSR applies to only major sources in an air basin, while District NSR requires permitting for so-called minor sources with emissions less than a federal major source and requires offsets when certain thresholds are exceeded. Another significant difference is when the "surplus" value of an ERC is determined. The "surplus" requirement ensures that any emissions reductions ERCs represent account for reductions not required by law. Under state law, the District determines "surplus" value at the time the ERCs are generated, whereas federal NSR determines the "surplus" value at the time of ERC use. The federal NSR "surplus" at time of use requirement thus discounts ERCs based on the change in law between the time the ERC is generated and the time the ERC is used. Thus, a source must obtain different quantities of ERCs based on state law for District NSR and federal law for federal NSR because of the difference in surplus value.

The District implements both District NSR and federal NSR through Rule 2201. For District NSR, thresholds for offsets are triggered on a pollutant-by-pollutant basis. For NOx and VOC, Rule 2201 requires offsets at 10 tons per year. Rule 2201 § 4.5.3. Also, the amount of offsets required vary from a 1:1 ratio to a 1.5:1 ratio depending on the source of offsets and the distance from the permitted source to the source of offsets. Rule 2201 § 4.8.4.

Federal NSR, in contrast, requires offsets and offset ratios for new major stationary sources and federal major modifications based on potential to emit thresholds that vary given the severity of the air quality classification. For example, a serious ozone nonattainment area defines

a federal major source as one with a potential to emit at least 50 tons per year of NOx or VOC and requires an offset ratio of 1.2:1. 42 U.S.C. § 7511a(c), (c)(10). A severe ozone nonattainment area applies to a larger universe of sources by defining major source as having a potential to emit at least 25 tons per year of NOx or VOC, 42 U.S.C. § 7511a(d), and a 1.3:1 offset ratio, unless a state "requires all existing major sources in the nonattainment area to use best available control technology . . . for the control of volatile organic compounds." 42 U.S.C. § 7511a(d)(2). An extreme ozone nonattainment area is the most stringent with a major source threshold set at 10 tons per year and an offset ratio of 1.5:1. 42 U.S.C. § 7511a(e), (e)(1). The District has evolved from a serious ozone classification to an extreme ozone classification, and thus over time federal NSR thresholds have decreased and offset ratios have increased.

3. Annual Offset Equivalency Tracking System

Because of the differences between the District NSR and federal NSR programs, in 1999 the District and EPA reached an agreement on a system for the District to demonstrate that the District NSR program requires an equal or greater amount of offsets than would have been required under federal NSR. EPA granted a limited approval and limited disapproval of the Annual Offset Equivalency Tracking System ("Equivalency System") and disapproved the System because it lacked "a specific and enforceable remedy for a shortfall in the annual equivalency demonstration." 65 Fed. Reg. 58252, 58253 (Sept. 28, 2000); 55 Fed. Reg. 37587 (July 19, 2001). In 2004, EPA approved the December 19, 2002 amendments to Rule 2201 to include the Equivalency System as part of the State Implementation Plan once the District included mandatory and enforceable remedies in the System in the event the District's equivalency "demonstration is erroneous." 69 Fed. Reg. 27837, 27840-27841 (May 17, 2004).

Section 7 of Rule 2201 governs the Equivalency System. The District "shall implement a system for tracking the following for each permitting action." Rule 2201 § 7.1.

- "The quantity of offsets that would have been required for new major sources and federal major modifications in the District had the federal new source review requirements, codified in 40 CFR 51.165, and Title I part D of the Clean Air Act (CAA), been applied to these sources." Rule 2201 § 7.1.1.

- "The quantity of offsets actually required for all new and modified sources in the District pursuant to the requirements of this rule, and, for the purposes of the Pre-baseline ERC Cap Tracking System outlined in any District adopted and EPA-approved attainment plan." Rule 2201 § 7.1.2.

- The surplus value of creditable emission reductions used as offsets by stationary sources. Rule 2201 § 7.1.3.[7]

[7] Rule 2201 defines the key terms "surplus value" and "creditable." Rule 2201 §§ 7.1.4, 7.1.5.

The District (1) "shall annually prepare a report with the following demonstrations to be provided to the public, the ARB and the EPA in accordance with the dates specified in Section 7.3"; and (2) "shall also make available to the public, the ARB and the EPA the data used to prepare the demonstrations." Rule 2201 § 7.2.

The report required by section 7.2 "shall cover the period August 20 to August 19 of each year." Rule 2201 § 7.3.1. "For each reporting period, the [District] shall submit the report and data described in Section 7.2 to ARB and the EPA no later than November 20 of each year." Rule 2201 § 7.3.2.

The equivalency demonstration shall consist of two tests to demonstrate that the District's offset system and rules are equivalent to federal offset requirements. Test 1 compares the quantity of offsets required by federal NSR and tracked pursuant to section 7.1.1 – the Federal Offset Quantity ("FOQ") – to the quantify of offsets required by District NSR pursuant to section 7.1.2 – the District Offset Quantity ("DOQ") – for each annual period. "The report shall include a comparison of the annual quantity of federal offsets that would have been required (as tracked pursuant to Section 7.1.1) to the annual quantity of offsets actually required under this rule, including any excess offsets required from previous reporting years (as tracked pursuant to Section 7.1.2)." Rule 2201 § 7.2.1.1.

