March 20, 2017

Chair Mary Nichols &
Members of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: South Coast Air Quality Management District Air Quality Management Plan
Agenda Item 17-3-4

Dear Chair Nichols and Board Members:

The South Coast Air Quality Management District Air Quality Management Plan (AQMP) that was enacted by the South Coast Governing Board on March 3, 2017 and sent to you for review and approval is grossly deficient and needs to be substantially revised. In particular, the AQMP fails because the South Coast Governing Board declined to use the powerful tool of an indirect source rule to curtain NOx and other emissions at local ports and warehouses, and because the unfunded $1 billion/year incentive plan that is the heart of the AQMP, which the Los Angeles Times correctly called "delusional," does not meet the legal standards of the federal Clean Air Act.

Indirect Source Rules.

As South Coast itself recognized in its 2012 AQMP:

> The Clean Air Act defines an indirect source as a "facility, building, structure, installation, real property, road or highway which attracts, or may attract, mobile sources of pollution." 42 U.S.C. § 7410(a)(5)(C); CAA § 110(a)(5)(C). Districts are authorized to adopt rules to "reduce or mitigate emissions from indirect sources" of pollution. (Health & Safety Code § 40716(a)(1)). The South Coast District is also required to adopt indirect source rules for areas where there are "high-level, localized concentrations of pollutants or with respect to any new source that will have a significant impact on air quality in the South Coast Air Basin." (Health & Safety Code § 40440(b)(3)). The federal Court of Appeals has held that an indirect source rule is not a preempted "emission standard." National

Association of Home Builders v. San Joaquin Valley Unified Air Pollution Control District, 627 F.3d. 730 (9th Cir. 2010).[1]

The provisions of Health & Safety Code § 40440(b)(3) are mandatory – beginning with "shall," not "may," but were ignored by the South Coast Governing Board. There is no question that the ports of Los Angeles and Long Beach are the largest sources of NOx emissions in the South Coast air basin, but through successful threats and lobbying they escaped any oversight in the AQMP in favor of loose voluntary measures – even though air emissions associated with the ports have begun to rise after declining during the 2008 recession and beyond.

NRDC is not asking for the AQMP to be sent back to South Coast to consider indirect source rules again. It is clear that the political will to follow the law is not present on the South Coast Governing Board. Instead, we ask ARB to enact indirect source rules covering ports and warehouses as proposed in the comment letter that NRDC and others are submitting with respect to the SIP plans for the San Joaquin Valley and South Coast air basins.

The Unfunded $15 Billion Incentive Plan.

Enforceability.

The AQMP fails to include enforceable measures to reach ozone attainment in 2023, relying instead on an unfunded $15 billion voluntary incentive plan. This is akin to buying a lottery ticket and hoping for the best.

Under the federal Clean Air Act, SIPs must "include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights) ... as may be necessary or appropriate" to meet the statutory attainment deadline.[2] While voluntary measures[3] have been approved by US EPA, e.g. in *BCCA Appeal Group v. EPA*, 355 F.3d 817 (5th Cir. 2003), the underlying requirement for enforceability does not disappear. Indeed the Fifth Circuit in *BCCA Appeal Group* cited with approval EPA guidance in determining whether the voluntary programs were adequate, stating that such measures should be described and identified; that states should "include supportable projections of emissions associated with the measures"[4]; and that "[t]he state must also make an enforceable commitment to monitor, assess, and report on the implementation and emissions effects of the VMEPs, as well as to timely remedy any shortfall in emissions reductions that do not meet the projected levels."[5] The court also reiterated EPA guidance that emissions reductions

[1] http://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2012-air-quality-management-plan/final-carb-epa-sip-dec2012/2012-aqmp-carb-epa-sip-submittal-approved-control-measure-ind-01.pdf

[2] 42 USC 7410 (a)(2)(A).

[3] The draft AQMP appears to be vague about whether the incentive programs are voluntary programs or economic incentive programs within the meaning of the CAA, and cites to EPA guidance for both. See p. 4-16 to 4-17 and Appendix IV. In our view, the incentive programs in the AQMP are the former, not the latter, because economic incentive programs must be, among other things, enforceable against sources, which the voluntary measures in the AQMP are not.

[4] *BCCA Appeal Group v. EPA*, 355 F.3d 817, 846 (5th Cir. 2003).

