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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 Revised Draft of Air Cleaner Regulation

Dear Ms. Jenkins:

Thank you for the workshop on June 11 and the opportunity to submit these written comments on behalf of Ecoquest International, Inc. ("Ecoquest"), a manufacturer of indoor air cleaners. We hereby incorporate by reference comments previously submitted in these proceedings with respect to dual-use devices and the testing issue.

As a starting point, Ecoquest supports the proposition that consumers should not be exposed to ozone concentrations that exceed the .05 ppm standard.

At the same time, we believe there are times that consumers can benefit from using an air cleaner emitting a higher concentration of ozone on a temporary basis while a room is unoccupied. We have previously cited the testimony of the International Ozone Association (which supports the .05 ppm standard) of the benefits in combating mold, mildew and smoke odors and a study done at Kansas State University citing ozone's benefits as a disinfectant in combating e coli and other bacteria on food preparation services. These benefits can be obtained while the spaces are unoccupied, just as the benefits of house fumigation can be obtained while a house is tented and of course unoccupied.

The Air Resources Board, to our knowledge, has not asserted that higher levels of ozone have no benefit in unoccupied spaces, only that ozone has limited benefit at concentrations of .05 ppm or less.

The proposed regulation would effectively bar California consumers from pursuing these benefits by banning devices that could emit a higher ozone concentration than .05 ppm, regardless of whether they are used in unoccupied spaces.

The proposed regulation, besides creating an unnecessary constraint on consumers, is legally flawed in several respects:

1. Inconsistent with language of AB 2276.

If the Legislature had authorized a ban on all devices exceeding the .05 ppm standard, I suppose we would all go quietly away. But AB 2276 is quite clear: it authorized regulations "to protect public health from ozone emitted by indoor air cleaning devices...used in occupied spaces" (Health & Safety Code section 4198(a) (Emphasis added). That phrase is repeated in the digest of the Legislative Counsel.

In an exercise of definitional fiat, the proposed regulation obliterates the statute's clear limitation to devices "used in occupied spaces" by defining "occupied space" to mean "an area within a building, structure, enclosure, or vehicle that is, or may be, occupied by a human being" (emphasis added). To underscore this manifestly overreaching interpretation, it defines "unoccupied space" as "an area..that is not, or may not be, physically occupied by a human being" (Emphasis added).

This interpretation of "occupied space" is a radical departure from the ordinary meaning of the phrase.

Merriam-Webster's Collegiate Dictionary, Eleventh Edition, defines "occupy" as:

- 1** : to engage the attention or energies of
- 2 a** : to take up (a place or extent in space) <this chair is *occupied*> <the fireplace will *occupy* this corner of the room> **b** : to take or fill (an extent in time) <the hobby *occupies* all of my free time>
- 3 a** : to take or hold possession or control of <enemy troops *occupied* the ridge> **b** : to fill or perform the functions of (an office or position)
- 4** : to reside in as an owner or tenant

Merriam-Webster's defines "may" as:

- 1 a** *archaic* : have the ability to **b** : have permission to <you *may* go now> : be free to <a rug on which children *may* sprawl -- C. E.

Silberman> -- used nearly interchangeably with *can* -- used to indicate possibility or probability <you *may* be right> <things you *may* need> -- sometimes used interchangeably with *can* <one of those slipups that *may* happen from time to time -- Jessica Mitford> -- sometimes used where *might* would be expected <you *may* think from a little distance that the country was solid woods -- Robert Frost>

(Available online at <http://www.m-w.com/>.)

The inclusion of the "may be" language would have the effect of stretching the definition of "occupied space" from something more akin to requiring actual presence into something that applies to just about all places within a building, structure, enclosure, or vehicle. This is due to the fact that there are few, if any, places within buildings, structures, enclosures, and vehicles that humans do not have either the ability, permission, possibility, or freedom to—or simply can—take up, fill, hold possession of, or control. Indeed, grafting the words "may be" onto the definition of "occupied space" essentially swallows any limitations the phrase "occupied space" would normally contain.

Courts have generally understood the term "occupied" to mean something closer to "actual presence" than the proposed definition would permit. For example, the California Supreme Court has stated, "Just as there is always a significant likelihood there will be someone present inside an inhabited dwelling, there is always the likelihood there will be a second person present in an occupied vehicle. (By definition, there will always be one person.)" (People v. Ochoa (2001) 26 Cal.4th 398, 462, emphasis added.)

California statutes further recognize that there is a difference between places that may or could be occupied, and those that are actually occupied. For example, Penal Code § 246 creates a felony for "[a]ny person who shall...discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar...or inhabited camper." Section 246 goes on to define "inhabited" as "currently being used for dwelling purposes, whether occupied or not." (Emphasis added.)

For our purposes, the implication of Section 246 is that California law recognizes a distinct difference between places that may or could be occupied (inhabited dwelling house, inhabited housecar, inhabited camper), and places that are

actually occupied (occupied building, occupied motor vehicle, occupied aircraft).

Any attempt to define the term "occupied space" as both space that is actually occupied and space that may or could be occupied blurs the distinction and deprives the word "occupied" of any real significance. This would be a departure from the normal use of the word "occupied", as demonstrated in *Ochoa* and Section 246; and would create inconsistency between the usage of "occupied" in the Penal Code (actual presence) and the Health and Safety Code as construed by the proposed regulation (possible presence).

