

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

Draft Staff Report for

PROPOSED AMENDED RULE 408 – CIRCUMVENTION

Dated: April 2018

Deputy Executive Officer

Planning, Rule Development, and Area Sources
Philip M. Fine, Ph.D.

Assistant Deputy Executive Officer

Planning, Rule Development, and Area Sources
Susan Nakamura

Planning and Rules Manager

CEQA and Rule Development
Michael Krause

Author:	Nicole Silva	Air Quality Specialist
Reviewed by:	Heather Farr Daphne Hsu	Program Supervisor Senior Deputy District Counsel
Contributors:	Barbara Baird Megan Lorenz Laki Tisopulos Marian Coleman Amir Dejbakhsh Andrew Lee Jason Aspell Scott Caso Rafael Reynosa Victor Yip John Anderson Kiersten Melville Amanda Sanders Shawn Bennage	Chief Deputy Counsel Principal Deputy District Counsel Deputy Executive Officer Deputy Executive Officer Assistant DEO Senior AQ Engineering Manager Senior Enforcement Manager Senior Enforcement Manager Senior Enforcement Manager Senior Enforcement Manager AQ Analysis and Compliance Supervisor AQ Analysis and Compliance Supervisor Supervising AQ Inspector Supervising AQ Inspector

**SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT
GOVERNING BOARD**

CHAIRMAN: DR. WILLIAM A. BURKE
Speaker of the Assembly Appointee

VICE CHAIRMAN: DR. CLARK E. PARKER, SR.
Senate Rules Committee Appointee

MEMBERS:

MARION ASHLEY
Supervisor, Fifth District
County of Riverside

BEN BENOIT
Mayor, Wildomar
Cities of Riverside County

JOE BUSCAINO
Council Member, 15th District
City of Los Angeles Representative

MICHAEL A. CACCIOTTI
Council Member, South Pasadena
Cities of Los Angeles County/Eastern Region

JOSEPH K. LYOU, Ph. D.
Governor's Appointee

LARRY MCCALLON
Mayor, Highland
Cities of San Bernardino County

JUDITH MITCHELL
Mayor Pro Tem, Rolling Hills Estates
Cities of Los Angeles County/Western Region

SHAWN NELSON
Supervisor, Fourth District
County of Orange

DWIGHT ROBINSON
Council Member, Lake Forest
Cities of Orange County

JANICE RUTHERFORD
Supervisor, Second District
County of San Bernardino

HILDA L. SOLIS
Supervisor, First District
County of Los Angeles

EXECUTIVE OFFICER:

WAYNE NASTRI

TABLE OF CONTENTS

EXECUTIVE SUMMARY	2
BACKGROUND	2
PROPOSED AMENDMENT.....	2
CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA).....	6
SOCIOECONOMIC ASSESSMENT	7
COMMENTS.....	7
DRAFT FINDINGS UNDER THE CALIFORNIA HEALTH AND SAFETY CODE.....	17
REFERENCES.....	17

EXECUTIVE SUMMARY

Rule 408 was adopted in 1976 to prohibit dilution to mask an air pollution problem. At the time of adoption, the only exemption to the rule were those cases in which Section 48700¹ (sic) of the Health and Safety Code or Rule 402 – Nuisance were the only rules violated. The purpose of proposed amended rule (PAR) 408 is to restrict the current exemption to only odor nuisances under Health and Safety Code Section 41700 or Rule 402 and prohibit temporarily altering normal business operations or equipment to evade detection of emissions during monitoring or testing.

