No. 11-71127

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA COMMUNITIES AGAINST TOXICS, et al.
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.
Respondents.

Petition for Review of a Final Rulemaking of
the United States Environmental Protection Agency

RESPONDENTS' CORRECTED ANSWERING BRIEF

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GLOSSARY

APA	Administrative Procedures Act
AB 1318	California Assembly Bill No. 1318
Act or CAA	Clean Air Act
AQMP	Air Quality Management Plan
CBE	Communities for a Better Environment
CCAT	California Communities Against Toxics
CEQA	California Environmental Quality Act
NAAQS	National Ambient Air Quality Standards
NSR	New Source Review
OSCV	Offset Source Calculation/Verification Form
PM_{10}	Coarse Particulate Matter
$PM_{2.5}$	Fine Particulate Matter
SB 827	Senate Bill No. 827
SCAQMD	South Coast Air Quality Management District
SIP	State Implementation Plan
SO_x	Sulfur Oxides
TSD	Technical Support Document

INTRODUCTION

California Communities Against Toxics ("CCAT") and Communities for a Better Environment ("CBE") (collectively "Petitioners") challenge EPA's final rule entitled "Revision to the South Coast Portion of the California State Implementation Plan, CPV Sentinel Energy Project, AB 1318 Tracking System," 76 Fed. Reg. 22,038 (Apr. 20, 2011) (hereinafter "Final Rule"). The Final Rule, promulgated by EPA under the authority of the Clean Air Act ("CAA" or the "Act"), 42 U.S.C. §§ 7401-7671q, incorporates enabling language into the South Coast portion of the California State Implementation Plan ("SIP"), and by that incorporation, approves as meeting federal CAA requirements the transfer of specifically identified emission reduction credits for coarse particulate matter (PM_{10}) and sulfur oxides (SO_x).

Petitioners assert that EPA's rulemaking was both procedurally and substantively flawed, and for the first time in their Opening Brief, provide specific details to support several of their substantive arguments. Respondents United States Environmental Protection Agency, Administrator Lisa P. Jackson, and Regional Administrator Jared Blumenfeld (collectively "EPA" or the "Agency"), seek remand of the rulemaking without vacatur in order to reconsider an aspect of its analysis that was not challenged by Petitioners.

STATEMENT OF JURISDICTION

EPA agrees with Petitioners' statement of jurisdiction.

STATEMENT OF THE ISSUES

1. Whether EPA satisfied the Administrative Procedure Act's notice-and-comment rulemaking requirements when it provided certain background documents available in paper at the docket's hardcopy location?
2. Whether Petitioners' actual notice of the background documents rendered harmless any procedural error that might have occurred during the rulemaking?
3. Whether Petitioners waived the argument that certain emission credits are not surplus or not quantifiable by failing to raise the issues with sufficient specificity in their comments to the Proposed Rule?
4. Whether the record supports EPA's conclusion that the AB 1318 Tracking System contains sufficient emission credits that meet the CAA's offset requirements set forth at 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(i)-(ii)?
5. Whether the CAA requires that EPA evaluate the balance in the South Coast Air Quality Management District's internal offset bank, in addition to evaluating compliance with each of the CAA offset requirements set forth at 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(i)-(ii), prior to approving the SIP Revision?
6. In light of EPA's request for a remand of its SIP approval decision to reconsider its analysis of the "base year" requirement, as well as the limited

impact of the deficiencies in the rule and the potential for disruptive effects that would flow from a vacatur of the rule during remand, is the proper remedy in this case remand without vacatur of the rulemaking?

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

The CAA establishes a comprehensive program for controlling and improving the United States' air quality through state and federal regulation. Since its inception in 1970, the CAA has depended upon federal and state cooperation to protect and improve the nation's air quality. Under the CAA, EPA must identify air pollutants that endanger the public health and welfare and promulgate National Ambient Air Quality Standards ("NAAQS") that specify the maximum permissible concentrations for those air pollutants in the ambient air. 42 U.S.C. §§ 7408, 7409. In turn, States must implement NAAQS through state implementation plans, or SIPs, which establish specific control measures that apply to particular sources of air pollution within a State and are designed to attain, maintain, and enforce NAAQS. *Id.* § 7410(a)(1).

States are required to adopt each SIP in a legally enforceable form after notice and a public hearing, and must submit the adopted SIP to EPA for approval within three years of EPA's promulgation or revision of a NAAQS. 42 U.S.C. § 7410(a)(1). The SIP approval process is not static; States routinely submit SIP revisions to EPA

for approval consistent with the requirements of the CAA, such as when changes to federal or state law occur and the State seeks to incorporate those changes into the SIP. *See id.* § 7410(a)(2)(H) (requiring that SIPs provide for regular revisions to reflect evolving air quality conditions and standards).

Once submitted for approval, EPA conducts a completeness review of the SIP. *Id.* § 7410(k)(1)(B). If EPA determines the submission is complete, "the Administrator shall approve" the SIP within 12 months of such determination "if it meets all of the applicable requirements" of the CAA. *Id.* § 7410(k)(2) & (3).

All SIPs, including SIP revisions, are subject to certain statutory and regulatory requirements, including CAA Part D, Sections 171-193, for nonattainment pollutants. *Id.* §§ 7410(a)(2), 7501-7515. CAA sections 172(c)(6) and 173 require that SIPs establish a permitting program for new and modified major stationary sources located in nonattainment areas; that program must include provisions requiring that emission increases be offset by corresponding emission reductions. *Id.* §§ 7502(c)(6), 7503. Section 173(c) requires that offsetting emissions reductions ("emission credits" or "offsets") be "in effect and enforceable" when a new source begins operations and the resulting increases in emissions be "offset by an equal or greater reduction" that was not "otherwise required." *Id.* § 7503(c)

EPA has elaborated on the criteria set forth in CAA section 173(c) in its implementing regulations, 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(i) and 40 C.F.R. pt. 51,

App. S IV(C)(3)(i)(1), stating that emission reductions from sources that are shutting down or curtailing operation are generally creditable for use as emission credits if the reductions are surplus, permanent, quantifiable, and federally enforceable. The terms surplus, permanent, quantifiable, and federally enforceable have not been defined by statute or regulation.

In addition, EPA has established by regulation a "base year" requirement for emission reductions to be credited as emission credits, 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii) and 40 C.F.R. pt. 51, App. S IV(C)(3)(i)(2). These "base year" provisions provide that such emission reductions may generally be creditable for use as offsets if "the shutdown or curtailment occurred after the last day of the base year for the SIP planning process," with the caveat that emission reductions from a prior shutdown or curtailment may be considered "to have occurred after the last day of the base year if the projected emissions inventory used to develop the attainment demonstration explicitly includes the emissions from such previously shutdown or curtailed emission units." *Id.*

II. Factual Background

The South Coast Air Quality Management District ("SCAQMD") is the California state entity responsible for managing the air quality in the South Coast Air Basin and the Riverside portions of the Salton Sea Air Basin. Cal. Health & Safety Code § 40412; Cal. Code Regs. tit. 17, §§ 60104, 60114. The South Coast Air Basin

and the Coachella Valley planning area, one of the areas within the Riverside portion of the Salton Sea Air Basin, have been designated as nonattainment for coarse particulate matter, PM_{10}. 40 C.F.R. § 81.305. Sulfur oxides are a precursor to PM_{10}, and therefore, are also treated as a PM_{10} nonattainment pollutant. 42 U.S.C. § 7513a(e).

