# Air Resources Board

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**Matthew Rodriquez**
*Secretary for*
*Environmental Protection*

**Edmund G. Brown Jr.**
*Governor*


June 16, 2014

Dr. Elaine Chang
Deputy Executive Officer
Planning, Rule Development, and Area Sources
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, California 91765-4178

Re: ARB Consumer Products Regulation and Proposed Amendments to SCAQMD Rule 1168

Dear Dr. Chang:

I am writing in response to your May 8, 2014, letter to Lynn Terry, Deputy Executive Officer of the Air Resources Board (ARB). Your letter requests a legal opinion regarding whether California law is consistent with the draft amendments to Rule 1168 recently proposed by the South Coast Air Quality Management District (SCAQMD).

Specifically, you would like to know if SCAQMD has the legal authority to regulate the following two categories of products: (1) adhesives and sealants that currently do not have volatile organic compound (VOC) limits specified in ARB Consumer Products Regulations, and (2) consumer products that currently do have VOC limits specified in ARB Consumer Products Regulations, including aerosol adhesives, when they are used as part of a manufacturing operation. For the reasons discussed below, the ARB Office of Legal Affairs concludes that SCAQMD has the legal authority to regulate both of these categories and is not preempted from doing so by California law. We will begin by addressing your first question.

Background: ARB Consumer Products Regulations and Preemption of Local Air District Rules

ARB Consumer Products Regulations (title 17, California Code of Regulations, sections 94500 et seq.) specify VOC limits for numerous categories of consumer products. These standards were adopted pursuant to Health and Safety Code section 41712, which authorizes ARB to adopt regulations to achieve the maximum feasible reduction in VOCs emitted by consumer products.

Health and Safety Code section 41712(f) limits the authority of local air districts to regulate consumer products. Section 41712(f) states:

> (f) "A district shall adopt no regulation pertaining to disinfectants, nor any regulation pertaining to a consumer product that is different than any regulation adopted by the state board for that purpose.

Beginning in 1992, ARB's Office of Legal Affairs has issued several legal opinions discussing the preemption language in Health and Safety Code section 41712 and the circumstances under which the SCAQMD and the local air districts can regulate consumer products. These opinions are attached to this letter as Enclosures 1 through 4. We will discuss the relevant portions of these opinions as we address the questions you have asked.

SCAQMD authority to regulate products that do have VOC standards specified in ARB Consumer Products Regulations

As you mention in your letter, the SCAQMD is in the process of developing amendments to SCAQMD Rule 1168. The SCAQMD has released a draft staff report (dated December 13, 2013) and several drafts of proposed amendments to Rule 1168. The most recent draft of the proposed amendments, which was released on May 16, 2014, would establish VOC limits for various categories of adhesives, adhesive primers, caulks, sealants, and sealant primers. The proposed amendments also provide that Rule 1168 does not apply to:

> "...consumer uses where the product is sold in containers less than or equal to one pound by product weight, or 16 fluid ounces, by product volume, and where there is an applicable VOC limit in the California Air Resources Board Consumer Products Regulation..." (proposed subsection (a) of Rule 1168).

This language is designed to clarify that the Rule 1168 amendments are intended to apply only to consumer products that are not regulated by ARB in ARB Consumer Products Regulations (see the Executive Summary of the December 13, 2013, draft staff report).

It is the above language that a group of industry representatives (group) takes issues with. The group believes that a consumer product is "regulated" by ARB if it is included within a category or subcategory that is defined or referred to in ARB Consumer Products Regulations, even if the regulation does not specify any VOC standards that apply to the consumer product category or subcategory. We do not agree with the group's position and have no concerns with the language quoted above.

This is not the first time that the ARB Office of Legal Affairs has addressed the issue raised by the group. All four of the legal opinion enclosures analyze the issue and all four reach the same conclusion, which is that if ARB regulations do not specify a VOC standard that applies to a product, then ARB does not regulate the VOC content of that product and local air districts are free to adopt their own VOC standards for the product. This conclusion was first reached in 1992 (see Enclosure 1), was reiterated in 1995, 2001, and 2010 (see Enclosures 2, 3, and 4), and is the same today as it has been for the past 22 years. Before discussing these legal opinions further, we will discuss the two product categories in ARB's regulation that are most relevant to the Rule 1168 amendments—the categories of "Adhesives" and "Sealant or Caulking Compounds." This discussion should make the group's argument less abstract by showing how it would apply to these categories.

ARB Consumer Product Regulations for "Adhesives" and "Sealant or Caulking Compounds"

ARB Consumer Products Regulation specifies VOC standards for a number of subcategories of "Adhesives" and "Sealant or Caulking Compounds." For "Adhesives," ARB Consumer Products Regulations specify VOC standards for:

(1) Aerosol adhesives (which are further divided into various subcategories of aerosol adhesive with different VOC limits for each subcategory.
(2) Construction, Panel, and Floor Covering Adhesives.
(3) Contact Adhesive (which is divided into two subcategories with different VOC limits).
(4) General Purpose Adhesives.

For "Sealant or Caulking Compounds" ARB Consumer Products Regulation divides this category into two subcategories ("Chemically Curing Sealant or Caulking Compound" and "Non-chemically Curing Sealant or Caulking Compound") and sets VOC standards for each subcategory.

ARB's Consumer Product Regulation contains a definition for each of the subcategories mentioned above (i.e. those subcategories of "Adhesive" and "Sealant or Caulking Compound for which VOC standards are specified). Definitions are necessary because it is important to distinguish the universe of products that are subject to the VOC standards from those that are not subject to the standards. In general, ARB definitions typically begin with a sentence that defines the overall product category (i.e., "Product Category A means ...", and end with one or two sentences that clarify that the product category does not include certain types of products (i.e., "Product Category A does not include ..."). If necessary to provide clarity, the regulation may also include additional definitions for those types of products that are not included.

For example, ARB Consumer Products Regulations contain this definition of "Sealant or Caulking Compound" (see title 17, CCR, section 94507(a)(130)):

> "(130) "Sealant or Caulking Compound" means any product with adhesive properties that is designed to fill, seal, waterproof, or weatherproof gaps or joints between two surfaces. "Sealant or Caulking Compound" does not include pipe thread sealants or pipe joint compounds; roof cements and roof sealants; insulating foams; removable caulking compounds; clear/paintable/water resistant caulking compounds; floor seam sealers; products designed exclusively for automotive uses; or sealers that are applied as continuous coatings. "Sealant or Caulking Compound" also does not include units of product, less packaging, which weigh more than one pound and consist of more than 16 fluid ounces.
>
> For the purposes of this definition only: "Removable caulking compounds" means a compound which temporarily seals windows or doors for three to six month time intervals.
>
> "Clear/paintable/water resistant caulking compounds" means a compound which contains no appreciable level of opaque fillers or pigments; transmits most or all visible light through the caulk when cured; is paintable; and is immediately resistant to precipitation upon application.
>
> "Sealant or Caulking Compound" is divided into two subcategories:
>
> (A) "Chemically Curing Sealant or Caulking Compound" means any "Sealant or Caulking Compound" which achieves its final composition and physical form through a chemical curing process, where product ingredients participate in a chemical reaction in the presence of a catalyst that causes a change in chemical structure and leads to the release of chemical byproducts. "Chemically Curing Sealant or Caulking Compound" includes, but is not limited to, products that utilize silicone, polyurethane, silyl-terminated polyether, or silyl-terminated polyurethane reactive chemistries. "Chemically Curing Sealant or Caulking Compound" does not include products which are not solely dependent on a chemically curing process to achieve the cured state.
>
> (B) "Non-chemically Curing Sealant or Caulking Compound" means any "Sealant or Caulking Compound" not defined under "Chemically Curing Sealant or Caulking Compound."

As you can see, this definition follows the typical pattern described above. The product category of "Sealant or Caulking Compound" is generally defined in the first sentence of the definition, followed by a detailed list of certain products that are not included in the definition. Additional definitions are also provided for two of the excluded products

("Removable Caulking Compounds" and "Clear/paintable/water resistant caulking compounds") in order to clarify exactly what these products are. If a product is not included in the definition, it is not a "Sealant or Caulking Compound" and is therefore not subject to the VOC standards that apply to Sealant or Caulking Compounds.

Applying the group's preemption argument to the above definition, its position would be that if a product subcategory is addressed in the definition, it is included in the definition and therefore "regulated" by ARB. The "regulated" subcategories would be all of the subcategories mentioned in the second sentence of the definition, which states:

> "Sealant or Caulking Compound" does not include pipe thread sealants or pipe joint compounds; roof cements and roof sealants; insulating foams; removable caulking compounds; clear/paintable/water resistant caulking compounds; floor seam sealers; products designed exclusively for automotive uses; or sealers that are applied as continuous coatings"

The group's view is that ARB has "regulated" all these product subcategories, even if VOC standards do not apply to these categories, and that therefore the SCAQMD is preempted from adopting VOC standards for all of these subcategories.

The above definition also states that "Sealant or Caulking Compound" "... does not include units of product, less packaging, which weigh more than one pound and consist of more than 16 fluid ounces." The same exclusionary language also appears in ARB's definition of "Adhesive." While we are not sure how the group views this language, a consistent application of the group's argument would seem to indicate that SCAQMD is preempted from regulating these product subcategories (i.e., products which weigh more than one pound and consist of more than 16 fluid ounces) because ARB has already "regulated" them by excluding these products from the definitions of "Sealant or Caulking Compound" and "Adhesive."

ARB's analysis of group's preemption argument

As mentioned previously, all four of the attached legal opinions reach the opposite conclusion from the group's position. ARB first articulated this conclusion in a 1992 legal opinion (Enclosure 1), which concluded that until ARB has adopted a VOC standard for a particular category of consumer products, local air districts retain their existing legal authority to adopt a regulation for that category.[1] The analysis in the opinion is straight forward and there is no need to repeat it here.

[1] The reasoning in ARB's 1992 opinion remains valid regarding the legal effect of the preemption language in Health and Safety Code section 41712, even though section 41712 was subsequently amended to prohibit local air districts from regulating disinfectants and aerosol paint, and from regulating aerosol adhesives prior to January 1, 2000 (see subsections (f), (h), and (i) of Health and Safety Code sections 41712).

