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Environmental Protection Agency
Region IX, 75 Hawthorne St.
San Francisco, CA 94105
Submitted electronically to www.regulations.gov

DOCKET ID No. EPA-R09-OAR-2023-0494

Re: US EPA Determination to Include SCAQMD Rule 2305, Warehouse Indirect Source Rule, California SIP (88 FR 70616)

The undersigned organizations submit these comments in Opposition to the proposed inclusion of Rule 2305 by the South Coast Air Quality Management District (SCAQMD) as a California SIP measure by the US Environmental Protection Agency (EPA) (88 FR 70616).

Our many concerns with the proposed SIP inclusion of Rule 2305 by the EPA are described below. These include the likelihood that EPA's proposed action may impact the ongoing litigation underway in federal district court on the very questions of the preemption of this rule under the Clean Air Act and other federal and state laws that EPA is addressing in this proposed SIP action. EPA should defer its action and avoid the interpretation of statutes and laws of which it has no special expertise or agency experience.

EPA Should Defer Action on Rule 2305 Until Federal Court Examinations of SCAQMD Legal Authority Are Complete and Resolved

In evaluating SIP proposals under the Clean Air Act, EPA is required to determine that revisions are enforceable and not prohibited by any provisions of state or federal law that would interfere with carrying out the provisions of the proposal. These precise questions are already before a federal court.

The US District Court is considering the question of whether Rule 2305 is preempted by multiple provisions of multiple federal statutes and not in compliance with state law. (See *Calif. Trucking Assn., et al. v. South Coast Air Quality Mgmt. Dist.* (Case No. 2:21-cv-06341-JAK-MRW, Calif. Central Dist., J. Kronstadt)). Because these questions are being considered concurrently by a federal court on a motion for summary judgment on the very questions of law that a SIP proposal must be approved or disapproved, EPA should defer taking the proposed action at this time.

EPA is not a party to this case and it has not participated or made any appearance in it. The agency should not now insert agency interpretations into that dispute by asserting legal opinions about not only the Clean Air Act, but also issues upon which the EPA possesses no special expertise or knowledge, including the federal Airline Deregulation Act, the Federal Aviation Administration Authorization Act, and questions of California constitutional and state tax law which are at the heart of the litigation.

Since these issues of federal and state statutory interpretation are already properly in front of a judge EPA should defer until the courts have resolved these legal questions. If EPA actually intended to provide its own interpretation in the pending case, as one could infer from the timing of the publication, then such an intention should have been clearly stated as the agency's intent in the publication of this docket. EPA did not express such an intent. To the contrary, EPA stated that, if the District Court were to issue a decision against the SCAQMD in the pending litigation, then EPA will take that decision into account and evaluate appropriate action at that time, which could include re-proposing action, supplementing the proposed action, or withdrawal of the approval (Footnote 42). By its own acknowledgement, EPA itself facially concedes that its action now could be premature, thus confirming that deferral is proper.

Rule 2305 Is Preempted by Federal Law, Rendering SIP Inclusion Inappropriate

Regardless of the timing of the related federal court action, Rule 2305 is preempted under multiple federal statutes, which renders it improper for EPA inclusion in the California SIP.

First, the Rule is preempted by Clean Air Act § 209 because it establishes de facto emission standards. The Supreme Court has previously held that a mandate to purchase certain types of vehicles are as much an emission standard as a mandate to an engine manufacturer. Under Rule 2305, SCAQMD has artificially structured the costs of compliance to make the acquisition of trucks that meet only certain emissions standards, and their associated infrastructure which is necessitated by truck acquisition, the only economically reasonable and the principal method of compliance.

Emissions standards are preempted by the Clean Air Act for all local and state jurisdictions, save for specific circumstances whereby the State of California may seek a waiver or authorization – a request which has not been sought in this instance because SCAQMD claims this is an indirect source rule.

Second, the Rule is preempted by the Airline Deregulation Act and the Federal Aviation Administration Authorization Act because it will mandate changes to prices, routes, and services, as described in earlier submissions to this docket. We appreciate that EPA acknowledges that these statutes are likely impediments to SIP approval, and therefore their inclusion in its proposed SIP findings and its interpretation of them in this matter. However, EPA has no basis or expertise upon which to rely with regard to either the interpretation or application of the Airline Deregulation Act or the FAA Authorization Act. The best source of definitive interpretation of the application of these federal statutes is a federal court – and militates in favor of deferral in this case.

