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Arnold Schwarzenegger
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Re: Applicability of Senate Bill 288 to Changes to Offset Requirements in New Source Review Rules

In August 2004, the Air Resources Board (ARB) issued a Guidance Document on New Source Review (NSR) and the applicability of Senate Bill (SB) 288 (Stats. 2003 ch 476.) This bill enacted the "Protect California Air Act of 2003," which is contained in Health and Safety Code sections 42500-42507. You and various other attorneys for air Districts have taken issue with an interpretation of Health and Safety Code section 42504(b) in the Guidance Document. Under this interpretation, offset requirements were included among the six NSR rule elements that a District is prohibited from amending if doing so would "exempt, relax, or reduce the obligations of a source" compared to the District's NSR requirements as of December 30, 2002. After carefully considering the issues, we have concluded that it is appropriate for to interpret section 42504(b) as you and the other air District attorneys suggest. However, we have also concluded that the only reasonable reading of section 42504(a) is that a District is precluded from amending its NSR rule if the effect of the amendments is to cause its overall NSR requirements – including any offset requirements – to be less stringent than the regulatory requirements as they existed December 30, 2002.

We will be issuing an amended version of the Guidance Document to reflect our conclusions, and in this letter I am setting forth in greater detail the basis for our determination. However, I want to emphasize that we are in no way suggesting there may not be good and sound policy justifications for reducing or eliminating the applicability of SB 288 to offset requirements in at least some situations. ARB is committed to working with the Districts in the legislative arena and elsewhere to address issues where there is consensus that changes are necessary.

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website: <http://www.arb.ca.gov>.

California Environmental Protection Agency

The pertinent provisions of HSC section 42504 are as follows:

§ 42504. Amending and revising new source review rules

(a) No air quality management district or air pollution control district may amend or revise its new source review rules or regulations to be less stringent than those that existed on December 30, 2002. If the state board finds, after a public hearing, that a district's rules or regulations are not equivalent to or more stringent than the rules or regulations that existed on December 30, 2002, the state board shall promptly adopt for that district the rules or regulations that may be necessary to establish equivalency, consistent with subdivision (b).

(b)(1) In amending or revising its new source review rules or regulations, a district may not change any of the following that existed on December 30, 2002, if the amendments or revisions would exempt, relax or reduce the obligations of a stationary source for any of the requirements listed in paragraph (2):

- (A) The applicability determination for new source review.
- (B) The definition of modification, major modification, routine maintenance, or repair or replacement.
- (C) The calculation methodology, thresholds or other procedures of new source review.
- (D) Any definitions or requirements of the new source review regulations.

- (2) (A) Any requirements to obtain new source review or other permits to construct, prior to commencement of construction.
- (B) Any requirements for best available control technology (BACT).
- (C) Any requirements for air quality impact analysis.
- (D) Any requirements for recordkeeping, monitoring and reporting in a manner that would make recordkeeping, monitoring, or reporting less representative, enforceable, or publicly accessible.
- (E) Any requirements for regulating any air pollutant covered by the new source review rules and regulations.
- (F) Any requirements for public participation, including a public comment period, public notification, public hearing, or other opportunities or forms of public participation, prior to issuance of permits to construct.

[Subsections (c) and (d) omitted]

Interpreting Health and Safety Code Section 42504(b)

Under section 42504(b)(1), a district is prohibited from adopting amendments to its NSR rule if the amendments “would exempt, relax, or reduce the obligations of a source” with respect to the six specified categories of requirements listed in section 42504(b)(2). While none of the six categories expressly referred to offset requirements, the August 2004 ARB Guidance stated that ARB interprets the fifth category – “Any requirements for regulating any air pollutant covered by the new source review rules and regulations” – to include the requirement to obtain offsets.

