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NATURAL RESOURCES DEFENSE COUNCIL

December 10, 2009

VIA U.S. PRIORITY MAIL AND ELECTRONIC MAIL

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Laura Yoshii
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Re: **PETITION TO EPA TO REQUIRE CALIFORNIA TO FOLLOW MANDATORY PROCEDURES FOR AMENDING A SIP, AND SECURE EPA APPROVAL OF AN AMENDED SIP, PRIOR TO RELYING ON ANY OFFSETS GENERATED PURSUANT TO A NEW RULE**

Dear Ms. Jackson and Ms. Yoshii:

Attached please find the *Petition to EPA to Require California to Follow Mandatory Procedures for Amending a SIP, and Secure EPA Approval of an Amended SIP, Prior to Relying on any Offsets Generated Pursuant to a New Rule* submitted by California Communities Against Toxics, Coalition for a Safe Environment, Communities for a Better Environment, Desert Citizens Against Pollution and the Natural Resources Defense Council. Please feel to contact us if you have any questions.

Sincerely,

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BEFORE THE ADMINISTRATOR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of Failure of California to Comply with Mandatory Procedures to Amend SIP Regarding Internal Bank Offset Credits held by the South Coast Air Quality Management District

PETITION TO EPA TO REQUIRE CALIFORNIA TO FOLLOW MANDATORY PROCEDURES FOR AMENDING A SIP, AND SECURE EPA APPROVAL OF AN AMENDED SIP, PRIOR TO RELYING ON ANY OFFSETS GENERATED PURSUANT TO A NEW RULE

California Communities Against Toxics, Coalition for a Safe Environment, Communities for a Better Environment, Desert Citizens Against Toxics and Natural Resources Defense Council (jointly "Petitioners") respectfully petition the Environmental Protection Agency ("EPA") to produce a written statement reiterating established law -- that rules or laws enacted by the State of California, or any subdivision thereof, are not valid for purposes of meeting requirements of the Federal Clean Air Act ("the Act" or "CAA") unless and until such rules or laws have received federal approval in a process compliant with the Act, its implementing regulations, the Administrative Procedures Act ("APA"), and case law. Further, we request that the EPA avoid an unreasonable delay in responding to this Petition because the South Coast Air Quality Management District has indicated it will disregard this rule, and begin relying on new rules concerning federal offsets prior to making any SIP submissions, let alone securing EPA approval.

I. Background

The South Coast Air Basin, which includes Orange County and parts of Los Angeles, San Bernardino and Riverside counties, suffers from the dirtiest air in the nation. The responsibility of regulating air quality in the Basin falls mostly on the South Coast Air Quality Management District ("SCAQMD" or "District"), which holds delegated authority to implement federal permitting under the CAA, in addition to its duties under state law.

Despite the District's efforts, for decades, the region has failed to meet health-protective air quality standards. 40 C.F.R. § 81.305. The ongoing failure to meet these standards has serious negative health consequences for the more than 14 million people who live, work, play and learn in the South Coast Air Basin. Considering only two of the Basin's many air pollutants, ozone and PM2.5, economist Dr. Jane Hall estimated that the cost of nonattainment in the South Coast Air Basin is more than $1,250 per person per year, which translates into a total of almost $22 billion in savings if federal ozone and PM2.5 standards were met.[1] Her report also noted that "[i]n Los Angeles County, PM2.5–related deaths are more than double the number of motor vehicle-related deaths."[2] Moreover, in April 2010, the region will fail to meet the one-hour ozone standard, despite having a clean air plan in place that purports to bring it into attainment by that date.

Recently, the District sponsored state legislation, SB 827 (Wright, 2009) that attempts to put into the District's SIP for the first time a new methodology for creating emission reduction credits. Working very closely with the bill's author, actively

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[1] Dr. Jane Hall et al., The Benefits of Meeting Federal Clean Air Standards in the South Coast and San Joaquin Valley Air Basins, at 5, November 2008.
[2] *Id.*

lobbying legislators, and spending significant financial resources, the SCAQMD persuaded the State Legislature to pass legislation that orders the District to create and issue emission reduction credits "that have resulted from emission reductions and shutdowns from minor sources since 1990" ("minor source shutdowns") for the purpose of meeting the requirements of the Act, the District's SIP, and issuing permits to facilities. Senate Bill 827, CA Health & Saf. Code § 40440.13(c)(2). [Attached as Exhibit A]. The SCAQMD also supported AB 1318, CA Health & Saf. Code § 40440.14(b)(2) (M. Perez, 2009) which includes identical language regarding the use of minor source shutdowns and directs the District to transfer those credits into its "Priority Reserve Account" and then to the CPV Sentinel Energy Project.[3] [Attached as Exhibit B]. The Governor signed AB 1318 (M. Perez, 2009) and SB 827 (Wright, 2009) on October 11, 2009.

SCAQMD's current SIP sets out the exclusive categories of facilities that may secure credits from the District, rather than purchasing them on the open market. The current SIP neither allows for the use of minor source shutdowns to generate credits for New Source Review ("NSR") purposes nor allows for the District's Priority Reserve Account to be used to provide emission reduction credits to Electrical Generating Facilities ("EGFs").[4]

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[3] AB 1318 actually outlines a series of requirements that an "eligible" project must meet to receive the credits, but the language was crafted to ensure that the Sentinel facility—and only the Sentinel facility—would be the "eligible" facility. Competitive Power Ventures, the owner of the Sentinel facility, was the sponsor of the bill.

[4] Indeed, in the case of EGFs, the District's Rule 1309.1 specifically limited the timeframe during which those facilities could access emission reduction credits in the District's Priority Reserve account. Under the terms of that SIP-approved Rule, EGFs are no longer eligible to access that account. The District acknowledges that it has never converted minor source reductions and shutdowns to internal credits. *See, for example*, the District's Staff Report for Rule 1315, discussed further below.

Despite the clear language of the SIP, the District's website indicates that it intends neither to adopt a new rule to use minor source shutdown credits nor to secure SIP approval from the State or EPA approval *prior* to using credits created by SB 827 or AB 1318.[5]

The District proposed to undertake these non-approved actions despite the fact that the District's previously attempted rule adoption process, an adoption process found unlawful by the California Superior Court, noted that this new credit generation mechanism was constructed for *the express purpose* of meeting the requirements of the federal NSR portion of the federal Clean Air Act. For example, the name of the now rescinded Rule 1315, of which the minor source shutdowns provision is a significant part, is "Federal New Source Review Tracking System," and its stated purpose is:

> to specify procedures to be followed by the Executive Officer to make annual demonstrations of equivalency to verify that specific provisions in the District's New Source Review (NSR) program related to sources that are either exempt from offsets or which obtain their offsets from the District's offset accounts meet in aggregate the federal nonattainment NSR offset requirements. The procedures specified in this rule are used by the Executive Officer to demonstrate that the sources which are subject to the federal NSR emission offset requirements and which obtain emission credits through allocations from District Rule 1309.1 – Priority Reserve or Rule 1309.2 – Offset Budget or which utilize the emission offset exemptions contained in Rule 1304 – Exemptions are fully offset by valid emission credits.

Further, the District has argued quite vigorously in federal court that Rule 1315—which includes the change that would allow the use of minor source shutdowns—is not part of the SIP. As the District told the Court:

> It is clear that the Plaintiffs are attempting to enforce SIP requirements that do not exist. The SIP as approved by EPA simply does not require that the District's

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[5] *See* SCAQMD Press Release, Governor Lifts Air Permit Moratorium, *available at* http://www.aqmd.gov/news1/2009/sb827signed.htm (last accessed 11/30/09). [Attached as Exhibit C].

> internal offsets be real, quantifiable, permanent, federally enforceable, or surplus. The validation requirements for the District's internal offsets are set forth in Rule 1315, *which is not part of the SIP*.

Defendant's Reply to Plaintiff's Supplemental Brief 10:15-19 (emphasis added). [Attached as Exhibit D].

Under the Act, every time a SIP revision is proposed, EPA must make a determination that such revision will not "interfere with" progress toward attainment, "or any other applicable requirement of [the Act]," CAA § 110(l). Given the desperate air quality conditions in the South Coast Air Basin, such a finding is vital before hundreds of thousands of pounds per day of pollution credits are infused into the SCAQMD permitting system. Unilateral action by the State or its subdivisions to amend the existing SIP without receiving EPA approval cannot be tolerated under federal law.

Further, in passing these two state laws that strive to amend the SIP, the State did not comply with the provisions established in 40 C.F.R. § 51.100-06, which set forth mandatory disclosure and public participation requirements for SIP revisions. The State has also not indicated any intention to comply with 40 C.F.R. Pt. 51, App. V prior to allowing these minor source shutdown credits to be used.

Finally, it is critical to note that the District seeks to undertake this action despite the fact that the Los Angeles County Superior Court stated—after extensive briefing and a full day trial—that:

> Rule 1315 does significantly more than simply meet the EPA's objections regarding the District's treatment of pre-1990 credits from major shutdowns for which there were inadequate records. Rule 1315 proposes four additional classes of credits - credits that by definition will (if used) translate clean air gains into pollution rights. These changes constitute matters of air pollution policy, not accounting, and it is the policy decision that has clear and unavoidable environmental consequences in degrading the quality of the air in the Basin over what would have existed in the

> absence of these revised rules, or had the District revised 1315 to deal only with the EPA's objections regarding undocumented credits.

Decision on Ruling on Respondent's Motion for Summary Adjudication 9:22-28, 10:27-28. [Attached as Exhibit E].

II. Petitioners

There are five signatories to this petition: 1) California Communities Against Toxics; 2) Coalition for a Safe Environment; 3) Communities for a Better Environment; 4) Desert Citizens Against Pollution; and 5) Natural Resources Defense Council. Members of Petitioners' organizations live, work, raise their families, and recreate in the South Coast Air Basin. They are adversely affected by exposure to levels of air pollution that exceed the national health-based ozone and particulate matter standards established under the Act. The adverse effects of such pollution include actual or threatened harm to their health, their families' health, their professional, educational, and economic interests, and their aesthetic and recreational enjoyment of the environment in the Basin. Moreover, they are adversely affected when decisions are made without compliance with federal laws, including the CAA and the APA.

Petitioner California Communities Against Toxics ("CCAT") was founded in 1989 at the Santa Isabel Church after a march on a proposed hazardous waste incinerator in Vernon. Over 25 environmental justice groups from across California came together to form a statewide coalition that would help the environmental justice community in California network, learn from each other's struggles, and advocate for policy change in state and federal government. CCAT now has 70 member organizations from around the State, holds a conference in a different part of the state each year, and is active in a number of efforts to advance community based environmental health protections across

the state. CCAT's mission is pollution prevention, environmental justice, and world peace.

Petitioner Coalition for a Safe Environment ("CFASE") is a not-for-profit membership corporation organized under the laws of the State of California. CFASE is dedicated to environmental justice, public health and public safety, and the reduction, elimination, and mitigation of air, land, and water pollution. CFASE actively pursues the reduction of air pollution in Southern California and effective enforcement of air quality laws and regulations.

Petitioner Communities for a Better Environment ("CBE") is a California not-for-profit public benefit corporation that strives to bring about environmental justice by empowering underrepresented communities. Founded in 1978, CBE organizers, researchers, and lawyers work with community members in low income communities of color to fight pollution. CBE's members in the South Coast Air Basin suffer the cumulative impacts of air pollution that Defendants allow to be emitted in and around their communities.

Petitioner Desert Citizens Against Pollution ("DCAP") has worked on air pollution and related issues since its formation in 1986. DCAP works with several coalitions to fight air pollution and challenges decisions by federal, state, and local governments that exacerbate air quality problems in California.

Petitioner Natural Resources Defense Council, Inc. ("NRDC") is a national environmental advocacy group organized as a not-for-profit membership corporation under the laws of the State of New York. NRDC is registered to do business in California and maintains offices in San Francisco and Santa Monica. NRDC is dedicated

to the preservation, protection and defense of the environment and actively pursues effective enforcement of air quality rules and regulations and the reduction of air pollution in Southern California on behalf of its members. NRDC has approximately 650,000 members nationwide, over 100,000 of whom reside in the State of California.

III. Procedural Authority

Petitioners petition EPA pursuant to the Administrative Procedures Act, 5 U.S.C. § 551, *et seq.* The APA specifically provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). The APA requires EPA to conclude the matter raised in this petition within a reasonable time. 5 U.S.C. § 555(b). The District has stated its intention to begin implementing this illicit SIP amendment on or around January 1, 2010. Given this, and the longstanding and clearly expressed law that SIP amendments are not valid until duly adopted, submitted to and approved by EPA, Petitioners request EPA to expedite the resolution of this matter. Delay beyond January 1, 2010 would be unreasonable.

