ATTACHMENT B

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Via Regulations.gov
Docket ID No. EPA-R09-OAR-2023-0626-0001
Ms. Ginger Vagenas

RE: 89 Fed. Reg. 7320 (Feb. 2, 2024) (Proposed) Air Plan Disapproval; California Los Angeles-South Coast Air Basin; 1997 8-hour Ozone standard.

Dear Ms. Vagenas:

Comments of the South Coast Air Quality Management District Staff Regarding U.S. EPA's Proposed Disapproval of the South Coast Air Basin Contingency Measure Plan for the 1997 Ozone Standard [Docket ID No. EPA-R09-OAR-2023-0626-0001]

Thank you for the opportunity to comment on the proposed disapproval of the South Coast Air Basin Contingency Measure Plan (CMP) for the 1997 Ozone Standard (89 FR 7320). South Coast Air Quality Management District (South Coast AQMD) is the local agency responsible for air quality in Orange County, the urbanized portions of Los Angeles, Riverside and San Bernardino Counties, and the Coachella Valley. While air quality has dramatically improved over the years, the region still exceeds National Ambient Air Quality Standards (NAAQS) for particulate matter and ozone, and experiences some of the worst air pollution in the nation. Over 17 million people reside in our region, and we are home to two-thirds of California's environmental justice (EJ) population. These frontline communities suffer the brunt of the impacts of air pollution. We estimate that approximately 1,600 premature deaths would be avoided annually if our region were able to attain the NAAQS.

When South Coast AQMD submitted the Contingency Measure Plan (CMP or Plan) in December 2019, we asked EPA to approve the Plan and to acknowledge responsibility for actions specific to federal regulated sources. We have been alerting EPA for years regarding the pressing need to take action on emission sources that are solely subject to federal regulatory authority. These are emissions that neither South Coast AQMD nor CARB has direct authority to regulate. Without federal action and with federal sources accounting for 36 percent of smog-forming emissions in 2023, and just under half of all emissions in 2037, it is impossible for the South Coast Air Basin (Basin) to attain the 1997 ozone standard and any future ozone standards.

As an extreme ozone nonattainment area, South Coast AQMD has implemented the most stringent regulations in the nation for stationary sources – power plants, refineries, and industrial facilities for which we have direct regulatory authority. We have established Best Available Retrofit Control Technology (BARCT) standards in rules that impose strict emission limits for virtually every combustion

category of stationary sources to reduce NOx emissions to the greatest extent feasible. Since the date of the 1997 ozone standard, we have cut emissions dramatically – emissions of nitrogen oxides (NOx), the key pollutant responsible for ozone formation in our region – have been reduced by over 75 percent. And currently, per our 2022 Air Quality Management Plan, we are implementing strategies to pursue zero emission technologies across all sectors wherever feasible.

South Coast AQMD has not been idle since the CMP was adopted in 2019. We have adopted or amended over two dozen rules to reduce precursor pollutants to ozone in the Basin since that time including:

> 2020: Rule 1107 – Coating of Metal Parts and Products, Rule 445 – Wood Burning Devices, Rule 1117 – Emissions from Container Glass Melting and Sodium Silicate Furnaces, Rule 1111 – Reduction of NOx Emissions from Natural-Gas-Fired, Fan-Type Central Furnaces, Rule 1179.1 – NOx Emission Reductions from Combustion Equipment at Publicly Owned Treatment Works Facilities, Rule 1178 – Further Reductions of VOC Emissions from Storage Tanks at Petroleum Refineries, Rule 1146 – Emissions of Oxides of Nitrogen from Industrial, Institutional, and Commercial Boilers, Steam Generators, and Process Heaters
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> 2021: Rule 1150.3 – Emissions of Oxides of Nitrogen from Combustion Equipment at Landfills, Rule 2305 – Warehouse Indirect Source Rule, Rule 1147.1 – NOx Reductions from Aggregate Dryers, Rule 1111 – Reduction of NOx Emissions from Natural-Gas-Fired, Fan-Type Central Furnaces, Rule 1109.1 Emissions of Oxides of Nitrogen from Petroleum Refineries and Related Operations
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> 2022: Rule 1135 – Emissions of Oxides of Nitrogen from Electricity Generating Facilities, Rule 461.1 – Gasoline Transfer and Dispensing for Mobile Fueling Operations, Rule 1134 – Emission of Oxides of Nitrogen from Stationary Gas Turbines, Rule 1115 – Motor Vehicle Assembly Line Coating Operations, Rule 1147.2 – NOx Reductions from Metal Melting and Heating Furnaces, Rule 1147 – NOx Reductions from Miscellaneous Sources, Rule 429 – Startup and Shutdown Provisions for Oxides of Nitrogen
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> 2023: Rule 1118 – Control of Emissions from Refinery Flares, Rule 1106 – Marine and Pleasure Craft Coatings, Rule 1107 – Coating of Metal Parts and Products, Rule 463 – Organic Liquid Storage, Rule 1178 – Further Reductions of VOC Emission from Storage Tanks at Petroleum Refineries, Rule 1153.1 – Emissions of Oxides of Nitrogen from Commercial Food Ovens, Rule 2202 – On-Road Motor Vehicle Options, Rule 1110.3 – Emissions from Linear Generators

Despite these aggressive actions, NOx emissions must be reduced even further to meet ozone standards. The Basin is home to the Ports of Long Beach and Los Angeles, the largest port complex in the nation. It should be no surprise that goods delivered to and transported from the ports have local emissions from ships, interstate trucks, and locomotives. Today, over 80 percent of NOx emissions are from mobile sources, and of these, it is the trucks, ships, aircraft, locomotives, and similar heavy-duty engines that are responsible for about three-quarters of these emissions. Indeed, most of the progress we've seen to date has been due to South Coast AQMD's and CARB's actions – since 1997 emissions under South Coast AQMD's and CARB's control have declined by 70 percent; yet the emissions subject to EPA's authority have only declined 15 percent. While CARB has developed and is implementing cutting-edge regulations to reduce mobile source emissions under its authority, EPA's rules have not yielded the same results, and

these federal sources are projected to grow over time. It is not possible for our region to meet the 1997 and future standards without the federal government addressing the sources under its control.

The Contingency Measure Plan in the 1997 AQMP laid out a roadmap of action that EPA needs to implement to reduce NOx emissions needed to meet ozone standards. However, in its proposed disapproval, EPA brushes this Plan aside, claiming that a local air authority cannot assign emission reductions to the federal government.

In fact, EPA has undertaken such voluntary measures for these emission reduction obligations in the past, including for the South Coast Air Basin in a 1997 approval of our 1994 AQMP. In the 1994 AQMP approval, EPA fully acknowledged the role of federal sources in causing high levels of ozone and that the region will be unable to meet air quality standards without further EPA regulation.[1] What was true almost 30 years ago is even more so today.

And it is not just our area that needs federal action to meet ozone standards. Regions of the country that have never had to contend with protracted ozone nonattainment are slipping into higher levels of ozone nonattainment. In the future, these areas will find themselves in the same position as South Coast AQMD unless EPA takes immediate action to reduce emissions from federally regulated sources.

If finalized, EPA's proposed disapproval will set in motion a series of events that ultimately result in the imposition of harsh economic sanctions in the region, including requirements that will make it much more difficult to obtain new air permits, as well as the loss of tens of billions in federal highway funds.

