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# LATHAM & WATKINS LLP

March 20, 2017

## *Via Electronic Upload*

Chair Mary D. Nichols  
ATTN: Clerk of the Board  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95814

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Re: Regulatory Flexibility Group Comments on the California Air Resources Board's ("ARB") Consideration of the South Coast Air Quality Management District ("SCAQMD") 2016 Air Quality Management Plan

Dear Chair Nichols:

Thank you for the opportunity to provide comments regarding ARB's consideration of the SCAQMD's 2016 Air Quality Management Plan (the "2016 AQMP"). These comments are submitted on behalf of the Regulatory Flexibility Group ("RFG"), a coalition of Southern California businesses in the aerospace, electronics, energy and petrochemical sectors. The RFG is committed to supporting strategies for achieving state and national air quality standards that are cost-effective and fairly allocated among all sectors of the Southern California economy.

Over the past four years, the RFG has been an active participant in the development of the 2016 AQMP, particularly with respect to Control Measure CMB-05: Further NOx Reductions from RECLAIM Assessment. The RFG submitted a number of comments on various iterations of the 2016 AQMP to the SCAQMD staff and SCAQMD Governing Board (the "Governing Board"), and we incorporate those prior comments herein by reference.<sup>1</sup> **The RFG hereby requests that the ARB disapprove the amendments to Control Measure CMB-05 that were adopted by the SCAQMD Governing Board at its hearing on March 3, 2017.** The reason for this request is that these "11<sup>th</sup> hour" amendments are arbitrary and unsupported by the administrative record, inconsistent with various state laws, and unnecessary to achieving the objectives of the 2016 AQMP. **At a minimum, the March 3, 2017 amendments to CMB-05 must be withheld from incorporation into the federally enforceable state implementation plan ("SIP").**

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<sup>1</sup> See November 7, 2016 letter to Dr. Phillip Fine and February 24, 2017 letter to Dr. William Burke (attached).

### ***Background***

The RFG was formed in the late 1980s to develop and advocate for a market-based emission reduction strategy for the South Coast region that would achieve equivalent emission reductions to a command-and-control regulatory regime, but at lower costs and with less disruption to the region's economy. Those efforts culminated in the adoption of the RECLAIM program. The RFG has participated in every significant amendment to the RECLAIM program since its initial adoption.

While we acknowledge that not all stakeholders support market-based emission control strategies, and respect that point of view, we firmly believe that the RECLAIM program has been highly successful. Regulated facilities under the RECLAIM program have dramatically reduced NO<sub>x</sub> emissions since the program's inception. As confirmed by required periodic reviews, the RECLAIM program has consistently achieved emission reductions in excess of what SCAQMD and ARB have determined to be necessary to maintain command-and-control equivalency. In fact, the NO<sub>x</sub> RECLAIM program has achieved an approximately 70% reduction in emissions from covered sources over the last two decades, which significantly exceeds the reductions from non-RECLAIM stationary sources over the same period.

The RFG participated actively in the rulemaking effort that led up to the adoption of amendments to the NO<sub>x</sub> RECLAIM program in December 2015 (the "2015 Amendments"). While some stakeholders desired even further reductions, the 2015 Amendments resulted in the largest adjustment to the NO<sub>x</sub> RECLAIM program since its inception in 1994. When fully implemented, the 2015 Amendments will have removed at least 12 tons per day ("TPD") of RECLAIM Trading Credits ("RTCs") from the NO<sub>x</sub> RECLAIM market (a 45% reduction). The RFG supported these further reductions.

In October 2016, the SCAQMD Governing Board adopted further amendments to the RECLAIM program that will remove additional RTCs from the market in the event of future RECLAIM facility shutdowns. The RFG did not oppose imposition of these additional reductions to the future supply of available RTCs, notwithstanding the fact that anticipated increases in the supply of available RTCs from mobile source reductions pursuant to SCAQMD Rule 2008, which were an integral element of the RECLAIM program when adopted, have never come to fruition. As a result, while RTCs have continued to be removed from the market over the life of the program, no newly created RTCs have been added to the market.