SCAQMD has been operating an internal bank of emission credits, including PM_{10} and SO_x emission credits, since the mid 1970's. PER000019. In 1990, SCAQMD adopted a group of rules, known collectively as Regulation XIII, that address the use of emission credits. *Id.* In 1996, EPA approved SCAQMD's Regulation XIII as a SIP Revision. *Id.* Under the SIP-approved SCAQMD Rules, SCAQMD's internal bank is generally used to provide emission credits for sources that are exempted from offsetting rules by SCAQMD Rule 1304 and for sources that are considered "priority sources" under SCAQMD Rule 1309.1. PER000013. EPA determined in 1996 that SCAQMD's implementation of its internal tracking system met the requirements of Section 173(c) and reiterated that finding in 2006. *See Revisions to the California Sate Implementation Plan, [SCAQMD]*, 71 Fed. Reg. 35,157, 35,158 (June 19, 2006). The Final Rule challenged here provides an alternative mechanism for the transfer of specific emission credits from SCAQMD's internal bank to a tracking system for the exclusive use of one facility, the CPV Sentinel

Energy Project (hereinafter "Sentinel"), which is neither exempt under Rule 1304 nor a priority source under SCAQMD Rule 1309.1. *See id.*

The background to the adoption of Final Rule is complicated but bears on a number of the issues raised by Petitioners. Petitioners have challenged SCAQMD's use of its internal bank to provide emission credits on numerous occasions in recent years. In one such instance, Petitioners, with two other environmental groups, sued SCAQMD in California Superior Court, challenging amendments to District Rule 1309.1 and a new District Rule 1315, which set forth the requirements for the operation of the SCAQMD's internal bank of emission reduction credits. *See* Pet'rs' Br. at 7. The Superior Court held that the SCAQMD violated the California Environmental Quality Act ("CEQA") when it adopted the amendments and new rule and barred implementation of the rules. *See Cal. Cmtys. Against Toxics v. SCAQMD*, No. B226692, 2011 WL 2937061, at *4 (Cal. App. 2d July 19, 2011) (unpublished opinion) (discussing litigation and legislative history of challenges before ultimately dissolving injunction). The court enjoined SCAQMD "from undertaking any action to further implement these rules pending CEQA compliance." *See id.*

In response to the Superior Court's decision, the California legislature enacted Senate Bill No. 827 ("SB 827"), authorizing SCAQMD to issue permits under Rules 1304 and 1309.1 in their pre-amended forms. *Id.* (citing Stats. 2009, c. 206 (SB 827), § 2). At the same time, the California legislature also passed Assembly Bill No. 1318

("AB 1318"), which directed SCAQMD to provide offsetting emission reductions for PM_{10} and SO_x from the SCAQMD's internal bank for the construction of the CPV Sentinel Energy Project, an 850-megawatt electrical generating facility in Riverside County, California. *Id.* at *5 (citing Stats. 2009, c. 285 (AB 1318), § 3).

In accordance with the legislative mandate set forth in AB 1318, SCAQMD identified specific emission credits that had been tracked in its internal bank to transfer to Sentinel, naming the newly created account the AB 1318 Tracking System. SCAQMD adopted the AB 1318 Tracking System on July 9, 2010, and the California Air Resources Board submitted the AB 1318 Tracking System to EPA as a source-specific SIP revision on September 10, 2010. PER 000017. The proposed SIP revision consists of text to be included as a revision to the South Coast portion of the California SIP, and in the AB 1318 Tracking System created to implement this new SIP provision. *See id.* The text of the proposed SIP revision provides that "[SCAQMD] shall transfer sulfur oxides and particulate emission credits from the [AB 1318 Tracking System] . . . to eligible electrical generating facilities . . . (i.e., the CPV Sentinel Power Plant) in the full amounts needed to issue permits to construct and to meet requirements for sulfur oxides and particulate matter emissions." *See id.* In effect, the SIP revision allows SCAQMD to transfer PM_{10} and SO_x emission credits out of its internal bank to Sentinel in sufficient amount to meet the projected needs of Sentinel. PER000007.

EPA published its proposed approval of the SIP revision on January 13, 2011 (hereinafter "Proposed Rule"), and provided a 30-day public comment period. PER000012-15. Petitioners sought two extensions of the time to file comments, both of which were denied. PER000037-43. On February 14, 2011, Petitioners jointly submitted comments. *See* Corrected Supplemental Excerpts of R. ("SER") 0005-24. On April 20, 2011, EPA addressed the comments in its Final Rule, and ultimately concluded that the SIP revision complied with all relevant CAA requirements. PER000005-11. In particular, EPA concluded that a sufficient number of the emission reductions that SCAQMD transferred into the AB 1318 Tracking System met the CAA offset requirements such that the number of credits in the AB 1318 Tracking System would more than meet the projected need of Sentinel. PER000006-7. Petitioners promptly filed this petition for review, and in their Corrected Opening Brief, asserted that EPA committed procedural error in the notice-and-comment rulemaking and that the SIP revision violates the CAA.

After reviewing the Petitioners' Opening Brief, EPA re-examined its rule and found an error in its reasoning that it desires to correct, and identified one interpretative issue that it would like to reconsider. EPA also noted that, in light of Petitioners' arguments that for the first time challenged specific emission reductions, EPA could have provided in its SIP approval action a more detailed description of which specific emission reductions satisfied the CAA offset requirements and that it

believed this would aid ultimate judicial review. Accordingly, on September 14, 2011, EPA moved the Court to remand the record to the Agency so it could specifically describe how the "surplus" and "quantifiable" requirements of 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(i) affect each of the emission reductions listed in the AB 1318 Tracking System, and so that it could reconsider whether its description of the "base year" requirement of 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii) was premised on a flawed interpretation of the regulation.

Petitioners opposed EPA's Motion for Remand of the Record, primarily because EPA asked for remand without vacatur; Petitioners requested remand *with* vacatur. On November 7, 2011, the Appellate Commissioner denied both Motions without explanation and ordered EPA to file this answering brief.

STANDARD OF REVIEW

The APA provides the standard of review for both Petitioners' procedural and substantive challenges to the AB 1318 Rule. The minimum notice-and-comment procedures required in informal rulemaking are set forth by the Administrative Procedures Act ("APA"), 5 U.S.C. § 553: The APA requires an agency to publish notice of a proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* at § 553(b)(3). The EPA "must provide notice sufficient to fairly apprise interested persons of the subjects and issues before the Agency." *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir.

2002) (quoting *NRDC v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988)). "On a petition for review from an agency decision, [the Court] determine[s] in the first instance the adequacy of the agency's notice and comment procedure, without deferring to an agency's own opinion of the adequacy of the notice and comment opportunities it provided. A decision made without adequate notice and comment is arbitrary or an abuse of discretion." 279 F.3d at 1186.

EPA's substantive determinations are to be upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review under this standard is narrow. A court will not substitute its judgment for that of the agency, especially where the challenged decision implicates substantial agency expertise. *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 378 (1989); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Gilbert v. Nat'l Transp. Safety Bd.*, 80 F.3d 364, 368 (9th Cir. 1996). Courts, instead, must affirm agency action if the agency has considered the relevant factors and articulated a "rational connection between the facts found and the choice made." *NRDC v. EPA*, 966 F.2d 1292, 1297 (9th Cir. 1992)(quoting *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1105 (9th Cir. 1989), and citing *State Farm*, 463 U.S. at 43). "This deference is highest when reviewing an agency's technical analyses and judgments involving the evaluation of complex scientific data within the agency's technical expertise." *League Of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th

Cir. 2010); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 801-02 (D.C. Cir. 1998) ("Our analysis is guided by the deference traditionally given to agency expertise, particularly when dealing with a statutory scheme as unwieldy and science-driven as the Clean Air Act.").

SUMMARY OF ARGUMENT

Petitioners' claims of procedural error lack merit. EPA satisfied the APA notice-and-comment procedural requirements. Moreover, Petitioners had actual notice of the documents they allege were not available during the rulemaking, which defeats their claim.

Regarding the substance of the Final Rule, EPA acknowledges that its discussion of the "surplus" requirement in the Final Rule included a misstatement. In addition, EPA has re-examined its analysis of the "base year" requirement and has found that it may not have considered the appropriate attainment demonstration when analyzing the "base year" requirement. Because of this misstatement and potentially flawed analysis, as well as EPA's desire to provide a specific accounting of its conclusions regarding the emissions reductions listed at each source, EPA recognized that judicial efficiency would be promoted by a remand of the record before the Court considered the merits of the case. EPA therefore expressly requested this relief by motion, which the Appellate Commissioner denied. Now that the merits of the case are before the Court, EPA again seeks a voluntary remand of

the rulemaking without vacatur, as EPA believes that its SIP approval is flawed but, based on the information presently before the Agency, is likely to be reaffirmed on other grounds following additional proceedings.

Petitioners' arguments do not provide a basis for vacatur of the rulemaking. An excess of emission reductions was transferred into the AB 1318 Tracking System, and Petitioners' allegations that specific emission reductions were not "surplus" or "quantifiable" do not undermine EPA's conclusion that a sufficient number of emission reductions that meet the CAA offset requirements were transferred into the AB 1318 Tracking System to meet the needs of Sentinel. Similarly, the record supports EPA's conclusion that the attainment demonstration cited in the Final Rule includes pre-base-year emission reductions.

In addition, contrary to Petitioners' assertions, EPA's analysis of the balance of SCAQMD's internal accounts was reasonable. Petitioners also challenge the method employed to quantify emission reductions and argue that EPA was required to engage in additional analysis of SCAQMD's internal bank of emission offsets. There is no legal authority that supports either of these contentions, and thus, these challenges lack merit.