The same conclusion was reached in a 1995 legal opinion (Enclosure 2). The opinion contains the following passages that specifically address the group's position:

> "For those consumer product categories for which the ARB has previously adopted VOC standards, Health and Safety Code 41712(e) prohibits a district from adopting any standards for these categories (unless the District regulation is identical to the ARB regulation). However, districts retain the authority to adopt standards for any consumer product category for which the ARB has not adopted VOC standards. The boundaries of the districts' authority are determined by the definitions of each product category specified in the ARB Consumer Products Regulations. If a product (or class of products) does not fall within the definitions specified for any of the product categories regulated by the ARB, then the product may be regulated by the districts."

The opinion goes on to discuss ARB regulation of the "Adhesive" category:

> "... For example, questions have recently been raised about the proper division between ARB and district authority to regulate the broad category of "adhesives." Applying the principles discussed above, one must examine the ARB's regulatory definitions to determine the scope of ARB and district authority. The ARB has established VOC standards for the category of "Household Adhesive" (Title 17, CCR, section 94509(a)). "Household Adhesive" is defined in ARB regulations as: "Household Adhesive" means any household product that is used to bond one surface to another by attachment. . . . "Household Adhesive" also does not include units of the product, less packaging, which weigh more than one pound or consist of more than 16 fluid ounces." (Title 17, CCR, section 94508(a)(46)) By its terms, ARB regulation for this product category has been limited to products which weigh one pound or less, or consist of 16 fluid ounces or less. This definition determines the boundaries of the category of "Household Adhesives" that the ARB has regulated. Therefore, adhesive products that fall outside of this defined category (i.e., products weighing more than one pound, or consisting of more than 16 fluid ounces) may be regulated by the districts.
>
> ...Some additional explanation of the "Household Adhesives" category may be useful in understanding the scope of the ARB's definition. At the time the definition for this category was developed during the 1992 Phase II rulemaking, several districts had either adopted or were developing regulatory standards for adhesives. The primary focus of the district regulations was to establish standards for adhesives used by stationary sources in commercial or industrial applications. The ARB "Household Adhesives" category was developed in consultation with industry, and was intended to include only the smaller

> containers of adhesives that were used primarily by consumers, and to exclude the larger containers of adhesives that were typically used in commercial and industrial applications."

Similar reasoning is also set forth in ARB's 2001 and 2010 legal opinions (Enclosures 3 and 4).

Taking a step back from the legal analysis in these opinions, it is worth observing that simple common sense supports ARB's conclusion that if ARB regulations do not specify a VOC standard that applies to a product, then ARB does not regulate the VOC content of that product. If the definition of a product category contains a list of products that are not included in the definition that is simply because the regulation is clarifying the boundaries of the product category (i.e., what is and is not included within the category). The group's position does not make sense because it is essentially saying ARB has "regulated" a product if an ARB definition clarifies that there are no VOC requirements that apply to this product. In other words, it is being argued that a consumer product category is "regulated" by ARB if ARB regulations clarify that the category is NOT regulated by ARB.

The group's position could be premised on the assumption that in deciding certain product subcategories are not included within the definition of a product category, ARB has made some kind of implicit regulatory determination that VOC standards should not be established for the excluded products at a future date. Such an underlying assumption would not be accurate. There may be any number of reasons why ARB staff decides not to propose VOC standards for certain types or subcategories of products. Probably the most common reason is that at the time that VOC standards were proposed for a product category, ARB staff did not have enough information to determine what VOC standard, if any, was appropriate for some subcategories within the overall product category.

A typical situation is that a manufacturer asserts during ARB's rule development process that products within a particular subcategory have specialized uses that require a higher VOC level in order to work properly. Staff may not have gathered sufficient data regarding the product subcategory and may not be able to determine whether these assertions are accurate. So the subcategory may be exempted from a proposed VOC limit for the broader category because there is simply not enough staff time or resources to investigate the appropriate VOC level for the subcategory. Standards for the excluded subcategories may be proposed in the future if staff has sufficient time and resources to undertake additional research. In other words, the fact that a product category is mentioned or defined in ARB Consumer Products Regulations does not

mean that ARB has determined that VOC standards are not appropriate and will never be set for this category.

The Group's Position is not consistent with the interpretation of the Second District Court of Appeal

On June 28, 2012 the Second District Court of Appeal issued a decision in *W.M.Barr & Company vs. South Coast Air Quality Management District* (207 Cal.App.4th 406, 143 Cal.Rptr.3d 403). In this case plaintiff W.M. Barr challenged the adoption of SCAQMD Rule 1143, which established VOC standards for paint thinners and multipurpose solvents sold in the SCAQMD. Among other things, W.M. Barr argued that Health and Safety Code section 41712(f) preempted SCAQMD from adopting Rule 1143 the Court rejected this argument and held that the SCAQMD was not preempted from adopting VOC standards for these product categories.

The Court's opinion contains a lengthy discussion of ARB's June 29, 2010 letter to William B. Wong, SCAQMD Principal Deputy District Counsel, from Robert Jenne, ARB Assistant Chief Counsel (Enclosure 4). The letter concludes that ARB has yet not adopted (as of June 29, 2010) regulatory requirements for the consumer product categories of paint thinners and multipurpose solvents, and therefore the SCAQMD is free to adopt its own regulations for these categories and is not preempted by Health and Safety Code section 41712(f).

The reasoning of both ARB's 2010 letter and the Court of Appeal is directly applicable to the present situation. In discussing W.M. Barr's preemption argument, the Court stated:

> "As of July 9, 2010, the date the District adopted Rule 1143, the Board had not adopted any rules regulating paint thinners or multipurpose solvents."
> (207 Cal.App.4th 419)

The Court then quotes the following sentence from ARB's 2010 letter:

> "The Board concluded, "[s]ince [the Board] has not yet adopted regulatory requirements for the consumer product categories of paint thinners and multipurpose solvents, [the District] is free to do so and is not preempted by Health and Safety Code section 41712(f)." (207 Cal.App.4th 419)

The Court agreed with ARB's conclusion and, before holding that SCAQMD Rule 1143 was not preempted by either Health and Safety Code section 41712(f) or ARB Consumer Products Regulations, stated:

> "Thus, we agree with the Board's interpretation that Health and Safety Code section 41712, subdivision (f) only creates preemption when the Board has already acted in the area with respect to the same consumer product with the same purpose, and that the Board's subsequent enactment of a regulation with respect to a product where a district has issued regulations does not operate to preempt the district's statute; statutes enacted by the Board and various local air quality districts may exist at the same time even if they are not identical." (207 Cal.App.4th 421)

There is one important thing to note about the above statements and the Court's holding. In 2010 when the SCAQMD adopted Rule 1143, ARB Consumer Products Regulations already contained definitions (but no VOC standards) for the product categories of "Multipurpose Solvent" and "Paint Thinner." ARB first adopted a definition for Multipurpose Solvent" in 1998 (after a July 24, 1997, public hearing), which was twelve years before the SCAQMD's 2010 adoption of a VOC standard for multipurpose solvents. And ARB first adopted a definition of "Paint Thinner" in 2005 (after a June 24, 2004, public hearing), which was five years before the SCAQMD's 2010 adoption of a VOC standard for paint thinners. ARB did not adopt VOC standards for these categories until after the SCAQMD did (see 207 Cal.App.4th 419).

The Court's holding and analysis is consistent with ARB's position, which is that ARB has not "regulated" a product if ARB regulations do not specify regulatory requirements that apply to the product. However, the Court's holding and analysis is not consistent with the group's position, which is that ARB has "regulated" a product category if ARB regulations contain a definition for that product category, even though no VOC standards are specified for that category. With respect to paint thinners and multipurpose solvents, ARB Consumer Products Regulations did contain definitions for these product categories that were adopted years before the SCAQMD adopted VOC standards for these products in 2010. We see no plausible way to reconcile the Court's decision with the group's position.

<u>Authority of the SCAQMD to regulate consumer products that currently have VOC limits specified in ARB Consumer Products Regulations, including aerosol adhesives, when they are used as part of a manufacturing operation.</u>

We will now turn to the second question asked in your letter, which is whether the SCAQMD has the authority to regulate adhesives and sealants that currently have VOC limits specified in ARB Consumer Products Regulations, including aerosol adhesives, when they are used as part of a manufacturing operation. Your first question raises several related and rather complicated issues. To simplify our analysis, we will answer your question in two parts.

*(1) SCAQMD has the authority to regulate products that are used as part of a manufacturing operation.*

Products "used as part of a manufacturing operation" fall into two general categories, both of which the SCAQMD has the authority to regulate. The first category consists of products that are commonly referred to as industrial products, which are products that are incorporated into or used exclusively in the manufacture or construction of the goods or commodities at the site of the establishment. These products may be regulated by the SCAQMD because they are not "consumer products" as that term is defined in ARB regulations, and ARB Consumer Products Regulations thus do not apply to these products. This is a complicated subject area that has been previously explained by ARB in two documents: an August 23, 1995, legal opinion attached to this letter as Enclosure 2, and an enforcement advisory issued by ARB in November 2002 (see ARB's website at http://www.arb.ca.gov/enf/advs/advs307.pdf). Please refer to these documents for a more detailed discussion of this subject.

The second category consists of products that are "consumer products" (as that term is defined in ARB Consumer Products Regulations), and have VOC limits specified in ARB regulations, when such products are used at stationary sources such as manufacturing facilities. ARB's position is that the SCAQMD can regulate the use of consumer products at stationary sources, as part of the long-standing authority of local air districts to regulate pollution generating activities at stationary sources. This conclusion is discussed in the February 20, 2001, letter to William B. Wong, SCAQMD Senior Deputy District Counsel, from Kathleen Walsh, ARB General Counsel (Enclosure 3), which you mention in your letter. This is also a complicated subject area, and you can find a detailed discussion of ARB's position in Enclosure 3.

*(2) SCAQMD has the authority to regulate aerosol adhesives.*

The SCAQMD currently has the authority to regulate all aerosol adhesives. This authority includes the regulation of aerosol adhesives that have VOC limits specified in ARB Consumer Products Regulations, regardless of whether the adhesives are used in manufacturing or non-manufacturing operations. As you mention in your letter, Health and Safety Code section 41712(h)(3) is quite explicit that on or after January 1, 2000, local air districts have the authority to regulate aerosol adhesives:

> **(3)** Notwithstanding any other provision of this section, on and after January 1, 2000, a district may adopt and enforce a regulation setting an emission standard or standards for VOC emissions for the use of aerosol adhesives that is more stringent than the standards adopted by the state board.

