

Ms. Peggy L. Jenkins
California Air Resources Board
Research Division, Fifth Floor
1001 I Street, P. O. Box 2815
Sacramento, CA 95814
aircleaners@listserv.arb.ca.gov

California Consumers for Freedom of Choice
Written Comments to the California Air Resources Board
Air Cleaner Regulation 6-05-07 Staff Revised Draft

Introduction

Thank you again for the opportunity to participate in this workshop on the development of a regulation to limit the use and emission of ozone from indoor air cleaners. The California Consumers for Freedom of Choice (CCFC) is a diverse group of California consumers from throughout the State. We are concerned over the California Air Resource's Board (CARB) rulemaking process as it affects the rights of consumers to select highly effective indoor air cleaning devices that emit ozone and are safe when used as directed. Our comments today focus on the 6-05-07 Draft Proposed Regulation Order for the Regulation for Limiting Ozone Emissions from Indoor Air Cleaning Devices.

It has been over a year since we first heard about AB 2276 and started our involvement in the legislative, political and rulemaking process in California. Our wide range coalition of California Consumers for Freedom of Choice is dedicated to one principal: *preserving one of the most fundamental roles of government in regulating business and products, and that is protecting a consumer's right to choose!*

At the suggestion of key members of the legislature, as well as the Governor's staff and the Governor himself, we have participated in this rulemaking in the spirit of cooperation to achieve a rule that would preserve to the maximum extent possible, a consumer's freedom of choice in selecting the equipment and technologies that *they believe* can best meet their "individual" needs and the needs of their families in various indoor environments, including residential, business, recreational, educational, religious, health, and travel, against both known and unknown forms of indoor air pollution. We have also participated to ensure that individual consumers can maximize their options as part of their obligations to be prepared during an influenza pandemic. As the Governor of California stated as he convened the State's summit to prepare for influenza pandemic, "We can't predict what will happen, but what we can do is plan. State government is taking action to prepare for a flu pandemic, but every Californian plays a role in preparedness. Every community, business, school and family must have their own emergency plan." (3/30/06 Governor's Press Release). The US Secretary of Health and Human Services has echoed the Governor's comments here on the role of individuals,

noting that in the final analysis, it will fall upon individuals, and NOT the government, to protect themselves and their families against all forms of indoor air pollution.

Towards this purpose, in prior comments and at prior work shops and even staff meetings, we have expressed our policy points of view, offered recommendations on standards and even on specific draft language changes. But, unfortunately, our voices have not yet been heard, to the point of the current Staff Draft not reflecting any of our *most basic* recommendations or positions. Perhaps it is our inexperience before the ARB; or our misinterpretation of who the primary beneficiaries of this process are intended to be?

Nonetheless, we are here again restating our positions and offering another round of recommended changes.

“We will not go away until we truly believe fair and reasonable consumer rights to freedom of choice protections, are adopted. We will continue participation each and every round, before Staff, the Full Air Resources Board, the Office of Administrative Law, the State Courts, the Governor’s Office, the Media, and even back to the legislature. Justice will not be served unless the consumers’ right to choose is protected!”

Our written comments focus on 5 areas raised by the latest draft:

1. Who are the intended beneficiaries of AB 2276 and Occupied Space Standards?
2. The rights of pre-existing customers prior to the regulation effective date for compliant air purifiers.
3. How will the labeling and language dilemma be solved?
4. How to inject *common sense* into the “termination by testing” provision.
5. Inconsistencies with federal and state laws.

1. Who are the intended beneficiaries of AB 2276 and Occupied Space Standards?

We submit that the intended beneficiaries of AB 2276 apply to the broadest reach or group of consumers in the State of California, and only apply to reasonable testing and limiting ozone levels in occupied spaces while they are physically being occupied at the time.

Interpreting the reach of AB 2276 to include the broadest group of consumers and restricting occupied space to its literal definition would result in the preservation of broadest consumer choices and options. It would also protect those who have and are still benefiting from their personal choices in the past; would protect those who CAN benefit from the broadest array of choices in the future; and result in maximizing for the broadest group of California Consumers on their permissible choices with reasonable safeguards.

