

No. 12-72358

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

COMMUNITIES FOR A BETTER ENVIRONMENT, et al.
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.
Respondent.

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

AMICUS CURIAE BRIEF OF
SOUTHERN CALIFORNIA ALLIANCE OF PUBLICLY OWNED
TREATMENT WORKS IN SUPPORT OF RESPONDENTS

CURTIS L. COLEMAN, SBN 056766
LAW OFFICES OF CURTIS L. COLEMAN
6601 Center Drive West, Suite 500
Los Angeles, California 90045
Telephone: 310-348-8186
Email: colemanlaw@earthlink.net

*Counsel for Southern California Alliance of
Publicly Owned Treatment Works*

RULE 26.1 CORPORATE DISCLOSURES

Pursuant to Fed. R. App. P. 26.1 and Ninth Cir. R. 26.1, Southern California Association of Publicly Owned Treatment Works (SCAP) makes the following disclosures:

SCAP states that it is a nonprofit membership corporation that represents publicly owned (i.e., municipal and special district) wastewater treatment and reclamation facilities; that it has no parent corporations and that no publicly held company owns any stock in it.

Dated: February 22, 2013

Respectfully submitted,

s/ Curtis L. Coleman
Curtis L. Coleman
LAW OFFICES OF CURTIS L. COLEMAN
6601 Center Drive W, Suite 500
Los Angeles, CA 90045
(310) 348-8186

*Counsel for Southern California Alliance
Of Publicly Owned Treatment Works*

CERTIFICATE AS TO RELATED CASES

Pursuant to Ninth Cir. R. 28-2.6 Southern California Association of Publicly Owned Treatment Works submit the following certification as to related cases: Petitioner's brief identifies the related cases.

Dated: February 22, 2013

Respectfully submitted,

s/Curtis L. Coleman

Curtis L. Coleman
LAW OFFICES OF CURTIS L.
COLEMAN
6601 Center Drive W, Suite 500
Los Angeles, CA 90045
(310) 348-8186

*Counsel for Southern California
Alliance of Publicly Owned Treatment
Works*

TABLE OF CONTENTS

IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	1
STATEMENT REGARDING PREPARATION OF BRIEF.....	3
ADDENDUM.....	4
OVERVIEW OF PROCEEDINGS.....	4
SUMMARY OF ARGUMENT.....	6
ARGUMENT.....	9
I. A SIP Approved Rule 1315 is a Prerequisite to the SCAQMD’s Ability to Provide Offsets to Essential Public Service Facilities	9
II. The Use of SCAQMD Internal Offsets for Rules 1304 and 1309.1 Have Been Approved as Part of California’s State Implementation Plan and are Necessary for Essential Public Service Facilities	10
A. SIP Approval of Rule 1304 and 1309.1.....	10
B. Essential Public Service Facilities Require Offsets from SCAQMD’s Internal Offset Accounts In Order to Upgrade, Modernize, Increase Capacity and Meet New Regulatory Requirements.....	11
C. The Large Majority of Priority Reserve Credits Used Pursuant to Rule 1309.1 Go To Essential Public Service Facilities	14
III. Based on Past Experience We Can Project What Will Happen if the Approval of Rule 1315 is Vacated	14

IV. If EPA’s Approval of Rule 1315 is Vacated Currently Planned Essential Public Service Projects will be Affected. 15

V. Even Projects that Result in a Net Reduction in Air Pollution Can Require Offsets from SCAQMD’s Internal Offset Accounts 17

VI. Conclusion 18

TABLE OF AUTHORITIES

Federal Register

61 Fed. Reg. 64291	11
77 Fed.Reg. 31200 (May 25, 2012	4, 10

Statutes

Cal. Health & Safety Code § 42504	18
---	----

SCAQMD Rules

Rule 1302.....	11
Rule 1306.....	17, 18
Rule 1309.....	12
Rule 1309.1	9, 10, 11, 12, 13, 14, 17