In this context, the RFG was hesitant to support proposed control measure CMB-05 as proposed by staff in the 2016 AQMP calling for an additional 5 TPD reduction in emissions from the RECLAIM program by 2031. The RFG was also concerned about suggestions that the program be sunset, given its past success as well as the significant investments that facilities have made premised on the market-based structure of the RECLAIM program. Nevertheless, because of the lead time provided (i.e., 2031), the RFG did not oppose the call for further reductions of 5 TPD. Furthermore, while RFG opposes a complete dismantling of the RECLAIM program, as it has in the past, the RFG expressed willingness to participate with other stakeholders to determine whether or not changes could be made to address their concerns.

Thus, the RFG supported CMB-05 as it was proposed by SCAQMD staff in the Final Draft 2016 AQMP released to the public in December 2016.

***Concerns with March 3, 2017 Amendments to CMB-05***

Without adequate public notice or opportunity for comment, amendments to CMB-05 were formally proposed for the first time at the March 3, 2017 hearing of the SCAQMD Governing Board. The proposed amendments were introduced *after* the close of the public comment period, and at a time when it was virtually assured that public comment could not be re-opened due to noticing requirements and the need to act on the 2016 AQMP to accommodate ARB's already scheduled consideration of the plan at its hearing on March 23-24, 2017. The amendments were passed by a vote of 7 to 6. Among other things, the amendments accelerate the 5 TPD reduction called for in the control measure from 2031 to 2025. There is no evidence in the rulemaking record that achieving an additional 5 TPD of NO<sub>x</sub> reductions by 2025 is technically or economically feasible. Furthermore, there has been no substantive assessment of the environmental or socioeconomic impacts of requiring the removal of an additional 5 TPD by a date prior to 2031.

- ***Procedural Due Process and the Right to Notice and Comment***

The right to procedural due process assured under both the United States and California constitutions, includes the right to notice of any proceeding which will affect a final determination of a protected interest and the opportunity to be heard and present objections in any such proceeding. *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987). In addition, various state law provisions, including the California Administrative Procedures Act codified at California Government Code § 11340 *et seq.*, and the SCAQMD Governing Board's own Meeting Procedures, set forth requirements for providing adequate public notice and opportunity to comment on proposed actions of the Governing Board. Because the amendments to CMB-05 were not formally introduced, or even suggested, until after close of the public comment period, and at a time when it was almost certain that public comment would not be re-opened, and in fact was not re-opened, their adoption runs afoul of these important procedural requirements.

- ***California Environmental Quality Act Considerations***

Adoption of the 2016 AQMP is a discretionary "project" subject to review pursuant to the California Environmental Quality Act ("CEQA"). A Notice of Preparation of a Draft Environmental Impact Report ("EIR") analyzing the impacts of the 2016 AQMP was prepared by SCAQMD staff and released on July 5, 2016. The Draft EIR was released on September 16, 2016, with the comment period closing on November 15, 2016. After incorporating comments and making minor textual changes, the Final EIR was released in January 2017.

The amendments to CMB-05 made on March 3, 2017 constitute changes to the project description made after completion of the Final EIR, without additional environmental review, or an opportunity to comment on potential environmental impacts associated with the changes. The project description is the sine qua non of an informative, legally accurate EIR. (State CEQA

Guidelines §15124, *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192.) A project description that is unstable and changing results in an EIR that fails to disclose the actual impacts of the project. As stated in *Inyo County*, “shifts among different project descriptions do vitiate the city’s EIR process as a vehicle for intelligent public participation.” (*Inyo County*, 71 Cal.App.3d at 197.) Moreover, “A project description that omits integral components of the project may result in an EIR that fails to disclose the actual impacts of the project.” (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26.) The Final EIR identified a number of environmental impacts associated with implementation of CMB-05, including air quality impacts, increased energy consumption, and impacts on climate change. (See Final EIR, pp. 4.1-2, 4.1-22, 4.1-44 and 4.2-2). No assessment was conducted to determine whether or not accelerating the 5 TPD of reductions called for in CMB-05 would increase the severity of these previously identified impacts or result in new impacts not identified in the Final EIR.

- ***California Health & Safety Code Sections 40922(b) – Implementation Schedule***

California Health and Safety Code Section 40922(b) sets forth specific requirements that must be taken into consideration when establishing the implementation schedule for a control measure in an attainment plan. Section 40922(b) provides that “[i]n developing an adoption and implementation schedule for a specific control measure, the district shall consider the relative cost effectiveness of the measure, as determined under subdivision (a), as well as other factors including, but not limited to, technological feasibility, total emission reduction potential, the rate of reduction, public acceptability, and enforceability.” There is no indication whatsoever that any of these factors were taken into consideration by the Governing Board when it voted to establish the accelerated implementation schedule for CMB-05.

