SB 49 (DE LEÓN)
OPPOSE/JOB KILLER

June 19, 2017

TO: Members, Assembly Committee on Environmental Safety and Toxic Materials

FROM: Louinda V. Lacey, California Chamber of Commerce
Agricultural Council of California
American Coatings Association
American Insurance Association
Association of California Water Agencies
Auto Care 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 Independent Petroleum Association
California League of Food Processors
California Licensed Foresters Association
California Manufacturers & Technology Association
California Metals Coalition
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
Forest Landowners 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
Valley Industry & Commerce Association
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 – JUNE 27, 2017
OPPOSE/JOB KILLER – AS AMENDED MAY 26, 2017

The California Chamber of Commerce and the organizations listed above 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 various California agencies to: 1) adopt new requirements/standards under California law with regard to water, air, endangered species, and other environmental mandates to be "at least as stringent as" associated federal authorizations, policies, objectives, rules, requirements and standards in existence as of a certain date, regardless of what happens at the federal level; 2) enforce and maintain standards/requirements under federal laws in addition to those under state laws regardless of what happens at the federal level (i.e., regardless of whether there is a decline in federal enforcement); 3) and/or provide biannual reports to the Legislature regarding compliance with the bill. The bill further incentivizes lawsuits against state and local agencies challenging their compliance with these requirements and their discretion regarding the determination of stringency and protection; and, also incentivizes lawsuits against businesses relating to the standards/requirements adopted by state agencies in accordance with the bill, if there is any perceived "backsliding" at the federal level.

The broad and vague language in the bill creates impractical implications and consequences that should be given serious consideration.

1. **The State Water Resources Control Board (SWRCB) already has the authority and directive to adopt drinking water standards; The Legislature should trust California agencies to act within their discretion and under their existing authority to enact standards/requirements, if needed, following federal action.**

The California Legislature has previously indicated its intent "to improve laws governing drinking water quality, to improve upon the minimum requirements of the federal Safe Drinking Water Act Amendments of 1996, to establish primary drinking water standards that are at least as stringent as those established under the federal Safe Drinking Water Act, and to establish a program under this chapter that is more protective of public health than the minimum federal requirements." (Health & Saf. Code, §116270(f).) In this regard, the SWRCB has the existing power, authority, and directive to adopt drinking water standards that shall not be less stringent than the national primary drinking water standards adopted by the United States Environmental Protection Agency (USEPA). (Health & Saf. Code, § 116365(a).) This is but one example of the SWRCB's authority and jurisdiction.

Indeed, California agencies generally have the authorization and power (except where preempted) to promulgate and enforce requirements more stringent than federal law within their respective jurisdictions, and they frequently exercise their discretion to do so. There is no indication that California agencies would do any less if the federal government were to rollback key environmental laws or regulations. In the event such action is preempted, **SB 49** would not provide any assistance because a state statute cannot override federal preemption. Additionally, to the extent an agency needs additional authorization in a specific area of the law, the Legislature may step in and provide such authorization. A targeted approach in that regard would allow the Legislature and the agencies to take a scalpel to the issue, thereby minimizing unintended consequences.

2. **Discretionary decisions based on science do not lend themselves to limitations of standards/requirements in existence at a snapshot in time; Such limitations will discourage comprehensive/collaborative environmental solutions if one portion of the solution results in perceived backsliding while, on the whole, the change is better for the environment.**

SB 49 attempts to lock in place federal standards "in existence" at a date certain. In practice, this notion has significant unintended consequences.

For example, California is currently working to revise its version of the Total Coliform Rule in response to the new Federal Revised Total Coliform Rule, which became effective under federal law on April 1, 2016. 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 could 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 be unable to change standards despite what science may recommend.

Other examples of unintended consequences include:

- **Delta Management**: If negotiations on improvements to manage the water delivery system and fisheries in the Delta leads to a potential increase in allowed incidental take of salmon at the water pumps in exchange for restrictions on ammonia discharges from publicly owned treatment works, **SB 49** would prohibit this from occurring because the increased incidental take allowance would be viewed as backsliding against current Endangered Species Act (ESA) take restrictions. This would prevent an improvement in overall management because no changes would be allowed that expand take under the ESA even if overall the change was better for our environment.