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Southern California Association of Publicly Owned Treatment Works (“SCAP”) submits this *amicus curiae* brief in support of respondents, United States Environmental Protection Agency (“EPA”); Bob Perciasepe, EPA Administrator; and Jared Blumenfeld, Regional Administrator, EPA Region IX. SCAP is a California non-profit membership corporation among whose members are operators of publicly owned (i.e., municipal or special governmental agency owned) wastewater treatment, wastewater reclamation and drinking water treatment and distribution facilities. These facilities are constantly being upgraded, expanded, and/or modernized to keep up with increasingly stringent regulatory mandates and orders and to serve the need for wastewater treatment, water reclamation and potable water supply services due to an increasing population in Southern California. As older equipment is replaced by newer equipment and facilities are modified to comply with more stringent water and air standards, while providing adequate treatment capacity for the growing population, facilities are also urged to reduce greenhouse gases by making beneficial use of waste gas streams. This is achieved by generating

electricity rather than burning this renewable resource in flares. In order to install the new equipment, upgrade facilities, or modify existing equipment, such facilities in the South Coast Air Quality Management District (“SCAQMD”) must obtain permits to construct and operate from SCAQMD. Often those permits must also be reviewed and approved by EPA.

Without an approved emission offset accounting rule, such as SCAQMD Rule 1315, in place, SCAQMD will be legally prohibited from allowing the use of its internal Offset Accounts¹ to provide offsets under its Rule 1309.1 to allow the issuance of permits for new and modified equipment operated by essential public services such as publicly owned treatment works, police and fire fighting facilities, prisons, schools and hospitals. Additionally, SCAQMD will be unable to issue permits for regulatory compliance projects at these essential facilities pursuant to SCAQMD Rule 1304.

¹ This nomenclature is used by Respondents in their Answering Brief to identify the SCAQMD’s “internal emissions offset bank” (see page 2 thereof) and *Amicus* uses the same term for consistency.

As noted by Respondents in their Answering Brief, one of the purposes that an emissions “banking” system such as SCAQMD’s internal Offset Accounts serve is to encourage the preservation and subsequent use of offsets from prior shutdowns to allow newer, more efficient stationary sources to replace older, more polluting sources. With respect to essential public services, it also provides the means by which these facilities can obtain the permits necessary to modernize and upgrade equipment to comply with more stringent environmental regulations imposed by regulatory agencies and assure operational reliability at all times.

Lack of availability of Priority Reserve offset credits and exemptions under SCAQMD Rule 1304 will have a direct and deleterious impact not only on those SCAP members in the SCAQMD, but to the many residents that are served by those facilities.

STATEMENT REGARDING PREPARATION OF BRIEF

No person, other than *Amicus Curiae* and counsel for *Amicus Curiae*, authored this brief in whole or in part, or made a monetary contribution to its preparation or submission.

ADDENDUM

Cited statutes, regulations and rules not included in Petitioners' or Respondents' addendum are provided in a separately bound addendum pursuant to Circuit Rule 28-2.7.

OVERVIEW OF PROCEEDINGS

SCAP supports EPA's approval of SCAQMD Rule 1315 and believes that the administrative record and EPA's explanation of its reasoning and action set forth in its Final Rule (77 Fed. Reg. 31200 (May 25, 2012)) fully support that approval as well. Since 1976, EPA guidance documents and regulations have allowed the construction of new and modified sources of air pollution in areas that do not attain the National Ambient Air Quality Standards (NAAQS) providing certain requirements are met. The nonattainment area must have approved State Implementation Plan ("SIP") provisions that meet the requirements set forth in 40 C.F.R. §51.165. EPA's analysis in 77 Fed. Reg. 31200 fully explains how SCAQMD's SIP revision submittal for Rule 1315 meets the applicable requirements.

SCAP does not intend to provide a detailed legal argument regarding why SCAQMD's Rule 1315 SIP submittal meets EPA's

requirements or why EPA's analysis is appropriate and sufficient. SCAP fully supports the analysis and argument presented by Respondents in their Answering Brief. Rather it is SCAP's intent to provide clarity to the arguments made by Petitioner and Respondents regarding the effects of Rule 1315. Petitioners state that "The District's NSR program exempts some facilities from the offsetting requirement even though federal law requires those facilities to offset." Petitioners' Opening Brief at 9. Respondents' Answering Brief refers to emissions banking systems and the SCAQMD's Offset Accounts as mechanisms to allow newer, more efficient stationary sources to replace older, more polluting sources (in generic terms). Respondents' Answering Brief at 10-11. While many non-major stationary sources are also permitted using offsets provided by the SCAQMD's internal Offset Accounts, the Clean Air Act and federal regulations are concerned with offsetting major stationary source emissions. The major stationary sources for which SCAQMD provides offsets through its internal Offset Accounts comprise a very small subset of major stationary sources: essential public services and innovative control technology projects through the Priority Reserve under Rule 1309.1, regulatory compliance projects

(including essential public service regulatory compliance projects), resource recovery and energy conservation projects, and ozone depleting compound replacement projects under SCAQMD Rule 1304(c). According to SCAQMD the “large majority of Priority Reserve offsets are used for essential public services.” *Amicus Curiae’s* Supplemental Excerpts of Record (“ACER”) 0002

This brief will explain how vacating the approval of Rule 1315 will affect SCAP members and the many residents they serve, and the adverse impacts that will (based on the similar recent history of Rule 1315 litigation in the SCAQMD) result.