With this as background, we believe EPA has a duty to work with us as co-regulators to resolve the daunting challenge before us. We believe there are plausible paths under the Clean Air Act available to EPA. Such paths would allow for the development of a plan where all three agencies – South Coast, CARB, and EPA – leverage their respective authorities to achieve the emission reductions needed to meet ozone standards in our area. With this goal in mind, we ask that EPA consider finalizing the following actions:

EPA Action on the Contingency Measure Plan

As per our original ask, we believe EPA can voluntarily agree to take on the 67-69 tpd NOx emission reduction that we outlined in the Plan. In the proposed disapproval, EPA states that "the Contingency Measure Plan's assignment of NOx reductions to federal measures and sources subject to federal authority is not approvable as a matter of law" and that "EPA has consistently taken the position that states do not have authority under the CAA or the U.S. Constitution to assign SIP responsibilities to the federal government."[2] But as we describe above, EPA previously approved just such a plan relying on federal measures in the South Coast AQMD 1994 ozone SIP. In approving that plan in 1997, EPA stated that "the Federal Government should help speed clean air, not only in California but on a national basis."[3] EPA further recognized that "massive further reductions are needed for attainment in the South Coast and…attainment may be either very costly and disruptive or impossible if further reductions are not

[1] See 62. Fed. Reg. 1150 (Jan. 8, 1997).
[2] 89 Fed. Reg. 7320, 7325 col. 1 (Feb. 2, 2024).
[3] 62 Fed. Reg. 1150, 1151 col. 1. (Jan. 8, 1997)

achieved from national and international sources."[4] What EPA said almost 30 years ago is still true and serves as a model for how EPA should proceed today.

We note Congress intended EPA to regulate sources that states are preempted from regulating where needed to allow an area to attain the NAAQS. Further, there are several statements in the legislative history of the 1990 Clean Air Act Amendments indicating that sanctions should not be imposed where a state has no control over the sources causing nonattainment. However, with full disapproval, EPA puts South Coast AQMD squarely in the place of facing penalties and sanctions due to failure to meet the ozone standard from emissions from preempted sources. It does not make sense that a region with the most stringent rules and largest investments in advanced clean air technology deployment should face perpetual nonattainment and looming harsh economic sanctions with no ability to resolve the situation.

We provide detailed legal arguments as to why the proposed full disapproval of the CMP is inappropriate under these circumstances in our attached detailed comments.

Limited Approval of the Contingency Measure Plan

Other pathways are available short of full disapproval. A limited approval of the Contingency Measure Plan is entirely appropriate as there are elements of the Contingency Measure Plan that EPA should approve today. For example, EPA can and should approve the elements that South Coast AQMD and CARB committed to do that have already been implemented and have achieved the requisite emission reductions to date. These include emission reductions establishing BARCT limits for all equipment in the RECLAIM program that affects combustion sources in RECLAIM and non-RECLAIM sources, implementation of the airport MOU, and cleaner Tier 4 passenger locomotives.

The limited approval is justified on the basis that overall, the actions committed to and implemented by South Coast and CARB are SIP-strengthening.[5] As fully explained in the attachment, EPA has both the authority and the responsibility to implement federal measures where required to allow an area to attain the NAAQS. Therefore, EPA can and should approve the federal portion of the Plan with an enforceable commitment to develop measures to bridge the gap that would remain in the Plan if federal measures were not included. As part of that exercise EPA agrees to voluntarily accept responsibility for the portion of emissions under their control as outlined by the CMP. EPA could then defer action on the state and South Coast measures that have not yet been implemented if EPA concludes that full approval of those measures is not feasible.

Partial Approval of the Contingency Measure Plan

Should EPA find the above pathway isn't acceptable, we see it better that EPA proceed with a partial approval. A partial approval is appropriate for the same reason that a limited approval is the least that EPA can do – acknowledge the commitments that South Coast and CARB made in the CMP that have already been addressed and implemented. We then urge EPA to subsequently agree to take on the needed federal measures.

[4] Id. at 1152 col. 3-1153 col. 1.
[5] See U.S. EPA Memorandum, Processing of State Implementation Plan (SIP) Submittals, July 9, 1992.

Conclusion

All these paths outlined above require EPA work with South Coast AQMD and CARB with an open mind to solve the problem. Without this – if EPA finalizes the full disapproval that they have proposed – we will be in a place where harsh economic sanctions would be imposed with no way to turn them off until South Coast is somehow able to achieve an additional 108 tpy of NOx emission reductions – a number that is mathematically impossible without EPA action, and will nonetheless take many years to achieve even with EPA action. This would be an absurd result, and we strongly urge EPA to work with us to identify pathways that achieve healthy air as quickly as possible, without severe economic harm to our region.

We ask EPA to take these comments into consideration and work with us to finally get our region into attainment. As we have laid out, we believe there are multiple pathways available to EPA beyond a flat disapproval of our plan, pathways which will finally result in clean air for our residents. We offer the attached detailed comments on the proposed disapproval of the Contingency Measure Plan for your consideration as you evaluate how to proceed.

We and CARB stand ready to roll up our sleeves with EPA in partnership to tackle this critically important work. Thank you for your consideration of our comments.

Sincerely,

Wayne Nastri, Executive Officer
South Coast AQMD

DETAILED COMMENTS BY SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT REGARDING EPA'S PROPOSED RULE, "AIR PLAN DISAPPROVAL; CALIFORNIA; LOS ANGELES-SOUTH COAST AIR BASIN; 1997 8-HOUR OZONE," 89 FED. REG. 7320 (FEBRUARY 2, 2024)

DOCKET ID NO. EPA-R09-OAR-2023-0626-0001

Introduction and Summary

The South Coast AQMD staff appreciates the opportunity to comment on EPA's proposed disapproval of the 2019 Contingency Measure Plan ("Plan"), published at 89 Fed. Reg. 7320 (February 2, 2024). The Plan clearly demonstrated that attainment is impossible without significant emission reductions from federally regulated sources ("federal sources").

EPA claims that a plan that relies on federal measures is unapprovable as a matter of law. But in fact, EPA previously approved just such a plan relying on federal measures in the South Coast AQMD 1994 ozone SIP. In approving that plan in 1997, EPA stated that "the Federal Government should help speed clean air, not only in California but on a national basis." 62 Fed. Reg. 1150, 1151 col. 1 (January 8, 1997). And EPA recognized that "massive further reductions are needed for attainment in the South Coast and…attainment may be either very costly and disruptive or impossible if further reductions are not achieved from national and international sources." 62 Fed. Reg. at 1152 col.3-1153 col. 1. The same is still true today.

EPA's proposed disapproval is based on an erroneous legal position that a plan relying on federal regulation of federal sources is per se unapprovable. It is also arbitrary and capricious because it entirely fails to consider an important aspect of the issue before it—namely the role of federal sources in South Coast's ability to attain the ozone standard. And it fails to provide a reasoned explanation for the change in position between its 1997 plan approval and its current position that a SIP may not rely on emission reductions from federal sources.

Congress intended for EPA to regulate sources that states are preempted from regulating where needed to allow an area to attain the NAAQS. The legislative history of the 1990 Clean Air Act Amendments noted that sanctions should not be imposed where a state has no control over the sources causing nonattainment. Reliance on federal measures within the Contingency Measure Plan thus should not be the basis for disapproval.

In its proposed disapproval, EPA states the Plan does not contain any contingency measures. We strongly disagree and believe EPA should re-propose its action with either a proposed approval or at the very least explain its rationale for finding why the measures in the Plan do not qualify.

Detailed Comments

I. The South Coast Air Basin Cannot Attain the 1997 8-hour Ozone Standard Without Significant Emission Reductions from Federally Regulated Sources.

The South Coast Air Basin cannot attain the 1997 8-hour ozone standard without significant emission reductions from federal sources. The California Air Resources Board (CARB) State Strategy Table 4, page 32, sets forth the emission reductions needed from mobile sources for the South Coast Air Basin to attain the 1997 ozone standard. The emission reductions needed from ships, locomotives, and aircraft total 46 tons per day (tpd).[1] When also considering the emissions from on-road heavy-duty trucks that are registered outside of California, the region needs a total of 67-69 tpd of NOx reductions from federal sources.[2] The total of 67-69 tons from federal sources was derived by looking at the total additional tons needed and subtracting the tons obtainable by the state or South Coast AQMD. The Section 182(e)(5) measures in the 2016 AQMP totaled 108 tpd of NOx. Contingency Measure Plan, p. 35. Tons obtainable by the state or South Coast AQMD totaled 24-26 plus 15, or 39-41. *See* Contingency Measure Plan, p. 39, table 2-1. The difference is 67-69 (108 minus 39 is 69; 108 minus 41 is 67). Thus, the remaining shortfall was 67-69 tpd. Staff also analyzed the potential emission reductions from federal measures and identified up to 78 tpd that could be obtained from these measures. Contingency Measure Plan, p. 59, Table 5-3 and 59-65.,. Thus, the federal measures were expected to be able to obtain sufficient emission reductions to provide for attainment.

