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June 7, 2019

VIA ELECTRONIC MAIL ONLY

Clerk of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Proposed Modifications to the Regulation for the Reporting of Criteria Air Pollutants and Toxic Air Contaminants

Dear Clerk of the Board:

On behalf of an unincorporated association of industrial members, we write in response to the California Air Resources Board's ("Board") proposed modifications to the Regulation for the Reporting of Criteria Air Pollutants and Toxic Air Contaminants ("Proposed Modifications").

We have carefully reviewed the Proposed Modifications and have concluded that they violate the Administrative Procedure Act (Gov. Code § 11340 *et seq.* [the "Act"]). As discussed below, the Proposed Modifications: (1) exceed the scope of authority conferred by statute and/or are inconsistent and conflict with the statutes that the Board purports to implement; (2) contain significant changes that require notice and a new public hearing; and (3) rely on an inadequate economic analysis. We respectfully request that the Board abandon the Proposed Modifications and restart the rulemaking process in compliance with the Act.

1. The Proposed Modifications exceed the scope of authority conferred by, and/or conflict with, AB 617 and AB 197 in violation of the Act.

A state agency does not have independent authority to adopt, administer, or enforce administrative regulations. Authority to adopt, administer, or enforce regulations must be conferred upon the state agency. When that authority has been conferred, the Act requires that "[e]ach regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." (Gov. Code § 11342.1. see also *County of Los Angeles v. State Department of Public Health* (1958) 158 Cal.App.2d 425 [holding that an agency must confine itself to reasonable interpretation in adopting regulations for administration of its governing statute].)

Even when a regulation is within the scope of the statute granting authority, "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (*Id.* at § 11342.2; see also *San Diego Nursery Co. v. Agricultural Labor Relations Board* (1979) 100 Cal.App.3d 128.)

Here, the Board's Proposed Modifications exceed the scope of authority conferred by the Health and Safety Code as respects the applicability of criteria pollutant and toxic air contaminant reporting requirements under Assembly Bill 617 ("AB 617"). The Proposed Modifications are also inconsistent with the purposes of AB 617.

AB 617 added and amended sections of the California Health and Safety Code relating to nonvehicular air pollution. AB 617 requires, among other provisions, the Board to establish a uniform reporting system for "stationary sources" to report emissions of criteria pollutants and toxic air contaminants. (Health and Safety Code, § 39607.1(b)(1).) AB 617 defines "stationary source" as facilities: (1) generating more than 25,000 MTCO2e annually; (2) authorized by permit to emit 250 tons or more of any nonattainment pollutant or its precursors annually; or (3) receiving an elevated prioritization score from a local air district based on cancer and noncancer health impacts. (See *id*. at § 39607.1(a)(2).) This definition of stationary source, consistent with the intent of AB 617, focuses on large stationary sources such as refineries, oil and gas production facilities, and glass manufacturing facilities.

In accordance with Health and Safety Code section 39607.1, the Board proposed regulations to establish the reporting system for stationary sources. The original draft regulations were generally consistent with AB 617's applicability requirements. The draft regulations did, however, require permitted facilities located within a designated disadvantaged community to report their emissions, beyond the definition of "stationary source" in Government Code section 39607.1(a)(2). (Draft Regulations, § 93401(a)(4)[as originally proposed].)

On December 14, 2018, the Board directed staff to make the Proposed Modifications. Relevant here, the Proposed Modifications expand the applicability of the annual reporting requirements beyond the definition of "stationary sources" in AB 617.

The Proposed Modifications add an additional applicability factor that, in effect, requires statewide reporting compliance from a wide range of sources, not just major "stationary sources" identified in AB 617. Specifically, the Proposed Modifications would require the following facilities to report under the new program:

> A facility with one or more permits to operate issued by an air district with actual emissions or activity levels of greater than or equal to any of the thresholds specified in (A) through (C) below, within a data year.
>
> (A) 4 or more tpy of any criteria air pollutant (except for carbon monoxide)
>
> (B) 100 or more tpy of carbon monoxide.
>
> (C) Activity levels published in Appendix A, Table A-3 for a permitted emissions process at a facility classified with a matching primary or secondary Standard Industrial Classification (SIC) code or North American Industry Classification System (NAICS) code listed for the permitted emissions process. If the SIC or NAICS codes have a designation of "Any" in Table A-3 for a permitted process, then reporting

> for the process is required regardless of the SIC or NAICS designation for the facility performing the process, if the listed activity level reporting threshold is exceeded.

(Proposed Modifications, § 93401.)

The Board's Proposed Modifications are blatantly outside the scope of the sources required to report their annual emissions under Health and Safety Code section 39607.1. The Health and Safety Code provides a precise definition of the "stationary sources" required to report, yet the Board's Proposed Modifications disregards the carefully debated and approved limits on the definition.[1]

Even if the Health and Safety Code did not expressly define "stationary source," the Board's expansive definition is inconsistent and conflicts with the purposes of AB 617 as a whole, which is intended to regulate major stationary sources and facilities in high risk communities—not statewide air emissions. Accordingly, the Board's Proposed Modifications exceed the scope of, and are inconsistent with AB 617, and, therefore, do not comply with the Act. (Government Code §§ 11342.1, 11342.2.)[2]

In addition, nothing in Assembly Bill 197 ("AB 197") gives the Board authority to adopt the Proposed Modifications as respects the expanded applicability criteria. AB 197, among other provisions, simply requires the Board to make available to the public greenhouse gas, criteria pollutant, and toxic air contaminant emissions that are already reported to the Board. (Health and Safety Code, § 38531(a).) Nothing in AB 197 requires, or even contemplates, new annual reporting requirements in addition to those mandated by AB 617. Accordingly, the Proposed Modifications are also outside the scope of AB 197.

