CENTER FOR BIOLOGICAL DIVERSITY
COMITÉ CIVICO DEL VALLE, INC.

December 2, 2019

Mr. Rory Mays
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–2018–0562

Dear Mr. Mays:

On behalf of the Center for Biological Diversity and Comité Civico del Valle, Inc., Air Law for All, Ltd. submits the following comments to Docket No. EPA–R09–OAR–2018–0562 in opposition to EPA's proposed action, "Clean Air Plans; 2008 8-Hour Ozone Nonattainment Area Requirements; Determination of Attainment by the Attainment Date; Imperial County, California," 84 FR 58641 (Nov. 1, 2019).

I. INTRODUCTION

The Center for Biological Diversity's mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health through science, policy, and environmental law. Based on the understanding that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked, the Center for Biological Diversity is working to secure a future for animals and plants hovering on the brink of extinction, for the ecosystems they need to survive, and for a healthy, livable future for all of us.

Comité Civico del Valle, Inc.[1] is a California non-profit organization based in Brawley, California with the mission "to improve access to healthcare, information, and prevention programs to low-income, underrepresented, and underserved community members in Imperial County by way of education, capacity building, and civic participation." Comité actively works for its members and the community at-large on many public health and environmental justice issues in Imperial and Riverside Counties, and hosts the annual Imperial County Environmental Health Leadership Summit. It has many members who live, work and recreate in the Imperial County nonattainment area.

For the reasons given below, the undersigned organizations oppose EPA's proposed action and encourage EPA to require more measures to protect public health and welfare in the Imperial County 2008 ozone nonattainment area.

1 https://www.ccvhealth.org/

II. ANY "BUT FOR" DETERMINATION SHOULD BE WITHHELD UNTIL THE CALIFORNIA AIR RESOURCES BOARD CREATES AND FUNDS AN ASSISTANT EXECUTIVE OFFICER POSITION FOR BORDER POLLUTION

Any "but for" determination based on cross-border transport from Mexico for the 2008 ozone NAAQS for Imperial County should be conditioned on California following through on its commitment to enhance and fund border pollution activities, including a California Air Resources Board assistant executive officer position for border pollution.

> State leadership agrees that more cooperation between Mexico and California is needed to combat cross border pollution. For example, the California Air Resources Board has an *Imperial County – Mexicali Air Quality Work Plan to Improve Air Quality in the Border Region*.[2] However, we question whether all the activities in the *Work Plan* have been carried out, as it appears there is much work remaining.[3]

For example, the California Air Resources Board has acknowledged the need to create and fund an assistant executive officer position with staff to focus on border pollution issues.[4] This need for an assistant executive officer position for border pollution was specifically addressed at the Board's December 13, 2018 meeting on the PM-10 State Implementation Plan for Imperial County, where Boardmembers Garcia, De La Torre, Takvorian and Chair Nichols emphasized that:

> "forming some type of office point person to deal with border regional issues is critical . . . it's long overdue that we have some mechanism to interact with that long border . . . we need to have someone here who is responsible and watching all of those issues . . . we really need to support that work, reinforce the work that you've done by really being able to implement it with someone on the ground . . . bring forward a recommendation sooner rather than later, especially as the budget process is going to be moving forward rather quickly."[5]

Yet, a year later, this California Air Resources Board assistant executive officer position for border pollution has not been created or funded by the State. We want to see action and a commitment of resources for this position. Any "but for" determination should be withheld until it is clear the State is doing all it can to reduce cross border transport at the Imperial

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2 Imperial County – Mexicali Air Quality Work Plan to Improve Air Quality in the Border Region (California Air Resources Board, Dec. 5, 2018), *available at* https://ww3.arb.ca.gov/planning/border/workplan.pdf.

3 Imperial County-Mexicali Work Plan Update and Air Quality Trends (California Air Resources Board, Sept. 12, 2019), *available at* https://ww3.arb.ca.gov/planning/border/Calexico-Mexicali_Work_Plan_Update_9_12_19.pdf.

4 "Following Desert Sun investigation, California takes new steps to combat air pollution along the border," Palm Springs Desert Sun (Dec. 20, 2018) *available at* https://www.desertsun.com/story/news/environment/2018/12/20/california-launches-new-efforts-fight-pollution-mexico-border/2356854002/

5 Meeting Transcript, 236-66 (California Air Resources Board, Dec. 13, 2018) *available at* https://ww3.arb.ca.gov/board/mt/2018/mt121318.pdf?_ga=2.123454029.71234138.1575312465-625996933.1491919805.

