SB 49 (DE LEÓN)
OPPOSE/JOB KILLER

May 3, 2017

TO: Members, Senate Committee on Appropriations

FROM: Louinda V. Lacey, California Chamber of Commerce
Agricultural Council of California
American Coatings Association
California Association of Realtors
California Association of Winegrape Growers
California Building Industry Association
California Business Properties Association
California Cattlemen's Association
California Construction and Industrial Materials Association
California Farm Bureau Federation
California Forestry Association
California League of Food Processors
California Manufacturers & Technology Association
California Paint Council
California Strawberries Commission
CAWA – Representing the Automotive Parts Industry
Chemical Industry Council of California
Civil Justice Association of California

Family Business Association of California
Greater San Fernando Valley Chamber of Commerce
Metal Finishing Association of Northern California
Metal Finishing Association of Southern California
National Federation of Independent Business
Simi Valley Chamber of Commerce
Southwest California Legislative Council
West Coast Lumber & Building Material Association
Western Growers Association
Western Plant Health Association
Western States Petroleum Association

SUBJECT: **SB 49 (DE LEÓN) CALIFORNIA ENVIRONMENTAL, PUBLIC HEALTH, AND WORKERS DEFENSE ACT OF 2017**
HEARING SCHEDULED – MAY 8, 2017
OPPOSE/JOB KILLER – AS AMENDED FEBRUARY 22, 2017

The California Chamber of Commerce and the organizations listed above must respectfully **OPPOSE SB 49 (de León),** which the California Chamber of Commerce has labeled a **JOB KILLER.** We appreciate California's concerns regarding the uncertainty at the federal level given some of the statements made and recent actions undertaken with regard to certain environmental laws/regulations. That said, **SB 49** is a premature, overbroad, and vague response to actions that could be undertaken in the future (with respect to the laws identified in the bill) while in the present creating substantial uncertainty for businesses in advance of any such potential changes, and correspondingly greatly increasing the potential for costly litigation.

SB 49 would require the state agencies to adopt standards that are "at least as stringent as" the baseline federal standards in the federal Clean Air Act, the federal Safe Drinking Water Act, the federal Water Pollution Control Act, the federal Endangered Species Act, and "other federal laws" defined as unidentified laws "relating to environmental protection, natural resources, or public health." The bill would also prohibit a state agency from amending or revising its rules or regulations in a manner less "stringent" in its protection of workers' rights or worker safety than standards established pursuant to federal law in existence as of January 1, 2016.

If there is interest in preserving various federal environmental laws, we believe a targeted approach where state agencies respond to federal action on a case-by-case basis is more appropriate. The broad and vague language in the bill creates impractical implications and consequences that should be given serious consideration.

Issues Specific to This Committee

With respect to the issues considered by the Senate Committee on Appropriations, we offer the following comments:

1. **Fiscal Impact to State**

SB 49 would require various California agencies to: (1) adopt new requirements/standards under California law with regard to water, air, endangered species, and others to be "at least as stringent as" associated federal authorizations, policies, objectives, rules, requirements and standards; (2) enforce and maintain identified standards/requirements under federal laws in addition to those under state laws; and/or (3) provide bi-annual reports to the Legislature regarding compliance with the bill. The California agencies impacted by the bill include (at a minimum) the California Air Resources Board, the State Water Resources Control Board, the Department of Fish and Wildlife (DFW), the Department of Justice, and the Department of Conservation.

In order to adopt the new requirements and standards identified in **SB 49**, the pertinent California agencies would each need to conduct a formal rulemaking process for each new rule or regulation, which takes a

significant amount of staff time and agency resources. Additionally, the agencies would need to identify all federal "authorizations, policies, objectives, rules, requirements and standards" associated with the directive, and would need to analyze the contents of those documents to determine whether they want to adopt the federal "baseline" standards or something more stringent (as California often does and is expressly allowed under the bill). In making this determination, the agencies would also need to consider how such standards/requirements interact with existing California standards/requirements to avoid conflicts or potential duplication. With respect to the 70+ animal species and 60+ plant species that would need to be evaluated for inclusion under the California Endangered Species Act (CESA), the DFW will need to determine if the inclusion of each individual species is "appropriate" in California. This determination will, presumably, require significant scientific research and analysis. Moreover, adding these species to CESA would require additional actions by the DFW to conserve these species and would require project applicants to obtain incidental take permits or create Natural Community Conservation Plans to allow for the incidental taking of these newly listed species. Both of these responsibilities would add significant costs to DFW.