IV. Argument

The Act requires EPA to promulgate national ambient air quality standards for harmful air pollutants, and directs the states to devise "state implementation plans" ("SIPs") to bring polluted areas into compliance, or attainment, with the standards. CAA § 109, 42 U.S.C. § 7409, CAA § 110, 42 U.S.C. §7410. The Act also requires EPA to approve plans and plan amendments developed by the states under the statute. CAA § 110(l). Congress expressly prohibited states from modifying SIP provisions concerning stationary sources. CAA § 110(i)("no...plan revision...modifying any requirement of an

applicable implementation plan may be taken with respect to any stationary source by the State.")(emphasis added).

The Act, EPA's regulations, and federal law are all very clear that unless and until the Administrator has approved a change to a State Implementation Plan, the proposed change is not a part of the plan. Further, only items in the plan are part of federal law and are able to meet federal law requirements. The Act states:

> Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress..., or any other applicable requirement of this plan.

CAA § 110(l). EPA's regulations further elaborate that:

> Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.

40 C.F.R. § 51.105.

The Ninth Circuit has interpreted the Act and EPA regulations to be inflexible on the question of when a SIP amendment takes effect, holding that a "SIP became *federal* law, not *state* law, once EPA approved it, and could not be changed unless and until EPA approved any change." *Safe Air for Everyone v. U.S. EPA*, 475 F.3d 1096, 1105 (9th Cir., 2007) (emphasis in original). Moreover, requiring EPA approval of SIP revisions has served as the factual predicate for development of plans for many decades. *See* 40 C.F.R. § 51.103-105.

Relying on AB 827 and SB 1318, the District intends to generate offsets using minor source reductions and shutdowns retroactive to 1990. As the District has acknowledged, minor source shutdowns are not allowed as offsets under the current SIP.

For example, the District's Staff Report for Rule 1315 provides the following chart at page 16:

Table 7
Summary of Changes between AQMD'S Existing and Proposed Revised NSR Tracking Systems for Equivalency with Federal Requirements:

1990 and Beyond Federal Emission Reductions

AQMD's Existing NSR Tracking System	AQMD's Proposed Revised NSR Tracking System
Remaining pre-1990 credits eligible for use until depleted.	Remaining pre-1990 credits eligible for use until the end of 2005; no pre-1990 credits will be used post-2005.
No credit taken for orphan shutdowns from minor sources.	Orphan shutdowns include shutdowns of both major and minor sources.
No further discount/adjustment applied to estimate actual emissions.	All orphan shutdowns will be discounted/ adjusted to reflect estimated actual emissions.
No further discount/adjustment for orphan shutdowns due to BARCT at time of use.	All orphan shutdowns will be discounted/ adjusted to BARCT at time of use by discounting balances "carried over" from one year to the next.

The District itself describes the "credit taken for orphan shutdowns from minor sources"—as a "change[] between AQMD's existing and proposed revised NSR Tracking Systems for equivalency with federal requirements." Further, the District has argued before the federal court that Rule 1315 is "not part of the SIP." *See generally* Defendant's Reply to Plaintiff's Supplemental Brief attached as exhibit D.

Despite the unavoidable fact that redefining offsets so that "Orphan shutdowns include shutdowns of both major and minor sources" constitutes a change to the South Coast Air Basin SIP, the District has stated that it does not need EPA approval prior to engaging in this conduct. *See* Exhibit C.

This approach by the District will violate federal statutes, EPA regulations, and case law. Accordingly, we call upon the EPA to ensure the integrity of the Act's SIP amendment process and to ensure that the APA process is upheld by requiring SIP approval *prior to these credits being used.*

Delaying until some distant point in the future when the District might or might not have adopted a rule, submitted it to EPA for approval, and secured that approval would be a clear violation of longstanding law. EPA cannot cure a failure to provide for notice and comment by soliciting public comment long after the activity has taken place since post-decisional requests for comments is an empty exercise. The whole purpose of notice and comment – to permit public concerns to inform an agency decision – is defeated if the agency has already acted. *See, e.g.*, *New Jersey v. EPA*, 626 F.2d 1038, 1049-50 (D.C. Cir. 1980) (holding that allowing post hoc comment does not cure EPA's failure to provide for notice and comment before making its decision); *Maryland v. EPA*, 530 F.2d 215, 222 (4th Cir. 1975) ("The reception of comments after all the crucial decisions have been made is not the same as permitting active and well prepared criticism to become a part of the decision-making process."), *rev'd on other grounds sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *Spirit of Sage Council v. Norton*, 294 F. Supp. 2d 67, 89-90 (D.D.C. 2003) (holding that an agency's acceptance of comments on a rule already adopted, but not repromulgated after the comments, does not cure procedural defects), *vacated as moot*, 411 F.3d 225 (D.C. Cir. 2005).

"Permitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the . . . process in a meaningful way." *City of New York v. Diamond*, 379 F. Supp. 503, 517 (S.D.N.Y. 1974).[6] The futility of post-decisional notice is highlighted by the fact

[6] Although in most of these cases the APA, 5 U.S.C. § 553, is the source of the requirement to provide notice and comment, their reasoning applies fully to notice and comment required directly under the CAA. Moreover, while the APA generally allows for "good cause" exceptions to the duty to provide for notice and comment, no such exception is available when notice is required by the organic statute, as it is in this case;

that credits from minor source shutdowns could be issued as soon as January 1, 2010, despite the fact that the current SIP does not allow for such conduct.

The United States Court of Appeals for the Ninth Circuit addressed this issue in *Safe Air for Everyone*, 488 F.3d 1088. The Court reiterated longstanding statutory and case law precedent that "[b]efore a SIP [amendment] becomes effective, EPA must determine that it meets the CAA's requirements. 42 U.S.C. § 7410(k)(3). EPA must also approve plan amendments and 'shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress...or any other applicable requirement of [the CAA].'" *Id.* at 1092-93.[7]

Not only would failure to secure approval of the District's proposed revision be a violation of the law, it is also poor policy. The EPA's engagement in some kind of post-decisional processes regarding this SIP revision would flout the intent of Congress in the carefully calibrated structure of the Act and the APA. Should EPA allow this practice to proceed without requiring pre-use SIP-approval of the credits authorized under SB 827 and AB 1318, it would deny the public a chance to provide input on whether this SIP revision complies with the law. Such an outcome would perpetuate, not resolve, the uncertainty regarding the validity of these credits. Further, acting before completing the required CAA process would deprive EPA of the option of analyzing whether the proposed SIP changes do not "interfere with any applicable requirement concerning attainment and reasonable further progress..., or any other applicable requirement of this

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see 5 U.S.C. § 553(b)(B). Thus, the CAA's mandate to provide for notice and comment on SIP submissions is even stronger than parallel requirements in the APA.

[7] This issue is of utmost concern as well because the District has argued that its SIP does not require the District's internal credits to comply with the provisions of section 173(c).

plan." CAA § 110(l). Equally important, EPA would be saying through its action that comments from the public are not relevant in the EPA decision-making process. The unavoidable meaning of bypassing the SIP revision process would be that *pre-decisional* discussions with the District were in fact *decisional* meetings. This kind of lack of transparency not only violates law and the statute, it is the worst kind of public policy—decisions made without the input of the public.

The EPA has a duty to make sure the District and the State do not change control strategies[8] in a currently applicable SIP prior to receiving EPA approval. Allowing the State and District to engage in procedurally invalid and illegal shortcuts to the important decisional steps required under the law to ensure high-quality decision-making by the EPA effectively excludes the public from participating with the SIP development process, an outcome that cannot be tolerated by the Act, the APA, EPA regulations, and case law. The importance of undertaking a full SIP revision process prior to use of these credits is particularly important given the real health and air quality impacts that would result from adding this additional pollution to the South Coast Air Basin. Indeed, the Los Angeles County Superior Court observed that,

> Rule 1315 is much more than a simple codification of the District's existing tracking system. As acknowledged by the District, the passage of Rule1315, with the interplay of 1309.1, results in the anticipated emission of hundreds of tons of pollution into the Basin every day. Whether used by electric generating plants, bio-solid facilities or any other polluters that the District might allow to access the Priority Reserve, Rule 1315 has expanded exponentially the universe of pollution credits available to entities needed to increase emissions into an already polluted

[8] In *South Coast Air Quality Management District v. EPA*, the D.C. Circuit made clear that "[s]omething designed to constrain ozone levels is a 'control,' and this would include NSR. To conclude otherwise would mean that Congress considered its carefully-crafted and well-calibrated graduated restrictions on new and modified sources less important than other provisions. If anything, the Act and its legislative history reflect the opposite position." 472 F.3d 882, 902 (D.C. Cir. 2006).

> Basin. The size and breadth of the Priority Reserve has clear, obvious and measurable consequences in a world in which those credits will be accessed and used by credit-hungry polluters. How big to make the Priority Reserve, whether to allow certain credits historically unavailable for use as credits to be captured and re-sold, and whether to take credits retroactively from clean air improvements already attained have real, foreseeable and substantial environmental consequences.

Superior Court Ruling 8:10-27. [Attached as Exhibit E].

A proper submission to EPA, as established in the provisions of 40 C.F.R. § 51.100-06, and 40 C.F.R. Pt. 51, App. V is clearly required in this matter. The State and District have made these submissions many times over the last three decades, and there has been no rationale why this alteration to the SIP should be different from previous submissions. Failing to require such a submission would deprive the region of vital protections under the Act and the APA, and set a terrible precedent for SIP development and legislative activities in California and nationwide.

V. Conclusion

Based on the information provided in this petition, we respectfully request that the EPA state in writing that the newly created provision for generating pollution credits from SB 827 and AB 1318 must be duly adopted, submitted to EPA and approved as part of the SIP prior to being used for purposes of the District's NSR program. The District has indicated that it plans to use these credits "soon after January 1." *See* Exhibit C.

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Thus, EPA failure to act prior to that date would be an unreasonable delay and we request EPA to make a decision on this petition prior to that date.

Respectfully submitted on this 10th Day of December, 2009.

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EXHIBIT A

Senate Bill No. 827

CHAPTER 206

An act to add and repeal Section 40440.13 of the Health and Safety Code, relating to the South Coast Air Quality Management District.

[Approved by Governor October 11, 2009. Filed with Secretary of State October 11, 2009.]

LEGISLATIVE COUNSEL'S DIGEST

SB 827, Wright. South Coast Air Quality Management District: CEQA: permits.

(1) The California Environmental Quality Act (CEQA) requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of, an environmental impact report (EIR) on a project that it proposes to carry out or approve that may have a significant effect on the environment or to adopt a negative declaration if it finds that the project will not have that effect. CEQA also requires a lead agency to prepare a mitigated negative declaration for a project that may have a significant effect on the environment if revisions in the project would avoid or mitigate that effect and there is no substantial evidence that the project, as revised, would have a significant effect on the environment. CEQA exempts certain specified projects from its requirements.

Under existing law, every air pollution control district or air quality management district in a federal nonattainment area for any national ambient air quality standard is required to establish by regulation, a system by which all reductions in emissions of air contaminants that are to be used to offset certain future increases in the emission of air contaminants are banked prior to use. The South Coast Air Quality Management District (district) promulgated various rules establishing offset exemptions, providing Priority Reserve offset credits, and creating or tracking credits used for offset exemption or Priority Reserve projects. In Natural Resources Defense Council v. South Coast Air Quality Management District (Super. Ct. Los Angeles County, 2007, No. BS 110792), the superior court found the promulgation of certain of these district rules to be in violation of CEQA.

This bill would authorize the district to issue permits under specified circumstances, notwithstanding this court decision. The provisions of the bill would be repealed on May 1, 2012.

(2) This bill would state the findings and declarations of the Legislature concerning the need for special legislation.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) As a result of the superior court decision in Natural Resources Defense Council v. South Coast Air Quality Management District (Super. Ct. Los Angeles County, 2007, No. BS 110792) holding that the South Coast Air Quality Management District (district) violated the requirements of the California Environmental Quality Act (CEQA) (Division 13 (commencing with Section 21000) of the Public Resources Code) in the promulgation of certain district rules, the district is unable to issue over a thousand pending permits that rely on the district's internal offset bank to offset emissions.

(b) The district may also have to set aside several thousand permits that were previously issued in reliance on the district's internal offset bank.

(c) Prompt legislative action is necessary as an interim measure; otherwise projects will be stopped from going forward or frozen in place, representing significant losses to the economy and the loss of numerous well-paying jobs.