But, even if EPA intended to move forward independent of the pending litigation, its actions here are inconsistent with how an agency should proceed in an iterative process with the public to create a fulsome and complete record upon which it might make such a determination. Much like in a regular rulemaking, where a federal agency publishes a Supplemental NPRM to assess issues in response to an initial set of public comments, EPA here should have published a specific supplemental notice seeking additional public input on these specific questions of which it has no legal expertise.

Preemption analysis is, of course, critical in this regard because any SIP submittal requires that a proposal demonstrate that state authority, pursuant to Clean Air Act § 110 (a)(2)(e). Yet, SCAQMD has expressly disclaimed any authority under § 110 for its adoption of Rule 2305.

Rule 2305 Is Unenforceable Under State Law, Rendering SIP Inclusion Fatal

Likewise, as this Rule is ineffective under California state law, it is improper for EPA inclusion in the California SIP. The EPA should acknowledge that the question of SCAQMD's authority to impose the Rule 2305 mitigation fee and indirect source rule is also subject to ongoing litigation on questions of state law and should be deferred.

For example, Rule 2305 imposes a new tax under state law for use of conventional trucks under the guise of a mitigation fee, but this new tax was adopted administratively and not by popular vote. This is facially inconsistent with the California Constitution, which requires that new taxes cannot be adopted without a requisite vote of the people. Rule 2305 is a tax because the "fee" greatly exceeds the reasonable or estimated costs of SCAQMD's estimated costs of programs and services, the "fee" bears no reasonable relationship to the burdens created by the fee payer's activities or operations, the "fee" chosen was arbitrary and not analyzed for cost-effectiveness, and the "fee" is proposed to be used for projects that will not achieve the emissions reductions for which the rule was adopted, including generic utility infrastructure upgrades.

In their Staff Report, SCAQMD point to California Health and Safety Code §§ 42311 and 40522.5, but then acknowledge that these sections only allow for the collection of valid cost of implementation fees, the type contemplated by SCAQMD's Rule 316, not those imposed by Rule 2305.

Their sole attempts to claim authority to impose such fees is to point to San Joaquin Valley Unified Air Pollution Control District's (SJVAPCD) Rule 9510 and their view that the Clean Air Act does not contain any prohibition on the scope of an Indirect Source Rule adopted by a state. Neither of these arguments should be persuasive to EPA because Rule 9510 was adopted before legislation changed the scope of what constitutes a tax under state law, and the Clean Air Act limits the scope and applicability of an Indirect Source Rule to new or modified sources.

In its notice, EPA avoids independent analysis of these limitations, and instead wholly relies on a memo provided by the state Attorney General and California Air Resources Board on the subject. EPA fails to acknowledge that this memo was provided as advocacy and justification for the adoption of Rule 2305, and that the state Board and the Attorney General have intervened as parties in the underlying litigation in support of Rule 2305. By providing no analysis and, instead, simply relying on the arguments of an advocate for the Rule and a party in the underlying litigation – state attorneys or no – is not an adequate basis for SIP inclusion. EPA cannot simply defer to the state's judgment regarding the lawfulness of its own proposal. Indeed, one would be hard pressed to find a state SIP proposal made by a state that was not advocated for and defended by the state's attorney general and the state's air quality agency.

Second, under California state law, the authority of SCAQMD is limited, and such limitations extend to specific source types. ISR rules are limited to "areas of the south coast district in which there are high-level, localized concentrations or pollutants or with respect to any *new* source that will have a significant effect on air quality in the South Coast Air Basin." Cal. Health & Safety Code § 40440 (italics added). But, Rule 2305 is not so limited, as SCAQMD expressly intends to regulate existing sources under state law – something that it does not have authority to regulate.

EPA Does Not Consistently and Clearly Define "Indirect Source Rule" Applications

Rule 2305 is not a legitimate "Indirect Source Rule" if one relies on the ISR at issue in *National Association of Home Builders v. San Joaquin Valley Unified Air Pollution Control Dist*., 627 F.3d 730 (9th Circuit 2010). Unlike the rule in the *NAHB* case, which squarely fit within Clean Air Act § 110, SCAQMD in this case has expressly disclaimed any attempt to fit its Rule within the bounds of the Clean Air Act's ISR provision, as it seeks to apply its rules to existing emissions sources. By contrast, *NAHB*'s rule applied only to new sources of emissions.

