CENTER ON RACE, POVERTY & THE ENVIRONMENT

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August 26, 2011

Andrew Steckel (Air-4)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105-3901

Re: Comments on Proposed Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District, Docket No. EPA-R09-OAR-2011-0571.

Dear Mr. Steckel:

The Center on Race, Poverty, & the Environment ("CRPE") submits these comments on behalf of The Association of Irritated Residents, Committee for a Better Arvin, and Comité Residentes Organizados Sevidores al Ambiente Sano (collectively "AIR").

I. INTRODUCTION.

AIR objects to EPA's proposed rule to approve the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) Rule 3170, "Federally Mandated Ozone Nonattainment Fee," as a revision to SJVUAPCD's portion of the California State Implementation Plan (SIP) ("Rule 3170") as required by Title I of the Clean Air Act ("the Act"). 42 U.S.C. § 7509.

Because the San Joaquin Valley is classified as an extreme 1-hour ozone nonattainment area, a SIP revision providing a penalty fee program under section 185 of the Act is required. 42 U.S.C. § 7511d (a). Rule 3170 fails to meet the requirements of section 185 and therefore AIR urges EPA to disapprove the SIP revision.

A. Factual Background.

In part because of exemptions for agriculture and oil production sources, and inadequate regulations, the San Joaquin Valley failed to attain the 1-hour ozone standard by November 15, 1999. 66 Fed. Reg. 56476 (Nov. 8, 2001). As a result, the San Joaquin Valley was reclassified as a severe nonattainment area by operation of law. *Id.* EPA subsequently found that California failed to submit required components of a severe area plan. 67 Fed. Reg. 61784 (Oct. 2, 2002). On April 16, 2004, the San Joaquin Valley was reclassified to an extreme 1-hour ozone nonattainment area. 69 Fed. Reg. 23951 (April 16, 2004). The Valley was required to submit an

extreme attainment plan by November 15, 2004 and New Source Review program amendments by May 15, 2005. 69 Fed. Reg. 20550 (April 16, 2004).

EPA rescinded the 1-hour ozone standard effective one year from the effective date of the 8-hour National Ambient Air Quality Standard ("standard," "standards," or "NAAQS") designation. 69 Fed. Reg. 23951, 23969 (April 30, 2004); 69 Fed. Reg. 23858 (April 30, 2004). Even though EPA has rescinded the 1-hour ozone standard, the discretionary and mandatory requirements applicable to 1-hour ozone nonattainment areas remain in effect. *See* 69 Fed. Reg. 23951, 23972-23974 (April 30, 2004); *see also South Coast Air Quality Management District v. U.S. EPA*, 472 F.3d 882 (D.C. Cir. 2006).

Oxides of Nitrogen (NOx) and Volatile Organic Compounds (VOCs) are ozone and fine particle (PM2.5) precursors. Both ozone and PM2.5 levels in the San Joaquin Valley constitute a public health crisis. The Environmental Working Group published the Air Resource Board's estimates that show 1,292 San Joaquin Valley residents die each year from long-term exposure to PM2.5.[1] Ozone and PM pollution exacerbate respiratory conditions, including asthma, increase hospitalizations and emergency room visits, contribute to cardiac illnesses, and increase school and work absenteeism.[2] The American Lung Association ranks the San Joaquin Valley counties of Kern, Tulare, Fresno, and Kings as the third, fourth, sixth, and eighth most ozone-polluted counties in the United States, respectively.[3] For the most particle polluted year-round counties, the American Lung Association ranks the San Joaquin Valley counties of Kern, Tulare, Kings, and Fresno as the first, second, fifth, and sixth most polluted counties.[4]

A document prepared jointly by the California Air Resources Board and the American Lung Association describes ozone as

> A powerful oxidant that can damage the respiratory tract, causing inflammation and irritation, and induces symptoms such as coughing, chest tightness, shortness of breath, and worsening of asthma symptoms. Ozone in sufficient doses increases the permeability of lung cells, rending them more susceptible to toxins and microorganisms. The greatest risk is to those who are more active outdoors during smoggy periods, such as children, athletes, and outdoor workers. Exposure to

[1] Renee Sharp and Will Walker, PARTICLE CIVICS: HOW CLEANER AIR IN CALIFORNIA WILL SAVE LIVES AND SAVE MONEY, Environmental Working Group at 19, attached as Exh. 1.
[2] American Lung Association, State of the Air: 2011, attached as Exh. 2.
[3] *Id*. at 16.
[4] *Id*. at 15.

