

Robert A. Wyman
Direct Dial: (213) 891-8346
ROBERT.WYMAN@LW.COM

355 South Grand Avenue
Los Angeles, California 90071-1560
Tel: +1.213.485.1234 Fax: +1.213.891.8763
www.lw.com

LATHAM & WATKINS LLP

August 31, 2012

By Electronic Mail
2012aqmpcomments@aqmd.gov

William Burke
Chairman
and Members of the SCAQMD Governing Board
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

FIRM / AFFILIATE OFFICES
Abu Dhabi Moscow
Barcelona Munich
Beijing New Jersey
Boston New York
Brussels Orange County
Chicago Paris
Doha Riyadh
Dubai Rome
Frankfurt San Diego
Hamburg San Francisco
Hong Kong Shanghai
Houston Silicon Valley
London Singapore
Los Angeles Tokyo
Madrid Washington, D.C.
Milan

File No. 018282-0000

Re: Regulatory Flexibility Group Comments

Dear Chairman Burke and Members of the SCAQMD Governing Board

Thank you for the opportunity to provide comments regarding the draft SCAQMD 2012 Air Quality Management Plan (AQMP). These comments are submitted on behalf of the Regulatory Flexibility Group (RFG), a coalition of California entities whose operations are subject to regulation under the Clean Air Act and corresponding state and regional air quality programs. RFG members include aerospace and electronics manufacturers, electric utilities and electric generating facilities, natural gas utilities, oil and chemical companies and other regulated entities. RFG members have participated in the review of and comment on SCAQMD regulations since the fall of 1990, when the coalition was formed.

I. OVERVIEW AND MAJOR RECOMMENDATIONS

We appreciate the Board's increasing sensitivity to the delicate balance between the region's economic health and continued air quality progress. We believe that the next decade poses unique and unprecedented challenges in crafting an air quality strategy that can meet the region's dual economic and environmental goals. Most of the readily identifiable control strategies for sources within the District's traditional jurisdiction already have been implemented. Future regulation thus will require that the District craft new approaches that are tailored to the region's unfinished business. Future strategies may need to focus to a greater degree on sources that have not yet been fully regulated and for which some opportunities may still remain to achieve cost-effective reductions (e.g., legacy fleets). We also agree with the SCAQMD staff recommendation that the District should consider selective time and place control measures to address specific problem areas without harming the economy.

Recognizing the extent of existing stationary source regulation, future measures for such sources should proceed only after very careful technical evaluation of the feasibility of achieving further reductions at a reasonable cost. Given the economic and employment risk of further burdening stationary sources, we strongly believe that future stationary source regulation should include very clear incremental cost-effectiveness benchmarks to ensure that control measures, as implemented, remain within reasonable economic boundaries.¹ Furthermore, any future stationary source measures should contain appropriate alternative compliance mechanisms (e.g., an alternative compliance fee set at the relevant incremental cost benchmark level and used to fund clean technologies) to ensure that sources have a ready compliance alternative when costs near the benchmark level. We applaud the District for considering the adoption of cost benchmarks in the draft AQMP and urge the District to use the benchmarks appropriately, as noted below.

Although the current draft AQMP is limited in scope to the attainment of the PM_{2.5} standard, we note that the plan contains the seeds of an emerging ozone attainment strategy.² Because both attainment strategies raise significant policy issues, we believe that the development of this year's plan is an appropriate time for the Board to consider some of the most important, overarching challenges that have emerged in recent years. These include the need to streamline stationary source permitting, to constrain regulatory costs and to reform significantly the region's offset program.

Before discussing the RFG recommendations in each of these three areas, we note the reasons why we believe that such reform will be critically important to the region. First, although we believe that, in theory, economic and environmental health can go hand in hand, coincident outcomes are unlikely without major change. Currently there is a material risk that the traditional burdensome permitting process, offset scarcity and continued imposition of technology-forcing regulations will result in environmental regulations thwarting economic health. This can happen whenever stationary sources choose not to site their operations, and their jobs, in Southern California due to the length, uncertainty and relatively high cost of seeking a permit here rather than in more hospitable regions. In many circumstances, we find that it is not even practical or cost-effective to site new "cleantech" operations (e.g., renewable energy projects for electricity generation or low-carbon transportation fuels) in the South Coast Air Basin. We are also concerned that we may lose many of the businesses currently operating

¹ For some context on this subject, consider President Clinton's July 16, 1997 memorandum to EPA ("Presidential Memorandum"), issued contemporaneously with the adoption of the eight-hour ozone and fine particulate standards. 62 Fed. Reg. 38421 (July 18, 1997). As stated in the Memorandum, "[i]t was agreed that \$10,000 per ton of emission reduction is the high end of the range of reasonable cost to impose on sources."