- ***California Health & Safety Code Section 40462(b) - Energy Resources***

California Health and Safety Code Section 40462 sets forth specific requirements pertaining to the adoption and revision of air district attainment plans. Section 40462(b) requires, among other things, that “revisions to the plan shall identify the resources necessary to carry out its provisions, including enforcement costs **and the effect of its provisions on energy resources.**” (emphasis added). The Final EIR for the 2016 AQMP concluded that implementation of CMB-05 as proposed by the SCAQMD staff would result in increased energy consumption. It is reasonable to conclude, therefore, that amending CMB-05 might alter the effect of CMB-05 on energy resources, yet no analysis was undertaken to determine whether, or to what extent, that might be the case.

- ***California Health & Safety Code Sections 40913(b) and 40922(a) - Cost-Effectiveness***

California Health and Safety Code Section 40913(b) mandates that “[e]ach district plan shall be based upon a determination by the district board that the plan is a cost-effective strategy to achieve attainment of the state standards by the earliest practicable date.” Similarly, Health and Safety Code Section 40922(a) requires that “[e]ach plan prepared pursuant to this chapter shall include an assessment of the cost-effectiveness of available and proposed control measures and shall contain a list which ranks the control measures from the least cost-effective to the most

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cost-effective.” These requirements are addressed in Chapter 6 of the 2016 AQMP (See p. 6-21). SCAQMD staff also conducted a separate Socioeconomic Assessment for the 2016 AQMP. It does not appear that any portion of this analysis was revised to reflect the amendments to CMB-05 adopted on March 3, 2017. Thus, the mandated cost-effectiveness analysis for CMB-05 is not based on the measure as adopted, and therefore does not satisfy the requirements of Sections 40913(b) and 40922(a).

***Proposal to Incorporate the Amendments to CMB-05 into the SIP***

The Final Draft 2016 AQMP, released in December 2016, was premised on the additional five TPD of reductions associated with CMB-05 occurring as late as 2031. That Final Draft 2016 AQMP included an attainment demonstration, based on extensive modeling, which showed compliance with all applicable federal Clean Air Act requirements. Since the Final Draft 2016 AQMP released in December 2016 was premised on full implementation of CMB-05 by as late as 2031, and concluded that, as proposed, the 2016 AQMP met the requirements of the federal Clean Air Act, the accelerated reductions embodied in the March 3, 2017 amendments are clearly not necessary to meet those requirements. They must therefore be excluded from inclusion in the SIP pursuant to California Health and Safety Code Section 40460(d), which provides as follows: “Notwithstanding any other provision of this division [pertaining to development of SCAQMD attainment plans], the state implementation plan for the air basin shall only include those provisions necessary to meet the requirements of the Clean Air Act [referring to the federal Clean Air Act].” Thus, even if ARB approves the 2016 AQMP as adopted, it must not include the amendments adopted on March 3, 2017 in what it forwards to the U.S. Environmental Protection Agency for approval into the SIP. To do so would be directly contrary to Health and Safety Code Section 40460(d).

***Conclusion***

Given that the Governing Board-approved amendments to CMB-05 were never analyzed prior to their introduction and adoption, and that there is no evidence in the administrative record to support their adoption, the amendments are arbitrary, and ARB should not approved them as part of the 2016 AQMP. We therefore urge ARB to disapprove the March 3, 2017 amendments to CMB-05 that: (1) accelerate the removal of 5 TPD from the NOx RECLAIM market from 2031 to 2025; and (2) direct an outcome (program sunset) that has not been fully evaluated or analyzed. Furthermore, the amendments to CMB-05 are not necessary to achieve compliance with federal requirements, and therefore, at a minimum, must be excluded from inclusion in the SIP. Thank you for the opportunity to submit these comments.