2. The Proposed Modifications contain significant changes that require a public hearing.

The Act prohibits state agencies from approving significant changes to draft regulations without notice and a public hearing.

> No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation. Any written comments

[1] The Board's own economic impact summary estimates an additional 48,700 sources would be required to report under the Proposed Modifications.

[2] We note that certain air districts are also concerned by the Proposed Modifications' expanded applicability criteria. As noted by the South Coast Air Quality Management District, "[w]hile some elements are mandated, such as development of a uniform statewide system of annual reporting of emissions of criteria pollutants and toxic air contaminants, **the most concerning elements proposed are not required under statute.**" (Letter from the South Coast Air Quality management District to David Edwards, dated March 29, 2019., attached as **Exhibit 1** [emphasis added].)

> received regarding the change must be responded to in the final statement of reasons required by Section 11346.9.

(Government Code, § 11346.8(c).)

The Act requires public notice of at least 45 days prior to the close of the public comment period and hearing date when acting on significant changes to previously published draft regulations. (See *id.* at 11346.4; see also *Californians for Safe Prescriptions v. California State Bd. of Pharmacy* (1993) 19 Cal.App.4th 1136, 1144-1146 [holding that an agency may rewrite regulations without complying with public hearing requirements unless the substantive provisions have been significantly changed].)

As discussed above, the Proposed Modifications add an additional applicability factor that requires reporting compliance from statewide sources, not just the major "stationary sources" identified in AB 617. These changes are not related to the original text of the proposed regulation and, therefore, the public was not given adequate notice that such changes could result. Board staff acknowledges just how substantial these changes are in its economic analysis, where it estimates 48,700 new facilities would be impacted, costing approximately $60 million more than the Board originally estimated over an eight-year period.

As previously discussed, the Proposed Modifications, as they relate to applicability, exceed the statutory grant of authority and are inconsistent with the purposes of AB 617. Given that the Proposed Modifications are not "nonsubstantial or solely grammatical in nature" the Board is prohibited from approving the Proposed Modifications without a new public hearing in accordance with Government Code section 11346.4.

3. The Revised Economic Impacts Summary Fails to Comply with the Act.

The Act requires state agencies to prepare an economic analysis of the potential adverse impact to California businesses and individuals prior to submitting a proposal to "adopt, amend, or repeal" a regulation. (Gov. Code, § 11346.3(a).) The Act requires one of two economic analyses, depending on whether the regulation is considered a "major regulation." (*Id.* at § 11346.3(a)(3).)

The Act defines "major regulation" as "any proposed adoption, amendment, or repeal of a regulation subject to review by the Office of Administrative Law … that will have an economic impact of California businesses enterprises and individuals in an amount exceeding fifty million dollars ($50,000,000), as estimated by the agency." (*Id.* at § 11342.548.)

Regulations that are not "major regulations" are required, as part of the regulation's initial statement of reasons ("ISOR"), to prepare a simple economic impact assessment that assesses whether and to what extent the regulation will affect the following:

(A) The creation or elimination of jobs within the state.
(B) The creation of new businesses or the elimination of existing businesses within the state.
(C) The expansion of businesses currently doing business within the state.

(D) The benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment.

(*Id.* at § 11346.3(b)(1)(A)-(D).)

By contrast, agencies proposing to enact "major regulations" are required to prepare a "standardized regulatory impact analysis in the manner prescribed by the Department of Finance" that addresses all of the following:

(A) The creation or elimination of jobs within the state.
(B) The creation of new businesses or the elimination of existing businesses within the state.
(C) The competitive advantages or disadvantages for businesses currently doing business within the state.
(D) The increase or decrease of investment in the state.
(E) The incentives for innovation in products, materials, or processes.
(F) The benefits of the regulations, including, but not limited to, benefits to the health, safety, and welfare of California's residents, worker safety, and the state's environment and quality of life, among any other benefits identified by the agency.

(*Id.* at 11346.3(c)(1)(A)-(F).)

The state agency must submit the standardized regulatory impact analysis to the Department of Finance for review and comment as to whether the analysis adheres to the Department's regulations. (*Id*. at § 11346.3(f).)

Failure to comply with the Act's economic impact assessment requirements may result in the invalidation of an otherwise properly promulgated regulation. (*California Association of Medical Product Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 306 ["*Maxwell-Jolly*"]; see also *Western States Petroleum Association v. Board of Equalization* (2013) 57 Cal.4th 401.) A court will declare a regulation invalid for "substantial failure" to comply with the Act's economic impact assessment requirements, which is defined as "*actual* compliance in respect to the substance essential to every reasonable objective of the statute." (*Maxwell-Jolly* at 307.)