County nonattainment area, including creating and funding the California Air Resources Board assistant executive officer position for border pollution.

In this regard, we note that every attainment plan, including the Imperial County plan at issue here, must meet the applicable provisions of section 110(a)(2).[6] Among those applicable provisions is section 110(a)(2)(E)(i), which requires the state to have "adequate personnel [and] funding" to "carry out" the plan.[7] Given the State's failure to fund and staff the assistant executive officer position for border pollution, which the California Air Resources Board has acknowledged is necessary for areas such as Imperial County, the Imperial County plan does not appear to satisfy this requirement.

III. EPA FAILS TO GIVE MEANING TO THE STATUTORY TERMS "MAINTENANCE" AND "MAINTAIN"

Section 179B(a) of the Clean Air Act ("Act"), "International Border Areas," provides:

> Notwithstanding any other provision of law, an implementation plan or plan revision required under [the Act] shall be approved by the Administrator if—
>
> (1) such plan or revision meets all the requirements applicable to it under [the Act] other than a requirement that such plan or revision demonstrate *attainment and maintenance* of the relevant national ambient air quality standards by the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision, and
>
> (2) the submitting State establishes to the satisfaction of the Administrator that the implementation plan of such State would be adequate to *attain and maintain* the relevant national ambient air quality standards by the attainment date specified under the applicable provision of [the Act], or in a regulation promulgated under such provision, but for emissions emanating from outside of the United States.[8]

Section 179B(b), on the other hand, provides:

> Notwithstanding any other provision of law, any State that establishes to the satisfaction of the Administrator that, with respect to an ozone nonattainment area in such State, such State would have *attained* the national ambient air quality standard for ozone by the applicable attainment date, but for emissions emanating from outside of the United States, shall not be subject to the provisions of section [181](a)(2) or (5) of [the Act] or section [185] of [the Act.][9]

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6 42 U.S.C. § 7502(c)(7).
7 *Id.* § 7410(a)(2)(E)(i).
8 *Id.* § 7509a(a) (emphasis added). Unless otherwise noted, all references in the text to "section" are assumed to refer to sections of the Act.
9 *Id.* § 7509a(b) (emphasis added).

It is immediately apparent that section 179B(a) refers to both "attainment and maintenance of" (or "attain and maintain") the national ambient air quality standards ("NAAQS"), while section 179B(b) refers only to "attained."[10]

EPA proposes to apply both section 179B(a) and section 179B(b) to the Imperial County plan, but EPA's proposed action is completely devoid of any discussion of the statutory terms "maintenance" and "maintain" in section 179B(a). For example, in section II.B. of its notice, EPA recites the statutory language of section 179B(a), but then immediately proceeds to discuss "EPA's approval of a state's CAA section 179B(a) demonstration that a nonattainment area would *attain* the standards but for emissions emanating from outside the U.S."[11]

At the outset, this is a failure of notice. EPA provides no explanation at all for its erasure of the terms "maintenance" and "maintain" from section 179B(a). It is also a failure to give any meaning to the terms. As a result, EPA's proposed action is contrary to law.[12]

A. Legislative History of Section 179B

Section 179B was created by the 1990 Clean Air Act Amendments, Public Law 101-549.[13] The Amendments originated from the Senate bill, S. 1630.[14] During the Senate debate on S. 1630, Senator Gramm of Texas introduced the original version of section 179B as a floor amendment.[15] This version became section 116 of S. 1630;[16] it placed the "International Border Area" provisions in section 180 of the Act, and was substantially similar to the version that was enacted, except the pollutant-specific provisions only addressed reclassification.[17] The Senate bill did not contain pollutant-specific provisions for extensions of the attainment date.[18]

The House bill, H.R. 3030, did not contain any international border provisions, but did contain provisions for pollutant-specific attainment date extensions.[19] In conference, the pollutant-specific provisions of the international border section were revised to include attainment date extensions as well as reclassification.[20]

B. The Structure of the Act Indicates "Maintenance" Addresses a Gap

10 The other pollutant-specific provisions for carbon monoxide, *id.* § 7509a(c), and particulate matter, *id. §* 7509a(d), are consistent with the ozone provisions in section 179B(b): they only refer to "attainment."

11 84 FR at 58643 (emphasis added).