Sincerely,

 on behalf of

Michael J. Carroll  
of LATHAM & WATKINS LLP

cc: Honorable Members, Air Resources Board

# Attachment

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November 7, 2016

### *Via Electronic Upload*

Dr. Phillip Fine  
Deputy Executive Officer  
Planning, Rule Development, and Area Sources  
South Coast Air Quality Management District  
21865 Copley Drive  
Diamond Bar, CA 91765

Re: Regulatory Flexibility Group Comments on the South Coast Air Quality Management District ("SCAQMD") 2016 Air Quality Management Plan

Dear Dr. Fine:

Thank you for the opportunity to provide comments regarding the October 2016 draft of the SCAQMD 2016 Air Quality Management Plan (the "AQMP" or "Plan"). We submit these comments on behalf of the Regulatory Flexibility Group ("RFG"), a coalition of California entities whose operations are subject to regulation under the Clean Air Act and corresponding state and regional air quality programs. RFG members include manufacturers, electric utilities and electric generating facilities, natural gas utilities, oil and chemical companies and other regulated entities. RFG members have participated in the review of and comment on SCAQMD regulations since its formation in the fall of 1990. We applaud District Staff for its extensive effort with respect to this iteration of the AQMP, and we look forward to continuing to work with Staff in advance of the Governing's Board's consideration of the Plan. Our general comments follow.

### ***RFG Supports a Technology- and Fuel-Neutral AQMP***

We appreciate that Staff has affirmatively stated in the draft AQMP that it intends to apply the long-standing approach of air quality regulatory agencies to set policies and requirements that are fuel and technology neutral. As we have previously advocated, the AQMP should not pick winners and losers, but instead should force technologies to compete against one another to maximize air quality benefits and provide products that meet residential, commercial, and industrial needs at reasonable cost.

Technology and fuel neutrality promotes competition, which forces technologies to become cleaner and drives down prices. In regulatory regimes around the Country, and in this District, technology and fuel neutral policies have succeeded in encouraging a clean air competition, which has resulted in the development and improvement of cleaner technologies powered by a number of energy sources. Importantly, technology and fuel neutrality also protects against price spikes and shortages, which can have devastating impacts on the economy. For all of these reasons, RFG fully supports the affirmative statement that the AQMP is intended to be fuel and technology neutral; we do, however, request that the District include additional affirmative statements throughout the AQMP (and, in particular, in CMB-01 and CMB-02) so that there is no ambiguity as to the District's intent in this regard.

### ***RFG Supports an Incentive-Based AQMP***

We appreciate the District's ongoing sensitivity to the delicate balance between the region's economic health and continued air quality progress. We believe that the next 15 years will pose unique and unprecedented challenges in crafting an air quality strategy that can meet the region's dual economic and environmental goals. In light of these interrelated goals, we were particularly encouraged by the draft AQMP's focus on aggressive, incentive-based programs targeting opportunities across industries and sectors for additional cost-effective emission reductions. As RFG has consistently advocated for the last decade, an incentive-based approach protects against the significant risk that mandating further reductions will result in Southern California businesses (which generally have already implemented Best Available Control Technology ("BACT")) incurring costs that are well beyond those that would be considered reasonable relative to the corresponding environmental benefit.

Nevertheless, we have some concerns that the textual revisions (*e.g.* the addition of the phrase "aggressive new regulations" to the overall strategy discussion on page 4-3 and the significant revisions to CMB-01 and CMB-02) made in the October 2016 draft of the AQMP preview an intent by the District to pull back from the incentive approach in favor of a traditional regulatory regime. While RFG recognizes that in order to achieve the Clean Air Act requirements, a combination of incentives and regulation will be necessary, we also feel strongly that an aggressive, multi-stakeholder effort to obtain the incentive funding necessary to derive air quality benefits in advance of implementing any regulations provides the best opportunity to meet air quality goals without risking the overall economic vitality of our region. RFG stands ready to work with the District to pursue the federal, state, and local funding opportunities in support of the incentive approach.

### ***Regulatory Measures and Cost-Effectiveness***

To the extent incentives alone are not sufficient to capture additional emission reduction opportunities from stationary sources, the District should only proceed with future regulatory measures after very careful technical evaluation of the feasibility of achieving further reductions at a reasonable cost. We are concerned with the District's increasing acceptance of higher values for cost effectiveness, particularly for those stationary sources that have already invested significantly in the control measures and from which there are limited further emission reduction opportunities available when compared to mobile sources.



Given the economic and employment risk of further burdening stationary sources, we strongly believe that any future regulation should include very clear incremental cost-effectiveness benchmarks to ensure that control measures, as implemented, remain within reasonable economic boundaries. Furthermore, any future stationary source measures should contain appropriate alternative compliance mechanisms (*e.g.*, an alternative compliance fee set at the relevant incremental cost benchmark level and used to fund clean technologies) to ensure that sources have a ready compliance alternative when costs near the benchmark level.