This language was placed in the Health and Safety Code in 1996 by Assembly Bill (AB)1849 (Stats.1996, Chapter 766), which preempted local districts from regulating aerosol adhesives during the three-year period from January 1, 1997, and January 1, 2000, and allowed districts to regulate aerosol adhesives after January 1, 2000. AB 1849 is briefly discussed on pages 3 and 4 of ARB's 2001 legal opinion set forth in Enclosure 3. There is little else that needs to be said about aerosol adhesives, since the language in the Health and Safety Code is so clear.

I hope this letter is helpful in your ongoing efforts to amend Rule 1168 and reduce consumer product emissions in the SCAQMD. If you have any questions, please feel free to contact Robert Jenne at 916-322-2884 or rjenne@arb.ca.gov.

Sincerely,

for EMP

Ellen Peter
Chief Counsel

cc: Robert Jenne
Senior Staff Counsel

Enclosures (4)

bcc: Richard Corey, EO
Lynn Terry, EO
Deborah Kerns, OLA
Kurt Karperos, AQPS
Karen Magliano, AQPS
Ravi Ramalingam, AQPS
David Edwards, AQPS
Jose Gomez, AQPS
Maryana Visina, AQPS
Steve Giorgi, ED

AQPS Chron
EO Chron (2)

Assignment #9167, 18548

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Enclosures

S:\01 STEP\DCE-AQPS\DCE 9167 (Rule 1168 letter)\Enclosures\ 1_1992-12-3 District Authority to Regulate Consumer Products, specifically Aerosol Coatings

S:\01 STEP\DCE-AQPS\DCE 9167 (Rule 1168 letter)\Enclosures\ 2_cp_opinion 1995

S:\01 STEP\DCE-AQPS\DCE 9167 (Rule 1168 letter)\Enclosures\ 3_2001-02-20 Preemption of District Consumer Products and Aerosol Coatings Rules

S:\01 STEP\DCE-AQPS\DCE 9167 (Rule 1168 letter)\Enclosures\ 4_2010-06-29 Letter to Bill Wong re Premption of SCAQMD Cons Prod Rules

ENCLOSURE 1

STATE OF CALIFORNIA
AIR RESOURCES BOARD
2020 L STREET
P.O. BOX 2815
SACRAMENTO, CA 95812

PETE WILSON, Governor

December 3, 1992

Peter M. Greenwald, District Counsel
South Coast AQMD
21865 E. Copley Dr.
Diamond Bar, CA 91765-4182

Regulation of Aerosol Paints

Dear Mr. Greenwald:

You have requested a legal opinion on the authority of the South Coast Air Quality Management District (SCAQMD) to adopt an aerosol coatings regulation in light of recent amendments to Health and Safety Code section 41712(e) (AB 2783, Sher; Stats. 1992, ch. 945). Specifically, you wish to know the opinion of the Air Resources Board (ARB) on two related issues:

(1) Does the SCAQMD have the authority to adopt an aerosol coatings regulation as long as the ARB has not previously adopted such a regulation? What is the status of the SCAQMD authority once the ARB has adopted such a regulation?

(2) If the SCAQMD adopts an aerosol coatings regulation, what is the effect on this regulation if the ARB subsequently adopts a different aerosol coatings regulation? Is the SCAQMD regulation preempted by the subsequent ARB adoption, or does the SCAQMD regulation remain legally effective?

To answer these questions, we carefully researched both the text and legislative history of AB 2783 and the California Clean Air Act of 1988 (Stats. 1988, ch. 1568). Our conclusions are as follows:

(1) Until the ARB formally adopts a regulation relating to aerosol coatings, the SCAQMD retains its existing authority to adopt an aerosol coatings regulation. However, once the ARB adopts an aerosol coatings regulation, Health and Safety Code section 41712(e) prohibits the subsequent adoption of a different aerosol coatings regulation by the SCAQMD.

(2) If the SCAQMD adopts an aerosol coatings regulation prior to any ARB adoption of a different regulation, the SCAQMD regulation remains legally effective and is not preempted by the subsequent ARB adoption.

The rationale for each of these conclusions can be briefly summarized. AB 2783 made several changes to the language of Health and Safety Code section 41712; the definition of "consumer product" was amended to include "aerosol paints", and the limited preemption language in section 41712(e) was modified to delete the opening phrase "... Prior to January 1, 1994 ...". Health and Safety Code section 41712(e) now reads as follows:

> "A district shall adopt no regulation relating to a consumer product which is different than any regulation adopted by the state board for that purpose."

Regarding the first issue mentioned above, by its terms, the language in section 41712(e) does not restrict district authority unless the ARB has already adopted a regulation "for that purpose". The ARB Legal Office has long taken the position that the qualifying phrases "... regulation relating to a consumer product ..." (e.g., not a regulation relating to consumer products in general) and "... for that purpose ..." indicate that the restriction on district action applies only to the regulation of those specific consumer product categories (e.g., hairsprays, glass cleaners, etc.) for which volatile organic compound (VOC) standards have already been specified in an ARB regulation. The language does not restrict district authority to regulate a particular consumer product category unless it has already been regulated by the ARB. However, once the ARB has adopted a VOC regulation for a particular category of consumer products (e.g., aerosol paints), Health and Safety Code section 41712(e) clearly prohibits local districts from subsequently adopting any VOC regulation that is different than the ARB regulation for that category.

Regarding the second issue, the language of section 41712(e) does not specifically state that a previously adopted district regulation is automatically preempted by the subsequent ARB adoption of a different regulation. Section 41712(e) merely provides that "... A district shall adopt no regulation ..." that is different from any ARB regulation. The Legislature did not state, as it could easily have done, that a district "... shall not adopt or enforce any regulation ..." that is different from an ARB regulation. The use of the term "enforce", or similar language, would have made it clear that previously adopted district regulations were preempted once the ARB acted to adopt its own regulation.

From the foregoing analysis, it is apparent that the language of section 41712 contains significant ambiguities. In an attempt to clarify these ambiguities, we have reviewed the legislative history of both AB 2783 and the California Clean Air Act of 1988, which enacted the original version of Health and Safety Code section 41712. Unfortunately, there is nothing in the legislative history of either bill which is dispositive in answering the specific questions posed above. It is possible to surmise that section

41712(e) was intended to promote some kind of statewide uniformity in consumer product regulations. However, the unusual and ambiguous wording of the language makes it unclear as to exactly how preexisting district regulations should be treated. In light of the textual ambiguities and the lack of any useful guidance in the legislative history, the question is to what extent it is appropriate to conclude that the Legislature intended to repeal by implication the districts' longstanding authority (see Health and Safety Code section 39002, 41508) to regulate aerosol paints as nonvehicular emission source categories.

The California Supreme Court has addressed a similar question in the case of Western Oil and Gas Association v. Monterey Bay Unified Air Pollution Control 49 Cal.3d 408; 261 Cal.Rptr. 384, 77 P.2d 157 (Aug. 1989). In the WOGA case, the Court discussed the circumstances under which it may validly be concluded that a statute operates to preempt or repeal by implication the authority of local air pollution control districts to control nonvehicular sources. In discussing the applicable precedents the Court stated as follows:

> "... All presumptions are against repeal by implication ... The presumption against implied repeal is so strong that 'To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation' ... There must be no possibility of concurrent operation ... implied repeal should not be found unless ... the later provision gives undebatable evidence of an intent to supersede the earlier ..." 49 Cal.3d 408, 419-420.

With respect to aerosol paints, it is apparent that one cannot conclude with certainty that the Legislature intended to automatically preempt district regulations which were adopted before the ARB adopts its own aerosol paint regulation. Based on the principles set forth in the WOGA case, it is clear that we must therefore conclude that preemption of aerosol paints is limited to the circumstances discussed above.

The ARB Office of Legal Affairs plans to issue a more complete legal analysis which explains in greater detail the rationale for the conclusions set forth in this letter. While we would ordinarily set forth a full legal analysis at the same time as our conclusions, we wished to let you know our legal conclusions as soon as possible given the fact this issue will be considered by the SCAQMD Governing Board in just a few days.

Please give me a call at (916) 322-2884 if you would like to discuss these issues further, or if you have any additional questions.

Sincerely,

Michael P. Kenny
General Counsel

rcj/rej/B95798

ENCLOSURE 2

MEMORANDUM

TO: Peter D. Venturini
Chief, Stationary Source Division

FROM: Michael P. Kenny
General Counsel

DATE: August 23, 1995

SUBJECT: ARB AUTHORITY TO REGULATE CONSUMER PRODUCTS

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ISSUES

You have requested a legal opinion on three issues relating to the authority of the Air Resources Board (ARB) to regulate consumer products. These three issues are:

(1) Health and Safety Code § 41712 gives the Air Resources Board (ARB) the authority to regulate consumer products, and defines a "consumer product" as ". . . a chemically formulated product used by household and institutional consumers. . . ." How does one distinguish between products that are "used by household and institutional consumers," and thus can be regulated by the ARB, and products which are not used by household and institutional consumers, and therefore cannot be regulated by the ARB?

(2) Now that the ARB has adopted VOC standards for many categories of consumer products under Health and Safety Code § 41712, what are the limits on the authority of local air pollution control districts (districts) to adopt and enforce consumer products regulations?

(3) What is the authority of the ARB to regulate consumer products that are pesticides? How does the ARB's authority interact with the authority of the Department of Pesticide Regulation to regulate pesticides under California law, and the authority of the United States Environmental Protection Agency (U.S. EPA) to regulate pesticides under federal law?

CONCLUSIONS

(1) To clarify the definition of "consumer product" in Health and Safety Code § 41712(c), the ARB has adopted regulatory definitions of "Household Product" and "Institutional Product or Industrial and Institutional (I&I) Product." These definitions are set forth in the ARB consumer products regulation, and generally delineate the scope of the ARB's authority over consumer products. However, the determination of whether a particular product category meets these definitions (and is therefore a "consumer product" which can be regulated by the ARB)

is a very fact-specific inquiry that must be made on a case-by-case basis.

(2) For those consumer product categories for which the ARB has previously adopted VOC standards, Health and Safety Code § 41712(e) prohibits a district from adopting any standards for these categories (unless the District regulation is identical to the ARB regulation). However, districts retain the authority to adopt standards for any consumer product category for which the ARB has not adopted VOC standards. The boundaries of the districts' authority are determined by the definitions of each product category specified in the ARB consumer products regulations. If a product (or class of products) does not fall within the definitions specified for any of the product categories regulated by the ARB, then the product may be regulated by the districts.

