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File No. 018282-0000

March 16, 2021

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South Coast Air Quality Management District
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Re: Proposed Rule 1109.1

Dear Wayne and Susan:

I am writing on behalf of the Regulatory Flexibility Group ("RFG") and the Western States Petroleum Association ("WSPA) to follow up on discussions that occurred during the Stationary Source Committee meeting on February 19, 2021 related to Proposed Rule 1109.1 ("PR1109.1").

First, I appreciate you clarifying that you agree that AB617, now codified in California Health & Safety Code ("HSC") Section 40920.6, did not mandate a transition from RECLAIM to a pure command and control regulatory regime. As I have pointed out in previous communications, the amendments to HSC Section 40920.6 implemented by AB617 did not modify HSC Sections 40920.6 (e) and (f) which remain unchanged in the statute, and continue to be applicable to district BARCT rulemaking. Those sections provide as follows:

> *(e) A district shall allow the retirement of marketable emission reduction credits under a program which complies with all of the requirements of Section 39616 , or emission reduction credits which meet all of the requirements of state and federal law, including, but not limited to, the requirements that those emission reduction credits be permanent, enforceable, quantifiable, and surplus, in lieu of any requirement for best available retrofit control technology, if the credit also complies with all district rules and regulations affecting those credits.*

> *(f) After a district has established the cost-effectiveness, in a dollar amount, for any rule or regulation adopted pursuant to this section or Section 40406 , 40703 , 40914 , 40918 , 40919 , 40920 , 40920.6 , or 40922 , the district, consistent with subdivision (d) of Section 40001, shall allow alternative means of producing equivalent emission reductions at an equal or lesser dollar amount per ton reduced, including the use of emission reduction credits, for any stationary source that has a demonstrated compliance cost exceeding that established dollar amount.*

Section 40920.6(e) continues to authorize implementation of BARCT via a marketable emission reduction credit program such as RECLAIM. Section 40920.6(f) requires a district to allow facilities to achieve established BARCT limits via alternative means under certain specified conditions. As you indicated on February 19, this might include mechanisms such as a facility bubble and/or averaging across units, among other things. We understand that in adopting 2016 AQMP Control Measure CMB-05 the Governing Board directed staff to transition to a command and control regulatory regime; nevertheless, it is important to recognize that state law continues to authorize and/or mandate consideration of alternative means of compliance where appropriate, including in the context of a rule that is predominantly command and control in nature.

Second, I appreciate your willingness to accept and consider updated cost data from the affected refiners. The data previously provided early in the rulemaking process was reflective of historical experience with typical emission control projects. In its current form, PR1109.1 would require installation of controls on virtually every emission unit at the refineries, including those with unique constraints, such as space limitations. The cost of installing controls on these units greatly exceeds the cost associated with more typical installations.

The cost-effectiveness analysis called for in HSC Section 40920.6 is a critical element of the BARCT determination process. That analysis is only as good as the cost data that is used, and use of inaccurate data renders the entire process meaningless. We appreciate that the rulemaking process has been underway for some time, but that is to be expected given the scope and magnitude of PR1109.1. We also understand that data collection must end at some point, and that there is considerable pressure to deliver the emission reductions that will come from implementation of PR1109.1. However, when it becomes apparent that additional data is needed to support a BARCT determination, particularly in a rulemaking of this significance, arbitrary deadlines must give way to ensuring the substantive integrity of the analysis. The updated cost data will improve the quality of staff's analysis and contribute to a more thorough rulemaking record.

Furthermore, to the extent that concerns related to timing are based on the requirement in HSC Section 40920.6 (c)(1) that ". . . each district that is a nonattainment area for one or more air pollutants shall adopt an expedited schedule for the implementation of best available retrofit control technology (BARCT), by the earliest feasible date, but in any event not later than December 31, 2023", those concerns are misplaced. As we have discussed, there are varying interpretations of that language among stakeholders that were involved in the AB617 legislative process. However, that debate need not be resolved in order to conclude that under the unique

circumstances in the SCAQMD it is not necessary for PR1109.1 to be adopted or implemented by any particular date in order for the SCAQMD to remain in compliance with HSC Section 40920.6(c)(1). As discussed earlier in this letter, HSC Section 40920.6(e) authorizes implementation of BARCT via a marketable emission reduction credit program such as RECLAIM. Therefore, as long as the NOx RECLAIM program remains in place and total allocations reflect BARCT-equivalent reductions in the aggregate, the SCAQMD will be in compliance with HSC Section 40920.6(c)(1).

It is my understanding that U.S. EPA has expressed the view that the NOx RECLAIM program should remain in place until the latest implementation date contained in any of the replacement landing rules to ensure that there is no "gap" between BARCT compliance via RECLAIM and BARCT compliance via the landing rules for any emission unit. If that is the case, as long as allocations are adjusted to reflect future BARCT levels as determined by a thorough and accurate analysis, including use of updated cost data, compliance with H&S Section 40920.6(c)(1) will be ensured regardless of the date of adoption and implementation of PR11091. Therefore, there is no justification in the statute as amended by AB617 for rushing the adoption of Rule 1109.1 or for imposing compliance deadlines in the rule that cannot realistically be achieved.

If you would like to discuss these issues further, please do not hesitate to call me at (714) 755-8105 or email me at michael.carroll@lw.com.

Best regards,

Michael J. Carroll
of LATHAM & WATKINS LLP

cc: Regulatory Flexibility Group
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