12 *E.g. North Carolina v. EPA*, 531 F.3d 896, 910 (D.C. Cir. 2008) ("All the policy reasons in the world cannot justify reading a substantive provision out of a statute.") (granting petition regarding failure of Clean Air Interstate Rule to give meaning to the phrase "interfere with maintenance" in section 110(a)(2)(D)(i)).

13 1 LEGISLATIVE HISTORY OF THE 1990 CLEAN AIR ACT AMENDMENTS, TOGETHER WITH A SECTION-BY-SECTION INDEX ("1990 LEGISLATIVE HISTORY") 711-12 (Environment and Natural Resources Policy Division, Congressional Research Service, Nov. 1993); P.L. 101-549 § 818, 104 Stat. 2697-98.

14 1 1990 LEGISLATIVE HISTORY 1451; H.R. Rep. 101-952 1 (conference report).

15 4 1990 LEGISLATIVE HISTORY 5740-42 (Senate debate, Mar. 9, 1990).

16 3 1990 LEGISLATIVE HISTORY 4288-290 (reprinting S. 1630 as passed by the Senate).

17 *See, e.g. id.* at 4222 (section 184 for ozone as referred to by section 180).

18 *See generally* 3 1990 LEGISLATIVE HISTORY 4119-4816. S. 1630 did contain a general provision similar to current section 172(a)(2)(A). *Id.* at 4168-69.

19 *See, e.g.*, 2 1990 LEGISLATIVE HISTORY 3797 (attainment date extensions for ozone).

20 1 1990 LEGISLATIVE HISTORY 1763-64.

As explained by EPA, international emissions cannot be used to modify a design value for determining if an area has attained.[21] This creates the possibility that an attainment plan for an area may be approved under section 179B(a) due to international border emissions, but the area may never actually attain the NAAQS due to those same emissions. This in turn creates a gap in the statutory structure.

For a nonattainment area not impacted by international border emissions, the state must generally submit an attainment plan that provides for attainment by the applicable attainment date.[22] After the applicable attainment date, EPA must determine whether the area actually attained the standards.[23] If the area fails to attain by the applicable attainment date, then the state will have additional planning obligations. For example, for a Moderate ozone area such as Imperial County that fails to attain and is reclassified to Serious, the state must submit a plan that, among other things:

- Provides for attainment by the Serious area attainment date;[24]
- Establishes an enhanced inspection and maintenance ("I/M") program;[25] and
- Strengthens the nonattainment new source review ("NSR") program.[26]

On the other hand, if the area attains by the applicable attainment date, then the state can and very likely will submit a maintenance plan and redesignation request. If the state waits to do so, then the state risks a scenario in which ambient air quality degrades and the area is no longer eligible for redesignation.

Thus, under Congress' carefully designed scheme, for areas unimpacted by international border emissions states will have additional planning obligations after the applicable attainment date: either additional attainment-related requirements for areas that fail to attain, or (in practice) maintenance plan requirements for areas that attain.

On the other hand, after EPA has approved an attainment plan under section 179B(a), and in tandem exempts the area from reclassification under (for example) section 179B(b), the state may never have additional obligations if the area never attains. This is a real possibility for an area such as Imperial County. Because EPA can only redesignate an area based on its design value,[27] and that design value cannot be modified based on international border emissions, the state may never have the opportunity or obligation to submit a maintenance plan. In other words, after EPA approves an attainment plan under section 179B(a) and exempts the

21 "[M]onitored data cannot be excluded for a determination of whether an area has attained a NAAQS based solely on the fact the data are affected by emissions from outside the U.S." 80 FR 12264, 12293 (Mar. 6, 2015).
22 *E.g.*, 42 U.S.C. § 7502(c)(1). Two exceptions, not relevant to the discussion here, are for Marginal ozone nonattainment areas, *id.* § 7511a(a), and Moderate particulate matter nonattainment areas, *i*d. § 7513a(a)(1)(B)(ii).
23 *E.g.*, 42 U.S.C. § 7511(b)(2).
24 42 U.S.C. § 7511a(c)(2)(A).
25 *Id.* § 7511(c)(3).
26 *Id.* §§ 7511(c), (c)(6), (c)(7).
27 *See* 42 U.S.C. § 7407(d)(3)(E)(i).

area from reclassification, there is a gap in the statute: the state has no additional obligations to address maintenance of the NAAQS.

