State of California
AIR RESOURCES BOARD

Final Statement of Reasons for Rulemaking,
Including Summary of Comments and Agency Responses

PUBLIC HEARING TO CONSIDER THE ADOPTION OF A HAIRSPRAY CREDIT PROGRAM

Scheduled for Consideration: November 13, 1997
Agenda Item No.: 97-9-2

I. INTRODUCTION

On November 13, 1997, the Air Resources Board (ARB or Board) conducted a public hearing to consider the adoption of a regulation establishing a Hairspray Credit Program (the "HCP regulation"). Related amendments were also considered to the California Consumer Products Regulations (Title 17, California Code of Regulations (CCR), sections 94500 to 94555). The HCP regulation and the related amendments provide for a voluntary, market-based emission reduction credit program for both credit generation and use within the consumer products arena. An Initial Statement of Reasons for Proposed Rulemaking (ISOR) was prepared and made available to the public on September 26, 1997. The ISOR is incorporated herein by reference. This Final Statement of Reasons for Rulemaking (FSOR) updates the ISOR by identifying and explaining the modifications that were made to the original proposal. The FSOR also summarizes the written and oral comments received during the rulemaking process and contains the ARB's responses to these comments.

At the November 13, 1997 hearing, the Board adopted Resolution 97-42, in which the Board approved the HCP regulation and related amendments. The approved regulations included modifications to the originally proposed language of the HCP regulation. In accordance with Government Code section 11346.8(c), Resolution 97-42 directed the Executive Officer to adopt the modified regulations after making them available for public comment, and to make such additional modifications as may be appropriate in light of the comments received. The modified HCP regulation was made available to the public for a 15-day comment period from February 11, 1998, to February 26, 1998, pursuant to Government Code section 11346.8. The "Notice of Public Availability of Modified Text", which included a copy of the full text of the regulation with the modifications clearly indicated, was mailed February 11, 1998 to each of the individuals described in subsections (a)(1) through (a)(4) of section 44, Title 1, CCR.

No comments were received during the 15-day comment period, and the Executive Officer determined that no additional changes should be made to the regulations. The Executive Officer subsequently issued Executive Order #G-98-022, by which the modified regulations were adopted. All modifications are discussed in detail in Section III of this FSOR. The HCP regulation will be contained in Title 17, CCR, sections 94560-94575. The related amendments will be contained in Title 17, CCR, sections 94502, 94509, 94522, and 94548.

As defined in Government Code section 11345.5(a)(6), the Board has determined that this regulatory action will neither create costs or savings to any State agency nor affect federal funding to the State. The Board has also determined that these regulations will not create costs or impose a mandate upon any local agency or school district, whether or not it is reimbursable by the State pursuant to Part 7 (commencing with section 17500), Division 4, Title 2 of the Government Code; or affect other non-discretionary savings to local agencies. In preparing the regulatory proposal, the ARB staff considered the potential economic impacts on California business enterprises and individuals. A detailed discussion of these impacts is included in the ISOR.

The Board has also determined, pursuant to Government Code section 11346.5(a)(3)(B), that the regulations may affect small business. The Board has further determined that no alternative was presented or considered which would be more effective in carrying out the purpose for which the regulatory action was proposed, or which would be as effective and less burdensome to affected private persons, than the adopted regulations.

II. GENERAL RATIONALE FOR THE REGULATION

The ISOR sets forth the rationale for the HCP regulation. This section of this FSOR briefly summarizes the general rationale. The HCP regulation establishes a voluntary program which is not mandated by state or federal law. The HCP regulation supplements the existing California Consumer Products Regulations which were adopted pursuant to section 41712 of the Health and Safety Code.

The program has been developed to provide an incentive for the early introduction of hairsprays that comply with California's 55 percent volatile organic compounds (VOC) standard for hairspray. At a March 1997 public hearing, the Board postponed the effective date of the hairspray standard by 17 months, from the original date of January 1, 1998, to June 1, 1999. The affected industry requested the postponement in order to have sufficient time to develop complying hairspray products that are acceptable to consumers. The Hairspray Credit Program also responds to a general request by industry for greater compliance flexibility in meeting the requirements of the California Consumer Products Regulations. Such flexibility tends to reduce the regulatory burden on businesses and provide an economic benefit to participants.