Moreover, the Rule in *NAHB* was concerned with the development site as a whole, rather than being engine- or vehicle-based. By contrast, SCAQMD Rule 2305 obligations are both engine- and vehicle-based, as it is triggered by trucks and compliance obligations can only be met by purchasing and using certain types of trucks and their supporting infrastructure. *NAHB*'s rule did not specify an engine standard: developers could retrofit existing equipment, use different fuels, etc. Here, SCAQMD only awards points for vehicles meeting specific emission standards and the infrastructure necessary for those vehicles.[1]

Where *NAHB*'s rule was based on a site-specific reduction and allowed developers to reduce their obligation by illustrating site-specific factors to achieve a specified cap, SCAQMD Rule 2305 makes such compliance impossible.

Of note, this treatment of Rule 2305 is also wholly inconsistent with EPA's own positive treatment of CARB's description of an ISR. Rule 2305 differs dramatically from that definition of an Indirect Source Rule, as described by CARB and accepted by EPA, in the recent EPA Ocean-Going Vessels At-Berth Notice of Decision, (88 FR 72461)(Oct. 20, 2023)(see https://www.govinfo.gov/content/pkg/FR-2023-10-20/pdf/2023-23261.pdf), which cited CARB's description of the different treatment of mobile source emissions vis-à-vis an ISR (at 72475):

> "The compliance obligations under the Regulation involve minimizing emissions from each vessel visit through various potential actions specific to that vessel visit, and reporting information needed to substantiate the required actions for that visit. Unlike an indirect source rule, the Regulation does not 'cap' emissions at an entire facility or

[1]In fact, trucks equipped with the newest State and Federally certified engines could not visit a facility regulated by Rule 2305 without accruing a compliance obligation, and trips by these newly State or Federally certified engines are not awarded "points" under the program – as only trips from "near-zero emission trucks" and "zero-emission trucks" are awarded points. An analysis of engines certified to the lowest non-zero optional NOx standard clearly demonstrates that even users of the newest State and Federally certified engines cannot earn points and comply without changing the emission control of the engine and vehicle. (see https://ww2.arb.ca.gov/sites/default/files/2023-10/List%20of%20Optional%20Low%20NOx%20Certified%20Heavy-1023-ADA-10032023.pdf)

> otherwise seek to reduce emission below a certain facility-wide level. While the Regulation does regulate ports and terminals, it does so only because regulating those entities has proven essential to ensuring each vessel visit is able to use an approved emission-reducing control technology."

Rule 2305 departs from this description in multiple respects. Indeed, EPA itself does not credit the program with achieving any emissions reduction due *inter alia* to its ambiguity and discretionary provisions. But, when a regulation involves minimizing emissions from each mobile source visit to a specific facility, CARB and EPA have acknowledged that this is not an ISR – rather it is an emissions standard that requires authorization or waiver under Clean Air Act § 209.

Indeed, Rule 2305 makes no such attempt at having emissions capped from warehouses, likely because "direct emission sources or facilities at, within, or associated with any indirect source shall not be deemed indirect sources" pursuant to Clean Air Act §110 (a)(5)(C). Yet, as SCAQMD itself pronounced, the purpose of its rule muddles and confuses whether its rules are direct or indirect sources to warehouses, as its goals are "to reduce local and regional emissions of nitrogen oxides and particulate matter and to facilitate local and regional emissions *associated with warehouses and the mobile sources attracted to warehouses*…" (emphasis added). Here, SCAQMD has not only failed to demonstrate that it has the authority to regulate trucks, but it intermingles direct and indirect source controls at each facility. EPA has not clarified how these requirements may exist simultaneously in the same rule.

In conclusion, EPA should either defer consideration of Rule 2305 for SIP approval until the questions of preemption of federal law and inconsistency with California state laws have been resolved or EPA should conclude that it is an impermissible regulation of mobile source emissions, and not included in the California SIP.

Sincerely,

American Trucking Associations
Building Owners and Managers Association of California
California Beer and Beverage Distributors
California Business Properties Association
California Business Roundtable
California Chamber of Commerce
California Retailers Association
California Trucking Association
CAWA – Representing the Automotive Parts Industry
FuturePorts
Truck Renting and Leasing Association
Global Cold Chain Alliance
Harbor Association of Industry and Commerce
Harbor Trucking Association
Los Angeles Area Chamber of Commerce
Los Angeles County Business Federation
NAIOP of California
Pacific Merchant Shipping Association
Redondo Beach Chamber of Commerce
San Gabriel Valley Economic Partnership
San Pedro Chamber of Commerce
South Bay Association of Chambers of Commerce