Test 2 requires the comparison of the FOQ with the creditable time-of-use surplus value of creditable emissions reductions used as offsets in the District system. "The report shall include a comparison of the annual quantity of federal offsets that would have been required (as tracked pursuant to Section 7.1.1) to the surplus value of creditable emission reductions used as offsets during the year (as tracked pursuant to Section 7.1.3)." § 7.2.2.1.

Test 2 allows the District to use additional creditable emissions reductions to support the Test 2 demonstration. "For purposes of the demonstration described in Section 7.2.2, the comparison may also include the surplus value of additional creditable emission reductions that have not been used as offsets and have been banked or have been generated as a result of permitting actions." Rule 2201 § 7.2.2.2.

The failure to demonstrate equivalency through either Test 1 or Test 2 triggers automatic remedies. If the District fails Test 1, then it may use additional creditable emission reductions to make up the shortfall. If the District lacks sufficient additional creditable emission reductions, then after the report deadline for that year, all permits for federal major sources that require offsets must apply federal offset calculation requirements from the Clean Air Act and EPA's implementing regulations, including the federal quantity and with surplus value at the time of use.

> If the District does not have sufficient additional creditable emission reductions to satisfy the shortfall described in 7.4.1.1, all ATCs issued after the report deadline for that year shall comply with the offset requirements of 40 CFR 51.165, and part D of Title I of the CAA, for each pollutant for which there is a shortfall, until the

applicability and offset requirements of this rule are revised to comply with the federal new source review requirements and approved into the SIP by EPA.

Rule 2201 § 7.4.1.2.

Test 2 compares the Federal Offset Quantity with the surplus value of District offsets combined with any additional creditable emission reductions. If the District cannot meet the Federal Offset Quantity and fails to demonstrate equivalency, then all permits issued after the applicable report date must ensure that all reductions used to satisfy offset requirements are creditable with surplus value at the time of use.

> If the comparison described in Section 7.2.2 does not show, or EPA determines the comparison erroneously shows, that the surplus value of creditable emission reductions used as offsets during the year (as tracked pursuant to Section 7.1.3) combined with additional emission reductions as described in Section 7.2.2.2 equals or exceeds the annual quantity of federal offsets that would have been required (as tracked pursuant to Section 7.1.1), all ATCs issued, for new major sources or federal major modifications, for each pollutant for which there is a shortfall, after the report deadline shall ensure that emission reductions used to satisfy offset requirements are creditable and that the surplus value of those credits is determined at the time of ATC issuance.

Rule 2201 § 7.4.2.1.

If the District "fails to submit a report meeting the requirements" of sections 7.2.1 or 7.2.2, then mandatory remedies apply until the District submits a compliant report. The automatic remedy for the District's failure to submit a compliant Test 1 equivalency demonstration:

> If the APCO fails to submit a report meeting the requirements of Section 7.2.1, all ATC issued after the report deadline and until the APCO submits to ARB, EPA and the public a report complying with the requirements of Section 7.2.1 shall comply with the offset requirements of 40 CFR 51.165, and part D of Title I of the CAA.

Rule 2201 § 7.4.1.3.

The automatic remedy for the District's failure to submit a compliant Test 2 equivalency demonstration:

> If the APCO fails to submit a report meeting the requirements of Section 7.2.2, all ATCs issued for new major sources or federal major modifications after the report deadline and until the APCO submits to ARB, EPA and the public a report complying with the requirements of Section 7.2.1 shall ensure that emission

reductions used to satisfy offset requirements are creditable and that the surplus value of those credits is determined at the time of ATC issuance.

Rule 2201 § 7.4.2.3.

4. The California Air Resources Board's Review of the District's Implementation of the Annual Offset Equivalency and Tracking System.

In November 2018, Earthworks published a report evaluating the validity of ERCs in the oil and gas sector and used in the District's implementation of Rule 2201.[8] The Earthworks Report evaluated a sample of ERCs and found, among other things, that "a significant proportion of ERCs in the San Joaquin Valley Air Pollution Control District's bank appear to be invalid." In response to the Earthworks Report and on January 9, 2019, San Joaquin Valley air quality advocates called on CARB to audit the District's ERC banks given the threat to public health and the integrity of the permitting system.[9] At the January 24, 2019 CARB meeting, the Board granted that request and directed staff to review the District's ERC program.

In June 2020, the CARB's Enforcement Division completed that evaluation and published the Review of the San Joaquin Valley Air Pollution Control District Emission Reduction Credit System ("ERC Report"). The ERC Report found significant instances where ERCs lacked validity as creditable reductions to serve as offsets. The ERC Report further evaluated the implementation of the Equivalency System because of the significant differences between the surplus value of ERCs under District NSR (surplus value at time of issuance) and federal NSR (surplus value at time of use). The Report discussed the significant impact that permitting as an extreme ozone nonattainment area had on the equivalency demonstration and the manner in which the District claimed to meet equivalency using additional creditable emission reductions derived from the Agricultural Internal Combustion Engine ("AG-ICE") program and orphan shutdowns. Specifically, the ERC Report found the District improperly relied on additional creditable emission reductions from AG-ICE projects and orphan shutdowns to claim the District demonstrated equivalency, in addition to its general lack of transparency affecting the Equivalency System. ERC Report at 33.