- **Central Valley Project (CVP) and State Water Project (SWP)**: If certain provisions in **SB 49** are triggered, it would lock in the current Biological Opinions (BiOps) issued by NOAA's National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) on the long-term operations of the CVP and SWP, which include Reasonable and Prudent Alternatives (RPAs) designed to alleviate jeopardy of listed species and adverse modification of critical habitat. The U.S. Bureau of Reclamation (Bureau), NMFS and the Department of Water Resources annually review the BiOps to determine the efficacy of the prior years' water operations and regulatory actions prescribed by their respective RPAs, with the goal of developing lessons learned, incorporating new science, and making appropriate scientifically justified adjustments to the RPAs or their implementation to support real-time decision making for the next water year. If changes need to be made, the Bureau holds public hearings to gain input from stakeholders to ensure all parties are aware of the proposed changes and can offer input into how the system should be operated. As we have seen in these past years of drought, and considering climate change predictions, flexibility in management is essential. This flexibility has also fostered new and innovated collaborative efforts between farmers and researchers to help restore species populations, such as salmon and delta smelt, by creating improved habitat on winter flood plains normally farmed during the spring and summer months. These projects aim to improve water supplies, flood control and the estuary's struggling ecosystem by improving infrastructure, flood capacity and habitat throughout the Yolo Bypass and other sections of the Delta. Flexibility in the BiOps is needed to continue to allow and encourage this type of innovation and adaptation to changing conditions and improved science.

- **Air Quality**: Through decades of implementing effective air quality strategies, air pollution from San Joaquin Valley businesses has been reduced by over 80% through an investment of over $40 billion by regulated sources. The pollution released by industrial facilities, agricultural operations, and cars and trucks are at historic lows for all pollutants. San Joaquin Valley residents' exposure to high smog levels has been reduced by over 90%. Unfortunately, after all this investment and sacrifice, the San Joaquin Valley Pollution Control District has reached a point where it cannot attain the federal standards even if it eliminated all Valley businesses, agricultural operations, or trucks traveling through the San Joaquin Valley. Without administrative and legislative action at the federal level to bring about a commonsense approach that ensures effective and reasonable implementation of the federal clean air mandates, residents in the San Joaquin Valley and other regions in the near future could face federal sanctions which will lead to economic devastation. Locking California into the existing standard, without consideration of the commonsense approach that ensures effective and reasonable implementation of the federal clean air mandates, could have devastating results.

3. **SB 49 will stifle affordable housing and infrastructure development and will negatively impact agriculture, farming, and other industries due to the slowdown in permit issuance, the additional costs associated with such permits, and the potential lack/unavailability of insurance policies.**

The incorporation of federal endangered species under the California Endangered Species Act (CESA) will stifle affordable housing and infrastructure development (e.g., WaterFix, High Speed Rail) and will negatively impact agriculture, farming, and other industries. As a practicing environmental attorney explained: "If passed, Senate Bill 49 would nearly double the number of listed species under [the California Endangered Species Act (CESA)] by adding 74 animals that are currently only protected under the federal Endangered Species Act (federal ESA). Further, Senate Bill 49 would arguably protect federal listed species from habitat modification that rises to the level of 'take' under the federal ESA, a protection those species do not currently enjoy under CESA. This could create many headaches for developers, in particular as they deal with a state agency that does not have the resources or experience to process incidental take permit applications for species listed only under the federal ESA." **SB 49** further requires the incorporation of insects as threatened or endangered species under CESA (which are not presently covered by CESA) and, specifically, would grant threatened or endangered status to 23 insect species. The inclusion of insects under CESA will be challenging and it is unknown whether the Department of Fish and Wildlife (DFW) has the necessary staff knowledge and expertise to implement the mandate. This will likely result in a slowdown

in the issuance of permits to applicants. Further, adding species to CESA adds significant costs to businesses who must negotiate permits with state and federal wildlife agencies.

California's listing of federal endangered species may also create uncertainty. By way of example: Since California listed the Northern Spotted Owl (a species that has been listed under the federal ESA for decades) under CESA, the USFWS has threatened to stop providing technical assistance to the public regarding actions needing federal approval to ensure they are in compliance with federal ESA requirements. This means forest landowners who now need both federal and state approval for their timber harvest activities can only get approval from the state, putting them at risk of violating the federal ESA. If the state were to list all the federally listed species without state listing status, the FWS could choose to take a similar action to the one it is threatening with the Northern Spotted Owl, putting landowners in the untenable position of trying to comply with the federal ESA and not being able to get the necessary permits or have certainty that their actions comply.

Further, **SB 49** may lead to the unavailability of/lack of access to insurance policies. The bill would create a broad and uncertain environmental regulatory environment, making the determination of what law or standard companies are subject to difficult to ascertain. To adequately understand and underwrite risks, insurance carriers need to understand the legal regime applying to the risk that a business seeks to insure. This bill creates significant regulatory confusion between state and federal law by making the law dependent on which is most stringent or when there is "backsliding" coupled with various litigation provisions. Without the ability to accurately underwrite an insurance policy, companies may not wish to underwrite the risk at all, while others may price the related insurance products too high, thereby deterring use and access to such policies.