(3) The ARB has the authority to regulate any pesticide product which meets the definition of "consumer product." Since the Department of Pesticide Regulation (DPR) also has broad authority to regulate pesticides under California law, the ARB and DPR have concurrent jurisdiction to regulate pesticide products. This means that persons subject to DPR and ARB regulations must comply with the regulations of both agencies. The U.S. EPA also has the authority to regulate pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the federal Clean Air Act. These federal laws do not preempt the authority of the ARB or DPR to establish VOC standards for pesticides under California law.

ANALYSIS

(1) Issue: Health and Safety Code § 41712 gives the Air Resources Board (ARB) the authority to regulate consumer products, and defines a "consumer product" as " . . . a chemically formulated product used by household and institutional consumers. . . ." How does one distinguish between products that are "used by household and institutional consumers," and thus can be regulated by the ARB, and products which are not used by household and institutional consumers, and therefore cannot be regulated by the ARB?

Conclusion: To clarify the definition of "consumer product" in Health and Safety Code § 41712(c), the ARB has adopted regulatory definitions of "Household Product" and "Institutional Product or Industrial and Institutional (I&I) Product." These definitions are set forth in the ARB consumer products regulation, and generally delineate the scope of the ARB's authority over consumer products. However, the determination of whether a particular product category meets these definitions (and is therefore a "consumer product" which can be regulated by the ARB) is a very fact-specific inquiry that must be made on a case-by-case basis.

Analysis: In 1988, the Legislature enacted the California Clean Air Act (Stats. 1988, Ch. 1568), which added a number of new provisions to the Health and Safety Code. One of

these new provisions was Health and Safety Code § 41712, which granted the ARB new authority to regulate volatile organic compound (VOC) emissions from consumer products. Health and Safety Code § 41712(c) defines a "consumer product" as follows:

> (c) For purposes of this section, a "consumer product" means a chemically formulated product used by household and institutional consumers, including, but not limited to, detergents; cleaning compounds; polishes; floor finishes; cosmetics; personal care products; home, lawn, and garden products; disinfectants; sanitizers; aerosol paints; and automotive specialty products; but does not include other paint products, furniture coatings, or architectural coatings.

For the ARB to have the authority to regulate a product under § 41712, it follows that this product must be a "consumer product," as the Legislature has defined that term in § 41712(c). For the purposes of analysis this definition can be conveniently divided into three parts: (1) the first part of the definition states that a consumer product is " . . . a chemically formulated product used by household and institutional consumers . . . "; (2) the second parts of the definition lists several examples of consumer product categories, and states that "consumer product" includes, but are not limited to, these examples; and (3) the last part of the definition lists several categories that are not "consumer products" (i.e., all paint products except for aerosol paints, furniture coatings, and architectural coatings.) It is apparent that Part (1) of the definition is the most critical part. Part (1) fundamentally defines what a consumer product is. Parts (2) and (3) simply provide examples and limitations which relate back to the basic definition of "consumer product" in Part (1). Therefore, this analysis will focus primarily on the language of the definition which states that a consumer product is " . . . a chemically formulated product used by household and institutional consumers. . . ."

ARB staff considered the meaning of these terms early in the development of the consumer products regulations. Whether a product is "chemically formulated" is usually fairly obvious. ARB staff felt that this portion of the definition did not need clarification. However, it is sometimes less obvious whether a product is "used by household or institutional consumers." ARB staff therefore felt that it was important to include definitions in the consumer products regulation which would interpret and clarify the meaning of these terms, and thus more clearly describe the boundaries of the ARB's authority to regulate consumer products under Health and Safety Code § 41712.[1] In the Phase II consumer products rulemaking (Phase II), ARB staff therefore proposed definitions of the terms "Household Product" and "Institutional Product or Industrial and Institutional (I&I) Product." These definitions were adopted by the Board in 1992 as part of Phase II. [2] The definitions are set forth in Title 17, California Code of Regulations (CCR), § 94508(a)(47) and (a)(52), and read as follows:[3]

> (47) "Household Product" means any consumer product that is primarily designed to be used inside or outside of living quarters or residences that are occupied or intended for occupation by individuals, including the immediate surroundings.
>
> (52) "Institutional Product" or "Industrial and Institutional (I&I) Product" means a consumer product that is designed for use in the maintenance or operation of an establishment that (A) manufactures, transports, or sells goods or commodities, or provides services for profit; or (B) is engaged in the nonprofit promotion of a particular public, educational, or charitable cause. "Establishments" include, but are not limited to, government agencies, factories, schools, hospitals, sanitariums, prisons, restaurants, hotels, stores, automobile service and parts centers, health clubs, theaters, or transportation companies. "Institutional Product" does not include household products and products that are incorporated into or used exclusively in the manufacture or construction of the goods or commodities at the site of the establishment.

The ARB believes that these definitions accurately reflect the intent of the Legislature in enacting Health and Safety Code  41712. The definitions clarify the boundaries of the ARB's authority to regulate consumer products. If a product category falls within the definitions of "Household Product" or "Institutional Product or Industrial and Institutional (I&I) Product," then the ARB has the authority to establish VOC standards for that category. If a product category does not fall within the boundaries of these definitions, then it cannot be regulated by the ARB under Health and Safety Code  41712. Although these definitions are generally self-explanatory, a few additional observations should be mentioned. [4]

In the vast majority of cases, it is quite clear whether a particular product is a "consumer product." To put the issue very simply, consumer products include the many chemically formulated products commonly available in such outlets as supermarkets, hardware stores, catalog sale companies, etc., that consumers purchase for use in and around their homes (i.e., household products). It is also fairly clear that certain products are not consumer products (i.e., products used by industrial facilities, where the products are ". . . incorporated into or used exclusively in the manufacture or construction of the goods or commodities at the site of the establishment . . . "). For example, "consumer products" do not include such products as fabric protectants and adhesives that are applied to furniture at a factory, as part of the manufacturing process. The definitions set forth above are intended to make this basic distinction.

Consumer products also include "institutional products" (i.e., chemically formulated products used by institutional consumers). These products include, among other things, products

such as air fresheners, general purpose cleaners, insecticides, etc., that are often similar to commonly available household products, and are typically used by establishments to perform tasks (e.g., cleaning, air freshening, etc. ) similar to those performed by household consumers. However, institutional products are sometimes sold in special stores or specialized distribution channels catering to particular market niches (such as janitorial services), and may or may not be available in retail stores frequented by household consumers. These products are referred to in the regulation as "Institutional Products" or "Industrial and Institutional (I&I) Product, since "I&I" is a term commonly used to describe such products within the consumer products industry.

Finally, the determination of whether a particular product category meets these general definitions (and is therefore a "consumer product" which can be regulated by the ARB) is a very fact-specific inquiry that must be made on a case-by-case basis. The ARB has made such a particularized determination in drafting the specific regulatory definitions for each of the product categories regulated by the ARB. The regulatory definitions for each product category were developed after extensive consultation with industry during the workshop and public comment process for each of the consumer product regulations. In drafting these specific product category definitions, the ARB has been mindful of the fact that the districts have historically regulated a number of stationary source categories. The ARB has generally attempted to define each consumer product category in such a way that the category does not cover sources that are already being controlled by existing district regulations. Further discussion of district regulations is set forth below.

(2) Issue: Now that the ARB has adopted VOC standards for many categories of consumer products under Health and Safety Code  41712, what are the limits on the authority of local air pollution control districts (districts) to adopt and enforce consumer products regulations?

Conclusion: For those consumer product categories for which the ARB has previously adopted VOC standards, Health and Safety Code  41712(e) prohibits a district from adopting any standards for these categories (unless the District regulation is identical to the ARB regulation). However, districts retain the authority to adopt standards for any consumer product category for which the ARB has not adopted VOC standards. The boundaries of the districts' authority are determined by the definitions of each product category specified in the ARB consumer products regulations. If a product (or class of products) does not fall within the definitions specified for any of the product categories regulated by the ARB, then the product may be regulated by the districts.

Analysis: Prior to the enactment of Health and Safety Code  41712, the authority to regulate VOC emissions from consumer products was vested in the local air pollution control and air quality management districts (districts). This authority existed under the legislative scheme established in Division 26

of the Health and Safety Code, under which local and regional authorities have primary authority to control sources of pollution other than vehicular sources (Health and Safety Code □□ 39002, 40000, 41508). The California Clean Air Act (Stats. 1988, Chapter 1568, □ 26) added □ 41712 to the Health and Safety Code, which gave the ARB authority for the first time to regulate VOC emissions from consumer products. Health and Safety Code □ 41712(e) also included a limitation on the authority of the districts to regulate consumer products. Section 41712(e) states as follows:

> "(e) A district will adopt no regulation relating to a consumer product which is different from any regulation adopted by the state board for that purpose." [5]

By its terms, the language in □ 41712(e) does not restrict district authority unless the ARB has already adopted a regulation "for that purpose." The ARB Office of Legal Affairs has long taken the position that the qualifying phrases " . . . regulation relating to a consumer product . . ." (e.g., not a regulation relating to consumer products in general) and " . . . for that purpose . . ." indicates that the restriction on district action applies only to the regulation of those specific consumer product categories (e.g., hair sprays, glass cleaners, etc.) for which VOC standards have already been specified in an ARB regulation. The language does not restrict district authority to regulate a particular consumer product category unless VOC standards for that category have already been established by the ARB. However, once the ARB has adopted a VOC regulation for a particular category of consumer products (e.g., hair sprays), Health and Safety Code □ 41712(e) clearly prohibits local districts from subsequently adopting any VOC regulation that is different from the ARB regulation for that category.

For the vast majority of consumer products, it is fairly clear in which category they should be placed. It is therefore equally clear whether or not a district can regulate such products. Occasionally, however, questions are raised about whether a particular class of products has or has not been regulated by the ARB. How does one determine the exact boundaries of the ARB's regulatory authority over a particular class of products? The ARB Office of Legal Affairs believes that there is a common sense answer to this question, which is that the boundaries of the districts' authority are determined by the definitions for each product category that is set forth in the ARB consumer products regulations. If a particular product (or class of product) meets the definition specified for a particular product category, as set forth in ARB regulations, then a district cannot regulate this product. If, on the other hand, a product or class of products does not fall within the definition specified for a product category in ARB regulations, then the product may be regulated by the districts.

