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January 18, 2024

Michael Krause, Assistant Deputy Executive Officer
Heather Farr, Planning and Rules Manager
Planning, Rule Development and Implementation
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

Re: Proposed Amended Rule 1118

Dear Mr. Krause and Ms. Farr,

We write on behalf of our client the Regulatory Flexibility Group (“RFG”) regarding Proposed Amended Rule 1118 (“PAR 1118” or the “Rule”). The RFG is an industry coalition that includes companies operating refineries and related facilities within the jurisdiction of the South Coast Air Quality Management District (“SCAQMD” or the “District”) that will be affected by PAR 1118.

As detailed below, the RFG has serious concerns about the proposal that a facility subject to PAR 1118 provide real-time, live feed images of defined “Flare Events” for posting on “the public website” (the “Live Feed Requirement”).¹ At a high level, a legally supportable basis to impose the Live Feed Requirement has not been presented. It represents an unnecessary and arbitrary addition to the already rigorous monitoring and reporting requirements in place in current Rule 1118 (and that will be further strengthened in PAR 1118). The Live Feed Requirement also raises significant policy concerns, including that potential network breaches could raise national security concerns and the misuse and/or misunderstanding of Flare Event images could cause market speculation or impact market conditions. We provide additional information on these concerns below.

The Live Feed Requirement Would be Inconsistent with the Health & Safety Code

The California legislature has established specific requirements that must be fulfilled, and specific findings that must be made in the exercise of an air district’s rulemaking authority. Substantial evidence in the record must demonstrate that the applicable requirements are satisfied

¹ See PAR 1118(j)(8).

and support the required findings. Failure to do so constitutes an arbitrary and capricious action and an abuse of discretion.

Authority

Section 40727 of the Health & Safety Code states: “Before adopting, amending, or repealing a rule or regulation, the district board shall make findings of necessity, authority, clarity, consistency, nonduplication, and reference.”² As a threshold matter, we do not believe there is authority to impose the Live Feed Requirement. “It is fundamental that an administrative agency has only such power as has been conferred upon it by the constitution or by statute and an act in excess of the power conferred upon the agency is void.” (*BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 994.)

The RFG recognizes that Health & Safety Code § 41511 provides “the district . . . may adopt rules and regulations to require **the owner or the operator of any air pollution emission source** to take such action as . . . the district may determine to be reasonable **for the determination of the amount of such emissions from such source.**” (emphasis added.) However, there is no evidence, yet alone substantial evidence, that the Live Feed Requirement is necessary for the *District* to estimate emissions. We understand that the intent behind the proposed requirement that the feed be posted on a public website is because “Community members want the visual assurance that the flare is burning cleanly.”³ Notwithstanding that the Live Feed Requirement will not give this visual assurance (as discussed below), it is the *District’s* mandate to regulate and estimate emissions, and, as described below, the Rule provides the regulatory framework for the District to implement its mandate. Accordingly, the Live Feed Requirement appears to go beyond the District’s authority.

Necessity

Even assuming the Live Feed Requirement was within the District’s authority, it is not *necessary* to achieve the stated goals of PAR 1118. Under California law, an agency is required to demonstrate that its actions are necessary to carry out its statutory authority, and without such demonstration the regulations will be struck down. (See *Orange County Water Dist. v. Alcoa Global Fasteners, Inc.* (2017) 12 Cal.App.5th 252, 338 [applying a necessity requirement under Section 8(c) of the Orange County Water District Act, and denying the District cost recovery where “[t]he District’s failure to conduct a baseline assessment of the risk to human health and the environment prevented the District (and the public) from adequately assessing the cost-effectiveness and necessity of the District’s proposed remedial actions.”].)

² “Authority” means “that a provision of law . . . permits or requires the [District] to adopt . . . the regulation.” “Consistency” means “that the regulation is in harmony with, and not in conflict with or contradictory to, existing statutes . . . or . . . regulations.” Health & Safety Code § 40727(b).

³ SCAQMD, PAR 1118 Working Group Meeting #3 Presentation (April 26, 2023) at p. 57, available at <https://www.aqmd.gov/docs/default-source/rule-book/Proposed-Rules/1118/par-1118---wgm-3-presentation.pdf?sfvrsn=18>.