These practical implications and consequences should be given serious consideration, especially given the broad language used in the bill.

4. **SB 49 subjects state and local agencies to writs of mandate under various scenarios, including when reasonable minds can differ as to whether a standard/requirement is "at least as stringent as" or "at least as protective as" existing federal law, and encourages such lawsuits through a one-sided attorneys' fees provision and the vague/ambiguous language of the bill.**

SB 49 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 terms "at least as protective of the environment" and "at least as protective of public health" are similarly vague and ambiguous, raising the likelihood of litigation. Further, the language "in existence as of" creates ambiguity as to what rules/regulations/laws are incorporated. How does the bill deal with splits in court precedent, the interpretation and application of rules or guidance in different regions of the EPA, or court imposed or agency voluntary stays in the implementation of such rules or guidance? (See, e.g., stays regarding the Waters of the U.S. rule, the class action waivers rule, and the interpretation of independent contractors)
    - 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." 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 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 rulemaking, etc. and exposes the agencies to litigation *regardless* of whether there is a rollback at the federal level.

5. Valuable and important agency resources will be diverted from existing programs and permit issuances to promulgate regulations that may never be needed.

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.

The extent of the costs associated with this mandate is currently unknown but will be significant for state agencies to implement the mandates of **SB 49**, especially with regard to rulemaking and enforcement. The Senate Committee on Appropriations' analysis reflects only one cost – up to $10.5 million to the Department of Fish and Wildlife, but numbers for implementation of the bill by the multitude of other agencies are lacking.

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." Diverting substantial agency resources and funds to implement the requirements under **SB 49** will certainly impact existing programs and permit issuances.

6. SB 49 subjects businesses to private rights of action and writs of mandate arising from the new more stringent California standards/requirements to be adopted regardless of whether the federal citizen suit provisions are repealed, and promotes such lawsuits through a one-sided attorneys' fees provision and the vague/ambiguous language of the bill.

The private rights of action contemplated in **SB 49** will have significant fiscal impact on businesses. These private rights of action go beyond the status quo and provide that an action may be brought by a person in the public interest to enforce the standards or requirements adopted pursuant to the bill's subdivision (b) of Sections 120041, 120051, and 120061 or to impose civil penalties for a violation of those standards or requirements pursuant to those acts. The uncertainty created by the vague, broad, and ambiguous language in the bill would negatively impact a business' growth, employment, and investment decisions, and could impact the budgets of state and local agencies.

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/state agency/local agency (any person/entity/agency subject to enforcement under the standard or requirement) 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), 120051(b), and 120061(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 and state and local agencies. 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, state agency, or local agency 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 and state and local agencies 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 (see the remarks under 4 above). 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.

7. SB 49 violates the California Constitution's single-subject rule.

Under the California Constitution, "[a] statute shall embrace but one subject, which shall be expressed in its title." (Cal. Const. art. IV, § 9.) **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, worker safety standards, and labor standards in the same bill dealing with a myriad of environmental laws, and the broad and vague reference to "public health" in the "other federal laws" definition.

8. SB 288 is not precedent for SB 49 and, even if it could be, issues relating to binding of state agencies' discretion under SB 288 should be a cautionary tale.

SB 49's identification of SB 288 (Chapter 476 Statutes of 2003) as precedent does not correlate. SB 288 was intended to guard against relaxations in federal permitting laws relating to new source review rules. Additionally, SB 288 was introduced after the federal government had taken action; whereas, **SB 49** is a preemptive strike at something that may not occur. In dealing with this one issue, SB 288 listed in great detail exactly what types of rule changes were prohibited. In contrast, **SB 49** deals with whole bodies of federal law and "other federal laws" that are unidentified, without any specificity other than the vague and broad "backsliding," "stringent," and "at least as protective of the environment/public health" prescriptions. These two bills are vastly different. The mere fact that "SB 288 has never been challenged" does not mean that it is legally sound; it merely means that it has never been challenged.

More importantly, since the adoption of SB 288, air districts throughout California and the Air Resources Board have encountered circumstances where necessary changes that would enhance *effective and reasonable* implementation of the federal clean air mandates and would not have a detrimental impact on air quality are prohibited due to the rigid language of the law. Locking in existing standards or requirements will similarly hamper the agencies' ability to make appropriate, effective, and reasonable adjustments in the future.

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

cc: The Honorable Kevin de León
Camille Wagner, Office of the Governor
Josh Tooker, Assembly Committee on Environmental Safety and Toxic Materials
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