While total NOx emissions in the South Coast Air Basin have been reduced by almost 50% between 2012 and 2023, almost all of these reductions have come from sources under CARB or South Coast AQMD authority. For example, over this time, NOx emissions from light-duty vehicles have been reduced by over 70%. CARB and the South Coast AQMD are doing our part. In contrast, NOx emissions from aircraft, locomotives, and ocean-going vessels have *increased* by almost 10% over the same period.[3]

EPA contends that the states have sole responsibility for cleaning the air, which includes emissions from federal sources, even though they lack the authority to regulate those federal sources. Congress gave EPA the authority to regulate those sources, but EPA claims it has no responsibility to contribute to the states' attainment of the NAAQS. EPA should take responsibility for its fair share of emission reductions that are still needed to fulfill the Section 182(e)(5) obligation. Put simply, EPA needs to do its fair share.

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[1] Revised Proposed 2016 State Strategy for the State Implementation Plan (March 7, 2017), Table 4 p.32. *available at* https://ww3.arb.ca.gov/planning/sip/2016sip/rev2016statesip.pdf.
[2] Final Contingency Measure Plan, December 2019, Table 2-1, p. 39, *available at* https://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2016-air-quality-management-plan/1997-ozone-contingency-measure-plan/1997-8-hour-ozone-draft-contingency-measure-plan---120619.pdf?sfvrsn=10.
[3] Final Contingency Measure Plan, December 2019, p. 58.

It would be impossible to attain the standard without the required reductions from federal sources. Reaching attainment solely with emission reductions from South-Coast-AQMD- and CARB-regulated sources would require completely eliminating all emissions from *virtually all* such sources—which is not realistic.

According to the CARB 2018 updates to the California SIP, baseline emissions of NOx in 2023 in the South Coast Air Basin were anticipated to total 269 tpd. *See* Summary Table for 2023 NOx Emissions (appended to these comments). To attain the 1997 ozone standard, these emissions would need to be reduced to a carrying capacity of 141 tons per day by 2023.[4] Thus, emissions in the region would have needed to be reduced by 128 tpd.

If no further reductions come from federal sources, all 128 tons of reductions would need to come from state and locally regulated sources. This would mean, for example, completely eliminating *all emissions* from stationary and area sources (49 tpd), all emissions from California-regulated on-road vehicles (69 tpd), and 10 tpd of California-regulated off-road sources such as larger farm and construction equipment (about 20% of the total emissions of off-road sources). See Summary Table for 2023 NOx Emissions (appended to these comments).

It is not possible to completely eliminate all emissions from on-road, stationary, and area sources of NOx in the South Coast Air Basin. This would mean zero emissions from all power plants; manufacturers; boilers supporting hospitals, institutions, and businesses; commercial cooking and residential fuel combustion (heating, cooking, and water heating); emergency generators and water pumps; and California-based trucks, automobiles, and buses. Such a scenario is currently not possible, and even if it were, it would bring the region's economy to a standstill. For many of these sources, zero-emission options are not yet technically achievable or commercially available. For others, even if a zero-emission option will likely be available in the next decade or so, the costs may be over $100,000 per ton. Nor is it realistic to expect that all such sources would be entirely zero-emissions in the near future. Therefore, it is imperative that significant emission reductions come from federal sources. And it would be manifestly unfair to penalize the region and the State by disapproving the Contingency Measure Plan and triggering sanctions based on such emissions under federal control. As discussed below, it would also violate principles of the Constitution and congressional direction, and would be arbitrary and capricious, and thus subject to reversal in court.

Most importantly, it is a matter of life and death for those who suffer from the air pollution that CARB and South Coast AQMD cannot regulate. "Breathing air containing ozone can reduce lung function and inflame airways, which can increase respiratory symptoms and aggravate asthma or other lung diseases." 89 Fed. Reg. 7320, 7321 col. 2 (February 2, 2024). Federal sources contribute significantly to ozone's health effects in the South Coast AQMD, so it is essential for EPA to partner together with South Coast AQMD to reduce emissions from federal sources and thereby reduce those health effects.

[4] Final Contingency Measure Plan, December 2019, p. 2.

II. EPA's Proposed Disapproval of the Federal Measures Is "Not in Accordance With Law" Because a SIP May Call for Federal Regulation of Federal Sources. (5 U.S.C. § 706(2)(A))

EPA's action to approve or disapprove a SIP submittal is governed by the Administrative Procedures Act, (APA), 5 U.S.C. § 706(2), rather than by Clean Air Act section 307 (42 U.S.C. § 7607). *Missouri Limestone Producers Ass'n., Inc., v. Browner,* 165 F.3d 619, 621 (8th Cir. 1999). But the standards are very similar. Under the APA, agency action will be set aside if, among other reasons, it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An action will be set aside also if it is "contrary to constitutional right, power, privilege or immunity." 5 U.S.C. § 706(2)(B). And an agency may not take action that is "in excess of statutory jurisdiction, authority or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

Because the region cannot attain the NAAQS without significant reductions from federal sources, the Contingency Measure Plan includes provisions for control measures for these sources. The Plan calls for 67-69 tons per day of NOx reductions to be obtained from federal sources. Contingency Measure Plan, p. 39, Table 2-1. EPA contends that calling for such reductions from federal sources that the State is preempted from requiring—which EPA terms a "Federal Assignment"—is unlawful. EPA's position is erroneous and thus the proposed decision is not in accordance with law. It is inconsistent with both the Clean Air Act (CAA) and its own past practice. Congress contemplated that EPA would regulate federal sources to ensure the South Coast Air Basin can attain the NAAQS.

A. The Supremacy Clause Poses No Obstacle to Approval of the Contingency Measure Plan.

Although it concludes that it cannot, as a matter of law, approve a SIP that anticipates federal regulation of federal sources, EPA cites no authority for that proposition beyond general references to the CAA and the "U.S. Constitution." We presume that EPA was referring to Supremacy Clause. But the Clause does not preclude EPA from approving the Plan.

EPA is undoubtedly correct that California cannot *compel* EPA to regulate federal sources. *See North Dakota v. United States*, 495 U.S. 423, 434 (1990) (applying the intergovernmental immunity doctrine). But EPA fails to cite anything in the Contingency Measure Plan that purports to do so. The intergovernmental immunity doctrine is narrow and precludes only direct state attempts to control or discriminate against the federal government and its instrumentalities. *Id.* at 436-39. The Plan does neither.

Nor, contrary to EPA's general assertion, is the Plan preempted for calling for federal regulation of federal sources. Several appellate courts have noted that, upon EPA approval, a SIP becomes federal law. *See Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1096 (9th Cir. 2010) (citing *Safe Air For Everyone v. U.S. E.P.A.*, 488 F.3d 1088, 1091 (9th Cir. 2007)); *BNSF Ry. Co. v. Clark Cnty., Wash.*, 11 F.4th 961, 968 (9th Cir. 2021); *Ammex, Inc. v. Wenk*, 936 F.3d 355, 361-62 (6th Cir. 2019) (collecting cases). Courts have therefore concluded that

state regulation in an approved SIP cannot be preempted by federal law. *Ammex*, 936 F.3d at 362-63. Rather, the question is whether the SIP can be harmonized with other provisions of federal law. *Ass'n of Am. R.R.*, 622 F.3d at 1097 (emphasis added); *accord Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1156 (9th Cir. 2020).

EPA has offered no argument to suggest that the Plan could not be harmonized with other federal law when incorporated into California's SIP. On the contrary, the Plan only calls for EPA to exercise its authority as provided for in the Clean Air Act.

B. Congress Recognized that EPA Would Need to Regulate Federal Sources to Enable Some Nonattainment Areas to Attain the NAAQS.