(d) Nothing in the case described in subdivision (a) requires the setting aside of any permit issued by the South Coast Air Quality Management District to any essential public service, that relied on Rule 1309.1, nor any permit that relied on Rule 1304, between September 8, 2006, and November 3, 2008.

(e) Section 40440.13 of the Health and Safety Code is not intended to affect any pending litigation challenging the district's internal offset accounts in federal court, or to give an advantage to a party in that litigation.

(f) The district shall have the authority to carry out the provisions of this act.

SEC. 2. Section 40440.13 is added to the Health and Safety Code, to read:

40440.13. (a) Notwithstanding the decision of the court in Natural Resources Defense Council v. South Coast Air Quality Management District (Super. Ct. Los Angeles County, 2007, No. BS 110792), the south coast district may issue permits in reliance on, and in compliance with, south coast district Rule 1304, as amended on June 14, 1996, and Rule 1309.1, as amended May 3, 2002, for essential public services, as defined in subdivision (m) of Rule 1302, as amended December 6, 2002.

(b) Nothing in this section affects the decision in the case described in subdivision (a) concerning the adoption, readoption, or amendment, or environmental review, of south coast district Rule 1315.

(c) (1) In implementing subdivision (a), the south coast district shall rely on the offset tracking system used prior to the adoption of Rule 1315 of the south coast district until a new tracking system is approved by the United States Environmental Protection Agency and is in effect, at which point that new system shall be used by the south coast district.

(2) In addition to using the prior offset tracking system, the district shall also make use of any emission credits that have resulted from emission reductions and shutdowns from minor sources since 1990. The district shall

make any necessary submissions to the United States Environmental Protection Agency with regard to the crediting and use of emission reductions and shutdowns from minor sources.

(d) This section shall remain in effect only until May 1, 2012, and as of that date is repealed, unless a later enacted statute, that is enacted before May 1, 2012, deletes or extends that date.

SEC. 3. The Legislature finds and declares that a special law is necessary and that a general law cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution because of unique circumstances concerning the South Coast Air Quality Management District.

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EXHIBIT B

Assembly Bill No. 1318

CHAPTER 285

An act to add Section 39619.8 to, and to add and repeal Section 40440.14 of, the Health and Safety Code, and to amend Section 21080 of the Public Resources Code, relating to the South Coast Air Quality Management District.

[Approved by Governor October 11, 2009. Filed with Secretary of State October 11, 2009.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1318, V. Manuel Perez. South Coast Air Quality Management District: emission reduction credits: California Environmental Quality Act.

(1) Under existing law, every air pollution control district or air quality management district governing board, except as specified, is required to establish by regulation a system by which all reductions in the emission of air contaminants that are to be used to offset certain future increases in the emission of air contaminants are required to be banked prior to use to offset future increases in emissions, as provided.

The California Environmental Quality Act (CEQA) requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of, an environmental impact report (EIR) on a project that it proposes to carry out or approve that may have a significant effect on the environment or to adopt a negative declaration if it finds that the project will not have that effect. CEQA also requires a lead agency to prepare a mitigated negative declaration for a project that may have a significant effect on the environment if revisions in the project would avoid or mitigate that effect and there is no substantial evidence that the project, as revised, would have a significant effect on the environment. CEQA exempts certain specified projects from its requirements.

This bill would require the executive officer of the South Coast Air Quality Management District, upon making a specified finding, to transfer emission reduction credits for certain pollutants from the south coast district's internal emission credit accounts to eligible electrical generating facilities, as described. By imposing these duties on the South Coast Air Quality Management District, the bill would impose a state-mandated local program. The bill would exempt from CEQA certain actions of the district undertaken pursuant to the bill. These provisions would be repealed on January 1, 2012.

The bill would require the State Air Resources Board, in consultation with specified agencies, to prepare and submit to the Governor and the Legislature a report that evaluates the electrical system reliability needs of the South Coast Air Basin and recommends the most effective and efficient

means of meeting those needs while ensuring compliance with state and federal law.

(2) This bill would state the findings and declarations of the Legislature concerning the need for special legislation.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) Sufficient rotating electrical generation capacity is required within the Los Angeles Basin Local Reliability Area to ensure stable operation of the power grid.

(2) Energy efficiency and renewable resources, which are primarily located outside of the Los Angeles Basin Local Reliability Area, may not be sufficient to satisfy the in-basin rotating electrical generation capacity need.

(3) In October 2005, the Public Utilities Commission and the State Energy Resources Conservation and Development Commission (commission) adopted the Energy Action Plan II, which establishes a policy that the state will rely on clean and efficient fossil fuel-fired generation to the extent energy efficiency and renewable resources are unsuitable.

(4) The Energy Action Plan II establishes a policy that the state will encourage the development of cost-effective, highly efficient, and environmentally sound supply resources to provide reliability and consistency with the state's energy priorities.

(5) Executive Order S-14-08, signed by the Governor on November 17, 2008, calls for a new, more aggressive renewable energy target, increasing the current goal of obtaining 20 percent of the energy used by electrical corporations from clean, renewable sources by the year 2010 to 33 percent by the year 2020.

(6) New electrical generating capacity in the Los Angeles Basin Local Reliability Area is required to meet best available control technology (BACT) standards and is required to fully offset any remaining emissions of nonattainment pollutants, including sulfur oxides and particulate matter with emission credits.

(b) The South Coast Air Quality Management District shall have the full authority to carry out the provisions of this act.

SEC. 2. Section 39619.8 is added to the Health and Safety Code, to read:

39619.8. On or before July 1, 2010, the state board, in consultation with the Public Utilities Commission, the State Energy Resources Conservation and Development Commission, the State Water Resources Control Board, and the Independent System Operator, shall prepare and submit to the

Governor and the Legislature a report that evaluates the electrical system reliability needs of the South Coast Air Basin and recommends the most effective and efficient means of meeting those needs while ensuring compliance with state and federal law, including, but not limited to, all of the following policies and requirements:

(a) The California Global Warming Solutions Act of 2006 (Division 25.5 (commencing with Section 38500)).

(b) Section 316(b) of the federal Clean Water Act, and any policies and regulations adopted by the State Water Resources Control Board as these regulations applied to thermal powerplants within the basin.

(c) State and federal air pollution laws and regulations, including, but not limited to, any requirements for emission reductions credits for new and modified sources of air pollution.

(d) Renewable energy and energy efficiency requirements adopted pursuant to Division 1 (commencing with Section 201) of the Public Utilities Code and Division 15 (commencing with Section 25000) of the Public Resources Code.

(e) Division 13 (commencing with Section 21000) of the Public Resources Code.

(f) The resource adequacy requirements for load-serving entities established by the Public Utilities Commission pursuant to Section 380 of the Public Utilities Code.

SEC. 3. Section 40440.14 is added to the Health and Safety Code, to read:

40440.14. (a) The executive officer of the south coast district, upon finding that the eligible electrical generating facility proposed for certification by the State Energy Resources Conservation and Development Commission meets the requirements of the applicable new source review rule and all other applicable district regulations that must be met under Section 1744.5 of Title 20 of the California Code of Regulations, shall credit to the south coast district's internal emission credit accounts and transfer from the south coast district's internal emission credit accounts to eligible electrical generating facilities emission credits in the full amounts needed to issue permits for eligible electrical generating facilities to meet requirements for sulfur oxides (SO_x) and particulate matter (PM2.5 and PM10) emissions.

(b) (1) In implementing subdivision (a), the south coast district shall rely on the offset tracking system used prior to the adoption of Rule 1315 of the South Coast District until a new tracking system is approved by the United States Environmental Protection Agency and is in effect, at which point that new system shall be used by the south coast district.

(2) In addition to using the prior offset tracking system, the district shall also make use of any emission credits that have resulted from emission reductions and shutdowns from minor sources since 1990. The district shall make any necessary submissions to the United States Environmental Protection Agency with regard to the crediting and use of emission reductions and shutdowns from minor sources.

(c) Within 60 days of the effective date of this section, for each eligible electrical generating facility, the south coast district shall report to the State Energy Resources Conservation and Development Commission the emission credits to be credited and transferred pursuant to subdivision (a). The State Energy Resources Conservation and Development Commission shall determine whether the emission credits to be credited and transferred satisfy all applicable legal requirements. In the exercise of its regulatory responsibilities under its power facility and site certification authority, the State Energy Resources Conservation and Development Commission shall not certify an eligible electrical generation facility if it determines that the credit and transfer by the south coast district do not satisfy all applicable legal requirements.

(d) In order to be eligible for emission reduction credits pursuant to this section, an electrical generating facility shall meet all of the following requirements:

(1) Be subject to the permitting jurisdiction of the State Energy Resources Conservation and Development Commission.

(2) Have a purchase agreement, executed on or before December 31, 2008, to provide electricity to a public utility, as defined in Section 216 of the Public Utilities Code, subject to regulation by the Public Utilities Commission, for use within the Los Angeles Basin Local Reliability Area.

(3) Be under the jurisdiction of the south coast district, but not within the South Coast Air Basin.

(e) The executive officer shall not transfer emission reduction credits to an electrical generating facility pursuant to this section until the receipt of payment of the mitigation fees set forth in the south coast district's Rule 1309.1, as adopted on August 3, 2007. The mitigation fees shall only be used for emission reduction purposes. The south coast district shall ensure that at least 30 percent of the fees are used for emission reductions in areas within close proximity to the electrical generating facility and at least 30 percent are used for emission reductions in areas designated as "Environmental Justice Areas" in Rule 1309.1.

(f) This section shall be implemented in a manner consistent with federal law, including the Clean Air Act (42 U.S.C. Sec. 7401 et seq.).

(g) This section shall remain in effect only until January 1, 2012, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2012, deletes or extends that date.

SEC. 4. Section 21080 of the Public Resources Code is amended to read:

21080. (a) Except as otherwise provided in this division, this division shall apply to discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps unless the project is exempt from this division.

(b) This division does not apply to any of the following activities:

(1) Ministerial projects proposed to be carried out or approved by public agencies.

(2) Emergency repairs to public service facilities necessary to maintain service.

(3) Projects undertaken, carried out, or approved by a public agency to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster-stricken area in which a state of emergency has been proclaimed by the Governor pursuant to Chapter 7 (commencing with Section 8550) of Division 1 of Title 2 of the Government Code.

(4) Specific actions necessary to prevent or mitigate an emergency.

(5) Projects which a public agency rejects or disapproves.

(6) Actions undertaken by a public agency relating to any thermal powerplant site or facility, including the expenditure, obligation, or encumbrance of funds by a public agency for planning, engineering, or design purposes, or for the conditional sale or purchase of equipment, fuel, water (except groundwater), steam, or power for a thermal powerplant, if the powerplant site and related facility will be the subject of an environmental impact report, negative declaration, or other document, prepared pursuant to a regulatory program certified pursuant to Section 21080.5, which will be prepared by the State Energy Resources Conservation and Development Commission, by the Public Utilities Commission, or by the city or county in which the powerplant and related facility would be located if the environmental impact report, negative declaration, or document includes the environmental impact, if any, of the action described in this paragraph.

(7) Activities or approvals necessary to the bidding for, hosting or staging of, and funding or carrying out of, an Olympic games under the authority of the International Olympic Committee, except for the construction of facilities necessary for the Olympic games.

(8) The establishment, modification, structuring, restructuring, or approval of rates, tolls, fares, or other charges by public agencies which the public agency finds are for the purpose of (A) meeting operating expenses, including employee wage rates and fringe benefits, (B) purchasing or leasing supplies, equipment, or materials, (C) meeting financial reserve needs and requirements, (D) obtaining funds for capital projects necessary to maintain service within existing service areas, or (E) obtaining funds necessary to maintain those intracity transfers as are authorized by city charter. The public agency shall incorporate written findings in the record of any proceeding in which an exemption under this paragraph is claimed setting forth with specificity the basis for the claim of exemption.

(9) All classes of projects designated pursuant to Section 21084.

(10) A project for the institution or increase of passenger or commuter services on rail or highway rights-of-way already in use, including modernization of existing stations and parking facilities.

(11) A project for the institution or increase of passenger or commuter service on high-occupancy vehicle lanes already in use, including the modernization of existing stations and parking facilities.

(12) Facility extensions not to exceed four miles in length which are required for the transfer of passengers from or to exclusive public mass transit guideway or busway public transit services.

(13) A project for the development of a regional transportation improvement program, the state transportation improvement program, or a congestion management program prepared pursuant to Section 65089 of the Government Code.

