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VIA EMAIL AND FEDERAL EXPRESS

Chairperson Lee-Volker Cox, and
Members of the Hearing Board
Santa Barbara County Air Pollution Control District
c/o Lyz Hoffman, Acting Clerk of the Board
260 North San Antonio Road, Suite A
Santa Barbara, California 93110

**Re: Hearing Board Case Nos. 2017-21-AP and 2017-24-AP
Response to Letter and Technical Attachment Submitted to District Hearing
Board by California Air Resources Board**

Dear Chairperson Cox and Members of the Hearing Board:

Petitioner Wine Institute hereby submits the following response to the California Air Resources Board's letter and technical attachment, submitted to this Hearing Board on March 13, 2018. Wine Institute respectfully requests that the Hearing Board exclude CARB's letter and Technical Support Memorandum from the record of this appeal because they are late submissions in violation of this Board's December 13, 2017 Order. In the event that the Hearing Board decides, for any reason, to consider CARB's submissions, Wine Institute requests that the Hearing Board also consider this letter submitted in response.¹

I. CARB's Submission Is A Late Brief Submitted on Behalf of the District and Should Be Disregarded

The District and Wine Institute entered into a stipulation to govern the submission of briefs and supporting declarations and documentary evidence. The stipulation, entered by the Hearing Board as an order on December 13, 2017, provides:

By February 28, 2018, the District will submit to the Hearing Board and serve on Wine Institute's counsel the District's response brief and all supporting declarations and documentary evidence....[and]

No declarations or documentary evidence will be submitted except in accordance with the above schedule or upon a showing of good cause to the Hearing Board.

¹ The District's counsel has indicated that the District will not object to Petitioner's submission of this response to CARB's letter.

CARB's letter to the Hearing Board states that CARB submitted its letter and technical attachment "*at the request of the Santa Barbara County Air Pollution Control District....*" The letter continues, stating, "The District also *requested* CARB staff to evaluate the claims raised in the Petition..." and "*at the District's request*, CARB staff respectfully submits this letter and attachments..."² Similarly, CARB's Technical Support Attachment (the "technical memorandum") recites that "*At the request of the [District], [CARB] staff evaluated the claims raised in the Petition...*" and "*CARB was requested to evaluate the claims raised.*"³

Plainly, CARB's letter and technical memorandum were materials submitted at the request of the District in opposition to Wine Institute's petitions. Just as Wine Institute was required to submit its briefs, declarations, and evidence in accordance with the Hearing Board's scheduling order, so was the District.

The District and CARB argue that CARB is permitted to submit its comments "in its role as a member of the public." But that argument has no more force or rationality than it would if the Wine Institute were to argue that it could submit its briefs and declarations at any time that it pleased simply because it is also an interested member of the public. Allowing the District to circumvent this Hearing Board's scheduling orders by requesting late submissions from other branches of government would result in nullification of this Board's scheduling orders.

CARB also argues that it is entitled to comment "as the state's oversight expert agency on environmental permitting." As discussed below, CARB's "oversight" role, to the extent relevant here, is limited to coordinating the activities of the districts and reviewing variances. This hearing does not relate to the matters on which CARB provides coordination, and is not a variance hearing. Since CARB's letter and technical attachment were submitted at the request of the District long after the stipulated filing deadlines, CARB's submissions should be disregarded and excluded from evidence at the hearing.

II. CARB Has a Very Limited Role in Stationary Source Permitting and No Agency Expertise in Making BACT Determinations

Because the California Air Resources Board (CARB) is a state agency charged with enforcing certain aspects of California's air pollution control laws, the Hearing Board may be inclined to assume that CARB has expertise in, or authority over, BACT determinations. CARB's letter encourages that assumption and implies that CARB has such expertise. CARB's letter states, for example, that CARB has an "oversight role" to ensure that California achieves state and federal air pollution standards. CARB also states that, as a result of its oversight role, it

² CARB March 13, 2018 letter at p. 1 (first and second paragraphs, emphasis added).

³ CARB Technical Support Attachment at pp. 1 and 9 (emphasis added).

has “developed expertise in stationary source matters and maintains a database of district BACT determinations.”⁴

But it is important to recognize that CARB has a very limited role in stationary source permitting, and no statutory role at all in exercising any expert judgment on BACT determinations. Health and Safety Code Section 40000 provides that the local and regional air pollution control districts shall have the primary responsibility to regulate emissions from stationary sources:

The Legislature finds and declares that **local and regional authorities have the primary responsibility for control of air pollution from all sources**, other than emissions from motor vehicles. The control of emissions from motor vehicles, except as otherwise provided in this division, shall be the responsibility of the state board.

CARB has no statutory role in BACT determinations. None of the Health and Safety Code sections that CARB cites as a basis for its authority with respect to BACT determinations has anything to do with the issue that is before the Hearing Board—namely, whether a given control technology can be deemed the “best available control technology.”