For example, questions have recently been raised about the proper division between ARB and district authority to regulate the broad category of "adhesives." Applying the principles discussed above, one must examine the ARB's regulatory

definitions to determine the scope of ARB and district authority. The ARB has established VOC standards for the category of "Household Adhesive" (Title 17, CCR, § 94509(a)). "Household Adhesive" is defined in ARB regulations as:

> "Household Adhesive" means any household product that is used to bond one surface to another by attachment. . . . "Household Adhesive" also does not include units of the product, less packaging, which weigh more than one pound or consist of more than 16 fluid ounces." (Title 17, CCR, § 94508(a)(46))

By its terms, ARB regulation for this product category has been limited to products which weigh one pound or less, or consist of 16 fluid ounces or less. This definition determines the boundaries of the category of "Household Adhesives" that the ARB has regulated. Therefore, adhesive products that fall outside of this defined category (i.e., products weighing more than one pound, or consisting of more than 16 fluid ounces) may be regulated by the districts. [6]

(3) Issue: What is the authority of the ARB to regulate consumer products that are pesticides? How does the ARB's authority interact with the authority of the Department of Pesticide Regulation to regulate pesticides under California law, and the authority of the U.S. EPA to regulate pesticides under federal law?

Conclusion: The ARB clearly has the authority to regulate any pesticide product which meets the definition of a "consumer product." Since the Department of Pesticide Regulation (DPR) also has broad authority to regulate pesticides under California law, the ARB and DPR have concurrent jurisdiction to regulate pesticide products. This means that persons subject to DPR and ARB regulations must comply with the regulations of both agencies. The U.S. EPA also has the authority to regulate pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the federal Clean Air Act. These federal laws do not preempt the authority of the ARB or DPR to establish VOC standards for pesticides under California law.

Analysis:

Regulation of Pesticides by the U.S. EPA

The U.S. EPA has authority to regulate consumer products that are pesticides under both the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA; 7 U.S.C. §§ 136-136(y)) and § 183(e) of the federal Clean Air Act (CAA) Amendments of 1990 (42 U.S.C. § 7511b(e)(3)). Section 183(e) of the CAA requires the U.S. EPA (among other things) to promulgate regulations or control techniques guidelines (CTGs) for consumer products. The language of § 183(e) is clear and does not preempt the authority of States to adopt their own consumer products regulations.[7]

FIFRA requires that "pesticides" be registered with the U.S.

EPA as a precondition to their sale and distribution. "Pesticide" is broadly defined by FIFRA to include any substance or mixture intended to prevent, destroy, repel, or mitigate any insect, fungus, virus, bacteria, or microorganism (other than microorganisms found in living man or living animals) 7 U.S.C. □ □ □ 36(t) and (u). This definition includes certain dual-purpose air fresheners, bathroom and tile cleaners, insect repellents, and other consumer products that have been registered under FIFRA because they are intended by their manufacturers to prevent, destroy, repel, or mitigate pests.

FIFRA does not preempt the ARB from adopting VOC standards for FIFRA-registered products. In fact, □ 24(a) of FIFRA expressly allows States to regulate the sale or use of pesticides as long as the State regulations do not permit any sale or use prohibited by the U.S. EPA (7 U.S.C. □ 136v(a); National Agricultural Chemical Ass'n v. Rominger (E.D.Cal. 1980) 500 F. Supp. 465, 15 ERC 1039; Chemical Specialities Manufacturers Association v. Allenby (9th Cir. 1992) 958 F. 2d 941, 34 ERC 2000, cert denied (1992) 113 S.Ct 80, 35 ERC 1688). [8]

Regulation of Pesticides by the State: ARB and DPR authority

Given that the State of California is not preempted by the CAA or FIFRA from regulating the VOC content of pesticides, which public agencies have the authority under California law to do so? The California Department of Food and Agriculture (now the Cal/EPA Department of Pesticide Regulation (DPR)) has been regulating pesticides since 1901 and extensively regulates the sale and use of pesticides in California. During the Phase I consumer products rulemaking, some individuals argued that the regulation of pesticides impermissibly intruded upon the pesticide registration scheme established in the California Food and Agriculture Code and administered by the DPR. The ARB Office of Legal Affairs did not agree with this view, and advised the ARB that it had full authority under state law to regulate consumer products that are pesticides registered with the U.S. EPA and DPR. Following is the reasoning supporting this conclusion.

Prior to the enactment of the Bronzan bill in 1984 (AB 2635; Stats. 1984, ch. 1386; Food and Agricultural Code □□ 11501.1 and 14007), local and regional air pollution control districts were free to regulate the use of economic poisons (e.g., pesticides) concurrently with DPR and other state agencies (People ex rel. George Deukmejian v. County of Mendocino et al. (1984) 36 Cal.3d 476; 21 ERC 1595). However, in response to this court decision the Legislature enacted a bill by Assemblyman Bronzan which explicitly overturned this decision and prohibited the districts (and other nonstate entities) from regulating the use of pesticides. Food and Agriculture Code □ 11501.1(a) now states that the provisions of the Food and Agriculture Code relating to pest control operations and agricultural chemicals are of statewide concern and occupy the entire field of regulation:

" Except as otherwise specifically provided in this

> code, no ordinance or regulation of local government, including, but not limited to, an action by a local governmental agency or department . . . , may prohibit or in any way attempt to regulate any matter relating to the regulation, sale, transportation, or use of economic poisons . . ."
> (Food and Ag. Code § 11501.1)
>
> The legislation further declares that:
>
> "It is the intent of the Legislature by this act to overturn the holding of [People v. County of Mendocino] and to reassert the Legislature's intention that matters relating to the economic poisons are of a statewide interest and concern and are to be administered on a statewide basis by the state unless specific exceptions are made in state legislation for local administration." (Stats. 1984, ch. 386, sec. 3)

It is clear that the ARB has not been preempted by the Bronzan bill. Food and Agricultural Code § 11501(b) states: " Neither this division nor Division 7 . . . is a limitation on the authority of a state agency or department to enforce or administer any law that the agency or department is authorized or required to enforce or administer."

The ARB is authorized to regulate consumer products by Health and Safety Code § 41712, which defines "consumer product" to include many types of consumer product categories that contain pesticides registered under FIFRA and the California Food and Agriculture Code (i.e., cleaning compounds; home, lawn, and garden products; disinfectants; sanitizers). Based on this very clear and explicit reference to many product categories which include pesticide products, we believe that § 41712 contains an unambiguous expression of legislative intent that pesticide products are subject to ARB regulation. If the Legislature had intended to preclude regulation of these products by the ARB, it could very easily have said so. Under this authority, the ARB has already established VOC standards for numerous consumer product categories that include pesticide products (e.g., insecticides, insect repellents, bathroom and tile cleaners, etc.).

Since the ARB is authorized by Health and Safety Code § 41712 to regulate the VOC content of pesticide products, and the DPR is also authorized by the Food and Agriculture Code to regulate pesticide products, it follows that the ARB has concurrent jurisdiction with the DPR to regulate these products for air quality purposes. "Concurrent jurisdiction" is a well-established legal principle under which two or more governmental agencies exercise jurisdiction over the same subject area or activity, and affected persons must comply with the regulations of both agencies. [9] The Legislature can establish one statutory scheme for the general regulation of pesticides and another for the general regulation of air pollution, and both implementing agencies share jurisdiction where there is an overlap. (see Orange County APCD v. Public Utilities Comm.

(1971), 4 Cal.3d 945, 2 ERC 1602); see also 54 Ops. Cal. Atty. Gen. 189 (concurrent authority of the State Forester and the Tahoe Regional Planning Agency to regulate the harvesting of commercial timber); and 37 Ops. Cal. Atty. Gen. 31, 33 (the Public Utilities Commission, Industrial Welfare Commission, and the Division of Industrial Safety have concurrent jurisdiction to regulate the health of common carrier employees). Concurrent jurisdiction is the only reasonable way to harmonize the separate regulatory schemes established by the Legislature in the Health and Safety Code and the Food and Agriculture Code.

The citations listed above describe only a few of the numerous instances where various public agencies exercise concurrent jurisdiction in regulatory situations, where each agency is empowered to regulate a particular aspect of a given activity. In the case of consumer products that are registered pesticides, pesticide manufacturers are subject to DPR regulations and orders regarding registered pesticide products, while also being subject to any applicable ARB regulations regarding the VOC content of products manufactured for sale or use in California. Manufacturers must also comply with any applicable DPR regulations that are adopted in the future to limit the VOC content of pesticides that are not consumer products (i.e., pesticide products used in agricultural and commercial structural pesticide applications), as described in DPR's commitment in the State Implementation Plan for Ozone (SIP).

**FOOTNOTES**

[1]: Such clarification of the meaning of legislative terms is a common practice in administrative regulations and is clearly authorized by California law. (see Western States Petroleum Assn. V. Superior Court (1995), 9 Cal.4th 559, 572; 38 Cal.Rptr.2d 139)

[2]: The definitions of these terms were developed in close cooperation with the consumer products industry during the public workshops and other meetings that were held as part of the development of Phase II. As a result of these discussions, general consensus was reached with industry representatives on the proper language for these definitions. ARB staff included these consensus definitions in the regulations formally proposed in the Phase II rulemaking. The definitions were subsequently adopted by the Board with no changes from the originally proposed language. No oral or written comments relating to these definitions were received by the ARB during the Phase II public comment periods, or at the Phase II Board hearing.

[3]: ARB regulations also contain a definition of the term "consumer product" (Title 17, CCR, § 94508(a)(18)). This regulatory definition is essentially identical to the definition set forth by the Legislature in Health and Safety Code § 41712(c). The scope of both definitions thus depends to a large extent on the meaning of the phrase " . . . household and institutional consumers . . .", which is in turn clarified by the

ARB's definitions of the terms "Household Product" and "Institutional Product or Industrial and Institutional (I&I) Product."

[4]: These observations are intended to provide some simplified descriptions of how the ARB definitions would apply to some very general situations. These observations are not intended to modify or add additional qualifications to the actual language of these definitions, as set forth in ARB regulations.

[5]: As originally enacted in 1988, Health and Safety Code § 41712(e) restricted the authority of local districts to adopt consumer product regulations only until January 1, 1994. After January 1, 1994, the original language provided no limitation on the authority of the districts to adopt consumer products regulations. This language was modified in 1992 to eliminate the reference to January 1, 1994, and thereby create a permanent restriction on district authority. The new, currently effective language is set forth above.

