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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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE AND TEMPORARY RESTRAINING ORDER

Hearing Date: January 15, 2010
Hearing Time: 8:30 a.m.
Dept: 85
Judge: Honorable James C. Chalfant
Action Filed: December 30, 2009

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I. INTRODUCTION

Petitioners and plaintiffs California Communities Against Toxics, Communities for a Better Environment and Coalition for a Safe Environment (collectively "Petitioners") seek a Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should not Issue against Respondent and Defendant South Coast Air Quality Management District ("District"), which restrains the District from taking any action or implementing in any manner Senate Bill 827 (Wright, 2009) and Assembly Bill 1318 (M. Perez, 2009) (collectively "Offending Statutes") and, in particular, the generation of emission reduction credits based on minor source reductions and shutdowns retroactive to 1990, and issuance of permits in reliance thereon. The Offending Statutes were adopted in violation of Article III, Section 3 of the California Constitution and, even if the Offending Statutes were valid, the District has failed to follow the clear requirements they set out.

Unless the District is restrained, Petitioners will be irreparably harmed. Petitioners are informed that on January 2, 2010, the District issued 1,300 permits in reliance on the Offending Statutes. Declaration of Angela Johnson Meszaros, ("Johnson Meszaros Dec."), ¶ 16. The District's reliance on the Offending Statutes causes irredressable harm to Petitioners and the environment. Significantly, if the District is not restrained, its actions will not only prevent an effective remedy in this matter, but also will strip the court of its constitutional authority, and deprive Petitioners of the remedies awarded by this Court in a series of previous cases. Indeed without an injunction, no matter how meritorious Petitioners' claims, Petitioners will have no way to safeguard the Constitution or to receive the meaningful CEQA analysis required by the law and ordered by this Court.

The Court has the power to grant a temporary restraining order and injunction where the plaintiff is likely to succeed on the merits of the case, and will suffer greater harm in absence of a temporary injunction than the harm caused by temporarily retraining the defendant. As set forth below, Petitioners are entitled to an injunction. Petitioners have a strong likelihood of success on the merits of its claims, and will suffer irreversible harm if the District is permitted to continue implementing the Offending Statutes. By contrast, there is no material harm to the

District if it is restrained from relying on the offending statues. Given this balance of severe harm to Petitioners, and minimal harm to the District, and that Petitioners are likely to succeed on the merits, Petitioners request the Court restrain the District and return the *status quo* to the time this case was filed.

II. BACKGROUND

In October 2006 Petitioners brought suit in this Court to address the District's effort to unlawfully invoke exemptions to the California Environmental Quality Act ("CEQA"), rather than analyze and mitigate its effort to generate hundreds of tons of pollution Emission Reduction Credits ("ERCs") for distribution to power plants and other facilities.[1] The District was adopting a new rule (Rule 1315) and amending an existing rule (Rule 1309.1) without first undertaking environmental review. Verified First Amended Petition for Writ of Mandate, Complaint for Declaratory and Injunctive Relief ("FAP"), ¶¶16, 17. The District demurred to this Court as to the claimed exemption for Rule 1309.1 (which would distribute ERCs to power plants). This Court overruled the District's demurrer.

Less than three months later, the District released its 100-page Draft Program Environmental Assessment[2], along with hundreds of pages of appendices, staff reports, and other documents. On July 10, 2007, the District released its 148-page Final Program Environmental Assessment ("PEA"). FAP, ¶ 18. After certification of the PEA on August 3, 2007, Petitioners challenged the adequacy of the document[3] and on July 28, 2008—after a full trial on the merits of the case—the Honorable Ann I. Jones ruled, *inter alia*, that Rules 1315 and 1309.1 are subject to CEQA and that the District's PEA was inadequate. Johnson Meszaros Dec., Exhibit B (July 28, 2008 Decision.), pp. 8-32. The Court subsequently issued a writ of mandate vacating the District's approval of the rules and enjoining the District from undertaking any action to further implement the rules pending CEQA compliance. Johnson Meszaros Dec., Exhibit C (Notice of Entry, with the Court's Judgment, Writ and Decision attached.)

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[1] NRDC v. SCAQMD, Los Angeles Super. Ct. No. BS105728, filed October 20, 2006.

