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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

CALIFORNIA COMMUNITIES AGAINST TOXICS, a California non-profit corporation; COMMUNITIES FOR A BETTER ENVIRONMENT, a California non-profit corporation; and COALITION FOR A SAFE ENVIRONMENT, a California non-profit corporation

Plaintiffs and Petitioners,
v.

STATE OF CALIFORNIA; SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

Defendants and Respondents

CASE NO.: BS124264

VERIFIED PETITION FOR WRIT OF MANDATE; COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(California Code of Civil Procedure 1085)

Plaintiffs and petitioners CALIFORNIA COMMUNITIES AGAINST TOXICS, COMMUNITIES FOR A BETTER ENVIRONMENT, and COALITION FOR A SAFE ENVIRONMENT (collectively "Petitioners") bring this action on their own behalf, on behalf of their members, on behalf of the general public and in the public interest to uphold the Constitution of the State of California and protect air quality in and around the South Coast Air Basin. Petitioners allege as follows:

INTRODUCTION

> [I]t is difficult to see how the legislature could more palpably invade the judicial department and effectively usurp its functions, than to pass statutes which should operate to set aside or annul judgments of courts in their nature final, and which would otherwise be conclusive on the rights of parties.

Mandel v. Myers, (1981) 29 Cal. 3d 531, 548 *quoting Denny* v. *Mattoon* (1861) 84 Mass. (2 Allen) 361 [79 Am.Dec. 784].

1. The Constitution of the State of California sets out the duties, powers, and functions of our government, dividing them among the three branches: the judiciary, the legislature, and the executive. It is bedrock constitutional law that neither the Legislature nor the Executive may usurp the authority of the Judiciary.

2. On October 11, 2009, Governor Schwarzenegger signed into law two bills, SB 827 and AB 1318, that overturn the July 28, 2008 judgment of the Los Angeles Superior Court in Case No. 110792.

3. That judgment prohibited Defendant South Coast Air Quality Management District ("the District") from fabricating emission reduction credits for distribution and sale without fully complying with the California Environmental Quality Act ("CEQA"). In addition to broadly addressing the creation of these credits without adequate CEQA analysis, the judgment specifically addressed the District's efforts to swell its emission reduction credits accounts in order to sell the credits to power plants and later to other large polluting entities.

4. The judiciary has already decided the question of whether CEQA is required prior to creation and distribution of these emission reduction credits. The Constitution prohibits the legislature from readjudicating the decisions.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to California Code of Civil Procedure Section 1085 and California Constitution Article 3 Section 3.

6. Venue is proper in this court pursuant to Code of Civil Procedure sections 393 and 394 because the District is located and operates in the County of Los Angeles. Further, the effects of the pollution and the illegal usurpation of power will be felt most intensely in the County of Los Angeles. Although the Legislature and Governor are located in Sacramento, the California Attorney General maintains an office in the County of Los Angeles.

PARTIES

7. Petitioner and Plaintiff 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 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. CCAT was a petitioner in the cases that this legislation seeks to overturn.

8. Petitioner and Plaintiff Communities for a Better Environment ("CBE") is an environmental justice public interest organization and a California not-for-profit corporation. CBE has approximately 20,000 members throughout the state of California, many of whom reside in the Los Angeles metropolitan area. CBE's mission is to achieve environmental health and justice for communities of color and working-class communities. CBE strives to accomplish its mission by organizing in traditionally disempowered communities, by facilitating public participation in administrative decision-making processes, and by ensuring implementation of laws like CEQA, which protect public participation, public health and the environment. For 30 years, CBE has advocated for meaningful protection of California's air.

Full enforcement of state environmental laws is critical to achieving CBE's mission, because air pollution has a disparate impact on people from poor communities and communities of color in the Los Angeles region. CBE's members are among the people who will be impacted by weakening the New Source Review system through the District's Program, which includes its plan to turn historic minor source shutdowns and reductions into new emissions, because the Program will allow deterioration of air quality in their communities, exacerbating the health impacts of air pollution in these communities. CBE was a petitioner in the cases that this legislation seeks to overturn.

9. Petitioner and Plaintiff Communities for a Safe Environment ("CFASE") is a not-for-profit membership corporation organized under the laws of the State of California. CFASE has approximately 500 members that live within the regulatory jurisdiction of the District. The health, well-being, and enjoyment of these members have been, and continue to be, adversely affected by the District's Program, which includes turning historic minor source shutdowns and reductions into new pollution. 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 effective enforcement of air quality rules and regulations, and the reduction of air pollution in Southern California. On behalf of its members, CFASE works to reduce, eliminate and mitigate public exposure to carcinogenic, respiratory, reproductive and developmental toxicants and pollutants caused by air, land, water pollution and manufactured products. CFASE is further dedicated to protecting, promoting, preserving and restoring our nature's delicate ecology through the protection of environment, natural resources, wildlife and habitats. CFASE was a petitioner in the cases that this legislation seeks to overturn.