Under the Hairspray Credit Program, hairsprays with VOC levels at 55 percent or below may qualify for credits for surplus emission reductions. The credits may be used, held, transferred, or retired for an environmental benefit. The credits may be used to comply with

certain requirements of the California Consumer Products Regulations (i.e., obtaining additional time to comply with the upcoming VOC standards for a wide variety of consumer product categories.) To preserve the emission reductions from consumer products relied upon in the California State Implementation Plan, all unused credits will expire on January 1, 2010.

III. MODIFICATIONS MADE TO THE ORIGINAL PROPOSAL

In response to comments received during the 45-day comment period, various modifications were made to the original proposal. All of the modifications were made to the text of the HCP regulation (i.e., no modifications were made to the related amendments to the California Consumer Products Regulations, as originally proposed by ARB staff). Described below are the modifications that were adopted by the ARB. All of these modifications were adopted to address comments received from the United States Environmental Protection Agency (U.S. EPA):

A. **Section 94560. Purpose.** Language was added to section 94560 to clarify that the goal of the Hairspray Credit Program is to benefit both the environment and the regulated entities. A new subsection 94567(h) (described below) specifies the process for determining whether the program has demonstrated an environmental benefit.

B. **Section 94562. Definitions.** Clarifying technical changes were made to the definitions of "Documented Sales Record", “State Implementation Plan”, and “Surplus” in section 94562.

C. **Section 94563. Application Process to Request Hairspray Emission Reduction Credits; Section 94566. HERC Account Registry; and Section 94568. Application Process for Use of Hairspray Emission Reduction Credits.** Language was added to sections 94563(a), 94566(a), and 94568(a) to clarify that for information claimed as “confidential” by participants in the Hairspray Credit Program, California law regarding the "Disclosure of Public Records" is applicable only to information in the custody of the ARB and is not intended to apply to information in the custody of the U.S. EPA.

D. **Section 94564. Protocol for Calculating Hairspray Emission Reduction Credits.** Clarifying modifications were made to section 94564. These modifications were designed primarily to improve the clarity of the original language, which was somewhat confusing. In addition, a baseline date of October 11, 1990, was included in the protocol for calculating hairspray emission reduction credits. October 11, 1990 is the date on which the Board approved the 55 percent VOC standard for hairsprays. Using this date as a baseline insures that credits can be granted only for hairsprays reformulated or introduced after the approval of the 55 percent regulatory standard.

E. **Section 94567. Allowable Uses of Hairspray Emission Reduction Credits.** A provision was added in a new subsection 94567(h) to ensure that the program would result in an environmental benefit, as staff anticipated in the ISOR. If an environmental benefit has not been realized by December 31, 2002, credit use after that date will be discounted by five percent. For purpose of this program, an environmental benefit is demonstrated if, during the time period from the start of the program until December 31, 2002, the total amount of credits generated is five percent greater than the amount of credits used.

F. **Section 94570. Approval of Application for Use of Hairspray Emission Reduction Credits; and Section 94571. Modification and Reconciliation of Account Balance for HERC Use.** Language was added to subsections 94570(b) and 94571(a), in order to achieve consistency with the new subsection 94567(h) described above. If the Executive Officer has determined that the Hairspray Credit Program has not demonstrated an environmental benefit by December 31, 2002, a responsible party would be required to provide an additional amount (e.g., five percent) of credits upon approval of use and reconciliation of use.

G. **Section 94575. Program Evaluation.** A new section 94575 was added to specify that staff will on an ongoing basis evaluate the implementation of the Hairspray Credit Program and, at least once every three years, report the results to the U.S. EPA.

H. To implement the above changes, various other technical modifications were made to the regulatory language. Miscellaneous clarifying and grammatical changes were also made. The clarifying and grammatical changes are designed primarily to delete unnecessary language, provide consistency in language use between the various sections of the HCP regulation, correct minor punctuation and grammatical errors, and provide clearer language in areas where the original language could be improved.

IV. SUMMARY OF COMMENTS AND AGENCY RESPONSES

The Board received written and oral comments in connection with the November 13, 1997 hearing. No comments were received during the subsequent 15-day comment period (February 11, 1998 to February 26, 1998).

A list of commenters is set forth below, identifying the date and form of all comments that were timely filed. Following the list is a summary of each objection or recommendation made regarding the specific adoption and amendments proposed, together with an explanation of how the proposed action has been changed to accommodate the objection or recommendation, or the reasons for making no change. There is no specific response to the DuPont Fluoroproducts' comment letter, because the letter supports the proposed regulatory action and makes no specific

recommendations. However, Mr. Jim Mattesich gave oral testimony on behalf of both DuPont Fluoroproducts and The Cosmetic, Toiletry, and Fragrance Association (CTFA). Staff has responded to Mr. Mattesich's comments below.

