South Coast
Air Quality Management District
21865 Copley Drive, Diamond Bar, CA 91765-4178
(909) 396-2000 · www.aqmd.gov

Office of the General Counsel
21865 Copley Drive
Diamond Bar, California 91765
909.396.2302, fax 909.396.2961

October 3, 2018

Via e-mail and U.S. Mail

Michael Carroll, Esq.
Latham & Watkins
650 Town Center Drive, 20th Floor
Costa Mesa, CA 92626-1925

Re: South Coast Air Quality Management District's Authority to Require Equipment Replacement

Dear Mr. Carroll:

This is in response to your letters of August 15, 2018, on behalf of the Western States Petroleum Association, and August 24, 2018, on behalf of the Regulatory Flexibility Group, regarding the District's ability to require equipment replacement as best available retrofit control technology (BARCT). Your letters take issue with many of the points made in the South Coast Air Quality Management District ("SCAQMD" or "the District") staff report for Proposed Amended Rule 1135. In this letter, we respond to your principal arguments.

In summary, we explain the particular instance in which SCAQMD has sought to specify a level equivalent to equipment replacement as BARCT for internal combustion engines on Santa Catalina Island. This letter demonstrates how public policy supports SCAQMD's interpretation. Moreover, as we explained in the Preliminary Draft Staff Report, the statutory definition of BARCT supports a broad interpretation. And applicable dictionary definitions do not preclude the view that BARCT can include equipment replacement. Additional arguments presented in your letters do not change this conclusion. Finally, even if a court were to conclude that BARCT cannot encompass equipment replacement, BARCT is not a limitation on SCAQMD authority. The SCAQMD retains broad statutory authority to adopt emission-control requirements for stationary sources, and that authority may require equipment replacement, as long as the requirement is not arbitrary and capricious.

Public Policy Supports the SCAQMD's Interpretation

Significantly, your letters fail to present any policy rationale for excluding replacement projects from BARCT. We note that you concede that a replacement project may be BARCT, as long as it does not include replacing the entire piece of equipment. (Aug. 15 Ltr., p. 2.) Presumably, something like a new ultra-low-NOx burner would be allowed as BARCT under your interpretation. However, the interpretation you urge would still unduly limit the application of BARCT and preclude SCAQMD from requiring cost-effective actions that would help achieve clean air. As noted in the staff report for PAR 1135, staff has proposed a BARCT for diesel fueled internal combustion engines that may be cost-effectively met by replacing the engine. If SCAQMD were precluded from requiring the replacement of these engines, the oldest and dirtiest power-producing equipment would continue to operate for possibly many years, even though it would be cost-effective and otherwise reasonable to replace those engines. As long as an emissions limit meets the requirements of the statutory definition set forth in section 40406, there is no policy reason why replacement equipment cannot be an element of BARCT. And there is no policy reason why the legislature would want BARCT to somehow limit the SCAQMD from requiring equipment replacement where that requirement is reasonable and feasible.[1]

The BARCT proposed for internal combustion engine power producers (replacement with Tier IV engines) is economically and practically reasonable and therefore does not "go beyond" BARCT, based on statutory definition. However, you seem to take the position that the District cannot require equipment replacement, whether as BARCT or otherwise. Such a position is contrary to the purpose behind the statutory scheme. As stated by the Supreme Court, the "statutes that provide the districts with regulatory authority serve a public purpose of the highest order-protection of the public health." (*W. Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.*, 49 Cal. 3d 408, 419 (1989) ("WOGA").) Therefore, courts should not find that any statute causes an "implied repeal" of the districts' authority. *Id.*

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[1] You appear to contend that it is not necessary to supply a policy reason the legislature would exclude all replacements from BARCT, even if they meet the statutory definition (discussion at RECLAIM Working Group). However, "[i]f the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Jones v. Lodge at Torrey Pines Partnership,* 42 Cal. 3d. 1158, 1163 (2008).) In this case, the statute permits two reasonable interpretations, since the statutory definition in section 40406 does not preclude requiring equipment replacement if it is reasonable considering economic and other factors. The legislative history and public policy both support the SCAQMD's interpretation, and a narrow interpretation is inconsistent with the statutory purpose.

