



CONSTRUCTION INDUSTRY  
AIR QUALITY COALITION

November 24, 2010

Coalition Members



Ms. Mary Nichols, Chairman  
California Air Resources Board  
1001 "I" Street  
P.O. Box 2815  
Sacramento, CA 95812



RE: PROPOSED "PROHIBITION OF FLASE STATEMENTS"  
REGULATION

Associated General Contractors  
America-San Diego Chapter, Inc.

Dear Chairman Nichols and Members of the Board:



How thoughtful that your staff have proposed a new regulation entitled "Prohibition of False Statements". I am reminded of the great adage, "There are lies, damn lies and statistics!"

Building Industry Association  
of Southern California



I marvel that you are able to succinctly delineate the difference between truth and falsehood in only 1/2 a page when it took 72 pages to control NOx from off-road engines. While it is unusual for CARB to circulate a draft rule before statewide workshops, I thought it would be helpful to raise a few questions that are not addressed in your current draft.

California Dump Truck Owners  
Association



If a person makes a statement to the agency that they believe to be true, based on their experience and that information cannot be proven to be true or it only becomes obviously true at a later date, are they subject to enforcement under this rule? At what point does enforcement take place? Who may file a complaint? Who determines the accuracy or inaccuracy of the statement? Will the final authority on falsehoods be appointed by the adopting agency or some higher authority? To whom may the decision be appealed and what is the punishment for a violation?

Engineering  
Contractors Association



Are mea culpa's acceptable restitution?

Engineering & General  
Contractors Association



I would cite as an example a small business owner who claims that a regulation will put him out of business. If two years later, the business is still operating but at 1/4 the revenue previous to the rule-making is the statement false? Is it 3/4 true and 1/4 false? If the statement was ignored and the rule adopted anyway, is the statement still false or was it an immaterial exaggeration? If the business flourished but the competitor went out of business was the statement false or merely inaccurate?

Engineering & Utility  
Contractors Association



Southern California  
Contractors Association

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That raises the question of when is an exaggeration false. What about a gross exaggeration or an exaggeration for effect? If nobody believes it anyway is it still false, or just unbelievable? Are unbelievable statements false or are they hyperbole? If everybody knows the information has been embellished, and disagrees with the person communicating the information, is it still false or merely opinion?

Also, is there a statute of limitations on accuracy? I recollect that 30 years ago the planet was going to experience a new ice age, at least that was the conventional wisdom and many well educated people believed it to be true. Now we are told that the planet is going to boil like a brussel sprout (hyperbole). When does a statement become absolutely true and absolutely false?

Does a change in administrations constitute a redefinition of that which is true and that which is false? Can prosecution take place retroactively? Perhaps the rule should include an "at the moment" exemption to protect those who chose to repeat "facts" that later prove to have been entirely false?

If the false information comes from a "model" rather than an individual can it still be false? The recent experience with the Off-Road model clearly presented the agency and CARB Board with volumes of false statistics and emissions that were clearly "material" to the rule-making at that time. Can the model be prosecuted? Would the model fall under your definition of "cover up by any trick, scheme, or device"?

Since each communication constitutes a violation does each printed staff report containing the false information count as a communication since the recipients were all different? If the falsehood becomes codified or duly adopted in a regulation, is it still false? Can enforcement still be initiated? Does the adopting authority then become the appropriate target for enforcement? Do you prosecute only the "yes" votes or the "no" votes as well?

If a falsehood is confirmed or supported by third parties are they also subject to enforcement? The environmental organizations are well known for their coordinated messaging and repetition of inaccurate information to make it appear truthful. Is only the first presenter liable for the falsehood or are all the subsequent speakers subject to the "false statements" rule as well? I'm reminded of the California PM 2.5 Premature Death falsehood that lives on despite all the evidence to the contrary contained in CARB funded research and other national data. How many times must a falsehood be repeated before it is deemed truthful and no longer subject to this regulation?

If information is only partially false are enforcement and fines pro-rated?

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I doubt there is currently sufficient information to determine whether or not the statement that “this is just CARB’s effort to avoid criticism, stifle debate and trample on free speech” is a falsehood. However, should it be true, then that individual should be the first choice to be appointed to the new position of arbiter of CARB truth. If not, the enforcement staff should hoist him or her on their own petard after exhausting all appropriate administrative remedies.

Any time a committee is involved in the drafting of a policy, it always tends to be longer than really necessary. Although a ½ page is probably a record for short at CARB, I am hopeful that my questions will not add to the length of the document. I would recommend that you refer to a previous regulation written by a single individual that might be appropriate in this circumstance. I believe you will find it under Commandment 9--“Thou shall not bear false witness against thy neighbor”. It is commonly shortened to “Thou shall not lie”.

One sentence. Pretty simple. It’s worked for a much larger organization for 2000 years. Maybe you should try it. It might save you a lot of trouble at the Office of Administrative Law.

Sincerely,

A handwritten signature in black ink that reads "Michael W. Lewis". The signature is written in a cursive, flowing style.

Michael W. Lewis  
Senior Vice President

Enclosure

cc:

Members of the Board, California Air Resources Board  
Ellen M. Peter, Chief Counsel, CARB  
Governor Arnold Schwarzenegger  
Governor Elect Edmund "Jerry" Brown  
Members of the California State Legislature

Proposed 17 CCR §95020  
Prohibition on false statements

(a) In any matter within the jurisdiction of the Board, no person may knowingly and willfully do any of the following when transacting any business with or communicating in any manner with the Board or the Board's staff:

- (1) falsify, conceal, or cover up by any trick, scheme, or device a material fact;
- (2) make any materially false, fictitious, or fraudulent statement or representation;
- (3) make or use any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; or
- (4) omit material facts from a communication with an intent to mislead.

(b) "Writing" means handwriting, typewriting, printing, Photostatting, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

(c) "Communicating, communication" includes speaking, writing or submitting any information to the Board or the Board's staff.

(d) A fact is "material" if it is necessary to make the communication, in light of the circumstances under which it was made, not misleading.

(e) Each communication forbidden by this section constitutes a separate violation of this section.

(f) This section and any penalty resulting from its violation are in addition to all other laws of this state.

(g) This section shall not be the basis for any private right of action.