BACKGROUND

Under Title 40 of the Code of Federal Regulations (CFR) Section 63.4 – Prohibited activities and circumvention² and Title 40 of the CFR Section 61.9 - Circumvention³, one cannot conceal an emission that would constitute noncompliance with a relevant standard. The CFR authorizes states, and in turn, air districts, to adopt their own circumvention regulations. Rule 408 was adopted on May 7, 1976 when the South Coast Air Quality Management District (SCAQMD) was the Southern California Air Pollution Control District. This rule replaced the existing prohibitory rules that were in effect in each of the four county regions for years prior to the formation of the SCAQMD. Rule 408 was adopted to prohibit the construction, installation, or use of any equipment or technique designed to conceal emissions without a concurrent reduction in the release of air contaminants to the atmosphere. Specifically, the current rule prohibits the circumvention of Chapter 3 (commencing with Section 41700) of Part 4, Division 26 of the California Health and Safety Code (H&SC), or SCAQMD rules. Circumvention rules and regulations are part of several state implementation plans as well as included in many California air districts’ rulebooks. Many of the California air districts have a similar stand-alone rule or a circumvention clause as part of their general prohibition rules. The proposed amendments to Rule 408 will address compliance issues that have been raised during recent enforcement activity.

PROPOSED AMENDMENT

The purpose of proposed amended rule (PAR) 408 is to clarify the rule language and make several revisions. The following are the proposed rule clarifications:

1. Rearrange the rule language to make the intent clear.
2. Replace the term “reduces” with “suppresses” as suppression is more indicative of circumvention.
3. Include the term “technique” to clarify that actions not involving equipment is also a violation of Rule 408.

The following are the proposed rule revisions:

¹ Inclusion of Health and Safety Code Section 48700 in the current version of the rule is an error. It should reference Section 41700.

² 40 CFR 63.4 Prohibited activities and circumvention.

³ 40 CFR 61.19 Circumvention.

1. Modify the language to indicate circumvention of any “law, regulation, rule, permit, order, or plan required by a rule” constitutes a violation of Rule 408.
2. Add a provision that prohibits altering normal operations or equipment to suppress emissions for the purpose of evading detection or concealing emissions during monitoring or testing.
3. Retain the exemption for cases in which the only violation is a nuisance, but limit it to odor nuisances.

The purpose of the first revision is to amend the language to indicate circumventing a “law, regulation, rule, permit, order, or plan required by a rule” constitutes a violation of Rule 408; the current rule language only states that circumventing the Health and Safety Code or SCAQMD rule constitutes a violation. This proposed amendment clarifies the SCAQMD’s authority; the SCAQMD already has the authority to issue a citation for circumventing a “law, regulation, rule, permit, order, or plan required by a rule.” Looking at each term individually:

- Plan includes any plan required by SCAQMD rules, including but not limited to:
 - Air monitoring plan (e.g., Rule 1420.2 - Emissions Standard for Lead),
 - Compliance plan (e.g., Rule 1146 - Emissions of Oxides of Nitrogen from Industrial, Institutional and Commercial Boilers, Steam Generators, and Process Heaters),
 - Emission control plan (e.g., Rule 1110.2 - Emissions from Gaseous - and Liquid-Fueled Engines), or
 - Risk Reduction Plan (e.g., Rule 1402 - Control of Toxic Air Contaminants from Existing Sources).
- Order may include, but is not limited to a stipulated order for abatement or a standard order for abatement, pursuant to SCAQMD Regulations 5 and 12.
- Permit includes any permit condition in a SCAQMD issued air quality permit or equipment description.
- Rule includes requirements in any SCAQMD rule.
- Regulation or law includes any regulation or law that the SCAQMD has authority to enforce.

The second proposed amendment prohibits altering normal business operations or equipment to evade detection of emissions during monitoring or testing. This is to address facilities that might, for example, block emission stacks, reduce their throughput, redirect throughput to other locations, or block monitors during monitoring or testing.