In the 1990 Amendments to the Clean Air Act, Congress preempted the states from establishing emission standards for locomotives, farm and construction equipment, and other nonroad engines, which includes marine vessels. CAA § 209(e), 42 U.S.C. § 7543(e).[5] And for decades states have been preempted from regulating new motor vehicles, with California allowed to adopt its own standards with a waiver from EPA. CAA § 209(a), (b), 42 U.S.C. § 7543(a), (b).

As Congress debated the 1990 Amendments, members of Congress from California stated that unless EPA regulates these nonroad sources, the South Coast region would be unable to attain the ozone standard. Representative Carlos Moorhead (R-CA) stated that it would be impossible for Los Angeles to attain the NAAQS if EPA fails to regulate these sources.[6] Senator Pete Wilson (R-CA) also explained that if these sources are not controlled, California will not be able to comply.[7] In response to these concerns, Senator John Chafee (R-RI), the lead co-sponsor of the senate bill, assured the California delegation that Congress intended that EPA would regulate federal sources as necessary so that all areas could attain the standards. In response to a question from Senator Wilson regarding the Amendments, Senator Chafee explained that "EPA has the *obligation*…to adopt control measure[s] for sources which it exclusively controls when these controls are necessary to attain national [ambient air quality] standards."[8] Finally, when Congress enacted section 213 of the CAA, 42 U.S.C. § 7547, which obligated EPA to regulate nonroad sources, it stated in the Conference Report: "We expect EPA to carry out this mandate in a fashion which assures that states which are preempted will not suffer any additional [e]missions beyond what they themselves would have allowed."[9] This Conference Report reflects the views of the members from both the House and Senate and is the form of legislative history that provides the best evidence of legislative intent. *Dep't of Health & Welfare, State of*

[5] The CAA also preempts state and local governments from setting emission standards for aircraft. CAA § 233; 42 U.S.C. § 7573.
[6] Congressional Research Service, A Legislative History of the Clean Air Act Amendments of 1990, (Leg. History), p. 2613.
[7] Leg. History, p. 1125-26.
[8] Leg. History, p. 1127 (emphasis added).
[9] Leg. History, p. 1021

Idaho v. Block, 784 F.2d 895, 901 (9th Cir. 1986). Thus, Congress intended for EPA to regulate federal sources as necessary to allow all areas to attain the standards.

Accordingly, in the Plan, California was implementing congressional intent in calling on EPA to regulate sources over which it has regulatory control due to Clean Air Act preemption. EPA states that the Contingency Measure Plan "purports to shift responsibility to achieve reductions needed for the South Coast to attain the 1997 ozone NAAQS from the State to the federal government…." 89 Fed. Reg. at 7325 cols. 1-2. But the Plan does not "shift" responsibility to EPA: EPA already shares responsibility for attaining the NAAQS. As discussed above, Congress expected that EPA would adopt control measures for sources under its control where necessary to attain the NAAQS. Specifically, the preemption of non-road engine regulation for the states carried with it Congress's expectation that EPA would exercise its authority to regulate non-road engines as necessary to allow for attainment in the South Coast Air Basin.

C. EPA Has Previously Approved an Ozone Attainment Plan that Relied on Federal Measures and Acknowledged that It Had the Authority to Do So.

In contending that a plan relying on federal measures is "not approvable as a matter of law," 89 Fed. Reg. at 7325, EPA has ignored the fact that it has previously approved a South Coast Ozone SIP that proposed EPA action to control emissions from federal sources. That precedent demonstrates that EPA can approve a SIP that relies on federal action to regulate the sources that only EPA may regulate.

In its 1997 approval of the 1994 ozone SIP, EPA stated: "The 'Federal Assignments' portion of the SIP is approvable because it is consistent, in the overall context of the California SIP, with the Clean Air Act requirements." 62 Fed. Reg. 1150, 1153 col. 1 (Jan. 8, 1997). EPA based the approval on the fact that:

> ...both EPA and the State are committing to undergo the consultative process described above, and to promulgate controls determined by that process to be appropriate. Those EPA and State commitments are enforceable by citizens. Based on these commitments, EPA will assure that the gap in emission reductions represented by the consultative process, and needed to attain, will be closed.

Id. at 1153 col. 2. EPA's regulation committing to rulemaking is found at 40 C.F.R. § 52.238. EPA concluded that the SIP, with its reliance on federal measures, satisfied the requirement for a "demonstration that the plan …will provide for attainment" of the NAAQS as required by CAA § 182(c)(1)(A). 62 Fed. Reg. at 1153 col. 1. EPA's 1997 approval demonstrates the error in EPA's conclusion in the proposed disapproval that reliance on federal regulation of federal sources is "not approvable as a matter of law." 89 Fed. Reg. at 7325 col. 1.

It is true that, as EPA cites in the proposed disapproval, EPA said in 1997 that "under the Constitution and the Clean Air Act, EPA does not believe a state has authority to assign emissions reductions to the federal government." 62 Fed. Reg. at 1151 col. 2. However, EPA went on to explain, "Nevertheless, EPA believes that the Federal Government should help speed

clean air, not only in California but on a national basis." *Id.* EPA further explained that it "recognizes that massive further reductions are needed for attainment in the South Coast and that attainment may be either very costly and disruptive or impossible if further reductions are not achieved from national and international sources." *Id.* at 1152-53.

EPA's prior position is also consistent with its recognition in other contexts that a state may rely on federal measures in its SIP. In 1994, EPA issued guidance stating that its:

> ...policy of authorizing SIPs to take credit for reductions from Federal measures is consistent with the overall scheme of the Clean Air Act ozone nonattainment provisions, as well as the relevant provisions by their terms. Congress anticipated that attainment of the ozone primary national ambient air quality standards would result from a combination of State and Federal actions. As a result, the reductions from Federal measures are an integral part of Congress's blueprint for attainment. Therefore, SIPs should be allowed to account for those reductions.

EPA Office of Air and Radiation, "SIP Credits for Federal Nonroad Engine Emission Standards and Certain Other Mobile Source Programs, " November 23, 1994, *available at* https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/19941123_nichols_sip_credits_nonroad_engine_emissions_standards.pdf . As explained in the first sentence of the memo, EPA has allowed states to take credit for federal measures that were not yet promulgated. As explained above, EPA likewise has the authority to approve a SIP relying on federal measures and must do so here, where the need is most critical.

Indeed, EPA again recognized the need for—and approved the use of—federal measures when it approved the 2016 Air Quality Management Plan in 2019. In its proposed approval, EPA included Table 7, which listed measures to be at least partly implemented by EPA totaling 108 tons per day of NOx emissions reductions. 84 Fed. Reg. 28132, 28149-50 (June 17, 2019). These included measures for heavy-duty trucks (specifying federal action), aircraft, locomotives, ocean-going vessels, and off-road equipment. *Id.* Although EPA may argue that these measures were also to be implemented by CARB and/or the District, they clearly identified EPA implementation and EPA approved the Plan. 84 Fed. Reg. 52005, 52012" col' 3 (Oct. 1, 2019).

EPA points to several other instances in which it previously took the position that states may not assign particular regulations to EPA for adoption and implementation. 89 Fed. Reg. at 7325, col. 1, n. 46. But it ignores the discussion noted above in the 1997 approval, which entirely undercuts the suggestion that EPA *cannot* approve a SIP that calls for federal regulation of federal sources.

The proposed disapproval's conclusion that a SIP is "unapprovable as a matter of law" because it contemplates EPA action to reduce emissions from federal sources is inconsistent with EPA's past practice in approving at least one SIP that did just that. The proposed disapproval does not—and cannot—explain away that contradiction.

D. Congress Called for EPA Action in these Circumstances.

As discussed in Section III.A above, the 1990 Amendments to the Clean Air Act set up an expectation that EPA would regulate non-road engines, specifically in order to allow the Los Angeles region to attain the ozone standard. If this assurance had not been provided, the Clean Air Act might have lost the support of the California delegation and the preemption for non-road engines might not have been enacted. EPA recognized its obligations in approving the 1994 SIP, as discussed in Section III.C. But now, EPA refuses to live up to its end of the bargain, by refusing to enact federal measures for sources it knows CARB and South Coast AQMD cannot regulate. This refusal is directly contrary to Congressional intent and thus, is not in accordance with law.

