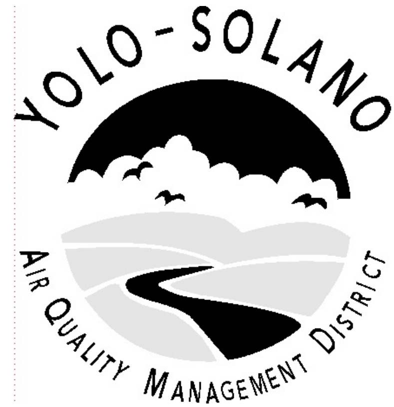
Yolo-Solano Air Quality Management District
1947 Galileo Court, Suite 103
Davis, CA 95618
(530)757-3650
www.ysaqmd.org



PROPOSED ADOPTION OF RULE 3.22, INDEMNIFICATION OF DISTRICT

FINAL STAFF REPORT

July 29, 2009

Prepared by: Tiffany Lathrop, Associate Air Quality Planner
tlathrop@ysaqmd.org

Reviewed by: Matthew R. Jones, Supervising Air Quality Planner
mjones@ysaqmd.org

Table of Contents — Page

I. EXECUTIVE SUMMARY 1

II. DISCUSSION OF PROPOSED RULE 3.22 REQUIREMENTS 1

III. COMPARISON TO OTHER APPLICABLE REGULATIONS AND REQUIREMENTS . . 3

IV. IMPACTS OF THE PROPOSED RULE 3

V. ENVIRONMENTAL IMPACTS OF METHODS OF COMPLIANCE 4

VI. REGULATORY FINDINGS 4

VII. PUBLIC COMMENTS AND STAFF RESPONSES 5

VIII. REFERENCES 7

ATTACHMENT A PROPOSED RULE 3.22, INDEMNIFICATION OF DISTRICT

ATTACHMENT B NOTICE OF EXEMPTION FROM CEQA GUIDELINES

ATTACHMENT C RESOLUTION NO. 09-09

ATTACHMENT D WRITTEN COMMENTS RECEIVED

I. EXECUTIVE SUMMARY

On June 10th, 2009, the Yolo-Solano Air Quality Management District (District) Board of Directors will consider the adoption of proposed Rule 3.22, Indemnification of District. Rule 3.22 is being developed in order to include an indemnification clause in the District's Rules and Regulations.

Air Quality Management Districts in California have been faced with legal challenges as a result of the issuance or denial of construction and operating permits. At present, the costs to defend claims and lawsuits would be borne by the District. This would require the District to spend public resources to defend a permit action that materially benefits the permit holder. District staff believes that it is more appropriate to have these costs borne by the permit holder.

Many public agencies in California require a permit holder or applicant to enter into an agreement through which the applicant agrees to bear the costs associated with defending the permit approval in court. The State Attorney General released a legal opinion (01-701) that supports the adoption of an indemnification clause. Indemnification provisions are currently in place in the South Coast Air Quality Management District (SCAQMD), San Diego County Air Pollution Control District (SDCAPCD), Butte County Air Quality Management District (BCAQMD), Placer County Air Pollution Control District (PCAPCD), and Tehama County Air Pollution Control District (TCAPCD).

II. DISCUSSION OF PROPOSED RULE 3.22 REQUIREMENTS

Listed below are descriptions of the proposed requirements for Rule 3.22, Indemnification of District:

Section 101 - Purpose: The purpose of this rule is to provide an administrative mechanism which requires indemnification of the District when a third party challenges the issuance of a permit/registration or the manner in which the District is interpreting or enforcing the terms and conditions of a permit/registration.

Section 102 - Applicability: The rule will apply to all District permit/registration applicants and all permit/registration holders.

Section 200 - Definitions: The rule proposes to define a total of two (2) terms in order to adequately describe all aspects of the rule and its requirements.

Section 300 Requirements
This section describes the actions the District will take in response to the receipt of a legal notice, petition, or complaint and also the terms/requirements for the permit holder/applicant in response to the legal notice, petition, or complaint. Specifically:

Section 301 - Notification: Requires the District to notify the permit holder/applicant in writing within 10 days of the receipt of a legal notice, petition, or complaint by a

third party.