[2] An Environmental Assessment is the District's functionally equivalent CEQA document. CEQA Guidelines § 15251(l).

[3] NRDC v. SCAQMD, Los Angeles Super. Ct. No. BS110792, filed August 31, 2007.

In its July 28, 2008 dispositive decision, the Court observed that Rule 1315 expanded "exponentially the universe of pollution credits" that would allow new emissions "into an already polluted Basin." Johnson Meszaros Dec., Exhibit B (July 28, 2008 Decision), p.8. 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.* In November 2008, 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. Johnson Meszaros Dec., Exhibit C.

As the table below shows, minor sources were a significant part of Rule 1315, generating more than 90% of the new credits, and a vital part of the Project.

Table 1: Credits Generated Under New Credit-Generating Mechanisms (1990-2003)[4]

Post-1990 Credit Categories	**VOC t/d**	**NOx t/d**	**SOx t/d**	**CO t/d**	**PM t/d**	**Total t/d**
BACT-BARCT Differential	0	0	0.	6.67	0	**6.67**
Payback of Offset Debt	0.03	0	0.02	0.01	0.02	**0.08**
Minor source shutdowns and reductions	50.39	17.35	4.12	14.01	13.56	**99.43**
ERCs Provided by Minor Sources to Offset Emission Increases (Rule 1303)	1.61	0.57	0.15	1.04	1.01	**4.38**
Offset Ratio Differential for All Sources (0.2 differential for SO_x, CO, and PM_{10})	0	0	0	0.47	0.04	**0.51**
Offset Ratio Differential for Exempt Sources (0.2 differential for SO_x, CO, and PM_{10})	-	-	-	-	-	-
TOTAL	**52.03**	**17.92**	**4.29**	**22.2**	**14.63**	**111.07**

In issuing the Writ, the Court explicitly rejected the District's request to rely on the ERCs generated, or "banked", by Rule 1315. Johnson Meszaros Dec., Exhibit C (Decision, p.

[4] This table totals, by category, the credits generated by Rule 1315's changes to the sources of credits to the District's offsets accounts if they were implemented retroactively from 1990 through 2003, the most recent data the District has made available. Johnson Meszaros Dec., ¶9.

1.) Subsequently, the District issued a "permit moratorium," and stopped issuing permits.

It appears that the District remained resolved not to disclose the true environmental impacts of its rule changes. Rather than simply move forward with CEQA analysis of Rule 1315, or some part thereof, to satisfy the court's order and end its moratorium, it instead spent the following 18 months working to avoid compliance with the Court's order--not by prosecuting an appeal[5], but by seeking legislative intervention. In the District's own words, "[t]o overcome the permit moratorium, AQMD sponsored legislation (SB 827) which was signed by the Governor and [took] effect on January 1, 2010." Johnson Meszaros Dec., Exhibit D (Notice of Intent to Issue Permits to Operate Pursuant to Rule 212 and a Title V Permit Pursuant to Rule 3006).

SB 827 orders the District to "make use of" emission reduction credits from "minor sources since 1990" ("minor source shutdowns") but also states that "nothing in this section affects the decision in the case described in subdivision (a)[6] concerning the adoption, readoption, or amendment, or environmental review, of south coast district Rule 1315." Johnson Meszaros Dec., Exhibit F (Senate Bill 827, CA Health & Saf. Code § 40440.13(c)(2); (b).) Given that emission credits are needed to meet requirements of the federal Clean Air Act, the legislature also ordered the District to respect clear federal law and make all necessary submissions concerning the new credits to the United States Environmental Protection Agency. The District has failed to make such submissions. CA Health & Saf. Code § 40440.13(c)(2).

III. ARGUMENT

Petitioners seek a temporary restraining order to prevent the generation and distribution of credits from retroactive minor source reductions and shutdowns, which is vital to preserve the status quo in this case. "A TRO, like a preliminary injunction, is by design to

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[5] Although the District filed an appeal, it indicated on August 7, 2009 that it intended to abandon its appeal, and in fact, on September 30, 2009 the District served its notice of dismissal. The Court of Appeal issued its remittitur on October 8, 2009. Johnson Meszaros Dec., Exhibit D (AQMD Notice of Dismissal; Remittitur.)