SUMMARY OF ARGUMENT

Rule 1315 does not govern what types of projects qualify for SCAQMD’s internal offsets. Rather, Rule 1315 establishes a tracking system by which the SCAQMD, EPA and the public can be assured that the SCAQMD’s internal offsets are documented, accounted for, and that their use will be allowed consistent with EPA regulations and guidance. SCAQMD’s internal Offset Accounts provide offsets for projects under Rule 1304 and 1309.1. Rule 1309.1 (insofar as it allows essential public

services to use Priority Reserve offsets) and Rule 1304 have been approved in the California SIP since December 1996.

Essential public service facilities require offset credits under Rule 1304 for regulatory compliance projects and resource recovery projects and Priority Reserve offset credits for other facility upgrades, modernizations and needed equipment due to the astronomical cost and/or unavailability of emissions offsets outside of the SCAQMD's Offset Accounts. The large majority of Priority Reserve offsets are used for essential public services to ensure that critical services are always available to the general public.

The inability to use Priority Reserve and Rule 1304 offsets will have a large and disparate impact on essential public service facilities. Based on what occurred during 2008 and 2009 when Rule 1315 was no longer operative because of a state court ruling, a ruling by this Court overturning EPA's approval of Rule 1315 will again result in a permit moratorium, where the SCAQMD will be unable to issue permits using emission credits from its internal Offset Accounts to provide offsets to fund its Priority Reserve Account and Rule 1304 to essential public service facility operators. It will affect projects currently being planned

by essential public service facilities, including but not limited to projects that will provide for beneficial use of renewable waste gases from sewage treatment, upgrade or add emergency power generation capabilities to assure continuous treatment and conveyance service during power outages to avoid discharge of untreated sewage to the streets or the Pacific Ocean, and to install improved solids handling and odor control facilities at a wastewater treatment facility. If SCAP members are affected in this way it is reasonable to believe that other essential public services such as police and hospital facilities, prisons, and schools will be similarly impacted as they were during the 2009 permit moratorium. Evidence of these impacts was included EPA's Rulemaking Docket.

Finally, because of the way SCAQMD's SIP approved New Source Review rules provide for the calculation of emission increases from new equipment and emission decreases from equipment removed from service, vacating the approval of Rule 1315 will prevent the SCAQMD from issuing permits for many modernization projects that would actually result in a net reduction in criteria pollutants and their precursors, and air toxic emissions.

Vacating EPA's approval will delay or prevent the construction of projects that have environmental and/or public health and safety benefits due to the impacts on the ability of the SCAQMD to issue permits using its internal Offset Accounts.

ARGUMENT

I. A SIP Approved Rule 1315 is a Prerequisite to the SCAQMD's Ability to Provide Offsets to Essential Public Service Facilities

In the absence of a SIP approved emission offset tracking and accounting system the SCAQMD will be unable to have federally approved internal Offset Accounts from which to provide offsets for the Priority Reserve pursuant to Rule 1309.1 and regulatory compliance provisions for essential public services projects under Rule 1304(c)(5). SCAQMD in its comment letter to EPA on the approval of Rule 1315 stated:

“Approval of Rule 1315 is extremely important to the South Coast region. EPA approval will allow the SCAQMD to ‘maintain the ... ability to continue through December 31, 2030 to issue permits to major sources that obtain offset

credits from the Priority Reserve under Rule 1309.1 ... and/or that are exempt from offsets under Rule 1304.’ (Rule 1315(a)(1)).” ACER 0002

EPA has required SCAQMD to codify an emission offset tracking, accounting, and reporting system to assure that there is a defined regulatory standard for such tracking, accounting and reporting. In the absence of such a rule EPA and the public would only have access to an informal tracking system, and thus it would be more difficult to determine if the system maintained compliance with federal regulations governing New Source Review programs. Rule 1315 “provides a federally approved and enforceable mechanism for the District to transfer offsetting emissions reductions from the District’s Offset Accounts to projects that qualify under District Rules 1304 and 1309.1.” 77 Fed. Reg. 31200, 31201.