Though the analysis in the Final Rule can be improved upon reconsideration, neither Petitioners' arguments nor EPA's acknowledged errors require vacatur of the rulemaking during remand, because (based on the information presently before EPA)

EPA believes the Final Rule is likely to be reaffirmed following additional agency proceedings. Moreover, a vacatur could have significant disruptive consequences for the Intervenors during the interim. Because the deficiencies in the rulemaking are relatively minor and likely to be corrected on remand, and because the disruptive consequences of a vacatur for Intervenors could be significant, the proper remedy in this case is remand without vacatur.

ARGUMENT

I. No Procedural Error Occurred During the Rulemaking.

As an initial matter, Petitioners assert that the omission from the electronic docket ("E-docket") and as an item on the Administrative Index of supporting technical documents that describe in detail the sources and equipment that give rise to the AB 1318 Tracking System emission credits (hereinafter "Documentation") was procedural error that violates the notice-and-comment procedural protections of the APA. But the record also shows that Petitioners received actual notice of the Documentation. This defeats their claim of procedural error.

The Documentation at issue consists of Offset Source Calculation/Verification Forms ("OSCVs") and additional supporting documentation compiled by SCAQMD for each piece of equipment listed in the AB 1318 Tracking System.[1] *See*, *e.g.*,

[1] These documents are listed in the Second Corrected List of Documents in the Administrative Record at II.D., "AB 1318 Tracking System Supporting Documentation, dated June 4, 2010." PER 000002.

PER000045-107; SER0031-88. SCAQMD provided the Documentation to EPA with its SIP submission, and EPA made the Documentation available in hard copy at its San Francisco office. PER000007.

The Proposed Rule described how the amounts of emission reductions transferred were based on the emissions reported to SCAQMD according to its Annual Emissions Reporting Program, and then stated that "Documentation for each of these offsetting emission reductions *is included in the docket* for this proposal." PER 000013 (emphasis added). The Proposed Rule also noted that "EPA has reviewed the documents provided for each offsetting emission reduction." PER 000014.

EPA maintained the official docket, including the Documentation for each transaction, in hard copy at its San Francisco office, but it also made some materials in the docket available electronically. PER000012. The Proposed Rule provided contact information for inquires about scheduling an appointment to inspect the hard copy materials or further information. PER000012.

As EPA noted in the Final Rule, "[Petitioners] did not try to contact any EPA staff to obtain a copy of the [Documentation] or request EPA to provide further specificity in the docket index." PER00007. Though Petitioners realized at least a week before the comment period closed that the Documentation described in the Proposed Rule was not available electronically, PER000040, Petitioners made no attempt to contact EPA to access the Documentation.

EPA also provided an index to the docket, and in the introductory portion of the Proposed Rule, EPA erroneously stated that "all documents in the docket are listed in the index." PER000012. The Documentation, however, was omitted as a line item from the index. EPA acknowledged this in its letter denying Petitioners' second request for an extension of the comment period. PER000042. In that same letter, EPA reiterated that the Documentation was available in the docket, though some information was available only at the hard copy location, and also noted that the Documentation had been publically available from other sources for at least six months. PER000042-43.

EPA regrets that its docketing and communications were less than perfect but, as discussed below, EPA's docketing fulfilled all relevant legal requirements. Furthermore, its misstatement was harmless as to the Petitioners because Petitioners were familiar with the Documentation from earlier proceedings and had actual notice that it was part of the record.

A. EPA Had No Obligation to Place Documentation in the E-docket or List Materials in an Administrative Index.

Notice is adequate under the APA where it would "fairly apprise interested persons of the subjects and issues before the Agency." *NRDC*, 279 F.3d at 1186. This notice requirement includes a duty to "identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules." *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). The

courts will not force agencies to undertake procedural burdens unless a statute or a regulation imposes that burden on the agency. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-44 (1978).

EPA satisfied the APA notice requirements in this rulemaking. The Proposed Rule clearly referenced the Documentation and described how it was used by EPA. The Proposed Rule also correctly stated that the Documentation was included in the docket. In addition, EPA made the Documentation available on request through the Agency contact. Thus, EPA fully described the technical documents it relied on and made them available to the public, and no procedural error occurred in regard to the availability of the Documentation.

Petitioners erroneously contend that an agency must make all materials that are in its paper docket available online, citing section 206(d)(2) of the E-Government Act of 2002. Pet'rs' Br. at 13, 17. In full, section 206(d)(2) of the E-Government Act states:

> Agency electronic dockets shall make publicly available online to the extent practicable, as determined by the agency in consultation with the Director—
>
> (A) all submissions under section 553(c) of title 5, United States Code; and
>
> (B) other materials that by agency rule or practice are included in the rulemaking docket under section 553(c) of title 5, United States Code, whether or not submitted electronically.

44 U.S.C. § 3501 note.

Petitioners omit the key phrase "to the extent practicable, as determined by the agency in consultation with the Director," fundamentally misconstruing its meaning. Pet'rs' Br. at 17. Section 206(d)(2) of the E-Government Act clearly gives the agency discretion to determine what is practicable, rather than creating an affirmative requirement that the Agency post all the materials in its administrative docket online. Petitioners provide no other legal authority for their contention that EPA has a duty to provide the Documentation electronically.

Petitioners also contend that once EPA represented that it was listing all documents in the docket in the index, it had an obligation to provide a complete index. Pet'rs' Br. at 16. Petitioners, however, fail to provide any legal citation to support this assertion. As noted above, EPA met the APA notice requirement that interested persons be fairly apprised of the subjects and issues before the Agency, and that they have access to technical documents relied on by the Agency. EPA's omission of the Documentation as a line item on the docket index, while potentially confusing, does not undermine the sufficiency of the notice provided by the Proposed Rule, which expressly referred to the Documentation.

B. Petitioners Had Notice of and Possessed the Documentation Before They Availed Themselves of the Opportunity to Comment.

Even if EPA's failure to publish the Documentation electronically or list it as a line item on the docket index could be construed as procedural error, Petitioners had

actual notice of the contents of the Documentation, and thus, to the extent any error occurred, it was harmless.

Section 706 of the APA instructs courts that when reviewing agency action "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. Section 706 is an "administrative law . . . harmless error rule." *Shinseki v. Sanders*, 129 S. Ct. 1696, 1704 (2009) (internal quotations and citations omitted). This portion of the statute "sums up in succinct fashion the 'harmless error' rule applied by courts in the review of lower court decisions as well as of administrative bodies." *Id.* (quoting U.S. Dep't of Justice, Att. Gen.'s Manual on the Admin. Procedure Act 110 (1947), reprinted in Admin. Conference of the U.S., Fed. Admin. Procedure Sourcebook 67, 176 (2d ed. 1992)) (emphasis omitted). Where, as here, a complaining party had actual notice and was able to submit its views to the Agency prior to the challenged action, no procedural harm is suffered by failure to provide notice as required by the APA. *See Cal-Almond, Inc. v. US. Dep't of Agric.*, 14 F.3d 429, 441-442 (9th Cir. 1993); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487-88 (9th Cir. 1992); *see also Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764, 765 (9th Cir. 1986) (failure to comply with statute's procedural requirements in every respect was harmless error where the complaining party had sufficient notice of the subjects and issues involved and was afforded a full and fair opportunity to be heard). "[T]he burden of showing an error is harmful normally falls upon the party attacking the agency's

determination." *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1090-91 (9th Cir. 2011) (citing *Shinseki*, 129 S. Ct. at 1706).

As EPA noted in the Final Rule, "the same records were provided to CCAT by [SCAQMD] long before our proposed approval was published." PER 000007. Petitioners not only had requested the Documentation from SCAQMD many months before the Proposed Rule was published, they were also extremely familiar with Documentation from their participation in the California Energy Commission ("CEC") certification proceeding for the Sentinel facility. *See* Respt's Request for Judicial Notice ("RJN") at ¶¶ 1-2; *see also* SER0025 (SCAQMD comment letter noting that Petitioners raised similar challenges in CEC proceeding). On December 7, 2009 and March 10, 2010, both Petitioners (California Communities Against Toxics and Communities for a Better Environment, respectively) intervened in the CEC certification proceeding. Respt's RJN at ¶ 1. During the proceeding, SCAQMD, Sentinel, and Petitioners presented expert testimony regarding the emission reduction credits that SCAQMD planned to transfer to the Sentinel project. *See* Respt's RJN ¶ 2.

Indeed, Petitioners do not dispute that they had the Documentation in their possession. *See* Pet'rs' Br. at 18. Petitioners, instead, assert that that they had no way of knowing "what 'documents' EPA received or was reviewing." *Id.* This assertion is disingenuous. First, it is evident that Petitioners were deeply familiar with the

Documentation from their participation in the CEC proceedings. Second, the Proposed Rule provided a contact at EPA who would have provided Petitioners with additional information about the Documentation if Petitioners had contacted that person. PER000012.