The Board's ISOR for the proposed regulations, as originally drafted, estimated the total costs of implementation, affecting 14,680 individual facilities, at $10.5 million over a four-year period, and $20.1 million after an eight-year period. As discussed above, the Proposed Modifications would require, based on the Board's own estimates, an additional 48,700 facilities to comply with the reporting regulations. The Board's preliminary revised economic impacts summary thus estimates the Proposed Modifications would cost approximately $80.2 million over an eight-year period.

The Proposed Modifications increase the estimated cost of implementing the regulations over the $50 million threshold, triggering the economic impact analysis requirements for "major regulations." (Gov. Code §§ 11342.548, 11346.3(c)(1)(A)-(F).) There is no evidence the Board completed a standardized regulatory impact analysis for "major regulations" as a result of the Proposed

Modifications, or submitted that analysis to the Department of Finance for review and comment as required by the Act.

As discussed below and detailed memorandum attached as **Exhibit 2**, the Board's economic analysis is also deficient in that it: (1) lacks any evidence to support its claims; (2) uses cost estimates that are too low; and (3) fails to consider the cost to implement the three-year methodology under section 93403(c)(4).

First, "[m]ere speculative belief is not sufficient to support an agency declaration of its initial determination about economic impact, [an] agency must provide in the record any 'facts, evidence, documents, testimony, or other evidence' upon which it relies on for its initial determination." (*Maxwell-Jolly*, *supra*, 199 Cal.App.4th at 305-306, quoting Gov. Code, § 11346.5(a)(8).) Here, the Board's preliminary revised economic impacts summary fails to, among other things, provide any evidence that justifies the number of estimated facilitites to be affected. The economic analysis also fails to provide evidence of any hourly labor costs or other data parameters that show the basis for the Board's calculation. (See Exhibit 2.)

Second, given that the Board's estimates are not supported by evidence in record, we understand that the economic analysis greatly underestimates the anticipated costs of the Proposed Modifications. (See Exhibit 2.) While the Board's economic analysis suggests that Proposed Modifications will cost approximately $80.2 million over an eight-year period, an experienced and respected engineering and environmental firm has conservatively estimated the actual costs will be two-to-three times higher. (Exhibit 2.) This estimate is consistent with analysis by the California Asphalt Paving Association and California Construction Materials Association, which have estimated the costs for compliance at $120 million per year. (Letter from CalAPA and CalCIMA to Clerk of the Board, dated June 7, 2019, attached as **Exhibit 3** ["The annual compliance cost for 60,000 facilities at just $2,000 dollars a facility would be an estimated $120 million annually."].)

Third, the economic analysis fails to analyze the change to current practices regarding revisiting quantification methods when a physical change has occurred at a facility. Specifically, the economic analysis fails to analyze the potentially substantial indirect costs and operational ramifications if application of the best method increased emissions from permitted units. (Exhibit 2.)

In summary, the failure to complete a standardized regulatory impact analysis, submitted to the Department of Finance, and other deficiencies in the Board's economic analysis constitute a substantial failure to comply with the Act, which will result in the invalidity of the Proposed Modifications.

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As discussed above, the Proposed Modifications: (1) exceed the scope of authority conferred by statute and/or are inconsistent and conflict with the statutes that the Board purports to implement; (2) contain significant changes requiring notice and a new public hearing; and (3) rely on a rely on an inadequate economic analysis that fails to comply with the Act. We respectfully request that the Board abandon the Proposed Modifications and restart the rulemaking process in compliance with the Act.

Best Regards,
HARRISON, TEMBLADOR, HUNGERFORD & JOHNSON

By
Adam K. Guernsey, Esq.

EXHIBIT 1

South Coast
Air Quality Management District
21865 Copley Drive, Diamond Bar, CA 91765-4182
(909) 396-2000 • www.aqmd.gov

March 29, 2019

david.edwards@arb.ca.gov
David Edwards
Chief, Greenhouse Gas and Toxics Emissions Inventory Branch
Air Quality Planning & Science Division
1001 I Street, 7th Floor
Sacramento, CA 95814

Comments on CARB's Proposed 15-Day Modifications to the Regulation for the Reporting of Criteria Air Pollutants and Toxic Air Contaminants

The South Coast Air Quality Management District (SCAQMD) staff appreciates the opportunity to provide comments on CARB's Proposed 15-Day Modifications to the Regulation for the Reporting of Criteria Air Pollutants and Toxic Air Contaminants (CTR) released March 4, 2019. We have been working closely with your staff on the CTR regulation and appreciate the dialogue, improvements to rule language, and evolved concepts over the course of the rule development process. SCAQMD staff supports rulemaking efforts by CARB to fulfill the requirements of AB 617, however, we still have concerns that the current proposal is overly ambitious and will likely be impossible to successfully implement in the proposed timeframes.

The motivation for the CTR regulation seems to be CARB staff's belief that this rule is mandated by legislation and that this data is absolutely essential for the success of AB 617 Community Emission Reduction Plans (CERPs). While some elements are mandated, such as the development of a uniform statewide system of annual reporting of emissions of criteria air pollutants and toxic air contaminants, the most concerning elements proposed are not required under statute. CERPs can and are currently being developed using the best available emissions data without the need for excessive requirements for statewide emissions reporting by individual facilities. Solely requiring facilities to report facility emissions does not guarantee the reporting of accurate data. Extensive protocol development, outreach, training, and auditing are needed; an effort which will take many years to be successful.