***RFG Advocates for the Immediate Implementation of Certain AQMP-Identified “Incentives” for Stationary Sources***

Currently, there is a material risk in Southern California that the traditional permitting process, offset scarcity and continued imposition of technology-forcing regulations will result in environmental regulations thwarting economic health. This can happen whenever stationary sources choose not to site their operations, and their jobs, in our region due to the length, uncertainty and relatively high cost of seeking a permit here rather than in more hospitable regions. We are also concerned that we may lose many of the businesses currently operating in the District if they believe they will be unable to achieve or afford emerging regulations. These unfavorable conditions can be avoided, or at least substantially reduced, by reforming the current regulatory program. This AQMP offers the opportunity to establish the framework to facilitate this needed reform.

We were particularly appreciative of the opportunity to share our concerns in this regard during the development of the Industrial Facility Modernization White Paper. In our comments on that document, we advocated for, among other things, the reform of the New Source Review (“NSR”) program and the development of a presumptive BACT approach to expedite permitting. While AQMP CMB-01 lists permitting and NSR enhancements (along with a number of worthwhile proposals) as “potential” incentive measures for stationary sources, RFG feels strongly that the AQMP needs to go further in this regard. ***Without near term, meaningful NSR and permitting reform, we risk losing job creating opportunities because our region cannot permit new facilities fast enough or cheaply enough to compete with alternative destinations.***

RFG, therefore, recommends that the AQMP commit the District to moving forward with the rapid deployment of the following two critical “incentives” to preserve existing manufacturing in the South Coast Basin and to capture new opportunities:

- ***Expedited Permit Processing:*** The District now has over 40 years of experience in evaluating control options (*e.g.*, BACT for the permitting of new and modified stationary sources). Certainly, the time has come when the District can identify, in advance, for the vast majority of the stationary sources it permits in the region, precisely what the control technologies will be for sources permitted here. We urge the District, in addition to expansion of the existing equipment certification program and pre-approved permit program, to develop a presumptive BACT approach by which sources can immediately receive a permit for most equipment types without the traditional extensive review period. Provided that the District develops a process for distinguishing between permit

applications that reasonably require further evaluation and those that do not, we believe that such an approach can be approved under existing law.

- *NSR Reform:* For well over a decade, we have urged the District, the California Air Resources Board and the EPA to pursue major offset reform. The current system is broken and the result is that it is nearly impossible for a manufacturing or energy project to be sited in the South Coast Basin even though any such facility would necessarily install BACT. Given this reality, we support the CMB-01-listed approaches of expanding the number of exemptions under Rule 1304, expanding the use of the priority reserve under Rule 1309.1, and providing short-term leasing options. We also see the contemplated clean air investment fund (“CAIF”) as fitting into a three-tier approach for the comprehensive reform of the current system that RFG has been advocating for the last several years. Under the RFG-proposed approach: (1) a facility would seek to obtain any available offsets at or below a predetermined offset price (*e.g.*, similar to the AQMP cost-effectiveness benchmarks); (2) if a sufficient supply is not available on the market, then the facility would purchase offsets from a pre-funded CAIF administered by the District or by other appropriate publicly-accountable entities; and (3) to the extent a sufficient offset supply is still not available, then the facility would pay the benchmark fee to the CAIF. The CAIF would invest in appropriate emerging low-emissions technologies that the Board determines will be necessary for attainment and to meet the region’s public health objectives.

While RFG also supports and deems critical a number of the other CMB-01-listed potential incentive opportunities for stationary sources (including incentive funding, CEQA initiatives, and recordkeeping reform), we feel strongly that expedited permitting and offset reform have the best opportunity to balance air quality improvement with the facilitation of needed opportunities for economic growth in our region and, therefore, request that the District make an affirmative commitment to immediately move forward with the implementation of these reforms in the AQMP.