² As explained below, because the 2012 AQMP does limit its scope to the attainment of the PM_{2.5} standard, we also believe that the Clean Air Act 182(e)(5) commitments in the draft AQMP are premature and better left for the 2015 AQMP. Waiting for the 2015 AQMP will allow the various stakeholders sufficient time to work with the District in identifying, fully vetting, and implementing "black box" control strategies without the expedited timing pressures associated with this 2012 AQMP process.

in the District if they believe they will be unable to achieve or afford emerging regulations. These unfavorable conditions can be avoided, or at least substantially reduced, by reforming the current regulatory program.

Significant reform can no longer wait. As recently as 1990, there were reported to be 1,141,167 manufacturing jobs in the Los Angeles-Long Beach-Santa Ana region. In just 20 years (by 2010), this number has dropped by fifty percent, to only 569,085, while population in the region has grown during the same period from 11.3 million to 12.8 million.³ We understand that the loss of manufacturing is not unique to Southern California and has been experienced to some degree throughout the United States. But, given the economic opportunity value associated with manufacturing and manufacturing jobs, we want Southern California to preserve those manufacturing jobs that it still has and to capture those that may become available. This opportunity is currently being squandered *because our region cannot permit new facilities fast enough or cheaply enough to compete with alternative destinations*. When such projects go elsewhere, we often lose not just the jobs but also the opportunity to build a more sustainable community, in which energy and consumer good production and consumption are co-located.⁴

We recommend three major actions to preserve existing manufacturing and to capture new opportunities:

A. Expedite and Streamline Stationary Source Permitting

The District now has almost forty years of experience in evaluating control options (e.g., Best Available Control Technology (BACT)) for the permitting of new and modified stationary sources. Certainly, the time has come when the District can identify, in advance, for the vast majority of the stationary sources it permits in the region, precisely what the control technologies will be for sources permitted here. We urge the District to develop a presumptive BACT approach by which sources can immediately receive a permit for most equipment types without the traditional extensive review period. We believe that such an approach can be approved under existing law provided that the District develops a process for distinguishing between permit applications that reasonably require further evaluation and those that do not.

³ See US Department of Commerce Bureau of Economic Analysis; <http://bea.gov/iTable/iTable.cfm?ReqID=70&step=1>. Manufacturing employment in the same region was as high as 24% of the employable population in 1970 and is now only 7.8%.

⁴ Remarkably, it takes truly extraordinary effort, including special state legislation (e.g., Assembly Bill 1318) and litigation, to permit the very cleanest natural gas-fired power plants in the region even when those plants are essential to back up the state's growing renewable energy portfolio or are essential to avoid blackouts. These problems have existed for over a decade - recall the need for special federal, state and regional executive orders and special administrative orders during the 2000-01 power crisis to allow Southern California to bring in even the cleanest new generation.

B. Reform the Offset Program

For over a decade we have urged the SCAQMD, the ARB and the EPA to pursue major offset reform. The current system is seriously broken and the result is that it is near impossible for a manufacturing or energy project to be sited in the South Coast even though any such facility would necessarily install BACT. We have proposed a three-tier approach to reform the current system. Under this approach, (1) a facility would seek to obtain any available offsets at or below a predetermined offset price (e.g., similar to the AQMP cost-effectiveness benchmarks); (2) if a sufficient supply is not available on the market, then the facility would purchase offsets from a pre-funded clean air investment fund (CAIF)⁵ administered by the District or by other appropriate publicly-accountable entities; and (3) to the extent a sufficient offset supply is still not available, then the facility would pay the benchmark fee to the CAIF. The CAIF would invest in appropriate emerging low-emissions technologies that the Board determines will be necessary for attainment and to meet the region's public health objectives.

C. Ensure AQMP Flexibility and Compliance Flexibility and Provide Safe Harbor

As the District considers even more stringent, technology-forcing regulations, it must recognize that some of the anticipated technologies may never develop, may emerge later than predicted or may cost more than anticipated.⁶ Accordingly, the District should take special care to ensure that control measures can in fact be achieved at the projected scale and the predicted cost.⁷ We strongly recommend

⁵ See, e.g., Presidential Memorandum, *id.* at 38429 (“The EPA will encourage the use of concepts such as a Clean Air Investment Fund, which would allow sources facing control costs higher than \$10,000 a ton for any of these pollutants to pay a set annual amount per ton to fund cost-effective emissions reductions from non-traditional and small sources. Compliance strategies like this will likely lower the costs of attaining the standards through more efficient allocation, minimize the regulatory burden for small and large pollution sources, and serve to stimulate technology innovation as well.”)

⁶ We are particularly concerned about proposed further volatile organic compound (VOC) reductions from the reformulation of coatings and solvents. We are highly skeptical of whether yet another tightening of such rules can be achieved without harming the regional economy, which relies heavily on the use of such materials.