Section 302 - Response to Notification: Describes the actions that the permit holder/applicant shall take in response to the District's notification. Within 30 days of the notification, the permit holder/applicant can either request cancellation of the application or revocation of the permit or, negotiate and sign an indemnity agreement with the District in accordance with Section 304 or, file an appeal in accordance with Section 306.

Section 303 - Failure to Act: States that a permit applicant/holder who fails to comply with Section 302 shall be deemed non-compliant and the application shall be subject to cancellation or the permit subject to revocation pursuant to Section 308, and the permit applicant/holder will be responsible for reimbursement to the District for all reasonable and necessary costs to defend from legal challenge the action of the District taken in relation to the application or permit, except as may be provided in an appeal approved by the District's Governing Board in accordance with Section 306.

Section 304 - Indemnity Agreement: An indemnity agreement shall include and not be limited to court cost payments, attorney fees, judgement costs, awards against the District, damages, or settlement costs.

Section 305 - Security: Describes that on a case sensitive basis, the Air Pollution Control Officer (APCO) may require security from the applicant or permit/registration holder in a form to be determined by the APCO.

Section 306 - Appeal: States that if the permit applicant/holder disagrees with the requirement to negotiate and sign an indemnity agreement, or any portion of the indemnity agreement, they may appeal to the District's Governing Board within 30 days of receiving the District's notification. Action on the application/permit will be suspended pending a decision by the Governing Board on the appeal.

Section 307 - Remedies: States that when a court action results in a ruling for the plaintiff (petitioner), the applicant or permit holder shall have the right to file a claim against the District for contribution of the portion of fault caused by the willful misconduct of the District.

Section 308 - Cancellation or Revocation: States that the District can cancel an application or revoke a permit for non-compliance pursuant to the sections included in the proposed rule or applicable state or federal air pollution control laws. For Permits to Operate, the District will request revocation which will be presented to the District's Hearing Board similar to an order of abatement.

Section 309 - Notice to Applicants: States that the notification of the indemnification requirement will be used by the District on all forms that are used by applicants to apply for or renew permits/registrations.

III. COMPARISON WITH OTHER APPLICABLE REGULATIONS AND REQUIREMENTS

California Health and Safety Code (CH&SC) Section 40727.2 requires districts to perform a comparative alternate analysis of any new control standard. Since there are no new control standards being proposed with this rule, this analysis can not be performed.

IV. IMPACTS OF THE PROPOSED RULE

Emissions Impacts

Proposed Rule 3.22 establishes a requirement for an indemnification agreement by permit applicants/holders who are given District notification that a third party legal notice, petition, or complaint has been filed. The proposed rule does not implement any control measure and therefore will not result in emission impacts.

Cost Effectiveness

Section 40703 of the CH&SC requires that the District consider and make public, its findings related to the cost effectiveness of implementing an emission control measure.

Since the proposed rule does not establish emission control measures, a cost effectiveness evaluation is not applicable. There is no cost to the District for implementing the rule. The District will observe potential long term cost savings associated with the adoption of the proposed rule.

Socioeconomic Impacts

CH&SC Section 40728.5 (a) requires the District, in the process of the adoption of any rule or regulation, to consider the socioeconomic impact if air quality or emission limits may be significantly affected. However, districts with a population of less than 500,000 persons are exempt from the provisions of Section 40728.5 (a).

The District's population is estimated to be approximately 300,000 and well below the 500,000 person threshold. Therefore, a socioeconomic analysis for this rule-making is not required. Additionally, there are no emission benefits created through adoption and implementation of the proposed rule, therefore, a socioeconomic impact is not applicable.

Incremental Cost Effectiveness

CH&SC Section 40920.6 requires an assessment of the incremental cost-effectiveness for proposed regulations relative to ozone, Carbon Monoxide (CO), Sulfur Oxides (SOx), Nitrogen Oxides (NOx), and their precursors. Incremental cost-effectiveness is defined as the difference in control costs divided by the difference in emission reductions between two potential control options that can achieve the same emission reduction goal of a regulation.

Since the proposed rule does not establish emission control measures, an incremental cost effectiveness evaluation is not applicable.

Impacts to the District

Since the proposed rule does not establish emission control measures and will be used for administrative purposes, there is no foreseen adverse impact to the District. There is no cost to the District for implementing the rule. The District will observe potential long term cost savings associated with the adoption of the proposed rule.

