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Office of the Executive Officer
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January 28, 2005

Ms. Catherine Witherspoon
Executive Officer
California Air Resources Board
P.O. Box 2815
Sacramento, CA 95812

Dear Catherine:

Thank you for your letter of January 24, 2005 setting out the status of SCAQMD's request that CARB submit to EPA a request for a waiver of the District's fleet rules pursuant to Section 209(b) of the Clean Air Act. Your letter provides us with a concise clarification of your views on some of the important issues regarding the fleet rules that have been under discussion among CARB, U.S. EPA and SCAQMD over the past several weeks. I believe, based on the content of your letter, that we should be able to agree on a process, as I set out below, that will satisfy your concerns and allow for an expeditious submittal of the waiver request to U.S. EPA.

The most significant issue concerns the actions CARB must take so that federal preemption of the fleet rules may be waived pursuant to Section 209(b). At the end of our recent teleconference, representatives of U.S. EPA recommended that you and I seek to agree on the process for CARB approval of the fleet rules, and indicated that EPA would give considerable deference to CARB's interpretation of the process to be followed.

As you know, the fleet rules have already been the subject of a lengthy and comprehensive public process. The SCAQMD adopted the rules over a one and a half year period in which all stakeholders were given a number of opportunities for public comment, including during a series of workshops on each of the fleet rules, during preparation and consideration of an EIR pursuant to the California Environmental Quality Act (CEQA), and as part of the District's public hearing process. In addition, CARB recently provided a 45-day period for the public to comment in writing on the District's waiver request.

Based on this procedural history, we believe, and we have suggested to you, that CARB could approve the rules through an executive order in just the same manner as it approves local rules for inclusion in the State Implementation Plan (SIP), and that such a procedure would satisfy the requirements of Section 209(b). This is the most expeditious path towards preserving full enforceability of the rules.

Alternatively, either you, as Executive Officer, or the Air Resources Board could approve the fleet rules immediately following a hearing before the full Board. This process would comply with all legal requirements but would take somewhat more time.

A further option would be for CARB to adopt the fleet rules as emergency regulations following a hearing on as little as ten days notice. The emergency regulations would be in effect for 120 days. During this period, CARB would proceed with the notice-and-hearing process set out in the California Administrative Procedure Act (APA). This expedited schedule would assure the continued enforcement of the fleet rules during the pendency of the APA rulemaking.

We understand that CARB has utilized this state-approved emergency rulemaking process to adopt regulations where imminent harm to public health would otherwise occur while a permanent rulemaking is underway. The "finding of emergency" necessary for CARB to adopt the fleet rules as emergency regulations would be straightforward, as the state and federal governments have identified diesel exhaust and its constituents as a toxic air contaminant. In this regard, we direct your attention to CARB's children's health study, as well as health documentation contained in your own diesel particulate control program.

In your letter you note that while U.S. EPA "was not completely definitive" regarding the adoption process, they had pointed to CARB's practice of submitting waiver requests for regulations that had been adopted pursuant to the State APA. That practice, however, follows the Legislature's requirement that CARB adopt its regulations pursuant to the APA. In contrast, the Legislature in California Health and Safety Code section 40447.5 granted the District specific authority to adopt the fleet rules and, as discussed above, the District did so in full compliance with the applicable notice and hearing procedures set out in the Health and Safety Code.

We firmly believe CARB can use the procedures we have discussed above to approve the fleet rules and have a strong preference for any of the above options. Nevertheless, in light of your potential reluctance to employ any of the procedures set out above — and in light of the willingness you have expressed in your January 24 letter to initiate a rulemaking process for the separate adoption by CARB of the SCAQMD fleet rules— I am prepared to outline a fourth option for CARB adoption in accordance with the procedures set out in the state APA. However, for this process to be acceptable to the District, I need your firm commitment that CARB will act in a truly expeditious manner. In your letter, you suggest that the fleet rules might be adopted "by the end of this year." I certainly would not characterize a process that takes that much time as "expeditious." Neither, I believe, would my Board or the affected public.

In reviewing the APA timelines for rule adoptions with counsel, I am hard pressed to explain to my Board why it would take CARB more than 90 days to hold a hearing to adopt the rules. The SCAQMD staff has conducted extensive emissions and cost analyses of the rules. We have also completed a full CEQA review, and already provided all of this information to CARB staff.

We seek your commitment to schedule the hearing before your Board for no later than April 30, 2005, and to use your best efforts to complete the adoption process, including submitting the rules to the Office of Administrative Law, by no later than 30 days after the hearing is held. I recognize that these are ambitious time-frames, but I believe that the importance of the fleet rules fully justifies the commitment of resources to meet these deadlines.