A rule is necessary when the record demonstrates a need for the regulation.⁴ Adopting the Live Feed Requirement when its necessity has not and cannot be demonstrated in the record would be outside of the District’s authority. (*Morris v. Williams* (1967) 67 Cal.2d 733, 748 [“Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations.”].)

The purpose of PAR 1118 is “to monitor and record data on Refinery and related flaring operations, and to control and minimize flaring and Flare-related emissions.”⁵ PAR 1118, as currently proposed, accomplishes this goal many times over by requiring strict adherence to emissions limitations and detailed monitoring and reporting requirements, including, among others:

- operating a flare to combust any planned or unplanned release of vent gas below a threshold of visible emissions; (PAR 1118(d)(5))
- operating flares to meet NO_x and SO_x emissions performance targets and, if those targets are exceeded, submitting a “flare minimization plan” which is made available to the public for comment; (PAR 1118(f) and (h))
- operating a Flare Monitoring System to continuously monitor and record gas flow and gas higher heating value and calculate or semi-continuously monitor total sulfur concentration; (PAR 1118(j)(5))
- submitting a Flare Monitoring and Recording Plan; (PAR 1118(i))
- monitoring of all Flares with a color video monitor capable of recording digital video of Flares; (PAR 1118(j)(7))
- submitting monthly and quarterly reports containing, among other things, the monitored and recorded information, emissions data, and descriptions of the cause of each Flare Event; (PAR 1118(j)(13) and (j)(14))
- conducting a “relative cause” analysis of Flare Events that combust more than 5,000 standard cubic feet of vent gas; (PAR 1118(d)(8))
- conducting a “specific cause analysis” when emissions exceed stated thresholds, and submitting it to the District and implementing all corrective actions identified therein; (PAR 1118(e))
- providing a 24-hour telephone service for public inquiries about Flare Events; and (PAR 1118(l)(1))
- providing notifications to the Flare Event Notification System within one hour of the start of a Flare Event exceeding stated thresholds, notifications which the public can sign up to receive. (PAR 1118(l)(2).)

⁴ Health & Safety Code § 40727(b)(1).

⁵ PAR 1118 Initial Preliminary Draft Rule Language (December 8, 2023).

These requirements sufficiently accomplish the Rule’s goal to monitor and record flare data and minimize flaring and flare-related emissions. An additional requirement to make a real-time, live feed image stream available on a public website does not further the Rule’s purpose. As discussed more fully below, live feed images from a static camera will not provide the District nor the public with accurate flare emissions information, and thus will not accomplish the purported purpose of the Live Feed Requirement. Further, refineries already monitor and report to the District reliable, continuously-monitored, and calculated emissions data submitted in regular reports. At best, the Live Feed Requirement duplicates what is accomplished by the PAR 1118 paragraph (l)(2) requirement to provide notice that a Flare Event is occurring.⁶

There is No Rational Basis for the Live Feed Requirement

An agency action is arbitrary and capricious when it is “unsupported by any explained reasoning.” (*Nat. Parks Conservation Assn. v. EPA* (9th Cir. 2015) 788 F.3d 1134, 1143.) The Live Feed Requirement does not appear to be rationally related to the purpose of the Rule. While one purpose of the Rule is to monitor and minimize visible emissions, making live images available on a public website will not further that purpose. The Rule already sets forth a visible emission limitation and the method by which compliance with that limitation is determined—which cannot be achieved by the public via images from a stationary camera posted to a website.

PAR 1118 states that visible emissions may not occur for more than five minutes in two hours, “as determined by the test method in (k)(2).” (PAR 1118(d)(1)(B).) Paragraph (k)(2) directs that visible emissions “shall be determined by US EPA Method 22” Members of the public viewing images on the District website are not likely to be familiar with the procedures in Method 22 and will be unable to accurately determine visible emissions from a live feed image. According to Method 22, “it is necessary that the observer is knowledgeable with respect to the general procedures for determining the presence of visible emissions. At a minimum, the observer must be trained and knowledgeable regarding the effects of background contrast, ambient lighting, observer position relative to lighting, wind, and the presence of uncombined water (condensing water vapor) on the visibility of emissions.”⁷ The live feed images taken from a static camera would not account for these variables, in effect making the camera (and the images that come from it) an unreliable observer of visible emissions.