A docketing error is harmless if the petitioner had actual notice of the information and was able to comment on it in the record. *See, e.g., Appalachian Power Co.*, 135 F.3d at 814-15; *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 540-41 (D.C. Cir. 1983). Here, Petitioners had actual notice of the Documentation and were able to submit comments on the record, which EPA considered. SER0005-24; PER00005-10. Petitioners have not and cannot meet their burden to demonstrate that any error that might have occurred caused them harm.

II. Petitioners Have Waived Issues Not Properly Presented to EPA During the Comment Period

A. Issues Not Raised in Comments Are Generally Waived.

It is well-settled that petitioners must raise issues during the comment process before raising them in litigation. *See Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1249 (9th Cir. 2000). Courts typically decline to consider issues not raised before an administrative agency because to do otherwise would "usurp[ ] the agency's function" and would "deprive[ ] the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Alaska Unemployment Comp. Comm'n v. Aragan*, 329 U.S. 143, 155 (1946); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S.

33, 37 (1952) ("[C]ourts should not topple over administrative decisions unless the administrative body. . . has erred against objection made at the time appropriate under its practice.").

As the Supreme Court has cautioned,

> administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."

Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978).

Thus, courts have held that a commenter waives an issue not raised with sufficient specificity. *See Tex Tin Corp. v. EPA*, 935 F.2d 1321, 1323 (D.C. Cir. l991); *see also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) ("[C]omments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true."). Petitioners have a fundamental "burden of clarifying [their] position for the EPA." *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1519-20 (D.C. Cir. 1988). "[T]he dialogue between administrative agencies and the public is a two-way street." *Id.* at 1520 (citation and internal quotation omitted). Thus, although EPA has an obligation to give full consideration to significant comments, "it is still incumbent upon [commenters] who wish to participate to structure their participation so that it is meaningful, so that it

alerts the agency to the [commenters'] position and contentions." *Vt. Yankee*, 435 U.S. at 553.

A court may excuse waiver if it concludes that the issue was raised before the agency during the administrative process or in exceptional circumstances. *See Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007). To determine whether exceptional circumstances exist, a court will "balance the agency's interests in applying its expertise, correcting its own errors, making a proper record, enjoying appropriate independence of decision and maintaining an administrative process free from deliberate flouting, against the interests of private parties in finding adequate redress for their grievances." *Universal Health Services, Inc. v. Thompson*, 363 F.3d 1013, 1021 (9th Cir. 2004).

B. Petitioners Failed to Raise their Arguments Regarding the "Quantifiable" and "Surplus" Requirements With Sufficient Specificity During the Comment Period.

Petitioners' comments on the CAA offset requirements consisted of general assertions of noncompliance. SER0005-24. At no point in their comments did Petitioners advance arguments related to any specific source or piece of equipment.

In their comments regarding the "quantifiable" issue, Petitioners simply asserted that EPA had not made available the type of detailed information that is, in fact, in the Documentation and that EPA had not performed the individual analysis required to show that each of the emission reductions listed in the AB 1318 Tracking

System were "quantifiable." SER0014. Petitioners' comments regarding the "surplus" requirement were more specific, referencing compliance with BACT and the operation of SCAQMD's internal account, but were equally unrelated to the arguments regarding specific sources that they now pursue in a judicial forum. SER0014-15.

For the first time in their Brief, Petitioners identify specific sources or pieces of equipment for which they assert that the emission reductions are not quantifiable or not surplus. Pet'rs' Br. at 21-26. Because neither Petitioners nor any other party raised these source-specific arguments in comments, the arguments have been waived.

This is not a case where the arguments that Petitioners now advance were raised during notice-and-comment proceedings. Nor do exceptional circumstances support an excuse of waiver in this case. EPA attempted to provide concise yet complete responses to Petitioners' vague and rambling comments. In this highly technical area of verification of emission reductions, Petitioners should not be permitted to omit any specific comment on the listed emission credits during the comment period, and then, cherry-pick particular emission credits that they later assert are questionable on judicial review. As noted above, Petitioners had access to the Documentation, yet did not make any references to the technical information that they now cite in their Opening Brief. Accordingly, Petitioners' general comments regarding the "quantitative" and "surplus" requirements appeared speculative; thus,

EPA's responses to those comments were general in nature. Petitioners' failure to present specific arguments regarding the emission reductions from particular sources during the administrative proceeding deprived EPA of the opportunity to consider and respond to them specifically. They cannot be presented for the first time to this Court without seriously undermining the administrative process.

III. The Record Supports EPA's Conclusion that a Sufficient Number of the Credits Transferred Meet the CAA Offset Requirements .

When EPA approved the Final Rule, rather than provide a source-by-source assessment of the emission credits, EPA simply stated that a sufficient amount of the emission reductions met the requirements to offset the amount of PM_{10} and SO_x emissions increases projected from Sentinel. PER000006-7. As set forth in the AB 1318 Technical Support Document ("TSD"), the maximum amount of emission credits needed for Sentinel was 118,120 lbs/year of PM_{10} and 13,928 lbs/year of SO_x emissions reductions. *See* PER000026. SCAQMD transferred into the AB 1318 Tracking System an amount of emission credits in excess of the maximum amount needed by Sentinel, a total of 137,799 lbs/year of PM_{10} and 25,438 lbs/year of SO_x emission reductions. PER000032, 36. Thus, there was an excess of 19,679 lbs/year of PM_{10} and 11,418 lbs/year of SO_x emissions reductions transferred into the AB 1318 Tracking System.

As EPA noted in its earlier Motion for Remand of the Record, if Petitioners' comments during the administrative process had included the new arguments raised

by Petitioners in their Opening Brief, the Agency's explanation of its reasoning in approving the SIP revision could have been more detailed. Despite the lack of a well-developed record to address the substantive challenges now raised by Petitioners, the evidence in the administrative record supports EPA's conclusion that a sufficient number of the AB 1318 Tracking System emission credits meet the CAA offset requirements.

A. Petitioners Exaggerate the Need for Surplus Adjustment.

"Surplus" for the purposes of 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(i) requires that "emission reductions used as offsets [ ] be 'surplus' to any other federal requirement to reduce emissions." PER0000021. Where emission reductions would be subject to a subsequently adopted air quality requirement that would reduce emissions, the amount of creditable emission reductions must be recalculated with a downward adjustment, when necessary, to account for any emission reductions that would be required by the new requirement. *See id.* This is a "surplus adjustment."

In addressing Petitioners' comments regarding the "surplus" requirement, EPA stated that "[SCAQMD] has not promulgated new rules or standards that would apply to these types of sources, and thus no adjustments to the credits were required." *Id.* EPA concedes that this absolute statement was incorrect, but believes that the number of credits affected by such new rules and standards is less than the number of excess emission reductions transferred into the AB 1318 Tracking System.

Petitioners' Corrected Opening Brief for the first time asserts that two SCAQMD Rules, Rule 1156 and Rule 1157,[2] require reductions in PM_{10} and SO_X, and thus, render at least some emission reductions "non-surplus."[3] Pet'rs' Br. at 21-22. Petitioners argue that Rule 1157 should have applied to seven sources listed in the AB 1318 Tracking System, and Rule 1156 should have applied to two of these same sources. *See id.*

Rule 1156 does not apply to any of the emission reductions included in the AB 1318 Tracking System. That rule, entitled "Further Reduction of Particulate Emissions from Cement Manufacturing Facilities," only applies (as its name suggests) to cement manufacturers, not to users of cement products. *See* Pet'rs' RJN, Ex. F. The two facilities that Petitioners claim are subject to Rule 1156, Elsinore Ready-Mix Co., Inc. and Oldcastle Westile, Inc., *use* cement products but do not *manufacture* cement. SER0031-32, 43-44, 45-47, 69-70. Therefore, Rule 1156 does not apply to

[2] Petitioners also reference BCM-08 as a control measure that applies to PM_{10}. *Id.* BCM-08 is simply a control strategy that is implemented through rules such as Rules 1157 and 1156. *See* SER0089-90.

[3] Petitioners, in fact, only identify a single source, Chandler Aggregates, for which they assert that the emission reductions should have been adjusted downward, but were not. Pet'rs' Br at 21. Petitioners merely identify the amount of emission reductions listed for each of the other six sources that they assert are subject to Rule 1157 and 1156. *Id.*

those facilities, and for that reason, Rule 1156 does not require any surplus adjustment to the emission reductions from these facilities.