E. If EPA Were to Reject the Contingency Measure Plan, It Would Need to Regulate Federal Sources as Part of a Federal Implementation Plan.

Because the South Coast Basin cannot attain the ozone NAAQS without reduction of the enormous emissions contributed by federal sources, the State cannot submit a revised Contingency Measure Plan that will show attainment without the "federal assignment" that EPA claims is unlawful. If the State cannot "correct the deficiency" in the SIP, EPA will be obligated to promulgate a federal implementation plan ("FIP") within two years. CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1); *Ass'n of Irritated Residents v. U.S. E.P.A.*, 686 F.3d 668, 675 (9th Cir. 2012). Because attainment in South Coast is impossible without regulation of federal sources, EPA would need to include regulation of federal sources in its FIP. This is because EPA's FIP must "provide for attainment of the relevant national ambient air quality standard." CAA § 302(y) (42 U.S.C. § 7602(y)). The Contingency Measure Plan merely anticipates that EPA will undertake the regulation it would be required to undertake regardless. Because EPA can approve a FIP in which it exercises its authority to regulate federal sources, it is illogical for EPA to refuse to exercise its regulatory powers to avoid the FIP (and accompanying sanctions). Under the circumstances, since a disapproval will ultimately result in a FIP and EPA will be forced to regulate federal sources to allow the region to attain, the only reason for disapproval is to impose draconian sanctions on the region.

* * *

In sum, EPA's conclusion that it cannot legally approve a SIP that includes a call for federal regulation of federal sources is unsupported and inconsistent with law and prior agency practice.

III. EPA's Proposed Disapproval of the Federal Measures is Arbitrary and Capricious and an Abuse of Discretion. (5 U.S.C. § 706(2)(A))

A. EPA's Proposed Disapproval Is Arbitrary and Capricious Because the Record Demonstrates that No Contingency Measures Could Achieve the Necessary Emission Reductions Without Reductions from Federal Sources.

EPA's proposed disapproval is arbitrary and capricious because EPA knows that the South Coast AQMD and CARB cannot adopt measures to attain the necessary reductions from federal sources, due to the Clean Air Act's preemption provisions. As explained in the Contingency Measure Plan, "[w]ithout further reductions from federal sources (i.e., OGV, aircraft, locomotives, out-of-state trucks), which account for 36% of NOx emissions, attainment of the 1997 8-hour standards is not possible by 2023." *Id*. at 39. But federal measures (including incentive measures) must be required to make up more than 36% of the remaining emission reductions for the Section 182(e)(5) commitment, because emissions from federal sources outside of California's control are expected to increase in the future without federal action. *Id*. at 6.

Figure ES-3 on page 6 shows that while California regulated mobile sources have reduced emissions by 75% from 2000 to 2019, emissions from federal sources were reduced only slightly from 2000 to 2020 and actually begin to increase around 2023. Emissions from federal sources are expected to surpass emissions from California sources by 2028. The total "further deployment" (Section 182(e)(5)) measures that must be replaced amount to 108 tons per day of NOx. *Id*. at 39, Table 2-1. Using all available avenues for CARB and South Coast AQMD measures garners only 24-26 tons per day. *Id.* At the time, it was hoped that a sales tax measure could be adopted that would provide an additional 15 tpd of emission reductions, but that did not occur, as the legislature did not adopt authorizing legislation. This leaves 67-69 tons per day of NOx to be obtained by federal measures and/or funding. *Id.*

Indeed, EPA's 1997 approval discussed above demonstrates that EPA has known *for over 25 years* that reductions from federal sources are needed to reach attainment in the South Coast Basin.

CARB and South Coast AQMD are already implementing more than their fair share of emission reduction measures for sources within their authority. And EPA has consistently recognized this. In 1997, EPA stated, "CARB's adopted and scheduled mobile source, consumer product, and pesticides measures all go beyond (in many cases, they go considerably beyond) existing control requirements applicable elsewhere in the Country. SCAQMD's existing regulations generally represent the most complete and stringent controls for each subject source in the Country." 62 Fed. Reg. 1150, 1178 col. 2 (Jan. 8, 1997). And as recently as 2022, EPA stated, "EPA acknowledges that California may have one of, if not the, most stringent emissions control strategies in the country…" 87 Fed. Reg. 31443, 31453, col. 2 (May 24, 2022). Therefore, EPA cannot reasonably argue that CARB and the South Coast AQMD could adopt many more measures within their authority which would be necessary to reach attainment.

The Contingency Measure Plan sets out a blueprint for EPA action, suggesting measures for each of the categories of (1) emission standards for low-NOx heavy-duty trucks (up to 35.7 tpd), (2) accelerating implementation of ocean-going vessels meeting Tier 3 standards in the waters off the South Coast Air Basin (up to 28.2 tpd), (3) accelerating implementation of Tier 4 locomotives in the South Coast (up to 11.2 tpd), and requiring or incentivizing aircraft visiting airports in the South Coast to substantially lower NOx emissions (up to 3.52 tpd). *See* Contingency Measure Plan at 60-65. EPA is well aware that CARB and South Coast AQMD cannot regulate these sources because the Clean Air Act preempts such regulation. *See* CAA § 209(e), 42 U.S.C. § 7543(e) (locomotives and marine vessels, which are a type of non-road engine); CAA§ 233, 42 U.S.C. § 7573 (aircraft); CAA § 209(a), 42 U.S.C. § 7543(a) (motor vehicles). As explained in the Contingency Measure Plan, while California can regulate the engine standards for trucks sold in California (with a waiver from EPA), "about 60% of total heavy-duty vehicle miles traveled in the South Coast on any given day are by trucks that were purchased outside of California." *Id*. at 60. A California truck rule that applies to vehicles purchased out of state could be difficult to implement if it only applied to vehicles that enter California. Thus, national regulation by EPA is critical.

Yet, instead of confronting this reality and committing to either implement these measures or initiate a process to develop measures it prefers, as it did in approving the 1994 SIP, EPA hides behind the erroneous legal argument that a plan relying on federal measures is unapprovable as a matter of law. EPA's proposed disapproval is unfair and illogical, because unrebutted evidence in the record shows that it is impossible for CARB and the South Coast AQMD to adopt an attainment plan that does not rely on federal measures. And the problem will continue and only get worse as the region develops plans for EPA's more recent and more stringent ozone standards. These plans will also have to rely on federal measures—even more so than the current plan.[10]

B. EPA's Proposed Disapproval Entirely Fails to Consider an Important Aspect of the Problem: The Impossibility of Attaining without Reductions from Federal Sources.

As discussed repeatedly above and demonstrated in the Plan itself, it is impossible for the South Coast Air Basin to attain the 1997 8-hour ozone standard without very substantial emission reductions from federal sources. This factor is overwhelmingly relevant to EPA's decision on whether to approve the federal measures in the Contingency Measure Plan. Yet, EPA never even

[10] *See, e.g.,* South Coast 2022 Air Quality Management Plan (adopted to demonstrate attainment of the 2015 ozone standard by 2037), page ES-3, Figure ES-1, showing that EPA will be responsible for 46% of all Nox emissions in 2037. And page ES-4, figure ES-4, showing that emissions from federal sources alone in 2037 will exceed the region's NOx carrying capacity by about 25 tons per day. (Carrying capacity means the amount of pollution per day that the region can hold and still meet the applicable air quality standard). *Id*., *available at* https://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2022-air-quality-management-plan/final-2022-aqmp/final-2022-aqmp.pdf?sfvrsn=16.

acknowledges the need. While EPA cites what the Contingency Measure Plan says about the role of federal sources in the emissions inventory, 89 Fed. Reg. at 7324 col.1, it does not express agreement with these statements, explain how they are relevant to the proposed action, or explain how it expects that the South Coast would be able to attain the standard without very substantial reductions from federal sources.