> levels of ozone above the current ambient air quality standard leads to lung inflammation and lung tissue damage, and a reduction in the amount of air inhaled into the lungs. Recent evidence hs, for the first time, linked the onset of asthma to exposure of elevated ozone levels in exercising children (McConnell 2002). These levels of ozone also reduce crop and timber yields, damage native plants, and damage materials such as rubber, paints, fabric, and plastics.[5]

The document also shows the significant health effects and costs of exposure to fine particulate matter and ozone in California.

In late 2008, Jane V. Hall, Ph. D., and Victor Brajer, Ph.D., published a comprehensive analysis of the effects from not meeting the 1997 8-hour ozone standard and the 2008 PM2.5 standard. The health effects of not meeting these standards, and their concomitant economic values, inflict a conservative measurable cost of $5.7 billion *each year* - $1,600 person – in the San Joaquin Valley.[6] While these data are not directly related to the failure to meet the 1-hour ozone standard, attaining the 1-hour standard reflects progress towards attaining the 8-hour standard and the 2008 PM2.5 standard (NOx and VOC are also PM2.5 precursors).

Rule 3170 is an important control strategy to help the Valley attain both the 1-hour and the 8-hour ozone standards. The Valley continues to violate the 1-hour and 8-hour ozone standards, making this action exceptionally important to protect the health and welfare of Valley residents.[7]

B. Statutory and Regulatory Background.

"The Clean Air Act sets forth a cooperative state-federal scheme for improving the nation's air quality." *Vigil v. Leavitt*, 366 F.3d 1025, 1029 (9th Cir. 2004). Congress enacted the 1970 Clean Air Act ("the Act"), as amended in 1977 and 1990, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). The Act relies on a scheme of cooperative federalism, whereby the states develop and submit plans and regulations to attain the

[5] The California Air Resources Board and the American Lung Association of California, RECENT RESEARCH FINDINGS: HEALTH EFFECTS OF PARTICULATE MATTER AND OZONE AIR POLLUTION, January 2004 at 2.
[6] See Jane Hall and Victor Brajer, THE BENEFITS OF MEETING FEDERAL CLEAN AIR STANDARDS IN THE SOUTH COAST AND SAN JOAQUIN VALLEY AIR BASINS, November 2008, attached as Exh. 3.
[7] To attain the 1-hour standard, the Valley must not have a monitoring station that violates the standard more than one day each year, on average, during the three-year period preceding the attainment date, 40 C.F.R. part 50, Appendix H.

health-based standards. EPA's role is to ensure that such plans and regulations conform to the minimum requirements of the Act.

On May 19, 2011, the District adopted Rule 3170 in a misguided effort to implement section 185 of the Act, 42 U.S.C. § 7511d. Section 185 requires States with ozone nonattainment areas classified as severe or extreme to have attainment plans requiring major stationary sources of VOCs or NOx emissions to pay a penalty fee. *See* 42 U.S.C. § 7511d (a). Upon failure to attain the 1-hour ozone standard, the District shall impose the section 185 required fee of $5,000 per ton of major stationary sources' NOx and VOC pollution that exceeds 80% of each sources' emissions in 2010.[8]

EPA implemented an 8-hour ozone standard, thereby revoking the 1-hour ozone standard in June of 2005. However, EPA also required that 1-hour nonattainment areas remain subject to the 1-hour requirements to ensure continued progress toward the 1997 ozone standards. Technical Support Document for EPA's Rulemaking for the California State Implementation Plan as submitted by the California Air Resources Board Regarding San Joaquin Valley Unified Air Pollution Control District Rule 3170, "Federally Mandated Ozone Nonattainment Fee" ("TSD"), at 3. While EPA's transition rule from the 1-hour to the 8-hour standard did not include the section 185 penalty requirement, the United States Court of Appeals for the District of Columbia Circuit held that EPA violated the Act when it failed to include the section 185 penalties, for "section 185 penalties must be enforced under the one-hour NAAQS." *South Coast Air Quality Management District v. EPA*, 472 F.3d 882, 903 (D.C. Cir. 2006).