[6]: Some additional explanation of the "Household Adhesives" category may be useful in understanding the scope of the ARB's definition. At the time the definition for this category was developed during the 1992 Phase II rulemaking, several districts had either adopted or were developing regulatory standards for adhesives. The primary focus of the district regulations was to establish standards for adhesives used by stationary sources in commercial or industrial applications. The ARB "Household Adhesives" category was developed in consultation with industry, and was intended to include only the smaller containers of adhesives that were used primarily by consumers, and to exclude the larger containers of adhesives that were typically used in commercial and industrial applications. It has been suggested that the ARB's definition draws the line between these two types of applications in an inappropriate place, and that quart and gallon sizes of adhesives should by regulated by the ARB as "Household Adhesives" instead of by the districts. The ARB staff is continuing to evaluate this category. At the present time, however, the boundaries of ARB and district authority over adhesives are delineated by the boundaries of the category of "Household Adhesives", as that term has been defined in ARB regulations.

[7]: The only requirement imposed on States by CAA § 183(e) is the requirement in § 183(e)(9) that any State which proposes consumer product regulations (other than those regulations adopted by the U.S. EPA under § 183(e)) must consult with the U.S. EPA Administrator regarding whether any State or local subdivision has promulgated consumer products regulations, or is in the process of promulgating such regulations.

[8]: FIFRA does contain a limited preemption that prohibits States from imposing any additional labeling or packaging requirements that are different than FIFRA requirements. Section 24(b) of FIFRA provides that States:

> " . . . shall not impose or continue in effect any

> requirements for labeling or packaging in addition to or different than those required under this subchapter."
> (7 U.S.C. □ 136v(b))

By its terms, this limited FIFRA preemption applies only to "requirements for labeling or packaging" ARB regulations recognize this preemption by providing that the code-dating (i.e., labeling) requirements of the consumer products regulation do not apply to FIFRA-registered products (see 17, CCR, □□ 94510(e) and 94512(b)). Except for labeling and packaging requirements, FIFRA gives States the freedom to impose whatever pesticide regulations they may wish, including regulatory limits on the VOC content of pesticides. (see Chemical Specialities Manufacturers Association v. Allenby, (9th Cir. 1992) 958 F. 2d 941, 34 ERC 2000, cert denied (1992) 113 S.Ct 80, 35 ERC 1688).

[9]: As discussed above, the practical effect of concurrent jurisdiction is that persons subject to DPR and ARB regulations must comply with the regulations of both agencies. In developing consumer products regulations the ARB has been careful to coordinate with the DPR to ensure that ARB and DPR regulations do not impose inconsistent requirements on pesticide manufacturers, distributors, or retailers. Furthermore, DPR has made a commitment in California State Implementation Plan for Ozone (SIP) to reduce VOC emissions from agricultural and commercial structural pesticide applications. DPR's SIP commitment should also not result in any inconsistent requirements, since DPR explicitly states in the SIP that it does not intend to develop control measures that apply to pesticides regulated as consumer products by the ARB.

ENCLOSURE 3


# Air Resources Board

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Mr. William B. Wong, Senior Deputy District Counsel
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Re: INTERPRETATION OF HEALTH AND SAFETY CODE SECTION 41712(f)

Dear Mr. Wong:

I am responding to your letter of January 17, 2001, in which you ask the Air Resources Board (ARB) to confirm that Rule 1171 of the South Coast Air Quality Management District (SCAQMD), as interpreted and applied by the SCAQMD, is not preempted by Health and Safety Code section 41712(f). For the reasons discussed below, we agree that SCAQMD Rule 1171 is not preempted.

**Background**

Before addressing the preemption issue, I would like to first provide some background on Health and Safety Code section 41712 and the regulations adopted by ARB under this section. In 1988, the Legislature enacted the California Clean Air Act of 1988 (the "Act"; Stats. 1988, Chapter 1568). The Act added a number of new provisions to the Health and Safety Code, including section 41712. Section 41712 gave the ARB new legal authority to control emissions from consumer products, an emission source that had previously been subject to very few air pollution control regulations.

Section 41712 requires the ARB to adopt regulations to achieve the maximum feasible reduction in volatile organic compounds (VOCs) emitted by consumer products. To implement section 41712, the ARB has adopted regulatory standards for numerous categories of consumer products. These standards are contained in several different regulations. The first consumer products regulation adopted by the ARB was designed to reduce VOC emissions from antiperspirants and deodorants (the "antiperspirant and deodorant regulation"; sections 94500-94506.5, title 17, California Code of Regulations (CCR)). The ARB adopted this regulation in 1990. Since 1990, the ARB has also adopted VOC standards for 46 other categories of consumer products, and 35 categories of aerosol coating products (see sections 94507-94528, title 17, CCR). The standards for aerosol coatings products (i.e. spray paint) are contained in sections 94520-94528, title 17, CCR (the "aerosol coatings regulation"), and

the standards for consumer products (except for antiperspirants and deodorants) are contained in sections 94507-94517, title 17, CCR (the "consumer products regulation").

The consumer products regulation prohibits any person from selling, supplying, offering for sale, or manufacturing for sale in California any consumer product which, at the time of sale or manufacture, contains VOCs in excess of these limits. It includes two VOC standards for automotive brake cleaners: a VOC standard of 50 percent by weight (which became effective on January 1, 1997) and a VOC standard of 45 percent by weight (which will become effective on December 31, 2002).

**Preemption of District Rules**

As you know, Health and Safety Code section 41712(f) contains language limiting the authority of districts to regulate consumer products. Section 41712(f) states:

> (f) "A district shall adopt no regulation pertaining to disinfectants, nor any regulation pertaining to a consumer product that is different than any regulation adopted by the state board for that purpose."

In this case, the critical portion of the definition is the last phrase "for that purpose." Since SCAQMD Rule 1171 imposes regulatory standards which apply to the use of automotive brake cleaners in solvent cleaning operations, and these standards are different than the automotive brake cleaner standards in the ARB consumer products regulation, the SCAQMD could not legally impose these standards if Rule 1171 was adopted for the same "purpose" as the ARB consumer products regulation. On the other hand, such standards would not be preempted by Health and Safety 41712(f) if Rule 1171 was not adopted for the same "purpose" as the consumer products regulation.

**Purpose of the ARB Consumer Products Regulation and Rule 1171**

The relevant question therefore becomes: "For what purpose did the ARB adopt the consumer products regulation, and for what purpose did the SCAQMD adopt Rule 1171?" Obviously, both rules were designed to reduce air pollution by reducing VOC emissions. But this is not a very useful way of stating the purpose of these rules since there are hundreds of ARB and SCAQMD rules that are designed to achieve this goal. I believe that the most useful way of stating the purpose of these two rules is to identify the universe of emission sources that the rules were intended to target.

The primary purpose of the ARB consumer products regulation is to reduce VOC emissions from products that are sold, supplied, offered for sale, or manufactured for sale in California to household and institutional consumers. The regulations were targeted primarily at consumer products manufactured for and distributed to outlets such as supermarkets, drugstores, warehouse stores, hardware stores, etc., and sold to consumers from these outlets. Before the California Clean Air Act was enacted, VOC emissions resulting from such widely distributed consumer sales had been subject to

very few regulatory restrictions. The consumer products regulation was not intended to impose regulatory restrictions on pollution-generating activities, such as the use of VOC-containing products, that take place at stationary sources. (There are two exceptions to this general rule which are discussed later on in this letter.) Control of VOC emissions from stationary sources (including area sources) has long been under the jurisdiction of the local air pollution control and air quality management districts (see Health and Safety Code sections 39002, 40000, and 41508), and districts have enacted many local district rules which impose restrictions on pollution-generating activities that occur at stationary sources.

Turning to SCAQMD Rule 1171, at first glance Rule 1171 appears to apply very broadly. However, it is my understanding from your letter that Rule 1171 is not interpreted or applied by the SCAQMD in this manner. Your letter states the rule is not applied to individuals who perform solvent cleaning (e.g., a consumer using automotive brake cleaners on their own car), but is instead applied only to "solvent cleaning operations" (i.e., stationary and area sources that the SCAQMD has traditionally regulated). In other words, Rule 1171 is designed to regulate activities that occur at permitted stationary sources, and such unpermitted stationary sources (including area sources) that have been traditionally regulated by the districts. As such, it falls squarely within the long-established authority of the districts to regulate activities of stationary sources, and was adopted for a different purpose than the ARB consumer products regulation. It is therefore our opinion that SCAQMD Rule 1171, as interpreted and applied by the SCAQMD, is not preempted by Health and Safety Code section 41712(f).

**ARB Regulations do not Regulate Product Use, with the Exception of Aerosol Adhesives and Aerosol Coatings**

To further explain this conclusion, it may be helpful to explain in greater detail the activities that are covered by the ARB regulations adopted under section 41712. The regulations apply to the acts of "selling," "supplying," "offering for sale," and "manufacturing" consumer products for sale in California. I mentioned above that the regulations (with two exceptions) were not intended to impose any restrictions on pollution-generating activities that take place at stationary sources. Accordingly, the regulations generally do not apply to, or impose any restrictions on, the act of "using" or "applying" a product. However, two exceptions to this general rule exist for the product categories of: (1) aerosol adhesives, and (2) aerosol coatings (i.e., spray paint). For these two categories, use restrictions are imposed by ARB regulations. As explained below, these use restrictions implement legislation establishing preemptions that are broader than the more limited preemption contained in Health and Safety Code section 41712(f).

Regulation of Aerosol Adhesives

For aerosol adhesives, the relevant legislation was Assembly Bill 1849 (AB 1849: Stats.1996, Chapter 766) which is codified in Health and Safety Code section 41712(h). Section 41712(h) includes the following language:

> " ... It is the intent of the Legislature that, prior to January 1, 2000, air pollution standards affecting the formulation of aerosol adhesives and limiting emissions of reactive organic compounds resulting from the use of aerosol adhesives be set solely by the state board to ensure uniform standards applicable on a statewide basis. ... Effective January 1, 1997, the state board's 75 percent standard shall apply to all uses of aerosol adhesives, including consumer, industrial, and commercial uses, and any district regulations limiting the VOC content of, or emissions from, aerosol adhesives, are null and void. ..."