[6] Health & Safety Code section 40440.13(a) identifies the case as "Natural Resources Defense Council v. South Coast Air Quality Management District (Super. Ct. Los Angeles County, 2007, No. BS 110792)".

preserve the status quo pending the evidentiary hearing to determine whether to issue a permanent injunction." *Scripps Health v. Marin* (1999) 72 Cal. App. 4th 324, 334. Two related factors are considered in deciding whether to grant temporary relief. The first is whether Petitioners are likely to prevail on the merits at trial. The second is whether Petitioners are likely to suffer irreparable harm if the injunction is denied that outweighs the harm likely to be suffered by the Respondent if the injunction is issued. *IT Corp. v. County of Imperial* (1983) 35 Cal. 3d 63, 69-70. These factors are applied on a sliding scale – the greater the showing on one of the factors, the less must be shown on the other factor to support an injunction. *Butt v. State of Calif.* (1992) 4 Cal. 4th 668, 678. The status quo has been defined to mean the last actual peaceable, uncontested status which preceded the pending controversy. *Voorhies v. Greene,* (1983) 139 Cal.App.3d 989,995 (quoting *United Railroads v. Superior Court* (1916) 172 Cal. 80, 87).

A. Petitioners are Likely to Succeed on the Merits

The Petition alleges *three* distinct violations. *First*, with the Offending Statutes, the Legislative branch usurped the power of the judiciary by re-adjudicating the final decision of the court in NRDC et al. v. SCAQMD, Los Angeles Super. Ct. Case No. BS110792. *Second*, when the District generated credits in reliance upon the Offending Statutes, it violated the statutes by doing so without first undertaking CEQA. *Third*, by acting to issue emission reduction credits in reliance on the Offending Statutes without submitting a proposed amendment to its State Implementation Plan ("SIP"), the District again violated the new laws by failing to make "necessary submissions to the United States Environmental Protection Agency."

1. Separation of Powers Prohibits the Offending Statutes' Re-Adjudication of the Final Court Decision Mandating CEQA Review Prior to Generation of Credits from Minor Source Reductions and Shutdowns

The separation of powers is a cornerstone of the California Constitution. To prevail on their first cause of action, Petitioners need only establish 1) that a court decision existed prohibiting the District from generating and distributing credits prior to adequate environmental review and 2) that SB 827 and AB 1318 re-adjudicated, or changed, the court's decision

requiring environmental review. *See generally, Mandel v. Myers* (1981) 29 Cal.3d 531, 547; *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200.

When a court has adjudicated a matter, the legislature and the Governor cannot change the court's decision by adopting a new law or mandating that the court reconsider or arrive at a different conclusion. In *Mandel*, the court concluded the case at bar and determined that the plaintiff was entitled to attorney fees. The legislative analyst disagreed with the court's ruling and sought and secured legislative action disallowing payment of the attorney's fees.

The California Supreme Court concluded this was a clear violation of the separation of powers doctrine. By legislating a different outcome, whereby no attorney fees would be paid to Mandel, the Legislature was intruding on the powers entrusted solely the judiciary. "[T]he Legislature enjoys no constitutional prerogative to disregard the authority of final court judgments resolving specific controversies within the judiciary's domain." *Mandel*, 29 Cal.3d at 547.

The Court differentiated between a law that would have general effect, for instance laws that governed payment of attorney fees in future cases, and a law that targeted an existing, already-adjudicated controversy. "Instead [of adopting a prospective law of general application], [the Legislature] undertook to reject a particular attorney fee award apparently because of a legislative committee's disagreement with the merits of the final court judgment rendered in the case." *Id.* at 551.

The Court of Appeal recently reiterated the bedrock principle of constitutional law, that under the California constitution, "[t]he Legislature is powerless to overturn a specific judicial decision." *CSBA*, 171 Cal.App.4th at 1200 (citing *Mandel*, 29 Cal.3d at 547.) In *CSBA*, the Legislature adopted a law that ordered an adjudicatory body to re-consider certain decisions it had made concerning funding of local mandates. One issue was whether requiring reconsideration usurps the judiciary's power, since it did not dictate the outcome. The court found there was no meaningful difference between changing a court's decision (effectively requiring a court to adopt a specific outcome), and requiring a court to revisit its decision. *CSBA*, 171 Cal.App.4th at 1201.