Rather than furthering the purpose of monitoring and minimizing visible emissions, the Live Feed Requirement *is highly likely to cause significant confusion surrounding flares and flare-related emissions*. Making these images available to the public in real-time will therefore serve no purpose that is rationally related to the Rule’s goals. Considering the rigorous

⁶ Adopting PAR 1118 with the Live Feed Requirement without making the required necessity finding with evidentiary support in the record would exceed the District’s statutory authority and would be voidable by a court. (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1042 [“An administrative agency must act within the powers conferred upon it by law and may not act in excess of those powers. [] Actions exceeding those powers are void, and administrative mandate will lie to nullify the void acts.”] [internal citation omitted].)

⁷ US EPA, EPA Method 22 – Visual Determination of Fugitive Emissions From Material Sources and Smoke Emissions From Flares (January 14, 2019), available at: https://www.epa.gov/sites/default/files/2019-08/documents/method_22_0.pdf.

requirements already proposed in PAR 1118, we doubt that “any explained reasoning” can support the inclusion of the Live Feed Requirement.⁸ (*Nat. Parks Conservation Assn.*, *supra*, 788 F.3d at 1143.) Inclusion of the Live Feed Requirement in PAR 1118 without a rational connection to the rule’s legitimate regulatory purpose would be arbitrary and capricious. (*California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 212 [“A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.”].)

The Live Feed Requirement Raises National Security and Market Integrity Concerns

RFG members also have serious concerns about the Live Feed Requirement conflicting with important policies surrounding national security and market integrity.

National Security

Refineries operate within sectors that are designated critical infrastructure under the National Infrastructure Protection Plan (“NIPP”).⁹ The NIPP is overseen by the Secretary of Homeland Security, and as a member of the energy and chemical sectors, refineries fall under the responsibility of both the Department of Homeland Security and the Department of Energy.¹⁰ The Live Feed Requirement, as a live feed image of on-refinery activities available broadly to the public, implicates national security policies contained in the NIPP that could complicate its implementation.

Because refineries operate within critical infrastructure sectors, they have robust cybersecurity protocols that will likely present significant challenges to implementing the Live Feed Requirement. For instance, several refineries are regulated as chemical facilities by the Department of Homeland Security and adhere to applicable Chemical Facility Anti-Terrorism Standards. The Chemical Facility Anti-Terrorism Standards include preparation of Security Vulnerability Assessments¹¹ and Site Security Plans.¹² Giving the public access to an online live image stream of on-refinery activities raises numerous potential issues affecting physical security as well as cybersecurity, particularly in the case of a live feed, and could conflict with security measures and plans that are in place pursuant to federal requirements and standards.

⁸ We note that both the San Joaquin Valley Air Pollution Control District (“SJVAPCD”) and the Bay Area Air Quality Management District (“BAAQMD”) have rules that are similar to SCAQMD Rule 1118, but neither district requires posting flare images to a public website. See SJVAPCD Rule 4311 § 6.10 and BAAQMD Rule 12-11-507. To our knowledge, SCAQMD would be the only air district to require a public live feed of images of flare events.

⁹ The National Infrastructure Protection Plan is responsive to Presidential Policy Directive 21: Critical Infrastructure Security and Resilience, signed on February 12, 2013.

¹⁰ See Dept. Homeland Security, NIPP 2013: Partnering for Critical Infrastructure Security and Resilience at p. 43, available at: <https://www.cisa.gov/sites/default/files/2022-11/national-infrastructure-protection-plan-2013-508.pdf>.

¹¹ 6 C.F.R. §27.215.

¹² 6 C.F.R. §27.225.

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Market Integrity

Finally, broadcasting on the internet a live feed of refinery flares for any member of the public to view will almost certainly lead to misinterpretation of flaring activity. As discussed above, the Live Feed Requirement will not provide for an accurate depiction of flare-related emissions, and public viewers will be left without necessary expertise or context to interpret flaring activity in real-time. Further, flaring information could be intentionally misused to manipulate markets and cause undue market impacts. Given the lack of necessity for the Live Feed Requirement described above, the significant risk of market manipulation weighs heavily in favor of the removal of the requirement.

Conclusion

For the reasons discussed above, we respectfully request that the District remove the Live Feed Requirement from PAR 1118 prior to releasing the preliminary draft rule language. Please contact me at (213) 891-7395, or by email at john.heintz@lw.com with any questions or for any additional information on the concerns summarized herein.

Best regards,



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