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June 12, 2007

via Federal Express and Electronic Mail

Dr. Robert J. Sawyer, Chairman
California Air Resources Board
P.O. Box 2815
1001 I Street
Sacramento, CA 95812

Re: Comments on (1) Proposed Pesticide Inventory Revision for the San Joaquin Valley Unified Air Pollution Control District's 2007 Ozone Attainment Plan; and (2) Pesticide Measures in the Proposed State Strategy for California's 2007 State Implementation Plan.

Dear Dr. Sawyer:

The Board must keep its promises, as well as the 2003 promise made by Governor Schwarzenegger to cut air pollution in California by 50% by 2010. We are gravely disappointed that ARB staff would propose actions for the Board that (1) undermine the Governor's commitment to improve air quality for all Californians; (2) manipulate your court-ordered obligation to adopt pesticide regulations; and (3) fail to commit to any new pesticide-related VOC reductions as part of the Proposed State Strategy for California's 2007 State Implementation Plan ("2007 Ozone SIP").

The Center submits these comments on behalf of El Comité para el Bienestar de Earlimart, Association of Irritated Residents, Community and Children's and Advocates Against Pesticide Poisoning, Ventura CoastKeeper, and the Wishtoyo Foundation (collectively "El Comité"), who are the community-based environmental justice organizations that went to court to make you keep your promise to regulate pesticide air pollution. El Comité continues to oppose your efforts to avoid that promise, including your appeal of the court orders and these recent proposals.

The Center also submits these comments on behalf of the California Rural Legal Assistance Foundation, Center for Biological Diversity, Coalition for Clean Air, Steven and Michele Kirsch Foundation, and Medical Advocates for Healthy Air. These organizations advocate for healthy air, healthy communities, and healthy ecosystems throughout California. These organizations object to the current proposals because pesticides and fumigants are a significant source of low-level ozone pollution (smog), toxic air pollution, and toxic contaminants that affect threatened and endangered species.

I. INTRODUCTION

The purpose of this letter is to raise our objections to the proposed actions by the Air Resources Board to (1) adopt the San Joaquin Valley Unified Air Pollution Control District's 2007 Ozone Plan at the June 14, 2007 Board hearing; and (2) adopt the 2007 Ozone SIP at the June 21 and 22, 2007 Board hearing, including a proposal to increase the allowable VOC emissions from pesticides and fumigants in Ventura County.

As proposed, your actions would violate a federal court order. Currently, the Members of the Air Resources Board (hereafter "you"), the Director of the Department of Pesticide Regulation (hereafter "Warmerdam") and the Secretary of the California Environmental Protection Agency (hereafter "Adams"), in your official capacities, are subject to a Federal court order in *El Comité para el Bienestar de Earlimart v. Helliker*, No. 04-0882 (E.D. Cal). You, Warmerdam, and Adams must adopt, implement, and submit regulations to the U.S. Environmental Protection Agency ("EPA") by January 1, 2008.[1] Such regulations must comply with a 12-year old promise made in the last statewide ozone strategy, the 1994 Ozone State Implementation Plan ("1994 Ozone SIP"), to achieve a 20% reduction from 1990 pesticide VOC emissions levels by 2005.[2] The Court found that you and your predecessors, acting in your official capacities, violated the Clean Air Act by not adopting the regulations as promised in the 1994 Ozone SIP.[3]

You, Warmerdam, and Adams have appealed the decision that held you violated the Clean Air Act and the order that mandates you adopt, implement, and submit the regulations to EPA by

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[1] *See* Order (Docket #126), attached as Exh. 1.

[2] *Id.*

[3] *El Comité para el Bienestar de Earlimart v. Helliker*, 416 F. Supp. 2d 912 (E.D. Cal. 2006), attached as Exh. 2.

January 1, 2008. Despite your appeal, the order mandating your compliance with the 1994 Ozone SIP remains in effect and governs your actions now.