[5] *Id.*

be quantifiable, surplus, enforceable, permanent, and adequately supported by the state. In *BCCA*, the court ultimately found that voluntary measures complied with the above criteria including "a description of the measure, the identified or predicted participants, the basis for the quantified emission reductions, and commitments to monitor, assess, and report emission reductions for the voluntary measures."[6]

The AQMP fails to comply with this EPA guidance because it does not provide a factual basis for quantified emission reductions (which are themselves often described as "TBD") or a commitment to monitor, assess and report emission reductions for the proposed voluntary measures. Moreover, EPA guidance requires that voluntary measures must be surplus, enforceable, quantifiable, permanent, and anti-backsliding. Particularly relevant here is the requirement for the measures to be enforceable. According to the guidance, measures are enforceable against a source if:

(1) They are independently verifiable;
(2) Program violations are defined;
(3) Those liable can be identified;
(4) For emerging measures, the State and the EPA maintain the ability to apply penalties and secure appropriate corrective action where applicable;
(5) They are enforceable in accordance with other EPA guidance on practicable enforceability;
(6) For voluntary measures, the EPA maintains the ability to apply penalties and secure appropriate corrective action from the State where applicable and the State maintains the secure appropriate corrective action with respect to portions of the program that are directly enforceable against the source;
(7) Citizens have access to all the emissions-related information obtained from the source;
(8) For emerging measures, citizens can file suits against sources for violations.[7]

The AQMP does not comply with factors 1-6 in the EPA guidance listed above, and if factor (7) is met, that would be only due to future Public Records Act requests.

South Coast staff have talked about "pivoting" to regulation if voluntary measures are not met, although nothing in the AQMP addresses how or when that would occur. On that topic, the EPA guidance states that voluntary programs should be accompanied by evaluation programs. The program should be specific and tailored to "accurately evaluate the voluntary measure." Evaluation of a voluntary measure should take place within 18 months (1 year to test the measure, 6 months to review it), and every three years thereafter.

In the case that an evaluation of the program demonstrates that the voluntary or emerging measure has been ineffective, a SIP submittal should "include an enforceable commitment that if the State learns through program evaluations (or by other means) of a shortfall (i.e., projected

[6] *Id.* at 847.
[7] EPA, Guidance, "Incorporating Emerging and Voluntary Measures in a State Implementation Plan (SIP)," issued September 2004, pp. 3-4, available at https://www.epa.gov/sites/production/files/2016-02/documents/emerging_vol_measures.pdf.

pollutant reductions were not or will not be achieved), the State will quickly correct the problem by providing enforceable emission reductions from other sources or by showing that the emission reductions are not needed for attainment, maintenance, or RFP/ROP."[8] In other words, where evaluation of a voluntary measure indicates a failure to achieve required reductions, the state should either make a showing that the emission reductions relied on in the voluntary measure are not needed to make attainment, or use a SIP revision to adopt other enforceable emissions reductions. This duty to correct a shortfall is timebound. If a rulemaking is not required for the SIP revision, any correction should be implemented "as soon as possible, and no later than one year after the program evaluation is completed (or when a State learns of the shortfall)"; if rulemaking is required, the state "should proceed as expeditiously as possible" and correct the shortfall within two years of its discovery.[9] These timeframes are not applicable where the measure is necessary to show attainment or ROP—at that point, "the timeframe to correct a shortfall cannot exceed the statutory attainment or ROP milestone date for the nonattainment area" and "[f]ailure to address this shortfall on a timely basis could lead to a finding of nonimplementation under section 179(a)(4) of the CAA" and imposition of sanctions.[10] These timing deadlines in the EPA guidance are particularly important now because of the relatively short time frame for ozone NAAQS compliance in South Coast.

EPA Guidance provides similar frameworks for programs utilizing voluntary mobile source emission reductions (VMEPs). In general, a valid SIP for a VMEP "1) identifies and describes a VMEP; 2) contains projections of emission reductions attributable to the program, along with relevant technical support documentation; 3) commits to monitor, evaluate, and report the resulting emissions effect of the voluntary measure; and 4) commits to remedy in a timely manner any SIP credit shortfall if the VMEP program does not achieve projected emission reductions."[11] As with the guidance for voluntary stationary controls, "In the event the voluntary measure does not achieve the projected emission reductions, the State, having previously committed in its SIP to remedying such shortfalls, will pursue appropriate follow-up actions in a timely fashion including, but not limited to: adjusting the voluntary measure, adopting a new measure, or revising the VMEP emission credits to reflect actual emission reductions, provided overall SIP commitments are met."[12] This language is absent from the AQMP.