On January 5, 2010, EPA issued a Memorandum entitled "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS," in which it provided "Alternatives to Section 185 Fee Programs" ("Fee Programs Memo"). The Fee Programs Memo identified three possible types of alternative programs that "may be acceptable if [they are] consistent with the principles of section 172(e) of the CAA." Fee Programs Memo at 3.

The three alternative programs in the Fee Programs Memo EPA believes could satisfy the section 185 requirement, are programs that: (i) achieve the same emissions reductions; (ii) raise the same amount of revenue and establish a process where the revenues would be used to pay for emission reductions that will further improve ozone air quality; and (iii) that would be equivalent through a combination of both emission reductions and revenues. Fee Programs Memo at 5-6.

[8] The $5,000 per ton fee is an annual fee in 1990 dollars, which must be adjusted for inflation. *See* 42 U.S.C. §§ 7511d (a), (b)(3).

C. Procedural Background.

On August 19, 2009, the California Air Resources Board (CARB) submitted SJVUAPCDs alternative fee-equivalent program, including Rule 3170 and various state law authorities to EPA. The program consisted of an assessment of fees on certain major stationary sources (exemptions were provided for "clean emissions units" and sources that begin operation after the attainment year), use of a two-five year baseline average, a two-consecutive baseline average, and a impermissible definition of "major stationary source." 74 Fed. Reg. 41826 (Aug. 19, 2009).

On January 13, 2010, EPA finalized a limited approval/limited disapproval for Rule 3170. 75 Fed. Reg. 1716 (Jan. 13, 2010). EPA determined that the SIP revision submitted did "not fully meet the statutory CAA section 185 requirement." *Id*. at 1717. EPA found that the rule was deficient in: (i) exempting units that began operation after the attainment year; (ii) exempting certain stationary sources; (iii) defining the baseline period as two consecutive years; (iv) allowing an average baseline to be based on emissions over a period of 2-5 years; and (v) defining "major source" contrary to the definition in the Act. *Id*.

The disapproval started sanction clocks under section 179. 42 U.S.C. § 7509; 40 C.F.R. § 52.31. EPA shall impose offset sanctions by August 12, 2011 and highway sanctions by February 12, 2012, unless the District corrects the deficiency that gave rise to the disapproval. 42 U.S.C. § 7509.

On May 19, 2011, the SJVUAPCD amended Rule 3170 to address EPA's disapproval. The revised program consists of three parts: (1) the assessment of fees on certain major stationary sources; (2) the collection of an additional $12 for each motor vehicle registered in the San Joaquin Valley; and (3) a requirement that SJVUAPCD annually demonstrate and report to EPA, that the combined fees from stationary sources and motor vehicle registration fees are at least equal to the amount of fees that would have been collected under the fee program prescribed in section 185. If SJVUAPCD fails to make the demonstration, SJVUAPCD must remedy the shortfall through collecting additional fees from major stationary sources.

SJVUAPCD made the following changes between the August 2009 version of Rule 3170 and the May 2011 version:

1. The fee exemption for certain stationary sources was maintained, however the exemption was clarified to be pollutant specific (VOC and NOx).

2. The fee exemption for units permitted after the attainment year was dropped and replaced with an exception for replacement units.
3. The two-five year baseline period was changed to a 2010 standard baseline, as well as a two-consecutive year average.
4. The "major source" definition of 25 tons per year of NOx or VOC was changed to reflect 10 tons per year.

On July 1, 2011, the D.C. Circuit Court of Appeals vacated the Fee Programs Memo, on the ground that it was final agency action for which notice-and-comment rulemaking procedures were required by the Administrative Procedure Act. *NRDC v. EPA*, No. 10-1056, 2011 WL 2601560, C.A.D.C. 2011.

EPA now proposes to approve Rule 3170 as an alternative to the program required by section 185 of the Act. Rule 3170 retains two provisions that EPA previously identified as deficiencies in its disapproval; (1) "a clean unit exemption which is not provided for under section 185; and (2) an allowance for an alternative baseline period of two consecutive years (2006-2010) if the APCO [Air Pollution control Officer] determines it would be more representative of normal operations." TSD at 7. The Act allows for alternative baseline periods only if a source's emissions are irregular, cyclical, or otherwise vary significantly from year to year. 42 U.S.C. § 7511d (b)(2).

