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January 10, 2018

Via U.S. Mail and Email

Wayne Nastri
Executive Officer
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, California 91765

Re: Concerns Regarding Proposed Rule 120

Dear Mr. Nastri:

This firm represents that California Metals Coalition ("CMC"). We write in reference to the Southern California Air Quality Management District's ("AQMD") proposed adoption of AQMD Rule 120, Credible Evidence, prior to the AQMD's January 11, 2018, public consultation meeting. The CMC and other interested parties are concerned about the concept of Rule 120, its use to circumvent state and federal evidentiary rules regarding scientific evidence, and its potential negative impact on the rights of AQMD's constituents. Further, proposed AQMD Rule 120 disregards the legislative intent behind the California Evidence Code and the Federal Rules of Evidence, which take precedent over administrative rules such as proposed AQMD Rule 120.

Proposed AQMD Rule 120 sets the standard for admissible evidence to establish whether a person has violated any plan, order, permit, rule, regulation or law as "any credible evidence." (See Proposed Rule 120(a)). The Rule then seeks to establish that any testing, monitoring, or other information-gathering methods that are approved by the AQMD, California Air Resources Board, or the U.S. EPA presumptively yield credible evidence. (See Proposed Rule 120(b)). Based on construction, it is clear that Rule 120 is intended to apply to scientific evidence. Through the enactment of this Rule, the AQMD is attempting, through administrative fiat, to circumvent the much more meticulous and well-established admissibility requirements that state law places on such scientific evidence.

The California Evidence Code ("Cal. Evid. Code") and the Federal Rules of Evidence ("FRE") set out specific guidelines for the relevance and admissibility of evidence. To be admissible, all evidence must be relevant to the matter at hand. (See Cal. Evid. Code §§ 350

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and 351; FRE, Rules 401 and 402). When it comes to scientific evidence, further scrutiny is required before it can be deemed admissible. (See *People v. Leahy* (1994) 8 Cal.4th 587, 594-604; see also Cal. Evid. Code §§ 720 and 801; FRE, Rule 702).

In California, the Courts have adopted the Kelly/Frye Test to determine the admissibility of scientific evidence. (See *Leahy, supra,* at 604). Under the Kelly/Frye Test, expert testimony based on new scientific techniques is subject to the following considerations: "(1) [T]he reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case." (*People v. Kelly* (1976) 17 Cal.3d 24, 30 (internal citations omitted)). When determining the reliability of the method, the proponent must show that the method "from which the deduction is made [is] sufficiently established to have gained general acceptance in the particular field in which it belongs." (*Id.*). The California Supreme Court has confirmed that, despite changes in federal evidence law, the Kelly/Frye Test is the standard for scientific evidence based on new techniques in California. (See *Leahy*, *supra*, at 604). In so doing, the Court held that the Kelly/Frye standard holds several advantages, including:

(1) Assuring that those persons most qualified to assess the validity of a scientific technique would have the determinative voice;
(2) Providing a minimal reserve of experts to critically examine each technique in a particular case;
(3) Promoting uniformity of decision based on finding a consensus in the scientific community; and,
(4) Protecting parties by its essentially conservative nature.
(*Leahy*, *supra*, at 595).

The Court in *Kelly* noted that the use of Kelly/Frye was important to protect the parties because "[l]ay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials. We have acknowledged the existence of a '…misleading aura of certainty which often envelops new scientific process, obscuring its currently experimental nature." (*Kelly*, *supra*, at 32; confirmed by the California Supreme Court in *Leahy*, *supra*, 595).

Based on the foregoing, the California Supreme Court has confirmed that the Kelly/Frye Test must be used to protect parties from untested new scientific methods by requiring the proponent of such methods to show that the specific method has gained general acceptance in the relevant scientific community. Through proposed Rule 120, the AQMD seeks to circumvent Kelly/Frye and allow the use of any method the AQMD deems acceptable without consideration of or acceptance by the relevant scientific community at large. In doing so, the AQMD places the rights of its constituents in jeopardy by denying the use of evidentiary standards created by the California legislature and defined by the Courts.