AB 1849 was the Legislature's response to the situation that existed in early 1996. By 1996, several districts had adopted adhesives rules that included standards (including use restrictions) for aerosol adhesives. District standards for aerosol adhesives were not uniform, and industry groups were concerned that some of these standards were not achievable. The AB 1849 amendments gave the ARB sole authority (until January 1, 2000) to set standards for all uses of aerosol adhesives. The ARB's existing 75 percent VOC standard for aerosol adhesives was expanded to cover "all uses" of aerosol adhesives, including nonconsumer uses. To reflect this legislative intent, the consumer products regulation was amended to state that no person shall "use" any aerosol adhesive which contains VOCs in excess of the specified VOC standard (see section 94509(i), title 17, CCR). This prohibition on "use" is in addition to the general prohibitions on the acts of selling, supplying, offering for sale, and manufacturing noncomplying aerosol adhesives for sale in California.

Regulation of Aerosol Coatings

A similar use restriction is also contained in the ARB aerosol coatings regulation (see title 17, CCR, sections 94520, 94522(a)(1), and 94523(d)). The use restriction in these sections is phrased in terms of "applying" aerosol coatings, and it covers all "commercial application" of these coatings (i.e., the use restriction includes non-consumer application of coatings at stationary sources).

The aerosol coatings regulation was adopted to implement the requirements of Health and Safety Code section 41712(i). As originally enacted in 1988, section 41712 did not give the ARB the authority to regulate VOC emissions from aerosol coatings. The authority to regulate aerosol coatings was vested in the local districts. This changed in 1992 and 1993, when the Legislature enacted AB 2783 (Stats. 1992, Chapter 945) and AB 1890 (Stats. 1993, Chapter 1028). These bills amended section 41712 to give the ARB the authority to adopt aerosol coatings regulations, and required the ARB to adopt such regulations by certain specified dates. The amendments also preempted the enforcement of the pre-1993 aerosol coatings rule that had been adopted by the SCAQMD. The AB 1890 amendments (which are now codified in Health and Safety Code section 41712(i)) include the following preemption language:

> "... It is the intent of the Legislature that air pollution control standards affecting the formulation of aerosol paints and limiting the emissions of volatile organic compounds resulting from the use of aerosol paints be set solely by the state

> board to ensure uniform standards applicable on a statewide basis. A district shall not adopt or enforce any regulation regarding the volatile organic compound content of, or emissions from, aerosol paints until such time as the state board has adopted a regulations regarding those paints, and any district regulation shall not be different than the state board regulation. ..."

Significance of the ARB's Use Restrictions for Aerosol Coatings and Aerosol Adhesives

There is a reason why I have discussed at some length the regulation of aerosol adhesives and aerosol coatings. In regulating consumer products, the ARB's regulatory approach has basically been to target the manufacture and sale of products to consumers. The actual use of these products by consumers is not regulated (except for aerosol adhesives and aerosol coatings). No limitations are placed on the amount of products that consumers can use, or on consumers' use of older, high-VOC products that may have been stored in homes or garages for years. Unlike ARB regulations for other categories of consumer products, ARB regulations for aerosol adhesives and aerosol coatings do impose restrictions on product use. These restrictions apply to activities (i.e., product use) that take place at stationary sources.

The different approach for aerosol adhesives and aerosol coatings illustrates what ARB regulations look like when they are adopted for the purpose of regulating stationary source activities that the districts have traditionally regulated. And it should make clear that ARB regulations for other categories of consumer products, such as automotive brake cleaners, were not adopted for this purpose. Furthermore, the ARB believes that the approach it has taken is consistent with the intent of the Legislature, since the Legislature's directives for aerosol adhesives and aerosol coatings contain much broader preemption language than the language used in Health and Safety Code section 41712(f). This different statutory language, along with the ARB's different regulatory approach for products other than aerosol adhesives and aerosol coatings, illustrates why the ARB has concluded that SCAQMD Rule 1171 is not preempted by Health and Safety Code section 412712(f).

**Arguments made in the Arent Fox Letter**

Finally, I would like to address some of the arguments made in an August 23, 2000, letter written to the SCAQMD by the law firm of Arent, Fox, Kintner, Plotkin & Kahn, PLLC ("Arent Fox letter"). The Arent Fox letter quotes portions of an August 23, 1995, ARB legal opinion to support their argument that the Rule 1171 requirements for automotive brake cleaners are in conflict with the ARB consumer products regulation, and are preempted by Health and Safety Code section 41712(f). When taken out of context, the quotations from this ARB opinion appear to support Arent Fox's argument. However, I would like to clarify that the opinion does not mean what Arent Fox says it means.

The ARB's 1995 legal opinion did not address the specific issues discussed in this letter. It was intended to address the issue of when districts may adopt broadly

applicable VOC standards for consumer products. The opinion envisioned a situation in which a district might wish to adopt a consumer products rule establishing VOC standards for certain categories of consumer products, and the district rule attempted to broadly apply these standards to the sale (and manufacture for sale) of consumer products within the district. For this situation, the opinion essentially concludes that: (1) a district may establish VOC standards for product categories that have not been regulated by the ARB, but (2) once the ARB has adopted a VOC standard for a particular category, then a district cannot adopt a VOC standard that is different than the ARB's standard.

The opinion did not address the issue of whether a district can continue to impose restrictions on activities (such as the use of certain consumer products) occurring at stationary sources that districts have traditionally regulated. Indeed, if one were to accept Arent Fox's argument, it would lead to unfortunate and unintended consequences for the control of air pollution in California. In adopting consumer products regulations, the ARB intended to regulate new air pollution sources that had previously escaped widespread regulation. The ARB regulations were intended to supplement the districts' existing stationary source control activities. If one accepts Arent Fox's arguments, it follows that stationary sources could use unlimited quantities of consumer products to accomplish a particular task that districts have traditionally regulated, even when other cost-effective, less polluting technologies could be used to accomplish the same task with far fewer emissions. By targeting an emission source that had not previously been effectively regulated, it was certainly not the purpose of the ARB regulations to deprive districts of their long-standing authority to regulate pollution-generating activities occurring at stationary sources, just because these activities may involve the use of consumer products.

I hope this letter is of use to you. If you have any questions, please feel free to call me at (916) 322-2884, or call Senior Staff Counsel Robert Jenne at (916) 322-3762.

Sincerely,

OFFICE OF LEGAL AFFAIRS

Kathleen Walsh
General Counsel

cc: James Mattesich
Livingston & Mattesich
1201 K Street, Suite 1100
Sacramento, CA 95814

ENCLOSURE 4


# Air Resources Board

**Mary D. Nichols, Chairman**
1001 I Street • P.O. Box 2815
Sacramento, California 95812 • www.arb.ca.gov

**Linda S. Adams**
*Secretary for*
*Environmental Protection*

**Arnold Schwarzenegger**
*Governor*


June 29, 2010

Mr. William B. Wong
Principal Deputy District Counsel
Office of District Counsel
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, California 91765-4178

re: Interpretation Of Health And Safety Code Section 41712(f)

Dear Mr. Wong:

I am responding to your request that I explain the regulatory adoption process of the Air Resources Board (ARB) and how it relates to the preemption language in Health and Safety Code section 41712(f). The context of your request is that the Governing Board of the South Coast Air Quality Management District (SCAQMD) is scheduled to consider the adoption of proposed amendments to Rule 1143 at a July 9, 2010, public hearing. The proposed amendments would, among other things, establish volatile organic compound (VOC) limits and labeling requirements for consumer paint thinners and multipurpose solvents.

Some industry representatives have asserted that Health and Safety Code section 41712(f) preempts SCAQMD from adopting the proposed amendments to Rule 1143. For the reasons discussed below, we have concluded that section 41712(f) does not preempt SCAQMD from taking this action.

**Background**

I would like to first provide some background on Health and Safety Code section 41712 and the regulations adopted by ARB under this section. In 1988, the Legislature enacted the California Clean Air Act of 1988 (the "Act"; Stats. 1988, Chapter 1568). The Act added a number of new provisions to the Health and Safety Code, including section 41712. Section 41712 requires ARB to adopt regulations to achieve the maximum feasible reduction in VOCs emitted by consumer products.

To implement section 41712, ARB has adopted regulatory standards for numerous categories of consumer products. Most of these standards are contained in ARB's "Regulation for Reducing Emissions from Consumer Products" (the "consumer products regulation;" sections 94507-94517, title 17, California Code of Regulations.

**Preemption of District Rules**

As you know, Health and Safety Code section 41712(f) contains language limiting the authority of local air pollution control and air quality management districts (districts) to regulate consumer products. Section 41712(f) currently states:

> "(f) A district shall adopt no regulation pertaining to disinfectants, nor any regulation pertaining to a consumer product that is different than any regulation adopted by the state board for that purpose."

The language above has gone through several iterations over the years. The original version of this language was included in the California Clean Air Act of 1998, and was amended in 1992 by AB 2783 (Sher, Stats. 1992, ch. 945). After the 1992 amendments, the language read as follows:

> "(e) A district shall adopt no regulation relating to a consumer product that is different than any regulation adopted by the state board for that purpose."

The 1992 language is essentially the same as the current language, except that the current language prohibits any regulation of disinfectants by the districts. The language regarding disinfectants was added in 1997 (Stats. 1997, ch. 689) and is not relevant to this analysis. The critical question is how the language restricts districts from regulating consumer products that are not disinfectants.

On December 3, 1992, ARB Chief Counsel Michael P. Kenny issued a legal opinion which directly addressed this question in the context of whether SCAQMD could legally adopt a VOC regulation for a category of consumer products (aerosol coatings) that ARB had not yet regulated. The legal opinion is attached to this letter. It discusses the legislative history of the preemption language in Health and Safety Code section 41712 and other legal precedents, and reaches two conclusions. The first conclusion is that until ARB has adopted a VOC regulation for a particular category of consumer products (e.g., aerosol paints), districts retain their existing legal authority to adopt a regulation for that category. The second conclusion is that if a district adopts a regulation for a product category that has not been regulated by ARB, and then ARB subsequently adopts a regulation for this product category, the district regulation remains legally effective and is not preempted by the subsequent ARB adoption

**When does ARB "adopt" a regulation?**

From the discussion above, the critical issue in a preemption analysis is whether ARB has "adopted" a regulatory standard for a particular category of consumer products. If ARB has not adopted a regulatory standard for a product category, then SCAQMD is free to do so. Following is a description of ARB's regulatory adoption process.