List of Commenters

DuPont	Dave W. Boothe, Global Business Manager DuPont Fluorochemicals Dupont Fluoroproducts Written Testimony: October 31, 1997
U.S. EPA	Mr. David P. Howekamp, Director Air Division, Region IX U.S. Environmental Protection Agency Written Testimony: November 12, 1997
CTFA/DuPont	Mr. Jim Mattesich CTFA (The Cosmetic, Toiletry, and Fragrance Association) and DuPont Fluoroproducts Oral Testimony: November 13, 1997

A. Comments received from the U.S. EPA

GENERAL COMMENT

1. **Comment:** EPA must perform independent analysis of any formal requests to revise the SIP. We have tried to review thoroughly the various iterations of the Hairspray Credit Program as they have been developed, and we do not anticipate identifying issues beyond those discussed below. It is possible, however, that our analysis of a submitted version of the program will raise additional concerns.

   Agency Response: Upon approval of this regulatory action by the Office of Administrative Law (OAL), the ARB intends to submit the Hairspray Credit Program (HCP) to the U.S. EPA as a revision to the California State Implementation Plan (SIP). The ARB staff will work with the U.S. EPA staff regarding any approval issues that may arise.

ADDITIONAL INFORMATION NEEDED FOR SIP SUBMITTAL

2. **Comment: EIP Analysis.** 40 CFR 51.490-494 (Subpart U) establishes requirements for economic incentive plans (EIPs) developed pursuant to §110(a) of the Clean Air Act. EIPS that are not specifically required by the Act are discretionary, and need not comply with the EIP rules as long as they do not allow sources to violate any requirements that

are included or relied on in a federally approved SIP. CARB's Hairspray Credit Program is a discretionary program, but would allow consumer products manufacturers to exceed SIP-approved VOC content standards. Lacking any other regulations or guidance, EPA has consistently used the EIP rules to evaluate discretionary EIP programs for SIP submittal, and believes it is appropriate to do so in evaluating CARB's hairspray Credit Program. Therefore, as part of the formal SIP submittal for this program, CARB should include a description of how the regulations address each element of Subpart U. We plan to include such information in any Federal rulemaking of EIP rules, and believe it is appropriate for states to provide the initial analysis.

Agency Response: Both the ARB and the U.S. EPA agree that the HCP is a discretionary program. In other words, the federal Clean Air Act does not mandate that California develop such a program. For discretionary EIPs, the EIP rules are intended to be used only as nonbinding policy guidance. The EIP rules are intended to be binding only on EIPs that are mandatory under the Clean Air Act. This is explicitly stated in several places in the Federal Register notice promulgating the EIP rules (see 59 FR 16690; April 7, 1994), as well as in the actual text of the EIP rules (see 40 CFR, Part 51, section 51.490).

Consistent with these explicit statements by the U.S. EPA, the ARB relied on the EIP rules as policy guidance and did not attempt to incorporate every specific provision of the EIP rules into the HCP regulation. The ARB strongly disagrees with the U.S. EPA's attempt to inflexibly apply every element of a nonbinding guidance document to a discretionary EIP. Such use of policy guidance is not permitted under federal law (see e.g., U.S. v. Zimmer Paper Products, Inc., 1989 WL 206586, 30 ERC 2093, 20 Envtl. L. Rep. 20,556 (S.D.Ind., Dec 05, 1989)). Therefore, it is not appropriate to require the ARB to include in the SIP submittal a description of how the HCP regulation meets every element of Subpart U (i.e., the EIP rules).

The U.S. EPA's comment also implies the EIP rules may somehow become binding on the Hairspray Credit Program because the HCP regulation "... will allow consumer product manufacturers to exceed SIP-approved VOC content standards ..." We do not agree with this contention. If the HCP regulation is approved as a SIP revision, it will simply provide an alternative method for regulated entities to comply with the existing standards for consumer products. No overall increase in emissions will occur. There is nothing in the EIP rules that causes them to become binding on a regulation simply because it provides an alternative compliance method. In addition, the HCP regulation specifically includes a section that retains the U.S. EPA's ability to take federal enforcement action against sources that the U.S. EPA believes to be in violation of any SIP requirement. Section 94574 (Federal Enforceability) does this by providing that the U.S. EPA is not bound by any approval determinations made by the Executive Officer under the HCP regulation. The language of section 94574 is based on equivalent language in the existing California Consumer Products Regulations, where it was included at the request of the U.S. EPA in

order to avoid possible SIP problems and allow the regulations to be approved as SIP revisions. In light of this language, it is misleading to imply that the HCP regulation would allow sources to violate SIP requirements.