10. Defendant and Respondent State of California is the entity that acted to violate the State Constitution by first passing, then signing bills that overturn a duly adjudicated decision of the Los Angeles Superior Court.

11. Defendant and Respondent South Coast Air Quality Management District ("AQMD" or "District") is established under Division 26 of the Health & Safety Code,

section 40400 *et seq.*, as the sole local agency within the South Coast Air Basin with responsibility for comprehensive air pollution control for the purpose of achieving and maintaining air quality within ambient air quality standards by developing, implementing and enforcing ambient air quality standards on non-vehicular sources. Under Senate Bill 827 and Assembly Bill 1318, AQMD is ordered to issue permits that rely on offset credits "that have resulted from emission reductions and shutdowns from minor sources since 1990." Under Assembly Bill 1318, AQMD is ordered to transfer these retroactive minor source emission reduction credits into its "Priority Reserve Account" and then sell the credits to "qualifying power plants." Both bills also require the District to 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." In this Petition and Complaint, reference to any act of the District shall be deemed to include the officers, directors, agents, employees, or representatives of the District who committed or authorized such acts, or failed to adequately supervise or properly control or direct their employees while engaged in the management, direction, operation, or control of the affairs of the District and did so while acting within the course and scope of their employment or agency.

STATEMENT OF FACTS

Background

12. Air quality in the Los Angeles area is the worst in the nation, putting its millions of residents at unnecessarily high risk of poor health and premature death. Indeed, as of 2008, twice as many people died each year from exposure to small particles in the air than in car crashes. In recognition of the impacts of air pollution, federal law requires any new source of air pollution to "offset"—or cancel out—new emissions with equal or greater reductions. Facilities that cannot reduce their emissions onsite may purchase emission reduction credits for pollutants on the offset credit market. In addition, the District maintains a cache of emission reduction credits called the "Priority Reserve." It uses the Priority Reserve to facilitate "essential public services" meeting federal Clean Air Act offset requirements

regardless of the market price for credits. These essential public services are facilities such as hospitals and schools. The District also allocates its emission reduction credits to businesses that qualify for District-created exemptions to the federal offsetting requirements. These District-created exemptions to not relieve the businesses from complying with federal law.

13. In 2006, EPA directed the District to remove from its account the vast majority of its emission reduction credits because it had no documentation to show that the emission reductions underlying the credits ever occurred. Because the EPA realized that the District was not taking adequate steps to ensure that its emission offset credits met federal requirements, EPA also directed the District to develop a rule that formalizes its procedure for ensuring that any emission reduction credits in its accounts are valid under federal law.

14. In response to the EPA's concerns, the District adopted Rule 1315. Going beyond the EPAs concerns, however, Rule 1315 also included provisions to generate more than 111 tons per day of emission reduction credits. By far the largest source of new credits was retroactive orphan minor source shutdowns. The District had never monitored, tracked or otherwise accounted for orphaned minor source shutdowns before, but under Rule 1315, they would generate more than 99 tons each day of new emission reduction credits.

15. Simultaneous with its adoption of Rule 1315, the District amended its Rule 1309.1 to allow it to sell the newly created credits to new power plants.

California Courts Have Twice Ruled that the District Must Fully Analyze its Program, Especially the Credit-Generating Function of the Program, Prior to Implementation

16. When it first adopted Rule 1315 and amended Rule 1309.1 in 2006, the District claimed each action was exempt from CEQA, and denied that they were both parts of a program to generate and distribute new credits.

17. Petitioners sued, contending that the District must conduct CEQA analysis of its Program. In February 2007, the Superior Court rejected the District's claimed exemptions, and the Court of Appeal declined to overturn that conclusion.

18. In response to the Court's ruling, in August 2007 the District adopted a Program Environmental Assessment for its adoption of Rule 1315 (to generate and account for new credits) and amendments to Rule 1309.1 (to open the Priority Reserve so power plants could purchase newly-created emission reduction credits) ("PEA"), and adopted Rule 1315 and amendments to Rule 1309.1. The PEA was deeply flawed, including the District's re-assertion of its position that there would be no environmental impact from Rule 1315's credit-generating function. Petitioners again filed suit.

19. The Superior Court found the District's CEQA document inadequate. In its July 28, 2008 dispositive decision, the Court observed, *inter alia*, that Rule 1315 expanded "exponentially the universe of pollution credits" that would allow new emissions "into an already polluted Basin." Decision on Ruling on Respondent's Motion for Summary Adjudication, *NRDC et al. v. South Coast AQMD et al.*, Los Angeles Super. Ct. No. BS 110792, July 28, 2008, p. 8 ("Decision") (incorporated in full as if set out fully herein.)

