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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