### ***The Future of RECLAIM Requires Careful Consideration***

The RECLAIM program has been highly successful. As the District is well aware, regulated facilities under the RECLAIM program have dramatically reduced NO<sub>x</sub> emissions since the program’s inception in the mid-1990s. In fact, the RECLAIM program has achieved an approximately 70% reduction in emissions from covered sources over the last two decades, which significantly exceeds the reductions from non-RECLAIM stationary sources over the same period. Critics of RECLAIM tend to evaluate the program against a “technology benchmark,” and point to the absence of specific control technologies at certain facilities as “evidence” of the program’s shortcomings. The problem with this approach is that it applies a completely inappropriate benchmark for evaluating the effectiveness of a market-based cap and trade program, which, by design, does not mandate any specific control technologies. The appropriate measure of success for a program such as RECLAIM is an “emissions benchmark,” which evaluates whether or not the program has achieved the intended emission reductions. As indicated above, when evaluated against the appropriate benchmark, RECLAIM has exceeded both requirements and expectations.

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The past success of the RECLAIM program does not mean that it should not be reevaluated from time to time, or that there are not ways to further improve upon the program. RFG supports continued evaluation of the program, as has been done since its inception, to determine whether or not there are ways to improve upon its past success. While additional analysis would be required before any informed decisions could be made, it may be appropriate to transition certain sources or categories of sources, particularly those that currently operate at BACT or BARCT levels, to a more traditional command and control regulatory regime. However, any transition of even a portion of the RECLAIM program to a command and control model will require extremely careful planning and consideration that takes into account the substantial investments that facilities have made over the past two decades consistent with the RECLAIM market-based model. In evaluating any proposed changes to the RECLAIM program, care should be taken to preserve those elements of the program that have worked effectively to achieve substantial emission reductions.

Finally, given the clear indication that the District intends to reevaluate at least certain aspects of the RECLAIM program, we do not believe it is appropriate at this time for the District to project a five ton emission reduction by 2031. Instead, we recommend assigning a "TBD" in the AQMP.

Thank you for the opportunity to submit these comments. We look forward to further discussions with the SCAQMD staff and with other stakeholders.

Sincerely,

A handwritten signature in black ink that reads "Michael J. Carroll". The signature is written in a cursive style with a large initial "M".

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of LATHAM & WATKINS LLP

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February 24, 2017

### *Via Electronic Mail*

Dr. William Burke, Chairman  
Governing Board  
South Coast Air Quality Management District  
21865 East Copley Drive  
Diamond Bar, CA 91765

Re: South Coast Air Quality Management District (“SCAQMD”) 2016 Air Quality Management Plan

Dear Dr. Burke and Honorable Members of the Governing Board:

For the last four years, the Regulatory Flexibility Group (“RFG”)<sup>1</sup> and its members have worked closely with SCAQMD staff and other stakeholders during the rigorous and broad SCAQMD 2016 Air Quality Management Plan (the “AQMP” or “Plan”) public process. That rigorous process produced a draft document that RFG feels appropriately balances environmental protection with economic health. Given the years of stakeholder input and extensive compromise on all sides reflected in the draft Plan, we were concerned that certain members of the Governing Board sought to introduce substantive changes to Plan after the closure of the public hearing on February 3, 2017. Given that these amendments were introduced after we had the opportunity to provide our written comments and oral testimony, we feel it is important to summarize for the Governing Board a few of our prior comments (transmitted to Dr. Phillip Fine in a letter dated November 7, 2016) that directly address certain aspects of the potential amendments discussed by the Governing Board.

### *Importance of a Technology- and Fuel-Neutral AQMP*

RFG has consistently advocated that AQMPs should not pick winners and losers, but instead should force technologies to compete against one another to maximize air quality benefits and provide products that meet residential, commercial, and industrial needs at reasonable cost.

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<sup>1</sup> RFG members include manufacturers, electric utilities and electric generating facilities, natural gas utilities, oil and chemical companies and other regulated entities. RFG members have participated in the review of and comment on SCAQMD regulations since its formation in the fall of 1990.

Technology and fuel neutrality promotes competition, which forces technologies to become cleaner and drives down prices. Importantly, technology and fuel neutrality also protects against price spikes and shortages, which can have devastating impacts on the economy. For all of these reasons, RFG fully supports the affirmative statement in the draft Plan that the AQMP is intended to be fuel and technology neutral. However, the amendments proposed to MOB-07 and MOB-08 on February 3rd break from the fuel and technology neutral policy by directing the use of “zero-emission” vehicles. Such an amendment would be inconsistent with both the overarching intent of the draft Plan (including the recognition that near-zero technologies are critical to achieve significant near-term emission reductions necessary for attainment) and the long standing technology and fuel neutral policies of the District.<sup>2</sup> The proposed amendments also conflict with the California Air Resources Board’s 2016 Mobile Source Strategy (Appendix IV-B to the AQMP), which relies on near-zero technologies. Further, an amendment requiring “zero-emission” vehicles would also be inconsistent with the 2011 SCAQMD Air Quality-Related Energy Policy, which directed SCAQMD staff to proceed with future clean air program development in a fuel neutral manner by “promot[ing] zero and near-zero emission technologies in both stationary and mobile applications to the extent feasible.”<sup>3</sup>