20. The Court opined that decisions such as "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*" were indisputably decisions that would "have real, foreseeable and substantial environmental consequences." *Id.* (emphasis added)

21. The Court further concluded that the Program, and specifically the aspect of the Program that was seeking retroactively to convert minor source shutdowns into emission reduction credits, would have significant environmental impacts and therefore required CEQA review.

22. The Court then considered whether the District had complied with CEQA's requirements to describe the project, analyze its environmental impacts, consider alternatives to the project, and mitigate impacts. The Court concluded the District had failed to do so. *Id.* at 11.

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23. The Court explained that the Program that needed to be described, and was not described, included the mechanisms by which the District intended to create new emission reduction credits:

> 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 . . . that is at the heart 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 [sic] 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* . . . . Nor is the impact of Rule 1315 – on a programmatic basis – limited to the eleven power plants currently in line for Priority Reserve access.
> Decision, pp. 11-12. (emphasis added)

> 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 through access to the Priority Reserves accounts….
> *Id.* pp. 13-14. (emphasis added)

24. The Court issued a judgment and writ of mandate that prohibited the District from relying on Rule 1315 while it readopted all *or part* of the Project. The Judgment provided that:

> IT IS FURTHER ORDERED that the District is enjoined from undertaking any action to implement the Project unless and until such time as the District has complied with the California Environmental Quality Act (California Public Resources Code § 21000 *et seq*.) and Guidelines (California Code of Regulations, tit. 14, § 15000 *et seq*.), and the Writ of Mandate issued in this case.

Writ of Mandate and Injunction, November 3, 2008. ("Writ") (incorporated in full as if set out fully herein.)

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25. Minor source shutdowns were a significant part of Rule 1315, generating approximately 90% of the new emission reduction credits, and therefore included in the Program.

26. Although it initially filed an appeal of the Superior Court's Writ, the District withdrew its appeal.

The Legislature Adopted Two Bills that Act to Overturn the Court's Ruling that the District Must Comply With CEQA Prior to Generating Emission Reduction Credits from Minor Source Shutdowns

27. Assembly Bill 1318 (M. Perez, 2009) orders the District to "make use of" emission reduction credits from "minor sources since 1990" ("minor source shutdowns"). Further, it explicitly orders the District to set aside the Court's mandate to undertake CEQA prior to relying on any part of the Program, by providing that CEQA "does not apply" to "[t]he 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." Public Res. Code § 21080(b)(16). .

28. AB 1318 amends Section 40440.14 of the Health and Safety Code to require that the District credit to its "internal emission credit accounts and transfer from [its] . . . 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 (SOx) and particulate matter (PM2.5 and PM10) emissions." Health & Saf. Code § 40440.14(a).

29. Like AB 1318, Senate Bill 827 (Wright, 2009) orders the District to "make use of" minor source shutdowns. Senate Bill 827, CA Health & Saf. Code § 40440.13(c)(2).

30. SB 827 includes the following language "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." Despite this language, the Legislature also orders that "the district shall also make use of any emission credits that have resulted from emission reductions and shutdowns from minor sources since

1990" to issue permits under its existing rules, a vital aspect of Rule 1315, and a key concern in the Decision and Writ.

FIRST CAUSE OF ACTION

VIOLATION OF CALIFORNIA CONSTITUTION ARTICLE 3 SECTION 3
STATE USURPED POWER OF JUDICIARY
BY ORDERING GENERATION AND USE OF
EMISSION REDUCTION CREDITS PRIOR TO CEQA REVIEW
(By all Plaintiffs against Defendant State of California)

31. Plaintiffs hereby incorporate by reference all of the foregoing paragraphs as though fully set forth herein.

32. Article 3 Section 3 of the California Constitution provides that "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

33. The judicial branch of the state government is entitled to make final decisions regarding specific controversies. That function is considered core to the judiciary, and may not be usurped by the legislative or executive branches of the state government.

34. The Superior Court of the County of Los Angeles issued a final decision, judgment and writ of mandate prohibiting the District, *inter alia*, from generating credits from minor source orphan shutdowns dating back to 1990 unless and until it adopts a rule enabling it to do so, and conducts an adequate environmental analysis under CEQA of that rule.

35. Further, the Superior Court of the County of Los Angeles issued a final decision, judgment and writ of mandate prohibiting the District, *inter alia*, from issuing permits that rely on credits from minor source orphan shutdowns dating back to 1990 unless and until it adopts a rule enabling it to do so, and conducts an adequate environmental analysis under CEQA of that rule.

36. By enacting SB 827, which requires the District to generate credits from minor source orphan shutdowns dating back to 1990, the legislative and executive branches have usurped the powers of the Superior Court of the County of Los Angeles.