An October 28, 2005 memorandum from Larry Greene and Lance Erickson to members of the California Air Pollution Control Officers Association (CAPCOA) puts forth five arguments against this interpretation:

1. An analysis of the language in an unofficial draft of SB 288 dated July 11, 2003 and in later drafts indicates that the list ultimately contained in section 42504(b)(2) was not intended to include offsets. In the July 11 draft, offset requirements were expressly included in section 43503(a)(5), part of a list of 10 categories that were included (although not exclusively) among the prohibited amendments to NSR rules. A note at the beginning of section 43503(a)(5) in the July 11 draft stated: “[Proponents to discuss possible elimination of this section.]” However, the list of prohibited changes in section 42503(b)(2) in the next unofficial draft dated August 15 did not include offsets – instead that list was apparently identical to the list of six categories in section 42504(b)(2) of the ultimately enacted text. Removal of the reference to offsets indicates an intent that offsets were not intended to be included in the enacted section 42504(b)(2) list.
2. An analysis of the language in section 42504(b)(2) indicates that:
 - (a) Offset requirements have such a central role in the NSR program that the Legislature would have specifically referred to the offset requirements had it intended offset requirements to be included in the section 42504(b)(2) list, and
 - (b) Section 42504(b)(2)(E) was not intended to be a “catch-all” provision. Rather, its reference to any requirements “for regulating any air pollutant covered by the new source review rules and regulations” had the limited effect of prohibiting a District from eliminating its NSR requirements as they applied to a particular air pollutant, e.g. oxides of nitrogen (NO_x), be regulated under NSR if NO_x is regulated under the NSR rule in effect December 31, 2002.

3. Principles of statutory construction do not support ARB's interpretation of section 42504(b)(2)(E).
4. Exclusion of offsets from the requirements of SB 288 has a firm public policy basis.
5. Including offsets in the requirements of SB 288 results in a lack of equity because section 42504 should not be used to "lock" district NSR rules into the attainment status that the rules represented as of December 30, 2002.

We have carefully considered the points that you and others have raised, and we have concluded that section 42504(b)(2)(E) and the remaining five listed categories of requirements in section 42504(b)(2) should appropriately be construed as not including offset requirements. As a result, we now interpret the prohibition in section 42504(b)(1) of NSR rule amendments that would exempt, relax, or reduce the obligations of a source with respect to the categories of requirements listed in section 42504(b)(2) as not applying to relaxations of offset requirements.

Interpreting Health and Safety Code Section 42504(a)

It remains necessary, however, to evaluate section 42504(a) to determine whether it imposes any limitations on amendments to offset requirements in District NSR rules independent of section 42504(b). The first sentence of section 42504(a) states that no District "may amend or revise its [NSR rules] to be less stringent than those that existed on December 30, 2002." You have suggested that this apparent prohibition can only be understood in the context of the rest of § 42504 because of the reference in the last sentence of section 42504(a) to ARB adoption of rules necessary to establish equivalency, "consistent with subdivision (b)." You conclude from this reference that equivalency only needs to be established for those items listed in subdivision (b). In your view, the only effect of subdivision (a) is to establish the procedural mechanism for assuring that the substantive requirements of subdivision (b) are met: i.e., through ARB oversight.

After reviewing your argument, we have concluded for the reasons below that section 42504(a) cannot reasonably be read in the limited fashion you suggest. Instead, we interpret section 42504(a) as prohibiting a District from relaxing offset requirements if the overall effect of the amendments – including any other elements not pertaining to offsets – is to make the District's NSR regulation less stringent than it was on December 30, 2002.

First, the plain language of the first sentence of subdivision (a) unambiguously establishes a substantive prohibition of NSR amendments that reduce the stringency of a district's NSR rule. There is little doubt that reducing or eliminating offset requirements will reduce the stringency of an NSR rule unless the effect of those changes is offset by other amendments making the NSR rule more stringent. Your proposed interpretation essentially makes the first sentence meaningless.

Second, given the fact that the "legislative findings" section of SB 288 specifically mentions offsets as a key element of NSR (HS&C § 42502(e) provides that, "The requirement for California BACT, offsets, and other requirements are set out in the rules and regulations adopted by the districts to establish the new source review program."), one must assume that the Legislature in prohibiting amendments reducing the stringency of an NSR rule did not intend that offset requirements would be excluded from a consideration of comparative stringency.