(14) Any project or portion thereof located in another state which will be subject to environmental impact review pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. Sec. 4321 et seq.) or similar state laws of that state. Any emissions or discharges that would have a significant effect on the environment in this state are subject to this division.

(15) Projects undertaken by a local agency to implement a rule or regulation imposed by a state agency, board, or commission under a certified regulatory program pursuant to Section 21080.5. Any site-specific effect of the project which was not analyzed as a significant effect on the environment in the plan or other written documentation required by Section 21080.5 is subject to this division.

(16) The selection, credit, and transfer of emission credits by the South Coast Air Quality Management District pursuant to Section 40440.14 of the Health and Safety Code, until the repeal of that section on January 1, 2012, or a later date.

(c) If a lead agency determines that a proposed project, not otherwise exempt from this division, would not have a significant effect on the environment, the lead agency shall adopt a negative declaration to that effect. The negative declaration shall be prepared for the proposed project in either of the following circumstances:

(1) There is no substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.

(2) An initial study identifies potentially significant effects on the environment, but (A) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (B) there is no substantial evidence, in light of the whole record before the lead agency, that the project, as revised, may have a significant effect on the environment.

(d) If there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared.

(e) (1) For the purposes of this section and this division, substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.

(2) Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or

evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment.

(f) As a result of the public review process for a mitigated negative declaration, including administrative decisions and public hearings, the lead agency may conclude that certain mitigation measures identified pursuant to paragraph (2) of subdivision (c) are infeasible or otherwise undesirable. In those circumstances, the lead agency, prior to approving the project, may delete those mitigation measures and substitute for them other mitigation measures that the lead agency finds, after holding a public hearing on the matter, are equivalent or more effective in mitigating significant effects on the environment to a less than significant level and that do not cause any potentially significant effect on the environment. If those new mitigation measures are made conditions of project approval or are otherwise made part of the project approval, the deletion of the former measures and the substitution of the new mitigation measures shall not constitute an action or circumstance requiring recirculation of the mitigated negative declaration.

(g) Nothing in this section shall preclude a project applicant or any other person from challenging, in an administrative or judicial proceeding, the legality of a condition of project approval imposed by the lead agency. If, however, any condition of project approval set aside by either an administrative body or court was necessary to avoid or lessen the likelihood of the occurrence of a significant effect on the environment, the lead agency's approval of the negative declaration and project shall be invalid and a new environmental review process shall be conducted before the project can be reapproved, unless the lead agency substitutes a new condition that the lead agency finds, after holding a public hearing on the matter, is equivalent to, or more effective in, lessening or avoiding significant effects on the environment and that does not cause any potentially significant effect on the environment.

SEC. 5. Due to unique circumstances concerning the South Coast Air Quality Management District, the Legislature finds and declares that a general statute cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution.

SEC. 6. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act, within the meaning of Section 17556 of the Government Code.

O

EXHIBIT C

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Governor Lifts Air Pollution Permit Moratorium

October 12, 2009

AQMD to begin issuing permits after Jan. 1

Hundreds of Southland businesses and public utilities forced to delay plans to expand, modernize or relocate can move forward after Jan. 1, 2010 now that Gov. Schwarzenegger has signed a bill lifting an air quality permit moratorium.

Yesterday, the governor signed Senate Bill 827 (Wright), which authorizes the South Coast Air Quality Management District to begin issuing more than 1,200 air pollution permit applications frozen by a state court decision in November 2008.

"Tens of thousands of jobs and more than $5 billion in investment were foregone as a result of the court decision," said AQMD Chairman William Burke, Ed.D. "The governor's approval now helps jump-start our ailing economy while protecting our air quality."

AQMD will begin issuing the first permits blocked by the moratorium soon after Jan. 1.

SB 827, first introduced as SB 696, allows AQMD to resume issuing at no charge emission "offsets" to small- to medium-sized businesses and public service facilities.

Specifically, AQMD can resume issuing offsets to businesses that emit less than four tons per year of smog-forming emissions, as well as public service facilities such as police and fire stations, schools, hospitals, landfills and sewage treatment plants. Businesses affected by the permit moratorium include gas stations, tortilla chip makers, automobile recyclers, grocery stores and many others.

SB 827 serves as a stopgap measure, temporarily lifting the permit moratorium while allowing AQMD time to complete rulemaking on its emission offset program pursuant to the state court decision. The legislation will expire on May 1, 2012.

Small businesses and public facilities have been unable to obtain offsets, also known as emission reduction credits, due to a lawsuit filed in August 2007 by the NRDC and other environmental groups.

The state judge's final order in this case required AQMD to set aside two of the agency's regulations governing its emissions offset program on California Environmental Quality Act (CEQA) grounds. The judge made the decision even though CEQA compliance would otherwise occur at the individual project approval phase. That in turn put a halt to issuing new permits for facilities that needed emissions offsets from AQMD. The state court ruling also potentially revoked over 3,000 permits issued since September 2006 that relied on offsets from the AQMD.

Whenever a new or modified facility increases its emissions in Southern California, it is required to provide emissions offsets to prevent air quality in an already polluted area from further deteriorating. Offsets are generated when a facility or air pollution-emitting

equipment is permanently shut down, or when an active plant controls its emissions to a greater degree than required by air quality regulations.

AQMD is the air pollution control agency for Orange County and major portions of Los Angeles, San Bernardino and Riverside counties.

EXHIBIT D

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, INC., a non-profit corporation; COMMUNITIES FOR A BETTER ENVIRONMENT, a California non-profit corporation; COALITION FOR A SAFE ENVIRONMENT, a California non-profit corporation; and DESERT CITIZENS AGAINST POLLUTION, a California non-profit corporation,

Plaintiffs,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; GOVERNING BOARD OF THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; and BARRY WALLERSTEIN, Executive Officer,

Defendants.

CASE NO.: CV08-05403-GW (PLAx)

ASSIGNED FOR ALL PURPOSES TO HONORABLE GEORGE H. WU

DEFENDANTS' REPLY TO PLAINTIFFS' SUPPLEMENTAL BRIEF

HEARINGS PENDING:
Hearing: Further Hearing of Motion to Dismiss and Motions to Intervene
Date: March 19, 2009
Time: 8:30 a.m.
Courtroom: 10

Defendants SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, GOVERNING BOARD OF THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, and BARRY WALLERSTEIN (collectively the "District") hereby submit the following Reply to the Plaintiffs' Supplemental Brief.

DATED: March 13, 2009 WOODRUFF, SPRADLIN & SMART, APC

By: _____
BRADLEY R. HOGIN
RICIA R. HAGER
Attorneys for Defendants SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; GOVERNING BOARD OF THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; AND BARRY WALLERSTEIN

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Introduction

In their Supplemental Brief, Plaintiffs make essentially two points: (1) outside of the SIP, the District and EPA have, on occasion, referred to the District's internal offsets as "emission reduction credits"; and (2) the District's internal bank must comply with Section 173(c) [42 U.S.C. § 7503]. As far as they go, both of these points are correct. It does not remotely follow from the first point, however, that the Plaintiffs have stated a valid claim for violation of the adopted SIP. Nor does it follow from the second point that the Plaintiffs have stated a valid claim for violation of Section 173(c).

First, regardless of the terminology used outside of the SIP to refer to the District's internal offsets, Rule 1309(b)(4) on its face plainly does not apply to the District's internal offsets. That section requires an *applicant* for Emission Reduction Credits to demonstrate that the emission reductions in question are real, quantifiable, permanent, and federally enforceable. The District's internal offsets do not result from an "application." The District generates internal offsets on its own initiative through a process set forth in Rule 1315.

In fact, the Plaintiffs have not really addressed the question asked by the Court. This Court asked the parties to describe the *different principles* that apply to the privately held Emission Reduction Credits and the District's internal offsets. The casual use of certain terminology by agency staff in documents outside of the SIP is not relevant to this key question. The short answer to the Court's question, explained at length in the District's Supplemental Brief, is as follows. The privately held Emission Reduction Credits are subject to very different requirements than the District's internal credits. The requirements for privately held Emission Reduction Credits are set forth in Rules 1309 and 1306. The approved SIP sets forth only a few requirements for the District's internal offsets. Rule 1315, which has not been

SIP-approved, sets forth detailed requirements for the generation and validation of the District's internal offsets. These requirements are *quite* different than the requirements that apply to privately held Emission Reduction Credits under Rules 1309 and 1306.

Second, although the District's internal bank is subject to the requirements of Section 173(c), it does not follow that the *plaintiffs* may enforce those requirements against the District. They plainly cannot. Section 173(c) sets forth general requirements that EPA must follow in approving SIP permitting programs. 42 U.S.C. § 7503(c). By its very nature, only *EPA* can violate Section 173(c). Citizens have one, and only one, opportunity to enforce Section 173(c): a petition for review under Section 307 [42 U.S.C. § 7607]. Such a suit must be brought against EPA in the applicable Court of Appeals.

I. Plaintiffs Have Not Shown, and Cannot Show, That Rules 1309 and 1306 Apply to the District's Internal Offsets.

The argument set forth in Section I of Plaintiffs' Supplemental Brief is based entirely on the fact that, in materials that are not part of the SIP, the District and EPA have on occasion referred to the District's internal offsets as "emission reduction credits." Although the Plaintiffs never expressly state so in their Brief, the Plaintiffs appear to infer from this fact the conclusion that the District's internal credits are subject to Rules 1309 and 1306. That conclusion is plainly incorrect. It is abundantly clear from the language and context of Rules 1309 and 1306 that they do *not* apply to the District's internal offsets.

A. Plaintiffs Ignore the Plain Language and Clear Context of Regulation XIII.

As this Court has already pointed out, the issue here is not what the internal credits are called -- the issue is whether the internal credits are subject to the

validation requirements set forth in Rule 1309(b)(4). Transcript at 42.[1] This Court explained as follows:

> "[I]t seems to me that one of the fundamental issues . . . is whether or not the district[']s -- whether or not it calls them ECR's or whether or not it calls them internal credits. [The District's] position is, is that the criteria is different and that the criteria does not require . . .a substantiation that they are . . . whatever the language is in 1309(b)(4), real, quantifiable, permanent and federally enforceable. So what I want to know is what is the evidentiary support from both sides that the district's ECR's or internal credits are guided by the same principles as opposed to the ones that are generated by private parties."

The short answer to the Court's question is this: it is quite clear from the language and context of Rule 1309 that the requirements of Rule 1309 do *not* apply to the District's internal offsets.

Rule 1309 on its face sets forth a process by which a *private company files an application* with the District for Emission Reduction Credits. Rule 1309.[2] The validation requirements that the Plaintiffs seek to enforce here, for example, are set forth in Rule 1309(b). Rule 1309(b) is entitled "*Application* for an ERC for a New Emission Reduction." *Id.* (emphasis added). Every subsection of Rule 1309(b) refers to the "application" or the "applicant." In particular, Rule 1309(b)(4) states that "*the applicant* must demonstrate to the Executive Officer or his designee" that the emission reductions are real, quantifiable, permanent, and federally enforceable. Rule 1309(b)(4) (emphasis added).[3]

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[1] *Reporter's Transcript of Proceedings*, Feb. 2, 2009; Declaration of Ricia R. Hager filed concurrently with Defendants' Supplemental Brief in Support of Motion to Dismiss, Ex. A, p. 44, lns. 3-15.

[2] Request for Judicial Notice filed concurrently with Defendants' Supplemental Brief in Support of Motion to Dismiss ("RJN"), Ex. G, p. 56.

[3] RJN, Ex. G, p. 57.

The requirements of Rule 1309 plainly do not apply to the District's internal offsets because the internal offsets *do not result from an application*. As explained in the District's Supplemental Brief, the District's internal offsets are generated on the District's own initiative. Rule 1315(c)(3).[4] District staff generates the internal offsets by "tracking" certain types of emission reductions, including orphan shutdowns, orphan reductions, and others, and "crediting" or depositing the reductions as offsets in the internal bank. *Id.*

The context of Rules 1309 and 1306 within Regulation XIII also confirms that those Rules do not apply to the District's internal offsets. Rule 1303(b)(2), for example, sets forth the District's basic offset requirement. Rule 1303(b)(2) provides in pertinent part as follows:

> The Executive Officer or designee shall, except as Rule 1304 applies, deny the Permit to Construct for any new or modified source which results in a net emission increase of any nonattainment air contaminant at a facility, unless each of the following requirements is met:
>
> . . .
>
> (2) Emission Offsets
>
> Unless exempt from offsets requirements pursuant to Rule 1304, emission increases shall be offset *by either Emission Reduction Credits approved pursuant to Rule 1309, or by allocations from the Priority Reserve in accordance with the provisions of Rule 1309.1*. Rule 1303(b)(2) (emphasis added).[5]

As explained in the District's Supplemental Brief, Rule 1303(b)(2) essentially sets forth three distinct ways that a new or modified source may satisfy the offset requirement: (1) by showing that they the source is *exempt* from offset requirements under Rule 1304; (2) by obtaining "Emission Reduction Credits *approved pursuant to*

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[4] RJN, Ex. K, pp. 74-75.