V. ENVIRONMENTAL IMPACTS OF METHODS OF COMPLIANCE

California Public Resource Code Section 21159 requires the District to perform an environmental analysis of the reasonably foreseeable methods of compliance when adopting a rule or regulation requiring the installation of pollution control equipment. As stated, this proposed rule is an administrative rule, therefore an analysis is not applicable.

Staff has determined that the project is categorically exempt from the requirements of the CEQA pursuant to Section 15308, Actions by Regulatory Agencies for Protection of the Environment. Staff prepared a Notice of Exemption (NOE) to meet the CEQA Guidelines (Attachment B).

VI. REGULATORY FINDINGS

Section 40727(a) of the CH&SC requires that prior to adopting or amending a rule or regulation, an air district's board make findings of necessity, authority, clarity, consistency, non-duplication, and reference. The findings must be based on the following:

1. Information presented in the District's written analysis, prepared pursuant to CH&SC Section 40727.2;
2. Information contained in the rule-making records pursuant to CH&SC Section 40728; and
3. Relevant information presented at the Board's hearing for adoption of the rule.

The required findings are:

Necessity: The proposed rule is necessary in order to meet the requirements of California Code of Regulations, Title 17, section 93115.

Authority: The District is authorized to adopt rules and regulations by CH&SC, Sections 40001, 40702, 40716, 41010 and 41013. (CH&SC Section 40727 (b)(2)).

Clarity: District staff has reviewed the proposed rule and determined that it can be easily understood by the affected industry. In addition, the record contains no evidence that the persons directly affected by the rule cannot understand the rule. (CH&SC Section 40727(b)(3)).

Consistency: The proposed rule does not conflict with and is not contradictory to, existing

statutes, court decisions, or state or federal regulations. (CH&SC Section 40727(b)(4)).

Non-Duplication: The proposed rule does not duplicate any state laws or regulations, regarding the attainment and maintenance of state and federal air quality limits. (CH&SC Section 40727(b)(5)).

Reference: This rule incorporates provisions of the CH&SC. (CH&SC Section 40727(b)(6)).

VII. PUBLIC COMMENTS AND STAFF RESPONSES

Staff held a public workshop on April 9th, 2009, to discuss the proposed adoption of Rule 3.22. Notification was sent to surrounding Air Districts, City Managers within the District, building/planning/community development departments within the District, all city and county libraries within the District, all Board members, and all permit/registration holders. The workshop notice was also published in the local newspapers. A copy of the public workshop notice, the draft staff report, and draft rule language was posted on the District's web page. The workshop was attended by three members of the public.

The 30-day public comment period was opened on April 23rd, 2009. Public comments received on the proposed rule are included in Attachment D.

Below, District staff will attempt to summarize the comments received during the public process and responses to each of those comments are included below:

C1. Eddie Woodruff, Paul Graham Drilling and Service Company
The proposed rule places an unfair shift of responsibility from the District to the permit holder. The proposed rule would allow the District to walk away from its decision and place all responsibility in the hands of the permit holder. The only recourse that exists for the permit holder is the decision to withdraw or cancel the permit or sign the indemnity agreement. The proposed rule also does not include a time limitation under which a permit could be challenged by a third party.

R1. It is the position of District staff that the rule does not shift unfair responsibility to the permit holder. The requirement of an indemnification agreement means that the District would stand behind, and be responsible for the consequences of its own work, but would not be drawn into a dispute between the applicant and third parties. An appeals and remedies process was incorporated into the proposed rule language to allow permit holders to negotiate the terms of the indemnification agreement, as well as the provisions for which a permit holder may file a claim against the District for its contribution due to willful misconduct.

C2. Eddie Woodruff, Paul Graham Drilling and Service Company.
It is suggested that in lieu of adopting the indemnification requirement, the District could instead financially plan for a budget reserve account from which, funds could be used to address litigious acts brought before the District. Additionally, the District could collectively band with other air districts in seeking a legislative act that would protect air districts during legal challenges or perhaps purchase a joint group

insurance offering similar protection from legal challenges.

R2. The District currently participates in the Yolo County Public Agency Risk Management Insurance Authority (YCPARMIA) for insurance coverage. YCPARMIA would be responsible for responding to and acting in collaboration with the District during cases of legal challenge. Therefore, the subsequent purchase of joint group insurance or lobbying for a legislative act are not warranted.