Third, reading the first sentence of section 42504(a) as not including a substantive requirement is not necessary to make the rest of subdivision (a) to make sense. In fact, the plain language and meaning of the first sentence that imposes an overall equivalency requirement is fully consistent with the rest of the subdivision. The first sentence of subdivision (a) states an overall equivalent stringency requirement, which is repeated in the first clause of the second sentence of (a). A district is not precluded by the equivalency requirement from relaxing one NSR element as long as one or more other elements are sufficiently strengthened to result in overall equivalent stringency. On the other hand, for the six elements on the subdivision (b)(2) list, subdivision (b)(1) prohibits any revisions that would "exempt, relax or reduce the obligations of a stationary source." Subdivision (b) therefore prohibits any weakening of one of the six subdivision (b)(2) elements as the element applies to a given stationary source, even if there is overall equivalent stringency because of the strengthening of other elements.

Thus when the second sentence of subdivision (a) authorizes ARB to make a finding that the district's rules "are not equivalent to or more stringent than" the district's prior rules, and then to reestablish equivalency "consistent with subdivision (b)," the Legislature is telling ARB that, along with achieving overall equivalency, ARB must also make sure there is no relaxation for any of the elements listed in subdivision (b)(2) with respect to any particular source. One can see that there are essentially two requirements – (1) overall equivalent stringency (emanating from the first sentence and the two references to equivalency in the second sentence of subdivision (a)), and (2) no relaxation of the subdivision (b)(2) elements as they apply to a particular source whether or not overall equivalent stringency of the NSR rule is maintained.

The interpretation you suggest, on the other hand, essentially ignores the first sentence of subdivision (a) and the two references to an equivalency requirement in the second

Barbara Baird
April 11, 2006
Page 6

sentence. And rather than simply using the plain statutory language to conclude that ARB's remedial actions establishing equivalency must be "consistent with subdivision (b)" (emphasis added), you are essentially reading subdivision (a) to say that ARB's actions are limited to correcting any district violations of subdivision (b).

Fourth, the legislative history that has been provided has only limited usefulness in interpreting section 42504(a) as enacted. In the unofficial July 11, 2003 draft language of section 42503, the list of ten categories of amendments subject to the prohibition was a part of subdivision (a). There was no analogue to section 42504(b)(1) as finally adopted, and no reference to subdivision (b) in subdivision (a). I don't have access to the unofficial August 15, 2003 version of the bill, but my understanding is that its section 42503(a) and (b) were identical to section 42504(a) and (b) in the official September 4, 2003 version and in the enacted bill. Thus offsets requirements were eliminated from the list of expressly covered categories of requirements in the same set of changes that created the subdivision (b)(1) prohibition of relaxing the obligations of a stationary source for any of the requirements listed in subdivision (b)(2), and that added to subdivision (a) the "consistent with subdivision (b)" requirement for ARB actions necessary to establish equivalent stringency. Under these circumstances, I do not believe that removal of offsets from the list that became section (b)(2) is particularly useful in interpreting the meaning of section 42504(a).

While the public policy arguments regarding offsets and SB 288 are significant, they do not justify disregarding the plain meaning of section 42508(a). However, we believe they could justify legislative amendments, and ARB staff is interested in working with CAPCOA in this regard. There also may be ways to construe current District regulations in ways that would not lock District NSR rules into the attainment status that he rules represented as of December 30, 2002.

If you have any questions on this matter, please call me at (916) 323-9606, or Senior Staff Counsel Leslie Krinsk at (805) 473-7325. Since I discussed this issue with Barry Wallerstein at the March 30, 2006 joint Board retreat, I am providing him with a copy.

Sincerely,

W. Thomas Jennings
Chief Counsel

cc: Barry R. Wallerstein
Leslie Krinsk

Barbara Baird
April 11, 2006
Page 7

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