El Comité wishes to place you, Warmerdam, and Adams on notice that if you violate the terms of the court order, El Comité will file a motion to enforce that order in the District Court, in which El Comité will seek *all appropriate remedies for that noncompliance.*

For the reasons set forth below, we strongly urge the Board to (1) reject staff's recommendation to change the pesticide VOC inventory for the San Joaquin Valley air basin (June 14 decision); (2) reject the proposal in Appendix H of the Statewide Air Quality Plan to change the 1994 Ozone SIP's strategy in Ventura County (June 21-22 decision); and (3) Commit to Adopt a Long-Term Pesticide VOC Reduction Strategy (June 21-22 decision).[4]

II. THE ADJUSTMENT OF THE PESTICIDE VOLATILE ORGANIC COMPOUND EMISSIONS INVENTORY FOR APPLICATION METHOD SUBSTANTIALLY OVERESTIMATES EMISSION REDUCTIONS SINCE 1991

The San Joaquin Valley Unified Air Pollution Control District ("District") adopted the 2007 Ozone Plan on April 30, 2007 with a specific Volatile Organic Compound ("VOC") inventory for Pesticides. The public notice for the Board's hearing to approve the District's 2007 Ozone Plan includes a proposal to adjust the VOC inventory from pesticides to "reflect changes to the emission estimating methodology to include updated emission factors and the inclusion of an application use factor [for fumigant applications]."[5]

The application method adjustment factor (AMAF) represents the fraction of the total number of pounds of fumigant pesticides applied that ultimately ends up in the air basin after the application. DPR claims emission reductions since 1991 resulting from the change in application

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[4]The two proposed actions suffer from significant procedural irregularities, including the procedural issues related to the proposed inventory revision and the violations of the California Environmental Quality Act should you adopt the Ventura County revision to the 1994 Ozone SIP's Pesticide Element. Your failure to comply with California procedural law will invalidate EPA approval of this SIP submission/revision. *See Sierra Club v. Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (7th Cir. 1983) (SIP revision approved by EPA is invalid where state violated procedural law).

[5]Notice of Public Meeting to Consider the Approval of the San Joaquin Valley 2007 Ozone Plan at 2 (May 30, 2007).

methods over time. There are three fundamental problems with these reduction estimates.

First, the AMAFs are based on unrepresentative field fumigation studies conducted in other states under cool soil conditions, which do not provide an accurate estimate of emissions from California fumigations conducted at high temperatures in the Central Valley during the peak ozone season from May to October. Studies conducted under worst-case scenarios have been excluded from the group of studies on which the regulation is based.[6]

Second, natural variability in flux rates (the rate at which the fumigant escapes from the soil) is large, thus a single study – or even several studies – will not provide an accurate estimate of actual emissions. It is not uncommon for flux rates for different field fumigation studies, even those conducted under very similar application conditions, to vary by a factor of two to four.[7]

Third, DPR has not presented any evidence supporting its estimates of historical fumigant application methods, nor has it made public the details of the process by which this information was obtained. When questioned about how DPR estimated these historical application methods at a recent meeting on Pesticide VOCs (May 22-23, DPR VOCs conference in Sacramento), a DPR staff member responded that DPR based the estimates on surveys of growers and discussions with agricultural commissioners. The public needs to know how those surveys were worded, which growers were asked to fill out the surveys, and which growers were not included in the survey. Which agricultural commissioners participated in the discussion? How was DPR's request for this information worded? What fraction of actual fumigant users did the survey participants represent and which fumigants did they apply? For large applicators, purchase records for plastic tarps or drip tape would provide some concrete data on which to base an estimate. However, the process DPR used to obtain the historical use information is so informal and unscientific as to be quite useless for actually estimating historical use patterns. Because of DPR's clear willingness to skew results toward lower emissions in the development of AMAFs, we are not sanguine about DPR's ability to give an unbiased estimate of historic application methods. Indeed, it was DPR's decision to skew the baseline inventory as the basis for not adopting regulations that gave rise to your liability.[8]

DPR's use of a single, cherry-picked study with low emission rates as representative of emissions from all applications of a particular fumigant and their failure to account for the natural

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[6]*See* Memorandum from Susan Kegley to Brent Newell, June 12, 2007, attached as Exhibit 3.

[7]*Id.*

[8]*See* note 3, *infra*.

variability between flux rates is unscientific and results in "reduction" estimates that are far greater than actual reductions. This systematic skewing of the data in an attempt to present the appearance of reductions suggests that DPR's "science" on this matter cannot be trusted to give reliable results. Instead of waiting until the calculations are re-done with more representative field studies, DPR should remove the AMAF from the calculation of fumigant emissions and this Board should not adjust the San Joaquin Valley pesticide VOC inventory to reflect that adjustment.

