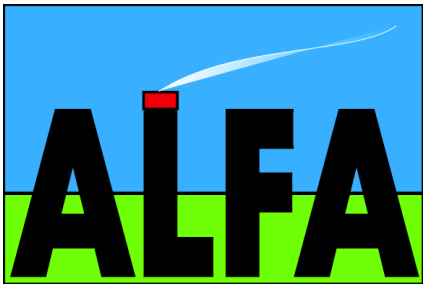

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January 21, 2020

Mr. John Kelly
Air Planning Branch
Air and Radiation Division
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA, 94105

Re: Docket ID No. EPA–R09–OAR–2018–0146

Dear Mr. Kelly:

On behalf of the Center for Biological Diversity, the Center for Environmental Health, and Citizens For Responsible Oil and Gas, Air Law for All, Ltd. submits the following comments to Docket No. EPA–R09–OAR–2018–0146 in opposition to EPA's proposed action, "Approval of Air Quality Implementation Plans; California; Ventura County; 8-Hour Ozone Nonattainment Area Requirements," 84 FR 70109 (Dec. 20, 2019).

I. EPA'S PROPOSED CONDITIONAL APPROVAL OF THE VENTURA COUNTY CONTINGENCY MEASURES IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW

While paying lip service to the Ninth Circuit's decision in *Bahr v. U.S. EPA*,[1] holding that use of already implemented measures as contingency measures is an illegal sham, EPA proposes to circumvent the decision by continuing to give credit to already implemented measures when assessing the adequacy of other contingency measures. By so doing, EPA relies on a factor Congress cannot have intended EPA to consider and therefore the proposal is arbitrary and capricious and contrary to law.

[1] *Bahr v. U.S. Environmental Protection Agency* ("*Bahr*"), 836 F.3d 1218 (9th Cir. 2016).

A. EPA Must Be Reminded Why Sham Contingency Measures Are Illegal

Necessarily inviting comment on the issue, EPA repeats its discredited arguments for sham contingency measures:

> It has been the EPA's longstanding interpretation of section 172(c)(9) that states may rely on federal measures (e.g., federal mobile source measures based on the incremental turnover of the motor vehicle fleet each year) and local measures already scheduled for implementation that provide emissions reductions in excess of those needed to provide for [reasonable further progress ("RFP")] or expeditious attainment. The key is that the statute requires that contingency measures provide for additional emissions reductions that are not relied on for RFP or attainment and that are not included in the RFP or attainment demonstrations. The purpose of contingency measures is to provide continued emissions reductions while the plan is being revised to meet the missed milestone or attainment date.[2]

EPA then acknowledges the Ninth Circuit Court of Appeals' rejection of EPA's sham.[3] But EPA does not explain the reasoning of the *Bahr* court. Instead, EPA merely states that within the jurisdiction of the Ninth Circuit, states cannot use sham contingency measures. EPA must therefore be reminded why sham contingency measures are contrary to the Clean Air Act ("Act").

1. The *Bahr* Opinion

For convenience, the relevant portion of the *Bahr* opinion is provided here:

> The statutory language in § 7502(c)(9) is clear: it requires the SIP to provide for the implementation of measures "to be undertaken" in the future, triggered by the state's failure "to make reasonable further progress" or to attain the NAAQS. These measures are included in the SIP as "contingency measures" and are "to take effect" automatically in the future. Although the statute does not define the word "contingency," the meaning of the term is not ambiguous. According to the dictionary definition, it means "a possible future event or condition or an unforeseen occurrence that may necessitate special measures." Webster's Third New International Dictionary (2002). Because Congress was clear that "contingency measures" are control measures that will be implemented in the future, and the statutory language is not susceptible to multiple interpretations, we must give effect to its plain meaning. Chevron, 467 U.S. at 842–43, 104 S.Ct. 2778.[4]

To elaborate on the meaning of the term "contingency," note that for example a "contingency plan" is "a course of action to be followed *if a preferred plan fails* or an existing situation changes" or "a plan or procedure that will take effect if an emergency occurs; emergency plan."[5] If a nonattainment area fails to attain or make RFP, then the attainment plan (the "preferred plan") has failed.

