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File No. 018282-0000

October 28, 2020

Barbara Baird
Chief Deputy Counsel
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

Re: Regulation of PM10 Under SCAQMD Regulation XIII

Dear Barbara:

Thank you for your letter dated July 10, 2020 responding to my letters dated April 21, 2020 and April 27, 2020 submitted on behalf of the Regulatory Flexibility Group ("RFG") and the Western States Petroleum Association ("WSPA), respectively. On behalf of both RFG and WSPA, I am writing to seek clarification regarding portions of the discussion of issue 2.a in your response to my April 21, 2020 letter.[1]

Some of the discussion at the top of page 3 of your response suggests that because SCAQMD Rule 1302(z), which sets forth the definition of "Nonattainment Air Contaminant," is contained in the approved State Implementation Plan ("SIP"), federal authority over the regulation of PM10 remains in place even though the South Coast Air Basin ("SCAB") is designated attainment for the federal PM10 standard. Some discussion that has occurred in the Regulation XIII Working Group regarding the U.S. Environmental Protection Agency ("USEPA") role with respect to regulation of PM10 within the SCAB also suggests such an interpretation. We do not believe this interpretation is correct.

As you point out in your July 10 letter, Rule 1302(z) defines "Nonattainment Air Contaminant" to include any air contaminant for which there is a state or national ambient air quality standard and for which the California Air Resources Board ("CARB") or USEPA has designated the region as non-attainment. This definition identifies the scope of the SCAQMD's authority to regulate air contaminants pursuant to Regulation XIII – it extends to any air contaminant that is non-attainment for either a state or federal standard. This definition does not,

[1] This letter is not a comprehensive response to your July 10, 2020 letters. In addition to the issue addressed herein, there are other positions set forth in your letter with which we may disagree. We may submit additional comments responding to those positions in the future.

and could not, define the scope of USEPA's authority over the regulation of air contaminants in the SCAB – that authority stems from the federal Clean Air Act and is limited to air contaminants that are designated non-attainment for the federal standards. Inclusion of the definition in the SIP does not "federalize" the regulation of "state-only" nonattainment air contaminants.

Such an interpretation would be contrary to Rule 1301(d) which specifically provides for the avoidance of such an outcome:

> (d) State Standards. For the purpose of this regulation, all references to the national ambient air quality standards and nonattainment shall be interpreted to include state ambient air quality standards. This subsection shall not be included as part of any revision to the District's portion of the State Implementation Plan (SIP).

This provision makes clear that while Regulation XIII addresses the SCAQMD's obligations with respect to both state and federal non-attainment air contaminants, there was no intent to extend federal requirements to state-only non-attainment air contaminants.

Federal authority over the regulation of a Nonattainment Air Contaminants under Regulation XIII ceases by operation of law when the region is designated as attainment with the federal standard for that contaminant. Based on the language of Regulation XIII, the change is self-effectuating, and there is no need to amend Regulation XIII to eliminate federal authority once attainment of a federal standard has been achieved. Furthermore, state-only Nonattainment Air Contaminants continue to be regulated by SCAQMD under Regulation XIII and the absence of federal authority does not result in the rules and regulations being less stringent. As a result, this scenario does not give rise to any issues with respect to SB288 (California H&S Code §42504) which prohibits certain amendments to new source review rules if the amendment would make the rules less stringent than those that existed on December 30, 2002.[2]

Because the SCAB is non-attainment for the federal PM2.5 standard, there is a federal role with respect to that subset of PM10. However, federal requirements pertaining to PM2.5 are fully addressed by Rule 1325.

The scope of federal authority over the regulation of PM10 within the SCAB is potentially important with respect to some of the issues that the Regulation XIII Working Group is addressing. Because the SCAB is attainment with the federal PM10 standard, there is no federal authority over the regulation of PM10 beyond the regulation of PM2.5 under Rule 1325. As a result, SCAQMD may have greater latitude to develop solutions for some of the issues

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[2] While not necessarily relevant here since there were no changes to Regulation XIII to reflect attainment with the federal standard, we note that SB288 does not apply to every aspect of a district new source review program; it applies only to certain changes that exempt, relax or reduce specified obligations of a stationary source. (California H&S Code §42504(b)). Conspicuously absent from the list of specified obligations are those related to emission offsets. (California H&S Code §42504(b)(2)). Therefore, changes that affect only emission offset requirements are not subject to the prohibitions of SB288. We are aware that CARB has issued contrary guidance on this point.

currently under discussion than it would have if additional limitations imposed by federal law applied.

For example, at the August 13, 2020 Regulation XIII Working Group meeting, staff laid out a proposed approach for amending the NSR applicability trigger in Regulation XIII to address federal requirements. Under the proposed approach, Regulation XIII would retain the existing PTE to PTE test as a "first tier" for evaluating whether or not a proposed modification triggers NSR. For those modifications that did not trigger NSR under the first tier test, a "second tier" consisting of the federal applicability tests would be applied. At the same meeting, staff summarized its proposal for calculating offsets required in connection with a major modification. That approach also includes two "tiers" with the "second tier" consisting of the federal methodology for modifications that fail to meet certain requirements. In the case of PM10, it is not necessary to apply the "second tier" for either the applicability or the offset determination. There is no need to satisfy federal requirements for contaminants for which the region is designated attainment.

We appreciate your attention to this matter and look forward to getting further clarification regarding SCAQMD's position. If you have any questions, please do not hesitate to call me at (714) 755-8105 or email me at michael.carroll@lw.com.

Best regards,

Michael J. Carroll
of LATHAM & WATKINS LLP

cc: Regulatory Flexibility Group
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