Just as it did in *Mandel* and *CSBA*, the Legislature here stepped in to re-adjudicate Petitioners' case. Or, as the District explained in its press release:

> Governor Lifts Air Pollution Permit Moratorium: 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.

Johnson Meszaros Dec., Exhibit E.

In its July 2008 decision, the Los Angeles Superior Court concluded that the District had violated CEQA by adopting Rule 1315 without adequate environmental review and mitigation. The crux of the violation was that the District proposed to retroactively generate and distribute for present use 111 tons per day of emission reduction credits without analyzing and mitigating the effects of those new emission reduction credits. Johnson Meszaros Dec., Exhibit B (July 28, 2008 Decision, pp. 13-14). The vast majority of these new emission credits -- more than 99 of the 111 tons per day -- would come from retroactive minor source reductions and shutdowns.

In November 2008, the superior court flatly rejected the District's request that it be allowed to rely on Rule 1315 while it conducted CEQA analysis of, and re-adopted that rule. Johnson Meszaros Dec., Exhibit C (November 3, 2008 Decision, pp. 1-2.) The court expressly prohibited the District from beginning to implement any part of its project prior to completion of adequate CEQA review. *Id.*

To change the court's final decision, the Legislature adopted the Offending Statutes, which mandate generation and issuance of the very credits the superior court had prohibited the District from generating or issuing without adequate CEQA review. The intent and effect of both laws is obvious: to change the outcome in the superior court case with which the Legislature disagrees. Under the California Constitution, the Legislature simply cannot step in as a court above all other courts, and change the final outcome of a case.

2. The District Violated SB 827 by Generating and Issuing Credits Prior to Complying with the Court's Order to Undertake CEQA

Interestingly, and in spite of the District's position, SB 827 includes the following language: "Nothing in this section affects the decision . . . concerning the adoption, readoption,

or amendment, or environmental review, of south coast district Rule 1315." CA Health & Saf. Code § 40440.13(b). Assuming, *arguendo*, that SB 827 is Constitutional, the plain language on the face of the statute is clear: The District may not generate or distribute credits generated by minor source reductions or shut downs without first complying the Court's 2008 Ruling, Writ and Injunction. The Court in its Decision clearly considered whether Rule 1315 or its parts—in particular the reliance upon minor source reductions and shutdowns—was a "project" under CEQA. A project that is not exempt must undergo CEQA. SB 827 did not create an exemption to CEQA—in fact it explicitly said "nothing in this section affects the decision . . . concerning . . . environmental review." The only way that the District could, in fact, comply with the Court's Decision would be if it were to complete a legally adequate CEQA review that disclosed, analyzed, and mitigated the impacts of the generation and use of the minor source credits.

Crediting and issuing this category of emission reduction credits without first undertaking CEQA violates Health and Safety Code sections 40440.13(b), and is therefore arbitrary, capricious, and not accordance with the law.

3. The District Violated SB 827 and AB 1318 by Generating and Issuing Credits from Minor Source Reductions and Shutdowns Without Making Necessary Submissions to EPA

The Offending Statutes amend the California Health and Safety Code to provide that "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." Health & Saf. Code 40440.13(c)(2) and 40440.14(b)(2).

Assuming, *arguendo*, that the Offending Statutes are Constitutional, this provision directs the District to undertake a condition precedent to its issuance of the permits: to comply with the federal Clean Air Act requirement that a revision to the federally-required State Implementation Plan ("SIP") requires approval from the U.S. EPA. The SIP is the District's blueprint for how it is going to meet federal air quality standards. The Clean Air Act requires that rules governing emission reduction credits be part of the SIP. *See* 42 U.S.C. 7503(a).

Timing for SIP revisions is critical. The Clean Air Act requires EPA review and approval of the specific revision being proposed. *Train v. NRDC* (1975) 421 U.S. 60, 92-94; *Metropolitan Washington Coalition for Clean Air v. District of Columbia* (D.C. Cir. 1975) 511 F.2d 809, 812-13. The United States Supreme Court has in fact ruled that a state's "approved SIP is the applicable implementation plan," and remains so even "during the time a SIP revision is pending." *General Motors Corp v. U.S.* (1990) 496 U.S. 530, 539-42. A SIP amendment cannot take effect unless and until EPA approves such a change. *Safe Air for Everyone v. U.S. EPA* (9th Cir., 2007) 475 F.3d 1096, 1105. Thus, to make necessary submissions to EPA, the District must submit its proposal *before* it can start generating or issuing credits.