3. **Comment: Compliance with Attainment Demonstration and RFP Requirements.** As part of the formal SIP submittal, CARB should provide a demonstration that there will not be temporal and spatial shifts of emissions that could impact the attainment demonstration and RFP (reasonable further progress) requirement specified in the federal Clean Air Act.

Agency Response: An analysis of the possible temporal and spatial impacts of the HCP is discussed in detail in Chapter V of the ISOR. The analysis concludes that credit generation and use in the HCP will not cause significant temporal or spatial emission impacts. Any impacts that do occur will be minimal, and will not be sufficient to interfere with California's attainment demonstration or RFP requirements. As explained in more detail in the ISOR, this is basically because the total amount of credits that could potentially be generated represents a relatively small amount of VOC emissions, even if they accumulate over time. Staff's analysis indicates that credit use will represent no more than 2 to 6 percent (depending on the year) of the total emissions inventory for consumer products. In addition, the HCP regulation specifies that all outstanding credits will expire on January 1, 2010 (see section 94567(g)), thereby preserving the overall emission reductions committed to in the SIP for the consumer products category.

APPROVABILITY ISSUES

4. **Comment: Environmental Benefit.** 40 CFR 51.493(a)(1) requires that, "The statement of goals must include the goal that the program will benefit both the environment and the regulated entities. The program shall be designed so as to meaningfully meet this goal either directly, through increased or more rapid emissions reductions beyond those that would be achieved through a traditional regulatory program, or, alternatively, through other approaches that will result in real environmental benefits." In the preamble to this regulation (59 FR 16694, April 7, 1994), EPA further clarifies that, "Environmental benefits can be created most directly by EIPs that require increased or more rapid emissions reductions beyond those that would be achieved through a traditional regulatory program. Specifically, a 10 percent increase in emission reductions would presumptively meet this benefits sharing goal."

CARB's September 26, 1997 "Initial Statement of Reasons for Proposed Hairspray (page I.4) states that, "staff anticipates an overall environmental benefit because more credits are likely to be generated than will be used." However, there are no assurances in the program design that this environmental benefit will occur, nor assurances that emission reductions at the beginning of the program will not result in significant emission increases at the end of the program. In order to comply with 40 CFR 51.493(a)(1), we recommend

revising the Hairspray Credit Program rule to automatically retire 10 percent of all credits generated for the benefit of the environment.

Agency Response: As explained in the response to Comment No. 2, the EIP rules constitute policy guidance, and are not binding on this discretionary program. Therefore, there is no legal requirement that the HCP regulation must generate any environmental benefit. Even if the EIP rules did apply, they allow considerable flexibility and do not require that a "benefit" must be in the form of a 10 percent increase in emission reductions. Section III.D.1. (Program Goals and Rationale) of the preamble of the EIP rules states:

> "The final rules reflect that it most appropriately falls to the States to determine the type and extent of benefits sharing that is practicable and appropriate, given the unique circumstances that any particular discretionary EIP is designed to address. Therefore, the final rules do not require any specific formula for benefit sharing. However, the final rules do recognize that the issue of benefits sharing will be part of the political consensus building process associated with designing a discretionary EIP." (59 FR 16694; April 7, 1994)

Even though showing a benefit is not legally required, the ARB believes that the HCP will, in fact, result in a benefit both to the environment and to regulated entities. In Chapter V of the ISOR, ARB describes the expected benefits of the program. The program will benefit the environment because it encourages early and extra emission reductions from hairsprays (which are the largest source category for VOC emissions in the consumer products arena), promotes the development and demonstration of low-VOC technology for hairsprays and its possible application to other consumer products, and preserves the SIP commitments for emission reductions from consumer products.

In response to the U.S. EPA's comment, however, the ARB added language to section 94560 to explicitly state that the goal of the program is to benefit both the environment and regulated entities. The ARB has also added a new subsection 94567(h), which is designed to ensure that the program provides an environmental benefit by specifying that if certain circumstances are met, credits will be discounted by five percent upon use. Section 94567(h) is discussed in more detail in Section III of this FSOR, and in the response to Comment No. 15 below.

