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August 15, 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 Western States Petroleum Association (“WSPA”) on an important issue that has arisen in connection with the transition of the Regional Clean Air Incentives Market (“RECLAIM”) program to a command-and-control regulatory structure. WSPA is a non-profit trade association representing companies that explore for, produce, refine, transport and market petroleum, petroleum products, natural gas and other energy supplies in five western states including California. WSPA has been an active participant in air quality planning issues for over 30 years. WSPA-member companies operate petroleum refineries and other facilities in the South Coast Air Basin that will be impacted by the transition out of the RECLAIM program.

South Coast Air Quality Management District (“SCAQMD”) staff has recently taken the position that a best available retrofit control technology (“BARCT”) standard may require total replacement of the emitting piece of equipment. SCAQMD staff has articulated this position in various meetings and documents produced in connection with the RECLAIM transition. The most detailed explanation of the staff’s position of which we are aware 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.

In the Rule 1135 Staff Report, 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. We provide a response to each of these arguments below.

“Common Sense Definition” Argument

The SCAQMD’s “common sense definition” argument is flawed in that it focuses on whether or not “replacements” are specifically excluded from the definitions of “retrofits,” as opposed to whether or not they are included within the definition. The SCAQMD’s backward approach to interpreting dictionary definitions is non-sensical. Under this approach, because the definition of “apple” does not specifically exclude “orange,” an orange may be an apple notwithstanding the fact that the definition of apple clearly does not include orange. When one focuses on what is included within the definitions of “retrofit,” as opposed to what is not excluded, it is clear that while replacement of certain elements of any particular object may be a “retrofit,” replacement of the object in its entirety is not.

One of the definitions relied upon by the SCAQMD is the following from the on-line Merriam-Webster Dictionary:

1: to furnish (something, such as a computer, airplane, or building) with new or modified parts or equipment not available or considered necessary at the time of manufacture, 2: to install (new or modified parts or equipment) in something previously manufactured or constructed, 3: to adapt to a new purpose or need: modify.

This definition makes clear that a “retrofit” involves an existing object – “(something, such as a computer, airplane, or building)” – upon which the act of retrofitting occurs, and which continues to exist following that action. The Rule 1135 Staff Report states: “This definition does not preclude the use of *replacement parts* as a retrofit.” (emphasis added). This statement is true, but it does not support the position taken by the SCAQMD that a retrofit may include the replacement of the entire object that is the subject of the retrofit. Note that in the case of BARCT, we are discussing retrofitting a piece of equipment and thus, the second of the definitions in Merriam Webster, “to install (new or modified parts or equipment) in something previously manufactured or constructed,” is the most applicable definition. When one retrofits equipment, such as a heater, the parts, such as a burner, may be updated, but the original heater itself remains.

It becomes even more clear that the staff’s interpretation of the term “retrofit” is incorrect when one considers the definition of the term “replace” from the same source:

2: to take the place of especially as a substitute or successor.

The distinction between these two terms is clear – in the case of “retrofit,” the pre-existing object that is the subject of the action continues to exist following the action, but in an altered state; whereas, in the case of “replace,” the pre-existing object of the action no longer exists following the action. So, if you replace a heater, the original heater no longer exists.

The other definition relied upon by the staff is from the on-line Dictionary.com:

1. To modify equipment (in airplanes, automobiles, a factory, etc.) that is already in service using parts developed or made available after the time of original manufacture, 2. To install, fit, or adapt (a device or system) or use with something older; to retrofit solar heating to a poorly insulated house, 3. (of new or modified parts, equipment, etc.) to fit into or onto existing equipment, 4. To replace existing parts, equipment, etc., with updated parts or systems.

Again, this definition makes clear that a retrofit involves the modification of existing equipment (e.g., airplane, automobile, factory), which continues to exist following such action. To the extent that the term “replacement” is used in the definition, it clearly refers to the replacement of *some element* of that object (e.g., parts of an airplane, equipment in a factory), and not to replacement of the entire object altogether.

And again, the distinction between the two terms becomes even clearer when one considers the definition of “replace” from the same source:

1: to assume the former role, position, or function of; substitute for (a person or thing), 2: to provide a substitute or equivalent in the place of.

“Replace” and “retrofit” are different terms with different meanings, and to suggest that the use of one term somehow includes the other, without some explicit statement of intent to do so, simply ignores the distinction between the two terms.

Furthermore, both “retrofit” and “replace” or “replacement” are terms commonly used in air quality statutes and regulations, and the difference between the terms is well understood. When a statute or regulation is intended to require, or apply to, “replacements,” that intention is typically clear on its face. When a legislative body means “replacement,” it says so explicitly, and to suggest that the California legislature intended to include “replacement” within the scope of a definition that uses the term “retrofit,” flies in the face of the distinction between these two terms that is embodied throughout the universe of air quality statutes and regulations. If the legislature had intended that equipment be replaced, they would have used the word “replacement” (best available replacement control technology). The SCAQMD staff cannot ignore the word “retrofit” in the term “best available retrofit control technology.” It is a fundamental principle of statutory interpretation that each term be given meaning.

“American Coatings” Argument

Neither the language from the *American Coatings* decision quoted in the Rule 1135 Staff Report, nor anything else in the decision, supports the proposition that a BARCT standard may require the replacement of the primary emitting equipment to which the standard is being applied. In fact, this issue is not even addressed in the case.

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The *American Coatings* case addresses the issue of whether or not there are certain circumstances where an adopted BARCT standard may be more stringent than the currently applicable best available control technology (“BACT”) standard for the same class or category of source. The court concludes that it is acceptable for an adopted BARCT standard *with a future compliance date* to be more stringent than the BACT standard that exists at the time the more stringent BARCT standard is adopted. *American Coatings*, 467. In explaining its decision, the court pointed out that a BARCT standard with a future compliance date need not be met until some point in the future after which advances in technology have occurred; whereas, a BACT standard must be met immediately in order for a source to obtain a pre-construction permit. The court also pointed out that BARCT standards with future compliance dates that could not be achieved as of the date of adoption are consistent with the concept that BARCT standards may be “technology-forcing.”

The Rule 1135 Staff Report correctly articulates the *American Coatings* holdings described above but does not contain any analysis to support the staff’s position that a BARCT standard can require the complete replacement of the emission unit. It simply includes the following conclusory statement: “Therefore, the SCAQMD may establish a BARCT emissions level that can cost-effectively be met by replacing existing equipment rather than installing add-on controls . . .” Rule 1135 Staff Report, p. 2-2. The staff report is devoid of any legal analysis or authority, including the *American Coatings* decision, that supports this conclusion.

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, or Bridgit McCann of WSPA at (310) 808-2146 or by email at bmccann@wspa.org.

Sincerely,



Michael J. Carroll
of LATHAM & WATKINS LLP

cc: Cathy Reheis-Boyd, WSPA
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