On June 26, 2020, CARB held a hearing on the ERC Report. The Board passed Resolution 20-11, in which the Board adopted the ERC Report's AG-ICE and orphan shutdown findings, found that Section 7.4 of Rule 2201 required automatic remedies in the event equivalency is not demonstrated, and directed staff to provide technical assistance and support to the public and community groups, among other findings. The Board identified the District's reform commitments including increasing the transparency of the Equivalency System and the annual reports, convening a public advisory workgroup to assist in developing solutions related

[8] *Undeserved Credit: Why emissions banking in California's San Joaquin Valley puts air quality at risk* (2018) (hereafter "Earthworks Report").

[9] *See* Letter from Central Valley Air Quality Coalition, et al. to Mary Nichols, January 9, 2019.

to the District's offset equivalency system, and adjusting the Equivalency System's use of AG-ICE and orphan shutdown additional creditable emission reductions, as "necessary next steps."

Mr. Sheikh, the District's Executive Director/APCO, acknowledged the mandatory remedies during the CARB hearing:

> In talking about these annual equivalency processes, it's important to understand that if annual demonstration reports do not show equivalency, the District's New Source Review rule that's in place today already contains a remedy which takes effect immediately without any action necessary by EPA. Under this built-in remedy, all ATC permits that are issued after the report deadline shall ensure that ERC is used to satisfy federal offset requirements are surplus at time-of-use. This means that only the surplus at time-of-use value, if any, of existing ERCs in the bank may be used to satisfy federal offset requirements. And so as we move forward in this discussion, I just wanted to make sure it was clear that we do have a remedy in the rule that would immediately transition to those federal time-of-use requirements, in the event that equivalency was not demonstrated.

Transcript, Video Conference Meeting of the California Air Resources Board at 33, June 26, 2020.

5. Offset Equivalency Reports for 2019-2020, 2020-2021, and 2021-2022 Fail to Demonstrate Equivalency.

On September 17, 2020, the District Governing Board provisionally withdrew all reductions derived from the AG-ICE program and orphan shutdowns. In a report to the Governing Board, Mr. Sheikh advised the Board:

> The findings of CARB's review point to the need to revisit the assumptions used in the District's equivalency demonstrations for the surplus value test. Consistent with the District's offset equivalency agreement with the federal EPA and with the provisions of the District's NSR rule, the District utilizes the surplus value of emission reductions across various categories to demonstrate equivalency with federal surplus value offsetting requirements on an annual basis. Two particular categories that have been utilized were agricultural engine electrification projects associated with the AG-ICE incentive program and unbanked facility shutdowns ("orphan shutdowns"). CARB raised valid questions regarding the assumptions, quantification methodologies, and creditability of the emission reductions associated with these projects when viewed in an NSR context. In response to the review, the District committed to revisiting the emission reductions used in the equivalency demonstration from these two categories.
>
> After further review of these projects and given the significant questions surrounding the assumptions, quantification methodologies, and creditability of

> the emission reductions from these two categories, the District believes it would be prudent at this point to recommend the provisional withdrawal of the emissions reductions from these projects from the equivalency system. This recommended action is consistent with your Board's direction for a proactive response to the review, and would allow the public process, including the recently created ERC Public Advisory Workgroup, to inform the development of mechanisms and methodologies for the use of these and other types of creditable emission reductions in demonstrating equivalency. Once EPA and ARB accepted mechanisms and methodologies are developed, the District would reintroduce the appropriate portion of the emission reductions from provisionally withdrawn projects.[10]

The Governing Board agreed with Mr. Sheikh's recommendation and adopted a motion to authorize Mr. Sheikh to provisionally withdraw those additional credits.

On November 20, 2020, the District submitted the 2019-2020 Offset Equivalency Report to the EPA as required by Rule 2201. Unlike prior annual reports, the 2019-2020 report failed to demonstrate equivalency. In Test 1, the District failed equivalency for VOC when the Federal Offset Quantity was greater than the District Offset Quantity and, after the District's adjustments, VOC equivalency failed with a shortfall greater than 2,000 tons per year.

For Test 2, the 2019-2020 report conceded failure for NOx and VOC without providing any data on the severity of the shortfall, citing the District's September 17, 2020 provisional withdrawal of AG-ICE and orphan shutdown reductions, stating that "the system was no longer able to demonstrate equivalency with the surplus value test."[11] The District implemented the Test 2 automatic remedy effective September 17, 2020 for all projects requiring NOx or VOC offsets for a new major source or a federal major modification.[12]

The 2020-2021 Offset Equivalency Report initially claimed that the District demonstrated equivalency for NOx in Test 1. However, the District withdrew that demonstration because additional creditable emission reductions were insufficient to satisfy the NOx Test 1 shortfall.

The 2021-2022 Offset Equivalency Report omits Test 1 and Test 2 for NOx and VOC, implicitly conceding Test 1 and Test 2 failure for NOx and VOC.