⁷ We note, for example, that the current draft AQMP contains some measures for which the necessary technical and economic feasibility work has not been done. Early indications are, for example, that the available emission reductions for off-road industrial equipment (SOON) may be only a fraction (e.g., ~10%) of the estimated 7.5 tons per day of NOx. Further, while we fully support the SOON program and its ability to achieve near-term NOx emission reductions (and obtain these reductions effectively for both the regulators and the regulated entities through incentives), in these budgetary times, the continued funding for the SOON program unfortunately cannot be counted upon moving forward. We argue that the more prudent approach is to vigorously pursue programs like SOON,

that the District take the following steps to protect against unintended harm to regulated stationary sources. It should:

1. Conduct appropriate technology evaluations before placing measures in the AQMP;
2. Avoid making SIP emission reduction commitments until it has very high confidence that a measure can be achieved at the anticipated cost;
3. State emission reduction commitments in a manner that maximizes the District's flexibility to shift reductions, as necessary, should technologies not emerge as hoped, without the need to seek EPA approval for necessary reduction in credit for technology-forcing rules; and
4. Ensure that future stationary source regulations include both alternative compliance options and an appropriate safe harbor (e.g., ceiling price "in lieu" payment to a CAIF) or some other appropriate cost-containment mechanism.

We stand ready to work closely with the District and other stakeholders on these major recommendations.

II. SPECIFIC ADDITIONAL AQMP COMMENTS

In addition to the foregoing, we wish to share the following specific comments regarding the draft AQMP:

A. RECLAIM

Ever since the 2001 RECLAIM amendments, we have been concerned that the program is no longer a true market, but is instead being used as a transitional device to compel the installation of Best Available Retrofit Control Technology (BARCT). So long as this is how the program is used, we believe the District should allow sources that have installed BARCT to be removed from RECLAIM. Otherwise, the program merely becomes a tax on already well-controlled units. The proposed RECLAIM control measure raises this risk by suggesting that a ratchet wholly unrelated to BARCT equivalency should be included in the AQMP simply because there is a belief that there are surplus RECLAIM Trading Credits in the market. If the District wishes to return RECLAIM to a market model, instead of a BARCT transition model, then it should specify a formal price cutoff – i.e., a price point at which the program would automatically come to a stop - or implement a ceiling price for RTCs that can guarantee compliance. Without such a circuit breaker, the District runs that risk that it may be wrong about the excess credits in the market. We note, for example, that many of the largest RECLAIM

but not make legally binding emission reduction commitments in the 2012 AQMP. We are also highly skeptical of whether the estimated RECLAIM ratchet would be warranted by a more detailed analysis of available control technologies. See further discussion of the RECLAIM in this letter.

LATHAM & WATKINS^{LLP}

facilities are in fact short, not long, on RTCs and that the weak economy may mask the actual long-term demand for credits. We strongly recommend that the District defer further RECLAIM NOx reductions until it has conducted a thorough BARCT equivalency analysis. The risk of harming the market prematurely is too great.

B. Cost-Effectiveness Benchmarks

We applaud the use of cost-effectiveness benchmarks, but urge the District to define such benchmarks so that costs are calculated individually for each specific type of technology or source. To be useful, control costs must be highly differentiated and must reflect incremental, not average, cost-effectiveness. Further, as noted above, we recommend that the District take other precautions to ensure that errors in predictions about technology development pace or cost do not result in harm to businesses or jobs.

C. Clean Air Act 182(e)(5) Commitments

While the current draft of the AQMP limits the scope of attainment to the PM2.5 standard, it also includes Clean Air Act §182(e)(5) proposed implementation measures with binding ozone reduction commitments. We acknowledge that significant ozone emission reductions will be needed to demonstrate attainment in 2023 and 2032 and are committed to working with the District and fellow stakeholders to identify and implement control measures for VOC and NOx that will provide these "black box" reductions. However, the abbreviated planning process for the 2012 AQMP does not afford stakeholders the time to fully review, analyze, and offer input on the proposed control measures currently in the draft AQMP. As touched on above, while we think many of the identified actions have value, we think additional technical and economic feasibility studies are necessary prior to committing to reductions. These control measures and reduction commitments are better left for the 2015 AQMP (or if the upcoming SIP call for the one hour ozone standard requires them), which will give the District and the various stakeholders time to develop a comprehensive and fully vetted ozone attainment plan without the expedited timing pressures of this 2012 AQMP.

Thank you for the opportunity to submit these comments. We look forward to further discussions with the SCAQMD staff and with other stakeholders.

Sincerely,



Robert A. Wyman
of LATHAM & WATKINS LLP