C3. Jack Rice, Tim Miramontes, and Joe Martinez, California Farm Bureau Federation - Associate Counsel, Yolo California Farm Bureau and Solano California Farm Bureau.

The Farm Bureau is concerned that the proposed rule places a significant liability risk on farmers for actions under which they have no control. In obtaining an agricultural registration, the farmer is fulfilling a ministerial act required by state law or District regulation, whereas, when an authority to construct permit is issued by the District, the conditions under which that permit are issued, are negotiable. The appeals process does provide an opportunity for a permittee/registrant to appeal to the Governing Board to not be required to sign an indemnification agreement, however, approval of the appeal is not guaranteed.

A possible solution offered by the CFBF is to narrow the indemnification obligation so a permittee/registrant is only liable for issues over which the permittee/registrant has control which could be accomplished by changing the rule language to incorporate this concept.

Additionally, the CFBF suggested that the proposed rule include an administrative process for a waiver which would allow applicants the opportunity to be relieved of the indemnification requirement up front rather than going through the appeals process.

R3. The District was interested in working with the CFBF and asked if the CFBF could devise proposed rule language incorporating their suggestions/comments for District review. The CFBF did forward proposed rule language and District staff met with CFBF to discuss the proposed changes. After meeting with representatives of the CFBF, the District conceded to the CFBF's request to remove applicability of the rule to registration holders since the registration process is ministerial in nature. However, District staff decided not to include the waiver provision proposed by the CFBF to allow the Governing Board full discretion as to those individuals whom would be granted an appeal or not.

C4. Christopher Valadez, Calfornia Grape and Tree Fruit League
The League stated that the proposed rule unfairly holds farmers responsible for actions for which they have no control over. Their position is that the farmer, or permit holder, obtains a permit for an operation in compliance with the District permit and conditions set forth under said District permit. The League suggested that if concern arises from a permit or permit activity, those issues should be

addressed outside of the rule-making process.

R4. The District does not agree with the statement that the proposed rule would unfairly hold farmers responsible for actions for which they have no control. The permit applicant/holder, or farmer in this case, has actively chosen to operate a business, which makes it a liable party. Although the District is responsible for protecting public health with regards to air pollution impacts and applies federal and state regulations to ultimately develop and enforce conditions of operating permits, the District's issuance of a permit does not recuse the permit holder from liability due to its choice to conduct business. District staff acknowledges that concerns that arise as a result of a permit/permit activity should be addressed at the time of permit issuance. This rule making process would apply to all permit applicants/holders, not to selected permits or sources, hence the rule-making process is the appropriate means for establishing the District regulation.

C5. Gary Tatum, Vacaville Chamber of Commerce
The letter submitted by the Chamber was written on behalf of the Solano County Farm Bureau and commented in support of the proposed solutions offered by the California Farm Bureau Federation. Additionally, the letter positioned that the Chamber actively fights for lessening governmental burdens placed on the business community and states that the proposed rule could have a substantial negative impact on the agricultural community.

R5. The District has been in active communication with the California Farm Bureau Federation regarding the concerns of the Yolo County and Solano County Farm Bureaus. District staff decided not to include the indemnification requirement of District registrations. Conversely, the District does not feel that the proposed rule could have substantial negative impacts on the agricultural community and in many ways protects individuals whom operate in the District by requiring the permit holder to bare the costs of potential litigious actions opposed to having all of the permit holders bare the costs though implementation of increased permit fees which would be necessary to cover the District costs to defend against the legal claim.

VIII. REFERENCES

1. Butte County Air Quality Management District, Rule 513, May 24, 2007.

2. Office of the Attorney General, Opinion No. 01-701, February 4, 2002.

3. Placer County Air Pollution Control District, Rule 411 Indemnification of District, February 14, 2008.

ATTACHMENT A

PROPOSED RULE 3.22, INDEMNIFICATION OF DISTRICT

ATTACHMENT B

NOTICE OF EXEMPTION FROM CEQA GUIDELINES

ATTACHMENT C

RESOLUTION NO. 09-09

ATTACHMENT D

WRITTEN COMMENTS RECEIVED