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[10] Memorandum from Samir Sheikh to District Governing Board, Item Number 13: Update on District Response to California Air Resources Board's Review of the District Emission Reduction Credit System, September 17, 2020.

[11] Letter from Arnaud Marjollet District Director of Permit Services, to Elizabeth Adams, EPA Air Division Director, November 20, 2020.

[12] *Id*.

6. The Emission Reduction Credit Public Advisory Group.

At the CARB hearing on the ERC Report, the District committed to assemble a public advisory group to advise the District on corrections needed to address the ERC and Equivalency System issues. The District, however, ran the advisory group as a body to solve the lack of additional creditable emission reductions needed to demonstrate equivalency while refusing to reconcile historical deficiencies in the ERC and Equivalency Systems. As a result of the District's failure to hold itself accountable, the advisory group's three public interest members resigned on July 14, 2022.[13]

OFFSET EQUIVALENCY REPORTS

The Offset Equivalency Reports for the reporting periods 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019-2020, 2020-2021, 2021-2022 are available online on the District website.[14] The District submitted each of these Offset Equivalency Reports to the EPA on the following dates:

- Offset Equivalency Report for 2003-2004 submitted on November 18, 2004.
- Offset Equivalency Report for 2004-2005 submitted on November 18, 2005.
- Offset Equivalency Report for 2005-2006 submitted on November 17, 2006.
- Offset Equivalency Report for 2006-2007 submitted on November 19, 2007.
- Offset Equivalency Report for 2007-2008 submitted on November 19, 2008.
- Offset Equivalency Report for 2008-2009 submitted on November 19, 2009.
- Offset Equivalency Report for 2009-2010 submitted on November 18, 2010.
- Offset Equivalency Report for 2010-2011 submitted on November 17, 2011.
- Offset Equivalency Report for 2011-2012 submitted on November 14, 2012.
- Offset Equivalency Report for 2012-2013 submitted on November 6, 2013.
- Offset Equivalency Report for 2013-2014 submitted on November 17, 2014.
- Offset Equivalency Report for 2014-2015 submitted on November 17, 2015; amended and resubmitted on January 13, 2016.
- Offset Equivalency Report for 2015-2016 submitted on November 18, 2016.
- Offset Equivalency Report for 2016-2017 submitted on November 17, 2017.
- Offset Equivalency Report for 2017-2018 submitted on November 16, 2018.
- Offset Equivalency Report for 2018-2019 submitted on November 18, 2019.

[13] Letter from Catherine Garoupa, et al. to Samir Sheikh, et al., July 14, 2022.

[14] *See* http://www.valleyair.org/busind/pto/annual_offset_report/annual_offset_report.htm (last visited on March 21, 2023).

- Offset Equivalency Report for 2019-2020 submitted on November 20, 2020; amended and resubmitted on January 5, 2021.
- Offset Equivalency Report for 2020-2021 submitted on November 19, 2021; amended and resubmitted on March 1, 2022.
- Offset Equivalency Report for 2021-2022 submitted on November 16, 2022.

VIOLATIONS OF AN EMISSION STANDARD OR LIMITATION.

The Equivalency System is an emission standard or limitation. As discussed above, EPA approved the December 19, 2002 amendments to Rule 2201 that added the Equivalency System and section 7 as part of the SIP. *See* 69 Fed. Reg. 27837 (May 17, 2004); 40 C.F.R. § 52.220(c)(311)(i)(B)(*1*). In 2010, EPA approved the December 18, 2008 amended version of Rule 2201 that added extreme ozone nonattainment NSR permitting thresholds and offset ratios, but effective upon EPA approval rather than District adoption. 75 Fed. Reg. 26102 (May 11, 2010) (effective June 10, 2010); 40 C.F.R. § 52.220(c)(363)(i)(A)(*5*). The most recent EPA-approved version of Rule 2201 in the SIP is that which the District adopted on April 21, 2011. 79 Fed. Reg. 55637 (Sept. 17, 2014); 40 C.F.R. 52.220(c)(400)(i)(A)(*1*).

The Clean Air Act defines "emission standard or limitation under this chapter" to mean "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard" or "any other standard, limitation, or schedule established under any . . . applicable State implementation plan approved by the Administrator[.]" 42 U.S.C. § 7604(f)(1) and (4). Rule 2201 meets the definition of emission standard or limitation under the Act and thus may be enforced by citizen suit. Valley EJ Organizations allege the following violations of section 7 of Rule 2201:

1. **The Offset Equivalency Reports for 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, and 2018-2019 violate sections 7.2.1 and 7.2.2 because these reports rely on reductions from the Agricultural Internal Combustion Engine ("AG-ICE") program as additional creditable emission reductions.**

The Offset Equivalency Reports for 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, and 2018-2019 violate sections 7.2.1 and 7.2.2 because these reports rely on, and carry forward, reductions from AG-ICE projects.