The proposal to require replacement of five out of the six internal combustion engines at Santa Catalina Island is supported by overwhelming policy justifications. There are six internal combustion engines at the facility, of which three are at least 50 years old. The other three were installed in 1974, 1985, and 1995. The 1995 engine was installed with SCR; the other five had SCR installed in 2003. Staff concludes that it would be more cost-effective to replace the five oldest of these engines with new Tier IV engines rather than to install additional add-on controls. (The sixth engine was found not to be cost-effective to replace). (Preliminary Draft Staff Report, p. 2-17.) These engines account for 0.06% of the electric utility power produced in the District. (Draft Staff Report, Table 4-1; 9 MWhr divided by 15,904 MWhr.) But they account for 5.7% of the emissions inventory from electricity generating facilities. (Draft Staff Report, Table 4-2; 0.2 tpd divided by 3.5 tpd.) If the SCAQMD could not require replacement of these engines, then paradoxically the oldest, highest-emitting equipment would escape control.

The SCAQMD has in the past required replacement of old equipment in appropriate cases. The SCAQMD has required replacement, for example, in its dry-cleaning rule, adopted in 2002, which required all perchloroethylene dry-cleaning machines to be phased out by 2020, with other specific requirements implemented starting shortly after rule adoption. (Rule 1421(d)(1)(F).) Thus, a perchloroethylene machine that was installed in 2001 would be required to be replaced with a non-perchloroethylene machine when it is 19 years old. While this is a rule relating to toxic air contaminants, we do not believe the SCAQMD's authority is any less for criteria pollutants.

As an additional policy and legal concern, we note that a restrictive definition of BARCT could potentially interfere with the SCAQMD's ability to require "reasonably available control technology" (RACT) for ozone as specified by Clean Air Act sections 182(b)(2) and 182(f). (42 U.S.C. §§7511a (b)(2) and 7511a(f).) EPA defines RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility. (44 Fed. Reg. 53762 (Sept. 17, 1979).) This definition does not even include the word retrofit and therefore could not be limited in the manner asserted in your letter. Yet if a particular RACT determination were to call for replacement of old, high-emitting equipment, under your interpretation, SCAQMD would not be able to implement RACT and would ultimately be subject to sanctions for inability to submit an approvable state implementation plan (SIP). An interpretation which would lead to such unreasonable consequences should be rejected, especially where it would frustrate the apparent intent of the legislature, which wanted SCAQMD to impose more stringent controls, in order to attain the federal clean air standards. (*Friedman v. City of Beverly Hills,* 47 Cal. App. 4th 436, 444 (1996).) As is obvious, the actual statutory definition, like the definition of RACT, does not include the term "retrofit," and the statute should be interpreted to ensure adequate authority to comply with RACT requirements.

Dictionary Definitions Support SCAQMD's Interpretation

We do not agree that the term "retrofit" excludes replacement, such as replacement of an engine. Your August 15 letter concedes that "retrofit" can include "replacement," but asserts that it can include a replacement only if just a part of a whole object is being replaced, not the entire object. (Aug. 15 Ltr. pp. 2, 4.) We do not find that limitation in the dictionary definitions for the term "retrofit," including those cited in the SCAQMD staff report for Rule 1135. Instead, at least one definition provides that "retrofit" can mean "to replace existing parts, equipment, etc., with updated parts or systems." (http://www.dictionary.com/browse/retrofit.) Nothing in this definition requires that only part of a piece of equipment can be replaced. Indeed according to this definition, a retrofit can include the replacement of an entire system. We therefore disagree with your conclusion that the use of the term "retrofit" necessarily means that the pre-existing object that is the subject of the action (e.g., the source) continues to exist after the action. Your August 15 letter takes the position that the most common use of the term retrofit is for a change to equipment that does not include replacement of the whole piece of equipment (e.g., "to install [new or modified parts or equipment] in something previously manufactured or constructed.") (Aug. 15 Ltr. p. 2.) You note that the definition of "replace" means "to take the place of especially as a substitute or successor." (Aug. 15 Ltr. p. 2.) We agree that "replace" is a more specific term than "retrofit." Our disagreement is with the principle that "best available retrofit control technology" can never include replacement of existing equipment. In our view, at least one dictionary definition of the term "retrofit" encompasses "replacement of equipment or systems." *See* definition cited above. This definition is broad enough to include replacing the entire piece of equipment or system. Therefore, the key issue to determine is what the legislature meant when it imposed the BARCT requirement on SCAQMD.