Nine percent limit for voluntary measures.

EPA guidance explicitly limits the extent to which a SIP can rely on voluntary measures to achieve required emissions reductions—in total, a state SIP may rely on voluntary measures from stationary and mobile sources to constitute 9% of required emissions reductions. For stationary sources, voluntary reductions may constitute up to a presumptive limit of 6% of

[8] *Id.* at pp. 21-22; *id.* at p. 21 ("The State should enforceably commit to complete an initial evaluation of the effectiveness of each measure no later than 18 months after putting the measure in place (one year to run the measure and six months to analyze the data to determine the measure's effectiveness).").
[9] *Id.* at p. 12.
[10] *Id.* at p. 22.
[11] EPA, Guidance, "Incorporating Voluntary Mobile Source Emission Reduction Programs in State Implementation Plans (SIPs)," issued October 1997, p. 2, *available at* https://www.epa.gov/sites/production/files/2016-05/documents/vmep-gud.pdf.
[12] *Id.* at p. 5.

required emissions reductions.[13] According to the guidance, "[a]ny request for a higher limit will be reviewed by EPA on a case-by-case basis" and a higher limit may be approved where the State makes a clear and convincing justification.[14] In addition, the guidance for voluntary mobile source emission reduction programs sets a 3% limit.[15]

Here, voluntary measures are relied on for the great bulk of needed NOx reductions. The AQMP simply does not make the clear and convincing showing justifying this, especially since it does not contain available, feasible control measures such as indirect source rules for ports and warehouses.

Adequate state resources.

The AQMP contains a wish list of potential funding sources but not one cent of dedicated funds to fund the massive changes in mobile sources contemplated in the plan. CAA section 110(a)(2)(E)(i) requires SIP submissions to provide necessary assurances that personnel and funding will be adequate to implement the SIP.[16] The adequate state resource provision requires each SIP submission to contain "necessary assurances that the State . . . will have adequate personnel [and] funding . . . to carry out such implementation plan." According to EPA Guidance, this provision indicates that "all SIP creditable programs . . . must demonstrate adequate personnel and program resources to implement the program."[17] EPA has also promulgated a binding regulation requiring SIPs to meet particular factors in order to be in compliance with the "adequate state resource" provision.[18] According to this regulation, SIP submissions must include (1) "a description of the resources available to the State and local agencies at the date of submission of the plan," (2) a description of "any additional resources needed to carry out the plan during the 5-year period following its submission," and (3) "projections of the extent to which resources will be acquired at 1-, 3-, and 5-year intervals."

For instance, guidance promulgated in 1978 directs that SIP submissions should include:

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[13] EPA, Guidance, "Incorporating Emerging and Voluntary Measures in a State Implementation Plan (SIP)," issued September 2004, p. 9, *available at* https://www.epa.gov/sites/production/files/2016-02/documents/emerging_vol_measures.pdf ("The presumptive limit is 6 percent of the total amount of emission reductions required for the ROP, RFP, attainment, or maintenance demonstration purposes. The limit applies to the total number of emission reductions that can be claimed from any combination of voluntary and/or emerging measures, including those measures that are both voluntary and emerging.").

[14] *Id.*

[15] A state may use 3% of total reductions needed for attainment to be from VMEPs, as long as the SIP describes the VEMP program and "projects emission reductions attributable to the program." The state can take credit for "realistic emission reduction estimates" from a VMEP program as long as the state provides provisions in the SIP to "monitor, evaluate, and report the emissions effect of the voluntary program." In addition, the state "must commit to remedy any emission reduction shortfall in a timely manner if the VMEP program does not achieve projected emission reductions." Voluntary Mobile Source Programs: Crediting Innovation and Experimentation Brochure, available at https://www.epa.gov/state-and-local-transportation/voluntary-mobile-source-programs-crediting-innovation-and.

[16] Clean Air Act Section 110(a)(2)(E)(i).

[17] Guidance Memorandum from Richard D. Wilson, Acting Assistant Adm'r for Air and Radiation to EPA Regional Adm'r (Oct. 24, 1997), https://perma.cc/KA94-UJVS.