SJVUAPCD argues that any shortfall in funds will be addressed by an increased motor vehicle registration fee. The California legislature passed AB2522 in 2008 (codified at Health and Safety Code section 40610-40613) which authorizes SJVUAPCD to increase motor vehicle registration fees by an amount not to exceed $30 per motor vehicle per year. On October 12, 2010, SJVUAPCD approved the assessment of a new motor vehicle registration fee of $12 per motor vehicle per year. *See* SJVUAPCD Final Staff Report, Appendix D including Resolution No. 10-10-14. The California Department of Motor Vehicles will collect the registration fee pursuant to California's Vehicle Code § 9250.17 and Health and Safety Code § 40610-40613.

Rule 3170 also requires SJVUAPCD to track emissions from stationary sources, fees collected from stationary sources, and fees collected from motor vehicle registration and determine the amount of fees that would have been collected from stationary sources if SJVUAPCD had implemented section 185 directly. Rule 3170 § 7.2.1.3. The District must then submit an "Annual Fee Equivalency Demonstration Report" to EPA to demonstrate that the amount of fees actually collected is the equivalent to that which would have been collected from the section 185 program. Section 7.3 requires SJVUAPCD to collect additional fees from stationary sources to make-up any shortfall in funds.

II. EPA LACKS AUTHORITY TO APPROVE AN ALTERNATIVE FEE PROGRAM.

EPA, as a Federal Agency, has only that authority granted to it by Congress. Administrative agencies act only pursuant to authority granted by congress, and do not act with unlimited authority subject to Congressional restriction. EPA's role in approving SIP revisions is to ensure that plans and regulations conform to the minimum requirements of the Act. Therefore, EPA only has the authority to approve SIP revisions which satisfy the mandates of section 185 of the Act.

Congress has not provided EPA with the authority to approve a program that is alternative to that which is required by section 185 and it is therefore illegal for EPA to approve an alternative fee program. Section 185 requires in no uncertain terms that the fee program shall apply to major stationary sources, and provides no discretion to EPA that would allow it to approve an alternative program. Yet, EPA proposes to approve Rule 3170 as an alternative program, if a state "can demonstrate an alternative program's equivalency by comparing expected fees and/or emissions reductions directly attributable to application of section 185 to the expected fees and/or emissions reductions from the proposed alternative program." 76 Fed. Reg. 45212, 45213 (July 28, 2011).

EPA argues that section 172(e), the anti-backsliding provision, allows EPA to approve a program which is alternative to the section 185 program, if it is "not less stringent" than that applied to the area before EPA revised the NAAQS. *Id*. EPA previously put forth this reasoning in a memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Air Division Directors, "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS," January 5, 2010 ("Fee Programs Memo"). The DC Circuit Court of Appeals vacated this guidance on the ground that it was final agency action for which notice-and-comment rulemaking procedures were required. *Natural Res. Def. Council, Inc. v. EPA*, No. 10-1056, 2011 WL 2601560, C.A.D.C. 2011.

Approving a section 185 program alternative would violate the plain language of both section 185 and 172(e), which only applies where EPA revises an ambient air quality standard to *make it less stringent*. EPA concedes that the 8-hour ozone standard is *more stringent* than the 1-hour ozone standard, and therefore EPA lacks authority under section 172(e). 76 Fed. Reg. 45213 (July 28, 2011). Congress provided no authority to EPA to allow states to adopt alternative programs to that which Congress required in section 185.

A. Alternative Fee Programs Violate the Plain Language of the Act.

Approving fee program alternative to that in section 185 violates the plain language of the Act. Section 185's plain language is unambiguous, "each major stationary source…shall…pay a fee to the State as a penalty…" 42 U.S.C. § 7511d(a). "The baseline amount shall be…the lower of the amount of actual VOC emissions ("actual") or VOC emissions allowed under the applicable implementation plan ("allowables") during the attainment year…the Administrator may issues guidance authorizing the baseline amount to be… [an] average calculation for a specific source…if that source's emissions are irregular, cyclical, or otherwise vary significantly from year to year." 42 U.S.C. § 7511d(b)(2).

Thus, Congress has specified the parameters of the section 185 program and in doing so, excluded any program that does not meet these minimal requirements. Therefore, to approve a fee alternative program that does not meet the minimal requirements explicitly set out in section 185 violates the plain language of the Act.