We agree with the goal of more comprehensive, accurate and consistent emissions data, but there are many approaches and methods to achieve this over time without the need for hastily developed statewide emissions reporting. As we have repeatedly expressed in our ongoing dialogue, mandatory emissions reporting by facilities may not be the most efficient or accurate approach to develop better emissions inventories. We think that the approach for basin-wide reporting is more equitable than AB617 community-specific reporting, but most of the new facilities reporting would have emissions substantially lower than the current SCAQMD Annual Emissions Reporting (AER) program applicability thresholds for criteria pollutants and toxic air contaminants, representing a very small fraction of the emissions inventory and overall toxic risk. In addition,

many of the proposed reporting variables are not necessary and will be intensive to collect and verify. Resources should be focused where air quality and public health risk problems are greatest. In our decades of experience, unidentified problems are generally not due to lack of emissions reporting.

We and other air districts want to be a part of AB 617 implementation and help develop systems, protocols, and outreach for improved emissions reporting. The approach from SCAQMD staff has been to provide meaningful input for rule language and assistance to CARB rule development staff to develop a reasonable rule with realistic outcomes.

For these reasons, the SCAQMD staff encourages CARB to reconsider some of the proposed language, and acknowledge impacts to the regulated industry and existing District emission reporting programs, in addition to the planning and resources needed to harmonize applicable requirements of District rules and regulations with those proposed in the CTR.

Our Recommendations:

- Modify the applicability to include unpermitted equipment and permitted facilities, thereby including fugitive emissions.
- Grant flexibility for air districts to determine best available data and methods for emission sources where better applicable information is available;
- Due to the potential increase of nearly 15,000 facilities reporting emissions, delay the individual reporting phases by at least one year for Phases I and II, and 2 years for Phase III.
- Restructure phases based on sector or industry as opposed to by the type of process.
- Abbreviated reporting should only apply to facilities that are exclusively conducting the activities for which such reporting qualifies. That being said, a process should be included by which other types of activities/equipment can also have streamlined emission calculations.
- Any facility that reports activity or emissions directly to CARB should have the same level of content as that require to be sent to air districts.
- Emission report contents of modeling variables should be removed.

We look forward to continuing to productively work with CARB on the development and implementation of this regulation. Specific comments on the 15-day Modifications to the CTR regulation are further discussed in more detail in the attachment. Please feel free to contact me to discuss these comments or any other concepts for this draft regulation.

Sincerely,

Philip M. Fine, Ph.D.
Deputy Executive Officer
Planning, Rule Development & Area Sources
South Coast Air Quality Management District

Attachment

Attachment

§93401(a) – General Applicability

We suggest that the proposed modification for applicability determination include unpermitted equipment at permitted facilities, which would also include fugitive emissions. Based on annual emission reports received for our AER program, unpermitted equipment can account for significant contributions, and in some cases more than 50% of the facility's total emissions.

§93402 – Definitions

"Best available data and methods" – We appreciate the modifications to this definition as it provides flexibility and discretion at the local air district level for what could be considered best available data and methods. Regarding use of maximum emission values (e.g., potential to emit, or prescriptive limits established by the permitting or regulation) SCAQMD staff agrees that these types of data sources should not be the primary choice for use when calculating emissions. However, in some cases it may be more accurate than what is available such as default AP-42 emission factors. We ask for clarification on whether the proposed language of "…and other air district-approved…methods may potentially qualify as being best available data and methods for emissions sources" would allow the local air district to approve the use of maximum emission values in these types of situations. If not, please modify the proposed language to allow for this, based on air district-approval.

§93403 – Emission Reporting Requirements

§93403(a)(3) – Initial Report Year for Facilities Subject to Section 93401(a)(4)

Facilities subject to Section 93401(a)(4) are required to submit annual emissions reports per the phase-in schedule provided in Appendix A, Table A-3. The AER program currently receives emission reports from approximately 2,000 facilities a year. Based on CARB's assessment of facilities affected (provided to air districts on 1-29-2019) the SCAQMD staff can potentially receive thousands of new reporters in Phase I alone.

- Combustion of crude, residual, distillate, or diesel oil (up to ~12,000 facilities)
- Metal plating, anodizing or grinding using cadmium or chromium (up to ~1,700 facilities)
- Auto body shops > 30 gallons of paint/year (up to ~1,000 facilities)

Phase II and III Sectors combined can potentially add thousands more. The additional facilities that would be required to report would most likely be smaller businesses that have emissions substantially lower than the current AER program applicability thresholds for either criteria air pollutants and toxic air contaminants, representing a very small fraction of the emissions inventory and most likely insignificant in terms of risk even when accounting for cumulative impacts. Furthermore, these facilities would not have the technical knowledge to calculate emissions and submit reports to the SCAQMD staff without significant training and outreach.