[5] RJN, Ex. C, p. 32.

Rule 1309"; or (3) by receiving "allocations from *the Priority Reserve in accordance with the provisions of Rule 1309.1.*" (emphases added).

The language of Rule 1303(b)(2) belies Plaintiff's entire argument. If the District's internal offsets were "Emission Reduction Credits approved pursuant to Rule 1309," there would be no need to add the phrase "allocations from the Priority Reserve in accordance with the provisions of Rule 1309.1." The only logical conclusion that one can draw from the language of Rule 1303(b)(2) is that the District's internal offsets are *not* "approved pursuant to Rule 1309." As explained above, this interpretation is *consistent with the plain language of Rule 1309*, which governs *applications from private companies* for Emission Reduction Credits. This interpretation is also consistent with Rule 1315, which describes a *completely different process* for generating internal offsets.

Elsewhere, Regulation XIII *never* refers to the District's internal credits as being "approved pursuant to Rule 1309." Depending on the context, Regulation XIII refers to internal offsets as "Priority Reserve allocations,"[6] "Priority Reserve Credits,"[7] "Priority Reserve Offsets,"[8] or "offsets obtained pursuant to the exemption provisions of Rule 1304."[9] There are other telling examples of the distinction between Emission Reduction Credits approved pursuant to Rule 1309 and the District's internal offsets as well. Rule 1306(e)(3), for example, explicitly excludes "Priority Reserve allocations" from the calculation of "Emission Reduction Credits."[10] In addition, Rule 1309.1(a)(5)(E) states that a facility must use any ERCs it holds before being eligible for the Priority Reserve.[11]

The existence and language of Rule 1315 also belie Plaintiffs' argument.

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[6] *See, e.g.,* Rule 1306(e)(3)(C). RJN, Ex. F, p. 53.
[7] *See, e.g.,* Rule 1309.1(a)(5)(A). RJN, Ex. H, p. 64.
[8] *See, e.g.,* Rule 1309.1(a)(5)(H). RJN, Ex. H, p. 64.
[9] Rule 1306(e)(3)(D). RJN, Ex. F, p. 53.
[10] *Id.*
[11] RJN, Ex. H, p. 64.

Although not part of the SIP, Rule 1315 governs the creation of the District's internal offsets. If the District's internal offsets were in fact created pursuant to Rule 1309, Rule 1315 would be unnecessary. Moreover, Rule 1315 imposes *different* requirements than those set forth in Rule 1309. Emission Reduction Credits under Rule 1309 are created through an application process. Internal offsets under Rule 1315 are created on the District's own initiative. Under Rule 1315, the District tracks and validates the internal offsets in the aggregate based on specified "reporting periods" (10/1/90-7/31/95; individual years from 8/95 to 7/04; 8/04-12/05; and each calendar year beginning with 2006).[12] In contrast, privately held Emission Reduction Credits are individually validated and registered under Rule 1309(c).[13] To take another example, surplus determinations for internal offsets are made in the aggregate on an annual basis under Rule 1315(d).[14] In contrast, surplus determinations for privately held ERCs are made on an individual basis under Rule 1309.[15]

Plaintiffs make much of the fact that the non-SIP approved version of Rule 1302 defines the term "allocation" as follows:

> ALLOCATION means emission reduction credits (ERCs) issued from the Priority Reserve or the Offset Budget or short-term credits issued from the Offset Budget.

This definition, however, in no way renders the District's internal offsets subject to Rule 1309. First, it is critical to note that the definition is not part of the approved SIP. In any case, the definition does not magically change (1) the language of Rule 1309(b), which relates entirely to credits generated by *private applications*; (2) the language of 1303(b)(2), which distinguishes between credits "approved pursuant to Rule 1309" and the District's offsets; or (3) the language of Rule 1315, which sets

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[12] Rule 1315(d)(1), RJN, Ex. K, pp. 75-76.
[13] RJN, Ex. G, p. 58.
[14] RJN, Ex. K, pp. 75-76.
[15] Rule 1309(b)(5), RJN, Ex. G, pp. 57-58.

forth specific validation requirements for the District's internal offsets that are different from the requirements of Rule 1309. In focusing on a provision that is not even in the SIP, Plaintiffs completely ignore the critical SIP-approved language and context of Rule 1309.

B. Use of the Term "Emission Reduction Credits" By Agency Staff Does Not Alter the Plain Meaning of Regulation XIII.

The Plaintiffs have submitted voluminous material in support of their Supplemental Brief to support the proposition that District staff and EPA staff have, on occasion, referred to the District's internal credits as "emission reduction credits." This proposition, while true enough, is completely irrelevant to the issue at hand: whether the requirements of Rules 1309 and 1306 apply to the District's internal offsets.

Privately held Emission Reduction Credits and the District's internal offsets serve the same basic purpose – they are both used to satisfy the offset requirement set forth in Rule 1303(b)(2). At the same time, as explained at length in prior papers and oral argument, they are subject to very different requirements. Most importantly, privately held Emission Reduction Credits are subject to Rule 1309(b)(4), meaning that an applicant must show that the emission reductions are real, quantifiable, permanent, and federally enforceable.

Because privately held Emission Reduction Credits and the District's internal offsets are used for the same basic purpose, it is hardly surprising that agency staff, in contexts where the differences between the two are not directly relevant, may use the same term to apply to both. This does not in any way change the language or context of Rule 1309 which, as explained above, clearly show that Rule 1309 does not apply to the District's internal offsets.

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II. The Issue Here is Not Whether Section 173(c) Applies to the District's Internal Bank; The Issue is Whether *Plaintiffs* Can Enforce Section 173(c) Against the District.

The argument set forth in Section II of Plaintiffs' Supplemental Brief is based entirely on the observation that the requirements of Section 173(c) [42 U.S.C. § 7503] apply to the District's internal bank. The District does not deny, and has not denied, this fact. The internal bank *is* subject to the requirements of Section 173(c), and in fact meets those requirements. Plaintiffs, however, miss the point. Plaintiffs' claim under Section 173(c) should be dismissed because, by its very nature, Section 173(c) cannot be enforced through a citizen suit under Section 304 [42 U.S.C. § 7604].

A. Plaintiffs Cannot Enforce Section 173(c) Through a Citizen Suit Under Section 304.

The Plaintiffs cannot directly enforce Section 173(c) under Section 304 because Section 173(c) sets forth requirements for *SIPs* to be approved by EPA. *Delaware Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 266 (3d Cir. 1991). Section 173(c) does not set forth specific "emissions standards or limitations" that apply to individual sources. Rather, it sets forth general requirements that can be met in various specific ways. It is well established that general Clean Air Act statutes requirements cannot be enforced by a citizen suit under Section 304. *Conservation Law Foundation v. Busey*, 79 F.3d 1250, 1258 (1st Cir. 1996).

As explained at length in the District's Motion to Dismiss and Reply, Section 173 does not set forth enforceable "emissions standards or limitations" within the meaning of Section 304. Rather, Section 173 describes the *types* of emission standards and limitations that must be contained in a SIP before EPA may approve the SIP. Section 173 is part of Subchapter 1, Part D of the Clean Air Act, entitled "Plan Requirements for Nonattainment Areas." Part D sets forth a variety of requirements that states must meet to have their SIPs approved by EPA. 42 U.S.C. § 7501 *et seq.* Sections 172(c) and 173 together establish general requirements for the *content* of

SIPs. 42 U.S.C. § 7502, 7503. Section 173, entitled "Permit Requirements," sets forth the general requirements for the permit programs mandated by Section 172(c)(3).

Sections 172 and 173 obviously do not impose any obligations on the District, because the District is not responsible for approving SIPs. Sections 172 and 173 only impose obligations on *EPA*, because only EPA has the authority to approve SIPs.

Plaintiffs miss the point when they repeatedly argue that the District's internal bank must be subject to the requirements of Section 173(c). The District's internal bank *is* subject to those requirements. That is not the issue. The issue here is whether the Plaintiffs can enforce the requirements of Section 173(c) against the District now, long after EPA has approved the SIP. The answer is clearly no. Because Section 173(c) by its nature imposes requirements on the *content* of SIPs, any challenge alleging non-compliance with Section 173(c) has to be brought against EPA in the Court of Appeal. *Delaware Valley Citizens Council for Clean Air v. Davis*, *supra*, 932 F.2d at 266.

Of course, the fact that a citizen suit under Section 304 is unavailable does not mean that, after SIP approval, the District is free to ignore federal offset requirements. Under Section 110(k), EPA exercises ongoing authority over the District to require revisions to an adopted SIP if EPA determines that the SIP is inadequate to meet Clean Air Act requirements. 42 U.S.C. § 7410(k)(5). EPA requests for SIP revisions are commonly referred to as "SIP Calls." EPA has and will exercise this authority when it finds that SIPs are inadequate to ensure compliance with federal requirements.[16]

Finally, it bears noting that EPA has expressly found that the District's internal bank meets the requirements of Section 173(c). In approving Regulation XIII in 1996,

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[16] Under the authority of Section 110(k), for example, the EPA issued a broad SIP Call in October of 1998, requiring twenty-two states and the District of Columbia to revise their SIPs by adding additional NOx controls. *See* 67 Fed.Reg. 8,396-8, 398 (February 22, 2002). *See* Defendants' Request for Judicial Notice in Support of Defendants' Reply Memorandum in Support of Motion to Dismiss Plaintiffs' Complaint, Ex. C, pp. 38-44.

EPA specifically determined that the District's internal tracking system was adequate to ensure the validity of the offsets as required by Section 173(c).[17] EPA has explained in no uncertain terms as follows:

> In approving Rule 1309.1 in 1996, we determined that the District's implementation of a tracking system demonstrated that the Priority Reserve bank's emission reduction credits complied with the requirements of section 173(c). Revisions to the California State Implementation Plan, South Coast Air Quality Management District, 71 Fed. Reg. 35,157, 35,158.[18]

If the Plaintiffs disagreed with EPA's assessment, their only recourse was to file a citizen suit against EPA under Section 307. 42 U.S.C. § 7607. Section 307 allows a petition for review challenging EPA's action in approving a SIP. 42 U.S.C. § 7607(b)(1).

B. <u>This Court Cannot and Should Not Attempt to Rewrite the SIP</u>.

It is clear that the Plaintiffs are attempting to enforce SIP requirements that do not exist. The SIP as approved by EPA simply does not require that the District's internal offsets be real, quantifiable, permanent, federally enforceable, or surplus. The validation requirements for the District's internal offsets are set forth in Rule 1315, which is not part of the SIP.

In Section IIB of their Supplemental Brief, the Plaintiffs make essentially the following argument: (1) if the validation requirements of Rule 1309 do not apply to the District's internal offsets, then the SIP does not meet the requirements of Section 173; (2) this court cannot "interpret" the SIP as though it were "unlawful"; therefore (3) this Court should "interpret" the SIP such that the requirements of Rule 1309 apply to the District's internal offsets.

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[17] EPA approved Rule 1309.1 as part of the SIP on December 4, 1996. "Approval and Promulgation of Implementation Plan for South Coast Air Quality Management District," 61 Fed. Reg. 64,291 (Dec. 4, 1996). RJN, Ex. L, p. 79.

[18] RJN, Ex. M, p. 87.

In effect, the Plaintiffs are asking this Court to re-write the SIP. As explained above, the plain language and context of Rule 1309 clearly shows that Rule 1309 does not apply to the District's internal offsets. Whether this renders the SIP unlawful is an issue not before this Court. Any argument that the SIP is unlawful must have been raised, if at all, in the Ninth Circuit in 1996 against EPA. For purposes of this case, this Court must take the SIP as this Court finds it.

Thus, by asking this Court to apply the requirements of Rule 1309 to the District's internal offsets, the Plaintiffs are, in effect, asking this Court to re-write the SIP. This Court should decline the Plaintiffs' invitation to do so for many reasons. The Clean Air Act reserves to EPA the authority to approve SIPs. This Court, moreover, does not have the resources or expertise to draft SIP provisions. Finally, as a practical matter, what should this new SIP say exactly? Should this Court import the requirements of Rule 1315 into the SIP, even though Rule 1315 has not been SIP-approved? If not, how would the Court reconcile the language of Rule 1309 with the District's actual practice of generating and validating internal credits? Clearly, this Court should simply give effect to the clear requirements of the SIP as written.