An agency acts arbitrarily and capriciously when it "entirely fails to consider an important aspect of the problem." *O'Keeffe's, Inc. v. U.S. Consumer Prod. Safety Comm'n*, 92 F.3d 940, 942 (9th Cir. 1996). The demonstrated inability of the State and South Coast to attain the NAAQS without federal regulation of federal sources is unquestionably "an important aspect of the problem." EPA cannot escape the conclusion that its action is arbitrary and capricious because it entirely failed to consider an important aspect of the problem—that the South Coast region needs reductions from federal sources in order to attain, and if so, what EPA is going to do about it.

C. EPA Failed to Acknowledge that It Is Changing its Prior Position and to Explain the Reasons for its Change.

When an agency changes policy, "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio*…." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The same principle should apply when EPA changes its legal position, especially when the prior legal position is thoroughly explained. In this case, EPA's action in proposing disapproval without acknowledging it is changing its prior position, admitting that it has previously approved a federal assignment, or explaining why it is changing its position, is arbitrary and capricious.

As explained in Part III B, EPA has previously approved a South Coast AQMD SIP submission that relied on federal measures. And contrary to EPA's position that such a plan is "not approvable as a matter of law," 89 Fed. Reg. at 7325 col. 1, EPA previously stated: "The 'Federal Assignments' portion of the SIP is approvable because it is consistent, in the overall context of the California SIP, with the Clean Air Act requirements." 62 Fed. Reg. at 1153 col. 1. Yet EPA wholly fails to recognize that it has not only changed its legal position (that such a SIP is approvable) but also its policy position that EPA has a responsibility to help clean the air. 62 Fed. Reg. at 1151 col.2. In the proposed disapproval, EPA attempts to make it appear that it is not changing its prior position, by stating that it has consistently taken the position that states do not have the authority to assign SIP responsibilities to the federal government. 89 Fed. Reg. at 7325 col. 1, n. 46. Misleadingly, it even cites the 1997 plan approval for that proposition, while completely ignoring the fact that in the 1997 action, it actually approved the Federal Assignments. None of the cited federal register notices argue that EPA's prior legal position was incorrect.

As argued above, EPA should return to its earlier position that EPA may approve a SIP that calls for federal regulation of federal sources, accepting that the state cannot *force* EPA to do so. And it should return to its prior policy that it is appropriate for EPA to assist states in attaining the

national ambient air quality standards, at least where significant reductions are needed from federal sources.

D. EPA's Proposed Disapproval Entirely Fails to Consider an Important Aspect of the Problem: Health Impacts to South Coast Residents that EPA Has the Authority to Address.

EPA's proposed disapproval acknowledges that ozone causes significant health problems. "Breathing air containing ozone can reduce lung function and inflame airways, which can increase respiratory symptoms and aggravate asthma or other lung diseases." 89 Fed. Reg. at 7321 col. 2. EPA also recognizes that the population of the South Coast nonattainment area is over 17 million. *Id.*, col. 3. And of course, the South Coast Air Basin is classified as "Extreme" for ozone nonattainment—the highest level of ozone in the nation. *Id.* Thus millions of people remain subject to harmful levels of ozone in the South Coast Air Basin. Yet, as EPA fails to acknowledge the record demonstrates conclusively, the federal ozone standards cannot be attained without significant regulation of sources subject solely to federal regulation. *See also* Table 1 at the end of this Comment.

It is undeniable that federal sources contribute significantly to the health effects of ozone in the South Coast AQMD. EPA cites no reason at all for failing to help reduce these health effects, except its erroneous belief that it cannot approve a plan relying on federal measures. EPA in the past has recognized that it has the obligation to help clean the air. 62 Fed. Reg. 1150, 1151 col. 2. (approval of South Coast 1994 ozone SIP). It provides no reason for abandoning this logical position. Its about-face in this proposed disapproval has no reasonable basis and is thus arbitrary and capricious and an abuse of discretion.

E. A Disapproval Would Be Irrational Because It Would Demand that California and South Coast Do the Impossible.

As discussed above, it is impossible for the South Coast Air Basin to attain the 1997 8-hour ozone standard without massive emissions reductions from sources subject solely to federal regulation. Therefore, if EPA were to disapprove the Plan because it relies on federal action, it would be impossible for the South Coast to submit a revised Plan that eliminated that reliance. South Coast would never be able to correct the alleged deficiency in the Plan and thus would be subject to sanctions it has no ability to avoid. CAA § 179B, 42 U.S.C. § 7509. The imposition of sanctions would be a significant harm.

These sanctions would likely lead to the South Coast AQMD eventually being unable to issue permits for new or modified major stationary sources (*id.* § 7509(B)(2)), because the 2-to-1 offset ratio would require offsets that simply are not available in the region. As an Extreme ozone area, the South Coast Air Basin requires ozone precursor offsets to be provided at a 1.2 to 1 ratio (Section 182(e)(1). Thus, a sanction requiring a 2 to 1 offset ratio will significantly increase the cost and the rate of depletion of offsets. The sanction will cause a 66.7% increase in

the offset ratio. The cost of offsets would thus increase by at least 66.7% per pound, which does not even consider increased costs due to increased demand for offsets.

There are currently three types of offset programs in the South Coast AQMD. The first are emission reduction credits, which are issued upon approval of an application by a source that has shut down, following procedures to discount the credits. These offsets (Emission Reduction Credits or ERCs) may be banked and sold to persons needing offsets. ERCs are trading at $365,000 per ton per year so the price of offsets for a modification or new major source would go up to at least $608,455 per ton per year. The price would be expected to go up as time goes on.

The second type of offset is the emission allocation under the NOx RECLAIM Program (Regional Clean Air Incentives Market) which is a cap-and-trade program for NOx emissions from sources of 4 tons per year or greater. These facilities must hold enough RTCs (RECLAIM Trading Credits) the end of each quarter to cover their emissions of NOx during that quarter. Also, RECLAIM is required to comply programmatically with the NOx offset ratio of 1.2 to 1. The program consistently meets this requirement. There are more than enough RTCs available to meet the 2 to 1 ratio.[11]However, someone could argue that each individual new or modified source must meet the sanction ratio of 2 to 1, which presents a legal uncertainty and possible 66.7% increase in offsets for new and modified sources.

The third type of offset is an internal bank offset and is created when a facility shuts down but does not apply for ERCs. These offsets are discounted, and then made available to essential public services such as sewage plants, hospitals, and schools. These entities do not have to pay for these offsets. However, the impact on the internal bank will increase by 66.7%. Because it will not be possible for the District to adopt a plan that does not rely on federal measures to attain by the applicable date, it will likely also be impossible to stop the sanctions clock for a number of years, until attainment. Therefore, the increased drain on the internal bank will continue. Eventually the bank will likely face a shortage of available offsets. Therefore, the offsets sanction will impose a heavy burden on the region's economy by increasing costs and reducing availability of offsets.

Moreover, the sanction of withholding highway transportation funds (*id.* § 7509(b)(1)) would likely impair billions of dollars in economic activity. According to the 2020 Regional Transportation Plan prepared by the Southern California Association of Governments, the region expects $41 billion in federal transportation funding by 2045. *See* Connect SoCal 2020, Ch. 4, p. 105., *available at* https://scag.ca.gov/sites/main/files/file-attachments/0903fconnectsocal-plan_0.pdf?1606001176. Thirteen percent of that funding, or $5.3 billion, is Construction Mitigation and Air Quality funds which would likely not be withheld under the highway funding

[11] *See, e.g.*, South Coast AQMD, "Annual RECLAIM Audit Report for 2022 Compliance Year," March 1, 2024, at 88-90, *available at* https://www.aqmd.gov/docs/default-source/reclaim/reclaim-annual-report/2022-reclaim-report.pdf?sfvrsn=12

sanction. This leaves $35.7 billion in funding for transportation projects that could be withheld if EPA imposes sanctions. Infrastructure projects could be waylaid, creating ramifications for the largest container ports complex in the nation. These and other highway projects could be stopped for many years, because the region cannot correct the so-called deficiency in the Plan. As noted repeatedly above, it would be impossible to submit and have EPA approve a plan that does not rely on reductions from federal sources.