EPA agrees that SCAQMD Rule 1157 is a new rule that applies to some of the emission reductions listed in the AB 1318 Tracking System and that a surplus adjustment on the emission reductions from the applicable sources should have been calculated to account for any emission reductions that would have been required by the subsequently adopted Rule 1157. However, Petitioners overstate the impact of this error on the number of emission reductions transferred to the AB 1318 Tracking System. Rule 1157, entitled "PM10 Emission Reductions From Aggregate and Related Operations," is a housekeeping rule that requires various techniques to be used throughout aggregate and related operations to minimize PM_{10} emissions. *See* Pet'rs' RJN, Ex. G. As such, Rule 1157 does not apply to Matthews International Corp., which as stated on its Offset Source Calculation/Verification Form, is a brass foundry. SER0071-73. A brass foundry and its sand reclamation system are not aggregate and related operations, and therefore, are not subject to Rule 1157.

When Matthews International is removed from the sources listed by Petitioners, at the most extreme, if the total emission reductions from all sources subject to Rule 1157 were adjusted down to zero, a total of 10,224 lbs/year of the 137,799 lbs/yr of PM_{10} transferred to the AB 1318 Tracking System would not meet

the surplus requirement.[4] Even under this most extreme situation, there would still be a sufficient amount of PM_{10} credits transferred to the AB 1318 Tracking System to meet the maximum need of Sentinel: 118,120 lbs/year of PM_{10}.

B. The Vast Majority of Emission Credits Transferred Are Quantifiable.

"Quantifiable," as set forth at 40 C.F.R. §51.165(a)(3)(ii)(C)(1)(i), "requires an accurate assessment of the quantity of emissions previously emitted by the source prior to modification or shutdown of the subject equipment." PER 0000021. In their Opening Brief, for the first time, Petitioners identify particular sources or pieces of equipment and dispute whether the associated emission reductions identified in the AB 1318 Tracking system are quantifiable. *See* Pet'rs' Br. at 23-25.

More broadly, Petitioners contend that portions of the Documentation are insufficient because "69 pieces of equipment lacked either one or both Annual Emission Reports for the period that EPA claims to have reviewed." Pet'rs' Br. at 25. This argument is premised on the faulty assumption that two years of data are required to quantify the emission reductions associated with the shutdown of a piece of equipment. *See id.*

[4] At a maximum, 10,224 lbs/year of PM_{10} emission reductions might be affected by a surplus adjustment to account for emission reductions required by Rule 1157, from the following sources: Chandler Aggregate (2,907 lbs/year of PM_{10}), Whitewater Rock & Supply Co. (4,836 lbs/year of PM10), Oldcastle Westile, Inc.(1,962 lbs/year of PM_{10}), Ortiz Enterprises Inc. (464 lbs/year of PM_{10}), CDE Resources, Inc. (28 lbs/year of PM_{10}), and Elsinore Ready-Mix Co. Inc. (27 lbs/year of PM_{10})

Neither the CAA nor its implementing regulations requires the use of two years of data to assess whether the emission reductions were quantifiable. Section 173 of the CAA does not define how to calculate actual emissions for purposes of providing emissions reductions. *See* 42 U.S.C. § 7503. EPA's regulations setting forth SIP requirements for emission credits are also silent on this issue. *See* 40 C.F.R. § 51.165(a)(3). EPA's Emissions Offset Interpretative Ruling, codified at 40 C.F.R. Part 51, Appendix S, however, establishes the procedure for calculating the "baseline for determining credit for emission and air quality offsets." Appendix S provides:

> When offsets are calculated on a tons per year basis, the baseline emissions for existing sources providing the offsets should be calculated using the actual annual operating hours for the *previous one or two year period* (or other appropriate period if warranted by cyclical business conditions).

Id. at IV.C. (emphasis added).

It appears that Petitioners' erroneous contention that SCAQMD must use two years of actual emissions to calculate emission credits is based on the definition of "actual emissions" in 40 C.F.R. § 51.165(a)(1)(xxxv). This definition of "actual emissions," however, does not apply to quantification of emission offsets as it is provided for calculating emissions increases from modifications, not for determining offset credits.

Furthermore, even if Petitioners were correct in asserting that two years of emissions data were required for each piece of equipment, Petitioners fail to support their argument with evidence from the record. To support this argument, Petitioners

point to only a single source, Whitewater Rock & Supply Co., at which two pieces of equipment had been shut down, and they fail to identify or cite to any record evidence regarding the other alleged 67 pieces of equipment. *See* Pet'rs' Br. at 25.

With respect to the two pieces of equipment that Petitioners do discuss, the record does not support Petitioners' contention that EPA considered only one year of emissions data. Instead, the record shows that SCAQMD, and subsequently EPA, adopted a conservative approach toward quantifying the emission reductions from the shutdowns. For both pieces of equipment at Whitewater Rock & Supply Co., SCAQMD assumed that the emissions for the missing year were zero, and that zero was averaged with the lbs/year of PM_{10} emissions reported for the second year. PER000095-000096.[5] Thus, under this conservative approach, only half of the possible emission reductions that might have been quantified based on a single year of data were transferred to the AB 1318 Tracking System. PER 0000032.

Petitioners also identify one source, Little Company of Mary Hospital, for which the emission reductions are not quantifiable. *See* Pet'rs' Br. at 23-25. EPA agrees that the emission reductions listed for Little Company of Mary Hospital, 388 lbs/year PM_{10} and 32 lbs/year SO_x, are not quantifiable. However, this very small number of credits does not undermine EPA's determination that the Documentation

[5] Petitioners' Brief miscites the record; the relevant OSCVs are at PER 0000095-96, not PER 0000025.

provided by SCAQMD demonstrated that "a sufficient number of emission credits transferred met the [CAA offset requirements]." Pet'rs' Br. at 23 (citing PER 000006-000007). Even when these 388 lbs/year of PM_{10} emission reductions are added to the maximum amount of lbs/year of emission reductions that might be subject to surplus adjustment under Rule 1157 (10,224 lbs/year of PM_{10}), the resulting sum of 10,562 lbs/year of PM_{10} does not undermine EPA's conclusion that a sufficient number of the credits transferred to the AB 1318 Tracking System meet the CAA offset requirements.

C. Despite EPA's Intent to Reconsider its Analysis of the "Base Year" Requirement, the Evidence Suggests that on Reconsideration, EPA Could Still Conclude that the Offset Credits Satisfy the "Base Year" Requirement.

Under 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii), in general, emission reductions will be creditable for use as an offset if "[t]he shutdown or curtailment occurred after the last day of the base year for the SIP planning process." In addition, emission reductions from an earlier shutdown or curtailment may be credited as offsets "if the projected emissions inventory used to develop the attainment demonstration explicitly *includes* the emissions from such previously shutdown or curtailed emission units." *Id.* (emphasis added.)

Petitioners assert that the Final Rule violates the "base year" requirement of 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii). Pet'rs' Br. at 26-28. In their comments, Petitioners stated that under the SCAQMD's 2007 Air Quality Management Plan ("2007

AQMP"), the applicable base-year was 2002, and since the 2007 AQMP did not include emission reductions pre-dating 2002 in the emissions inventory, certain emission reductions listed in the AB 1318 Tracking System were not creditable as emission credits. SER0015-16, 18. In response, EPA also referenced the 2007 AQMP, noting the 2002 baseline, and stated that because SCAQMD adds a portion of pre-baseline emission reductions into the emissions inventory for each future year, SCAQMD complies with the "base year" requirement. PER000008-9.

Petitioners in their Brief challenge EPA's determination that the credits listed in the AB 1318 Tracking System meet the requirement of 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii) that pre-baseline emission reductions must be explicitly included in the emissions inventory. Pet'rs' Br. at 26. Petitioners specifically point to Table 2-12 in the 2007 AQMP, arguing that the information in the table shows that the pre-2002 emission reductions were excluded from the 2007 AQMP. Pet'rs' Br. at 27-28.

As set forth in greater detail below, EPA seeks to reconsider the assumption that the 2007 AQMP should be considered when assessing compliance with the "base year" requirement. Based on the information currently available to it, EPA believes that, upon reconsideration, it could conclude that, rather than the 2007 AQMP, a different attainment demonstration should be considered for this analysis.