To prove a business altered their normal business operation to *evade detection* necessitates proving the intent. Normal business operations can change for a variety of reasons that would not indicate circumvention. Routine changes may include, but are not limited to, seasonal increase or decrease of work, large projects or work orders that may temporarily change emissions levels, or improving the efficiency of an operation that could change emissions. To prove intent, the onus is on enforcement staff, who will assess all the available facts. For example, staff may be able to prove a facility is purposely reducing their work load or altering equipment to suppress emissions by reviewing operator logs, fuel usage, production records, purchase records, work orders, and interviewing employees, etc. Another factor enforcement staff would take into consideration is the length of time an operation was altered. Alteration of business operations or equipment for

purposes other than evading detection or concealing emissions during monitoring and testing, such as enhancements to business practices to facilitate the sustained reduction of emissions or to reduce potential impacts on neighboring communities and other sensitive receptors would not be viewed as circumvention.

The purpose of subdivision (b) is to prevent a facility from suppressing emissions or evading detection during source testing or monitoring. Stakeholders expressed concern with the monitoring requirement because of the availability of low cost sensors and future community monitoring requirements. Assembly Bill 617, adopted on July 26, 2017, requires community air monitoring systems to be established to assist in the development of a strategy to reduce community exposure to air contaminants in affected communities.⁴ In addition, SCAQMD Rule 1180 – *Refinery Fenceline and Community Air Monitoring*, adopted on December 1, 2017, requires petroleum refineries to develop fenceline air monitoring plans and deploy fenceline monitoring. Circumventing monitoring is included in PAR 408, not only to address a facility possibly avoiding monitoring required by an existing rule or order, but also because future community monitors will read ambient air pollution concentrations and the data from those monitors will be evaluated to determine potential sources of emissions. Accurate and complete data is critical to obtain a comprehensive understanding of the emissions affecting impacted communities.

The last proposed revision is to the existing exemption that allows concealing emissions when mitigating nuisances. Field inspections found facilities attempting to use that exemption to violate SCAQMD rules. That exemption is being limited to only include mitigating nuisance *odors*. The current exemption also references an incorrect section of the Health and Safety Code. Current rule language references Section 48700 instead of Section 41700. Staff has corrected the Health and Safety code reference and has also moved the exemption to a separate subdivision to improve clarity.

CIRCUMVENTION EXAMPLES

As stated earlier, PAR 408 was initiated to address recent enforcement issues. The following hypothetical examples are provided to assist in understanding the proposed amendments, but are not intended to be an exhaustive list of examples of cases where this rule may or may not be applicable. These examples are a snapshot of enforcement scenarios to further understand the applicability of the rule and its amendments. More examples will be compiled in a support document that will be made available on the SCAQMD Rule Support webpage (<http://www.aqmd.gov/home/rules-compliance/rules/scaqmd-rule-book/support-documents>) and will be updated when necessary.

Example 1

A facility routes their exhaust gas through a bypass stack to conceal an emission exceedance from an installed emission monitoring system, flow monitoring system, or air pollution control device. Enforcement staff identifies the bypass stack and cites the facility for violating Rule 408.

⁴ Assembly Bill No. 617 as referenced in https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB617.

This example illustrates a violation of Rule 408(a) because the facility concealed emissions that would have been a rule violation.

Example 2

A person may use dust suppressants on a variety of surfaces with particulate matter accumulation to comply with Rule 403 – *Fugitive Dust*. A person using compliant dust suppressants to comply with Rule 403 *would not be in violation* of the rule since the technique to suppress the dust is also suppressing or reducing air pollutant emissions; and therefore, would result in an overall reduction in the total release of air contaminants to the atmosphere.

This example illustrates compliance with Rule 408(a) because the facility used a Rule 403 compliant technique to suppress and reduce the total release of air contaminants to the atmosphere.

Example 3

A facility moves the stack of their permitted air polluting equipment to redirect air pollutant emissions away from a nearby sensitive receptor with the intent to reduce exposure without increasing or decreasing the level of emissions.

This example illustrates compliance with Rule 408(a) because the move was permanent, but the facility would be required to file a permit modification before making the change per Rule 203 – *Permit to Operate*, or submit a modification to any affected monitoring plan, to ensure the modification to the exhaust stacks are properly reflected in affected monitoring plan.