Disapproval of the Plan based on California and South Coast AQMD's failure to do the impossible would be fundamentally irrational. "The law does not require impossibilities of any person, natural or artificial.…" *Dist. of Columbia v. Woodbury,* 136 U.S. 450, 464 (1890); *Messina v. U.S. Citizenship & Immig. Servs.*, No. CIV.A. 05CV73409DT, 2006 WL 374564, at *6 (E.D. Mich. Feb. 16, 2006) ("It is arbitrary and capricious to require compliance with a regulation when compliance is impossible."). Here, EPA's interpretation of CAA Section 110(a)(1) (42 U.S.C. Section 7410(a)(1), which requires states to adopt a plan "which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within the state", is that the state must show attainment by the applicable date without relying on federal measures. This is an impossibility. EPA cannot by a disapproval require South Coast and California to do the impossible.

Furthermore, the doctrine of construing statutes to avoid "absurd results" prevents EPA from disapproving the Plan. EPA's interpretation of CAA Section 179(a)(3)(B), which provides for sanctions if EPA disapproves a plan, unless the deficiency has been corrected, results in this case in sanctions being imposed following EPA's disapproval even though the state and local governments have no ability to correct the deficiency. This is an absurd result, penalizing a state for failure to do the impossible. Any action which would impose sanctions on a region for a failure caused by sources over which it has no control would create absurd results. The Supreme Court has long held that when the literal language of a statute:

> ...has led to absurd or futile results…this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose rather than the literal words.

United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) (cleaned up). The Supreme Court reiterated this language in *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). Penalizing the South Coast with an action that causes sanctions because of emissions over which the state and local agencies lack the ability to set emission standards creates absurd results and is plainly at variance with the purpose of the statute as a whole, which is not to penalize states for sources outside their control.

IV. Disapproval of the Contingency Measure Plan Leading to Imposition of Sanctions Would Be Arbitrary and Capricious and Contrary to Law.

Ordinarily, a deficiency in a SIP submission that is not corrected by the state would result in the imposition of sanctions by EPA. CAA § 169, 42 U.S.C. § 7609; CAA § 110(m), 42 U.S.C. § 7410(m). Here, however, imposition of sanctions in the South Coast Basin based on EPA's disapproval of the Contingency Measure Plan would be unlawful.

A. Congress Did Not Intend EPA to Impose Sanctions Where State and Local Governments Lack the Authority to Regulate Sources Causing a Failure to Attain.

The text of the CAA and its legislative history make plain that Congress intended EPA to impose sanctions to encourage states to rectify deficiencies in their SIPs and to deter future deficiencies. That congressional intent cannot support imposition of sanctions where the state has *no ability* to rectify the deficiency because it is due to emissions from sources over which the state has no control.

First, as explained above, the legislative history of the 1990 Amendments to the Clean Air Act shows that Congress did not intend sanctions to be imposed where the state and local governments lack sufficient authority to remedy the deficiency, which in this case is because the CAA preempts state and local governments from setting emission standards for federal sources. On May 23, 1990, during the House debate on the CAA, Representative Norm Mineta (D-CA) stated: "Under the sanctions provisions, the EPA Administrator is required to establish criteria for exercising his or her authority to impose sanctions on political subdivisions that have adequate authority to correct an air quality deficiency."[12] In this case, the South Coast AQMD does not have adequate authority to correct the supposed deficiency, since it is impossible to devise a plan that does not rely on emission reductions from federal sources for which EPA has the authority to set emission standards. This principle was repeated during the House debate on the Conference Report on October 26, 1990. Representative Glenn Anderson (D-CA) stated: "This provision will ensure that available sanctions are applied to the geographical areas under the control of the government agency principally responsible for failure to comply with the Clean Air Act and with the authority to remedy the deficiency."[13] While this discussion pertains directly to CAA Section 110(m), which prohibits statewide sanctions for 24 months if the failure is primarily due to a political subdivision, it clearly shows that Congress did not intend for sanctions to be imposed on an area that may be unable to correct the deficiency.

Second, section 110(m), which provides for discretionary sanctions, provides that the sanctions are to be imposed "for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met." CAA § 110(m), 42 U.S.C. § 7410(m). In other words, they are

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[12] Congressional Research Service, *A Legislative History of the Clean Air Act Amendments of 1990,* (Leg. History) Committee Print, p. 2658
[13] Leg. History, p. 1200.

designed to provide an incentive for states to adopt compliant SIPs and to correct deficiencies in those SIPs when identified by EPA. Further, that section ensures that EPA will impose sanctions only against the particular region of a state that is *responsible* for the SIP deficiency. It directs the Administrator to impose sanctions "with respect to any portion of the State the Administrator determines reasonable and appropriate." *Id.* It further directs EPA to develop regulations to ensure that "such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency." *Id.* Where a deficiency cannot be corrected because it is attributable to emissions from federal sources, the region that cannot comply is in no sense responsible for the deficiency and no amount of sanctions can encourage compliance. While this language applies specifically to discretionary sanctions, it reflects the basic purpose of sanctions to encourage the state to take action to correct the deficiency that caused the sanctions, which is not possible in this case.

Third, CAA section 179B (42 U.S.C. § 7509a) requires EPA to approve an attainment demonstration where the state shows it would attain the standard "but for emissions emanating from outside of the United States." The legislative history of this section makes it clear that it was adopted precisely because it would be unfair to hold a state responsible for *emissions over which it has no control*. The amendment was sponsored by Senator Phil Gramm (R-TX), who explained, "it is unfair to hold El Paso accountable for pollution that is generated in a foreign country that they have no control over."[14] Senator Max Baucus (D-MT), the sponsor of the Senate bill, spoke in support of the provision, noting that border areas "do not have control of their own destiny themselves."[15] Congress clearly intended that areas that have no control over the sources causing nonattainment not be penalized for that nonattainment.

Finally, in the "Good Neighbor" provision, CAA § 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D), the Clean Air Act requires upwind states to control interstate pollution that might otherwise impair a downwind state's ability to attain the NAAQS. *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 498-99 (2014). This provision reflects another congressional commitment to avoid penalizing states that cannot attain the NAAQS due to factors entirely outside their control. *See North Carolina v. EPA*, 531 F.3d 896, 912 (D.C. Cir. 2008) (EPA must ensure that upwind states reduce transboundary pollution prior to the downwind states' deadlines for attainment).

By the same token, Congress did not anticipate that areas would fail to attain due to emissions from federal sources and certainly did not anticipate that such areas would be sanctioned for EPA's failure to regulate those sources.

B. Under EPA's Proposed Disapproval, the Clean Air Act's Sanctions Regime Would Violate the Spending Clause as Applied to the South Coast Air Basin.

EPA's imposition of sanctions in the South Coast Air Basin would violate the Tenth Amendment and Spending Clause. The CAA is implemented through the delicate balance of federal and state

[14] Leg. History, p. 5741.
[15] Leg. History, p. 5742.

action that is characterized as cooperative federalism. *Comm. for a Better Arvin v. U.S. E.P.A.*, 786 F.3d 1169, 1173 (9th Cir. 2015). Though the federal government may financially induce states to administer regulations of Congress's choosing, it cannot commandeer state regulatory processes or impose financial inducements that are so severe that they transform pressure into compulsion. *Nat'l Fed'n of Independent Bus. v. Sebelius,* 567 U.S. 519, 580 (2012) ("*Sebelius"*). EPA's actions now threaten to convert the Clean Air Act's sanctions into exactly that.

We recognize that courts have traditionally upheld Clean Air Act sanctions against coercion claims. *See, e.g., Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d. 138 (D.C. Cir. 2015); *Virginia v. Browner,* 80 F.3d 869 (4th Cir. 1996). The present case however is markedly different in the degree of the financial inducement at issue and the unique practical challenges faced by South Coast AQMD. In 2012, the Supreme Court held that the Affordable Care Act's expansion of Medicaid, which required states to implement the expansion in order to receive their existing Medicaid grant, was unconstitutionally coercive. *National Federation of Independent Businesses v. Sibelius*, 567 U.S. 519 (2012) The Court focused heavily on the amount of funding, which could make up over ten percent of a state's budget, that was threatened by the Act. This amount of funding went beyond "relatively mild encouragement" to become a "gun to the head." *Id.* at 581. Though few federal grants could ever approach the magnitude of Medicaid, the exact point at which financial inducement transforms pressure into compulsion has never been defined. *See South Dakota v. Dole,* 483 U.S. 203, 211 (1987) (explaining that financial inducement can be coercive but not quantifying the exact amount at which pressure transforms into compulsion).