The Offset Equivalency Report for 2008 claimed 1,210.7 tons per year of NOx reductions from 919 projects in the AG-ICE program. ERC Report at 48-49. By the 2018-2019 report, those additional reductions had been used as additional creditable emission reductions to satisfy shortfalls, representing 77 percent of all NOx additional creditable emission reductions. *Id*. Because the Equivalency System allows for unused additional creditable emission reductions to carry-over for use in future years, each Offset Equivalency Report for 2007-2008, 2008-2009,

2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, and 2018-2019 relied on additional creditable emission reductions derived from the AG-ICE reductions and carried any unused credits forward from 2008. The 1,210.7 tons per year of NOx additional credits are not valid as additional creditable emission reductions and the reports filed violate sections 7.2.1 and 7.2.2 for several reasons:

- The reductions are not the result of permitting actions. Section 7.2.2.2 of Rule 2201 allows additional creditable emission reductions in limited circumstances, and those credits must derive from permitting actions. Ten AG-ICE projects evaluated in the ERC Report generating the claimed reductions did not involve permitting actions. ERC Report at 53. On that basis, Valley EJ Organizations allege all 919 projects did not involve permitting actions and are thus ineligible as sources of additional creditable emission reductions.

- The District claimed more reductions from the 919 AG-ICE projects than it should have when it claimed 1,210.7 tons per year of NOx reductions. The District did so by overestimating reductions using the wrong load factor. *See* ERC Report at 49-52. CARB calculates that the District over-valued the reductions by 35 percent or more. *See* ERC Report at 51.

- Some of the AG-ICE projects received Carl Moyer funding and, under California law, are not eligible as a source of emissions reduction credits to offset any emission reduction obligation. Health & Safety Code § 44281(b); ERC Report at 53.

- The reductions from AG-ICE are not creditable reductions for the purposes of section 7.2.2.2 because such reductions are not "permanent" as required by section 7.1.5 of Rule 2201. ERC Report at 54-55.

- On September 17, 2020, the District provisionally withdrew all AG-ICE emission reductions from the Equivalency System. *See* District Governing Board Action Summary Minutes, September 18, 2020 at 10. "As discussed above, all emission reductions from orphan shutdown projects, including agricultural engine electrification projects, have been provisionally removed from the District's offset equivalency system." 2020 Offset Equivalency Report at 12. The District has not corrected the Offset Equivalency Reports for 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, and 2017-2018 to remove the AG-ICE reductions that the District withdrew.

The District has thus violated an emission standard or limitation and continues to violate an emission standard or limitation. These violations of an emission standard or limitation are on-going.

2. **The Offset Equivalency Reports for 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, and 2018-2019 violate sections 7.2.1 and 7.2.2 because these reports rely on reductions from orphan shutdowns as additional creditable emission reductions.**

The Offset Equivalency Reports for 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, and 2018-2019 violate sections 7.2.1 and 7.2.2 because these reports rely on, and carry forward, reductions from orphan shutdowns.

In 2011, the District claimed 525.8 tons per year of VOC from orphan shutdown 2011-S-9990046-4884. From the 2010-2011 report and through to the 2017-2018 report, 320.7 tons had been used as additional creditable emission reductions and 205.7 tons had been carried over. ERC Report at 58. The ERC Report found that the actual emissions for this source had been zero since 2001, and that a Title V permit had capped allowable emissions at 50 tons per year, which allowed at best 25 tons as eligible for additional creditable emission reductions. ERC Report at 58. This project represents approximately 20 percent of total VOC credits claimed from orphan shutdowns.

In addition, the District provisionally withdrew all orphan shutdown credits on September 17, 2020. *See* District Governing Board Action Summary Minutes, September 18, 2020 at 10; 2020 Offset Equivalency Report at 12. Because the Equivalency System allows for unused additional creditable emission reductions to carry-over for use in future years, each Offset Equivalency Report for 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, and 2018-2019 have all relied on invalidated reductions derived from orphan shutdowns and carried forward unused reductions. The total amount of orphan shutdown reductions that the District removed from the Equivalency System total 396.3 tons per year of NOx and 2,539.6 tons per year of VOC. ERC Report at 48. The District has not corrected the Offset Equivalency Reports for 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, and 2018-2019 to remove orphan shutdown reductions the District withdrew.

The District has thus violated an emission standard or limitation and continues to violate an emission standard or limitation. These violations of an emission standard or limitation are on-going.

3. **The Offset Equivalency Reports for 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, and 2009-2010 violate sections 7.2.1 and 7.2.2 because these reports reflect incorrect Federal Offset Quantities when the District implemented Rule 2201 at the severe ozone nonattainment major source threshold and offset ratio rather than the extreme major source threshold and offset ratio.**

Upon EPA's approval of the Equivalency System in 2004, Rule 2201 implemented federal NSR at the severe ozone nonattainment area major source threshold of 25 tons per year of NOx and VOC with an offset ratio of 1.3:1. Rule 2201 §§ 3.25.1 and 3.5.3 (December 19, 2002

version). For District NSR, Rule 2201 required offsets at 10 tons per year for VOC and NOx. Rule 2201 § 4.5.3. The Federal Offset Quantity in Test 1 and 2 was lower in Offset Equivalency Reports for 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, and 2009-2010 than it would have been had the District implemented federal NSR at the extreme threshold of 10 tons per year of NOx and VOC and the offset ratio of 1.5:1. The District amended Rule 2201 to incorporate the extreme area requirements effective upon EPA approval on June 10, 2010.