Implementation will require significant resources, time, and planning to:

- Identify all new sources subject to the proposed toxic pollutant thresholds, throughput, and/or material usage – extremely difficult absent reliable data for throughput and/or material usage;

- Perform outreach to inform the regulated industry of newly adopted state emission reporting requirements;
- Conduct training sessions for the regulated industry on how to use the AER Reporting Web Tool;
- Develop uniform methodologies to calculate emissions for industries identified in each sector;
- Conduct training sessions on how to calculate toxic emissions for a variety of industry sectors;
- Develop software modifications to handle significantly increased numbers of facilities reporting to the AER Reporting Tool; and
- Handle increased inquiries received through AER hotline and other communications from the regulated industries regarding emission reports and estimating emissions.

For these reasons, we suggest the following initial report years for each of the Phase Sectors to allow ample time to implement the above prior to receiving annual emission reports:

- Phase I – Beginning with data year 2021 reported in 2022;
- Phase II – Beginning with data year 2023 reported in 2024; and
- Phase III – Beginning with data year 2025 reported in 2026.

Appendix A, Table A-3 – Sector Phases and Activity Level Reporting Thresholds

We suggest that Table A-3 be restructured based on sector or industry type rather than on a particular toxic compound that could be emitted by any industry type. As mentioned above, it will be extremely difficult to determine which facilities will need to report if it is based on actual throughput or toxic emissions for a given compound as this data may be unavailable for those facilities that currently do not submit annual emissions reports. Determining who will need to report based on industry type will be clear and straightforward for both the local air district and the affected facilities.

§93403(b)(3) – Abbreviated Reporting

The proposed language for abbreviated reporting is currently only allowed for retail gas stations and facilities that have equipment that combust specific fuel types. We appreciate efforts to streamline emissions calculations for reporters with these types of activities/equipment and suggest that language be added to include an approval process for other types of activities/equipment to be streamlined as additional activities/equipment will most likely be identified during implementation.

We also recommend that abbreviated reporting only apply to facilities that are exclusively conducting the activities that qualify. Facilities that also have other emissions generating activities should submit a "normal" report.

§93403(d)(2) – Submittal of Emissions Reports to CARB

This section previously referred to facility activity or emissions data that could alternatively be sent to CARB, however, now only certain elements of an emissions report are applicable. Notably missing is emissions data under 93404(d). What is the basis of this exclusion? It would seem that the proposed language would create segmented reports…some portions reported to local air

districts and others to CARB. We suggest that this section be revised to reflect the intent of the original language.

§93404 – Emission Report Contents

§93404(b)(6) – Starting with the 2020 data year, facilities will be required to submit annual emissions reports that include the general contents as specified in Section 93404(b). Some of this general content includes technical metadata that we presume will be used for modeling purposes. Data points include geospatial coordinates for stacks, release location heights, exit gas temperatures, stack dimensions, exit gas velocities, etc. There is major concern with the quality and accuracy of the data that will be received from reporters who are not trained or familiar with such technical data. Some of this requested data will not be applicable to many emissions sources. Extensive training and outreach will be necessary for facilities, especially smaller businesses, in order to receive accurate and meaningful data. Additionally, the SCAQMD staff and CARB review and verification of data would be highly resource intensive with little benefit for air quality.

We request that this section be removed from the rule or significantly modified to only require this from facilities that pose potentially high health risks, possibly based on the total amount of toxic emissions the facility reports or other indicators such as proximity to sensitive receptors. Local air districts could request this data outside of the annual emissions reporting process in order to ensure that it is accurate before it is used and available to the public, as is done currently for the AB2588 program.

EXHIBIT 2

SESPE CONSULTING, INC.

1565 Hotel Circle South, Suite 370 • San Diego, California 92108

MEMORANDUM

Date: June 7, 2019

To: Adam Guernsey, HTHJ

From: Scott D. Cohen, P.E., C.I.H.

Cc: Mark Harrison, HTHJ
Brian Anderson, Sespe

Re: Comments on the May 13, 2019 Version of the Modified Proposed Regulation for the Reporting of Criteria Air Pollutants and Toxic Air Pollutants

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Sespe has reviewed the Notice and attachments for the subject Proposed Regulation including the following:

- Notice of Public Availability of Modified Text and Availability of Additional Documents and/or Information.
- Attachment A: Revised Regulation Text.
- Attachment B: Description and Rationale for Regulation Updates.
- Attachment C: Outreach and Notification.
- Attachment D: Preliminary Revised Economic Impacts Summary.

In our role as a professional engineering and environmental consulting firm, our staff has accumulated decades of experience scoping, budgeting and preparing emissions inventories for industrial clientele in various business sectors, located in many different California air districts (and agencies in other states), and for a variety of purposes (e.g., reporting, CEQA, air permitting, health risk assessment, etc.). Qualifications and additional information on Sespe and its staff are available upon request and from our website (www.sespe.com).

Our comments on the proposed modifications, which relate to the implementation cost presented in the economic analyses for this rulemaking, are summarized in the list below followed by a detailed discussion of each.

1. The economic analysis lacks any evidence to support its claims.
2. Cost estimates are too low and not representative of the typical array of direct and indirect costs.
3. Cost to implement the 3-year methodology approval process (i.e., § 93403(c)(4)) does not appear to have been considered.