The procedure for making "submissions to the United States Environmental Protection Agency" is outlined in 40 C.F.R. pt 51 App. V and has several distinct requirements, including "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. The District has not caused such a submission to be made to the United States Environmental Protection Agency. Johnson Meszaros Dec., ¶ 17.

The District is not, however, waiting to begin implementation of SB 827. At the District's January 8, 2010 Governing Board meeting, the District's Executive Office indicated that on January 2, 2010, the District had issued more than 1,300 permits in reliance on SB 827. Johnson Meszaros Dec., ¶ 16. Until the District submits a proposed SIP amendment to EPA, it has not made the necessary submissions. 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.

B. Petitioners Will Suffer Irreparable Harm In the Absence of a Temporary Restraining Order and Preliminary Injunction

In assessing a petition for temporary restraining order or preliminary injunction, the Court must weigh the comparative harm suffered by plaintiffs if the injunction does not issue against the harm suffered by defendants if it does. *Right Site Coalition v. Los Angeles Unified School District* (2008) 160 Cal. App. 4th 336, 338**.** Further, if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction even if the moving party cannot show that the balance of harms tips in his favor. *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 447.

1. Petitioners will Suffer Irreparable Harm Unless the District is Restrained and Enjoined from Generating and Issuing Credits from Retroactive Minor Source Reductions and Shutdowns

The harm to the Petitioners if no injunction were to issue is irreparable, although the impact to the District is slight. Petitioners would be harmed in at least two ways should the District be allowed to continue operating in violation of the Constitution and the newly-amended Health and Safety Code. First, Petitioners' members are breathing the air that is negatively impacted by the Defendant's creation of emission reduction credits in reliance on the unconstitutional adoption the SB 827 and AB 1318. Declaration of Jennifer Ganata ("Ganata Dec.") ¶¶ 3-8; Declaration of Robert Cabrales ("Cabrales Dec.") ¶¶ 9-11. The credits generated by the District will result in the release of both Particulate Matter ("PM") and ozone-causing pollution ("VOCs" and "NOx").

In 2007, the California Air Resources Board ("ARB") observed that "air pollution exposure is associated with premature death."

> Attaining the California PM and ozone standards would annually prevent about 8,800 premature deaths, or 3.7% of all deaths. These premature deaths shorten lives by an average of 14 years. This is greater than the same number of deaths (4,200 – 7,400) linked to second-hand smoke in the year 2000. In comparison, motor vehicle crashes

caused 3,200 deaths and homicides were responsible for 2,000 deaths.[7]

A year later, ARB drastically increased its estimate of premature deaths caused by PM, from 8,800 up to approximately 18,000.[8] As a point of comparison, the Port of Los Angeles—considered to be the largest single source of PM emissions in the entire 10,000 square mile area of the South Coast Air Basin—emitted 2.35 tons per day of PM10 in 2008. Ganata Dec., ¶ 6. The District, in generating emission reduction credits from minor sources since 1990, is creating approximately 13.56 *tons per day* of PM10 ERCs—6 times more that the Port of Los Angeles. Once emitted, it is difficult to remove the pollution from the air. Certainly, the damage to Petitioners' members who breathe the air is done when they inhale, and cannot be undone at some future time. Cabrales Dec., ¶ 11.

Second, without an injunction, the District's act of generating credits and then distributing permits in reliance on those credits would render any later judgment ineffectual. Plaintiffs have requested both declaratory and injunctive relief prohibiting the District from relying on AB 1318 and SB 827, because the Legislature usurped the judiciary's right to be the final arbiter of cases brought before it and because the District is acting prior to complying with the requirements of the statutes. The superior court's final order prohibited the District from, among other things, relying on the credit-generating mechanisms in Rule 1315 until it had conducted adequate CEQA review. If, during the time it takes to adjudicate this matter the District is generating credits in reliance on the unconstitutional statutes, or fails to follow the requirements of the statutes, then it has succeeded in both changing the *status quo* and destroying Petitioners' remedy or fails to follow the requirements of the statutes,.