Section 7.2.1 and 7.2.2 require the District to demonstrate the equivalency compared to the Federal Offset Quantity. The Offset Equivalency Reports for 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, and 2009-2010 violate sections 7.2.1 and 7.2.2 by reporting a Federal Offset Quantity in Test 1 and Test 2 based on the quantity of federal offsets required in a severe nonattainment area. EPA classified the District as an extreme ozone nonattainment area for the 1-hour standard and an extreme ozone nonattainment area for the 8-hour standard during this period. Under the Clean Air Act, the District was required to implement federal NSR as an extreme nonattainment area during this period. The Federal Offset Quantity in Test 1 and Test 2 should have thus reflected offset quantities required in an extreme nonattainment area.

- The District requested reclassification of the San Joaquin Valley from a severe to an extreme 1-hour ozone nonattainment area. EPA reclassified the District to an extreme area effective May 17, 2004 and required the District to submit amendments to Rule 2201 to incorporate extreme area requirements by May 16, 2005. 69 Fed. Reg. 20550 (April 16, 2004).

- Effective June 15, 2005, EPA revoked the 1-hour ozone standard and federal NSR permitting based on that standard. 69 Fed. Reg. 23951 (April 30, 2004). The D.C. Circuit Court of Appeals later vacated that revocation, holding that federal NSR based on the 1-hour ozone standard remained a control subject to the Clean Air Act's anti-backsliding provision. *South Coast Air Quality Management District v. EPA*, 472 F.3d 882, 900-902 (D.C. Cir. 2006).

- Prior to the June 15, 2005 1-hour ozone standard revocation that the D.C. Circuit later vacated, EPA required federal NSR permitting as an extreme area during the transition from the 1-hour to the 1997 8-hour ozone standard. EPA explained that in the transition to the 8-hour ozone standard, NSR permitting under the 1-hour standard would apply if the area had the higher classification under the 1-hour standard. 70 Fed. Reg. 71612, 71682-71683 (Nov. 29, 2005). Such was the case in the San Joaquin Valley. In 2004, EPA designated the Valley as a serious nonattainment area for the 1997 8-hour ozone standard, established 2013 as the attainment year, and made that effective on June 15, 2004. *See* 69 Fed. Reg. 23858, 23888-89 (April 30, 2004). Under these circumstances, EPA interpreted 40 C.F.R. § 52.24(k) to apply extreme ozone NSR requirements to the Valley effective June 15, 2004. 70 Fed. Reg. 71612, 71682-71683 (Nov. 29, 2005).

- In the same rulemaking in which EPA required federal NSR as an extreme area effective June 15, 2004, EPA also promulgated amendments to 40 C.F.R. § 52.24(k) and 40 C.F.R. pt. 51, Appendix S that include extreme nonattainment area requirements. 70 Fed. Reg. 71612, 71677 (Nov. 29, 2005). Section 52.24(k) and Appendix S require federal NSR in the Valley as an extreme area between the date EPA designates the Valley as nonattainment and the date when EPA approves the state's NSR program.

The 1-hour ozone standard reclassification of the Valley to extreme in 2004, the 1997 8-hour ozone standard phase 2 transition rule that required federal NSR as an extreme area in the Valley beginning in 2004, the D.C. Circuit decision in *South Coast* that vacated the revocation of federal NSR for an extreme 1-hour ozone area, and the applicability of Appendix S prior to the June 10, 2010 effective date of an amended Rule 2201 all support Valley EJ Organizations' allegation of the violation of an emission standard or limitation. Federal NSR required the district to permit sources as an extreme ozone nonattainment area between 2004 and 2010, and the District submitted Offset Equivalency Reports for the years 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, and 2009-2010 with a lower Federal Offset Quantity than what federal law required. As a result, these reports violate sections 7.2.1 and 7.2.2.

The ERC Report describes the benefit the District secured by violating sections 7.2.1 and 7.2.2 between 2004 and 2010:

> At the same time, the District's NSR program, once significantly more stringent than federal requirements no longer is for NOx and VOC because of the District's reclassification to extreme non-attainment status for ozone in 2010. Prior to [the 2010] reclassification, the District's offsets thresholds for major sources were below the federal offset threshold and therefore the District required a greater use of offsets to mitigate emissions increases than what was federally required. However, upon reclassification, the District's offset threshold was no longer lower than the federally required threshold, which created a situation in which more offsets are generally required for major sources under federal requirements than under district rules.

CARB ERC Report at 21. The District also describes the benefit the District secured by violating sections 7.2.1 and 7.2.2 between 2004 and 2010:

> It is important to note that the lower thresholds for new major sources and the significance thresholds for federal major modifications that would be proposed under an 8-hour extreme rule would make it more difficult to demonstrate the District's annual offset equivalency as required by Section 7 of Rule 2201. For instance, some of the "extra" offsets that we have traditionally relied on to demonstrate equivalency have come from the minor source offsetting of sources permitted at more than 10 tons per year of VOC or NOx, while federal surplus offsets would only have been required for 25 ton and greater sources. Since we

> now must lower the federal offsetting level to 10 tons per year, these "extra" district offsets largely disappear. Similarly, the necessitated change to federal offset ratios may also eliminate some "extra" District offsets that we have traditionally relied on to demonstrate equivalency.

