March 28, 2017

TO: Members, Assembly Environmental Safety and Toxic Materials Committee

FROM: Louinda Lacey, California Chamber of Commerce
Associated General Contractors
Associated General Contractors – San Diego Chapter
California Independent Petroleum Association
California Manufacturers & Technology Association
California Metals Coalition
Chemical Industry Council of California
Construction Employers' Association
Industrial Environmental Association
National Federation of Independent Business
Western States Petroleum Association

SUBJECT: AB 421 (SANTIAGO) HAZARDOUS SUBSTANCES: LIABILITY: RESPONSIBLE PARTIES
HEARING SCHEDULED – APRIL 4, 2017
OPPOSE/JOB KILLER – AS INTRODUCED FEBRUARY 9, 2017

The California Chamber of Commerce and the organizations listed above must respectfully **OPPOSE AB 421** as introduced February 9, 2017, which the California Chamber of Commerce has labeled a **JOB KILLER.** The bill would make "emissions into the air" eligible for cost recovery under the California Hazardous Substances Account Act (HSAA). Although the HSAA incorporates many of the definitions and provisions from the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), this bill seeks to diverge from the traditional alignment between the HSAA and CERCLA due to the U.S. Court of Appeals for the Ninth Circuit's recent decision in *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975 (2016), which expressly stated that emissions into the air do not qualify as a "disposal" under CERCLA. The Ninth Circuit's unanimous decision was well-reasoned and the policy arguments supporting the decision apply to the HSAA as well. As explained herein, there are many concerns with imposing cost recovery obligations on "emissions into the air" under the HSAA.

A few of the concerns with the broad and sweeping inclusion of "emissions into the air" under HSAA's cost recovery liability are:

- Does the provision apply to permitted and unpermitted air emissions? While there is a Health and Safety Code excluding permitted emissions under the HSAA, it is unclear how/if that provision would apply to this bill. If it applies to permitted emissions, what is the point of a permit? If it does not apply to permitted emissions, how would one distinguish between permitted and unpermitted air emissions for purposes of liability? How would the bill apply to clean-up operations relating to accumulated permitted emissions? How would it apply to Title V permits? Would the bill apply to clean-up at residences? If so, it could apply superfund and related impacts on marketability to

homeowners or other property owners. Would the bill apply to land disturbances (e.g., excavation, landscaping, digging, etc.) that result in the emission of a substance into the air?

- The "federally permitted releases" defense to proposed liability is unclear given recent U.S. Environmental Protection Agency interpretations. This could result in even law abiding emitters facing the threat of a plaintiff hunting for deep pockets and then placing the burden on the law abiding emitter to prove that its air emissions do not fall within the ambit of liability.
- Would the provision apply to unregulated types of air emissions, which may become regulated in the future? See the retroactive language.
- Without a "threshold" for liability, the bill sweepingly makes even nominal air emissions actionable for cost recovery with, as the **AB 421** Fact Sheet explains, imposing the burden on "a defendant to prove that its actions did not cause the contamination, shifting the burden of proof from the plaintiff to the defendant."
- The bill would create liability for anyone with respect to air emissions, even public agencies (e.g., California Department of Transportation, municipal landfills, wastewater treatment plants, utilities, airports). Additionally, the bill would allow a county or the state to sue to recover clean-up costs when one or the other, or both, was/were grossly negligent in its/their oversight of regulated activities while placing the burden on the defendant to show that its emissions did not contribute to the contamination.
- The retroactive language means that litigation may now arise for air emissions that occurred 35 years ago and could go back even further due to the potential delayed discovery of such air emissions (relating to when the cause of action may have accrued).
- The bill would result in facilities in California being treated differently from other facilities in the Ninth Circuit.
- Air emissions are very different from disposal into water or onto the ground. Divisibility of harm would be nearly impossible to prove by a defendant.
- Depending on wind currents, each emission could result in multiple "disposals" and re-disposals, hundreds or even thousands of miles away from the location of the emission.
- The sponsor of the bill, the County of Los Angeles, and other public entities already have other avenues for recovery available to them – including but not limited to the public nuisance doctrine.
- The term "disposal" appears in various definitions throughout the HSAA. Careful consideration should be given as to the effect that changing the definition as proposed would have on other definitions. Additionally, the term "disposal" is also used in California's Hazardous Waste Control statute and the federal Resource Conservation and Recovery Act.
- The Ninth Circuit explained that, if air emissions were included in the term "disposal," the interpretation of "deposit" would be inconsistent with the "disposal" under the innocent landowner defense, which would create a never-ending process essentially vitiating the defense. Since air emissions can be picked up and redeposited by wind, each owner and operator of property upon which air emissions land and leave from will be a potentially responsible party.
- It is unclear whether this bill would apply to diesel emissions or not.

AB 421 would impose significant cost obligations on businesses and facilities on the back-end. When combined with the increased costs proposed on facilities on the front end and during operation (e.g., A.B. 245-246, 248-249, 1179), the costs would become insurmountable and punitive, supporting the notion that California intends to export its hazardous waste out of our state. Again, it is important to note that soil excavated in California and deemed hazardous waste (costing millions of dollars to excavate) would not be deemed hazardous waste in other states – it would be disposed of as garbage.

For these reasons, we must **OPPOSE AB 421 (Santiago)**.

cc: The Honorable Miguel Santiago
Graciela Castillo-Krings, Office of the Governor
Josh Tooker, Assembly Environmental Safety and Toxic Materials Committee
John Kennedy, Assembly Republican Caucus
District Office, Members, Assembly Environmental Safety and Toxic Materials Committee

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