- Section 40405 provides a definition of BACT in a chapter devoted to the South Coast Air Quality Management District. It says nothing about CARB.
- Section 39600 provides that CARB shall perform acts necessary for the execution of the powers and duties granted to CARB by state law. It does not refer to BACT determinations.
- Sections 40924 and 40925 provide that local air pollution control districts shall report to CARB regarding their progress in achieving the districts’ triennial attainment plans and in meeting State Ambient Air Quality Standards, and shall update the districts’ plans. Again, this section makes no reference to BACT determinations.
- Sections 42360 through 42363 give CARB the power to revoke or modify a permit variance. These sections may theoretically give CARB authority to revoke or modify a variance related to BACT, but only if a BACT condition is the subject of a variance. CARB has no authority with respect to BACT determinations in the absence of such a variance.

Other than its authority to revoke or modify a variance, the only statutory authority that CARB has that relates in any way to BACT determinations is under Health and Safety Code

⁴ CARB letter at 2.

section 39602, which provides that CARB is the state agency responsible for the preparation of the state implementation plan and, “to this end, shall *coordinate* the activities of all districts necessary to comply with that act.” However, the few courts to address this provision have determined that CARB’s role is largely administrative in nature.

Although the California Air Resources Board, a state agency, coordinates the activities of air pollution control districts that are necessary to comply with the Clean Air Act, [Health & Safety Code § 39602], the Board’s limited oversight role over districts does not support the District’s contention that it is merely an enforcement agency of the Board and therefore performs a central governmental function. Indeed, the California Legislature has declared that “[l]ocal and regional authorities have the primary responsibility for control of air pollution from all sources other than vehicular sources.”⁵

And California’s Attorney General has agreed with this assessment.

[I]t is the districts that have primary responsibility for controlling air pollution from all nonvehicular sources within their respective jurisdictions. The Board’s duties are more administrative in nature. It assists the districts in their duties (§ 39605), adopts standards of ambient air quality for the various regions of the state (§ 39606), monitors air pollutants (§ 39607), collects research data on air pollution (§ 39701), and reports to the Legislature on problems relating to air quality management (§ 39702), among other responsibilities.⁶

Section 39602’s direction to *coordinate* the activities of local districts is far from a statutory mandate to direct, supervise, guide, or review the interpretation and application of best available control technology analysis to stationary source permitting.

None of the statutory provisions that CARB cites gives CARB any authority over “achieved in practice” determinations, and there is nothing in CARB’s letter or technical memorandum to suggest that CARB has any such authority, or has ever made a BACT determination or an “achieved in practice” determination. CARB does not identify any statutory role that it has in reviewing or approving best available control technology for stationary source permitting. There is no mention of any such role in the statutes cited by CARB.

⁵ *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 782–83 (9th Cir. 2005) (quoting Cal. Health & Saf. Code § 39002 and citing § 40000).

⁶ 65 Cal. Op. Att’y Gen. 435 (1982).

CARB's letter and technical memorandum are in effect late "amicus briefs" by a government agency that has no role in making BACT determinations in general or "achieved in practice" determinations in particular.

III. CARB's Role as Host of the Statewide BACT Clearinghouse Does Not Give CARB Any Authority on BACT Determinations

CARB also cites its role in maintaining the Statewide BACT Clearinghouse database as a source of its expertise with respect to BACT.⁷ The BACT Clearinghouse is simply a list of BACT determinations made by air pollution control districts throughout the state. There is no statute requiring CARB to establish the BACT Clearinghouse, and CARB is not required to exercise any judgment with respect to submitted determinations. Those determinations are submitted directly into the database by district staff. According to the BACT Clearinghouse website, CARB simply manages the database for the state association of Air Pollution Control Officers:

The Statewide Best Available Control Technology (BACT) Clearinghouse is a database developed by the Air Resources Board staff and staffs from various air pollution control and air quality management districts (districts). ARB staff manages the database under the direction of the California Air Pollution Control Officers Association's (CAPCOA) Engineering Managers Committee and coordinates the submittal of BACT determinations made by the districts to the U.S. Environmental Protection Agency.

*This web page provides a mechanism for district staffs to input BACT determination directly on-line into the Statewide BACT Clearinghouse database...*⁸

Neither the BACT Clearinghouse nor any laws or regulations require CARB to exercise any independent judgment in posting BACT determinations to the BACT Clearinghouse.⁹ Indeed, the goals of the Clearinghouse are simply to be a repository of information for local air pollution control districts (and the EPA).¹⁰

⁷ CARB also states that it will refuse to remove the BACT determination from the Clearinghouse "based on our own expert judgment" even if the District withdraws its determination. Whether CARB removes the "achieved in practice" determination is not an issue that is before the District or the Hearing Board.

⁸ BACT Clearinghouse Background, available at: <https://www.arb.ca.gov/bAct/bAct.htm> (emphasis added).

⁹ CAPCOA BACT Clearinghouse Resource Manual, available at <https://www.arb.ca.gov/bact/docs/clearinghouse.htm>.

¹⁰ See BACT Clearinghouse "Original Goals", available at: <https://www.arb.ca.gov/bact/docs/clearinghouse.htm>.