Interpreting occupied space to reflect any and all indoor space ever capable of being occupied at any time significantly narrows and restricts the reach of consumers who can benefit from AB 2276. Such an interpretation, we submit, not only has no basis from the language or intent of AB 2276, but it would turn public policy upside down by severely restricting choices of the many, both past users and future users; reward select interest groups, technologies and products, and potentially penalizing others; require consumers to select higher priced but permitted alternatives, such as commercial and industrial air cleaner services where specifically allowed by the Rule; create an elite class of consumers who will purchase out of state or find ways to exercise their freedom of choice, ESPECIALLY where there is little if any impact on outside 3rd parties; and create disincentives for new products and technologies (utilizing the latest science) to be introduced in California.

Here are just a few of the most recent stories from our members that illustrate how the current Staff Draft could affect tens of thousands of them; and how a narrow interpretation of the class of intended beneficiaries will result in a denial of the consumer's right to choose and likely produce unfavorable consequences:

Mary – Mary is a mother of 3 children with an abusive husband – abusive not in a physical sense, but by constantly endangering her and her young children. Mary's husband is a chain cigarette smoker who refuses to smoke outside. From the time he returns home each day after work, until he sleeps, and before leaving each morning he is a chain smoker in his home. And since the state's banning of smoking in public buildings where he works and in bars & restaurants, his smoking has increased inside his home. Several times a week friends who smoke come over, too. Each morning, like clock-work after her kids are off to school, Mary takes her air purifier and places it in each room where her husband has smoked and sets it on the highest levels to expedite the removal of smoke and its residual chemicals from the air and surfaces of her home. Mary's particular purifier has a timer built in that controls the amount of time the unit is set on high mode. She then comes back after the set time and ventilates the treated rooms before her kids return home from school. This is how Mary *chooses* to address and reduce primary and second hand smoke, odors and residual surface contamination from her family's home environment. How will Mary and others in her situation be impacted by Staff's Draft. Especially since it's not against the law to smoke in homes, even if occupied by minor children. Mary may be using a purifier that when used as directed with a set timer in unoccupied spaces on the highest setting might exceed 0.05 ppm of ozone, or might not meet the 2 inch tail pipe test when set as directed for occupied spaces, but overall meets the ambient level through the room of no more than 0.05 ppm. She is using her purifier in her personal residence, while her children are not physically present, and she is not physically present in the rooms where the purifier is on the highest operational timed settings, and she ventilates before her children return. Under the Staff Draft, Mary could not purchase an air purifier that does what her current purifier is capable of doing; and if her current purifier ever needed repair or replacement from an out of state manufacturer/distributor, she would be denied service as the manufacture

would not be able to ship the same type of purifier back to her due to restrictions from the ARB's ruling.

Tom – Tom runs a small executive suite rental office complex for small businesses. In the past, he used his air purifiers on the highest levels of ozone, or small ozone generators to quickly clean offices vacated in his rentals while not occupied to rid them of odors, chemicals and smoke related to tenant cigarette smoking as well as facilitate faster odor removal of fresh paint. He also uses them when there is a fire causing smoke in his rental complex either on his premises or from nearby wild fires. Before he invested in his personal equipment, he used Service Masters for smoke related problems, who had charged him and his insurance company \$18,000 for a similar cleanup. Under the Staff Draft, Tom would no longer be able to use his purifier equipment in this manner, even though his use is in occupied space during unoccupied times.

Elaine – Elaine's son is a very well known TV sports writer and commentator and during playoff seasons she helps to take care of her grandchildren. She uses air purifiers that allow her to quickly deodorize and surface clean against germs and bacteria in the house, and even in the garage where skunks oftentimes crawl in; and when the kids are at school and she is away she sanitizes her home and duct system with a purifier that has *optional* and *timed ozone settings* when at the highest levels. On those occasions where wild fires have created smoke and chemicals that have swept into the neighborhood and into the house, she has used the purifiers in the highest settings to more quickly clean the indoor air, again on a room-to-room basis while each room is unoccupied at the time. Under the Staff Draft, Elaine would no longer be able to do these types of clean-ups with her current purifiers, and she would not be able to repair or replace it with the same effective features if it breaks.

Trace – Trace lives with his 80 year old father along the beach and uses his purifiers to constantly reduce mold odor, mold spores and surface mold caused by reoccurring outdoor moisture and ocean mist. He even uses his purifier on the highest levels when indoor mold appears on wall surfaces after bad storms where often times roof water leakage occurs - *again when no one is home, or not in the actual room being treated*. Trace nor his father can afford any other solutions, either roof repairs or thousands of dollars a year to commercial or industrial cleanup companies. His greatest fear is that his purifiers break down and the manufacturer cannot fix and return it because they are out of state and the product will not meet the Final ARB Rule; and if a machine cannot be fixed and he orders a new one the manufacturer cannot ship it into the state; and if he goes out of state to purchase and transport a purifier that meets his needs but may not be compliant with the Final ARB Rule, then he could be stopped at the border and be arrested and his purifier seized. Under the current Staff Draft, Trace's concerns are very real!