[2] 84 FR at 70123.
[3] *Id.* at 70123-124 (citing *Bahr*, 836 F.3d at 1235–1237).
[4] *Bahr*, 836 F.3d at 1235.

And, in the case that there are already implemented measures the state did not rely on for attainment, RFP, or other Act requirement, the attainment plan has failed despite the emission reductions from those already implemented measures. In other words, the already implemented measures failed as well. Simply put, Congress cannot have intended for nothing to happen when an attainment plan, even a plan relying on already implemented measures as contingency measures, fails.

Although the *Bahr* majority did not discuss the policy implications, it should be noted that disallowing sham contingency measures does not discourage a state from early emission reductions. Early emission reductions can help ensure an area will attain by its attainment date; the consequences of failure to attain, such as higher offset ratios and new planning obligations, are serious. Thus, states retain a powerful incentive–much more powerful than potential use as a contingency measure–for early emission reductions. Furthermore, having contingency measures with teeth gives states an incentive to attain to avoid having to trigger the contingency measures, perhaps not only through seeking additional emission reductions, but also through vigorous enforcement of the SIP.

EPA's supposed policy justification is particularly wrong-headed when a state tries to rely on existing federal measures, such as those for mobile sources, as contingency measures. The state is not responsible for the emission reductions from federal measures, and to speak of the state's incentive to make those reductions is absurd.

Existing federal measures fail as contingency measures not only because they are existing and therefore not implemented in the future, but potentially for another reason as well. Sections 172(c)(9) and 182(c)(9) require the SIP to "provide for implementation of specific measures" as contingency measures.[6] Unless the state has adopted a state equivalent of a federal measure and submitted that equivalent measure for adoption in the SIP, the SIP does not "provide for implementation" of the federal measure.

In the case of mobile source standards, states are generally preempted from adopting standards, except in the case of a California waiver.[7] EPA's current actions to weaken mobile source standards and revoke California waivers demonstrate another problem with reliance on federal measures that are not approved into the SIP: the rug can be pulled out from under the contingency measures by unilateral EPA action that takes place outside the SIP process, in violation of the structure of the Act, and therefore without the state's consent.

2. The *LEAN* Opinion

[5] RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 439 (2d. ed. unabridged, 1987) (emphasis added). Likely in part due to the potential confusion of using the word "plan" in the SIP context, Congress used the phrases "contingency measures," 42 U.S.C. § 7502(c)(9), or "contingency provisions," *id.* § 7511a(c)(9), instead. Even then, Congress used the more natural "contingency plan" in section 182(g)(3). *See id.* § 7511a(g)(3).
[6] 42 U.S.C. §§ 7502(c)(9), 7511a(c)(9).
[7] *Id. §* 7543.

In *LEAN*, the Fifth Circuit Court of Appeals upheld EPA's interpretation of section 172(c)(9) as allowing for sham contingency measures. The opinion erred in three respects.

First, unlike the *Bahr* opinion, the *LEAN* opinion did not examine the plain meaning of "contingency," which confirms the plain meaning of "to take effect."

Second, the opinion disregarded the plain meaning of "to take effect" by adopting EPA's theory that the statute was silent on whether "continuing" emission reductions could be used as contingency measures. This is a typical form of EPA misdirection: EPA attempts to avoid clear statutory language by inventing a statutory gap on some other issue. That is simply not how statutory interpretation works: one must start with the statutory language, and if it resolves the issue that is the end of the matter.

Third, the opinion erred in its discussion of the policy implications. Even with sham contingency measures disallowed, states still have a powerful incentive for additional emission reductions: the threat of failure to attain, reclassification, and additional planning obligations. States are not "penalized" for early emission reductions simply because those reductions don't qualify as contingency measures; those reductions don't count against the state in any way. On the other hand, public health and welfare is penalized by allowing for sham contingency measures.

Thus, the *LEAN* opinion offers no support for sham contingency measures. EPA must abandon its policy everywhere, not merely within the Ninth Circuit's jurisdiction.