B. Alternative Fee Programs Exceed EPA's Gapfilling Discretion.

Approving an alternative fee program exceeds EPA's discretion. Under *Chevron*, if Congress has not spoken to the precise question at issue and the statute is "silent or ambiguous," then an agency's interpretation must be a permissible construction of the statute. 467 U.S. 837 at 842–843. That is, where Congress has left gaps between statutory requirements, an agency has the limited discretion to permissibly fill such gaps so as to maximize the intent of Congress. *Id*. *See also S. Coast v. EPA*, 472 F.3d 882, 903. But where the "the Environmental Protection Agency disagrees with the Clean Air Acts' requirements…, it should take its concerns to Congress… In the meantime, it must obey the Clean Air Act as written by Congress and interpreted by this court." *Sierra Club*, 479 F.3d 875, 884 (D.C. Cir. 2007) (per curiam); see also *Natural Res. Def. Council, Inc. v. EPA*, No. 10-1056, 2011 WL 2601560, C.A.D.C. 2011. Here, EPA proposes to accept a program other than that provided by Congress in section 185 of the Act. 76 Fed. Reg. 45212, 45215 (July 28, 2011). Given that Congress provided a specific program, EPA has no discretion to approve an alternative. To do so, exceeds any discretion that the Agency may hold.

C. Alternative Fee Programs Are Impermissible Under Section 172(e).

Section 172(e) provides that in relaxing a NAAQS, EPA must "provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." 42 U.S.C. § 7502(e). EPA relies on section 172(e) for the mistaken

proposition that it has the authority to "allow states to adopt alternative programs." 76 Fed. Reg. 45212-45213 (July 28, 2011).

However, the Circuit Court for the District of Columbia already ruled that "[b]ecause these [section 185] penalties were designed to constrain ozone pollution, they are controls that section 172(e) requires to be retained." *So. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 903 (D.C. Cir. 2006). The *So. Coast* court upheld retention of several provisions, including nonattainment fees for regions that fail to meet the 1-hour ozone standard and contingency measures that are triggered when regions fail to meet that standard. *Id*. at 902-05. The D.C. Circuit recently reiterated this point in stating "[i]n other words, the Act creates a one-way ratchet, 'plac[ing] states onto a one-way street whose only outlet is attainment' of the NAAQS—even NAAQS EPA has subsequently replaced." *NRDC v. EPA*, 643 F.3d 311, 322 (D.C. Cir. 2011).

Therefore, EPA mistakenly finds discretion in section 172(e), where none exists.

III. RULE 3170 VIOLATES SECTION 185.

Section 185 requires that "each major stationary source of VOCs [or NOx] located in the area shall…pay a fee to the State as a penalty" for failure to attain the national primary ambient air quality standard for ozone by the applicable attainment date. 42 U.S.C. § 7511d (a). Rule 3170 violates section 185 because it exempts certain major stationary sources, extends the definition of baseline emissions to two years without the applicable section 185 compliance, and fails to penalize major stationary sources. Because section 185 does not allow for such exemptions, EPA must disapprove Rule 3170.

A. Rule 3170 Illegally Exempts Major Stationary Sources.

Section 185 requires that "*each* major stationary source" must pay the penalty fee where an area has failed to attain the NAAQS. 42 U.S.C. § 7511d (a).

Rule 3170 fails to meet this requirement; "[a]ny unit that is a clean emissions unit for NOx *shall not* be subject to the NOx fee requirements of this rule" and "[a]ny unit that is a clean emissions unit for VOC *shall not* be subject to the VOC fee requirements of this rule." Sections

4.1 and 4.2 (emphasis added). A Clean Emissions Unit is defined as an emissions unit that the APCO has determined meets one of the following criteria:

a. The unit is equipped with an emissions control technology with a minimum control efficiency of at least 95% (or at least 85% for lean-burn, internal combustion engines); or
b. The unit is equipped with emission control technology that meets or exceeds the requirements for achieved-in-practice Best Available Control Technology as accepted by the APCO during the period from 2006 through 2010.

Rule 3170 § 3.5 (April 21, 2011).

The Act provides no exemption for any major stationary source, regardless of the emission control technology employed. *See* 42 U.S.C. 7511d. EPA itself acknowledged as much in its 2009 disapproval. EPA stated that "…the exemption does not comply with CAA. Rather, it requires 'each major source' to pay the fee (*see* CAA section 185(a))." 75 Fed. Reg. 1716, 1718 (January 13, 2010). Therefore, Rule 3170 runs afoul of the section 185 obligation and EPA approval of Rule 3170 violates section 185.