If the facility moved the stack to evade detection from a nearby monitor, this example would illustrate a violation of Rule 408(b) because the facility changed equipment to conceal the emissions from the monitoring device.

Example 4

Many rules, plans, or permit conditions require facilities to control emissions. A facility may attempt to conceal an emission violation by blocking the exhaust stack or altering the equipment to bypass the equipment’s sensor that takes criteria pollutant or toxic emissions readings. This would conceal the total emissions released from the facility without reducing the total release of air contaminants.

This example illustrates a violation of Rule 408(a) because the facility used a technique to alter equipment to conceal a violation.

If the facility blocked the exhaust stack to prevent an ambient air monitor from detecting accurate emissions, this example would illustrate a violation of Rule 408(b) because the facility was altering equipment to evade detection during monitoring.

Example 5

A rule requires monitoring outside of the facility. Due to odor complaints, the facility installed fans at their equipment’s exhaust points to mitigate odors released to the surrounding community. The fans were also directing regulated emissions away from the air monitoring equipment and concealing emissions that would have exceeded permit conditions.

This example illustrates a violation of Rule 408(a) and (b) because the odor mitigation concealed regulated emissions that would have violated a permit condition during monitoring.

If the only emission was an odor, the facility could suppress or conceal that odor emission using equipment or techniques and not be in violation of Rule 408(c).

Example 6

A facility was found in violation of a rule for exceeding criteria pollutant or toxic emission allowances. The SCAQMD Hearing Board required the facility to meet certain emissions limits. To ensure the facility corrects their violation, pursuant to the Hearing Board's order, enforcement staff placed air monitoring equipment outside the facility. The facility altered its normal business operation by outsourcing part of their production to avoid higher emission readings during monitoring and resumed normal business operation after monitoring ceased.

This example illustrates a violation of Rule 408(b) because the facility altered normal business operations for the purpose of suppressing emissions during monitoring.

Example 7

A facility complying with ambient air monitoring requirements received a large work order. The blower on the facility's spray booth breaks down and the facility documents that the equipment cannot be repaired or replaced until after the work order is scheduled for completion. The facility maintains supporting documentation for this breakdown. The facility outsources the work order to another facility so the job may be completed on schedule.

This example illustrates compliance with Rule 408(b) because the facility did not alter their normal business operations to conceal emissions and had documents to support the legitimate reason for outsourcing.

Example 8

A facility that produces digester gas is required to source test its flare. In order to follow the source test protocol correctly, the source test requires a 60 minute test run time at a specified load. After 45 minutes, the facility has to stop the source test because there was not a sufficient amount of gas. The facility will be required to wait until there is an adequate quantity of gas to complete the source test at the specified load and duration. The facility also maintains proper documentation to demonstrate why the source test could not be completed.

This example illustrates compliance with Rule 408 (b) because the facility was not trying to conceal emissions during a source test; the facility had a valid reason to stop the source test and maintained proper documentation to support the reason for its failure to complete the source test.

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Pursuant to the California Environmental Quality Act (CEQA) and SCAQMD Rule 110, the SCAQMD, as lead agency for the proposed project, has reviewed the proposed amendments to Rule 408 pursuant to: 1) CEQA Guidelines Section 15002(k) - General Concepts, the three-step process for deciding which document to prepare for a project subject to CEQA; and 2) CEQA Guidelines Section 15061 - Review for Exemption, procedures for determining if a project is

exempt from CEQA. Since the proposed project is comprised of updates to the existing rule for the purpose of clarifying the meaning of circumvention, SCAQMD staff has determined that it can be seen with certainty that there is no possibility that the proposed project may have a significant adverse effect on the environment. Therefore, the proposed project is considered to be exempt from CEQA pursuant to CEQA Guidelines Section 15061(b)(3) – Activities Covered by General Rule. Also, the proposed amendments to Rule 408 are categorically exempt because they are designed to further protect or enhance the environment pursuant to CEQA Guidelines Section 15308 – Actions by Regulatory Agencies for Protection of the Environment. A Notice of Exemption will be prepared pursuant to CEQA Guidelines Section 15062 - Notice of Exemption. If the proposed project is approved, the Notice of Exemption will be filed with the county clerks of Los Angeles, Orange, Riverside and San Bernardino counties.