II. The Use of SCAQMD Internal Offsets for Rules 1304 and 1309.1 Have Been Approved as Part of California’s State Implementation Plan and are Necessary for Essential Public Service Facilities

A. SIP Approval of Rule 1304 and 1309.1

Rules 1304 and 1309.1 (insofar as it allows essential public services access to Priority Reserve offsets) were approved as SIP

provisions on December 4, 1996 (61 Fed. Reg. 64291). That approval specifically contemplated that SCAQMD would use credits from its internal Offset Accounts to provide emission offsets for sources subject to the exemptions in Rule 1304 and for sources eligible for the Priority Reserve offsets through Rule 1309.1. *Id* at 64292.

B. Essential Public Service Facilities Require Offsets from SCAQMD's Internal Offset Accounts In Order to Upgrade, Modernize, Increase Capacity and Meet New Regulatory Requirements

Essential public service facilities are defined in SCAQMD Rule 1302 as:

- (1) sewage treatment facilities, which are publicly owned or operated, and consistent with an approved regional growth plan;
- (2) prisons;
- (3) police facilities;
- (4) fire fighting facilities;
- (5) schools;
- (6) hospitals;
- (7) construction and operation of a landfill gas control or processing facility;
- (8) water delivery operations; and
- (9) public transit.

Each of these operations is necessary for public health and safety and they all have limited funds with which to operate and provide the

“essential” public services. In order to minimize regulatory burdens and ensure the reliability of critical public services by maximizing the monies that go to providing those services, SCAQMD has, through Rule 1304(c)(5) and Rule 1309.1(a)(3), provided a mechanism by which federal emission offset requirements can be met for essential public services without their having to go into the marketplace and negotiate for and purchase scarcely available emission reduction credits created through SCAQMD Rule 1309. ACER 0002-0003. Indeed, Priority Reserve credits are only available to an essential public services facility to the extent that an essential public service facility operator cannot reasonably retrofit existing equipment at the facility to reduce emissions to offset the increased emissions from the new or modified equipment for which a permit is being sought. SCAQMD Rule 1309.1(a)(3).

Essential public service facilities do not seek permits for the purposes of increasing production to increase profits. They seek permits because of the need to:

- modernize equipment to increase efficiencies and avoid breakdowns

- upgrade and expand facilities to meet demands of the residents they serve
- install new equipment (e.g. backup emergency power generators) to assure that the essential public service operations (e.g., potable drinking water, water to fight fires, police emergency response and coordination centers, sewage treatment facilities and sewage pumping to treatment facilities, as well as hospital operations and, prisons) can continue in the event of an electrical power outage or other large scale local or regional disturbance
- upgrade facilities and equipment to meet new regulatory clean water and clean air requirements
- install new equipment to control odors and make beneficial use of renewable waste process streams including gases and solids.

If they are unable to obtain permits for these types of projects using credits provided through Rules 1304 and 1309.1, essential public service facilities would incur significant delays, increased costs and, in many cases, total inability to move forward with these types of projects.

This is due to the cost and delays inherent in obtaining sufficient emission offsets from sources other than SCAQMD, as well as the dearth of offsets for such pollutants as PM10 and NOx that could make getting a permit impossible for many projects. ACER 0002-0003.

C. The Large Majority of Priority Reserve Credits Used Pursuant to Rule 1309.1 Go To Essential Public Service Facilities

The SCAQMD has stated that “Priority Reserve offsets are made available to essential public services, innovative technologies, and research operations. The large majority of Priority Reserve offsets are used for essential public services.” ACER 0002. Therefore it is logical that any action that affects the availability of Priority Reserve credits will have a disproportionately large impact on the essential public service community and the many residents it serves.

III. Based on Past Experience We Can Project What Will Happen if the Approval of Rule 1315 is Vacated

In 2008 the Los Angeles Superior Court overturned SCAQMD’s adoption of Rule 1315 and enjoined the District from providing credits pursuant to Rules 1304 and 1309.1, citing failure to comply with the California Environmental Quality Act. ACER 0002. During the period that SCAQMD was unable to provide credits for projects under Rules

1304 and 1309.1 (late 2008 through 2009) essential public service project permitting came to a virtual standstill. SCAQMD pursued state legislation to provide relief from the state court ruling and numerous essential public service facility operators provided accounts of the hardships they were incurring due to the inability to get permits. SCAP members were among those providing comments. Essential public service facilities were unable to get permits for wastewater treatment plant upgrades and expansions and small emergency generators to prevent sewage spills. Resource recovery projects to make beneficial use of landfill gas and sewage digester gas to generate electricity also could not be permitted. ACER 0007-0020.