B. Baseline Definition Illegally Includes Two Consecutive Years.

Rule 3170 also fails to meet the requirements of section 185 by allowing an alternative baseline period for major stationary sources. The Act requires that a source's baseline be determined by its attainment year emissions or it may be calculated over a period of more than one calendar year if a source's emissions are irregular, cyclical, or otherwise vary significantly from year to year. 42 U.S.C. § 7511d (b). EPA's Guidance on Establishing Emissions Baselines under Section 185 of the Clean Air Act (CAA) for Severe and Extreme Ozone Nonattainment Areas that Fail to Attain the 1-hour Ozone NAAQS by their Attainment, (March 21, 2008) ("Baseline Memo") provides that sources with annual emissions that are "irregular, cyclical, or otherwise vary significantly from year to year" could use the "baseline actual emissions" calculation method in EPA's Prevention of Significant Deterioration of Air Quality (PSD) regulations found at 40 C.F.R. § 52.21(b)(48). This method allows a qualifying source to calculate its baseline rate using relevant source records from any 24-consecutive month period within the past 10 years. Baseline Memo at 2-3.

Rule 3170 sections 3.2.1 and 3.2.2 provide that the baseline period shall be either calendar year 2010 or "[a]n alternative baseline period reflecting the average of at least two consecutive years within 2006 through 2010, if those years are determined by the APCO as more representative of normal source operation."

In the 2009 disapproval, EPA determined that "Rule 3170 does not conform to CAA section 185 because it allows all sources to calculate their baseline over a two-year period, regardless of whether emissions are irregular, cyclical, or otherwise vary significantly." 75 Fed. Reg. 1716, 1719 (Jan. 13, 2010). In the current proposed rule, EPA again admitted that the alternative baseline period of two consecutive years in section 3.2.2 was "not directly consistent with section 185" and stated that this inconsistently might result in a "shortfall in collected funds." 76 Fed. Reg. 45212, 45214 (July 28, 2011). Nevertheless, EPA has proposed full approval in violation of the Act.

C. Motor Vehicle Fees Do Not Cure Deficiencies.

Rule 3170 does not comply with section 185 even with the proposed collection of motor vehicle fees, under Vehicle Code § 9250.17 and Health and Safety Code § 40610-40613. Rule 3170 § 3.4. The imposition of fees on mobile sources does not cure the deficiencies of impermissible major stationary source exemptions and illegal baseline calculations. Section 185 does not permit such deficiencies, regardless of whether a state proposes to collect fees through an alternative program, such as motor vehicle fees.

Section 185 provides two limited exceptions. Sources that emit during an extension year under section 7511(a)(5) are not required to pay the fees and areas with a total population under 200,000 that can demonstrate "that attainment in the area is prevented because of ozone or ozone precursors transported from other areas" are exempt from the fees. 42 U.S.C. § 7511d (c) and (e). The imposition of motor vehicle fees does not qualify the San Joaquin Valley for either of the limited fee exceptions contemplated in the Act. As such, the mobile source fees in Rule 3170 do nothing to satisfy the section 185 requirements and the Rule remains deficient.

IV. RULE 3170 IS UNENFORCEABLE.

The Act requires each SIP to "include *enforceable* emission limitations and other control measures . . . ." 42 U.S.C. § 7410(a)(2)(A) (emphasis added); *see also Id.* § 7502(c)(6). The Act unambiguously mandates that the various measures and regulations upon which a state relies to comply with the Act must be included and approved as part of the SIP. *Id. See also Bayview Hunter Point Cmty. Advocates v. Metro. Transp. Comm'n*, 366 F.3d 692,695 (9th Cir. 2004).

Approved SIPs are enforceable by either the State, the EPA, or via citizen suits brought under section 304(a) of the Act. *Id. (citing Baughman v. Bradford Coal Co.*, 592 F.2d 215, 217 n. 1(3rd Cir. 1979); 42 U.S.C. § 7604(a). "Once the EPA approves a SIP, it becomes federal law." *El Comité Para el Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1066 (9th Cir. 2008) (*citing Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007); *Bayview Hunters Point* at 695). EPA must ensure that the measures upon which the attainment and progress demonstrations rely are actually enforceable, creditable controls approved into the SIP subject to the anti-backsliding provisions of the Act.