In summary, we strenuously object to the procedural irregularities associated with this proposal. The data supporting these emission inventory adjustments is inadequate, and the public and District decision-makers have not had a meaningful opportunity to consider these changes that reduce the VOC inventory by 5 tons per day in the San Joaquin Valley, according to the Staff Report.[9] The actual proposal to change the inventory in the District's 2007 Ozone Plan was not made publicly available until May 30, 2007, only 14 days prior to the June 14, 2007 hearing. Moreover, the claimed technical basis for the inventory adjustment is the April 6, 2007 memorandum from Terrell Barry to John Sanders, which is only two months old.[10] This proposal was not available to, or considered by, the public or District decision-makers during the time leading up to and including the April 30, 2007 hearing to approve the District's 2007 Ozone Plan. Nor has the Barry Memorandum or the concept of fumigant application method emission reductions been subject to public comment or peer review: DPR's public comment period on these proposals remains open until July 13, 2007.

To the extent that ARB staff also propose to amend the South Coast, Ventura, Southeast Desert, and Sacramento nonattainment areas' VOC inventories in the same or similar manner as this proposed change, these comments apply with equal force. Because there is no historical basis to apply method use adjustments (historical pesticide use reports do not include method of use data) and because the application method adjustment factors are not based on good science, we urge the Board to reject the pesticide VOC inventory adjustment proposed by staff. We also call on the Board to reject the proposal because of the significant procedural irregularities. We further request that the Board direct staff to work with DPR to develop an accurate and historically valid inventory.

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[9]Final Draft Staff Report at 17, Table 4. The undersigned do not concur with the "old" inventory as described in Table 4. The latest inventory from DPR dated October 26, 2006 calculated the 2004 pesticide VOC inventory in the San Joaquin Valley air basin to be 25.6 tons per day, making the difference between the most recent DPR inventory and your proposed change to be 7.7 tons per day. *See* Memorandum from Tamara Roush to John Sanders, October 24, 2006 at 4, attached as Exhibit 4 (hereafter "Roush Memoandum").

[10]Attached as Exh. 5.

We remind you that the underlying basis for the Court's holding that you, Warmerdam, and Adams violated the Clean Air Act is because of *inventory manipulation*. The proposal that staff brings to you now manipulates the inventory using AMAF, and does not comport with the EPA-approved methodology for calculating the Pesticide VOC inventory, including the key baseline inventory, in the Pesticide Element of the 1994 Ozone SIP.

Moreover, by artificially decreasing the 1991 baseline inventory, the proposal will also reduce the *amount* of emission reductions required by the Court order and the 1994 Ozone SIP. In other words, by skewing the 1991 baseline inventory downward, the actual tonnage reductions which the regulations must demonstrate decrease significantly: 20% of a smaller number yields less actual reductions.

You should carefully consider this proposal, because your approval will violate a Federal court order that the Plaintiffs will enforce.

III. THE ADJUSTMENT OF THE PESTICIDE VOLATILE ORGANIC COMPOUND EMISSIONS INVENTORY FOR APPLICATION METHOD SUBSTANTIALLY OVERESTIMATES EMISSION REDUCTIONS SINCE 1991

Staff's proposal to amend the 1994 Ozone SIP with respect to the Pesticide Element in Ventura County would violate the court order, the Clean Air Act, and the California Environmental Quality Act.

First, the proposal would violate the court order because you, Warmerdam, and Adams have not obtained an order to alter the judgment. You remain subject to its terms and may not take this action without prior court approval.

Second, even if you could ignore a Federal court order, the Clean Air Act prohibits EPA from granting a SIP revision that interferes with attainment of the ozone standard and any other Clean Air Act requirement. Specifically, the proposal violates section 110(l) of the Clean Air Act, 42 U.S.C. § 7410(l), because the net effect of the proposal is an increase of one ton per day of VOC emissions for Ventura.[11] Section 110(l) prohibits EPA from approving revisions to a state's EPA-

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[11]Staff proposes to allow an increase of one ton per day of VOC from pesticide use and substitute that one ton with a claimed surplus ton of VOC reductions already achieved from motor vehicle controls. The net change is an overall increase of one ton per day of VOC because but for the change, the air basin would have benefitted from two tons per day of VOC reductions (one ton from motor vehicles and the ton from pesticides). *See* Appendix H to Proposed State

approved SIP "if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in [42 U.S.C. § 7501]), or any other applicable requirement of this Act." 42 U.S.C. § 7410(l). Appendix H contains no showing that the one ton per day increase of VOC in the Ventura air basin will not interfere with Ventura's obligation to demonstrate reasonable further progress, attainment with the eight-hour ozone standard by the deadline for a serious nonattainment area, or any other requirement of the Clean Air Act. *See Hall v. U.S. EPA*, 273 F.3d 1146 (9th Cir. 2001).