1.0 ECONOMIC ANALYSIS LACKS ANY EVIDENCE TO SUPPORT ITS CLAIMS

The number of facilities that will be affected by the proposed modifications is claimed to be 50,000 (Page D-1). Without supporting evidence (e.g., at least a table listing number of facilities by district), the regulated community is unable to evaluate veracity and/or correctness of this claim. Another example is the cost of labor which is briefly described without providing the hourly labor cost(s) that were used (Page D-2). The cost to a facility would be the product of the hourly labor cost(s) by worker type and number of additional hours each would work to comply with the proposed modifications. The cost for each facility would then be summed to determine the total cost to the regulated community. Not one of the parameters is divulged or substantiated with supporting evidence. This is unacceptable method as it lacks disclosure of the basis for calculation, and would not stand if a facility were to report emissions in such a manner. Accordingly, the "preliminary" economic analysis fails to serve the intended purpose and would need to "show the math" for it to be of any use to the public. Transparency is necessary in order for the public and regulated community to fully understand how the economic impact analysis was performed.

2.0 COSTS ESTIMATES ARE TOO LOW

Even without knowing the basis for the estimation of cost per facility as discussed in Item 1 above, it is clear to us from having prepared many emissions inventories that the true costs will be at least two or three times the costs estimated by CARB. For instance, many facilities will hire a consultant to prepare their emissions inventory and/or data to be used by the district to prepare the inventory. Although facility staff could "do the math," they are more comfortable having an expert do it because they generally rely on outside expertise with respect to the air quality regulations, and how a district or CARB will interpret the language. Even among air agencies and agency staff, there are differences of opinion and interpretation of certain language (e.g., definition of portable and location in the PERP regulation).

Moreover, businesses understand that substantial downside effects could occur when mistakes are made and/or because of non-optimal assumptions. Mistakes expose businesses to potential violations often including penalty and re-work costs while eroding trust between the business and interested stakeholders (i.e., regulators and public). Use of non-optimal assumptions may result in additional work or other eventualities that may erode trust when the are realized and changes to address them are sought. For instance, over-estimation of emissions can result in higher prioritization score which leads to health risk assessment and related costs, public notifications, and/or costly mitigations to reduce emissions and related health risk.

The above discussion is possibly more true for businesses that have never prepared an emissions inventory and are unfamiliar with the process and procedures that should be followed. Page D-3 states that these facilities on average will experience cost of $490/yr the first year and $250/yr in future years. These amounts may pay for facility staff time to collect the activity data. However, many will hire a consultant and our experience is that often businesses often hire consultants every year even though the quantification methods are known and staff could do the work internally. This mode of conduct is like accountants that are retained to keep books and/or prepare taxes. To that end, Sespe's rates for typical staff that would prepare an emissions inventory and/or data request response are provided in Table 1 below.

Costs estimated by Sespe to perform even the simplest tasks often exceed $1,000 which is a value that we consider the low end of the spectrum of potential costs that a facility may incur. For instance, assuming it takes an engineer half-day to complete a draft inventory/data request response for internal review by a project manager, there's also the client who will review the draft and only after their comments and revisions are addressed, the final product would be signed-off by a principal and sent to an air district. Table 1 presents representative labor costs of preparing a simple emissions inventory taking less than one man-day to complete.

Table 1. Cost Estimate for Simple Emissions Inventory

Role	Hours	Representative Hourly Rate	Labor Cost
Principal	0.5	$225	$112.50
Manager	2.0	$175	$350.00
Engineer	4.0	$135	$540.00
TOTAL			**$1,002.50**

Unlike the example above, air quality regulation and emissions estimation are seldom simple even for facilities in sectors that are would prepare abbreviated reporting. The reality is that most emissions inventories that Sespe staff has prepared cost between $2,500 and $5,000 depending on the size and complexity of the facility.

3.0 COST TO IMPLEMENT THE 3-YEAR METHODOLOGY APPROVAL PROCESS OMITTED

Proposed modifications include the following statement applicable to facilities complying with Abbreviated Reporting methods.

> *"§ 93403(c)(4): The approval process will include an evaluation of the quantification method proposed by the air district, and approval will be based on the use of sound engineering principles and assumptions. Emissions quantification must be based on <u>best</u> available data and methods, and must be evaluated and approved at least every three years by the Executive Officer."* (underline added).

The above provision would result in change from the current practice which is to revisit quantification methods when a physical change has occurred or at the request of the facility. There is no cyclical review. The word "best" means that quantification methods could change over time potentially resulting in greater emissions estimates than previous methods.

The 3-year approval process has direct costs in terms of possibility that district or CARB staff requests data to be (re)collected (e.g., to confirm past data as may have been collected during an initial source test), other information requiring labor, or assert that the quantification method used previously is no longer the best available. Perhaps more importantly, the 3-year approval process may have substantial indirect costs and operational ramifications if application of the best method increases emissions from permitted units. In that

case, the process could trigger permitting and/or offsets without any physical change or as part of the next application process for a physical change at the facility. These potential indirect costs should be quantified and considered in the economic analysis of the proposed rule modifications.

Thank you for your time and consideration of these comments. Please contact Scott Cohen weekdays at 619.894.8670 if clarification or discussion regarding these comments is desired.