Rule 3170 is unenforceable because the air district methodology provided to calculate the equivalency is not an emission standard or limitation upon which citizens can bring suits. Additionally, enforcement of Rule 3170 is not practical because it is virtually impossible for citizens or EPA to determine whether the ARB and the District have, in fact, raised funds equivalent to that which would be generated under the section 185 penalty fee program and neither EPA nor private citizens can enforce the state mandated $12 motor vehicle fee. Because Rule 3170 is unenforceable EPA's approval is arbitrary and capricious.

A. The Fee Equivalency Demonstration System is Unenforceable.

Section 110(a)(2)(A) requires each SIP to include enforceable emission limitation and control measures such that any person can enforce such standards or limitations under section 304(a). 42 U.S.C. §§ 7410 (a)(2)(A) and 7604 (a).

Rule 3170 provides no standards or limitations and is therefore unenforceable. Instead the rule includes a fee equivalency demonstration system to estimate and calculate major source NOx and VOC fees (sections 7.2.1.3 and 5.1-5.3). Because the equivalency demonstration is not an emission standard or limitation, citizens are not able to enforce the manner in which the District demonstrates equivalency. The court in *El Comité Para el Bienestar de Earlimart v. Warmerdam,* explained that because the inventory at issue there was not itself a "standard or

limitation" as defined by the statute, it was not an "independently enforceable aspect[] of the SIP." 539 F.3d 1062, 1072-73 (9th Cir. 2008). Thus, in order to be "enforceable" any data or rubric that will be used to determine when and how the state has met it's obligation must be an "independently enforceable aspect[] of the SIP." *Id*.

The fee equivalency calculations provided in Rule 3170 are not "standards" or "limitations." Thus, Rule 3170 violates the Act's requirement that Rule 3170 be enforceable. *Id.* 42 U.S.C. §§ 7410 (a)(2)(A) and 7604 (a).

B. The Motor Vehicle Fee is Unenforceable.

ARB and the District propose to implement the $12 motor vehicle fee through state law mechanisms which are not federally enforceable.

State law authorizes the increased motor vehicle fee (Health and Safety Code § 40610 - 40613), state law requires the registration fee to be collected by the California Department of Motor Vehicles (California Vehicle Code § 9250.17), and state law requires these revenues to be used to fund incentive-based programs resulting in NOx and VOC emissions reductions (Health and Safety Code § 40610 - 40613). TSD at 7. Rule 3170 does not include the motor vehicle registration funding mechanism itself, but rather relies on state law to implement and enforce the fee. As a result, even if Rule 3170 becomes part of the California SIP, EPA will have no way to enforce the fee.

Thus, the San Joaquin Valley $12 motor vehicle registration fee is not enforceable by EPA or citizens, as required by the Act. 42 U.S.C. §§ 7410 (a)(2)(A) and 7604 (a).

C. EPA's Approval is Arbitrary and Capricious.

Moreover, the proposed rule fails to include any analysis or make any finding with respect to enforceability. The TSD sets forth a single, conclusory sentence stating that the rule is enforceable. "The rule is generally clear and consistent with the Bluebook and the Little Bluebook and other relevant EPA guidance regarding enforceability." TSD at 9. EPA must articulate a rationale connection between the facts found and the choice made. Because EPA fails to make any factual finding of enforceability, and fails to articulate a rational basis for concluding that Rule 3170 is enforceable, EPA's decision to approve Rule 3170 is arbitrary and capricious.

V. EVEN IF EPA HAD THE AUTHORITY TO CONSIDER ALTERNATIVE FEE PROGRAMS, RULE 3170 IS DEFICIENT.

Even if Congress provided EPA with the authority to approve an alternative fee program under section 172(e), Rule 3170 would not qualify because it is less stringent than the section 185 program. Section 185 is not a standard-based provision of the Act, nor is it based on a specific fee collection amount. The purpose of section 185 is to penalize major stationary sources in severe and extreme nonattainment areas. Therefore, the "stringency" of section 185 does not stem from an overarching dollar figure or emission target, but rather from three requirements; (i) that "each major stationary source" be pay the penalty fee; (ii) that the fee paid by each source be equal to $5,000, adjusted for inflation, per ton of VOC or NOx emitted in excess of 80 percent of the baseline; and (iii) the baseline amount be established from the attainment year inventory, unless the source's emissions are irregular, cyclical, or otherwise varying significantly from year to year. 42 U.S.C. § 7511d.