37. By enacting SB 827, which requires the District to issue permits that rely on

credits from minor source orphan shutdowns dating back to 1990, the legislative and executive branches have usurped the powers of the Superior Court of the County of Los Angeles.

38. By enacting AB 1318, which requires the District to generate credits from minor source orphan shutdowns dating back to 1990, the legislative and executive branches have usurped the powers of the Superior Court of the County of Los Angeles.

39. By enacting AB 1318, which requires the District to issue credits from minor source orphan shutdowns dating back to 1990, the legislative and executive branches have usurped the powers of the Superior Court of the County of Los Angeles.

40. By enacting AB 1318, which requires the District to transfer to qualifying power plants credits from minor source orphan shutdowns dating back to 1990, the legislative and executive branches have usurped the powers of the Superior Court of the County of Los Angeles.

41. By enacting AB 1318, which requires the District to transfer to qualifying power plants credits from minor source orphan shutdowns dating back to 1990, and exempting the selection, credit, and transfer of emission reduction credits from CEQA, the legislative and executive branches have usurped the powers of the Superior Court of the County of Los Angeles.

SECOND CAUSE OF ACTION

VIOLATION OF HEALTH AND SAFETY CODE SECTIONS 40440.13(b)(2) AND 40440.14(c)(2)

(By all Plaintiffs against Defendant South Coast Air Quality Management District)

42. Plaintiffs hereby incorporate by reference all of the foregoing paragraphs as though fully set forth herein.

43. Pursuant to both Senate Bill 827 and Assembly Bill 1318, the California Health and Safety Code is amended to provide that "The district shall make any necessary submissions to the United States Environmental Protection Agency with regard to the

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crediting and use of emission reductions and shutdowns from minor sources." Health & Saf. Code 40440.13(c)(2) and 40440.14(b)(2).

44. The "crediting and use of emission reductions and shutdowns from minor sources" is a revision of the District's portion of the State Implementation Plan required under federal law for regions that, like the South Coast Air Basin, fail to meet the National Ambient Air Quality Standards.

45. The procedure for making "submissions to the United States Environmental Protection Agency" is outlined in 40 C.F.R pt 51 App. V and requires, *inter alia*, "A formal letter of submittal from the Governor or his designee, requesting EPA approval of the plan or revision thereof;" "A copy of the actual regulation;" "The State's demonstration that the national ambient air quality standards, prevention of significant deterioration increments, reasonable further progress demonstration, and visibility, as applicable, are protected if the plan is approved and implemented;" and "Modeling information required to support the proposed revision." 40 C.F.R. 51 App V.

46. The District has not caused such a submission to be made to the United States Environmental Protection Agency.

47. The District has indicated that it will begin crediting and using emission reductions and shutdowns from minor sources as emission reduction credits on January 1, 2010, or very soon thereafter. Crediting and issuing this category of emission reduction credits without "submissions to the United States Environmental Protection Agency" violates Health and Safety Code sections 40440.13(b)(2) and 40440.14(c)(2), and is therefore arbitrary, capricious, and not accordance with the law.

THE NEED FOR INJUNCTIVE RELIEF

48. By committing the acts alleged herein, Defendants and Respondents have caused irreparable harm for which there is no plain, speedy, or adequate remedy at law. In the absence of equitable relief, the general public is harmed and will continue to be harmed.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for judgment as set forth below:

A. A temporary restraining order, preliminary and permanent injunction enjoining Defendant and Respondent South Coast Air Quality Management District, its agents, employees, assigns, and all persons acting in concert or participating with it from crediting or using any of the credits generated by minor source shutdowns and reductions dating back to 1990 until the District:

i. adopts and submits to United State Environmental Protection Agency a rule allowing it use any such credits, and

ii. complies with the Decision, Judgment and Writ issued by the Superior Court of the County of Los Angeles;

B. For an injunction to be issued under the seal of this Court enjoining the State of California from implementing SB 827 and AB 1318;

C. For a writ of mandate to be issued under the seal of this Court commanding the State of California to set aside its adoption of SB 827 and AB 1318;

D. For a writ of mandate to be issued under the seal of the Court prohibiting the South Coast Air Quality Management District from relying on SB 827 and AB 1318;

E. For a declaratory judgment that, by adopting SB 827 and AB 1318 the State of California violated the California Constitution's Separation of Powers requirement;

F. For plaintiffs' fees and costs, including reasonable attorneys' and expert witness fees, as authorized by California Code of Civil Procedure section 1021.5 and any other applicable provisions of law;

G. For such other relief as this Court deems appropriate and just.

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Respectfully submitted,

Dated: December 30, 2009

LAW OFFICES OF ANGELA JOHNSON MESZAROS

Original signed by .
Angela Johnson Meszaros

Dated: December 30, 2009

COMMUNITIES FOR A BETTER ENVIRONMENT

Original signed by .
Shana Lazerow

Attorneys for Petitioners