B. EPA's Proposed Conditional Approval of the Ventura County Contingency Measures Threatens to Make a Mockery of the *Bahr* Decision

EPA proposes, under section 110(k)(4) of the Act, to conditionally approve the contingency measures based on a commitment by the District to submit "at least one" of three measures. Under EPA's longstanding policy, contingency measures should approximately equal one year of RFP.[8] This policy is well grounded in the statute. However, EPA admits that the promised contingency measures here will "likely" not equal one year of RFP. Nonetheless, EPA proposes to conditionally approve the promised measures. The sole reason EPA gives is surplus NOx reductions from already implemented measures. Under the *Bahr* decision, such reductions cannot qualify as contingency measures, but EPA proposes to functionally treat them as such by claiming they are relevant to the adequacy of the promised contingency measures. This disregard for the *Bahr* decision threatens to make a mockery of it by allowing approval of de minimis real contingency measures so long as sham contingency measures exist but are not submitted as such.

[8]"Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements," 80 FR 12285 (citing "State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,"57 FR 13498, 13511 (Apr. 16, 1992) (section III.A.3.c)).

1. Because the Submission Does Not Quantify the Reduction from the Promised Contingency Measures, the Reductions Must Be Presumed De Minimis

The District commits to submit "at least one" of three measures to be triggered if the area fails to attain or make RFP:

- amendments to the Crude Oil Storage Tank Degassing Operations rule;
- amendments to the Polyester Resin Material Operations rule; or
- amendments to the Architectural Coatings rule.

EPA states:

> The District did not quantify the potential additional emission reductions from its contingency measure commitment, but we believe that it is unlikely that the attainment contingency measure, once adopted and submitted, will achieve one year's worth of RFP (i.e., 1.1 tpd of VOC or 0.8 tpd of NOX) given the types of rule revisions under consideration and the magnitude of emissions reductions constituting one year's worth of RFP.[9]

In the absence of quantification of the emission reductions (and associated technical basis), or even some sort of qualitative assessment, for purposes of both public notice and assessment of the adequacy of the promised contingency measures, the emission reductions must be presumed to be de minimis.[10] As a result, EPA's belief that it is "unlikely" the promised contingency measures will equal one year of RFP is at best an understatement. There is simply no basis whatsoever in the record to think that the emission reductions from the promised measures equal one year of RFP or for that matter anything more than a de minimis amount.

2. Already Implemented Measures Are Not Relevant to the Adequacy of Contingency Measures

Although there is no basis whatsoever in the record to find that the promised contingency measures are adequate to meet one year of RFP–or for that matter to meet any reasonable standard for judging contingency measures–EPA nonetheless proposes to conditionally approve them:

> However, the 2018 SIP Update provides the larger SIP planning context in which to judge the adequacy of the to-be-submitted District contingency measure by calculating the surplus emissions reductions estimated to be achieved in the RFP milestone years and the year after the attainment year. More specifically, the 2018 SIP Update, as clarified by CARB in August 2019, identified surplus NOx reductions in the various RFP milestone years. For Ventura County, the estimates of surplus

[9] 84 FR at 70125.

[10] If EPA or the District produces an analysis of the emission reductions from the promised contingency measures that purports to support the conditional approval, then EPA must re-propose its action.

> NOx reductions are 7.1 tpd in 2017 and 6.5 tpd in 2020 and are 8 or 9 times greater than one year's worth of progress (0.8 tpd of NOx).
>
> The surplus reflects already implemented regulations and is primarily the result of vehicle turnover, which refers to the ongoing replacement by individuals, companies, and government agencies of older, more polluting vehicles and engines with newer vehicles and engines. In light of the extent of surplus NOx emissions reductions in the RFP milestone years, the emissions reductions from the District contingency measure would be sufficient to meet the contingency measure requirements of the CAA with respect to RFP milestones, even though the measure would likely achieve emissions reductions lower than the EPA normally recommends for reductions from such a measure.[11]

This is functionally no different than simply approving the already implemented regulations as contingency measures, in violation of *Bahr*.[12] EPA is stating that it's acceptable to approve the promised contingency measures because other, already implemented regulations achieve one year of RFP, even if the promised contingency measures achieve only de minimis emission reductions. In other words, EPA thinks that states can circumvent *Bahr* by including legitimate but token de minimis contingency measures in the plan and still rely in large part on already implemented measures that are illegal as contingency measures under *Bahr*. Thus, EPA proposes to "rel[y] on [a] factor[] which Congress has not intended it to consider,"[13] emission reductions from already implemented measures.