5. **Comment: $[\text{VOC Content}]_{\text{baseline}}$.** Paragraph 94564(a) generally defines $[\text{VOC Content}]_{\text{baseline}}$ to mean the lower of either actual or allowable VOC contents in a hairspray product. This provision was recently modified, however, to state that, "... Where the applicable product has not been reformulated, paragraphs (2) or (3) shall apply." We are concerned that this would allow credit generation for products that have had low VOC contents for many years and did not reformulate as a result of this rule.

While there may not be actual products like this that would effectively increase emissions under this provision, it would be inappropriate for us to approve the provision and precedent as written. EPA and CARB staff have discussed including a cut-off date in the provision which may adequately address CARB's intention and our concern regarding this provision.

Agency Response: In response to this comment, the ARB modified section 94564(a) and added subsection 94564(b)(5) to specify that no credits shall be generated for hairspray products initially offered for sale in California before October 11, 1990, that have not been reformulated after October 11, 1990. October 11, 1990 is an appropriate baseline date because it is the date of the public hearing at which the Board originally approved the hairspray standards. The ARB also modified the regulatory language in section 94564. Protocol for Calculating Hairspray Emission Reduction Credits, to clarify how [VOC Content]$_{baseline}$ is determined. These modifications address the issues identified by the U.S. EPA

6. **Comment: Auditing.** In the October 23, 1997, letter, CARB indicates that they intend to include a provision in the Board Resolution to require the Executive Officer to monitor the program, conduct an annual analysis of credit generation and use activities, identify any significant problems in the implementation of the program, propose any future regulatory modifications that may be appropriate, and report such information at least triennially to EPA. For consistency with 40 CFR 51.493(f)(3), the audit requirements should also include explicit requirements to track program results in terms of both actual emission reductions and, to the extent practicable, cost savings relative to traditional regulatory program requirements. In addition, in order to assure federal enforceability, these audit requirements must be included in the regulatory text.

Agency Response: As explained in the response to Comment No. 2, the HCP regulation is a discretionary program that is not legally required to comply with the U.S. EPA's EIP rules (including the provisions of 40 CFR 51.493(f)(3)). However, we believe that the auditing process requested by the U.S. EPA would provide useful information, and we have no objection to including this process in the text of the HCP regulation. Accordingly, the ARB added a new section 94575 (Program Evaluation) to the regulation. Consistent with 40 CFR 51.493(f)(3), this section includes the audit requirements previously committed to by the ARB and the additional provisions identified by the U.S. EPA.

7. **Comment: Definitions of SIP and Surplus.** The definitions of "State Implementation Plan" and "Surplus" contained in 94562(k) and (m) would allow modification of the SIP without EPA approval in violation of §110(i) of the Clean Air Act. To address this concern, section 94562 might be revised as follows: "State Implementation Plan means the <u>most stringent requirements contained in the</u> California State Implementation Plan submitted by the Air Resources Board to the United States Environmental Protection

Agency (U.S. EPA) or approved by the U.S. EPA, in accordance with requirements of the Clean Air Act." And: "Surplus means VOC emission reductions not required by or relied on by any hairspray standard in section 94509... or the State Implementation Plan. Surplus VOC emission reductions shall not include emission reductions occurring prior to January 1, 1998. For purposes of this article only, surplus VOC emission reductions shall include compliance with the second-tier standard of 55 percent VOC in hairsprays between January 1, 1998 and June 1, 1999."

Agency Response: In response to this comment the ARB modified the definitions of "State Implementation Plan" and "Surplus". In modifying the definition of State Implementation Plan (SIP), we used some but not all of the U.S. EPA's suggested language. We used the suggested language that the SIP is the plan "approved by" the U.S. EPA. This language is appropriate because it is consistent with the use of this term in the federal Clean Air Act. We did not follow the U.S. EPA's suggestion to incorporate the phrase "most stringent requirements", because this language would create too much uncertainty about what requirements actually apply. This language would also create consistency problems for the program, where credits can be awarded for early compliance with a 55 percent VOC standard that has been postponed from January 1, 1998 to June 1, 1999. It is unclear whether awarding "early" compliance credits in this situation would be consistent with a SIP definition which refers to the "most stringent" of these two requirements.

Regarding the definition of "Surplus", we made the modifications suggested by the U.S. EPA (with a few minor wording changes to improve readability). The suggested modifications are appropriate because they clarify and are consistent with the operation of the Hairspray Credit Program.