Statutory Definition of BARCT Supports SCAQMD's Interpretation

The statutory definition of BARCT, as found in Health & Safety Code section 40406, does not contain any language precluding replacement technology. Section 40406 defines BARCT as "an emissions limitation that is based on the maximum degree of reduction achievable, taking into account environmental, energy, and economic impacts by each class or category of source." Thus, BARCT is an emissions limitation. Nothing in the statutory definition specifies the type of technology that may be used. Your entire argument therefore rests on the use of the word "retrofit" in the term being defined. But the California Supreme Court has made it clear that it is the definition of BARCT that controls, not implications from the language used in the term itself. Thus, the Supreme Court rejected the argument that "best available retrofit control technology" is limited to that which is readily available at the time when the regulation is enacted, and instead concluded that it encompasses technology that is "achievable," i.e., expected to become available at a future date. (*American Coatings Ass'n. v. South Coast Air Quality Mgt. Dist.,* 54 Cal. 4th 446, 462 (2012).) The Court focused on the actual statutory definition, which provides that BARCT is "an emissions limitation that is based on the maximum degree of reduction achievable, taking into account environmental, energy, and economic impacts by each class or category of source." (*American Coatings,* 54 Cal. 4th at 463.) The Court concluded that in

common usage, "achievable" means "capable of being achieved," which in turn includes "a potentiality to be fulfilled or a goal to be achieved at some future date." *Id.*

Thus, an emissions reduction was "achievable" when the rule was adopted in 1999 if it was "capable of being achieved" by the rule deadline of 2006. (*American Coatings,* 54 Cal. 4th at 464.) This was so even if that reduction was not "readily available" in 1999, notwithstanding the use of the word "available" in the term being defined. Your August 24 letter argues that this case did not decide whether BARCT may include replacement technology. That is true, but the Supreme Court did hold that the statutory definition controls, and in this case the statutory definition does not preclude replacement technology.

When the legislature has defined a term, courts must follow that definition. (*People v. Ward,* 62 Cal. App. 4th 122, 126 (1998).) Following the California Supreme Court's analysis in *American Coatings,* the test of whether an emission limit constitutes BARCT is whether it meets the definition found in the statute. (§40406.) If so, then it is within the statutory definition of BARCT, whether or not it is within the most common understanding of "retrofit." This does not mean that the word "retrofit" is surplusage. The use of the word "retrofit" serves to distinguish an emission limit that is imposed on existing sources, and which under the statutory definition must consider economic and other factors, from the emissions limit imposed on new sources. The limit for new sources must be met if it has been achieved in practice, regardless of cost. *See* definition of "best available control technology" [BACT] in section 40405, which includes "the most stringent emission limitation that is achieved in practice by that class or category of source." We do not argue that a replacement can be BARCT if it does not meet the definition of BARCT. Instead, if a limit meets that definition, it can be BARCT even if it can most cost-effectively be met by replacing the equipment with new equipment, as recognized in the dictionary definition discussed above.[2]

Other Statutory References to "Retrofit" Are Inapplicable

In your August 24 letter, you argue that the legislature has used the term replacement as well as retrofit in certain sections of the Health and Safety Code, so that these terms must mean something different from each other. (§§ 43021(a) and 44281(a).) Furthermore, the legislature

[2] Your August 24 letter also argues that *American Coatings* is irrelevant because it dealt with a rule for architectural coatings, requiring coating reformulation, which "does not typically involve the manufacture of modified production equipment or new add-on controls," whereas control technologies that require physical modification of existing equipment or installation of add-on controls may require "significant disruption to the operation of the facility." (Aug. 24 Ltr. p. 6.) We do not know whether the claim regarding architectural coatings is correct, but even if it is, we do not understand how this relates to the question at issue since *both* add-on controls (your definition of "retrofit") and replacements would involve the disruption of facility operations for some time.

defined retrofit in sections 44275(a)(19) and 44299.80(o) and the definition does not mention replacement but rather making modifications to the engine and fuel system. Finally, you note that these same code sections define "repower" as replacing an engine with a different engine. (§§ 44275(a)(18) and 44299.80(n); Aug. 24 Ltr., pp. 4-5.) However, all of these code sections were adopted long after 1987, when the legislature mandated SCAQMD to require BARCT for existing sources. They do not shed any light on what the legislature meant by "retrofit" in 1987 when section 40406 was adopted. All of the sections cited (except section 43021(a)) deal with incentive programs, and the definitions are specifically stated to be only "as used in this chapter"; i.e., for the specific incentive program. (§§44275(a); 44299.80(a).) These definitions facilitate the administering agency in implementing the programs, which generally provide different amounts of funding for different types of projects, including "repowering" or "retrofitting." (*See e.g.*, https://www.arb.ca.gov/msprog/moyer/source_categories/moyer_sc_on_road_hdv_2.htm.)

