





"Promoting Jobs in a Competitive Business Climate"





Chair Ben Benoit and Governing Board Members
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

Sent via Email

Re: Additional Comments on Draft Rule 2305

Dear Chair Burke and Governing Board Members:

The 45 undersigned organizations believe there are numerous unanswered questions and concerns regarding PR 2305, and, therefore, we cannot support the rule as proposed. We will not review all of the issues that have been raised in the many letters you have received, but we do want to take this opportunity to focus on the obvious legal issues that exist, and the fact there is no data to support the claims this rule will achieve any emission reductions.

The Mitigation “Fee” is an Illegal Tax

In 2010, Californians approved Proposition 26 to keep government agencies like the SCAQMD from using the “fee” loophole to approve taxes. It is also important to note the SCAQMD is the one who bears the burden of proving it is not a tax.

Proposition 26 states that government activity funded by a legitimate fee must benefit only the taxpayers that pay the charge – think of things like permit fees, license fees, or

trash service charges. Activity benefiting entire communities, and charges that pick winners and losers, are not evenly distributed and therefore constitute a tax.

The district's charge would apply to a limited subset of taxpayers – those that operate warehouses above a specific size – and the payers would not receive any specific benefit. That is a tax.

The SCAQMD Does Not Even Have Legal Authority to Adopt the Rule

The District has identified no law that expressly grants it authority to adopt an ISR that regulates existing sources. Under Federal law an ISR is defined as “the **facility-by-facility review** of indirect sources of air pollution, including such measures as are necessary to assure . . . that a **new or modified indirect source** will not attract mobile sources of pollution” that would cause or contribute to an exceedance of or prevent the maintenance of a National Ambient Air Quality Standard (“NAAQS”). 42 U.S.C. § 7410(a)(5)(D) (emphasis added). The EPA expressly understood this to apply to the evaluation of indirect sources “effects on air quality prior to their construction and modification.” 38 Fed. Reg. 9599 (1973) Nowhere does federal law allow the SCAQMD to develop an ISR like PR 2305 that applies to existing sources and does not look at each facility individually .

There is also no authority under State law that allows the SCAQMD to adopt PR 2305. The statute that provides the SCAQMD with limited ISR authority only references authority for indirect source controls for “any **new source** that will have a significant effect on air quality in the South Coast Air Basin.” HSC § 40440(b)(3) (emphasis added). Thus, the Legislature did not grant the District authority to require existing, unmodified sources to comply with an indirect source control program. It is interesting that SCAQMD staff does not even make a reference to Section 40440 in their attempt to claim there is legal authority to adopt PR 2305.

The SCAQMD staff effort to claim PR 2305 is legal relies primarily on the case of *California Building Industry Association v. San Joaquin Valley Unified Air Pollution Control District* (2009) 178 Cal.App.4th 120. Yet, the ISR at issue in that case only applied to new or modified development projects, and the rule takes a facility by facility approach. PR 2305 does not do either.

There is no Data to Support Any Claim the Rule Will Decrease Emissions

Unfortunately, many have been led to believe the ISR will result in emissions reductions. Yet, in the response to comments section of the Environmental Assessment (EA) the SCAQMD staff set out in writing that there is no such data to support any claim of emissions reductions. Staff wrote;

“Potential changes in NOx and DPM concentrations would be speculative and have not been calculated as the underlying assumptions needed to conduct this analysis are too uncertain...” (emphasis added, Environmental Assessment (EA), C-41)

SCAQMD staff also commented on there being no data to support any claim of the rule achieving any ozone reductions. Staff wrote;

“...ozone concentrations were not modeled. Ozone concentrations cannot be reasonably calculated for individual rules given the many variables needed to conduct this regional modeling analysis. (Emphasis added, C-41)

The draft staff report also admits that “it is not possible” to determine the emissions impacts of the rule. So, instead of trying to determine any potential emissions reductions, staff came up with 19 “scenarios” and “...all 2,902 warehouses were assumed to only comply with a single scenario approach from 2022 through 2031. **No single scenario in this bounding analysis is expected to occur.**” (emphasis added, pg. 60). This clearly means that any supposed emission reduction “estimates” are based upon imaginary scenarios that will never happen.

We remain concerned that SCAQMD staff have not even attempted to evaluate the overlap between PR 2305 and the California Air Resources Board proposed Advanced Clean Fleets (ACF) rule. That rule will regulate the same emissions far more comprehensively and more effectively than PR 2305. The fact remains that once ACF is considered, PR 2305 cannot result in any real, surplus emissions reductions.

Even if one is to speculate that the ISR will minimally reduce emissions, as stated during the January 27, 2021 SCAQMD’s Scientific, Technical, & Modeling Peer Review Advisory Group meeting, such small quantities of NOx reductions will not be sufficient to decrease the ozone concentrations in the basin.

The fact this rule will not reduce ozone concentrations, and may even increase the ozone level, is proven by the pandemic induced events of March through May of 2020 when traffic dropped dramatically. This led to a significant reduction in NOx emissions, yet the ozone level actually increased. At best, staff is speculating the rule may get some minimal emissions reductions. If a much larger NOx reduction did NOT decrease the ozone level, and it actually increased, the science makes it clear this rule will not move the needle and also may make it worse.

There needs to be an overall plan to address the true science of the increase in ozone, not some incremental hope, for addressing the ozone issue. The science needs to lead us to a real plan, and that has not occurred to date.

Conclusion

As mentioned, there are numerous other important outstanding issues that need to be resolved. Yet, even standing alone, we find it very difficult to understand how a rule can be brought forward for approval when there are obvious outstanding legal issues, and no data to support that it could achieve its stated purpose. This is a complex rule which has far reaching impacts, and is taking an approach that staff admits has never been attempted. Therefore, we believe it is vital to be sure the rule is legally sound and based upon solid data, technology, science and analysis which is currently not the case.

We thank the Board members for truly analyzing the legal and practical problems that exist with the rule.

Sincerely,

American Trucking Associations
Association of California Recycling
Industries
Auto Care Association
Building Owners and Managers
Association
California Beer and Beverage
Distributors
California Building Industry Association
California Business Properties
Association
California Business Round Table
California Distributors Association
California Fuels and Convenience
Alliance
California Manufactures & Technology
Association
California Retailers Association
California Small Business Alliance
California Taxpayers Association
California Trucking Association
Carson Dominguez Employers Alliance
CAWA – Representing the Automotive
Parts Industry
Chemical Industry Council of California
Construction Industry Air Quality
Coalition
El Segundo Chamber of Commerce
Engineering Contractors' Association
Foreign Trade Association of Southern
California

Greater Ontario Business Council
Harbor Trucking Association
Inland Empire Economic Partnership
International Bottled Water Association
Long Beach Area Chamber of
Commerce
Los Angeles Area Chamber of
Commerce
Los Angeles County Business
Federation
Majestic Realty
NAIOP Inland Empire
NAIOP SoCal
National Retail Federation
Orange County Business Council
Pacific Merchant Shipping Association
Pacific Mountain Logistics, LLC
PactivEvergreen
Quik Pick Express, LLC
San Gabriel Valley Economic
Partnership
Southern California Leadership Council
The Toy Association
Valley Industry and Commerce
Association
Watson Land Company
Western Aerosol Information Bureau
Western Independent Refiners
Association

Cc: Ian MacMillan
Victor Juan