EXHIBIT 3

CalAPA
California Asphalt Pavement Association

CALCIMA
California Construction and Industrial Materials Association

June 07, 2019

Clerk of the Board
California Air Resources Board
1001 I street
Sacramento, CA 95814

RE – OPPOSITION: PROPOSED REGULATION FOR THE REPORTING OF CRITERIA AIR POLLUTANTS AND TOXIC AIR CONTAMINANTS – Supplemental 25-Day Comments

Dear Mr. Gaffney:

The California Construction and Industrial Materials Association (CalCIMA), and the California Asphalt Pavement Association (CalAPA) oppose the expansion of statewide reporting by the California Air Resources Board from the "major sources" identified specifically by the legislature in AB 617. CARB's expansion to include practically all stationary sources within California is not appropriate. We do not believe such a program has benefits nor fits the structure of AB 617's effort to target resources on impacted communities.

CalCIMA is the state trade association for aggregate, industrial mineral, and ready mix concrete producers in California. CalCIMA members provide the essential materials needed to build the state's public highways, roads, rail, and water infrastructure; to build homes, schools and hospitals; to grow crops and feed livestock; and to manufacture wallboard, roofing shingles, paint, glass, low-energy light bulbs, and battery technology for electric cars and windmills. While we have some sources that are major sources the majority of our member facilities are non-major stationary sources. CalAPA is a statewide trade association representing the asphalt pavement industry in California, including asphalt producers, refiners, paving contractors and other firms. Asphalt facilities are already subject to stringent reporting requirements by local air districts across the state.

We are appreciative that the Air resources Control Board has provided abbreviated reporting for construction aggregate facilities as well as adopted an implementation schedule that should somewhat reduce the burden of this regulation. Expanding from the statutorily authorized approximately1400-

2000 large facilities as mandatory reporters identified by CARB as meeting the AB 617 definition to over 50,000 reporters creates significant impacts.

These regulations would impose significant costs to materials producers and air districts. The lack of consistent emission factors and methodologies statewide between air districts in calculating emissions for stationary source would create a database that is imprecise, inconsistent and will present inequivalent information as equivalent for similar types of facilities. As a result it will misinform the public should they attempt to compare data across incompatible air district systems. The resulting confusion is the exact opposite of the original intent of AB617. The legislatively approved definition of stationary sources for this reporting system was targeting only major stationary sources and high risk facilities for which consistency can be created.

Approach Exceeds Explicit Legislative Authority in AB 617:

The legislature provided an explicit definition of stationary source for this regulatory endeavor in Health and Safety Code 39607.1. Further, in Legislative analysis, the legislature specifically noted it covered reporting by "major sources." AB 617 was a carefully constructed, phased-in, targeted approach to reducing emissions exposure in our most impacted communities instead of a broad statewide approach.

Health and Safety Code 39607.1 is CARB's authorization for a statewide reporting system on stationary sources as defined. It has a three part definition of Stationary source for the purposes of the section, not a four part definition.

> "39607.1.
> (a) For purposes of this section, the following definitions apply:
>
> (1) "Nonattainment pollutant" means a criteria pollutant for which a district is classified as a nonattainment area pursuant to this division or the federal Clean Air Act (42 U.S.C. Sec. 7401 et seq.).
>
> (2) "Stationary source" means any of the following:
>
> (A) A facility that is required to report to the state board the facility's greenhouse gas emissions pursuant to Section 38530.
>
> (B) A facility that is authorized by a permit issued by a district to emit 250 or more tons per year of any nonattainment pollutant or its precursors.
>
> (C) A facility that receives an elevated prioritization score based on cancer or non-cancer health impacts pursuant to Section 44360.
>
> (b) (1) The state board, in consultation with districts, shall establish a uniform statewide system of annual reporting of emissions of criteria pollutants and toxic air contaminants for a stationary source.
>
> (2) The state board shall require a stationary source to report to the state board its annual emissions of criteria pollutants and toxic air contaminants using the uniform statewide system of annual reporting developed pursuant to paragraph (1).

(c) With the report required pursuant to paragraph (2) of subdivision (b), the state board may require, as appropriate, a stationary source to provide relevant facility-level emissions data.

(d) The state board may require, as appropriate, a stationary source to verify or certify the accuracy of its annual emissions reports by a third-party verifier or certifier that is accredited by the state board."

The section reads clearly enough. It creates a three part definition of stationary source that captures major and high risk sources within the state and authorizes in consultation with districts the creation of an annual reporting system for those stationary sources explicitly defined for use within the section.

There is further evidence that the legislature considered this annual reporting system being limited to "major stationary sources." In the July 14, 2017 Assembly Analysis on Concurrence with Senate Amendments the analysis notes:

"1) Provides for regular and consolidated reporting of emissions from *major stationary sources* (emphasis added) by requiring ARB to establish a uniform statewide system of annual reporting of criteria pollutants and toxic air contaminants (TACs), including reporting by sources of facility-level emissions data and third-party verification."