Therefore, the legislature had a specific purpose in distinguishing between replacements and retrofits in these particular chapters, whereas no one has identified a policy reason that the legislature would have wanted to exclude replacement projects from BARCT, as long as they met the statutory definition.[3]

Statute Discussing Best Available Control Technology Determinations Does Not Circumscribe BARCT Definition

Your August 24 letter argues that section 40920.6 supports your claim because it states that in establishing the best available control technology (BACT), the District shall consider only "*control options* or emission limits *to be applied to the basic production or process equipment.*" (Emphasis is in letter.) You argue that this means BACT, and therefore BARCT, is a measure to be applied to the existing emitting source, not replacement of the emitting source in its entirety. (Aug. 24 Ltr. p. 4.) This inference is incorrect, since BACT is frequently applied to replacement of an entire source (such as repowers of electric generating units) as well as to new and modified

[3] Section 43021(a), enacted in 2017 as part of SB1, prohibits Air Resources Board rules that require the "retirement, replacement, retrofit, or repower" of a commercial motor vehicle for a period of time. While you argue that this language means that a replacement must be different than a retrofit, under that theory it must also mean that a replacement is different from a repower, whereas under the sections cited above, a repower IS a replacement. Presumably, the legislature wanted to make very sure it covered all possibilities. And to add to the confusion, the Carl Moyer statutes appear to distinguish "retrofit" (an eligible project under §44282(a)(2)) from "use of emission-reducing add-on equipment" (an eligible project under §44281(a)(3)). Normally installing add-on controls is considered a type of retrofit. (*See* Aug. 24 Ltr., p. 4.) Therefore, we cannot draw any conclusions from the use of different terms in different parts of the Health & Safety Code.

sources. Obviously, in the case of a new source, there is no existing equipment to which to apply the technology. We interpret this statutory language to mean that in establishing BACT, the SCAQMD may not fundamentally change the nature of the underlying process. For example, if an applicant seeks approval of a simple cycle turbine, the SCAQMD cannot require it to instead construct a combined cycle turbine, since they have different operational characteristics and needs to fill. This would be consistent with EPA's Draft NSR Workshop Manual, p. B-13, that specifies that in determining BACT, states need not redefine the design of the source, although they retain discretion to do so where warranted (i.e., to require consideration of inherently cleaner technology). (https://www.epa.gov/nsr/nsr-workshop-manual-draft-october-1990.) SCAQMD does not propose to require a facility subject to BARCT to "redefine" the nature of its source but merely to replace old diesel internal combustion engines with new diesel internal combustion engines meeting EPA's Tier IV standards. Therefore, section 40920.6 does not speak to the question at hand: whether BARCT precludes replacing old equipment with new equipment of the same type.

SCAQMD Has Authority to Require Equipment Replacement, Which is Not Limited by the Definition of BARCT

Finally, even if BARCT by itself did not include replacement equipment, the SCAQMD could still require the equipment to be replaced. Your August 24 letter states that the District's "authority is both granted and limited by section 40440(b)(1)," which provides that the District's rules "shall do all of the following: (1) Require the use of best available control technology for new and modified sources and the use of best available retrofit control technology for existing sources." We disagree that section 40440(a)(1) grants the authority to require BARCT (i.e., that without that section, the District would have no authority to require BARCT). We also disagree with the proposition that section 40440(a)(1) limits the District's authority.

State law has explicitly granted air districts primary authority over the control of pollution from all sources except motor vehicles since at least 1975, when the air pollution regulation provisions were recodified. (*See* § 40000, enacted Stats. 1975, ch. 957, § 12; *see also* § 39002, containing similar language and adopted in that same section.) As held by the California Supreme Court, these two sections (and their predecessors dating back to 1947) confirm that the air districts had plenary authority to regulate non-vehicular sources "for many years." *WOGA,* 49 Cal. 3d. at 418-419. And the Supreme Court had previously recognized the air districts' authority to adopt local regulations for non-vehicular sources under the predecessor statutes. (*Orange County Air Pollution Control Dist. v. Public Util. Comm.,* 4 Cal. 3d 945, 948 (1971).) Under these broad statutes, the districts could have adopted BARCT requirements for non-vehicular sources. Section 40440(a)(1), therefore, was not a statute granting authority, since the districts already had authority, but a statute imposing a *mandate* to adopt BARCT.