Phoebe – Phoebe commutes for a company both within and outside of California; she also does missionary work in poorer areas. Currently, she uses a personal purifier to breathe better in stuffy planes and terminals while on travel, and in poorer neighborhoods of Los Angeles where the air quality is stagnant and riddled with bacteria and germs. To

help protect her in both indoor environments against germs and microbial pollution including TB, Avian Flu and SARS which years earlier affected her family's village in China, she uses the same Wein Industries air personal purifier (that has several peer reviewed studies proving its effectiveness!) that failed the 2 inch ozone test during the initial Staff Workshop, even though the ozone production is a byproduct of ionization; even though it passed when tested 2 inches below the nose. Under the current Staff Draft, Phoebe will not have this purifier option in the future; and even if her current purifier is exempted, she fears that when it needs repair or replacement, she will no longer have this highly effective personal option to choose. Her concerns were recently heightened when she returned from overseas around the same time Andrew Speaker (the Atlanta attorney diagnosed with drug resistant TB) was flying home. She would like to ask staff and the Board Members what she should do if someone like an Andrew Speaker was on her plane and was continuously coughing and sneezing over an eight hour flight in her breathable air space, or they sat next to each other in the Airport for 2 hours waiting for a connecting flight. If her personal air purifier is banned under the current Staff proposal, what options will the ARB offer to protect her personal breathing space?

Boris – Boris works part-time with members of his church and local real estate companies helping to clean up the polluted air in residential homes from odors, mold, mildew, pet dander, and surface and airborne bacteria. In some cases the residences are completely unoccupied during a 3 or 4 day period as the owners or tenants are away; in other cases the residence's owners or tenants are there, but either not in the rooms or areas being treated at the time, or they leave the residence for a few hours every day when the purifiers are on the highest settings to speed up the cleaning process. Although Boris does charge for private residences, he does not charge for Church related properties or in those situations referred to him by the Church where the owners or tenants do not have the ability to pay. Boris is concerned that he might not be able to continue to provide these quality services under the final Board Rule, or be able to repair, replace or even purchase new equipment capable of handling the problems mentioned. Under the current Staff Draft, Boris' concerns are very legitimate!

2. The rights of pre-existing customers prior to the regulation effective date for compliant air purifiers.

Another concern we have with the current Staff Draft is that tens of thousands of pre-existing consumer customers who are extremely satisfied with their current air purification equipment and usage choices/options would be negatively impacted in repair and replacement situations. For example, a purifier under warranty is shipped back to an out-of-state manufacturer who then discovers they cannot re-ship the repaired unit back into California because it may not meet the final ARB rule due to the unreasonable 2 inch tail pipe test, certification or other operational issues. Consumers would be "hung out to dry" whether their purifier is in or out of warranty coverage. If it breaks they cannot get it fixed or replaced with the same flexible features and operational controls that they desired when they initially purchased their purifier. What options will ARB offer to consumers here?

Now instead of extinguishing consumer rights altogether here, and without conceding our earlier submitted arguments and positions, what about the following “Modest Solution” that easily can be implemented and enforced: Set up a simple waiver process where all a consumer or the manufacturer has to do is provide a copy of proof of purchase prior to the effective date of any Final Rule, and any repairs or comparable replacements where repairs are not possible for pre-Final Rule purchases are permissible. There is no language comprehension or other issue present here that should compromise a pre-existing consumer’s right to choose.

3. How will the labeling and language dilemma be solved?

It is apparent that Staff has rejected, at least in part, offering consumers choices in equipment (those that meet the 0.05 ppm verses those that can exceed under any circumstance, even including products with built in timers when on high in unoccupied spaces) as well as where they can use equipment (those that can be used in a residential, business, recreational, religious, educational, automotive vehicle, or any other indoor settings while the space is occupied or unoccupied, as opposed to treating all of these referenced settings where any individual “could” ever be present as “occupied”) out of concern that a percentage of California consumers cannot read or comprehend the English language. On the basis of that concern, ARB staff has stated that they believe this “class of consumers” is not capable enough to figure out how to (a) read or follow any instructions either on machine labels or in machine operating manuals/directions on adjusting the operational settings to allow for a higher than 0.05 ppm of ozone when the space is non-occupied, or (b) comprehend the difference between using the machine while an area or room was occupied verses unoccupied, or (c) comprehend the circumstances under which they could optionally set a timer that is built into the unit or manually adjust the operational settings to allow for a higher than 0.05 ppm of ozone in unoccupied spaces, and then to revert the settings back to 0.05 ppm or less of ozone when the space is occupied.