The economic sanctions threatened against South Coast are undoubtedly severe. South Coast AQMD is responsible for large areas of Los Angeles, Orange, Riverside, and San Bernardino counties, comprising a region whose population of 17 million people makes up nearly half of the state's entire population (44 percent to be exact).[16] The basin is an economic engine for the entire state of California and home to two of the largest ports in the country (the Ports of Los Angeles and Long Beach). Sanctions threaten immense economic harm to the region and the State, and the financial impact of sanctions approaches "economic dragooning." *Sebelius,* 567 U.S. at 582.

South Coast also faces unique obstacles to regulating the sources that cause it to be in nonattainment. Most significantly, the state and local agencies that are responsible for air pollution control are precluded, both by the provisions of the Clean Air Act itself and principles of international law, from adopting the regulations necessary to avoid sanctions. The CAA preempts states from regulating locomotives and aircraft. Large ocean-going ships are regulated by the International Maritime Organization, an international agency that is not obligated to consult with local and state air agencies. These challenges leave California and the South Coast AQMD with few options and make sanctions inevitable, as explained above. The State is thus

[16] Compare these numbers to those in *Mississippi,* in which the coercion argument was advanced for a single county in Texas, one out of 254 counties in the state, and with a population of approximately 70,000 people. 790 F.3d 138 at 178.

denied the real choice necessary for the federal government's exercise of the Spending Clause to be constitutional.

EPA's refusal to regulate federal sources also violates the Spending Clause by retroactively altering the conditions under which states could lose federal funding pursuant to the CAA. The Supreme Court has framed congressional applications of the spending power as a contract, noting that the legitimacy of this power "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Sebelius,* 567 U.S. at 576-77 (quoting *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1984)); *see also Guardians Ass'n v. Civil Servs. Comm'n of City of N.Y.,* 463 U.S. 582, 596 (1983) ("[T]he receipt of federal funds under typical Spending Clause legislation is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt.").[17] Spending Clause legislation that subjects states to new terms and conditions that they neither agreed to nor could have anticipated when electing to comply with federal spending conditions thus threatens state sovereignty and the balance of state and federal power.

In *Sebelius,* the Supreme Court held that the Affordable Care Act's statutory changes to the Medicaid program subjected states to new terms and conditions that they had no notice of when agreeing to participate in the original Medicaid program. Likewise, the CAA has long reflected a bargain in which states like California have agreed to adopt SIPs to attain the federal NAAQS in exchange for receiving substantial federal highway funds. As explained above, when this deal was struck, Congress indicated that EPA would regulate federal sources if necessary for states to achieve the NAAQS. The CAA's legislative history demonstrates that it was under these terms that the states—and specifically California—agreed to the program and acquiesced to federal authority. In failing to regulate the sources under its purview, EPA has reneged on its contractual commitment and in doing so is preventing California and South Coast from attaining the NAAQS. This condition compels states to achieve emissions reductions without EPA's promised contribution and imposes goals that are impossible for South Coast to achieve. The State and South Coast neither had notice of, nor agreed to, these terms, and for decades have reasonably relied on federal funds based on a mutual understanding of the CAA that EPA now seeks to retroactively alter by asserting that California and South Coast cannot adopt a SIP that anticipates federal regulation of federal sources.

The fact that these new retroactive conditions arise not from statutory amendments, as they did in *Sebelius*, but rather from EPA's conduct makes them no less meaningful. Whether by legislation

[17] The requirement that states *knowingly accept* the terms of Spending Clause conditions is also a factor in determining whether congressional application of the Spending Clause is coercive. *See, e.g., South Dakota*, 483 U.S. at 207 ("[W]e have required that if Congress desires to condition the States' receipt of federal funds, 'it must do so unambiguously…, enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'").

or unofficial agency practice, EPA's failure to fulfill its obligations under the original CAA contract is inconsistent with the Supreme Court's jurisprudence under the Spending Clause.

V. EPA's Proposed Disapproval of the State and Local Contingency Measures Is Not in Accordance with Law.

Under the Clean Air Act, Extreme ozone nonattainment areas may rely on measures that require the development of new technology or require coordination among a number of government agencies. 79 Fed. Reg. at 7322 col. 2. If they do so, they must submit an enforceable commitment to adopt contingency measures "to be implemented … if the anticipated technologies do not achieve the planned reductions." CAA § 182(e)(5), 42 U.S.C. § 7511a(e)(5). EPA states that the Contingency Measure Plan fails to "include any contingency measures that could be implemented if the planned reductions from new technology measures are not achieved." 89 Fed. Reg. 7320, 7325 col. 2.

Importantly, EPA does not say there are not enough contingency measures; rather, it suggests that there are not *any*. This is clearly erroneous. Indeed, EPA lists the measures for implementation by South Coast AQMD and CARB that are included in the Plan. 89 Fed. Reg. at 7323 cols. 2,3. EPA fails to explain why these measures do not qualify as Section 182(e)(5) contingency measures. At minimum, EPA should approve the South Coast measures that have already been implemented. These include reductions from RECLAIM, reductions from facility-based measures for airports (MOUs for each major commercial airport have been submitted as part of the SIP), and the conversion of Metrolink locomotives to Tier 4. EPA does not show how the contingency measures fail to meet any statutory requirement. In fact, Section 182(e)(5) states that the contingency measures may be implemented if EPA finds that an Extreme area has failed to meet the periodic reductions required by Sections (b)(1) or (b)(2) of Section 182. This is exactly what was done for the measures that have already been implemented. Moreover, all the measures in the contingency measure plan, including the federal measures, meet the statutory requirement that they "shall be adequate to produce emission reductions sufficient, in conjunction with other approved plan provisions, to achieve the periodic emission reductions required by subsection (b)(1) or (c)(2) of this section and attainment by the applicable dates." CAA § 182(e)(5), 42 U.S.C. § 7511a(e)(5). EPA fails to explain why these measures, which meet the statutory requirements, do not qualify as contingency measures under Section 182(e)(5).

Conclusion

EPA's proposed disapproval of the Contingency Measure Plan is a betrayal of the residents of the South Coast Air Basin who rely on reductions from federal sources to ever be able to breathe clean air. As time goes on, the role of federal sources gets bigger and bigger. For the 2015 ozone standard—due to be attained in 2037—federal sources *by themselves* emit more than the carrying capacity of the region for NOx. EPA must take action now to fulfill its legal and moral obligation to regulate federal sources to allow the South Coast region to attain the NAAQS. The proposed disapproval is unlawful and an abuse of discretion and must be reversed.

Table A- Sources of NOx emissions by category for calculations of reductions needed to attain in Section II.

Source Category	2023 NOx Emissions	References
Stationary and Area Sources	49 tpd	2018 SIP Update https://ww2.arb.ca.gov/sites/default/files/classic/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161
CA Vehicles (on-road)	68.5 tpd	2018 SIP Update https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161 EMFAC 2014 https://arb.ca.gov/emfac/2014/
CA off-road mobile	54.2 tpd	2018 SIP Update https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161 California Emission Projection Analysis Model (CEPAM) Version 1.05 https://www.arb.ca.gov/app/emsinv/fcemssumcat/fcemssumcat2016.php
Federal Vehicles (on-road)	20.3 tpd	2018 SIP Update https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161 EMFAC 2014 https://arb.ca.gov/emfac/2014/
Federal off-road	7.2 tpd	2018 SIP Update https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161 California Emission Projection Analysis Model (CEPAM) Version 1.05 https://www.arb.ca.gov/app/emsinv/fcemssumcat/fcemssumcat2016.php
Federal planes trains and ships	69.7 tpd	2018 SIP Update https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161
TOTAL	269 tpd	