ARB's regulatory adoption process is governed by the provisions of the California Administrative Procedure Act (APA; Government Code section 11340 et seq.) and the Health and Safety Code. Section 39601(a) of the Health and Safety Code requires ARB to adopt regulations in accordance with the APA, which establishes a detailed administrative process for the adoption of regulations by State agencies. The process begins when a State agency makes a proposed regulation available for a 45-day public comment period (Government Code § 11346.4). A public hearing is then held. If the State agency wishes to make changes to its original proposal, the changes (except for nonsubstantial or solely grammatical changes) must be made available for a 15-day public comment period before the agency can adopt the proposed regulation (Government Code § 11346.8(c)). If the State agency decides to make additional changes after the first 15-day comment period, the additional changes must then be made available for a second 15-day comment period. It is not uncommon for two or three 15-day comment periods to occur before an agency ultimately adopts the proposed regulation. The process is designed to ensure that a State agency does not take final action to adopt a proposed regulation before it has a chance to fully consider public comments made on the proposal.

ARB has followed APA procedures for all the regulations it has adopted over the past three decades. At a Board hearing to consider a proposed regulation, the Board often wishes to make changes to the original proposal. To comply with APA requirements, the Board cannot adopt such changes without first making them available for an additional 15-day public comment period. The Board accomplishes this by delegating to its Executive Officer the responsibility to make the modified regulatory text available for one or more 15-day public comment periods, to consider such written comments as may be submitted during this period, to make modifications as appropriate in light of the comments received, and then to either adopt the regulations or present them to the Board for further consideration if warranted. This delegation to the Executive Officer is specifically authorized by sections 39515 and 39516 of the Health and Safety Code.

At the end of this process (i.e., after the close of the 15-day comment period and after all comments have been considered) the Executive Officer—acting on behalf of the Board under the authority delegated to him or her by the Board—will sign an Executive Order that adopts the proposed regulation. Then ARB staff submits the final rulemaking package to the State Office of Administrative Law (OAL) for approval. The proposed regulation becomes legally effective under State law once it is approved by OAL.

**Has ARB adopted a regulation establishing regulatory requirements for paint thinners and multipurpose solvents?**

The answer is no; ARB has not yet adopted regulatory requirements for paint thinners or multipurpose solvents. Here is what has happened so far in the regulatory adoption process described above. On August 7, 2009, ARB staff issued a 45-day notice proposing a variety of amendments to ARB's consumer products regulation. These amendments included proposed VOC standards and labeling requirements for multipurpose solvents and paint thinners, which had not previously been regulated by the Board. A public hearing on staff's proposal was held on September 24, 2009. At the conclusion of the hearing, the Board approved Resolution 09-51, in which the Board directed the Executive Officer to take final action to adopt the proposed amendments with various modifications, after making the modified regulatory language available for an additional 15-day public comment period. Resolution 09-51 further directed the Executive Officer to consider such written comments as may be submitted during this period, to make modifications as appropriate in light of the comments received, and then to either adopt the regulations or present them to the Board for further consideration if the Executive Officer determines that this is warranted.

On January 14, 2010, the modified regulatory language was made available for a 15-day public comment period. The Executive Officer then determined that it was appropriate to propose additional modifications, which were made available for a second 15-day public comment period which began on June 28, 2010, and will end on July 13, 2010. The Executive Officer has not yet signed an Executive Order adopting the proposed amendments because he will first need to consider all relevant comments received during this second 15-day comment period. This means that the Executive Order adopting the amendments will not be signed before SCAQMD's July 9, 2010, public hearing, because the second 15-day comment period will not conclude until July 13, 2010. In other words, ARB has not yet adopted the proposed amendments regarding multipurpose solvents and paint thinners, and will not adopt them before July 9, 2010. Our best estimate at this time is that ARB's adoption of the proposed amendments will not take place until late July or early August of 2010.

**Conclusion**

Since ARB has not yet adopted regulatory requirements for the consumer product categories of paint thinners and multipurpose solvents, SCAQMD is free to do so and is not preempted by Health and Safety Code section 41712(f). If SCAQMD adopts these requirements before ARB does, then the SCAQMD requirements remain in effect and are not preempted when ARB ultimately does adopt regulatory requirements for these products.

I hope this letter is of use to you. If you have any questions, please feel free to call me at (916) 322-3762 or send me an email at rjenne@arb.ca.gov.

Sincerely,

Robert Jenne

Robert Jenne
Assistant Chief Counsel
OFFICE OF LEGAL AFFAIRS

ENCLOSURE 4

ENCLOSURE 4

STATE OF CALIFORNIA
AIR RESOURCES BOARD
2020 L STREET
P.O. BOX 2815
SACRAMENTO, CA 95812

PETE WILSON, Governor

December 3, 1992

Peter M Greenwald, District Counsel
South Coast AQMD
21865 E. Copley Dr.
Diamond Bar, CA 91765-4182

Regulation of Aerosol Paints

Dear Mr. Greenwald:

You have requested a legal opinion on the authority of the South Coast Air Quality Management District (SCAQMD) to adopt an aerosol coatings regulation in light of recent amendments to Health and Safety Code section 41712(e) (AB 2783, Sher; Stats. 1992, ch. 945). Specifically, you wish to know the opinion of the Air Resources Board (ARB) on two related issues:

(1) Does the SCAQMD have the authority to adopt an aerosol coatings regulation as long as the ARB has not previously adopted such a regulation? What is the status of the SCAQMD authority once the ARB has adopted such a regulation?

(2) If the SCAQMD adopts an aerosol coatings regulation, what is the effect on this regulation if the ARB subsequently adopts a different aerosol coatings regulation? Is the SCAQMD regulation preempted by the subsequent ARB adoption, or does the SCAQMD regulation remain legally effective?

To answer these questions, we carefully researched both the text and legislative history of AB 2783 and the California Clean Air Act of 1988 (Stats. 1988, ch. 1568). Our conclusions are as follows:

(1) Until the ARB formally adopts a regulation relating to aerosol coatings, the SCAQMD retains its existing authority to adopt an aerosol coatings regulation. However, once the ARB adopts an aerosol coatings regulation, Health and Safety Code section 41712(e) prohibits the subsequent adoption of a different aerosol coatings regulation by the SCAQMD.

(2) If the SCAQMD adopts an aerosol coatings regulation prior to any ARB adoption of a different regulation, the SCAQMD regulation remains legally effective and is not preempted by the subsequent ARB adoption.

The rationale for each of these conclusions can be briefly summarized AB 2783 made several changes to the language of Health and Safety Code section 41712; the definition of "consumer product" was amended to include "aerosol paints", and the limited preemption language in section 41712(e) was modified to delete the opening phrase "... Prior to January 1, 1994 .. ". Health and Safety Code section 41712(e) now reads as follows:

> "A district shall adopt no regulation relating to a consumer product which is different than any regulation adopted by the state board for that purpose "

Regarding the first issue mentioned above, by its terms, the language in section 41712(e) does not restrict district authority unless the ARB has already adopted a regulation "for that purpose". The ARB Legal Office has long taken the position that the qualifying phrases "... regulation relating to a consumer product .." (e.g., not a regulation relating to consumer products in general) and ".. for that purpose ..." indicate that the restriction on district action applies only to the regulation of those specific consumer product categories (e.g , hairsprays, glass cleaners, etc ) for which volatile organic compound (VOC) standards have already been specified in an ARB regulation. The language does not restrict district authority to regulate a particular consumer product category unless it has already been regulated by the ARB. However, once the ARB has adopted a VOC regulation for a particular category of consumer products (e.g., aerosol paints), Health and Safety Code section 41712(e) clearly prohibits local districts from subsequently adopting any VOC regulation that is different than the ARB regulation for that category.

Regarding the second issue, the language of section 41712(e) does not specifically state that a previously adopted district regulation is automatically preempted by the subsequent ARB adoption of a different regulation. Section 41712(e) merely provides that "... A district shall adopt no regulation ..." that is different from any ARB regulation. The Legislature did not state, as it could easily have done, that a district "... shall not adopt or enforce any regulation ..." that is different from an ARB regulation. The use of the term "enforce", or similar language, would have made it clear that previously adopted district regulations were preempted once the ARB acted to adopt its own regulation.

From the foregoing analysis, it is apparent that the language of section 41712 contains significant ambiguities. In an attempt to clarify these ambiguities, we have reviewed the legislative history of both AB 2783 and the California Clean Air Act of 1988, which enacted the original version of Health and Safety Code section 41712. Unfortunately, there is nothing in the legislative history of either bill which is dispositive in answering the specific questions posed above. It is possible to surmise that section

41712(e) was intended to promote some kind of statewide uniformity in consumer product regulations However, the unusual and ambiguous wording of the language makes it unclear as to exactly how preexisting district regulations should be treated. In light of the textual ambiguities and the lack of any useful guidance in the legislative history, the question is to what extent it is appropriate to conclude that the Legislature intended to repeal by implication the districts' longstanding authority (see Health and Safety Code section 39002, 41508) to regulate aerosol paints as nonvehicular emission source categories.

The California Supreme Court has addressed a similar question in the case of Western Oil and Gas Association v. Monterey Bay Unified Air Pollution Control 49 Cal.3d 408; 261 Cal Rptr. 384, 77 P.2d 157 (Aug. 1989). In the WOGA case, the Court discussed the circumstances under which it may validly be concluded that a statute operates to preempt or repeal by implication the authority of local air pollution control districts to control nonvehicular sources. In discussing the applicable precedents the Court stated as follows:

> "... All presumptions are against repeal by implication ... The presumption against implied repeal is so strong that 'To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation' ... There must be no possibility of concurrent operation ... implied repeal should not be found unless ... the later provision gives undebatable evidence of an intent to supersede the earlier .." 49 Cal.3d 408, 419-420.

With respect to aerosol paints, it is apparent that one cannot conclude with certainty that the Legislature intended to automatically preempt district regulations which were adopted before the ARB adopts its own aerosol paint regulation. Based on the principles set forth in the WOGA case, it is clear that we must therefore conclude that preemption of aerosol paints is limited to the circumstances discussed above.

The ARB Office of Legal Affairs plans to issue a more complete legal analysis which explains in greater detail the rationale for the conclusions set forth in this letter. While we would ordinarily set forth a full legal analysis at the same time as our conclusions, we wished to let you know our legal conclusions as soon as possible given the fact this issue will be considered by the SCAQMD Governing Board in just a few days.

ENCLOSURE 4



Please give me a call at (916) 322-2884 if you would like to discuss these issues further, or if you have any additional questions.

Sincerely,

Michael P. Kenny
General Counsel

rcj/rej/B95798