Final Staff Report for Rules 2201 and 2530 at 8 (December 18, 2008).

The Federal Offset Quantity data in Test 1 and Test 2 of the Offset Equivalency Reports for 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, and 2009-2010 have a cumulative effect. The Equivalency System allows additional creditable emission reductions to satisfy any shortfall in either Test 1 or Test 2 as authorized by sections 7.2.2.2 and 7.4.1.1. Rule 2201 allows the Equivalency System to carry-over any unused additional creditable emission reductions to future years. *See* Rule 2201 § 7.2.2.2.4. With a correct, higher Federal Offset Quantity, any shortfalls in Test 1 or Test 2 would necessitate greater amounts of additional creditable emission reductions in a given year, and thus limiting the amount available for carry-over into future years.

The District has thus violated an emission standard or limitation and continues to violate an emission standard or limitation. These violations of an emission standard or limitation are on-going.

4. **The Offset Equivalency Reports for 2010-2011, 2011-2012, 2012-2013, and 2013-2014 violate sections 7.2.1 and 7.2.2 because these reports reflect incorrect Federal Offset Quantities when the District failed to use the extreme ozone nonattainment area offset ratio.**

The District has admitted that it used the wrong Federal Offset Quantity in the 2010-2011, 2011-2012, 2012-2013, and 2013-2014 Offset Equivalency Reports and has thus violated sections 7.2.1 and 7.2.2. "The District determined that an adjustment was necessary to correct an issue affecting NOx and VOC for tracked federal projects during the period starting August 20, 2010, and ending August 19, 2014. Specifically, the appropriate extreme non-attainment federal offset ratio of 1.5 to 1 for NOx and VOC was not applied during this period." 2020 Offset Equivalency Report at 10. This had the effect of lowering the Federal Offset Quantity in Test 1 and Test 2. This also had the effect of requiring less additional creditable emission reductions to compensate for shortfalls than would have been the case had the District applied the correct ratio. As discussed above, the erroneous and low Federal Offset Quantity amounts in the 2010-2011, 2011-2012, 2012-2013, and 2013-2014 reports have a cumulative effect in future years.

The District has thus violated an emission standard or limitation and continues to violate an emission standard or limitation. These violations of an emission standard or limitation are on-going.

5. **The District violated sections 7.4.1.3 and 7.4.2.3 by failing to implement the automatic remedies for submitting annual reports that do not comply with sections 7.2.1 and 7.2.2.**

Valley EJ Organizations have alleged above that the District violated the Equivalency System when it relied on invalid reductions from the AG-ICE program and orphan shutdowns. Following the ERC Report, the District provisionally withdrew all AG-ICE program and orphan shutdown reductions. *See* Violations of an Emission Standard or Limitation #1 and #2, *supra*. Shortly after withdrawing those reductions, the District conceded Equivalency System failure for NOx and VOC in the Offset Equivalency Report for 2019-2020. For Test 1, the District disclosed a VOC shortfall of over 2,000 tons per year. For Test 2, the District failed to disclose the NOx and VOC shortfalls. The revised Offset Equivalency Report for 2020-2021 admitted a Test 1 shortfall for NOx, and failed to disclose that shortfall.

Moreover, Valley EJ Organizations have alleged above that the District violated the Equivalency System when it generated the Federal Offset Quantity based on federal NSR permitting for a severe ozone nonattainment area instead of an extreme area. *See* Violations of an Emission Standard or Limitation #3 and #4, *supra*.

If the District submits annual reports that do not comply with sections 7.2.1 and 7.2.2, the District has a duty to implement automatic remedies until it has submitted corrected reports. Rule 2201 §§ 7.4.1.3 and 7.4.2.3. Because of the invalidity of AG-ICE and orphan shutdown reductions, and the District's provisional withdrawal of those reductions, the Offset Equivalency Reports for 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, and 2018-2019 that relied on such reductions violate sections 7.2.1 and 7.2.2. Furthermore, because of the incorrect Federal Offset Quantity in Test 1 and Test 2, the Offset Equivalency Reports for 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, and 2013-2014 that violate sections 7.2.1 and 7.2.2. By submitting reports that violate sections 7.2.1 and 7.2.2, the reports trigger the automatic remedies in sections 7.4.1.3 and 7.4.2.3. The District has failed to implement those automatic remedies or submit corrected reports, and thus violates 7.4.1.3 and 7.4.2.3 of Rule 2201.

The District has thus violated an emission standard or limitation and continues to violate an emission standard or limitation. These violations of an emission standard or limitation are on-going.

6. **The District violated sections 7.4.1.2 and 7.4.2.1 by failing to implement the automatic remedies for failure to demonstrate equivalency for VOC and NOx.**

The District's failure to demonstrate equivalency in the 2019-2020 and 2020-2021 reports necessarily means equivalency failure occurred in reporting periods prior to those reports. For several years, the District's use of reductions from AG-ICE projects and orphan shutdowns

allowed the District to improperly claim equivalency. *See* Violations of an Emission Standard or Limitation #1 and #2, *supra*. Moreover, the District used incorrect Federal Offset Quantity data in Tests 1 and 2 for several years. *See* Violations of an Emission Standard or Limitation #3 and #4, *supra*. Data showing the reporting period at which time equivalency failure first occurred is within the exclusive possession and control of the District. Therefore, Valley EJ Organizations allege that the District failed to demonstrate equivalency during a reporting period on or after the 2003-2004 reporting period and the District thus violated Rule 2201 for that reporting period and each subsequent reporting period through the 2019-2020 reporting period when it failed to implement the automatic remedies required by sections 7.4.1.2 and 7.4.2.1.