1. Upon Reconsideration, a Likely Alternative Analysis Could Conclude that the "Base Year" Requirement Is Satisfied.

In EPA's earlier Motion for Remand of the Record, EPA sought a remand so that it could reevaluate its presumption that the 2007 AQMP was the appropriate attainment demonstration to consider in assessing compliance with the "base year" requirement when it issued the Final Rule. As previously noted in that Motion, 40 C.F.R. § 51.165(a)(3)(ii)(C)(1) was revised as a part of comprehensive rulemaking that was finalized after reconsideration in 2007. *See Phase 2 of the Final Rule To Implement the 8-Hour Ozone National Air Quality Standard—Notice of Reconsideration*, 72 Fed. Reg. 31,727, 31,738-43 (June 8, 2007). In that rulemaking, EPA restructured the regulation, subdividing the "federally enforceable, quantifiable, and surplus" requirements and the "base year" requirement, and eliminating a previously-imposed requirement that an approved attainment demonstration be in place to allow new and modified sources to meet the offset requirement.[6] *See id.* This revision of the

[6] Prior to the rulemaking that concluded in 2007, 40 C.F.R. § 51.165(a)(3)(ii)(C)(1) stated:

> Emissions reductions achieved by shutting down an existing source or curtailing production or operating hours below baseline levels may be generally credited if such reductions are permanent, quantifiable, and federally enforceable, and if the area has an EPA-approved attainment plan. In addition, the shutdown or curtailment is creditable only if it occurred on or after the date specified for this purpose in the plan, and if such date is on or after the date of

(footnote continued . . .)

regulation was subsequently challenged in the Court of Appeals for the District of Columbia Circuit. That court held that the elimination of the "fully-approved SIP requirement" was arbitrary and capricious, and remanded that portion of the 2007 rulemaking to EPA without vacatur. *NRDC v. EPA*, 571 F.3d 1245, 1267, 1276 (D.C. Cir. 2009). The Agency has not yet revised the regulatory language of the "base year" requirement following the *NRDC v. EPA* decision.

EPA wishes to reconsider whether the base-year for the purposes of 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii) should be evaluated by reference to the base-year used in the most recent EPA-approved attainment demonstration for the relevant pollutant. Under this reasoning, the 2007 AQMP that formed the basis for the EPA SIP approval challenged here would *not* be the appropriate attainment demonstration to consult for two reasons. First, at the time the SIP Revision was approved in April 2011, the 2007 AQMP had not been approved by EPA. The 2007 AQMP was not approved until November 9, 2011. *See Approval of Air Quality Implementation Plans; California; South Coast; Attainment Plan for 1997 PM2.5 Standards,* 76 Fed. Reg. 69,928 (Nov. 9, 2011).

> the most recent emissions inventory used in the plan's demonstration of attainment. Where the plan does not specify a cutoff date for shutdown credits, the date of the most recent emissions inventory or attainment demonstration, as the case may be, shall apply. . . .

Requirements for Implementation Plans; Air Quality New Source Review, 54 Fed. Reg. 27,286, 27,299 (June 28, 1989).

Second, the 2007 AQMP was adopted to demonstrate attainment with the fine particulate matter ("$PM_{2.5}$") and 8-hour Ozone NAAQS. *Id.* While the 2007 AQMP makes reference to PM_{10}, it does not demonstrate attainment with the PM_{10} NAAQS. As the CAA offset provision is pollutant-specific, *see* 42 U.S.C. § 7503(c), upon reconsideration, it is possible that EPA will conclude that a PM_{10} attainment demonstration (rather than the 2007 AQMP) should be used in evaluating whether the PM_{10} emission reductions that SCAQMD transferred to the Sentinel AB 1318 Tracking System complied with 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii).

The most recent EPA-approved attainment demonstration for PM_{10} for the South Coast and Coachella areas was submitted in 2003 and approved by EPA in 2005 (hereinafter "2003 AQMP"). *See Approval and Promulgation of [SIPs] for Air Quality Planning Purposes; California—South Coast and Coachella*, 70 Fed. Reg. 69,081 (Nov. 14, 2005). Thus, one possible outcome on reconsideration is that EPA will conclude that it is this 2003 AQMP that should be referenced when evaluating PM_{10} emissions reductions for the Sentinel AB 1318 Tracking System.

Notably, at least based on the information presently before EPA, if the 2003 AQMP is used to analyze compliance with 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii), it appears that all of the credits transferred to the AB 1318 Tracking System would, in fact, meet the requirements of 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii). The first sentence of the provision provides that all emission reductions that occur after the last day of

the relevant base-year are generally creditable. The base-year of the emissions inventory in the 2003 AQMP is 1997. *See Proposed Rule, Approval and Promulgation of [SIPs] for Air Quality Planning Purposes; California—South Coast and Coachella*, 70 Fed. Reg. 43,663, 43,665 (July 28, 2005). All emission credits included in the AB 1318 Tracking System occurred in 1999 and later. PER000006. Therefore, at least based on the information presently before the Agency, it appears that all potential emission reductions from shutdown equipment occurred after the last day of the base-year, and thus, that the "base year" requirement of 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii) would be satisfied when analyzed in reference to the 2003 AQMP. Of course, EPA is not attempting to prejudge this issue; any final decision involving reevaluation of the SIP would occur only after notice and an opportunity for comment, and EPA would make its decision based on the information then before the Agency.

2. Even if the 2007 AQMP Is Considered the Relevant Attainment Demonstration Document, the "Base Year" Requirement is Satisfied.

Though EPA has stated its desire to reconsider its analysis of the "base year" requirement, Petitioners' contentions that the 2007 AQMP explicitly excludes pre-2002 credits is incorrect. The emissions inventory for the 2007 AQMP is set forth in Appendix III, Chapter Two of the 2007 AQMP, "Base and Future Year Emission Inventories," a complicated, technical document, containing numerous subsections.

See generally Pet'rs' RJN, Ex. B; *see also* SER0091-129.[7] Petitioners refer to Table 2-12 and related text that describe SCAQMD's calculation of "Growth from New and Modified Sources." *See* Pet'rs' Br. at 28. This section of Appendix III presents SCAQMD's evaluation of the minimum amount of emission credits necessary to account for growth from new and modified sources. *See* SER0119-122. While Table 2-12 and the accompanying text state that pre-2002 credits are *not needed* for growth from new and modified sources for PM and SOx, *see id.*, this portion of the 2007 AQMP does not state that such credits were excluded, as Petitioners contend. Accordingly, the table and text cited by Petitioners are not determinative of whether pre-baseline emission reductions were included in the emissions inventory for the 2007 AQMP.

SCAQMD's prior discussion of "Baseline Emission Inventories" in Appendix III, Chapter 2 of the 2007 AQMP, however, demonstrates that SCAQMD has, in fact, included pre-baseline emission reductions in the 2007 AQMP emissions inventory. SER0094-95, 116, 123. As set forth at the beginning of Appendix III, SCAQMD calculates future year baseline emissions by considering: 1) the base-year emissions, i.e. emissions in 2002; 2) the level of control due to regulations; and 3) the potential

[7] Petitioners have requested that the Court take judicial notice of the 2007 AQMP. The 2007 AQMP is part of the administrative record. *See* PER000008-9. The Corrected Certified List of Documents in the Administrative Record inadvertently omitted the 2007 AQMP, and this omission was corrected by the filing of the Second Corrected Certified List of Documents in the Administrative Record. Dkt No. 38.

for growth of various categories of polluting sources. SER0094. Put differently, SCAQMD's 2007 AQMP used a three-step analysis to develop the emissions inventory for the 2007 AQMP. First, SCAQMD started by including all emissions that were occurring in the base-year of 2002. Second, SCAQMD considered the amount by which those emissions would be affected by installation and operation of pollution controls. Third, SCAQMD considered the amount by which emissions of each pollutant from various sources were expected to increase, and accounted for that anticipated growth in the future year emission data. It is at this step that, as noted in the Final Rule, SCAQMD "adds in a portion of pre-baseline banked credits into the inventory." PER000009.

Table 2-8 shows approximately how many tons/day of additional $PM_{2.5}$ SCAQMD included in the future year emission data beyond the base-year emissions, i.e., emissions in 2002. *See* SER0116. The "No Growth" category represents the 2002 level of emissions, taking into account subsequent changes in the regulation of the pollutant. *Id.* The "With Growth" category specifically incorporates additional emissions added into the 2020 inventory to account for anticipated growth; these additional emissions are pre-base-year emissions, plus the limited amount of emissions growth from increased capacity by existing sources. *Id.* As shown in Table 2-8, SCAQMD added 1 ton/day of $PM_{2.5}$ for point sources and 8 tons/day for area

sources to the emissions inventory from its internal bank of pre-base-year emissions reductions to account for growth in 2020. *Id.*

In addition, the 2007 AQMP emissions inventory provides for an "Offset Budget," an emissions account for use with Rule 1309.2. SER0123. To provide offset emissions for the Offset Budget, the 2007 AQMP included a set-aside account of one ton per day for each criteria pollutant in the Offset Budget. *Id.* Further, the 2007 AQMP makes clear that this line item in the accounting is in addition to emissions already included in the AQMP baseline inventories, i.e., the addition of pre-base-year emissions into the AQMP's inventory for each pollutant for 2020 "With Growth" emissions. *Id.* ("This line item is to account for emissions that may not be included in the AQMP baseline inventories."). The 2007 AQMP clearly states that the emissions bank would be funded with pre-base-year emission credits. *Id.* ("The initial funding of the Offset Budget will be from expired minor source shutdown credits for the years 2000 through 2002.").