One of our members commented upon seeing this provision that this ran contrary not only to her understanding of our national policy on English, but directly contradicted the State of California policy on English in repeated statements by the current Governor (as recently at June 15, 2007, and reported by CBS News before the National Association of Hispanic Journalists). The founders of our country came from different cultures and even languages, but agreed to assimilate into one language: **English**. A prerequisite to becoming an American Citizen under current law is learning to read and understand English, and even taking a test in English! If a current citizen sponsor’s a family member from another country who is not yet proficient in English, then the sponsor is responsible for being their surrogate in navigating the English language. If a person purchases an air purification system or air cleaner, then more likely than not someone in the distribution or sales chain has explained in a language the consumer can understand what the product is as well as the operational use and warnings instructions. Consumers, regardless of their level of literacy are not unintelligent and will not pay up to hundreds of dollars (which is

average for air purifiers) for a product that they are not sure what it is, how it works, or whether or not it is safe! To suggest otherwise is to insinuate that people who do not comprehend English are stupid. To ban safe and effective products when used as directed or impose tough restrictions on a consumer's right to choose the type of indoor air protection for themselves and their families because of a very small percentage of residents or citizens who have failed in their obligation to read and comprehend English, serves only to penalize the overwhelming numbers of consumers who are faithful US Citizens and have fulfilled their obligations to learn English and assist family members with any language barriers.

Here, we submit another "Modest Proposal" as a possible solution for non-occupied space and for optional higher than 0.05 ppm ozone functioning: Because of computer and printing technologies, manufacturers now can provide labels in any foreign language approved by the ARB; and either that label can be the original label from the manufacturer, or the local distributor can download a file from the manufacturer and print it out on an Avery-type label and place it on the air purifier or air cleaner; and if dual language disclosure is an issue, then we do not know of any consumer who would object to helpful disclosures even on an oversized label in order to have the right to choose the products and operational features they determine best to meet their individualized and family needs.

4. How to inject common sense into the "termination by testing" provision.

As we have consistently submitted, the testing provisions in AB 2276 do not mandate any particular standard or testing protocol. Rather, it merely requires that the Board "shall consider existing and proposed testing methods, including, but not limited to, those developed by the American National Standards Institute and Underwriters Laboratory." Further, Section 41985.5.(a) defines the Federal ozone emissions limits for the Board to follow:

(a) "Federal ozone emissions limit for air cleaning devices" means the level of generation of ozone above which the device would be considered adulterated or misbranded pursuant to Section 801.415 of Title 21 of the Code of Federal Regulations, specifically the generation of ozone at a level in excess of 0.05 part per million by volume of air circulating through the device or causing an accumulation of ozone in excess of 0.05 part per million by volume of air when measured under standard conditions at 25 degrees Celsius (77 degrees Fahrenheit) and 760 millimeters of mercury in the atmosphere of enclosed space intended to be occupied by people for extended periods of time. (underlining & bolding added)

We have also submitted our concerns that testing procedures not exclude current beneficial products on the market *that are scientifically proven* to address microbial, bacterial and other airborne and surface contaminants. For example, the Wein Mini-Mate personal purifier worn around Mr. Montoya's neck that Mr. Paul Overbeck, the Executive Director for the International Ozone Association tested at the December 9,

2006 Staff Work Shop, demonstrating that approximately 2 inches above the purifier, the ozone emissions exceeded the 0.05 ppmv; however, when tested 2 inches below Mr. Montoya's nose, the ozone emissions were below 0.05 ppmv. Under the current Staff Draft, this product would fail to comply with testing and would be banned from sale, even though there was not an accumulation of ozone in excess of 0.05 ppmv in the atmosphere of breathable space occupied by the wearer or bystander of this device. New beneficial products that otherwise comply with the Federal guidelines but not the Board Rule similarly would be banned from sale in California, depriving consumers of the *freedom to choose* among these safe and highly effective products which they deem best for their individual and family use.