8. **Comment: Executive Officer Discretion.** As described in our June and July 1997 comment letters, we are concerned that this program allows the executive officer (EO) discretion to modify the SIP in violation of 110(i) of the Act. Most notably, the definition of documented sales record in paragraph 94562(g) allows the EO overly broad discretion to determine product sales and thus HERCs. While we have no reason to believe that California would exercise this discretion unreasonably, we cannot establish precedent for other states by approving this discretion into the SIP.

We appreciate CARB's addition of section 94574, Federal Enforceability, to address EPA's concerns about this EO discretion. EPA previously approved a similar provision to address limited EO discretion in other consumer product rules. However, documented sales records are an essential component of every application of this rule and not appropriate for broad EO discretion. Modifications to the rule that would address our concern include the following:

a. Include applicable, objective, predefined, and limited criteria which must be met in addition to gaining EO's approval.

b. Revise section 94574 to clarify that all HERC use or generation approvals must be submitted to EPA for inclusion into the SIP.

c. A combination of "a" and "b" whereby only those HERC use or generation approvals that were based on documented sales records or other elements that relied on EO discretion must be submitted to EPA for inclusion into the SIP.

Agency Response: We do not agree that the HCP regulation gives the Executive Officer overly broad discretion to determine product sales and credits. To address some of the U.S. EPA's concerns, however, the ARB modified the definition of "Documented Sales Record" to eliminate unnecessary language and provide more specific criteria for Executive Officer approval. The modified definition provides that a documented sales record must be a written, point-of-sale record (i.e., accurate records of direct retail or other outlet sales) or another system of documentation that provides similar information. The written records/documentation must allow accurate determination of the mass of product and the time period during which the product was sold for use in California. The modified language also provides that all compilations made by independent market surveying services must be made using methods consistent with widely-accepted practices of the business, scientific, or regulatory communities (see Comment 17 for an industry perspective on the use of such compilations). These are fairly explict criteria that limit the Executive Officer's discretion.

The ARB strongly believes that the program would be unworkable if nearly all Executive Officer discretion were eliminated, which would be the practical effect of the U.S. EPA's suggested changes. Some Executive Officer flexibility is necessary for the implementation of a program of this nature. The program design recognizes that each application will be unique as companies vary in size, target markets, product lines, and methods for keeping records. We also do not agree that the program allows the Executive Officer the discretion to modify the SIP in violation of section 110(i) of the Clean Air Act. As explained in the Response to Comment No.2, section 94574 is specifically designed to address this issue and avoid inconsistency with federal Clean Air Act requirements.

With the modified definition of "Documented Sales Record" and the current language of section 94574, the ARB believes that it is not necessary to use the combination approach suggested by the U.S. EPA. Specifically, we do not believe that section 94574 should be modified to provide that all HERC use or generation approvals (or all approvals that involve Executive Officer discretion) must be submitted to the U.S. EPA for inclusion into the SIP. The SIP submittal process is very slow and cumbersome. The federal Clean Air Act requires that a public hearing be held for every SIP submittal. SIP submittals routinely take more than a year, and often much longer, before approval is granted.

Building such delays and complexity into the program would make it significantly less likely to be used by industry. The current approach in section 94575 is the same approach used in all the other California Consumer Products Regulations; participating businesses are given the option of whether or not they want to go through the SIP submittal process. This approach allows businesses the option of incurring the additional bureaucratic hassle of the SIP submittal process, in order to gain the advantage of protection from possible federal enforcement action. We believe that the current approach is better and much more practical than the U.S. EPA's suggested approach.

RECOMMENDATIONS

9. **Comment: Confidentiality**. We are concerned that sections 94563(a), 94566(a), and elsewhere might bind EPA to the public disclosure provisions outlined in state regulations and unacceptably supersede federal regulations. These provisions should be revised to clarify that information provided to CARB and claimed by the manufacturer as confidential will be handled by CARB in accordance with the referenced state provisions.

Section 114 of the Clean Air Act specifically states that: "Any records, reports or information obtained under subsection (a) of this section shall be available to the public, except that records...(other than emissions data), to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person..." In addition, we provided relevant sections from the draft Open Market Trading Guidance (OMTG) in our June 19 letter. The draft OMTG specifically states that the public must have access to all information that is required in notifications to the regulatory agencies. When the OMTG is finalized, we expect to use it to evaluate EIP programs that have not yet been approved into the SIP. It is unclear to us whether the draft hairspray credit rule provides for public access to information as outlined in the CAA and draft OMTG.