This disregard for *Bahr* cannot stand. EPA needs to move on from the denial stage and accept the truth: EPA's longstanding policy on contingency measures is, and always was, nothing more than an illegal device to let states off the hook for their responsibilities under the Act.

3. Contingency Measures Should at a Minimum Equal One Year of RFP

EPA states:

> Next, we considered the adequacy of the RFP contingency measure (once adopted and submitted) from the standpoint of the magnitude of emissions reductions the measure would provide (if triggered). Neither the CAA nor the EPA's implementing regulations for the ozone NAAQS establish a specific amount of emissions reductions that implementation of contingency measures must achieve, but we generally expect that contingency measures should provide for emissions reductions approximately equivalent to one year's worth of RFP, which, for ozone,

[11] 84 FR at 70125.
[12] Technically, EPA's proposal is even worse than a simple violation of *Bahr*: the already implemented regulations would not even need to be approved into the SIP.
[13] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

> amounts to reductions of 3 percent of the RFP baseline year emissions inventory for the nonattainment area. For the 2008 ozone NAAQS in Ventura County, one year's worth of RFP is approximately 1.1 tpd of VOC or 0.8 tpd of NOX reductions.[14]

While the relevant contingency measure provisions of the Act, sections 172(c)(9) and 182(c)(9), may not explicitly state the amount of emission reductions, EPA's policy requiring one year of RFP is well-grounded in the Act. First, as explained by EPA, this ensures emission reductions in the interim period while the state prepares a new submission:

> [C]ontingency measures should represent 1-year's worth of progress, amounting to reductions of 3 percent of the baseline emissions inventory for the nonattainment area, *which would be achieved while the state is revising its plans for the area*.[15]

In particular, when an ozone nonattainment area fails to reach a milestone and has therefore failed to make RFP, under section 182(g)(3) the state must elect to either: 1) have the area reclassified; 2) rely on the approved contingency measures; or 3) adopt an economic incentive program. If EPA determines that the approved contingency measures are inadequate to meet the next milestone, then the state has one year to submit a revision to do so. Thus, the one year of RFP has structural support in the Act. If the area fails to attain and is reclassified, the state may have longer periods to submit the next plan, but one year is the minimum period in the case of failure to meet a milestone.

Second, the plain meaning of "contingency" supports EPA's reasoning that contingency measures should provide sufficient emission reductions while the state is revising its SIP. A "contingency fund" consists of "money or securities set aside to *cover* unexpected conditions or losses."[16]" If one has a contingency fund to cover potential loss of one's job, then one expects the contingency fund to be large enough to cover expenses until a new job can be found. While it may not be possible to estimate precisely how long finding a new job will take and what the expenses may be in the interim, a de minimis amount will certainly not be enough. Similarly, while it may not be possible to estimate precisely how long a state will take to revise its SIP, a de minimis amount of emission reductions will certainly not be enough to cover air pollution issues in the interim period.

II. CONCLUSION

Emission reductions from the promised contingency measures have not been quantified, or even assessed qualitatively. There is therefore no basis whatsoever to find them adequate, under EPA's reasonable standard of 1-year of RFP or any other reasonable standard that requires more than de minimis emission reductions. EPA's proposal to

[14] 84 FR at 70124-125.
[15] 80 FR at 12285 (emphasis added).
[16] RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 439 (2d. ed. unabridged, 1987) (emphasis added).

find them adequate due to other, existing emission reductions amounts to using the other reductions as a sham contingency measure, in disregard of the *Bahr* decision. . For these reasons, EPA must disapprove the contingency measures element.

Respectfully,

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