Conclusion

For the reasons discussed in the District's Motion, Reply, Supplemental Brief, and above, the District respectfully requests that this Court dismiss the Complaint on the grounds that (1) the court lacks jurisdiction, and (2) the Complaint fails to state a claim for which relief can be granted.

DATED: March 13, 2009

WOODRUFF, SPRADLIN & SMART, APC

By: _____

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of 18 and not a party to the within action; I am employed by WOODRUFF, SPRADLIN & SMART in the County of Orange at 555 Anton Boulevard, Suite 1200, Costa Mesa, CA 92626-7670.

On March 13, 2009, I served the foregoing document(s) described as **DEFENDANTS' REPLY TO PLAINTIFFS' SUPPLEMENTAL BRIEF**

☐ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list;

☒ by causing the foregoing document(s) to be electronically filed using the Court's Electronic Filing system which constitutes service of the filed document(s) on the individual(s) listed on the attached service list;

☒ **(BY MAIL)** I placed said envelope(s) for collection and mailing, following ordinary business practices, at the business offices of WOODRUFF, SPRADLIN & SMART, and addressed as shown on the attached service list, for deposit in the United States Postal Service. I am readily familiar with the practice of WOODRUFF, SPRADLIN & SMART for collection and processing correspondence for mailing with the United States Postal Service, and said envelope(s) will be deposited with the United States Postal Service on said date in the ordinary course of business.

☐ **(BY OVERNIGHT DELIVERY)** I placed said documents in envelope(s) for collection following ordinary business practices, at the business offices of WOODRUFF, SPRADLIN & SMART, and addressed as shown on the attached service list, for collection and delivery to a courier authorized by WOODRUFF, SPRADLIN & SMART to receive said documents, with delivery fees provided for. I am readily familiar with the practices of WOODRUFF, SPRADLIN & SMART for collection and processing of documents for overnight delivery, and said envelope(s) will be deposited for receipt by WOODRUFF, SPRADLIN & SMART on said date in the ordinary course of business.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury that the above is true and correct.

Executed on March 13, 2009 at Costa Mesa, California.

Priscilla Gaida

WOODRUFF, SPRADLIN & SMART ATTORNEYS AT LAW COSTA MESA

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EXHIBIT E

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JOHN A. CLARKE, CLERK
BY: _____, Deputy
Lara Ismael

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

Natural Resources Defense Council, Inc., et al. Petitioners, vs. South Coast Air Quality Management District, Respondent. Inland Energy, Mojave Desert Air Quality Management District, Antelope Valley Air Quality Management District, Real Parties in Interest.	Case No.: BS 110792 Decision on Ruling on Respondent's Motion for Summary Adjudication

Having reviewed the pleadings filed by the parties and the voluminous administrative record, having held a trial on the petition and having heard arguments of the parties, having allowed additional briefing and having, thereafter, taken the

Minutes Entered: **Dept.**

matter under submission, the court now rules as follows:

I. Introduction

By this action, petitioners Natural Resources Defense Council, Inc., Communities for a Better Environment, Coalition for a Safe Environment, and California Communities against Toxics (hereinafter "Petitioners" or "NRDC") seek to set aside the South Coast Air Management District's (hereinafter "District") decision to certify a Program Environmental Assessment ("PEA") and approve Rules 1315 and 1309.1.

Petitioners contend that the District exceeded its authority by promulgating air quality regulations that actually increase air pollution in the South Coast Air Basin. In addition, petitioners challenge the PEA and the rule-making process generally as a violation of the California Environmental Quality Act ("CEQA"). The petitioners complain that the District failed to provide an adequate Notice of Preparation ("NOP") and failed to submit the NOP to the appropriate agencies as required under CEQA. In addition, petitioners complain that the PEA itself failed to analyze or mitigate the significant environmental impacts of these rules and failed to consider any mitigation measures, as required by CEQA. Specifically, petitioners complain that the PEA failed to disclose or analyze the significant health impacts, the aesthetic impacts, and the greenhouse gas emissions resulting from the anticipated and foreseeable effects of these rule changes. Finally, petitioners assert that the PEA failed to

adopt a mitigation monitoring plan and failed to analyze a reasonable range of alternatives – all in violation of CEQA.

The District and Real Party in Interest, Inland Energy, reject these arguments and assert that the process and outcome of the District's amendment of Rule 1309.1 and its adoption of Rule 1315 do not violate CEQA. Initially these parties assert that the passage of Rule 1315 did nothing more than refine the District's own tracking procedure of emission credits. The District further argues that this Rule was not a project under CEQA or is exempt under the common sense exemption. With regard to its amendment to Rule 1309.1 (by which it allowed power plants to obtain access to the Priority Reserve), the District asserts that this rule change is statutorily exempt under Public Resources Code § 21080(b)(6).

After a challenge to these rules brought by Petitioner in this court, the District elected to prepare a PEA. And, pursuant to a motion made by the respondent, the court dismissed the first lawsuit as moot.

In this action, the District and Inland Energy (for convenience, hereafter "respondents") contend that the District is legally authorized to promulgate the rules under consideration in this case. Further, respondents assert that the PEA and the process by which Rule 1315 and the amendment to Rule 1309.1 were promulgated meet the requirements of CEQA. Specifically, respondents contend that the rule-making process employed by the

District in this case afforded interested members of the public ample access to the decision process. Further, respondents contend that the PEA analyzes the environmental impacts of these rules and adequately considers mitigation measures. Finally, respondents assert that the District's measures have adequately mitigated all significant environmental impacts of Rules 1315 and 1309.1.

II. Discussion

Petitioners have set forth a number of different arguments in support of their petition for writ of mandate. The court will consider each of them separately.

(1) Are the District's Actions *Ultra Vires*?

Petitioner's initial challenges to the District's actions assert that the District exceeded its authority by amending Rule 1309.1 -- a rule change intended not to address its regulatory mission, i.e., the improvement of air quality in the Basin, but rather, to address the need to increase the number of generating facilities needed to meet the growing demand for electricity. This "energy mission" is not within the scope of the District's statutory authority granted to it under the Lewis-Presley Air Quality Management Act. In addition, petitioners argue that the lynchpin of the District's decision, i.e., that the area requires new generating capacity of 2300 megawatts annually, is without any factual support in the record. In short, the specter of

"shortages of electric generating capacity in the district that could begin as early as the summer of 2007," is wholly unsupported by any substantial evidence.

Respondents assert that ensuring the construction of new, cleaner, more efficient generating facilities will have, as its intended and direct effect, the improvement of air quality in the Basin. For example, by replacing diesel-fired electric generating capacity with cleaner natural-gas fired generators, the overall quality of the air in the South Coast Air Basin will improve. In addition, the District cites the quantity of power necessary to replace aging generating capacity and the inadequacy of renewable alternatives as substantial evidence in support of its amendment to allow 11[illegible] tons/day of emission credits and allowing them to be used to construct power plants capable of generating 2700 megawatts of power.

Looking at the amendment to Rule 1309.1, the District will be able to distribute captured emission credits held in the Priority Reserve to electric generating facilities for the construction of new facilities in Southern California. This amendment to re-distribute air pollution credits from the Priority Reserve is clearly within the ambit of the District's authority under Lewis-Presley. Petitioner's objection to the District's amendment to Rule 1309.1 is not that it cannot amend the rules to allow additional sources access to the Priority Reserve. Rather, the petitioner's objection is that it cannot permissibly authorize

these entities -- electrical generating facilities using natural gas -- to obtain those credits. The petitioner's objections appear not to be with the agency's power, generally, to afford access to its Priority Reserve to certain entities, but rather to the application of that power in this particular instance. Surely, as petitioner acknowledged in argument, if the District tracked orphan shutdowns from minor sources and, in turn, used those credits for development of solar generating facilities, petitioners would not challenge the District's actions as *ultra vires*.

That the amendment to Rule 1309.1 reflects an acceptance by the District that air quality must be balanced with a demonstrated need to develop new sources of electricity does not make these decisions fall outside of the District's statutory authority. In this instance, the Board's conclusion that the need to ensure cleaner, more efficient sources of electricity required an amendment to Rule 1309.1 to ensure that these projects could obtain air pollution credits is not inconsistent with or contrary to its responsibility for comprehensive air pollution control.

Nor can the court conclude that there was no substantial evidence in the administrative record to support the District's position that additional generating facilities must be built in the region to accommodate both the replacement of aging facilities and the need to expand capacity due to increased demand for electricity in the near future. Petitioner's contention that substantial evidence must support the specific amount of generating capacity

contemplated in the first round of Priority Reserve credit distribution is not valid. Rather, what must be shown is that the agency had evidentiary support that there is existing demand for the credits contemplated to be redistributed under the rule-making. See California Sportfishing Protection Alliance v. State Water Resources Control Board, 160 Cal 4th 1625, 1639-40 (2008). A reasonable inference can be drawn from the substantial evidence in the record that at least 2700 megawatts will be demanded in the foreseeable future. (AR 224-25, SAR 13418-13419, SAR 4458-4460).

As for the evidence contained in the administrative record, the court has reviewed and relied on the parties' supplemental letter briefs submitted to the court after the hearing on the petition. Respondent's citation to evidentiary support from third parties and staff testimony based thereon is sufficient to avoid the claim of "no substantial evidence" made by petitioners.

Accordingly, respondent's motion for summary adjudication on the Eighth and Ninth Causes of Action is granted.[1]

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[1] The court denies the District's request for judicial notice of Exhibit A and grants the request to take notice of the existence of Exhibit B, the PUC proceeding, but declines to take further notice as to the truth of the statements contained therein.

(2) Is the District's Adoption of Rule 1315 and Amendment of Rule 1309.1 Subject to CEQA?

Although inviting Judge Chalfant to dismiss as moot the initial lawsuit in which petitioners challenged the District's claim that Rules 1315 and 1309.1 were not subject to CEQA, the District once again contends that the rule-making was exempt. That contention is wholly without merit. There is no question that the adoption of Rule 1315 and the amendment of 1309.1, taken together or separately, are projects subject to CEQA. Rule 1315 is much more than a simple codification of the District's existing tracking system. As acknowledged by the District, the passage of Rule 1315, with the interplay of 1309.1, results in the anticipated emission of hundreds of tons of pollution into the Basin every day. Whether used by electric generating plants, bio-solid facilities or any other polluters that the District might allow to access the Priority Reserve, Rule 1315 has expanded exponentially the universe of pollution credits available to entities needed to increase emissions into an already polluted Basin. The size and breadth of the Priority Reserve has clear, obvious and measurable consequences in a world in which those credits will be accessed and used by credit-hungry polluters. How big to make the Priority Reserve, whether to allow certain credits historically unavailable for use as credits to be captured and re-sold, and whether to take credits retroactively from clean air improvements already attained have real, foreseeable and substantial environmental consequences. Nor does the court find convincing respondents' assertion that

they have no plans for the use of all of the credits in the reserve and have no idea whether anyone will ever use this burgeoning collection of Priority Reserve emission credits. The expressed purpose of revising the historic policies of allowing minor shutdowns, for example, and converting those into future emissions was the District's belief that existing avenues of obtaining pollution credits (e.g., cleaning up dirty sources, shutting down polluters, or just correcting the balances to equal the amount of Priority Reserve credits currently on the books) were inadequate to allow the construction of new generating plants -- plants which by their very nature will have an adverse impact on the environment. Respondents' claim of "common sense" exemption is clearly unavailable in this case. See Davidon Homes v. City of San Jose, 54 Cal. App. 4th 106, 117 (1997) (the common sense provision applies only where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment). Common sense, in fact, dictates that Rule 1315 will have a significant effect on the air quality in the Basin and in communities adjacent thereto.[2]

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[2] Rule 1315 does significantly more than simply meet the EPA's objections regarding the District's treatment of pre-1990 credits from major shutdowns for which there were inadequate records. Rule 1315 proposes four additional classes of credits – credits that by definition will (if used) translate clean air gains into pollution rights. These changes constitute matters of air pollution policy, not accounting, and it is the policy decision that has clear and unavoidable environmental consequences in degrading the quality of the air in the Basin over what would have existed in the absence of these revised rules, or had the

Nor is the statutory exemption relating to the construction and siting of power plants applicable to the amendments proposed to Rule 1309.1. The thermal power plant exemption, by its express terms, does not apply to agency rules that provide access to air pollution credits for certain entities, including power generating plants. Nor will it be sufficient to postpone evaluation of the collective or cumulative environmental impact of these rules on a site-by-site basis when a power plant is later evaluated under CEQA.