Again, we offer a "Modest Solution" to help resolve this matter: CCFC along with other parties have expressed concerns over the staff proposed testing and the UL protocol. Chief among those concerns is the use of the 2 inch rule, the lack of *common sense* understanding of how ozone works in real world settings, and how outdoor ozone exposure for employees is treated by governmental agencies.

While we are unable to ascertain the origin of the 2 inch rule, or understand the rationale for creating ozone in a sealed environment devoid of anything capable of reacting with it over time, we submit it is time for a *common sense* alternative testing mode that recognizes the indoor environmental challenges facing consumers today and in the future.

Under the proposed room and placement configuration, the unit is arguably placed in its worst case scenario (maximum output with lowest air flow setting) and the measurement is performed for 24 hours and during this time the percentage of ozone in the room cannot exceed 0.05ppm (nor at the unit output). This would be equivalent to measuring the temperature output of a "stack type" heater stating that the room cannot exceed 70° and making the measurement 2 inches from the stack. Bottom line, meeting the specifications would render the heater virtually useless. As noted by the International Ozone Association, creating ozone in a sealed environment, without having anything in that environment for it to react with will over time allows the concentration levels to build to levels that will exceed the 0.05ppm limit since the output from the device would be greater than the time it takes for the ozone to "naturally dissipate".

Why not devise a more realistic test in a real world environment? One that assesses ozone creation as well as ozone dissipation in a typical, or representative residential environment (as opposed to a 2 inch placement environment), furnished with commonly accepted items such as furniture, carpet, curtains, fans, etc. And why not use multiple measurement points with the room over a 24 hour basis. In addition, why not measure not only the average concentration, but also measure the ozone exposure, just as the federal government and State of California do for outdoor workers. We are confident that staff and participating manufacturers could develop such an alternative, optional test that is more representative of actual livable environments. To date, we have not been able to find any representative consumers who actually place their air purifier 2 inches

away from their face; nor can we find anyone that would remain in direct contact with their air purifier at a 2 inch distance for 24 hrs.

We are not advocating at this time the elimination of the current test, only permitting an additional, alternative test that from our perspective is more representative of real world residential environments that the Board should be concerned about.

Amending the Staff Draft to allow for this *common sense* alternative testing compliance will prevent inadvertently precluding beneficial products currently on the market or newer technologies to come to market based on the *latest science*.

5. Inconsistencies with federal and state laws.

The Staff Draft must be consistent with all applicable federal and state laws, not only those governing or relating to ozone levels and testing, but also those intended to provide *all* classes of consumers with *all* reasonably available choices to prepare and protect themselves against (a) prolonged and unnecessary hospitalizations and even death resulting from Healthcare Associated Infections (See Senate Bill 739 enacted in 2006), (b) pandemic influenza (See California preparedness planning and funding related documents at <http://www.pandemicflu.gov/plan/states/california.html>, and 2006 enacted legislation relating to the State's policies on pandemic influenza preparedness and funding), as well as (c) other natural disasters.

We submit that the current Staff Draft not only fails here, but would actually eliminate *viable* alternative choices and options for consumers to meet their individual and family preparedness and protection.

Conclusion

We strongly urge and request Staff to consider the positions stated here, our Modest Solutions, as well as reconsider our recommended draft changes from our prior written comments. We are deeply concerned that Staff has overreached in its current draft from the guidelines and language set forth in AB 2276, and that they are making decisions and judgments that we perceive to benefit certain corporate and business interests over the most important of all, *consumer interests!*

Just as the political process is characterized by corporate & business influence, lobbying, compromise, and even wheeling & dealing political trade-offs, the Board process is suppose to be "not a Political Process" but the "Peoples' Process," characterized more by protecting broad consumer interests, options, decisions, and freedom of choice.

We remind Staff once again that what should remain in everyone's mindset in this rulemaking is that indoor *air quality is all about consumers' freedom of choice* over the products that best meet their individualized needs and those of their families today and in the future. The success or failure of this rulemaking process will be judged by how well it helps to legitimately take away consumers' fears of what is in the indoor air they breath,

and what *viable* resources they have to protect themselves and their families from both known and unknown forms of indoor air pollution now and in the future.

Sincerely,

Greg Montoya

Greg Montoya, Chairman
Robert I. Brickman, General Counsel
California Consumers for Freedom of Choice
2631 Acuna Court
Carlsbad, California 92009
Telephone: (888) 218-4608