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

Re: Comments on Air Cleaner Draft Regulation

Dear Ms. Jenkins:

Thank you for the informative workshop on March 29 and the opportunity to submit written comments. These comments are being submitted on behalf of Ecoquest International, Inc. ("Ecoquest"), a manufacturer of indoor air cleaners.

Ecoquest manufactures a line of air purifiers, some of which use ionization technology alone (which do not present issues with the proposed regulation) and some of which have an ozone option. For the current design of air cleaners that have an ozone option that exceeds the .05 ppmv standard, known as the "away mode," consumers are instructed in the users manual and on an electronic display panel that the mode should be used only when the space is unoccupied. Furthermore, the away mode automatically shuts off after 2, 4, 6 or a maximum of 8 hours, as selected by the operator.

Ecoquest generally supports the proposition that consumers should not be exposed to ozone in concentrations that exceed the .05 ppmv standard, a standard which exists in federal law and to which Ecoquest has studiously sought to adhere.

Ecoquest regrettably is compelled to oppose the proposed regulation and herewith offers an alternative that would be fully protective of public health.

1. Summary of objections.

As I indicated in my brief remarks at the workshop, Ecoquest opposes the regulation due to the fact that it makes no accommodation for dual use air cleaner devices (devices designed

for use on one setting while the space is occupied and at a higher setting while the space is intended to be unoccupied, with ample warnings in the latter situation). The draft essentially ignores all the suggestions we made in our letter of January 9, 2007 and in our subsequent meeting with you and other staff.

We believe the proposed ban on residential indoor air cleaners is not only not authorized by AB 2276 but it actually violates AB 2276's requirement that the regulation be "consistent with federal law," which provides for labeling of devices to assure proper use in spaces intended to be occupied.

Furthermore, the proposed regulations create an arbitrary distinction by allowing "commercial" use of indoor air cleaning devices that go beyond the .05 ppmv ozone standard, so long as they are labeled "solely for commercial use in unoccupied spaces." The treatment by the proposed regulation of commercial uses is consistent with federal law while the treatment of residential uses is not.

The result is a regulation that unnecessarily restricts consumer choice, denying consumers a popular and safe means of combating household odors, including from cigarette smoke, wildfires and mildew.

We cannot think of another consumer product that is safe when used as directed which is banned from residences but allowed in businesses.

2. What AB 2276 requires.

Section 41986(a) of the Health and Safety Code, enacted by AB 2276, requires the state board to adopt regulations "consistent with federal law, to protect public health from ozone emitted by indoor air cleaning devices ... used in occupied spaces." *See also section 4198 (e).¹

Moreover, AB 2276, in Health and Safety Code section 41985.5, specifically adopts a federal ozone emission limit for

¹ "(e) It is the intent of the Legislature that this section be interpreted and applied in a manner that is consistent with federal law. The regulations adopted by the state board pursuant to this section shall be consistent with federal law. The state board may, to the extent a waiver is required, seek a preemption waiver from the federal government to authorize the state board to adopt regulations that are more stringent than federal law." (Emphasis added)

801.415(c)(1): "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 (emphasis added)."

The application of the same standard to spaces which the consumer is specifically instructed to keep unoccupied is not consistent with the federal regulation and thus beyond the authority granted in AB 2276.

There is another inconsistency with the federal regulation. That regulation declares that a device will be considered "adulterated and/or misbranded ... if it is used or intended for use under the following conditions:

"(3) To generate ozone and release it into the atmosphere and does not indicate in its labeling the maximum acceptable concentration of ozone which may be generated (not to exceed 0.05 part per million by volume of air circulated through the devices) as established herein and the smallest area in which device can be used so as not to produce an ozone accumulation in excess of 0.05 part per million." (21 C.F.R. section 801.415(c)(3)) (emphasis added).

Read in the context of the standard in subsection (1), applicable to "enclosed space intended to be occupied by people for extended periods of time" the federal regulation recognizes a labeling or warning obligation for devices which are capable of exceeding the standard if not used properly. The proposed regulation goes beyond that regulatory framework, and is therefore inconsistent with it, by banning devices for residential use regardless of whether they are appropriately labeled and appropriate warning given.

The draft regulation seems to bow to this federal framework, however, when it deals with the commercial context, by creating an exemption for "commercial use in unoccupied spaces: The provisions of this article do not apply to indoor air cleaning devices manufactured, advertised, marketed, labeled, and used solely for commercial use in unoccupied spaces, provided they are prominently labeled as 'solely for commercial use in unoccupied spaces', or alternatively, 'not for use in occupied spaces' and 'not for residential use.'" (Proposed section 94803(b)).

Thus in the commercial context, the manufacturer can label the device and sell it even though there is risk that the device would be used against the instructions while the space is occupied. But in the residential context, the device is banned. We do not think these different regulatory applications can both be consistent with the same federal regulation (which does not distinguish among industrial, commercial or residential).