C. EPA Must Address the Statutory Terms "Maintenance" and "Maintain"

EPA cannot erase the "maintenance" language from section 179B(a) by claiming that the Act cannot mean "maintenance." An agency seeking to overcome the plain language of the Act "must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it."[28] EPA cannot meet this "exceptionally high" standard.[29]

1. EPA Cannot Show That, As a Matter of Historical Fact, Congress Did Not Mean "Maintenance" and "Maintain"

For the first prong, "historical fact," EPA may, in an effort to claim the entire section was sloppily drafted, point to acknowledged errors in section 179B: the reference in section 179B(b) to section 181(a)(2) and the reference to carbon monoxide in section 179B(d).[30] However, both of those errors fit comfortably under the second prong above—logic and statutory structure—and do not reveal any historical fact about Congress' intent. Furthermore, only one of the errors existed in Senator Gramm's floor amendment;[31] the other was introduced in conference as part of adding attainment date extensions.[32] Thus, it is harder to fault Senator Gramm's amendment, which contained the "maintenance" language, as error-ridden. Finally, S. 1630 contained provisions for maintenance plans that are similar to those eventually enacted as section 175A,[33] so EPA is foreclosed from arguing that the legislative history somehow shows section 175A supersedes the "maintenance" language in section 179B(a).

EPA may also point to the circumstances—a floor amendment and a conference agreement—and claim those show that the "maintenance" language was not what Congress intended. However, in discussing application of the first prong to the 1990 Amendments, the D.C. Circuit Court of Appeals has stated:

> The haste and confusion attendant upon the passage of this massive bill do not license the court to rewrite it; rather, they are all the more reason for us to hew to the statutory text because there is no coherent alternative intention to be gleaned from the historical record.[34]

So it is here.[35]

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28 *Engine Mfrs. Ass'n v. U.S. E.P.A.*, 88 F.3d 1075, 1089 (D.C. Cir. 1996).
29 *Friends of Earth, Inc. v. E.P.A.*, 446 F.3d 140, 146 (D.C. Cir. 2006).
30 42 U.S.C. §§ 7509a(b), (d).
31 4 1990 LEGISLATIVE HISTORY 5741.
32 1 1990 LEGISLATIVE HISTORY 1764.
33 *Compare* 3 1990 LEGISLATIVE HISTORY 4193-94 *with* 42 U.S.C. § 7505a.
34 *Engine Mfrs. Ass'n* 88 F.3d at 1092-93.
35 Note also that Public Law 101-549 was "An Act [t]o amend the Clean Air Act to provide for attainment *and maintenance* of health protective national ambient air quality standards, and for other purposes." 104 Stat.

2. *EPA Cannot Show That, As a Matter of Logic and Statutory Structure, Congress Almost Surely Could Not Have Meant "Maintenance" and "Maintain"*

Turning to the second prong, "logic and statutory structure," EPA may argue that the phrase "maintain the [NAAQS] by the applicable attainment date" does not make sense, while "attain … the [NAAQS] by the applicable attainment date" does. The phrase "attain … the [NAAQS] by the applicable attainment date" is common in part D of title I and has a familiar and well-understood meaning,[36] while the phrase "maintain the [NAAQS] by the applicable attainment date" does not occur elsewhere.

That the phrase "maintain the [NAAQS] by the applicable attainment date" is unique, however, does not mean it is incapable of being given a "plausible explanation."[37] Due to the potential lack of planning obligations after the attainment date when a plan is approved under section 179B(a), the phrase can be taken to mean that the plan should have all the required provisions for maintenance in place "by the applicable attainment date." It is EPA's duty—which EPA has failed to meet—to fill in the details of what such provisions should be. As a reasonable possible interpretation, the plan could be required to show that emissions within the state will not grow after the attainment date in such a way that the root cause of the failure to attain shifts from international border emissions to in-state emissions. A state might be able to do this through an analysis of emissions inventories, or through modeling, as with a maintenance plan under section 175A. If information shows that in-state emissions will increase in such a way that the state cannot make such a demonstration, then additional control measures could be required. But, again, it is EPA's duty in the first instance to propose an interpretation, not for commenters to guess at what it might be.

3. *EPA Cannot Negate the "Maintenance" Requirement Through EPA's Tired "Applicable Requirement" Ploy*

Finally, EPA may attempt to argue that, for this submittal, there is no "applicable requirement" under section 179B(a)(1) that the plan "demonstrate maintenance by the applicable attainment date." This runs into several issues. First, section 179B(a)(2) does not contain the "applicable" language. Second, section 179B(a)(1) and (a)(2) both use "and," not "or," between "attainment" (or "attain") and "maintenance" (or "maintain"), which suggests both attainment and maintenance requirements apply to this submittal.