IV. CARB's Submissions Misstate The Law Applicable to BACT Determinations

At its core, CARB's argument is that the District can reasonably extrapolate from past uses of the emissions controls that they are likely to work at CCWS and therefore are "achieved in practice."¹¹ In support of this argument, CARB cites *American Coatings Association v. South Coast Air Quality Management District*.¹² But *American Coatings* concerned whether emissions controls were "achievable" (and therefore "best available retrofit control technology"—BARCT), not whether the controls had been "achieved in practice" and were therefore BACT. The *American Coatings* court said nothing about what degree of use was required to demonstrate "achieved in practice" but noted that "[b]est available control technology' is limited to extant technology because BACT is a standard that defines what technology must be used when industry seeks permission for imminent new construction."¹³ CARB cites no authority for its argument that the District may extrapolate from past use to call something "achieved" that has not yet been achieved in fact.

CARB also cites Health and Safety Code section 40723 in support of its argument for reasons that are inscrutable.¹⁴ Section 40723 provides that BACT permit conditions made based in part on vendor representations regarding whether emissions reductions are "achievable" must be relaxed where a permit applicant demonstrates that the vendor representations were wrong and the reductions were not achieved. This statute shows that the Legislature has concluded that vendor representations, unsupported by operating experience, are not an adequate basis for a BACT determination even when the issue is the degree of emissions reductions that are "achievable." Such representations have even less value in determining the degree of emissions reductions that have actually been achieved in practice.

CARB appears to suggest that the test is not whether the emissions controls are achieved (or have been achieved) but instead that the District's determination of "achieved in practice" can be made solely on vendor representations that they are *achievable*. To the extent CARB makes this contention, CARB cites no authority in statute, regulation or case law for such an interpretation.

CARB also cites cases that examine how an achieved-in-practice control should be applied to a new source.¹⁵ Those cases hold that BACT review, in CARB's words, "includes

¹¹ CARB Technical Support Attachment, at 3-4.

¹² *American Coatings Ass'n v. South Coast Air Quality Management District*, 54 Cal. 4th 446, 467 (2012)

¹³ 54 Cal. 4th at 467.

¹⁴ CARB Technical Support Attachment, fn. 2.

¹⁵ CARB Technical Support Attachment, fn. 3.

reasonably extrapolating emissions reductions achieved in practice to the particular context of a new facility.”¹⁶ Those cases do not, however, hold or suggest that reasonable extrapolation may be used *to make* an “achieved in practice” determination.

With respect to the time period that emissions controls must be used to be considered “achieved in practice,” CARB argues that an example set forth in District Policy and Procedure No. 6100.064.2017 means that emissions controls need only be operated for a “reasonable period of time.”¹⁷ But that standard is no standard at all. What is a reasonable period of time? As Wine Institute noted in its opening and reply briefs, the District’s own Achieved In Practice Memorandum accompanying the permit set a six-month time period, which is the same time period used by the South Coast Air Quality Management District. The facts submitted *by the District* demonstrate that the emissions controls have not operated for that time period.

Moreover, as Wine Institute’s briefing makes clear, there is no evidence that the control efficiency required by the District has ever been *achieved* at CCWS, much less for a “reasonable time period.” CARB argues that CCWS has achieved a 50-59 percent control efficiency with an “unknown fraction” of emissions uncontrolled.¹⁸ CARB argues from these data that it is “reasonable to expect the capture and control efficiency to increase with the requirement for all fermentation tanks to be controlled.” This is a clear admission that CARB bases its argument on what is “reasonable to expect” and not on what has been “achieved in practice.” If the District’s policy means what it says in plain English, then the emissions controls are not achieved in practice BACT because the performance standard has not been “achieved in practice.”

The remainder of CARB’s submission is a rehash of the District’s arguments. CARB cites studies dating back to the 1980s to demonstrate that it is theoretically possible to reduce VOC emissions from wine fermentation. But that is, of course, not the issue before the Hearing Board. The issue is whether the emissions controls have been “achieved in practice.” It is undisputed that this District’s determination in this case is the first time that *any district in the state* has determined that the emissions controls are “achieved in practice.” The studies from the 1980s CARB cites have no relevance to the issue before the Hearing Board. CARB also notes that the Wine Institute supported San Joaquin Valley APCD Rule 4694. Rule 4694 establishes, in essence, an emissions trading scheme. It also has no relevance to the issues before the Hearing Board.

¹⁶ CARB Technical Support Attachment, fn. 3.

¹⁷ CARB Technical Attachment at pp. 4-5.

¹⁸ CARB Technical Support Attachment at p. 14

V. Conclusion

Petitioner Wine Institute respectfully requests that the Hearing Board exclude CARB's letter and Technical Support Memorandum from the record of this appeal. In the event that the Hearing Board decides, for any reason, to consider CARB's submissions, Wine Institute requests that the Hearing Board also consider this letter submitted in response and grant Wine Institute's petitions.

Respectfully submitted, ,



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RMG/cgd