If an alternative program is permissible under section 172(e), then accordingly, it must not be "less stringent." In other words, an alternative program must still require each major stationary source to pay a penalty fee, that fee must be equal to the annual adjustment rate of $5,000 per ton of VOC or NOx emitted in excess of 80 percent of the baseline, and the baseline must be based on the attainment year, unless the source's emissions are irregular, cyclical, or otherwise varying significantly from year to year.

Rule 3170 fails to attain this level of stringency, as it does not charge all stationary sources penalty fees and the fees charged may be based on a two-year baseline even when the sources emissions are not irregular, cyclical, or otherwise varying significantly from year to year. The addition of a motor vehicle registration fee to offset any shortfall in funding due to these lesser stringencies, does not cure the deficiencies themselves.

A. Exemptions for Certain Stationary Sources.

Rule 3170 is less stringent than the section 185 program because it exempts certain stationary sources from paying penalty fees. One of the "stringencies" of section 185 is that it applies to "each major stationary source." As discussed above, in Section II, Rule 3170 exempts entire stationary sources from paying any penalty fees at all. *See* Rule 3170 § 4.0. Regardless of how clean a unit is, an outright exemption from the fee provides no penalty and is therefore less stringent than the section 185 program**.**

B. Baseline Definition Includes Two Consecutive Years.

Rule 3170 is less stringent than the section 185 program because it allows sources to use an alternative baseline, reflecting a two year average even if the source's emissions are not irregular, cyclical, or otherwise significantly varying from year to year. See discussion above in Section II. Without limiting the availability of the alternative baseline to those sources with irregular, cyclical, or emissions that otherwise vary significantly from year to year, the alternative baseline is automatically less stringent than required in section 185.

C. Motor Vehicle Fees Do Not Cure Deficiencies.

SJVUAPCD proposes to collect fees from mobile sources, specifically $12 per year motor vehicle registered in the San Joaquin Valley per year, to "make up for any shortfall in collected funds that might result from these two provisions [the exemption for certain major stationary sources and the allowance of alternative baselines]." 76 Fed. Reg. 45212, 45214 (July 28, 2011). Adding an additional fee collection mechanism does not increase the stringency of Rule 3170 such that it is equivalent to the section 185 program.

The "stringency" of section 185 does not stem from a dollar figure target, but rather from three requirements; (i) that "each major stationary source" be required to pay; (ii) the fee paid by each source shall be equal to $5,000, adjusted for inflation, per ton of VOC or NOx emitted in excess of 80 percent of the baseline; and (iii) that the baseline amount is established from the attainment year inventory, unless the source's emissions are irregular, cyclical, or otherwise varying significantly from year to year. 42 U.S.C. § 7511d.

Charging motor vehicle fees merely adds a revenue stream. It fails to make up for the shortfall of not charging all major stationary sources penalty fees and basing those fees on the attainment year baseline, unless the sources emissions are irregular, cyclical, or otherwise vary significantly from year to year. 42 U.S.C. § 7511d.

VI. TITLE VI VIOLATION.

Rule 3170 penalizes vehicle owners, already subject to stringent motor vehicle emissions standards and who pay extra at the pump to buy fuel that meets ARB fuel rule requirements, instead of owners of major stationary sources. Because the motor vehicle owners in the Valley are largely low-income and people of color, where owners of major stationary sources are not, this rule disparately impacts low-income and people of color, in violation of Title VI of the Civil Rights Act, EPA's regulations implementing Title VI, and President Clinton's Executive Order 12898. The Air District is a recipient of federal funding and shifts the fee burden from majority white owned major stationary sources to the Valley's majority population who are people of

color. Because the District receives federal funding, it is EPA's duty to ensure that the District does not administer its Clean Air Act programs in a manner that violates Title VI.

To the extent that EPA does not believe that it may consider this particular comment as appropriate under the Clean Air Act, AIR respectfully requests that EPA construe this particular comment as a complaint filed pursuant to EPA's regulations implementing Title VI of the Civil Rights Act.

VII. CONCLUSION.

For the reasons set forth above, EPA has no authority to allow states to adopt an alternative fee program, Rule 3170 violates section 185, is not enforceable, is deficient even as an alternative fee program, and violates Title VI of the Civil Rights Act. EPA should disapprove Rule 3170. Thank you for your time, consideration, and effort.

Sincerely,

/s
Laura Baker
Staff Attorney

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