Second, your approval of staff's proposal to allow increased VOC emissions from fumigant use in Ventura County violates the California Environmental Quality Act because the Environmental Impact Analysis (1) is the functional equivalent of a Negative Declaration and staff failed to prepare the functional equivalent of an Environmental Impact Report when substantial evidence supports a fair argument that your decision to adopt the proposal may have a significant effect on the environment; and (2) fails to require feasible mitigation measures and project alternatives for the toxic effects on public health and threatened/endangered species from increased fumigant use.

A. The Board Must Prepare the Functional Equivalent of an Environmental Impact Report.

The Environmental Impact Analysis presents a document functionally equivalent to a Negative Declaration, rather than the functional equivalent of an Environmental Impact Report.[12] As a result, the "fair argument" standard applies to whether the ARB must prepare a more thorough environmental analysis. *See Friends of the Old Trees v. Department of Forestry and Fire Protection* (1997) 52 Cal.App.4th 1383, 1396-1397. The CEQA Guidelines codify the "fair argument" standard:

> If the lead agency finds there is substantial evidence in the record that the project may have a significant effect on the environment, the lead agency shall prepare an EIR (*Friends of "B" St.* (citation omitted)). Said another way, if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant

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Strategy for California's 2007 State Implementation Plan.

[12]Even if the Environmental Impact Analysis is the functional equivalent of an EIR, the Analysis cites to no substantial evidence that would support the no impact conclusion.

effect. (*No Oil* (citation omitted).)

CEQA Guidelines § 15064(g)(1); *see also* Pub. Res. Code § 21080(d).

The Environmental Impact Analysis contends that there will be no adverse toxic effects on public health from increased fumigant use.

> DPR regulations and U.S. EPA label restrictions currently in place are designed to prevent acute or chronic toxic exposure. They are sufficient to avoid adverse effects of toxic emissions from any additional use of these fumigants that would result if the VOC reduction targets in the pesticide element of the SIP were one ton per day higher in Ventura in 2008.[13]

The Environmental Impact Analysis fails to support this conclusory statement with any facts or analysis, which CEQA requires. *See Mountain Lion Coalition v. California Fish and Game Commission* (1989) 214 Cal.App.3d 1043, 1047 (the environmental document prepared by a certified agency must support its conclusions with "references to specific scientific and empirical evidence"). This assertion fails to pass even the "straight-face" test: it is inconceivable for the Environmental Impact Analysis to assert that an increase in toxic fumigant use will have no impact on the environment.

1. Substantial evidence shows that neither DPR regulations nor EPA labeling requirements adequately prevent acute or chronic health impacts.

The Environmental Impact Analysis' claim that *current* DPR regulations and EPA pesticide labeling requirements "are sufficient to avoid adverse impacts" is specious. EPA labeling inadequately prevents acute or chronic health impacts, the California Office of Environmental Health Hazard Assessment concludes that current methyl bromide regulations are not protective of pubic health, DPR's MITC Toxic Air Contaminant Evaluation shows that the public living or working near fumigated fields are inadequately protected from acute or longer term health effects, and there are currently no regulations in place to protect pubic health from chloropicrin use.[14]

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[13]*See* Appendix E to Proposed State Strategy for California's 2007 State Implementation Plan at 37.

[14]*See* Memorandum from Anne Katten to Brent Newell, June 6, 2007, attached as Exhibit 6.

2. Substantial evidence demonstrates that fumigants cause acute and chronic impacts to human health and to threatened and endangered species.

The most significant fumigants used in Ventura County are methyl bromide, chloropicrin, 1,3-dicloropropene, and metam-sodium.[15] These fumigants inflict substantial harm on human health. These fumigants also may inflict substantial harm on the California red-legged frog,[16] which is found in Ventura County and listed as endangered under the federal Endangered Species Act.[17] If used adjacent to or upstream or upwind of California red-legged frog populations, these fumigants could inflict substantial harm on red-legged frogs. Moreover, there is no indication that ARB consulted with the California Department of Fish & Game or the U.S. Fish & Wildlife Service regarding the proposed project's impacts to the red-legged frog or other threatened or endangered species in Ventura County.