Given that the District's rule-making was subject to CEQA, did the respondents comply with the Act?

(3) Did the District Provide an Adequate Description of the Project?

In the first cause of action, petitioners contend that the respondent failed to provide an accurate and detailed description of the proposed rule-making objectives, as well as its characteristics. The court agrees.

A project, as defined by CEQA, "encompasses the whole of an action, which has a potential for resulting in a physical change in the environment, directly or ultimately." Rio Vista Farm Bureau Center v. County of Solano, 5 Cal. App. 4th 351, 370

District revised 1315 to deal only with the EPA's objections regarding undocumented credits.

(1992). It is necessary, therefore, in defining the project in the PEA to provide an accurate and detailed description of both rules and their anticipated effects. "An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 193 (1977). And, a curtailed project description may distort the objectives of the reporting process – which is to allow public decision-makers with the information necessary to balance the proposal's benefit against its environmental costs, consider mitigation measures, and assess the advantages of terminating the proposal (i.e., the no project alternative) and weigh other alternatives in the balance.

In the PEA at issue in this case, the District impermissibly disaggregated the two rules and failed to consider the obvious and intended consequences of the rules operating in tandem. In the Project Objectives, the District separated the objectives of the amendments to Rule 1309.1 and the proposed objectives of Rule 1315. By doing so, the District failed to describe the objectives of both rules as a coherent whole.

The effect of this inaccurate project description – dividing into sub-parts a policy that is inseparable in its objective and operation – is to distort the substantial and significant environmental effects that are present in these two rules.

The mischief in the PEA begins with the District's repeated assertion that Rule 1315 will have no environmental impacts and,

therefore, need not be evaluated in the PEA. But, it is the universe of emission credits (and, foreseeably and consequently, the emissions that will be allowed thereby to be released into the environment) that is at the heart of a programmatic assessment of the rule-making. Whether it is for electric generation, or bio-solid treatment facilities or some other project of importance to the region, it cannot be doubted that in a world of ever-scarcer emission credits that a huge cache of district-held credits in a now-accessible Priority Reserve will be used. This foreseeable consequence is particularly apparent where, as in this case, the District has articulated a willingness to open the Priority Reserve for uses far removed from the entities who historically could obtain access to those reserves. The scope and foreseeable impact of Rule 1315 on the environment is greater, in fact, than the Rule 1309.1 amendments upon which respondents focus. Nor is the impact of Rule 1315 – on a programmatic basis – limited to the eleven power plants currently in line for Priority Reserve access.

In a world of ever-shrinking emission credits and ever-growing demands on the part of industry and commerce to obtain emission credits, it cannot be seriously doubted that the capture and redeployment of credits – taken in tandem with the District's clear decision to make the Priority Reserve open to private and public utilities and other pollution-creating facilities – will have the foreseeable and inevitable consequence of significantly increasing air pollution in the South Coast Air Quality Management District. Whether these increases in pollution will

be offset by other mechanisms is not clearly known, particularly in light of the PEA's failure to conduct any mitigation analysis with regard to Rule 1315. Clearly, the elimination of pollution caused by diesel-fired back-up generators may mitigate that environmental consequence of these rules.[3] But, that effect appears minuscule in light of the magnitude of the credits to be captured in the Priority Reserve under the proposed Rule 1315.

The environmental effects of Rule 1315, in conjunction with the current and future amendments to Rule 1309.1 are real, capable of being quantified and not remote or speculative. This program is clearly distinguishable from the program under consideration in the Rio Vista case. In Rio Vista, the court determined that the waste management plan served only as a "general planning device," in which "no specific facility had been proposed, and the County has not committed to a definite course of action." Rio Vista, supra, 5 Cal. App. 4th at 373. In this project, the District has amended its New Source Review program with the articulated commitment of retroactively generating 111 tons/day of credits and making them available now and in the future to all facilities

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[3] Even this contention is questionable. As pointed out in the administrative record, using the District's own numbers, if diesel backup generators operated every day (which they do not), the proposed changes to Rules 1315 and 1309.1 would generate emissions of particulate matter, sulfur dioxide and carbon monoxide greater than they do. As correctly noted by petitioners, "the District's proposed medicine is far worse that the disease it purports to cure."

through access to the Priority Reserves offset accounts, including at least enough power plants to generate 2700 megawatts of new electricity. This is not, as in Rio Vista, a case in which the plan may or may not be implemented in the future. Rather, it is a plan with a definite course of action that requires careful environmental review.

(4) Does the PEA Adequately Analyze the Environmental Effects?

In the second cause of action, petitioners contend that the District failed to adequately address the environmental effects of the program (including both Rule 1315 and the amendment to Rule 1309.1), including but not limited to, the impacts to aesthetics, health, and global warming.

Before reaching this claim, it is necessary to state clearly the limited scope of this court's review of the PEA in this case.

Section 21168.5 of the Public Resources Code provides that a court's inquiry into an action to set aside an agency's decision shall extend only to whether there was a prejudicial abuse of discretion. Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings, 43 Cal. 4th 1143, 1161 (2008). An abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. Save Our Peninsula Committee v. Monterey County Board of Supervisors, 87 Cal. App. 4th 99, 117 (2001).

The overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage. Id. The EIR, or in this case, the PEA, is the heart of CEQA. Id. The ultimate decision to approve a project is a nullity if it does not provide the decision-makers and the public with the information about the project that is required by CEQA. Id. at 118.

When the informational requirements are not complied with, an agency has failed to proceed in a manner required by law and, therefore, the agency has abused its discretion. Id. And, although an agency's factual determinations are subject to deferential review, questions of the application and interpretation of CEQA are matters of law. Id.

CEQA requires that the PEA include analyses of any significant environmental effects of a proposed project. A significant effect on the environment means a substantial or potentially substantial adverse change in the environment. Petitioners challenge the sufficiency of three aspects of the PEA's analysis of the environmental impacts of the District's project: (1) Health Impacts; (2) Aesthetic Impacts; and (3) Climate Change Impacts. Additionally, petitioners complain that the cumulative effects of these environmental harms were not assessed at all. These contentions will be evaluated separately below.

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A. The PEA Fails to Examine Adequately the Health Impacts from the Project.

When addressing the human health impacts of a project, the Legislature has determined that certain kinds of impacts are necessarily "significant" and, therefore, automatically require action to effectuate CEQA's substantive mandate. These mandatory findings of significance include human health impacts when the environmental effects of a project will cause substantial adverse impacts on human beings, directly or indirectly.

Despite the fact that the project contemplates the capture of significant amounts of emission credits (much of which is dangerous particulate matter and smog-forming pollution) and their re-distribution to a number of different polluters – including *inter alia* eleven natural-gas fired electricity plants, bio-solid treatment facilities, and crude oil facilities at the Port of Los Angeles -- the PEA analyzes the health effects of the project at only one location, the Vernon Power Plant. Rather than conduct the analysis necessary to quantify (at least approximately) the health effects of the entire program, the PEA instead simply says that such a task is "not possible". (AR 5509).

An agency must use its best efforts to find out and disclose all that it reasonably can. And, an environmental assessment must "include detail sufficient to enable those who did not participate in its preparation to understand and to consider

meaningfully the issues raised by the proposed project." Laurel Heights Improvement Ass'n v. Regents of the University of California, 47 Cal. 3d 376, 405 (1988).

Rather than conduct a complete analysis, the District fails to even disclose all of the relevant data in its possession. The District possesses, but did not release, "modeling data" regarding the health effects for two facilities other than the Vernon plant. (AR 6039). And, the one facility for which data was provided, Vernon, hints that the health effects of the program – taken cumulatively – would be monumental. Looking at that one facility only and using the most conservative estimates, the facility is predicted to cause 3.82 premature deaths a year. Assuming that the facility will operate over a period of thirty years, this one facility alone may result in 115 additional deaths. Despite these significant health effects, the District fails to release or analyze existing data or to obtain additional information necessary to evaluate the full health consequence of this plan.

Further, the District also fails to analyze meaningfully the cumulative health impacts of Rule 1315's introduction of millions of pounds of new pollution – pollution credits that are intended to be and will be converted into new emissions – into the Basin. There is no analysis performed of the health impacts of increased smog precursors, particularly for inland regions like Riverside where it accumulates. (AR 6063). The District also failed to analyze the collective health effects of increasing particulate

matter in an area already exceeding state and federal health standards. (AR 5442).

While it is true that the final specifications and parameters from the power generating plants are unknown at this time, the District could have used a number of measures presently available to assess the foreseeable health effects of the air quality deterioration directly resulting from this project.

What is wholly speculative, however, is the District's claimed health benefits from avoiding "rolling blackouts" in the event that these eleven new facilities were not built. This list of random, improbable events does not constitute substantial evidence sufficient to support the District's conclusion of no substantial health effects. The specter of auto accidents at intersections and failed respirators at hospitals due to potential power failures is wholly unsupported by substantial evidence. In fact, there is little substantial evidence in the record to support the District's claim that additional generating capacity located in the Los Angeles Basin is necessary to avoid blackouts. Nor is there any competent evidence to support the District's opinion that health effects caused by the changes in credit tracking and distribution contemplated by this project will be mitigated by the elimination of diesel-generating capacity. As stated earlier, the pollution caused by these generators are but a small fraction of the emissions credits that Rule 1315 will make available.

The failure of the PEA to describe, evaluate, analyze, and consider the substantial health impacts of the program -- not just the serious impact caused by a single generating plant -- and to discern whether claimed benefits will be sufficient to mitigate these impacts renders the PEA legally deficient.

B. The PEA Fails to Examine Adequately the Aesthetic Impacts from the Project.

Once again, the PEA suffers from the District's failure to consider the impact of increasing significantly the particulate and sulfuric emissions that are the foreseeable consequence of the program. And, to the extent that the PEA does analyze aesthetic impacts, the discussion is impermissibly disaggregated and limited to the speculative musings as to the aesthetic implications of as-yet undesigned and yet-to-be constructed power plants.

The most obvious visual effect of allowing millions of pounds of new pollution to be introduced into the already polluted air of the Basin -- the further browning of the sky -- is completely unaddressed in the PEA. Rather, the District concludes -- unbelievably -- that these amendments will have "no direct impact on a scenic vista . . . or substantially degrade the existing visual character or quality of the site and its surroundings." (AR 5481).

The District's blissful conclusion is wholly unsupported by any

substantial evidence in the record. Rather, it is based on the District's unsubstantiated claim that "it would be speculative to analyze any impact on aesthetics resulting from haze." How is it speculative to entertain the visual effect of adding millions of pounds of particulate matter and thousands of pounds of sulfur oxides to the already hazy sky? It is not at all speculative that there will be a loss of scenic vistas of mountain and sea that results from increasing the existing layer of haze and smog that rests over the Basin.

The absence of any analysis of the foreseeable aesthetic consequences in the form of haze and smog as a direct result of capturing and making particulate credits available for entities who will, *inter alia*, construct power plants and other smog-creating facilities, renders the PEA inadequate as a matter of law. See El Dorado Union High School Dist. v. City of Placerville, 144 Cal. App. 3d 123, 132 (1983)(requiring an analysis of secondary impacts that are likely to result from the project.).

Moreover, by analyzing each of the impacts from specific facilities separately, the District fails to consider the aggregate effect of the program. By segregating each generating facility and by failing to consider the overall visual impact of the introduction of significant amounts on new air pollution in the Basin, the District impermissibly minimizes aesthetic impacts. See Rio Vista, supra, 5 Cal. App. 4th at 370. A project "encompasses the whole of an action," and "a narrow view

of a project" results in the "fallacy of division" – "overlooking its cumulative impact by separately focusing on isolated parts of the whole." Id.

C. The PEA Fails to Examine the Global Warming Effects of the Project.

The District's PEA limited its discussion of the greenhouse gas/global warming consequences of the project to the increased generation of a single greenhouse gas -- carbon dioxide. The emission credits captured and tracked under the new Rule 1315 and their use to allow the construction of new electric generating facilities has a certain and foreseeable effect on global warming. Despite these known substantial environmental consequences, the PEA fails to identify fully these effects, fails to adequately analyze or quantify them and, as a result, fails to consider mitigation measures, in violation of CEQA.

The District's claim that the petitioners failed to exhaust this objection administratively is without merit. Petitioners' filed objections during the rule-making clearly noted that the PEA failed to address the impact of "carbon dioxide *and other greenhouse gases*." (AR 6010-6011)(emphasis added).