Moreover, both of our agencies have demonstrated that they are capable of meeting an expedited schedule when we fully utilize the resources available to us. For example, during the state energy crisis, SCAQMD developed and adopted a major revision to our RECLAIM program and several associated mobile source credit rules —including CEQA documentation— within a four-month period. When the state and public needed help, we shifted our priorities to match this need. Certainly, with a staff of more than 1,000 people, the existing substantial record created during our rulemaking process, and the subsequent court proceedings, CARB is capable of a rule adoption, if it desires, within the suggested time period.

We would willingly provide additional District resources to you at your request to assist with CARB's preparation of the necessary documents and reports, as we have done in the past. We have assigned staff to work for CARB on state fuels policy and on the hydrogen highway. And we will continue to make resources available for projects that address critical public health concerns, regardless of which agency is heading up the project. We would hope that you share our position and that you will provide the necessary resources for expeditious adoption of the fleet rules.

Your letter also raises two additional points that we discussed with U.S. EPA: whether the fleet rules are within the scope of previously granted waivers and whether the Clean Air Act's lead time requirements apply. On the former issue, we believe that the fleet rules fall within the scope of previously granted waivers. Nothing in the fleet rules requires certification of new engines or vehicles. Rather, the rules rely entirely on engines and vehicles that are CARB-certified and commercially available. As CARB previously submitted waiver requests to U.S. EPA for the engines and vehicles required by the fleet rules, the fleet rules are within the scope of the existing waivers that EPA has granted to CARB.

Also, CARB's practice when submitting waiver requests has been to request a within-the-scope of the waiver determination, or, alternatively, a new waiver, and we encourage you not to depart from this practice for the fleet rules waiver. We continue to believe, however, that through our joint and cooperative efforts, we will be able to present a persuasive case to EPA warranting a determination that the rules are within the scope of previous waivers. In any event, from a clean air and public health perspective, it would be very short-sighted and indefensible to refuse to proceed expeditiously with the waiver based on the fear that EPA may decline to treat the waiver request as within-the-scope and instead treat it as a request for a new waiver.

We similarly believe that EPA's views on the applicability of lead time requirements is not a reason for CARB to decline to submit the fleet rules to EPA for a waiver. We are pleased that in your letter you affirm that CARB maintains that the lead time criterion does not apply to California standards but applies to federal standards only. We are in full agreement with your position, and see no reason not to proceed on the basis of what we both view as the correct reading of the law.

Moreover, if the fleet rules are determined to be within the scope of previous waivers, as we believe to be the case, the lead time issue would not arise. Finally, because the vehicles mandated by the fleet rules must be commercially available, and the fleet rules that the District adopted have been in effect and implemented for over four years, the claim that the lead time requirements apply in this situation is indefensible.

In short, we call upon you to support continuation of the fleet rules by taking the following steps:

- Proposing the SCAQMD fleet rules, as written, for adoption by the CARB Board by relying, in the first instance, on the extensive work performed by SCAQMD staff; and
- Proposing adoption under an APA timetable that provides for a hearing to be held by April 30, 2005.

CARB has an opportunity to assist the 42 percent of Californians who live in our air district and are seeking clean air. The fleet rules simply require the purchase of lower emission vehicles that are commercially available. We believe that the fleet rules are consistent with Governor Schwarzenegger's goal of 50 percent reduction in air pollution by 2010, with the South Coast Air Basin Air Quality Management Plan, as well as with California's adopted policy of reducing California's petroleum dependence. It is important to note that the latter policy, as you know, was approved by both the California Energy Commission and the CARB Governing Boards.

Finally, your letter noted the possibility of CARB examining new control measures not included in the 2003 South Coast State Implementation Plan as an alternative means of replacing emission reductions associated with the fleet rules. Since CARB already has a shortfall in its SIP commitments, it is difficult to understand why one would add to an existing deficit in the control program while exposing environmental justice communities and others to highly toxic diesel exhaust in the interim. Such an action by CARB would be an obvious step backwards, and we call upon you to abandon such an approach.

In closing, please let me remind you of the substantial public benefits of the fleet rules and of the need for prompt action. Any lapse in the fleet rules would allow for the purchase of dirty diesel vehicles that would remain on California roads for years to come, substantially affecting the health of the breathing public. For this reason, above all others, we continue to request that CARB move forward expeditiously to assist us in the ongoing implementation of the fleet rules. I look forward to working with you on this important project.

Sincerely,

Barry R. Wallerstein, D.Env.
Executive Officer

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cc: Alan Lloyd
Terry Tamminen
CARB Board Members