To comply with the requirement of 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii) that pre-base-year emission reductions be explicitly included, it is not necessary, as Petitioners contend, that pre-base-year emission reductions be listed by source. *See* Pet'rs' Br. at 26. 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii) requires simply that the emissions from the shutdown are explicitly included in the projected emissions inventory that is part of the relevant attainment demonstration. In other words, 40

C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii) requires that when pre-base-year credits are used as emission credits, an examination of the projected emissions inventory used in the appropriate attainment demonstration must show that emissions from previously shutdown or curtailed emission units have been added to the emissions inventory. As discussed above, an examination of the 2007 AQMP shows that SCAQMD did include pre-base-year emissions in its emission inventory; thus, the requirements of 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii) are satisfied when the 2007 AQMP is considered as the relevant attainment demonstration.

IV. The Transfer of Emission Credits from SCAQMD's Internal Account Does Not Violate the CAA.

A. Though EPA is Not Required to Examine the Balance in SCAQMD's Internal Bank, EPA Reasonably Concluded that the Balance Is Positive.

Petitioners also contend that the CAA requires that EPA engage in an additional step beyond assessing whether the emission reductions in the AB 1318 Tracking System meet the CAA offset requirements specifically set forth at 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(i)-(ii). According to Petitioners, EPA must also assess whether SCAQMD's internal bank has a positive balance. *See* Pet'rs' Br. at 19. Petitioners do not point to any independent authority in the CAA that requires such an investigation, but rather, seem to assert that this additional requirement is intertwined with the CAA offset requirements. *See* Pet'rs' Br. at 29 ("[A] positive account balance is . . . vital to the question of whether credits that are taken from the accounts are already used.").

EPA does not dispute that the balance of the internal bank is relevant to the limited extent that the balance of the account indicates that the credits have not already been used. *See* PER000006-7. As EPA stated in the Final Rule, EPA's assessment of each of the emission reductions listed in the AB 1318 Tracking System encompassed the consideration of whether the credit had been previously "used" within the SCAQMD's internal bank. *See*, *e.g.*, PER000008 ("[T]he attainment plan has not relied on these emission reductions, thus they remain creditable for other purposes, such as NSR offsets.").

Furthermore, EPA addressed Petitioners' contention that the balance in SCAQMD's internal bank is negative. *See*, *e.g.*, PER000008-9 ("We repeat that [SCAQMD] does not have a negative balance. . . . [SCAQMD's] balance of credits from each pollutant is positive when credits from minor orphan shutdowns are included."). EPA stated in the Final Rule that SCAQMD could replace the pre-1990 credits that were removed from the internal bank with previously uncounted emission reductions from minor source orphan shutdowns.[8] PER000008. Notably, Petitioners offer no argument or authority to the contrary. EPA concluded that SCAQMD's "internal bank is adequately funded and does not have 'negative balances.'" PER000008.

[8] Minor source orphan shutdowns are "a category of offsets that are collected when 'minor stationary sources' cease or reduce operations without requesting emission reduction credits." PER000123-24.

As referenced in the Final Rule, these issues were also addressed in greater detail in a letter sent by Administrator Jackson to Petitioners on September 23, 2010, in response to an administrative petition (hereinafter "Administrator's letter"). PER000006-09. The Administrator's letter described the process whereby SCAQMD removed pre-1990 emission credits for which SCAQMD did not have adequate documentation and added in credits from minor source orphan shutdowns that it had not previously counted. PER000007-10; PER0000128-136. In that letter, EPA concluded that the existing approved SIP regulation does not preclude the use of minor source orphan shutdown offsets and that after SCAQMD recalculated its running balances, SCAQMD's internal bank is operating in compliance with the approved SIP and that the balance is positive. *Id.*

In sum, EPA fully addressed Petitioners' assertion that the emission reductions transferred to the AB 1318 Tracking System were not creditable based on Petitioners' assertions that SCAQMD's internal account had a negative balance. Though EPA responded to Petitioners' comments regarding the balance of SCAQMD's internal bank in reference to the creditability of the offsets transferred to the AB 1318 Tracking System, the CAA does not impose any additional requirement that EPA validate the balance in SCAQMD's accounts in the context of this rulemaking.

B. Rule 1315 Does Not Need to Be Approved by EPA to Transfer Offset Credits from the Internal Bank to the AB 1318 Tracking System.

Petitioners also erroneously contend that the balance of SCAQMD's internal bank is necessarily dependent on whether EPA approves SCAQMD's Rule 1315. *See* Pet'rs' Br. at 29-31, 35.[9] Rule 1315 is one of several rules within SCAQMD's Regulation XIII that address New Source Review ("NSR") requirements within SCAQMD. Some of the rules in Regulation XIII have been submitted and approved by EPA as SIP Revisions, but others have not. Rule 1315, entitled "Federal NSR Tracking System," sets forth the structure and procedures for operation of SCAQMD's internal bank. At present, Rule 1315 has been submitted by SCAQMD to EPA for approval as a SIP Revision, but EPA has not yet acted on the SIP submission.

Petitioners point to no authority that requires that the SCAQMD's internal account be described and approved in an EPA SIP revision in order to use certain

[9] Petitioners also reference, without any specific allegation, their challenges to the implementation of Rule 1315 in state court. *See* Pet'rs' Br. at 32. To any extent that the state court litigation might be relevant, it has been resolved, and the validity of Rule 1315 under state law is not in question. In December 2009, Petitioners returned to California state court to challenge the SB 827 and AB 1318 legislation. *CCAT v. SCAQMD*, No. B226692, 2011 WL 2937061, at *6 (Cal. App. 2d July 19, 2011) (unpublished opinion). This litigation has subsequently been resolved. On June 11, 2010, the trial court granted SCAQMD's motion for judgment on the pleadings in its entirety. *Id.* On July 19, 2011, the California appellate court affirmed the trial court's judgment, dismissing the case. *Id.* at *15. On writ of return, the trial court discharged its previously instituted writ of mandate and dissolved the accompanying injunction. *CCAT v. SCAQMD*, No. BS110792 (Cal. Super. Ct., County of Los Angeles, Sept. 7, 2011) (unpublished decision).

credits that are tracked in the internal bank. Indeed, the CAA contains no provision requiring that a SIP include an offset tracking system. *See* 42 U.S.C. § 7410(a)(2)(A).

Moreover, this Court has recently held that the CAA and the California SIP do not require that SCAQMD use a tracking system to demonstrate a positive balance in its internal bank. *See NRDC v. SCAQMD*, 651 F.3d 1066, 1073 (9th Cir. 2011). In this most recent *NRDC v. SCAQMD* case, these same Petitioners joined with other environmental advocacy organizations to file a citizens' suit against SCAQMD in federal court. *NRDC v. SCAQMD*, 694 F. Supp. 2d 1092 (C.D. Cal. 2010). They claimed that SCAQMD was in violation of section 173(c) of the CAA and the SIP because SCAQMD did not have in place a tracking system whereby it could demonstrate that emission credits from SCAQMD's internal bank meet the CAA offset requirements. *NRDC*, 694 F. Supp. 2d at 1104-05. The district court dismissed the case, holding, *inter alia*, that nothing in Subchapter 1 of the Clean Air Act or the South Coast portion of the California SIP "delineates any requirement that a SIP (or a permit program contained within the SIP) include a tracking system as to emission reduction credits or other offsets." *NRDC*, 694 F. Supp. 2d at 1113. In affirming the district court's dismissal of the case, the Ninth Circuit stated: "There is no ambiguity here. Nothing in the EPA-approved SIP even suggests a tracking system must be applied." 651 F.3d at 1073. Thus, to the extent that Petitioners contend that SCAQMD is required to operate a tracking system as to its internal accounts by the

CAA or the California SIP, this Court has previously decided the issue against Petitioners, and Petitioners are precluded from re-litigating it. *See Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000) ("Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.") (internal quotations and citation omitted).

C. EPA's Reference to the Administrator's Letter Was Appropriate.

EPA appropriately incorporated the reasoning set forth in the Administrator's letter in its response to comments in the Final Rule. Contrary to Petitioners' assertion, the Administrator's letter was relevant to Petitioners' comments. In both their comments to the Agency and in their Opening Brief, Petitioners asserted that the SCAQMD's internal bank has a negative balance. As EPA noted in the Final Rule, the Administrator's letter "details the Agency's determination that the District may use emissions reductions from previously shutdown sources, including minor source orphan shutdowns, to fund its internal accounts," and "also disagrees with assertions that the District's internal accounts have negative balances." PER00007; *see also* PER000008. Thus, the Administrator's letter is relevant to Petitioners' comments.