The District has thus violated an emission standard or limitation and continues to violate an emission standard or limitation. These violations of an emission standard or limitation are on-going.

7. The Offset Equivalency Reports for 2019-2020, 2020-2021, and 2021-2022 violate sections 7.2.1 and 7.2.2 because the reports do not disclose Test 1 and Test 2 results.

The District conceded Equivalency System failure for NOx and VOC in the Offset Equivalency Report for 2019-2020. For Test 2, the District failed to disclose the NOx and VOC shortfalls.

The revised Offset Equivalency Report for 2020-2021 admitted a Test 1 shortfall for NOx, and failed to disclose that shortfall. The District failed to perform Test 1 for VOC and failed to disclose shortfalls. The District failed to perform Test 2 for NOx and VOC and failed to disclose shortfalls.

The Offset Equivalency Report for 2021-2022 omitted Test 1 and Test 2 for NOx and VOC and failed to disclose shortfalls.

The Offset Equivalency Report for 2019-2020 violates section 7.2.2 because it fails to disclose the NOx and VOC shortfalls. The Offset Equivalency Reports for 2020-2021 and 2021-2022 violate sections 7.2.1 and 7.2.2 because the reports fail to perform Test 1 and Test 2 for NOx and VOC and fail to disclose shortfalls.

The District has thus violated an emission standard or limitation and continues to violate an emission standard or limitation. These violations of an emission standard or limitation are on-going.

PERSONS RESPONSIBLE FOR THE VIOLATION OF AN EMISSION STANDARD OR LIMITATION.

The San Joaquin Valley Unified Air Pollution Control District and the Governing Board of the San Joaquin Valley Unified Air Pollution Control District are the persons responsible for the violations of Rule 2201 alleged above.

IDENTITIES OF NOTICING PARTIES

Committee for a Better Arvin
Estela Escoto
1241 Bear Mountain Blvd., Suite C
Arvin, CA 93203
Telephone: (559) 272-4874 x15
Email: arvintaxpro@gmail.com

Delano Guardians
Gloria Herrera
1012 Jefferson Street
Delano, CA 93215
Telephone: (661) 229-9751
Email: gloriaherrera297@gmail.com

Committee for a Better Shafter
Anabel Marquez
209 Golden West Ave.
Shafter CA, 93263
Telephone: (661) 746-0408
Email: mariaanabelmarquez54@gmail.com

Central Valley Air Quality Coalition
Catherine Garoupa
4991 E McKinley Ave, Suite 109
Fresno, CA 93727
Telephone: (661) 229-9751
Email: catherine@calcleanair.org

Social and Environmental Entrepreneurs (SEE), Inc.
Jennifer Hoffman
23564 Calabasas Road, Suite 201
Calabasas, CA 91302
Telephone: (818) 225-9150
Email: jennifer@saveourplanet.org

ATTORNEYS FOR NOTICING PARTIES

Brent Newell
Law Offices of Brent J. Newell
245 Kentucky Street, Suite A4
Petaluma, CA 94952
Telephone: (661) 586-3724
Email: brentjnewell@outlook.com

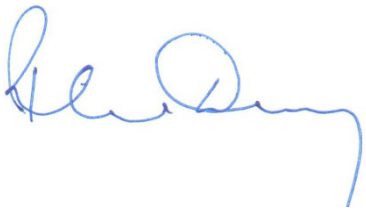
Richard T. Drury
Lozeau | Drury LLP
1939 Harrison Street, Suite 150
Oakland, CA 94612
Telephone: (510) 836-4200
Email: richard@lozeaudrury.com

Grecia Orozco
Center on Race, Poverty & the Environment
1012 Jefferson Street
Delano, CA 93215
Telephone: (562) 659-5314
Email: gorozco@crpe-ej.org

CONCLUSION

Following the 60-day period, Valley EJ Organizations will file suit in U.S. District Court to compel the District to comply with Rule 2201. If you wish to discuss this matter short of litigation, please direct all future correspondence to Valley EJ Organizations' attorneys.

Sincerely,



Brent Newell Richard Drury

Grecia Orozco

cc: By Certified Mail, Return Receipt Requested

Governor Gavin Newsom
1021 O Street, Suite 9000
Sacramento, CA 95814

Michael Regan, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Mail Code 1101A
Washington, D.C. 20460

Martha Guzman, Regional Administrator
U.S. Environmental Protection Agency Region 9
75 Hawthorne Street
Mail Code ORA-1
San Francisco, CA 94105

Liane M. Randolph, Chair
California Air Resources Board
P.O. Box 2815
Sacramento, CA 95812

Steven Cliff, Executive Officer
California Air Resources Board
P.O. Box 2815
Sacramento, CA 95812