EARTHJUSTICE

October 17, 2016

Chair Mary Nichols
Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: San Joaquin Valley 2016 Moderate Area Plan for the 2012 PM2.5 Standard

Dear Chair Nichols and Board Members:

On October 20, 2016, the California Air Resources Board (ARB) is scheduled to consider staff's recommendation to approve the San Joaquin Valley's latest plan required for meeting the 2012 PM2.5 national ambient air quality standards ("2016 Plan"). This plan seeks to demonstrate that attainment of the 2012 standard by the statutory attainment deadline of December 31, 2021 is not practicable and that the area should be reclassified as a serious nonattainment area with a deadline beyond 2021. We are writing to urge the Board to reject the proposed approval of the 2016 plan because it plainly does not meet the requirements of the Clean Air Act.

Under the Clean Air Act, particulate matter nonattainment areas can submit a plan that demonstrates that attainment by the statutory deadline is impracticable and request more time to prepare a new plan with more stringent controls and an extended attainment deadline. The Act, however, does not allow these areas to delay minimum efforts to reduce emissions while that subsequent plan is being prepared. These areas must still require reasonably available controls, demonstrate reasonable further progress in reducing emissions, and provide contingency measures to be implemented in the event that promised progress is not achieved. The 2016 Plan claims that these interim control and progress requirements are already being met, and that no new actions are required to comply with the Clean Air Act. This "do nothing" strategy cannot be approved for the following reasons:

(1) EPA Has Already Found that the District Has Not Evaluated *All* Available Control Measures.

The Plan claims the District has already adopted the most stringent measures available and that there simply are no additional measures. *See* Plan at 3-5 (pointing to analysis of control measures in the "2015 Plan for the 1997 PM2.5 Standard"). But EPA has rejected this very analysis, and identified a number of additional measures that should be considered in the Valley. *See* 81 Fed. Reg. 69396, 69397-400 (Oct. 6, 2016). On multiple occasions, EPA and Valley advocates have identified additional measures that could be adopted or tightened. Just recently,

EPA noted that the District should consider further strengthening of its fireplace rule. 81 Fed. Reg. 69393, 69395 (Oct. 6, 2016). The District is asking the Board to agree that it has "left no stone unturned" when EPA has already expressly rejected this claim

The ARB Staff Report seems to side-step this claim by concluding that "This [District] analysis shows that no new measures were identified that would advance attainment." Staff Report: ARB Review of the San Joaquin Valley 2016 Moderate Area Plan for the 2012 PM2.5 Standard, at 13 (Sept. 16, 2016). The problem with Staff's attempt to justify overlooking the District's false claim is that EPA has expressly rejected this justification in moderate areas claiming that attainment is "impracticable." EPA's regulations provide: "If the state demonstrates that the area cannot practicably attain the applicable PM2.5 NAAQS by the [moderate area attainment date], the state shall adopt <u>all</u> technologically and economically feasible control measures . . . ." 40 C.F.R. § 51.1009(a)(4)(ii) (emphasis added). This is in contrast to the option available in moderate areas able to demonstrate attainment, which requires the adoption of all technologically and feasible control measures "that are necessary to bring the area into attainment by such date." *Id.* § 51.1009(a)(4)(i).

In a plan claiming impracticability, the District and ARB must include adoption of "all" reasonable control measures even if they cannot be shown to advance attainment. The 2016 Plan plainly does not meet this requirement. It relies on an analysis of controls that EPA has already rejected as failing to include a variety of available control measures. ARB cannot avoid this defect by asserting (with no evidence) that additional measures would not make a difference. The 2016 Plan's claim that nothing more is required to meet minimum control requirements is plainly false and cannot be approved.

(2) <u>Because the Control Measure Demonstration is Flawed, So is the Reasonable Further Progress Demonstration</u>

In a plan demonstrating attainment, the reasonable further progress requirements is typically met by showing generally linear progress in reducing emissions from baseline levels to the levels necessary for attaining in a particular year (*i.e.*, by the most expeditious attainment date practicable). Because "impracticability" area plans do not demonstrate attainment, there is no way to draw a line from baseline emission levels to the emission levels that will provide for expeditious attainment. But the Act still requires a reasonable further progress demonstration to ensure that the required controls and resulting emission reductions are not "back-loaded" or otherwise delayed. EPA's implementation rule explains that, in these "impracticability" areas, "RFP would be calculated directly from the projected emission reductions from all control measures identified for the area (as RACM and RACT and additional reasonable measures), such that there is no difference between emission reductions estimated from control measures and those estimated for demonstrating RFP." 51 Fed. Reg. 58010, 58067 (Aug. 24, 2016).

In the 2016 Plan, because the control measure assessment was done incorrectly, the RFP targets are also incorrect. What this means is the 2016 Plan commitments to reducing emissions are less

stringent than required by the Act. Once again, the 2016 Plan strategy of doing nothing cannot be approved as complying with the Clean Air Act.

(3) "Excess Emissions" Cannot be used as Contingency Measures in a Plan Claiming Impracticability

The 2016 Plan claims that it can satisfy the contingency measures requirement without adopting any actual control measures because it can "skim" credit from "excess" emission reductions that go beyond what is required to achieve reasonable further progress. Plan at 3-14 to 3-16. But as noted above, in plans claiming that attainment by the statutory attainment deadline is impracticable, because there is no difference between emission reductions estimated from control measures and those estimated for demonstrating RFP, there are no "excess" emission reductions beyond RFP. EPA could not have been clearer: "[C]rediting an area for 'excess' emission reductions to satisfy the contingency measure requirement is not allowable for Moderate areas that cannot practicably attain by the statutory date." 51 Fed. Reg. at 58067 (emphasis added); *see also Bahr v. EPA*, 2016 WL 4728040 (9th Cir. Sept. 12, 2016) (rejecting use of "excess emissions" as contingency measures).

The 2016 Plan's claim that nothing new is required to meet the contingency measure requirement is again plainly flawed and must be rejected.

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ARB must exercise its oversight responsibilities and reject district plans that clearly fail to meet the requirements of the Clean Air Act. *See* H&S Code § 39602. ARB approval of the 2016 Plan promises only to further delay controls in a region desperate for the measures required by the Act.

Sincerely,

/s/

Paul Cort

Cc: Richard Corey, ARB
Elizabeth Adams, EPA

The Board Should Send the Plan Back to the District for Further Review.

In addition to these highlighted defects, Valley advocates will point out other issues to ARB Board members including the Plan's flawed control and precursor analyses, but these Board members typically assume that staff and EPA have worked out these issues and will not second-guess staff on legal and technical issues. That is why EPA engagement is critical. The defects highlighted here are so fundamental to the design of the plan and so plainly contrary to EPA's implementation rule and guidance that it is appropriate for EPA to advise ARB and the District to address these defects now.

The air quality planning process in the Valley has been marked by decades of delay and failure. EPA, in meetings with the District and Valley advocates, has acknowledged a need to engage earlier in the plan development process to ensure that time is not lost pursuing legally defective strategies, and to offer the District and State planning agencies the opportunity to address defects before formal EPA disapproval is required. Refusing to point out obvious flaws in the District's strategy is not only unfair to the planning agencies, it is unfair to the Valley residents who will be forced to breathe the filthy Valley air while adoption of the required control measures continues to be delayed.

Thank you for your attention to this matter and we look forward to your leadership on this issue.

Sincerely,

Paul Cort