While it is clear that **SB 49** will impose significant costs on various California agencies relating to rule making, enforcement and reporting, it would be very difficult to fully quantify or estimate the extent of the financial impact at this juncture due to the broad directive relating to "authorizations, policies, objectives, rules, requirements and standards."

SB 49 imposes another cost on agencies beyond the rule making, enforcement, and reporting requirements – costs relating to litigation. With regard to the private rights of action, the Attorney General will be required to review the 60-day notices of intent to sue to evaluate the need to file litigation, and it will receive notifications regarding pending litigation as well. More importantly, **SB 49** expressly provides for suits against public agencies. The bill expressly authorizes a person to petition a court for a writ of mandate to compel a state or local agency to perform an act required by, or to review a state or local agency's action for compliance with, the bill and the Protect California Air Act of 2003 (Health & Saf. Code, §§ 42501, 42504). The anticipated prevalence of such prospective litigation is greatly amplified by:

- The vague, ambiguous, and broad language of the bill. For example, the bill states that agencies need to adopt regulations/standards at least as stringent as the federal baseline standards "in existence as of January 1, 2016, or January 1, 2017, whichever is more stringent." The determination of which is more "stringent" will likely lead to a difference of opinion, and the language "in existence as of" creates ambiguity as to whether it includes rules/regulations/laws subject to a stay or an injunction – e.g., Waters of the U.S. rule, which is presently stayed pursuant to a U.S. Sixth Circuit decision.

- The one-sided attorneys' fees and cost provision. The bill allows for recovery of attorneys' fees pursuant to Code of Civil Procedure section 1021.5 and expert fees pursuant to Code of Civil Procedure section 1033 "for an action brought pursuant to this section." These types of fee and cost provisions incentivize lawsuits.

- There are no set timelines for compliance; yet the litigation provision goes into effect immediately.

It is important to note that **SB 49** requires the state agencies to expend funds to implement its directive relating to rule making, etc. and exposes the agencies to litigation *regardless* of whether there is a rollback at the federal level.

2. Fiscal Impact on Businesses

While not the focus of the Senate Committee on Appropriations, it should also be noted that **SB 49** would allow private rights of action against businesses beyond the status quo, which would have a significant financial impact on businesses. The uncertainty created by the vague, broad, and ambiguous language in the bill would further negatively impact a business' growth, employment, and investment decisions.

SB 49 provides that a private right of action would be triggered if ***either*** of the following occurs: 1) the U.S. Environmental Protection Agency (U.S. EPA) revises the standards or requirements described in the newly contemplated statutes to be less stringent than the applicable baseline federal standards; or 2) the identified federal environmental laws are amended to repeal the citizen suit provisions contained therein. The key question is – what standards would be enforceable if either of these occurs? The bill provides that the standards adopted by the **California agencies**, as required by the bill, which must be "at least as stringent" as the federal standards, would be enforceable via a private right of action if either of the conditions occurs. (See **SB 49** §§ 120201(a)-(c), 120050(b), 120051(b).) As a leader in environmental protection, California routinely adopts more stringent and different standards than the federal standards, and we expect the state agencies to do no less with **SB 49**'s directive. Accordingly, if the California agencies adopt more stringent standards under the **SB 49** directive, and the private right of action is triggered, a business may be sued based on the new California standards, because **SB 49** states a person in the public interest can sue to "enforce the standards or requirements adopted pursuant to" sections 120050(b) and 120051(b). Given that California does not presently allow for private rights of action under all of the statutory schemes impacted by **SB 49**, this would constitute an expansion of potential litigation against businesses. This does not merely allow California to avoid backsliding of the federal "baseline" standards. Moreover, if there is no repeal of the citizen suit provision under federal law, but the U.S. EPA adopts a "less stringent" standard, a business could be subject to suit in both federal and state courts for the same violation.