In federal Court, the method used for determining the admissibility of scientific evidence is based on FRE, Rule 702, the case *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

(S.D. Cal. 1989) 727 F. Supp. 570, and subsequent cases, which have further defined what is referred to as the "*Daubert* standard." In developing the *Daubert* standard, the federal Courts sought to comply with FRE 702, which is intended to ensure that any witness who is offered to provide scientific, technical or other specialized knowledge, will be qualified as an expert by knowledge, skill, experience, training, or education. (See FRE, Rule 702; See Also, *Leahy*, at 597). While laying the ground work for the *Daubert* standard, the Court held that "expert opinion not based on facts or data of a type reasonably relied upon by experts in the particular field is not helpful, but instead is confusing or misleading and should therefore be excluded." (*Daubert,* 727 F.Supp., at 572 (internal citations omitted)).

Under the *Daubert* standard, the judge is the gatekeeper of admissibility regarding scientific evidence to ensure that expert scientific testimony truly proceeds from scientific knowledge. (CITE). The judge must ensure that the scientific evidence is relevant to the matters at issue and that it rests "on a reliable foundation." (*Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 584-587). Furthermore, the judge must conclude that the evidence reflects scientific knowledge and whether it was derived by the scientific method. (*Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315-1316). The Court has provided a non-exhaustive list of "illustrative factors" to consider when determining if the evidence is derived from scientific methodology, including the following:

(1) General acceptance in the relevant scientific community;
(2) Whether it has been subjected to peer review and publication;
(3) Whether it can and has been tested;
(4) Whether the known or potential rate of error is acceptable; and
(5) Whether the research relied upon to support the evidence was conducted independent of the particular litigation or dependent on an intention to provide the proposed evidence. (*Id.*, at 1316-1318).

The federal *Daubert* standard, as articulated above, is even more stringent than the California Kelly/Frye test and is intended to avoid the introduction of confusing and misleading evidence by requiring a minimum standard. If AQMD Rule 120 is adopted as proposed, the standards set by the federal government and judiciary will be undermined.

Adherence to the state and federal evidentiary standards is required because the AQMD's authority is ultimately derived from state and federal law. The AQMD and the California Air Resources Board obtain their enforcement authority from sections 111 and 112 of the federal Clean Air Act. (See Clean Air Act, §§ 111, 112). The Clean Air Act provides a minimum set of enforcement standards that state agencies must apply. (See Clean Air Act, § 107(a)). Therefore, the AQMD cannot implement rules that undercut federal authorities, including those that apply to federal evidentiary standards, and proposed Rule 120 potentially subverts these standards, as well as the State Implementation Plan, which is required by the Clean Air Act for the federal government to delegate enforcement authority to the states.

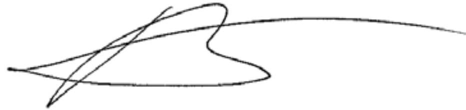
Likewise, pursuant to California Government Code § 11342.2, any regulation adopted by a state agency based on the express or implied terms of a statute and intended to implement, interpret, clarify, or otherwise carry out the provisions of the statute, is only valid

and effective if it is consistent and not in conflict with the statute and is reasonably necessary to effectuate the purpose of the statute. (Cal. Gov. Code § 11342.2). As the California Evidence Code applies to disputes arising from California statutes, to the extent that the AQMD's authority is derived from California law, California evidentiary standards must also apply and the AQMD cannot override that authority.

In order to address the above concerns, proposed Rule 120 must be modified to ensure that any test methods/models must be subject to peer review, quantitative evaluation, and approval by an appropriate public agency through a public process. Otherwise, Rule 120 must not be approved as it is contrary to California law.

Thank you for your prompt attention to this matter. Any questions or comments may be directed to the undersigned.

Very truly yours,



Alastair F. Hamblin

cc: James Simonelli, Executive Director, California Metals Coalition