Agency Response: As requested, the ARB modified sections 94563, 94566, and 94568 to clarify that the confidentiality provisions of the HCP regulation apply only information in the custody of the ARB, and are not intended to apply to information in the custody of the U.S. EPA. Regarding the draft OMTG, the U.S. EPA has not released a complete copy of the entire document. It is unclear whether or not the OMTG, as presently drafted, even applies to the HCP Regulation. In any event, the OMTG is currently in draft form and may change substantially before it is finalized. When the final OMTG becomes available, the ARB will review it and determine if any changes should be made to the HCP regulation.

10. **Comment: HERC Price**. The price of HERCs has been deleted from the list of reporting requirements contained in provision 94566(d). Our experience has been that market programs function more efficiently when the price of credits are publicly available, and we highly recommend that the Hairspray Credit Program include such a reporting

requirement. This information will also help CARB and the public evaluate the program's effectiveness.

Agency Response: The ARB did not modify section 94566(d) to require price reporting. Price reporting is not legally required by any applicable federal or state requirement. In addition, industry participants at public workshops on the HCP specifically requested that ARB not include credit price as a reporting requirement. The ARB does not wish to require businesses to provide such information, in an attempt to make the program work more efficiently, when the potential program participants do not believe that the information would be helpful and do not want to provide it. In the event that information on credit price is voluntarily provided by participating businesses, however, the ARB will compile this information and make it publicly available.

11. **Comment: Negative Credit Balance**. The rule should include greater disincentives for negative credit balances that are caused by poor estimates of product sales. This can be accomplished by requiring either: a) at the credit use application period, credit users purchase HERCs at some percentage above projected needs, or b) during the reconciliation period, credit users purchase more HERCs than needed to offset any negative balances. While the threat of enforcement provides some deterrence, an explicit structural disincentive in the rule can also be effective and has been proposed for trading rules in other states.

Agency Response: Pursuant to Health and Safety Code section 42400 *et seq*., substantial penalties are available for violations of the HCP regulation. The application of these penalty provisions to the HCP regulation is clarified in section 94573. Section 94573(e) provides that incurring a negative balance will constitute a single, separate violation for each day of the time period approved for credit use (i.e., the delayed compliance period or portion of the period). Additionally, program participants are required, pursuant to section 94571(d), to reconcile any credit shortfalls (i.e, provide additional credits) or be subject to additional penalties pursuant to section 94573(d)(2).

The ARB believes that these penalty provisions provide adequate disincentives against negative credit balances being incurred by program participants (i.e., a negative credit balance occurs if excess emissions are greater than the quantity of credits provided). We also believe that any additional disincentives would unnecessarily discourage participation in the HCP. Therefore, we did not make the modifications suggested by the U.S. EPA.

12. **Comment: Discrepancies Between Formulation Data and Test Data**. Section 94564(b)(2) describes a general procedure to resolve discrepancies between test results required by 94563(c)(2)(B) and formulation data required by 94563(b)(2)(F). We support the intention of this paragraph and recommend that it be applied to credit users as well as generators. In addition, we would like additional information about how this procedure will work in practices to ensure it will not result in inappropriate EO discretion.

Agency Response: In an application to request credits (i.e., credit generation), the VOC content is submitted in Part One of the application and the test results are submitted at a later date in Part Two of the application. Where there is a discrepancy, the Executive Officer may disapprove the application for credits. However, in the case where there is a discrepancy but the test results still show that the hairspray product has a VOC content equal to or less than 55 percent (e.g., the VOC content reported was 40 percent, but the test results showed a VOC content of 45 percent) the Executive Officer and the applicant may agree to an alternative VOC content (i.e., 45 percent) for the calculation of credits. All testing for VOC content must be conducted using the approved test methods specified in section 94515 for determining the VOC content of consumer products.

In an application to use credits (section 94568), an applicant must submit VOC content and test results together in a one-part application. If there is a discrepancy, the Executive Officer will not approve the application for credit use. This approach achieves the same effect for credit use (i.e., avoiding discrepancies between formulation data and test results) as the process for generating credits.