SOCIOECONOMIC ASSESSMENT

The proposed amendments to Rule 408 clarify the rule language and make several revisions that are administrative in nature and will not impose any additional costs to the affected facilities or result in other socioeconomic impacts. In addition, the proposed amendments do not significantly affect air quality emission limitations, and therefore, no socioeconomic analysis is required under California Health and Safety Codes § 40440.8 and § 40728.5.

COMMENTS

Key Comments from Public Meetings

Public Consultation Meeting #1 General Comment:

Stakeholders expressed concern that the proposed amendment will change enforcement practices.

Response to General Comment:

SCAQMD enforcement practices will not change. Circumvention will be assessed on a case-by-case basis, evaluating whether the actions taken by a facility was to circumvent any law, order, permit, rule, or plan required by a rule.

Public Consultation Meeting #2: Bill LaMarr – California Small Business Alliance

Will businesses be notified if a community monitor is placed near their facility? Is it possible that a business will not know a monitor is near their site?

Response to Mr. LaMarr:

Public notifications will be part of the community monitoring program but there may be instances where a facility is not aware of a monitor placed near their facility. The burden will be on the SCAQMD to prove if a facility violated subdivision (b) by altering their normal business operation in order to evade detection by a community monitor.

Public Consultation Meeting #2: Susan Stark – Andeavor

Draft Staff Report

What if a facility reduces emissions for an extended period of time, such as five years, due to the presence of a monitor? Would that be considered a violation of subdivision (b)?

Response to Ms. Stark:

The length of time a business alters their operations is one factor enforcement staff takes into consideration when determining whether detection is being evaded and a violation occurred. Further, the question assumes enforcement staff would not notice a reduction in emissions before five years. Enforcement staff may discover that the facility reduced their emissions before the five years in question during routine inspection or investigation. Enforcement staff reviews operating logs and speak with facility staff to gain insight as to why the facility may have altered their business operations. It would not be a violation of PAR 408 if the facility permanently reduces their emissions due to business reasons or a community concern, even with the presence of a monitor.

Public Consultation Meeting #2: Kenneth Pacheco – Andeavor

Staff clarified that normal business operations may include changes due to seasonal work, but for our business, it is not really seasonal. Operations may change on a daily basis depending on a series of factors, for example, what is driving the market at that time. How would SCAQMD view that as altering business operations?

Response to Mr. Pacheco:

Staff cited seasonal changes as just one example of a change in normal business operations that would not be considered circumvention. Staff recognizes that business operations may change on a daily basis and understands that some businesses are market driven or dependent on the amount of work orders received. The purpose of subdivision (b) was to address those instances in which a facility alters their business to evade detection by monitors or a source test.

Stationary Source Committee: Curt Coleman – Southern California Air Quality Alliance

The commenter suggested developing guidelines, outside of the staff report, containing various circumvention scenarios that could be available to the regulated community to serve as guidance for affected stakeholders and, if needed, periodically updated.

Response to Mr. Coleman:

Staff provided a variety of examples in the staff report to assist in a better understanding of the rule. Due to the vast number of different sources regulated in our region, it would not be possible to list all scenarios that would or would not apply to this rule. Instead, staff provided examples within this staff report as a point of reference to address the stated concerns of stakeholders during this rule development. Staff will also develop a separate document outside of the staff report that will be published on the SCAQMD's Support Documents webpage for rules (<http://www.aqmd.gov/home/rules-compliance/rules/scaqmd-rule-book/support-documents>).