Third, EPA must explain, if the "demonstrate maintenance by the applicable attainment date" language does not apply to this plan submittal, under what circumstances and to which submittal it would apply. Otherwise, EPA's interpretation would make the words "maintain" and "maintenance" into "mere surplusage."[38] The requirement cannot apply to a maintenance

2399. This, along with the addition of section 175A to the Act, suggests that maintenance of the NAAQS was a key issue for the 101st Congress.

36 *E.g.*, 42 U.S.C. § 7511(b)(2)(A) ("whether the area attained the standard by [the applicable attainment date]").

37 *Engine Mfrs. Ass'n*, 88 F.3d at 1091.

38 *Natural Resources Defense Council v. E.P.A.*, 489 F.3d 1364, 1373 (D.C. Cir. 2007)

plan under section 175A, as such a plan must demonstrate maintenance of the NAAQS after redesignation, not by the applicable attainment date.[39] Nor can the requirement apply to the construction programs that are intended to maintain the NAAQS, at least not without imposing additional requirements under those programs.[40]

Finally, it is EPA's failure to give meaning to the terms "maintenance" and "maintain," such as in the manner suggested above, that creates the potential for EPA to argue that there are no "applicable requirements." Such circularity cannot be used to nullify statutory language.

D. Programs to Maintain the NAAQS

Three programs are designed to maintain the NAAQS with respect to emissions from stationary sources: the minor new source review ("NSR") program, the prevention of significant deterioration program ("PSD"), and the nonattainment NSR program.[41] EPA may attempt to deem these programs as the portion of the implementation plan to which "maintenance" in section 179B(a) applies. There are two reasons this argument fails.

First, these programs are designed to maintain the NAAQS, not to maintain the NAAQS "but for" international border emissions. In particular, a minor NSR program can allow construction of new sources and consequent emission increases willy-nilly so long as they will not "interfer[e] with the attainment or maintenance of" the NAAQS.[42] It is not clear—and due to its failure to address the statutory language EPA does not explain—how this provision should be interpreted for a nonattainment area that has an approved plan under section 179B(a).

This issue indicates another way EPA could attempt to give meaning to the clear language of section 179B(a): implementation plans could be required to address how the minor NSR program should operate in this circumstance in order to ensure maintenance of the NAAQS "but for" international border emissions. However, as a practical matter, the permitting agency for Imperial County, like most other permitting agencies, never actually determines if each new minor source causes or contributes to ozone violations. In any case, EPA cannot say that minor NSR programs in this circumstance should operate identically to minor NSR programs generally, as that would fail to give any significance to the statutory language.

Second, these programs do not address mobile sources. We mean mobile sources in the broadest sense to include not only vehicles but also sources of ozone precursors like pesticides

39 *See* 42 U.S.C. § 7505a(a).

40 *See infra*, section I.D.

41 *See* 42 U.S.C. §§ 7410(a)(1), (a)(2)(C). Under section 110(a)(1), implementation plans must provide for maintenance of the NAAQS; section 110(a)(2)(C) identifies the minor NSR, PSD, and nonattainment NSR programs as elements in the plan to provide for maintenance. While the nonattainment NSR program applies only in nonattainment areas, the offset provisions, *id.* § 7503(c); 40 C.F.R. 51.165(a)(3), if implemented properly, ensure that construction of new major sources and major modifications will not cause or contribute to violations of the NAAQS for which the area is designated nonattainment.

42 *See* 40 C.F.R. § 51.160(a)(2). The focus here is on minor NSR because PSD does not apply to criteria pollutants (and their precursors) for which an area is designated nonattainment, and as explained above, *supra* n. 33, the nonattainment NSR program, unlike the minor NSR program, requires offsets for new major sources and major modifications.

and fertilizers. Nor do these programs address most non-point sources like confined animal feeding operations (CAFOs).

IV. CONCLUSION

The State's failure to fund and staff the assistant executive officer position for border pollution calls into question the State's ability to carry out the Imperial County plan. Due to EPA's failure to discuss the terms "maintenance" and "maintain," EPA's proposal is not in accordance with procedure required by law. And EPA's corresponding failure to give those terms any meaning is not in accordance with law. For these reasons, EPA cannot finalize its proposed approval of the Imperial County plan.

Respectfully,

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