[18] 40 C.F.R. § 51.280 (2016)

> An identification of and commitment to the financial and manpower resources necessary to carry out the plan . . . made at the highest executive level having responsibility for SIP . . . includ[ing] written evidence that the State, the general purpose local government or governments, and all state, local or regional agencies have included appropriate provision in their respective budgets and intend to continue to do so in future years for which budgets have not yet been finalized . . . [19]

Similarly, a 2013 guidance document on infrastructure SIP elements states that:

> [An] infrastructure SIP submission should identify organizations that will participate in developing, implementing, and enforcing EPA-approved SIP provisions related to the new or revised NAAQS and thus require resources for doing so. The infrastructure SIP submission should describe the resources that are available to these organizations for carrying out the SIP. Resources to be described should include: (1) those available to these organizations as of the date of infrastructure SIP submission; (2) those considered necessary during the 5 years following infrastructure SIP submission; and (3) projections regarding acquisition of the described resources. . . . [T]he air agency should explain in the infrastructure SIP submission how resources and personnel . . . are adequate and provide any additional assurances needed to meet changes in resource requirements by the new or revised NAAQS.[20]

It is true that courts have often given deference to agency determinations of adequate state resources, but the AQMP is an outlier in both the scope of state funding necessary and the complete lack of assurances that any of it will occur, and so such deference should not be applied here.

A note on the Bahr case.

The Ninth Circuit, in *Bahr v. EPA*[21], provided a strengthened interpretation of the Clean Air Act's contingency measure provision, rejecting EPA's reading of the statute that would have allowed already implemented measures to count as contingency measures. Instead, the court decided that based on the plain reading of the statute and meaning of the word "contingency," a contingency measure must be a future device to be implemented where emissions reduction measures fail.[22] The Ninth Circuit also rejected the Fifth Circuit's conclusion in *Louisiana Envtl. Action Network v. EPA*, 382 F.3d 575, 580 (5th Cir. 2004), holding that contingency measures

[19] Criteria for Proposing Approval of Revision to Plans for Nonattainment Areas, 43 Fed. Reg. 21,673, 21,675 (May 18, 1978).
[20] EPA , Guidance on Infrastructure State Implementation Plan (SIP) Elements Under Clean Air Act Sections 110(a)(1) and 110(a)(2) 1 n.2 (2013), pp. 40-41, https://perma.cc/JW2G-RFPB.
[21] *Bahr v. EPA*, 836 F.3d 1218, 1235 (Ninth Cir. 2016) (the court rejected a 2014 Final Rule by EPA interpreting the Clean Air Act's contingency measure provision, where EPA had stated that "[n]othing in the statute precludes a state from implementing such measures before they are triggered") (citing 79 Fed. Reg. at 33114. (relating to the PM-10 SIP for Maricopa County and interpretation of the contingency measure requirement in 7502(c)(9)).
[22] *Id.* at 1236.

could include measures that had already been implemented by the state.[23] The court remanded Arizona's SIP to the court for further consideration of the contingency measures.[24]

The AQMP includes the following language related to contingency measures that appears to have been explicitly rejected by *Bahr*:

> U.S. EPA guidance provides that contingency measures may be implemented early, i.e., prior to the milestone or attainment date. Consistent with this policy, States are allowed to use excess reductions from already adopted measures to meet the CAA Sections 172(c)(9) and 182(c)(9) contingency measures requirement. This is because the purpose of contingency measures is to provide extra reductions that are not relied on for RFP or attainment, and that will provide a cushion while the plan is being revised to fully address the failure to meet the required milestone. Nothing in the CAA precludes a State from implementing such measures before they are triggered.[25]

This relies on 2011 EPA guidance codified at 76 FR 57891 South Coast attainment plan for the 1997 8-hour ozone standard. While this is not the specific rule rejected in Bahr, the reasoning was explicitly rejected.

Conclusion

The AQMP needs to be amended by ARB to include tough and timely indirect source rules for ports and warehouses in the South Coast air basin. It also needs to be wholly rewritten to comply with EPA guidance as to enforceability, percentage of reliance on voluntary measures, and adequate state resources. If ARB and, ultimately, US EPA do not step up where South Coast has fallen short, the AQMP risks rejection by the courts while the clock is ticking towards the 2023 attainment date. Should that occur, and should ARB and South Coast ask for more time for attainment, NRDC will vigorously oppose. There is time, now, to reach ozone attainment by 2023, and approval of the AQMP in its current form will waste that time. NRDC asks that ARB revise the AQMP now to comply with state law and the federal Clean Air Act.

Thank you for your consideration of this letter.

Yours truly,

David Pettit
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Natural Resources Defense Council

[23] *Id.*
[24] *Id.* at 1237.
[25] Draft AQMP at 4-50.