That the project will enable the construction of at least 11 new gas-fired power plants in the region and will, therefore, contribute directly and cumulatively to the addition of new greenhouse gases into the Basin is neither speculative nor

uncertain. In their Comments to the Draft PEA, petitioners noted that 19.6 percent of greenhouse gas emissions in California stem from electric power facilities. When the new rules allow additional facilities to be built, it is inevitable that these emissions will increase. Yet, not a single word of the PEA is addressed to greenhouse emissions other than carbon dioxide.

It is legally impermissible to ignore a known environmental effect based only upon the claim that those effects will be analyzed later when the utility using those credits submits an analysis. See Rio Vista, supra, 5 Cal. App. 4th at 370. In fact, the entire purpose of a programmatic analysis is to consider and attempt to mitigate the cumulative effect of an entire program at the earliest possible stage -- not to postpone the analysis of the environmental effect and then view it in isolation at a single power plant..

It is undisputed that many of the greenhouse gas emissions that will be generated by the ultimate end-users of the Priority Reserve have not been discussed in the PEA. Without more, the failure to discuss these reasonably foreseeable environmental impacts of both the rules and the facilities that those rules expressly contemplate constitutes an abuse of discretion.

The PEA's analyses of health impacts, aesthetic impacts and global warming/greenhouse gases are fundamentally flawed. The failure to adequately analyze these impacts renders the District's PEA inadequate under CEQA.

(5) Does the PEA Adequately Analyze Mitigation Measures?

In the third cause of action, petitioners assert that the District violated the law by rejecting as infeasible numerous alternatives without first demonstrating with substantial evidence that conclusion. Petitioners further contend that this inadequate analysis of alternatives to the program will have an adverse effect on human health and the environment.

Given that there are significant environmental impacts due to the implementation of this project, the PEA must include written findings on (1) changes or alterations that might mitigate or avoid significant environmental effects; and (2) specific economic, social or other reasons that make other mitigation measures not feasible. Rio Vista, supra, 5 Cal. App. 4th at 374.

As a careful review of the PEA discloses, a number of feasible mitigation measures were not adequately identified or discussed in the PEA. Much of the problem in this area stems from the unreasonably narrow description of the project in the first instance. It is not clear what the underlying fundamental objective of the District's project is. If the District's environmental objective is to eliminate reliance on diesel-powered backup generators, then one possible mitigation measure would be to limit access to the Priority Reserve to those power companies wanting to replace dirty power generators with newer, cleaner generating plants. Giving credit to allow the construction of a new plant by a different energy firm will not

necessarily preclude a firm with inadequate capacity from firing up its dirty diesel-powered generators in response to its own supply shortages. Or, if the problem is a state-wide shortage of electricity, that shortage needs to be quantified (which is flatly not in the administrative record), then the alternatives of siting the capacity in areas with cleaner air and transporting it into the basin via additional transmission capacity is an alternative that should be considered. Or, if the problem is with peak power, the question remains whether that limited, incremental power can be provided using solar, wind or other renewable facilities. If peak power is the fundamental objective of the project, and renewable energy is feasible for this use, then an appropriate mitigation measure would be to limit access to the Priority Reserve for the construction of wind or solar facilities only. Or, if the problem is that the EPA wants better record-keeping for emission credits maintained in the Priority Reserve, then a viable mitigation measure would be to allow orphan shutdowns and other new credits to be untracked and un-recorded in an amount roughly equal to the shortfall in the committed reserve credits when the pre-1990 credits are taken out of the Priority Reserve.

Without a clear understanding of the underlying fundamental purpose of this program, it is impossible to consider meaningful alternatives or measures to mitigate the environmental impacts of the program. There might not be any mitigation measures that will substantially reduce the significant environmental effect of providing the District with the power that it requires. But, at

least, once the magnitude of the problem is clearly stated, then the magnitude of the sclution necessary to address it can be clearly understood. Without any definition of the nature and size of the problem to be solved, it is impossible to evaluate transparently the alternatives that would "substantially lessen the significant environmental effects" of the project. Los Angeles Unificd School Dist. v. City of Los Angeles, 58 Cal. App. 4th 1019, 1028-29 (1997). See also Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Assn., 42 Cal. 3d 929, 936 (1986)(It is transparency and accountability that CEQA purports to ensure.)

(6) Did the District Adopt Feasible and Enforceable Mitigation Measures?

In the fourth cause of action, petitioners contend that the mitigation measures adopted in this case, notably a flat mitigation fee that is not linked to the reduction of the environmental effects at a particular location and a renewable energy due diligence requirement that is largely hollow, are inadequate as a measure of law.

The District requires the power plants to pay a mitigation fee. These fees, however, have not been designed to mitigate the emissions that will result from the withdrawal of these new credits from the Priority Reserve. For instance, although the staff recommended that mitigation fees be higher for facilities that were to be constructed in poor air quality zones, the Board

rejected the amendment because of an unsupported and undocumented fear that a tiered fee structure would disadvantage certain firms competitively. (AR 4364-65, 5224-25, 4638-39).

And, the mitigation fee is not linked, through binding commitments, to the reduction of emissions at the same location where the new facilities will operate. (AR 6009, 6063). Thus, the program will allow facilities to be built in already heavily impacted neighborhoods and then, in its unfettered discretion, allow the mitigation fees to be spent making the air cleaner in communities where air quality has not been compromised. If the intention of the fee is to mitigate the significant environmental effects to be imposed on those communities where new power plants are to be constructed, then it is inexplicable why the District did not require the mitigation fee to be spent reducing pollution in that locale. There is no rationale, much less substantial evidence, given for the District's decision to de-link the expenditure of the mitigation fee from the area needed to have the increase in pollution mitigated. Leaving the expenditure of the mitigation fees solely to the discretion of the District without further limits or restrictions ensures that the mitigation fees will not reduce impacts in the affected areas. See Save our Peninsula, supra, 87 Cal. App. 4th at 140 (the idle act of collecting mitigation fees is inadequate absent "evidence that the required mitigation would actually be implemented.")

Finally, the District adopted, without substantial evidence to support that decision, a rule that required the power plants to

demonstrate only that renewable/alternative energy was not a viable option for the power to be generated at the specific site. By limiting the discussion only to the feasibility of alternatives at the particular site, this provision essentially vitiates the renewable energy due diligence requirement. And, there is nothing in the record to support the board's decision. While added upon motion of Dr. Joseph Lyou, it was thereafter reconsidered and rescinded without any showing of infeasibility. (AR 4623-25, 4636-47).

If, once again returning to the absence of a clearly defined project objective, the program is intended to reduce electricity shortages, it should be immaterial whether the alternative generating capacity is located at one site or another, so long as transmission capacity exists to deliver the power into the grid. If the encouragement of cleaner, greener power is the project objective, then a due diligence rule that is site-specific clearly undercuts the requirement as an effective mitigation measure. The District's decision to retreat from a more rigorous "due diligence" requirement, without substantial evidence to establish its infeasibility, violates CEQA. An unsubstantiated opinion does not constitute substantial evidence. Save Our Penninsula, supra, 87 Cal. App. 4th at 122.

(7) Did the District Adopt a Mitigation Monitoring Plan Designed to Ensure Compliance?

In the fifth cause of action, petitioner challenge the District's

failure to include a mitigation monitoring plan. Specifically, petitioners contend that without a proper monitoring plan, the District's actions are arbitrary and capricious, without evidentiary support and a prejudicial abuse of discretion.

CEQA requires that the District adopt a monitoring or reporting program. And, the monitoring program is to be adopted as part of the project approval. As expressly stated in the law, the plan "shall be designed to ensure compliance during project implementation." Pub. Res. Code § 21081.6(a)(1). Reporting generally consists of "a written compliance review that is presented to the decision-making body." As set out in the CEQA guidelines, this reporting is suited to projects that have measurable or quantitative mitigation measures or which involve regular review. 14 C.C.R. § 15097(c)(1). Monitoring, by contrast, is suited to projects with complex mitigation measures which may exceed the expertise of the local agency to oversee, or are expected to be implemented over a period of time, or require careful implementation to ensure compliance. 14 C.C.R. § 15097(c)(2). In all but the most simple projects, a monitoring and reporting plan are appropriate. See 14 C.C.R. § 15097(c)(3).

In this case, The district explicitly decided not to adopt a mitigation monitoring plan. And, the only reference to a reporting plan is the requirement that the Executive Officer shall prepare an annual report on the status of the emission reduction projects funded by the emission fees from this rule. (AR 4372).

The reporting plan, as currently designed, fails to ensure compliance with the adopted mitigation measures. It fails to verify that the mitigation fees are being used to reduce emissions and provides no accountability as to how the fees will be expended. While the District noted that there would be future "guiding principles" drafted with regard to the expenditure of the fees, those requirements were not included in the project and do not, at this time, ensure compliance as required. As such, the monitoring plan set forth in the District's program is inadequate as a matter of law.

(8) Was Proper Notice and Opportunity to Participate Given?

In the sixth and seventh causes of action, petitioners challenge the procedural process by the District promulgated the PEA. Specifically, petitioners contend that the District failed to comply with CEQA by failing to prepare a notice of preparation with regard to Rule 1315 and by failing to consult necessary public agencies.

The parties do not dispute what notice was given in this case. The District did not send a Notice of Preparation (NOP) to the Office of Planning and Research or to any responsible and trustee agencies with regard to Rule 1315. This failure violates the compulsory language of Public Resources Code § 21080.3. And, the Notice of Preparation failed to even mention Rule 1315 in the project title, project description and project purpose.

As set forth in Public Resources Code § 21080.4, "[i]f a lead agency determines that an environmental impact report is required for a project, the lead agency shall immediately send notice of that determination by certified mail . . . to each responsible agency, the Office of Planning and Research, and those public agencies having jurisdiction by law over natural resources affected by the project . . . ."

The District objects to petitioner's claim of non-compliance because this objection was not exhausted administratively. That claim, however, simply cannot be supported. A review of the administrative record clearly evidences that petitioner NRDC, in its comments on the Draft PEA, placed the District on notice that they objected to the fact that the District had failed to comply with the procedural requirements of CEQA.

Respondents also argue that there were no "responsible or trustee agencies" whose participation was necessary to an effective decision-making process. That, however, is not for the District to decide in order to overlook the mandatory notice provisions. Rather, all draft PEAs must be submitted to the necessary state clearinghouses to ensure a full and fair opportunity for all interested members of the public to participate fully. Save Our Penninsula, supra, 87 Cal. App. 4th at 133.

However, even if the court agrees that the District's notice was inadequate, such a finding does not mandate that the writ be granted and the rule-making be repeated. While full compliance

with CEQA is essential to the maintenance of its important public purpose, the disclosure requirements are not fatally defective unless prejudice can be shown. See San Joaquin Raptor Rescue Center v. County of Merced, 149 Cal. App. 4th 645, 653 (2007).

In this case, petitioner's conclusory claim that "prejudice is manifest" is not sufficient. While respondent acknowledges that OPR was not notified, the District did provide ample notice to interested parties of its proposed rules and ample objections were asserted and, ultimately, rejected. The purpose of the notice rules are to ensure an open and public decision-making process based on a full and fair description of the project under review. That open and public process, in fact, occurred in this case. Prejudice cannot be shown and, therefore, the mandate shall not issue based on the District's failure to comply with CEQA's notice requirements.

Were these procedural omissions the only defect cited by petitioners, that would be the end of the discussion. As it is not, and because a further review of this rule-making will be required, the District should ensure that it complies fully and precisely with the statutory notice provisions of CEQA in the future.[4]

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[4] Any future notices must include information sufficient to ensure that the entire project (both Rule 1315 and amendments to Rule 1309.1) is adequately described in the Notice of Preparation and is served on the clearinghouse and any other responsible or trustee agencies.

III. Conclusion

For the foregoing reasons, the court:

(1) Does not find that the District's actions in this instance were *ultra vires* and, for that reason, grants respondent's request for summary adjudication on the eighth and ninth causes of action; and

(2) Does declare that the District's actions in promulgating Rule 1315 and the amendment to Rule 1309.1 violate CEQA for the reasons set forth above.

Accordingly, the court shall grant the petition on the first, second, third, fourth, and fifth Causes of Action and issue a writ of mandate vacating the District's approval of the rules and enjoining the District from undertaking any action to further implement these rules pending CEQA compliance.

To the extent that petitioners believe that they are entitled to attorney's fees and costs, they are ordered to file a separate application with regard to that request.

IT IS SO ORDERED.

DATE: July 29, 2008

Hon. Ann I. Jones
Judge of the Superior Court

Minutes Entered: **Dept.**