



October 24, 2007

VIA ELECTRONIC MAIL

Ms. Mary D. Nichols
Chair
California Air Resources Board
P.O. Box 2815
Sacramento, CA 95812

Re: San Joaquin Valley 2007 PM₁₀ Maintenance Plan

Dear Chair Nichols:

On behalf of the Sierra Club, the Steven and Michele Kirsch Foundation, Concerned Residents of Lockwood Valley, Mary-Michal Rawling of Merced, and Tri-Valley CAREs, we submit these comments and urge you and the other members of the California Air Resources Board not to approve the San Joaquin Valley Unified Air Pollution Control District's 2007 PM₁₀ Maintenance Plan. A maintenance plan is supposed to be the strategy for ensuring that an area that is attaining the national ambient air quality standards will continue to maintain clean air. The maintenance plan looks at what conditions resulted in attainment and shows how these conditions will be preserved into the future. The plan therefore depends on a solid demonstration that the current conditions have resulted in attainment, and that these conditions are permanent and enforceable. Without this foundation, any strategy built upon preserving or even marginally improving the status quo cannot ensure that the standards will continue to be met.

Approval of the District's Maintenance Plan is not appropriate because the Valley continues to violate the 24-hour PM₁₀ standard. Nor is there any need to rush through approval of this plan and the related request to redesignate the Valley to attainment for PM₁₀.

Approval of the Maintenance Plan is Premature Because the San Joaquin Valley Has Not Yet Attained the National 24-Hour Standard for PM₁₀

From 2004 to 2006, the three-year period the District points to as demonstrating attainment of the PM₁₀ standards, monitors in the Valley measured exceedances of the 24-hour standard on September 3, 2004 (Corcoran), November 22, 2005 (Bakersfield), November 26, 2005 (Bakersfield), September 14, 2006 (Santa Rosa Rancheria), September 20, 2006 (Santa Rosa Rancheria), September 22, 2006 (Corcoran, Bakersfield, Tracy and Oildale), October 25, 2006 (Corcoran and Bakersfield), October 26, 2006 (Santa Rosa Rancheria), and December 8, 2006 (Corcoran and Bakersfield). Because many of the monitors that measured these exceedances only operate every three or six days, most of these exceedance measurements are treated as multiple days of exceedances. 40 C.F.R. part 50, app. K. Corcoran and Bakersfield therefore had at least eight exceedance days, Oildale had six, Tracy had one and the Santa Rosa Rancheria

had eighteen. Under the national 24-hour PM₁₀ standard, an area may exceed the standard at a location no more than three times over a three-year period. *Id.*

These exceedances were no different in timing, source, level or number than the PM₁₀ exceedances that have plagued the Valley from the outset. The exceedances all occurred during the fall, which is the period of high dust-generating agricultural activity before the rains begin. The measured concentrations ranged from 156 (just above the 24-hour standard) to 304 micrograms per cubic meter. The only difference is that the San Joaquin Valley Air District now seeks to have these exceedances ignored, where it has never made such an attempt in the past. We find it troubling and sad that the District has resorted to claiming that every single time the standard is exceeded, even if it happens multiple times every fall, it could not be the fault of the dust-generating activities that everyone in the southern Valley knows pollute the air, but instead must be the result of some “exceptional” event.

The Staff Analysis review of PM₁₀ trends is misleading because it assumes that every one of these exceedances can be ignored.¹ The Staff Analysis’ statistical evaluation of pollution trends and its conclusion that these trends are due to emission reductions in the Valley are not based on a scientific or technical determination, but on the legal assumption that all unfavorable monitoring data can be omitted. This assumption is inappropriate for most of these exceedances and flat wrong for others.