The legislature got it right as those are the stationary sources best situated to report annually

Confidentiality of Data

With the Air Boards decision to move forward with a detailed reporting regulation will enable the calculation of production totals for industries such as construction aggregate and asphalt facilities by third parties**.** This knowledge may be utilized to gain competitive advantage in the marketplace and in worst-case scenarios subject public agencies to bid responses from parties who know they have no competition inflating project costs. Rock, Sand gravel concrete and asphalt are all local commodities and the dominant consumer of those commodities is the public through infrastructure maintenance and creation programs. Particularly in certain markets this leads to the potential that competitors knowing each other's production information can gain market advantage at the public's expense. We strongly encourage the board to limit the availability of data which enables the reverse engineering of production data. While the state has no mandatory data collection for asphalt until the boards reporting system goes active, it does have annual reporting for mines. In public Resource Code 2207(g) it protects that mineral production data to prevent abuse.

"(g) Any information in reports submitted pursuant to subdivision (a) that includes or otherwise indicates the total mineral production, reserves, or rate of depletion of any mining operation may not be disclosed to any member of the public, as defined in subdivision (b) of Section 6252 of the Government Code. Other portions of the reports are public records unless excepted by statute. Statistical bulletins based on these reports and published under Section 2205 shall be compiled to show, for the state as a whole and separately for each lead agency, the total of each

mineral produced therein. In order not to disclose the production, reserves, or rate of depletion from any identifiable mining operation, no production figure shall be published or otherwise disclosed unless that figure is the aggregated production of not less than three mining operations. If the production figure for any lead agency would disclose the production, reserves, or rate of depletion of less than three mining operations or otherwise permit the reasonable inference of the production, reserves, or rate of depletion of any identifiable mining operation, that figure shall be combined with the same figure of not less than two other lead agencies without regard to the location of the lead agencies. The bulletin shall be published annually by June 30 or as soon thereafter as practicable."

The nature of the data collected and reported in this reporting regulation is such that one will be able to reverse engineer production data for every mineral operation within the state, which could in turn trigger federal anti-trust concerns.

Significant Cost Burdens on Non-Major Emitters and Air Districts:

As there are areas of the state where annual reporting occurs by our members, we have actual costs for complying with annual reporting obligations for non-major sources. The general operator cost to submit data to South Coast Air Quality Management District is between $2,500 to $5,000 per year in direct consultant cost without including time and labor costs. In meetings with CARB staff, we have learned this reporting system is expected to include up to 60,000 facilities annually up from less than 20,000 annually in the version before the Board in December. The annual compliance cost for 60,000 facilities at just $2,000 dollars a facility would be an estimated $120 million annually.

The added burdens on local air districts are also a significant concern to the materials industry. Added burdens on their staff resources and lack of a budget directly impact their ability to undertake critical activities such as permit modifications, variances, health risk assessments and other necessary activities that keep our operations running. Some local air districts are implementing special fees for these additional activities. The equipment specificity of stationary source permitting systems and need to update permits due to replacement is a very real need and delays in such actions have real impacts on material producer's ability to operate.

Permit Requirements and Emission Factors are not Consistent Statewide

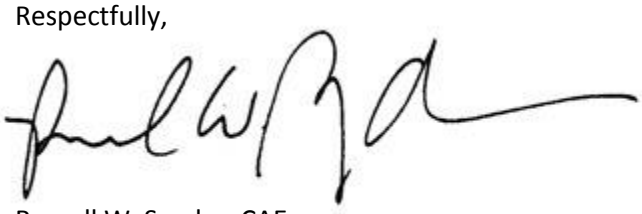
Local air districts have developed and implemented stationary permitting systems which fit the needs and sources within their districts. This is fundamental to the design intent of the local district system and it's recognition that South Coast is not Yolo-Solano. As a result, which emissions factors are utilized and what sources are encompassed within permits varies by district. These are not large major emitter combustion sources with CEMS systems such as the facilities identified in AB 617's statutory authority but a broader more diverse array of businesses. Some of these sources do not have health risk assessment requirements and are now subject to AB 2588 due to AB 617. Incorporating all of that mixed data into a statewide system doesn't create clarity but confusion as sources from one district are

"apples" and similar sources in other districts are "oranges," and the resulting numbers are therefore not directly comparable as to what is achievable.

AB 617 effectively accommodates this by enabling fence-line monitoring of stationary sources once AB 617 communities are identified. Consistent, comparable data on emissions leaving the sites in the direct area of concern was authorized. It is not necessary to bring every non-major facility into a statewide reporting system. AB 617 relies on monitored exposure assessments not emissions assessments. Target the impacted community and do extra work within that community, not statewide. In addition, allow the use of existing available air monitoring data rather than require the implementation of a new monitoring network. Again the Legislature had the wisdom to create a scalpel that focused costs and burdens where change was most needed. It did not create a system to act everywhere -- instead the concept was to target the resource expenditures of districts' businesses and the state on the communities most in need of reductions now, with the understanding that the lessons learned there may be expandable to other places later. This reporting system as constructed is the opposite of that policy structure.

Again we are thankful that the Board is proposing some reductions to your initial draft and allowing some construction aggregate facilities abbreviated reporting. The extended timeframes for air districts to prepare may be helpful. However the program is a significant expansion beyond the authority granted CARB by the legislature in AB 617.

Respectfully,



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