Comment Letters Received



California Council for Environmental and Economic Balance

101 Mission Street, Suite 1440, San Francisco, California 94105
415-512-7890 phone, 415-512-7897 fax, www.cceeb.org

March 22, 2018

Nicole Silva
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765
Submitted electronically to nsilva@aqmd.gov

RE: Proposed Amended Rule 408: Circumvention

Dear Ms. Silva,

We submit the following comments on behalf of the California Council for Environmental and Economic Balance (CCEEB) on Proposed Amended Rule: Circumvention (PAR 408). CCEEB is a nonpartisan, nonprofit coalition of business, labor, and public leaders that advances strategies for a healthy environment and sound economy. CCEEB represents many facilities that operate in the South Coast Air Quality Management (District) and that are subject to PAR 408.¹

Since the release of preliminary rule language, staff has committed to working with stakeholders on the proposed amendments. We would like to acknowledge the significant improvements made in addressing stakeholder concerns regarding PAR 408. While many of the concerns raised by CCEEB's have been addressed, additional comments have developed through the District's public process.

Our primary, high-level comments are:

- **Provide additional examples of when PAR 408 would not be applicable** – Staff should provide additional examples of when a facility would not be in violation of PAR 408.
- **Develop a checklist or a related document for standardized enforcement review** – Additional guidance for enforcement staff should be developed to ensure standardize interpretation of PAR 408 and that the rule writer's intent is clearly understood.

What follows is a more detailed discussion of each of these points.

Examples of Non-Applicability of PAR 408

CCEEB asks that the District clarify the intended applicability of PAR 408 by providing additional examples of when a facility would not be in violation of the rule. We are

¹ SCAQMD PAR 408 referenced as presented at March 14, 2018 Public Consultation Meeting.

particularly interested in better understanding how enforcement would apply to proposed subsection (b), which currently states that “[a] person shall not alter normal business operations or equipment to suppress emissions for the purpose of evading detection or concealing emissions during monitoring or testing.” Enforcement of this provision requires two subjective inquiries – 1) what are “normal business operations or equipment,” and 2) what is the “purpose” of altering those operations or equipment. Additional examples will provide necessary clarification to guide both facility operators and enforcement staff. The current draft staff report includes four examples of circumvention.² Only one of these is when a facility would not be in violation of PAR 408. The other three are examples of when a facility would be in violation of the rule. CCEEB believes additional examples of when PAR 408 would not be applicable are needed.

1-1
Con't

Enforcement Guidance

Similarly, guidance, in the form of a standardized check-list or a set of questions or factors, will also support District implementation of PAR 408 in two main ways. First, enforcement staff will be better able to understand the rule writer’s intent of PAR 408, while still considering enforcement on a case-by-case basis. Second, it will provide greater consistency by defining and standardizing how sections of PAR 408 can be interpreted. For example, different inspectors may interpret different activities as altering of normal business operations or require testing or monitoring of varying durations under PAR 408(b).

1-2

A check-list or set of questions with respect to circumvention involving alteration of normal business practices or equipment to suppress emissions for the purpose of evading detection or concealing emissions during monitoring or testing should include a requirement that the inspector (1) describe the alteration, (2) explain how the alteration enabled the facility to avoid detection during monitoring or testing, and (3) provide any alternative explanation from the facility regarding the rationale for the alteration. Requiring that inspectors factually outline the elements of a circumvention violation will promote consistency in the interpretation and application of this rule, since a conclusory statement from the inspector that the facility altered to avoid detection or to conceal emissions would not be sufficient.

Ultimately, enforcement guidance will support staff in fully realizing the rule writer’s intent of PAR 408, given the amendments are based upon recent enforcement issues.³ CCEEB requests that this additional guidance be included in the Staff Report so that it memorializes staff’s intent contemporaneous with rule adoption.

