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August 24, 2018

VIA EMAIL

Dr. Philip Fine
Deputy Executive Officer
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

Re: SCAQMD Staff Proposal to Require Equipment Replacement as BARCT

Dear Dr. Fine:

We are submitting these comments on behalf of our client the Regulatory Flexibility Group ("RFG"). The RFG is an industry coalition comprised of companies in the refining, utility and aerospace sectors that operate facilities within the jurisdiction of the South Coast Air Quality Management District ("SCAQMD"). RFG member facilities are subject to the Regional CLean Air Incentives Market ("RECLAIM") program, and will be seriously affected by the transition to a command-and-control regulatory structure that is currently underway. The RFG participated in the development of the RECLAIM program from its inception, and has been an active participant in all major amendments to the program, including those currently underway.

Introduction

These comments are focused on recent assertions by SCAQMD staff that a best available retrofit control technology ("BARCT") standard may require total replacement of the emitting piece of equipment. SCAQMD staff has asserted this position in various meetings and documents pertaining to the RECLAIM transition and development of command-and-control BARCT rules. The most detailed explanation of the staff's position that we are aware of is contained in the July 2018 Draft Staff Report in support of proposed amendments to SCAQMD Rule 1135 ("Rule 1135 Staff Report") at pages 2-1 through 2-2, wherein staff makes two arguments in support of its position. First, it cites to dictionary definitions of "retrofit" and concludes that "replacement" is not specifically excluded from those definitions. Second, it cites to a California Supreme Court case, *American Coatings Ass'n v. South Coast Air Quality Mgt. Dist.*, 54 Cal 4th 446 (2012), for the proposition that a BARCT standard may require replacement of the emitting equipment in its entirety.

The RFG concurs with the comments of the Western States Petroleum Association ("WSPA") submitted on August 15, 2018 pertaining to this issue ("WSPA Comments"). We hereby supplement those comments with further analysis of the relevant statutory provisions, which illustrates that the staff's interpretation is inconsistent with the whole of Division 26 of the California Health & Safety Code, which addresses Air Resources, and runs contrary to standard principles of statutory construction. In addition, we provide additional analysis distinguishing SCAQMD Rule 1113, which is the subject of the *American Coatings* case, from the BARCT rules currently under development to replace the RECLAIM program.

Relevant Statutory Provisions

At question is the scope of the SCAQMD's authority to require the use of BARCT for existing sources. That authority is both granted and limited by Health & Safety Code Section 40440(b)(1), which provides, in relevant part:

> (b) The rules and regulations adopted pursuant to subdivision (a) [authorizing SCAQMD board to adopt rules and regulations to carry out air quality management plan] shall do all of the following:
>
> (1) Require the use of best available control technology for new and modified sources and the use of best available retrofit control technology for existing sources.

Health & Safety Code Section 40406 defines BARCT as follows:

> As used in this chapter, "best available retrofit control technology" means an emission limitation that is based on the maximum degree of reduction achievable, taking into account environmental, energy, and economic impacts by each class or category of source.

Finally, Health & Safety Code Section 40920.6, specifies the procedures the SCAQMD is required to follow when establishing a BARCT standard, and provides, in part:

> (a) Prior to adopting rules or regulations to meet the requirement for best available retrofit control technology pursuant to Sections 40918, 40919, 40920 and 40920.5, or for a feasible measure pursuant to Section 40914, districts shall, in addition to other requirements of this division, do all of the following:
>
> (1) Identify one or more potential control options which achieves the emission reduction objectives for the regulation.
>
> (2) Review the information developed to assess the cost-effectiveness of the potential control option. For purposes of this paragraph, "cost-effectiveness" means the cost, in dollars, of

the potential control option divided by emission reduction potential, in tons, of the potential control option.

(3) Calculate the incremental cost-effectiveness for the potential control options identified in paragraph (1). To determine the incremental cost-effectiveness under this paragraph, the district shall calculate the difference in the dollar costs divided by the difference in the emission reduction potentials between each progressively more stringent potential control option as compared to the next less expensive control option.