IV. If EPA's Approval of Rule 1315 is Vacated Currently Planned Essential Public Service Projects will be Affected

SCAP has surveyed its members with facilities in the SCAQMD. There are numerous projects that will be affected that are similar to those identified in the letters sent by SCAP members to the California Legislature in 2009. A short list of agencies and impacted projects is provided below:

Eastern Municipal Water District (Riverside County)

- nine new emergency generators at various facilities

- new odor control systems at two facilities
- a biodiesel processing system
- microturbines to generate renewable electricity from waste gases

City of Los Angeles

- project to utilize large quantities of sewage digester gas to produce renewable electricity and steam for the Hyperion Treatment Plant
- replace two 750 HP emergency generators with new generators to assure operational reliability in the event of a power outage
- replacement of approximately 50 emergency generators with technology that meets more stringent air toxics requirements.
- a project to treat reclaimed water to drinking water standards rather than discharge it to the Los Angeles River
- installation of six new emergency electrical generators in various locations

Metropolitan Water District

- new or replacement emergency electrical generators at six facilities to improve operational reliability

Orange County Sanitation District

- project to upgrade the sewage treatment process to improve solids handling capability, replace aging sludge dewatering equipment with new, more efficient dewatering equipment and improved odor control equipment

V. Even Projects that Result in a Net Reduction in Air Pollution Can Require Offsets from SCAQMD's Internal Offset Accounts

Due to the method specified in SCAQMD's New Source Review rule for calculating emission increases and decreases for offset purposes, installing new, lower emitting equipment to replace some older higher emitting equipment still requires offsets to be provided under Rule 1304 or Rule 1309.1. This is because under the process set forth in SCAQMD Rule 1306 the emissions from the new equipment are analyzed first and the emissions must be offset if there is an increase of more than 1 pound per day at a major source. Then, the reductions from removing the old equipment from service are credited to the SCAQMD's internal Offset Account. No "netting" is allowed. As a

result, if EPA's approval of Rule 1315 is vacated, even projects that result in a net reduction in air pollution will not be able to get permits under Rule 1304 or by using credits from Rule 1309.1. ACER 0003-0004.

This is especially a problem for facilities that are required to install new equipment to comply with new SCAQMD emission standards. Normally they would be permitted pursuant to Rule 1304(c)(4), but if SCAQMD cannot provide the initial offsets for the new equipment pursuant to the two-step mechanism described above, permitting will be difficult if not impossible. ACER 0003-0004. It is complicated by Cal. Health & Safety Code § 42504 which prohibits SCAQMD from amending the calculation method specified in Rule 1306 if it would result in a "less stringent" calculation method. In these circumstances, compliance with new regulatory standards will be difficult, at best, and impossible at worst, all to the detriment of air quality.

VI. Conclusion

If the Court grants the petition for review and vacates EPA's approval of Rule 1315, the goals of the Clean Air Act will not be

furthered, they will be frustrated. Essential public services will be adversely and disproportionately impacted and environmental improvement projects will be delayed or abandoned. In light of these considerations and the fact that EPA acted reasonably and properly and followed the required procedures in approving Rule 1315, the Court should deny the petition for review.

Dated: February 22, 2013

Respectfully Submitted,

s/ Curtis L. Coleman

CURTIS L. COLEMAN
LAW OFFICES OF CURTIS L. COLEMAN
6601 Center Drive W, Ste 500
Los Angeles, CA 90045
Tel: (310) 348-8186
Fax: (310) 861-1484
colemanlaw@earthlink.net

Attorney for Amicus Curiae
Southern California Association
of Publicly Owned Treatment Works

CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(b), I certify that this brief, including headings, footnotes and quotations, but excluding the table of contents, table of citations and certificates of counsel, contains 3,183 words using Microsoft Word 2010, which is in compliance with the type volume limitation of 7,000 words.

Dated: February 22, 2013

Respectfully Submitted,

s/ Curtis L. Coleman

CURTIS L. COLEMAN
LAW OFFICES OF CURTIS L. COLEMAN
6601 Center Drive W, Suite 500
Los Angeles, CA 90045
Tel: (310) 348-8186
Fax: (310) 861-1484
colemanlaw@earthlink.net

Attorney for Amicus Curiae
Southern California Association
of Publicly Owned Treatment Works