The Environmental Impact Analysis' failure to engage in a good faith analysis of the toxic impact from increased fumigant use in Ventura County violates CEQA. The Board should direct staff to prepare the functional equivalent of an EIR to analyze, mitigate, and require feasible alternatives to reduce the toxic effects on public health and threatened/endangered species from increased fumigant use.

B. The Environmental Impact Analysis Fails to Analyze Fumigant Impacts, Require Feasible Mitigation Measures, and Require Feasible Project Alternatives.

As demonstrated above, the Environmental Impact Analysis fails to consider or analyze the toxic effects on public health and threatened/endangered species from increased fumigant use. In addition to a good faith analysis, the Board has a duty to include in this Environmental Impact Analysis alternatives to the project and mitigation measures to minimize any significant adverse environmental impact. Pub. Res. Code § 21080.5(d)(3)(A). The Environmental Impact Analysis

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[15]*See* Roush Memoandum at 7, attached as Exhibit 4.

[16]*See* Second Declaration of Susan Kegley in Support of Plaintiffs' Second Motion for Summary Judgment, attached as Exhibit 7.

[17]U.S. Fish & Wildlife Service, "Listed, Proposed, And Candidate Species Which May Occur in Ventura County, CA," on the internet at http://www.fws.gov/ventura/esprograms/listing_ch/spplists/species_ven.cfm (last visited June 7, 2007).

fails to consider or propose any mitigation measures or alternatives to address toxic effects on public health, the environment, and threatened/endangered species from increased fumigant use.[18]

IV. THE PROPOSED STATE STRATEGY FOR CALIFORNIA'S 2007 STATE IMPLEMENTATION PLAN SHOULD COMMIT TO ADOPT A LONG-TERM PESTICIDE VOC REDUCTION STRATEGY

As written, the Department of Pesticide Regulation's Proposed Pesticide Strategy merely commits to comply with the terms of the 1994 Ozone SIP and the court order (and includes the impermissible manipulation of the inventory, as discussed in Section I, *supra*).[19] Given staff's claim that the ozone pollution problem is so severe in the San Joaquin Valley that the Board must grant the District's request to reclassify as an extreme nonattainment area, the decision not to include a further commitment to reduce emissions from one of the largest sources of VOC in the San Joaquin Valley should be reconsidered.

The Proposed Pesticide Strategy merely states that "[f]uture DPR actions will be included in SIP updates after DPR takes regulatory action."[20] There is no commitment for further reductions, only a vague and unenforceable statement of intent to do something in the future. The Board should include a commitment to adopt a specific strategy to reduce VOC emissions from pesticide and fumigant use in all ozone nonattainment areas of California.

V. CONCLUSION

The ARB staff proposals to revise the pesticide inventory in the District's 2007 Ozone Plan and to adopt the Proposed State Strategy for California's 2007 State Implementation Plan continues California agencies' favored treatment of pesticide users and manufacturers at the expense of the public health. Even after the Plaintiffs were forced to sue you and make you comply with the 1994 Ozone SIP, ARB staff offer more of the same instead of advancing those qualities of this Board that

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[18]*See* Appendix E to Proposed State Strategy for California's 2007 State Implementation Plan at 51.

[19]*See* Proposed State Strategy for California's 2007 State Implementation Plan at 131. It is somewhat ironic that the 2007 Proposed State Strategy for pesticides is nothing more than a commitment to comply with a commitment made on November 15, 1994, which the EPA has already approved as part of the State Implementation Plan.

[20]*Id.*

make the Board a leader among air regulators.

It is truly sad that instead of honoring the Governor's promise and the Board's promises made more than a decade ago, ARB staff propose to take you down the path of least resistance. Do not follow them.

Sincerely,

Brent Newell
Center on Race, Poverty & the Environment

Brent Newell for
Tom Frantz
Association of Irritated Residents

Brent Newell for
Mati Waiya
Ventura CoastKeeper and
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Brent Newell for
Susan Frank
Steven and Michele Kirsch Foundation

Brent Newell for
Dr. David Pepper
Medical Advocates for Healthy Air

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Coalition for Clean Air

cc: Air Resources Board Members (by U.S. and Electronic Mail without exhibits)
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