(4) Consider, and review in a public meeting, all of the following:

(A) The effectiveness of the proposed control option in meeting the requirements of this chapter and the requirements adopted by the state board pursuant to subdivision (b) of Section 39610.

(B) The cost-effectiveness of each potential control option as assessed pursuant to paragraph (2).

(C) The incremental cost-effectiveness between the potential control options as calculated pursuant to paragraph (3).

(5) Make findings at the public hearing at which the regulation is adopted stating the reasons for the district's adoption of the proposed control option or options.

Interpreting The Meaning Of BARCT

Staff's "Common Sense Definition" Argument Is Flawed

In the Rule 1135 Staff Report, staff sets forth what it refers to as a "common sense definition" argument in which it reaches the conclusion that the term "retrofit" as used in Section 40406 encompasses "replacement" because "replacement" is not specifically excluded from the cited definitions of "retrofits." At first blush, this argument appears similar to a basic rule of statutory construction known as the "plain meaning rule," which means giving words their ordinary meaning. However, the staff's "common sense definition" argument is directly contrary to the "plain meaning rule" which is codified in the California Code of Civil Procedure as follows: "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, *not to insert what has been omitted*, or to omit what has been inserted . . ." See Cal. Civ. Proc. Code § 1858 (emphasis added). "Replacement" has been very clearly and specifically omitted from Section 40406, and that ends the analysis under the "plain meaning rule." Staff's argument violates that rule by seeking to insert "replacement" where it simply does not exist.

"Control Options" Connote "Retrofits;" Not "Replacements"

Use of the phrases "control option" and "control options" in Health & Safety Code Section 40920.6 is informative. Those phrases are used elsewhere in Health & Safety Code Division 26, which pertains to Air Resources, in ways that make it clear that they refer to emission controls to be applied to the underlying source (i.e., retrofits). For example, Section 40440.11(a) provides:

> "In establishing the best available control technology . . . the south coast district shall consider only *control options* or emission limits *to be applied to the basic production or process equipment* existing in that source category or a similar source category." (emphasis added).

Thus, when Health & Safety Code Section 40920.6 uses the phrases "control option" and "control options" repeatedly to specify the procedures the SCAQMD is required to follow when establishing a BARCT standard it is referring to measures *to be applied to* the emitting source, not replacement of the emitting source in its entirety.

When The Legislature Means "Replacement," It Says "Replacement"

There are many provisions in Division 26 where the terms "replace" or "replacement" are used, indicating that when the legislature means "replace" it states so explicitly. Furthermore, the terms "replace" or "replacement" are frequently used in conjunction with "retrofit" or terms similar to "retrofit," such as "modify" or "alter" (or variations thereof). This makes it clear that there is a distinction between actions that result in changes to an existing emissions source, and actions that result in its elimination altogether.

For example, Section 43021(a) provides:

> ". . . the retirement, *replacement*, *retrofit*, or repower of a self-propelled commercial motor vehicle . . . shall not be required until the later of the following:" (emphasis added).

Similarly, Section 44281(a) which identifies projects eligible to participate in the Carl Moyer Program, provides:

> "Emission-reducing *retrofit* of covered engines, *or replacement* of old engines powering covered sources with newer engines . . ." (emphasis added).

Use of the term "replacement" in the provisions cited above illustrates that when the legislature means "replacement" it states so explicitly. Furthermore, use of both "replacement"

and "retrofit" illustrates that the legislature intends to distinguish between the two terms, and that that "retrofit" does not encompass "replacement" as suggested by staff's interpretation of the definition of BARCT in Section 40406. If staff's interpretation was correct, then the use of both terms in the cited provisions would be redundant. Generally, if the legislature chose to include language, it must be given some meaning, and statutes are to be interpreted in a manner that avoids rendering some words surplusage, null or absurd. See Ingredient Communications Council, Inc. v. Lungren, 2 Cal. App. 4th 1480, 1492, 4 Cal. Rptr. 2d 216, 224 (3d Dist. 1992), rev. denied (April 23, 1992).