We appreciate the opportunity to provide these comments on PAR 408. Should you have any questions or wish to discuss our comments further, please contact me (billq@cceeb.org or 415-512-7890 ext. 115), Janet Whittick (janetw@cceeb.org or ext. 111), or Devin Richards (devinr@cceeb.org or ext. 110).

² SCAQMD. Draft Staff Report. “Proposed Amended Rule 408: Circumvention.” February 2018.

³ SCAQMD. Public Consultation Meeting. “Proposed Amended Rule 408: Circumvention.” March 14, 2018.

RE: PAR 408

March 22, 2018

Page 3 of 3

Sincerely,



Bill Quinn
CCEEB Vice President
South Coast Air Project Manager

cc: Philip Fine, SCAQMD
Jerry Secundy, CCEEB
Janet Whittick, CCEEB
Devin Richards, CCEEB
CCEEB South Coast Air Project Members

Response to Comment 1-1:

Staff included additional examples of circumvention in the staff report, section “Circumvention Examples,” to address this request. It is not possible to address all types of sources and potential violation scenarios. Enforcement staff will implement this rule on a case-by-case basis. The scenarios included in this staff report will not be a comprehensive list of rule violations; however, they should serve as a guide to assist stakeholders’ understanding of the examples of applicability or compliance with the rule and its implementation.

Response to Comment 1-2:

Due to the diversity and complexity of the industries regulated within the SCAQMD, it is not possible to develop a standardized checklist or set of questions for enforcement staff to rely. Most inspections vary depending on the type of facility and rules with which the facility must comply.

In regards to subdivision (b) of this rule, if there was an alteration of business operations or equipment that enforcement staff observed or noted, staff would have to provide evidence that the alteration was made to evade detection or conceal emissions. If the facts obtained demonstrated that the facility altered their business operation to evade detection or conceal emissions, the facts that lead to that conclusion would be detailed by staff.

Comment Letter #2

Comment Letter 2

John C. Heintz
Direct Dial: 213.891.7395
john.heintz@lw.com

355 South Grand Avenue, Suite 100
Los Angeles, California 90071-1560
Tel: +1.213.485.1234 Fax: +1.213.891.8763
www.lw.com

LATHAM & WATKINS^{LLP}

FIRM / AFFILIATE OFFICES
Beijing Moscow
Boston Munich
Brussels New York
Century City Orange County
Chicago Paris
Dubai Riyadh
Düsseldorf Rome
Frankfurt San Diego
Hamburg San Francisco
Hong Kong Seoul
Houston Shanghai
London Silicon Valley
Los Angeles Singapore
Madrid Tokyo
Milan Washington, D.C.

March 23, 2018

Philip Fine, Ph.D
Deputy Executive Officer
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

Re: Regulatory Flexibility Group Comments on the South Coast Air Quality Management District's Proposed Amended Rule 408

Dear Dr. Fine:

Thank you for the opportunity to provide these comments regarding the District's Proposed Amended Rule ("PAR") 408, Circumvention. We submit these comments on behalf of the Regulatory Flexibility Group ("RFG"), a coalition of California entities whose operations are subject to regulation under the Clean Air Act and corresponding state and regional air quality programs. RFG members have participated in the review of and comment on SCAQMD regulations since its formation in the fall of 1990, and we have appreciated the opportunity to work with Staff and other stakeholders over the last several months on PAR 408. RFG is appreciative that, following several public meetings and the receipt of comments from a wide variety of stakeholders, the District has made a number of changes to its initial draft rule that more appropriately tailor the rule to achieve its intended purposes while minimizing unintended consequences. RFG further appreciates the District's revisions to the initial draft rule that preserves facilities' ongoing ability to proactively address and manage potential nuisance odors.