The manner in which EPA incorporated the analysis set forth in the Administrator's letter into the Final Rule is also appropriate. The APA requires that

an Agency responding to comments in informal rulemaking "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). EPA's reference to and incorporation of the Administrator's letter complies with this APA requirement. EPA both attached and incorporated the Administrator's letter into its Response to Comments. PER000006-7, 8, 9-10. Then in making reference to the Administrator's letter, EPA both summarized relevant portions of the Administrator's letter and made specific references to sections of the letter. *Id.* After providing both a summary of and reference to the incorporated Administrator's letter, EPA stated that "for all of the reasons set forth in the Administrator's letter," EPA disagreed with Petitioner's various contentions. PER000007. This manner of referring to and incorporating the Administrator's previous articulation of the same issues was entirely appropriate.

While the Agency could have duplicated the contents of the Administrator's letter in its response to comments in the Federal Register, rather than summarizing and incorporating that letter, it would merely have been duplicative of what had been communicated to Petitioners previously and was available through various sources. Neither the APA nor any other law or regulation imposes an obligation to restate the reasoning laid forth in the Administrator's letter in full in the Federal Register preamble to the Final Rule.

Petitioners' contention that EPA cannot make reference to the reasoning in the Administrator's letter because the letter is not final agency action, Pet'rs' Br. at 33, lacks any legal basis. The cases cited by Petitioners only support Petitioners' first contention — that the Administrator's letter is not final agency action, which EPA does not dispute. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (discussing what constitutes "final agency action"); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (same); *Ore. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 983-84 (9th Cir. 2006) (same). But it is immaterial whether the Administrator's letter was final agency action; EPA's SIP approval undoubtedly *is* final agency action, and EPA's incorporation in that approval of the letter's contents renders that analysis final for the purposes of the APA.

V. Remand Without Vacatur Would Allow EPA to Address the Deficiencies in the Rulemaking and Avoid Potential Disruptive Effects.

EPA seeks to reconsider its analysis in the rulemaking, and thus requests that the Court remand the Final Rule to the Agency without vacatur. "A reviewing court has inherent power to remand a matter to the administrative agency." *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1127 (9th Cir. 1983). "[I]t is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions." *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002). This authority includes the right to seek voluntary remand of a challenged agency decision, without confessing error. *SKF USA Inc., v. United States*,

254 F.3d 1022, 1029 (Fed. Cir. 2001). For example, the agency may seek remand because it wishes to reconsider its interpretation of the governing statute, the procedures it followed in reaching its decision, or the decision's relationship to other agency policies. *Id.* A court should "not substitute [its] judgment for that of the agency on matters where the agency has not had an opportunity to make a factual record or apply its expertise." *New Mexico Envtl. Improvement Div. v. Thoma*s, 789 F.2d 825, 835 (10th Cir. 1986).

Where a court finds that an agency action is flawed, but believes the agency may be able to provide an explanation sufficient to sustain the agency decision, courts have often recognized that they have discretion to remand an agency decision without vacating it. *See*, *e.g.*, *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995). Courts may allow agency actions to remain in place pending completion of a remand, even where those actions have been found to be "arbitrary and capricious." *See*, *e.g.*, *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1122-23 (9th Cir. 2003); *United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 966-67 (D.C. Cir. 1990). Although vacatur is sometimes necessary to remedy an alleged harm - such as where the court determines conclusively that the agency lacks authority or a factual basis to regulate - vacatur is not always necessary and could have adverse consequences. In deciding whether to vacate an administrative action in conjunction with a remand, courts will balance the seriousness of the deficiencies in the

administrative action and the disruptive consequences of an interim change that may itself be changed. *See*, *e.g.*, *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993); *Cook Inletkeeper v. EPA*, No. 07-72420, 2010 WL 4127976, at *2 (9th Cir. Oct. 21, 2010); *Checkosky v. SE*C, 23 F.3d 452, 464-65 (D.C. Cir. 1994) (separate opinion of Silberman, J.). A flawed rulemaking may be remanded without vacatur when a court perceives the possibility of unforeseen, undesirable consequences. *W. Oil & Gas Ass'n. v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980).

None of Petitioners' challenges provides any ground for vacating the Final Rule. Petitioners have argued that (1) certain select credits that were transferred to the AB 1318 Tracking System did not meet the CAA offset requirements, and (2) more generally, challenged EPA's notice-and-comment procedures, EPA's analytic approach to quantification, EPA's conclusion that the "base year" requirement was satisfied, and whether the CAA requires some extra action with respect to the tracking system for SCAQMD's internal accounts. For the reasons set forth above, each of Petitioners' more general arguments lacks merit, and thus, none requires that the rulemaking be set aside.

With respect to Petitioners' targeted challenge of specific emission reductions listed in the AB 1318 Tracking System, EPA agrees that Petitioners have identified some emission credits that are not quantifiable and others that should have been assessed for a surplus adjustment. This does not, however, undermine EPA's

conclusion that AB 1318 Tracking System contains sufficient credits that meet the CAA offset requirements to meet the needs of Sentinel. The number of offset credits transferred exceeded the number needed. The AB 1318 Tracking System contains an excess of 19,679 lbs/year of PM_{10} offset credits and 11,418 lbs/year of SO_x offset credits. Where the Petitioners' assertions have merit, they place into question *at most* 10,562 lbs/year of PM_{10} and 32 lbs/year of SO_x, amounts that are well within the surplus present in the AB 1318 Tracking System.[10] Thus, to the extent that the Agency misspoke in its rulemaking when is stated that "[SCAQMD] has not promulgated new rules or standards that would apply to these types of sources, and thus no adjustments to the credits were required," that misstatement does not undermine its ultimate conclusion.

Similarly, with respect to the "base year" issue, though EPA now believes that, at least based on the information presently before it, it could conclude upon reconsideration that the 2003 AQMP is the appropriate AQMP when evaluating compliance with 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii), both the 2003 and the 2007

[10] As discussed previously, the emission reductions listed for Little Company of Mary Hospital (388 lbs/year PM_{10}; 32 lbs/year SO_x) are not quantifiable. In addition, Rule 1157 had the potential to affect a total of 10,224 lbs/year of PM_{10} emissions from the following sources: Chandler Aggregate (2,907 lbs/year of PM_{10}), Whitewater Rock & Supply Co. (4,836 lbs/year of PM_{10}), Oldcastle Westile, Inc.(1,962 lbs/year of PM_{10}), Ortiz Enterprises, Inc. (464 lbs/year of PM_{10}), CDE Resources, Inc. (28 lbs/year of PM_{10}), and Elsinore Ready-Mix Co. Inc. (27 lbs/year of PM_{10}). *See* PER000029-33.

AQMP emission inventories include emission credits from 1999 through 2008. Thus, upon reconsideration, it is possible that assessment of the "base year" requirement with the appropriate AQMP will satisfy the requirements of 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii). Since the outcome of any reconsideration could be the same—approval of the submitted SIP—vacatur is not necessary to remedy any harm in this case.

The extent of any disruptive effect of a vacatur is uncertain, but the potential for unnecessary disruption due to an interim change certainly exists. At present, Intervenor Sentinel has commenced construction of the Sentinel facility, and vacatur should not have a direct consequence on Sentinel's ability to construct. However, depending on the timing of a decision in this case, a vacatur of the rule has the potential to have unforeseen, negative consequences for Intervenors. For example, a vacatur may have implications for Sentinel's ability to commence operations after construction is completed. *See* 42 U.S.C. § 7503(c)(1) (providing that "[emission credits] shall be, *by the time a new or modified source commences operation*, in effect and enforceable . . . "). Also, the AB 1318 legislation expires on January 1, 2012, and though the state law provides that any transferred credits remain in place after the sunset date, a vacatur might lead to further challenges to SCAQMD's transfer of the offset credits. Because the deficiencies in the Final Rule do not cast doubt on the approval of the SIP revision, and because a change in the regulatory status quo could

have significant disruptive effects, the Final Rule should not be vacated during remand.

CONCLUSION

For the foregoing reasons, the Court should remand the rulemaking without vacatur so that EPA can address the identified issues and determine whether the rulemaking may be reaffirmed on other grounds.

Respectfully Submitted,

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STATEMENT OF RELATED CASES

Respondents know of no cases pending in this Court that are related to this case.

CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(B), I certify that this brief, including headings, footnotes, and quotations, but excluding the table of contents, table of citations, and certificates of counsel, contains 12,806 words, which is in compliance with the type volume limitation of 14,000 words.

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