13. **Comment: Test Method Inaccuracies**. EPA believes it is appropriate to account for test method inaccuracies when quantifying HERC generation. However, the adjustment for test method inaccuracies has been deleted from the September 26, 1997 proposed regulations. We supported CARB's proposed methodology as outlined in the June 26, 1997 document, and recommend its reinstatement to ensure more conservatively that credits are real.

Agency Response: A three percent adjustment was included in an earlier draft of the HCP regulation, in an effort to correct for test method variability in ARB Method 310 (referenced in section 94515, title 17, CCR). This adjustment was deleted in the proposal made available for a 45-day comment period, because it was not justified on technical grounds. Method 310 already includes an adjustment for test method variability, and it is unnecessary to include a second adjustment in the HCP regulation.

B. Comments made by Jim Mattesich on behalf of CTFA/DuPont

14. **Comment:** CFTA and Dupont support the concept of the program and want a program that works by January 1, 1998. If it's done right, the program will provide necessary flexibility to industry. It can be a win for industry, the ARB, and for clean air in California. CTFA and Dupont would like to be able to say at this hearing that we support the particular proposal before the Board, but we cannot do so at this time because the final language for the program has not yet been drafted. We believe that we will be able to support the language that is ultimately drafted, but we will need to withhold judgement until we see the additional language the ARB will be drafting in response to the U.S. EPA's comments.

Agency Response: On February 11, 1998, the CTFA, Dupont, and other interested parties were provided the modified regulatory language through the "Notice of Public Availability of Modified Text" described above. No comments were received from the CTFA or Dupont during the 15-day comment period.

15. **Comment**: The U.S. EPA has asked for a 10 percent mandatory discount off the top for any credits that are created under the Hairspray Credit Program. Manufacturers should not be required to go to the time, trouble and expense of complying early, or getting super compliant product, and then have 10 percent of these credits taken away. This is unnecessary and not the right way to go.

Agency Response: The ARB agrees that a mandatory ten percent discount is not necessary or legally required (see the response to Comment No. 4). For the reasons discussed in the ISOR (see pages I.4 and Chapter V), we also believe that the program will provide a benefit to both the environment and the regulated entities. However, after discussions with stakeholders and U.S. EPA, the HCP regulation was modified to ensure that an environmental benefit will occur.

A new subsection 94567(h) was added to require the Executive Officer to determine whether the Hairspray Credit Program has demonstrated an environmental benefit by December 31, 2002. An "environmental benefit" is defined as a situation in which the total amount of credits generated is five percent greater than the total amount of HERCs used. If such an environmental benefit has not been demonstrated by December 31, 2002, then all credits will be discounted by an amount of five percent upon use. The ARB believes that this five percent discounting (if the specified criteria are met) is a reasonable compromise between the requests of U.S. EPA and industry. The provision will ensure some benefit for the environment, and industry may also benefit because the five percent discount may encourage the U.S. EPA to approve that program as a State Implementation Plan (SIP) revision.

16. **Comment:** Industry would be discouraged from using the HCP regulation if the regulation is not approved by the U.S. EPA as a SIP revision. If the HCP regulation is not approved into the SIP, credit generation and use would not comply with federal law. Industry cannot make multimillion dollar decisions if they think that they are ultimately not going to get both state and federal compliance out of it. People are not going to roll the dice on large numbers with this hanging over their heads.

Agency Response: ARB staff believes that the HCP and related amendments are in full compliance with all applicable state and federal requirements, including all requirements under the Clean Air Act for SIP submittals. The ARB intends to submit the HCP regulation to the U.S. EPA as a revision to the SIP, and to work with the U.S. EPA staff toward approval of the submittal.

17. **Comment:** The U.S. EPA wants to restrict the ARB's discretion in accepting "documented sales records" for determining product sales. It appears that U.S. EPA wants to require that there be no discretion in terms of looking at standard industry reporting systems, like Nielsen data or IRI data or other well-accepted data. The U.S. EPA seems to indicate that the only data that would be acceptable are retail receipt kind of data, which is an impossible requirement because all the sales in the State are not captured by computer. However, IRI and Nielsen-type data is the data that manufacturers use to make multi-billion dollar decisions upon, because they accept its reliability when they are deciding whether to market a new product and which way to go with the current product. Manufacturers accept it to make mega decisions. We think your staff could accept it as well for these limited purposes.

Agency Response: In this comment, the commenter essentially supports the ARB's proposed definition of "documented sales records" in section 94562(g), and expresses disagreement with the U.S. EPA's comments on this definition. This comment is addressed in the response to the Comment No. 8.