The one-sided attorneys' fees and costs provision further incentivizes the lawsuits contemplated in **SB 49**. This provision is also divergent from federal law. Generally, when California courts have concurrent jurisdiction with federal courts to enforce federal law, California courts may award attorneys' fees under the federal statutes, using the federal standards. (*Serrano v. Unruh* (1982) 32 Cal.3d 621.) Under the federal citizen enforcement provisions, the court may award the costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. (See 33 U.S.C., § 1365(d), 42 U.S.C., § 7604(d), and 16 U.S.C, § 1540(g)(4)). This one-sided attorneys' fees provision would increase the prevalence of lawsuits against businesses as compared to federal law. Therefore, **SB 49** would again not be maintaining the status quo.

The vague, broad, and ambiguous language in **SB 49** also increases the likelihood of litigation. Some of the questions/concerns include:

- The reference to "other federal laws" is problematic because it creates confusion by simply being defined as laws not specifically identified that relate to "environmental protection, natural resources, or public health." It would be left to the courts to interpret the broad and vague language when litigation arises, which would leave businesses in limbo and subject to a myriad of nonmeritorious lawsuits while such litigation makes its way through the court system. Arguably, as written, "other federal laws" could include the Migratory Bird Treaty Act, the National Environmental Policy Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Resource Conservation and Recovery Act, to name but a few. The use of the broad term "relating to" raises significant concerns.

- The terms "federal standards," "stringent," and "backsliding" are vague and ambiguous.

    - How are the "standards" determined? For example, the U.S. EPA has various regions that often prescribe and enforce different standards. Is the applicable "standard" whichever one is the most "stringent," or is the "standard" whatever is being implemented by Region 9 as of January 1, 2016, or January 1, 2017?

    - The term "backsliding" is unclear because, for example, what if a standard is changed based on new science or technology and reasonable minds could differ as to whether a change in that standard is considered "backsliding" or not. The U.S. EPA spent many years developing an *e. coli* standard to replace the fecal coliform standard. The change is a more appropriate standard, as it is measuring the constituent that actually threatens public health, rather than a surrogate that may or may not threaten health. If **SB 49** had been in place when the *e. coli* standard was adopted, California would have been prohibited from adopting the improved standard that was just as protective of the

environment and public health, but that simply created a more accurate measurement of water quality impairments. Would this have been considered "backsliding" under **SB 49**? Putting federal environmental laws into place without any opportunities for change means California would never be able to change standards despite what science may recommend.

- By incorporating the federal "standards," are we also incorporating federal case law on the interpretation of those standards or agency interpretations?

    - If so, how do we handle splits in the federal circuit courts with regard to their interpretation of a "standard," "rules," "requirement," or "authorization"? Do we apply the Ninth Circuit decisions? What if the Ninth Circuit has not opined on an issue? Do we leave it to California courts to resolve, even if there are other federal circuits that have opined on the issue?
    - If not, are we leaving the broad and ambiguous "authorizations, policies, objectives, rules, requirements, and standards" to future California court opinions for clarification? This would, of course, result in significant uncertainty to businesses.

- How does the "existence as of" language apply to rules/laws/regulations that are currently subject to stays or injunctions? With respect to the Clean Water Act, how would this bill deal with the nationwide stay imposed by the U.S. Court of Appeals for the Sixth Circuit with respect to the "waters of the United States" rule?

- Who determines whether the standard or requirement is "less stringent" and what does that mean?

- Who determines if there has been "backsliding"? Would this be determined through the citizen suit provision – in other words when individuals acting as private attorney generals bring suit? Would this be determined by the petitions for writ of mandate contemplated in the bill?

- Would a change in ***any*** standard or requirement open the door to a private right of action as to ***all*** standards or requirements?

We are also concerned that **SB 49** runs afoul of the constitutional "single-subject rule" principle. (Cal. Const. art. IV, § 9.) The constitutional section states: "A statute shall embrace but one subject, which shall be expressed in its title." **SB 49** clearly deals with more than one subject, which is contrary to the single-subject rule. (See, e.g. *Harbor v. Deukmejian* (1987) 43 Cal. 3d 1078, 1096; *Lewis v. Dunne* (1901) 134 Cal. 291, 295-296.) This constitutional provision is violated by, at a minimum, the inclusion of workers' rights and worker safety standards in the same bill and the broad and vague reference to "public health" in the "other federal laws" definition.

Without clarification, the courts would have to grapple with these questions, which will result in many pending cases sitting on court dockets for years without any certainty for state/local agencies and businesses while they struggle with increased litigation costs.

For these reasons, we must **OPPOSE SB 49 (de León).**

cc: The Honorable Kevin de León
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