We also disagree with the claim that section 40440(a)(1) requiring the SCAQMD to impose BARCT on existing sources was a "limitation" of district authority. State law expressly provides that districts "may establish additional, stricter standards than those set forth by law," unless the

legislature has specifically provided otherwise. (§§ 39002; 41508.) Nothing in section 40440(a)(1) specifically limits the District's authority. In fact, the legislative history of the bill requiring SCAQMD to impose BARCT – among other requirements – states that "this bill is intended to encourage *more aggressive improvements in air quality* and to give the District new authority to implement such improvements." (*American Coatings*, 54 Cal. 4th at 466 (emphasis added).) As stated by the Supreme Court, "[t]he BARCT standard was therefore part of a legislative enactment designed to augment rather than restrain the District's regulatory power."[4] *Id.* As illustrated by the legislative history, BARCT is a "minimum" requirement, and the legislature did not intend it to preclude the District from adopting requirements that go beyond BARCT.

Moreover, when the legislature extended the BARCT requirement to other districts with significant air pollution (§40919(a)(3) (districts with serious pollution and worse)), the legislature expressly stated that the bill "is intended to establish minimum requirements for air pollution control districts and quality management districts" and that "[n]othing in this act is intended to limit or otherwise discourage those districts from adopting rules and regulations which exceed those requirements." (Stats. 1992, ch. 945 § 18.) Thus it is clear that BARCT is not intended to be a limitation or restriction on existing authority.[5]

In an earlier case, the California Supreme Court made it clear that new legislation does not impliedly repeal an air district's existing authority unless it "gives *undebatable evidence* of an intent to supersede" the earlier law. *WOGA,* 49 Cal. 3d. at 420 (internal citation omitted; emphasis by Supreme Court). There the Court noted that the present statutes and their predecessors giving air districts authority over non-vehicular sources, including the authority to regulate air toxics, had been in effect before the allegedly preempting law was enacted (in 1983; Stats 1983 Ch. 1047), and had been generally understood and acted upon. *WOGA*, 49 Cal. 3d at 419. The Court concluded there was no "undebatable evidence of a legislative intent to repeal the districts' statutory authority to protect the health of their citizens by controlling air pollution." *WOGA*, 49 Cal. 3d at 420. By the same token here, there is no undebatable evidence of an intent to limit air districts' existing authority by imposing a *mandate* to adopt BARCT requirements. Instead, BARCT was a minimum requirement that SCAQMD must impose, not a

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[4] There were some new authorities granted in 1987, including section 40447.5, authorizing fleet rules and limits on heavy duty truck traffic and section 40447.6, authorizing the SCAQMD to adopt sulfur limits for motor vehicle diesel fuel. We do not believe that section 40440(a)(1) granted "new" authority to require BARCT, as the districts already had authority over non-vehicular sources.

[5] Although the California Supreme Court found it unnecessary to decide whether the SCAQMD could adopt rules going beyond BARCT, because it held that BARCT could include technology-forcing measures, it did state that BARCT was not designed to restrain the District's regulatory power. (*American Coatings*, 54 Cal 4th at 466, 469.)

limit on its ability to impose additional, including more stringent, requirements. Indeed, the argument that BARCT limits SCAQMD's authority is illogical. It would make no sense for the Legislature in 1987 to limit only the district with the worst air pollution (SCAQMD) while leaving untouched the authority of other districts with lesser levels of pollution.

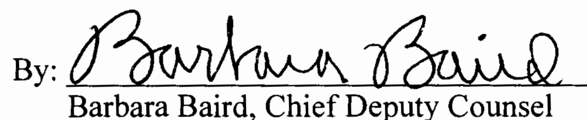
Nor does this conclusion leave the SCAQMD with unlimited regulatory power. In going beyond the statutory minimum of BARCT for existing sources, the District would still be limited by the requirement that its rules may not be arbitrary and capricious, or without reasonable or rational basis, or entirely lacking in evidentiary support. (*American Coatings,* 54 Cal. 4th at 460.) And of course, the SCAQMD's rulemaking authority is limited by applicable constitutional principles. Therefore, stakeholders need not rely on an argument that BARCT restricts the SCAQMD's authority in order to ensure the SCAQMD does not implement arbitrary action.

Conclusion

SCAQMD has the authority to require equipment replacement as a BARCT requirement as long as the requirement meets the statutory definition of BARCT. But even if BARCT were to exclude equipment replacement, the SCAQMD would still have the authority to require replacement, as long as the requirement is not arbitrary and capricious. The proposed BARCT for internal combustion engines on Santa Catalina Island is reasonable and feasible, and no one has argued to the contrary.

Respectfully submitted,

SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT
Bayron T. Gilchrist, General Counsel

By: 
Barbara Baird, Chief Deputy Counsel

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cc: Bill Quinn, CCEEB Vice President