First, contrary to the statement on page four of the Staff Analysis, EPA has not excused the three days of exceedances in Corcoran triggered by the reading on September 3, 2004, nor the two days of exceedances measured in Bakersfield on November 23 and 25, 2005. 71 Fed. Reg. 63642, 63658-59 (Oct. 30, 2006). For the first of these exceedances, EPA concluded that it need not make a finding on whether the exceedance was due to an excusable exceptional event, because none of these exceedances would result in a violation of the 24-hour standard. *Id.* The November 2005 exceedances in Bakersfield were admitted by EPA in its August 27, 2007 proposal to affirm the attainment demonstration and concur with the requests to flag data as influenced by exceptional events. 72 Fed. Reg. 49046, 49063. Second, as a legal matter, the remaining exceedances have not been excused by EPA. EPA has only proposed to ignore these exceedances. Earthjustice will submit extensive evidence to EPA demonstrating why this proposal is technically indefensible and why EPA cannot finalize its decision to ignore these events. We suggest, at a minimum, that it is premature to approve the Maintenance Plan based on the Staff Analysis, which has not yet been determined to be legitimate as a legal matter. The staff cannot support its claims that the Valley has attained or that there is a statistically significant trend toward cleaner air until EPA makes a final determination on what monitoring data can in fact be ignored.

¹ Staff’s reliance on EPA’s October 30, 2006 attainment finding is misguided. First, EPA made its finding in the face of the several of the exceedances described below without explaining why these exceedances can be ignored. EPA’s new August 27, 2007 proposal to “confirm” that finding is an attempt by EPA to cure its arbitrary 2006 attainment finding by offering a *post hoc* technical rationale. This new rulemaking effort cannot undo the procedural defects that are currently being litigated in the original finding. Second, as noted, the Valley experienced several more exceedances following the October 2006 finding. These should have automatically negated the 2006 attainment finding, but at a minimum mean that the 2006 action is no longer sufficient to support an attainment finding.

There is No Need to Rush Approval of the Maintenance Plan

Notwithstanding the fact that EPA has yet to finalize its conclusions regarding whether the exceedances measured in 2006 can be ignored, the District and ARB staff are trying to rush this Maintenance Plan through the approval process. To our knowledge, no area in the country has asked to be redesignated from nonattainment to attainment based on such a short history of monitoring data. Most areas have waited beyond the minimum three-year period to assess whether the air quality improvement is truly a permanent condition or merely a product of favorable conditions. We are also unaware of any area that, in making such a redesignation request, has had to rely on ignoring so many monitored exceedances. The request here is premised on the District's new belief that every exceedance, no matter how regular, is the product of an exceptional event.

The Staff Analysis uses the tired scare tactic that quick approval is required to avoid loss of highway funding claiming that "[u]pdated budgets for PM₁₀ must be approved by U.S. EPA by January 2008." Staff Analysis at ES-3. This is simply not true. The staff can point to no legal authority for this claim. Moreover, the statement is misleading in that it implies that the only way to update budgets is through approval of this Maintenance Plan, which is also untrue. The truth is that the early 2008 timeline is one of convenience to allow the transportation planning agencies (e.g., the COGs) ample time for planning. COGs have had to deal with delays in the budgets on many occasions and can work with EPA to address such delays in a variety of ways. Instead of pushing for redesignation and approval of a maintenance plan, the District and ARB could also have addressed these budgets through a demonstration that the District is meeting its rate of progress (ROP) milestones for reducing the emissions inventories in the Valley. We believe the reason this option was not chosen is the same reason that EPA has yet to approve the last such ROP demonstration prepared by the District in 2006, which is that such a demonstration cannot be technically supported. That the District cannot demonstrate that it has achieved the necessary reductions in its inventories should be a red flag to any request to claim that the work in the Valley to address PM₁₀ is complete.

What is most absurd about the attempt to scare the Board into rushing through approval of the Maintenance Plan is that the conformity budgets relied upon in the Maintenance Plan do not match the budgets as revised by ARB. *See* Staff Analysis at 11-12. Staff have recommended that the Board approve the Maintenance Plan with the District's promise to make amendments to the Maintenance Plan at a later date. *Id.* at 12. The more appropriate agency decision is to wait until the District adopts these amendments and offers the complete plan for public review and comment. By the time the District submits a complete plan, the Board will have a better picture of whether in fact the District can defensibly claim attainment in the Valley.

These types of rushed attempts to avoid meaningful action in the Valley are the reason the District suffers from a lack of public trust. The public has increasingly turned to this Board to provide the voice of reason. We hope, notwithstanding the incomplete analysis and

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recommendations provided to you by your staff, that you will postpone a decision on this Maintenance Plan to ensure that the Valley is truly meeting the PM₁₀ standards before asking for redesignation to attainment.

Sincerely,

/s/ Paul Cort

Paul Cort
Staff Attorney
Earthjustice