RFG does, however, request an additional confirmation regarding PAR 408 subsection (b), which currently states that "[a] person shall not alter normal business operations or equipment to suppress emissions for the purpose of evading detection or concealing emissions during monitoring or testing." RFG recognizes and supports the District's goal to address facilities that intentionally set out to game testing or evade monitoring, but we are concerned with the potential for inconsistent enforcement given the rule's subjective language. We therefore request that the District clarify in the staff report that this rule is a "specific intent" rule and that, to establish a violation, the District will need to demonstrate a facility engaged in willful and intentional actions for the express purpose of evading detection or concealing emissions during monitoring or testing. We assume that alteration of business practice for purposes other than evading detection or concealing emissions and enhancements to business practices to facilitate the sustained reduction of emissions or reduce potential impacts on neighboring communities and

2-1

US-DOCS\99883369

March 23, 2018
Page 2

LATHAM & WATKINS^{LLP}

other sensitive receptors would not be viewed as circumvention, and we request the District's confirmation of the same.

Thank you for the opportunity to submit these comments, and thank you for putting forward a robust stakeholder process that has resulted in a rule language that will help protect our air quality while appropriately considering the unique operational challenges across business sectors.

2-1
Con't

Best regards,

/s John Heintz

John C. Heintz
Of LATHAM & WATKINS LLP

Cc: Michael A. Krause, SCAQMD
Robert A. Wyman, Latham & Watkins
Michael J. Carroll, Latham & Watkins
Regulatory Flexibility Group

US-DOCS\99883369

Response to Comment 2-1:

Altering normal business operations or equipment for purposes other than evading detection or concealing emissions during monitoring or testing is not a violation of subdivision (b). A facility can alter their business to enhance their operations or to reduce potential impacts on neighboring communities and sensitive receptors. In such cases, that would not be viewed as circumvention. The facility may be asked to demonstrate that the alteration of their normal business operation was not to evade detection or conceal emissions during monitoring or testing. Ultimately, the burden of proof is on SCAQMD to prove a violation of subdivision (b).

DRAFT FINDINGS UNDER THE CALIFORNIA HEALTH AND SAFETY CODE

Health and Safety Code Section 40727 requires that prior to adopting, amending or repealing a rule or regulation, the SCAQMD Governing Board shall make findings of necessity, authority, clarity, consistency, non-duplication, and reference based on relevant information presented at the hearing. The draft findings are as follows:

Necessity –Proposed amended Rule 408 – Circumvention is necessary to prevent a facility from using the nuisance exemption to conceal the release of excess emissions or evade detection from testing or monitoring.

Authority - The SCAQMD Governing Board obtains its authority to adopt, amend, or repeal rules and regulations from Health and Safety Code Sections 39002, 40000, 40001, and 40702.

Clarity - The SCAQMD Governing Board has determined that Proposed Amended Rule 408 – Circumvention, is written and displayed so that the meaning can be easily understood by persons directly affected by them.

Consistency - The SCAQMD Governing Board has determined that Proposed Amended Rule 408 - Circumvention, is in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, federal or state regulations.

Non-Duplication - The SCAQMD Governing Board has determined that Proposed Amended Rule 408 - Circumvention does not impose the same requirement as any existing state or federal regulation, and the proposed amendments are necessary and proper to execute the powers and duties granted to, and imposed upon, the SCAQMD.

Reference - In adopting this regulation, the SCAQMD Governing Board references the following statutes, which the SCAQMD hereby implements, interprets, or makes specific: California Health and Safety Code sections 40001, and 40702; and Title 40 of the Code of Federal Regulations Sections 61.19 and 63.4.

REFERENCES

1. Prohibited Activities and Circumvention, 40 CFR 63.4, available at <https://www.law.cornell.edu/cfr/text/40/63.4>.
2. Circumvention, 40 CFR 61.19, available at <https://www.law.cornell.edu/cfr/text/40/61.19>.
3. District Rules Database, California Air Resources Board. <https://www.arb.ca.gov/drdb/drdb.htm>.
4. AB-617 Nonvehicular air pollution: criteria air pollutants and toxic air contaminants. California Legislative Information, available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB617.