There is no reason to think the Legislature meant the term "occupied" to be interpreted differently than in Section 246.

2. Effect on workplace standards.

The Federal Food and Drug Administration regulation, 21 CFR Section 801.415(d), indicates that the 0.05 ppm limit "does not affect" the present workplace threshold limit of ".10 parts per million of ozone exposure for an 8-hour-day exposure of industrial workers as recommended by the American Conference of Governmental Industrial Hygienists." This standard is reflected in the Cal OSHA workplace standard, a "permissible exposure limit" of .1 ppm (8 CCR section 5155), which also contains a "short term exposure limit" (15 minute time weighted average exposure which is not to be exceeded at any time during the work day) of .3 ppm.

The proposed regulation, by the back door of banning devices that could result in concentrations over .05 ppm, imposes a stricter requirement than contemplated in the federal regulation and trumps the Cal OSHA standard.

The Cal OSHA standard is instructive also as to the Legislature's intent on the question of whether the regulation applies to spaces when they are unoccupied.

8 CCR § 5155 contains the Dept. of Industrial Relations regulations on ozone levels in the workplace. Read as a whole, it becomes clear that Section 5155 does not seek to regulate air contaminants except when employees are present and subject to exposure.

8 CCR § 5139 contains the purpose of Article 107 (8 CCR §§ 5139-5155), and it states, "Article 107 sets up minimum standards for the prevention of harmful exposure of employees to dusts, fumes, mists, vapors, and gases." (Emphasis added.) Subdivision (a) of Section 5155 contains the scope of application of the

section. Paragraph (a)(1) states, "This section establishes requirements for controlling employee exposure to airborne contaminants...at all places of employment in the state." (Emphasis added.)

Subdivision (b), which contains Section 5155's definitions, also demonstrates that Section 5155 is only concerned with employee exposure to contaminants specifically, and not with regulating air contaminants generally. The "ceiling limit" is defined as "The maximum concentration of an airborne contaminant to which an employee may be exposed at any time." (Emphasis added.) The "eight-hour time weighted average concentration" (TWA) is defined as, "An employee's exposure, as measured...in Appendix A, to an airborne contaminant during a workday." (Emphasis added.) The "short term exposure limit" is defined as, "A 15-minute time-weighted average exposure which is not to be exceeded at any time..." (Emphasis added.)

Perhaps most dispositive is subdivision (c). Subdivision (c) contains the operative provisions of § 5155, which are set in terms of exposure limits, as opposed to generic air contamination limits. (Emphasis added.) Subdivision (c) sets a "permissible exposure limit," which caps the maximum employee exposure to airborne contaminants expressed as an eight-hour time-weighted average concentration (TWA). It also sets the "short term exposure limit" which caps the maximum employee exposure to airborne contaminants as expressed in a 15-minute TWA.

The most logical reading of these regulations is that they do not regulate the amount of air contaminants in the workplace when employees are absent; they only regulate the level of exposure to various contaminants that employees can be subjected to over the course of their work shift.

This position is further supported by the statutes that authorized the adoption of 8 CCR § 5155. Labor Code § 142.3 gives the Department of Industrial Relations general authority to adopt, amend, or repeal occupational health orders. Subdivision (c) states, "Any occupational safety...order promulgated under this section shall prescribe...the forms of warning as are necessary to ensure that employees are apprised of all hazards to which they are exposed...[T]hese standards...shall provide for monitoring and measuring employee exposure...as may be necessary for the protection of employees..." (Emphasis added.)

Labor Code § 144.6 sets out the criteria to be considered by the Department of Industrial Relations when adopting standards concerning toxic materials or harmful physical agents. It states, "In promulgating standards...the board shall adopt that standard which most adequately assures, to the extent feasible,

that no employee will suffer impairment of health or functional capacity even if such employee has regular exposure to a hazard regulated by such standard..." (Emphasis added.)

Again, the most logical reading of these authorizing statutes is that they only seek to empower the Department of Industrial Relations to adopt regulations that will limit employee exposure specifically, and not workplace air contaminants generally.

3. Inconsistent with federal law.

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." (Emphasis added.) *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 spaces intended to be occupied (found at 21 C.F.R. section 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 while the device is in use 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:

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)

"(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 regardless of whether they are appropriately labeled and appropriate warning given.

4. Non-compliant with 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.

5. 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 device that could exceed the .05 ppm emissions concentration standard should not be used while the space is occupied.

This approach would have two beneficial aspects:

- 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.

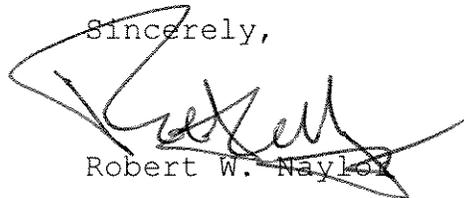
We propose the following warning requirement:

"Portable air cleaning devices designed or advertised for use only 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 unoccupied 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, that the device should never be used when the space is occupied by humans or animals."

The definitions of "occupied space" and "unoccupied space" should also be revised to their commonly accepted meanings.

In the interest of achieving a regulation that does not exceed the legislative grant of authority and does not unnecessarily restrict the ability of California consumers to attack odors, smoke, mildew and other contaminants in their own homes, we look forward to further commenting on the final draft regulations and to participating fully in the hearing process before the Air Resources Board.

Sincerely,



Robert W. Naylor