The Legislature Has Defined "Retrofit" And Distinguished It From "Replacement"

Finally, Division 26 includes a specific definition of "retrofit" in Sections 44275(a)(19) and 44299.80(o), which provide:

> "Retrofit" means making modifications to the engine and fuel system so that the retrofitted engine does not have the same specifications as the original engine.

This definition makes clear that in the case of a "retrofit," the existing emissions source continues to exist following the retrofit, but in an altered state. Furthermore, while Division 26 does not include a definition of "replacement," it frequently makes distinctions between the terms "retrofit" and "repower," which is defined in Sections 44274(a)(18) and 44299.80(n) (immediately preceding the definitions of "retrofit") as follows:

> "Repower" means *replacing* an engine with a different engine."

Thus, in the context of Division 26, "repower" and "replace" are synonymous, and very specifically and explicitly distinguished from "retrofit." The legislature was very deliberate in its use of these terms throughout the air quality statute. To suggest, as staff does, that "retrofit" as used in Section 40406, implicitly encompasses "replacement" flies in the face of the numerous distinctions between these terms made in the statute, and violates accepted rules of statutory construction.

Distinguishing *American Coatings*

As correctly pointed out in the WSPA comments, there is nothing in the holdings of the *American Coatings* decision that supports the proposition that BARCT may include replacement of the emitting equipment in its entirety; that question wasn't even before the court. Furthermore, even if the decision supported staff's position, which it does not, it would be distinguishable based on the fundamental differences between SCAQMD Rule 1113, which was the subject of the case, and the BARCT rules currently under development to replace the RECLAIM program.

SCAQMD Rule 1113 regulates architectural coatings, and the control strategy is reformulation of the covered coatings over time to reduce the VOC content. The rule does not impose limits on emitting equipment, and emission control equipment (i.e., hardware) is not required by, or even mentioned in the rule. In contrast, the BARCT rules currently under

development to replace the RECLAIM program would impose emission limits on process or production equipment to be achieved through add-on emission control equipment (or, according to staff's current theory, replacement of the process of production equipment). There are fundamental differences between these two types of rules that make it impossible to draw any parallels between them. Thus, even if there was something in the *American Coatings* decision that supported staff's position, and again there is not, it would be of no relevance to the rules currently under development.

In the case of coatings reformulation, the control strategy involves research and development that can be undertaken completely independent of ongoing production. The work is undertaken in laboratories, and ongoing production processes and equipment are unaffected. Once the reformulated coating has been developed, production switches to the new coating with no need to modify the production equipment, and in most cases, no lost production time. Thus, there is little or no risk to ongoing production while the control strategy is implemented or if the control strategy proves to be infeasible (i.e., effective reformulations that meet the lower limits cannot be developed). Furthermore, while coating reformulation can require a significant investment of time and money, it does not typically involve the manufacture of modified production equipment or new add-on controls, permitting required to modify or install emitting or control equipment, and physical installation of modified or new equipment.

By contrast, control strategies that rely on physical modification of emitting equipment and/or installation of new add-on control equipment, which also typically involve a research and development stage, also require the manufacture of new equipment, permitting prior to commencing installation of the new equipment, and a physical modification or installation process. Thus, the lead times and costs associated with implementing this type of control strategy are typically much longer and higher. Furthermore, implementation of such strategies can seldom be accomplished without significant disruption to the operation of the facility, particularly at complicated facilities such as those currently covered by the RECLAIM program. And if the control strategy proves to be ineffective in achieving desired emission levels, significant investments of time, money, and lost production may have been for naught.

Trying to draw any parallels between a "technology-forcing" reformulation rule, such as SCAQMD Rule 1113, and the "landing rules" currently under development misses the fundamental differences between these two types of BARCT rules. Furthermore, as stated at the outset, staff has not drawn any parallels that would support its position that BARCT standards may compel replacement of the underlying production equipment even if such parallels could be drawn.

Thank you for considering these comments. We look forward to continuing to work with you on these rulemakings which are critically important to stakeholders as well as the regional economy. If you have any questions, please contact me at (714) 401-8105 or by email at michael.carroll@lw.com.

Sincerely,

Michael J. Carroll
Of LATHAM & WATKINS LLP

cc: Robert Wyman, L&W
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RFG Members