### *The Future of RECLAIM Requires Careful Consideration*

As detailed in our November 7, 2016 comments on the draft Plan, RFG supports the continued evaluation of the RECLAIM program, as has been done since its inception, to determine whether or not there are ways to improve upon its past success. While additional analysis would be required before any informed decisions could be made, it may be appropriate to transition certain sources or categories of sources, particularly those that currently operate at BACT or BARCT levels, to a more traditional command and control regulatory regime. However, any transition of even a portion of the RECLAIM program to a command and control model will require extremely careful planning and consideration that takes into account the substantial investments that facilities have made over the past two decades consistent with the RECLAIM market-based model. Further, in evaluating any proposed changes to the RECLAIM program, care should be taken to preserve those elements of the program that have worked effectively to achieve substantial emission reductions.

We also advocated that, given the clear indication in the draft Plan that the District intends to reevaluate at least certain aspects of the RECLAIM program, it was not appropriate for the District to project a five ton emission reduction by 2031. Instead, we recommend assigning a “TBD” in the Plan. District staff declined to adopt our suggestion, choosing instead to leave the five ton commitment by 2031 in place. While RFG continues to view such commitment as premature, any amendment to move that commitment up to 2025 (as alluded to by a member of the Governing Board following the close of the public hearing on February 3rd) is particularly

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<sup>2</sup> These policies have succeeded in encouraging a clean air competition, which has resulted in the development and improvement of cleaner technologies powered by a number of energy sources.

<sup>3</sup> “AQMD Air Quality-Related Energy Policy,” SCAQMD, July 11, 2011, available at: <http://www.aqmd.gov/docs/default-source/planning/Greenhouse-Gases/board-approved-energy-policy-090911.pdf?sfvrsn=6>; see also Southern California Gas Company’s November 7, 2016 Comments on the Revised Draft 2016 Air Quality Management Plan at 1-3.

**LATHAM & WATKINS** LLP

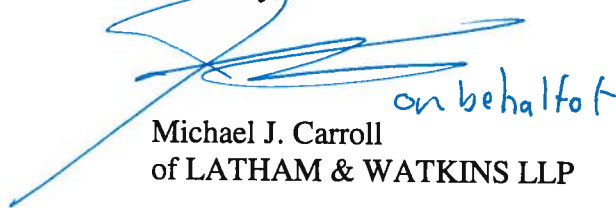
troubling given that the impact analysis associated with removing an additional five tons from the program six years earlier than currently contemplated has not yet occurred. While enhancements to the RECLAIM program may ultimately achieve five tons or more in emission reductions prior to 2031, the District should not make a commitment to an earlier date until it completes an analysis informed by a robust stakeholder process.

***Conclusion***

In closing, we believe strongly that the draft Plan put forth by staff reflected the extensive compromise reached over the last four years and provides the framework for bringing the Basin into attainment without thwarting economic health, and we encourage the Board to approve the draft as put forward by staff. However, to the extent the Governing Board does consider adopting amendments, we ask that the Board consider the comments already put forward by the RFG on the draft Plan that relate to the importance of fuel neutrality and the need for an informed, comprehensive evaluation of the RECLAIM program.

Thank you for the opportunity to submit this letter. We look forward to continued collaboration with SCAQMD staff and with other stakeholders to implement the Plan following the Governing Board's adoption.

Sincerely,



Michael J. Carroll  
of LATHAM & WATKINS LLP

cc: Marion Ashley, Member, South Coast Air Quality Management Board  
Ben Benoit, Vice Chairman, South Coast Air Quality Management Board  
Joe Buscaino, Member, South Coast Air Quality Management Board  
Michael A. Cacciotti, Member, South Coast Air Quality Management Board  
Dr. Joseph K. Lyou, Member, South Coast Air Quality Management Board  
Judy Mitchell, Member, South Coast Air Quality Management Board  
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Dr. Clark Parker, Member, South Coast Air Quality Management District  
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