In sum, an air cleaner that is intended for use in unoccupied spaces and is accompanied by appropriate labeling is permitted under federal regulations, regardless of whether it is for commercial use, and the proposal to ban such air cleaners only in residential settings is not consistent with federal law and therefore not authorized by AB 2276.

3. Unnecessarily restrictive to accomplish its purpose.

The effect of the proposed regulation is to deprive consumers of a relatively inexpensive product designed to produce some of the widely acknowledged benefits² of devices "manufactured, advertised, marketed, labeled and used solely for commercial [or industrial] use in unoccupied spaces," leaving those who could afford the commercial devices the completely legal option of purchasing them separately for use in their homes.

In short, the regulation deprives consumers of the opportunity to achieve these benefits even if they strictly adhere to instructions for proper use.

4. The "2 inch rule" for ozone monitoring.

We note that the Underwriters Laboratories "clarification" of the Ozone Test Section (37) of UL 867 maintains the requirement that devices be tested with a "single ozone monitoring sampling tube...positioned with the sample tube opening located 2 inches (50 mm) from the air outlet of the product and is to point directly into the airstream." This is known as the two inch rule. We believe this is inconsistent with the federal regulation quoted above which contains an alternative ozone accumulation standard. AB 2276 requires the regulations to be

² The International Ozone Association commented at the first workshop about anti-microbial benefits as well as beneficial impacts on mold, mildew and smoke. We also attach a study done at Kansas State University citing ozone's benefits as a disinfectant in combating e coli and other bacteria on food preparation surfaces.

"consistent with federal law," and the two inch rule bars the alternative use of the federal ozone accumulation standard.

This standard is also not necessary to protect public health. Ozone levels dissipate quickly even a few inches from the emissions source. Accordingly the "2 inch rule" in the UL 867 ozone test is not appropriate. It is the equivalent of measuring the temperature of a room by a thermostat next to the heating vent rather than at a location that more accurately measures room temperature.

5. Complying with the Administrative Procedures Act.

Under Government Code section 11349.1, the Office of Administrative Law is required to review proposed regulations to determine if they meet, among others, the following standards: authority and consistency. These terms are defined in Government Code section 11349:

"(b)'Authority' means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.

"(d)'Consistency' means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."

As we have already argued, the provision of AB 2276 (Health and Safety Code section 41986(a) and (e)) which requires the board to adopt regulations "consistent with federal law" for devices "used in occupied spaces" does not provide authority, as required by the Administrative Procedures Act, to develop and adopt a regulation that is not consistent with federal law and which applies to devices when not used in occupied spaces. Nor does such a regulation meet the consistency standard, because it is in conflict with or contradictory to the statute and the federal regulation.

Likewise, the proposed two inch rule, being in conflict with the federal regulation that provides for an alternative ozone accumulation standard of .05 ppmv, does not meet the requirement of section 41986(a) that requires regulations to be consistent with federal law and thus is beyond the authority created by AB 2276. It also fails the consistency standard of the Administrative Procedures Act.

6. Alternative Proposal.

We suggest in the alternative that the staff revise the regulation to include strict warning and labeling requirements to assure that consumers in both residential and commercial

settings, are fully informed that any settings on a device that could exceed the .05 ppmv emissions concentration standard should not be used while the space is occupied.

This approach would have several beneficial aspects:

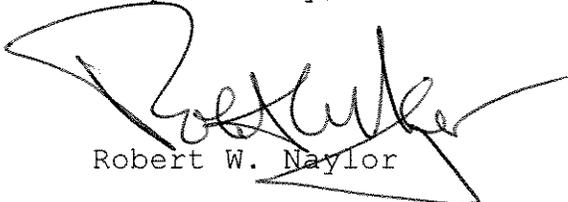
- It would allow tens of thousands of California consumers who have dual-use devices to replace them when they wear out (rather than try to extend their service), but with the benefit of a newly approved set of warnings.
- It would treat consumers of air cleaning devices the same way we treat consumers of all other products that are safe when properly used but potentially dangerous when misused (ranging from automobiles to insecticides to pharmaceuticals).
- It would narrow the market for buying non-conforming devices in other states and bringing them into California

We propose the following warning requirement to deal with the "dual use" air cleaner issue:

"Portable air cleaning devices designed or advertised for use in occupied spaces that exceed, when used as directed, the maximum concentration standard of .05 ppmv shall not be sold in California. Devices that are designed for use in both occupied and unoccupied spaces or that are designed for use in enclosures of multiple sizes and which do not exceed the concentration standard when used as directed in occupied spaces shall contain a clear warning in an instruction manual to be included at time of sale, in the packaging materials and on the device itself, whenever there is reference to any setting that could produce a concentration in excess of .05 ppmv, that the device should never be used at that setting when the space is occupied by humans or animals."

We look forward to meeting soon with ARB staff to discuss these issues in more depth.

Respectfully,



Robert W. Naylor

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