The superior court concluded that it was not simply the act of distributing credits to power plants, one category of facilities at issue in the District's rule amendments, that would

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[7] California Air Resources Board and American Lung Association, Recent Research Findings: Health Effects of Particulate Matter and Ozone Air Pollution, November 2007, http://www.arb.ca.gov/research/health/fs/pm_ozone-fs.pdf (last accessed January 12, 2010).

[8] Cabrales Dec., ¶ 11; ARB, Methodology for Estimating Premature Deaths Associated with Long-term Exposure to Fine Airborne Particulate Matter in California (October 24, 2008) http://www.arb.ca.gov/research/health/pm-mort/pm-mort_final.pdf (last accessed January 12, 2010.)

have an environmental impact. Johnson Meszaros Dec., Exhibit B (July 28, 2008 Decision) pp. 11-12. "[I]t is the universe of emission credits" wrote the Court " . . . that is at the heart of the rule-making." *Id.*

After trial and additional briefing, the Court emphatically rejected the District request to rely on Rule 1315 while it underwent CEQA review and rule re-adoption. Johnson Meszaros Dec., Exhibit C (Judgment, p. 2; Tentative Order, November 3, 2008, p. 1, observing that the dominant feature of Rule 1315 is its "credit-counting" and "banking" function.) Were the District to generate credits pursuant to Rule 1315's primary "credit-counting" mechanism to expand its "universe of emission credits" prior to CEQA review and readoption of Rule 1315, the Superior Court's mandate that review occur *prior* to generation could never be honored.

Were the District to go further and actually issue permits to construct and operate new emission sources in reliance on those new credits, the question of harm to entities that relied on those permits would loom large. The District claims to have issued more than 1,300 permits on January 2, 2010. Johnson Meszaros Dec., ¶ 16. It has not stated how many of those permits rely on credits generated from retroactive minor source shutdowns, and how many rely on credits generated from pre-existing credit-generating mechanisms. Even if the District immediately ceased issuing permits under the Offending Statutes or fails to follow the requirements of the statutes, every day the emissions of pollutants occurred pursuant to the illegitimate credits is a day of pollution that should not have occurred. Cabrales Dec., ¶ 11.

Allowing the District to generate and issue credits from retroactive minor source reductions and shutdowns would also thwart effectiveness of any judgment on Petitioners' Second and Third Causes of Action. *See id.* SB 827 requires that the District first undertake CEQA on the use of minor source shutdowns and both. *See id.* SB 827 and AB 1318 require that the District make "all necessary submissions to the United State Environmental Protection Agency" concerning credits from retroactive minor source reductions and shutdowns.

Both completion of CEQA and the submission to EPA prior to the District's commencement of generation and distribution is vital to Petitioners' interests. Cabrales Dec., ¶¶ 10-11. If, at the conclusion of this litigation, this Court concludes that that the time to undertake

CEQA or to make submissions to EPA was prior to generation and distribution of credits, the District have already generated more than 99 tons per day of emission credits, and allowed untold numbers of new sources to emit pollution in reliance thereon.

2. The District will not Suffer any Substantial Harm Should an Injunction Issue

The District does not have any direct financial, property, or contractual interest in the credits it seeks to generate in reliance upon the challenged statutes. The District does, however, have an interest in insuring the stable functioning of its permitting program—an interest served by maintenance of the status quo until the question about the constitutionality and the execution of the statutes has been decided by this Court.

IV. UNDERTAKING

No bond is required for issuance of a temporary restraining order. *Biasca v. Superior Court* (1924) 194 Cal. 366, 367-368. If the court determines a bond is required, Petitioners request that it be nominal in amount. Petitioners are functionally indigent, and are undertaking this matter to advance the greater public interest. Respondents will suffer no economic harm from a temporary restriction on generating and distributing retroactive minor source reduction and shutdown credits, thus no substantial bond is justified.

V. NOTICE AND COUNSEL

Petitioners have timely notified all parties and all known counsel to this case. Johnson Meszaros Dec., ¶¶ 2-5. Petitioners are advised that Kurt Wiese, General Counsel, South Coast Air Quality Management District, 21865 Copley Drive, Diamond Bar, CA 991765, phone (213) 396-2302, fax (213) 396-2961 and/or Stephen Kostka and Raymond Marshall, Bingham McCutchen LLP, 3 Embarcadero Center, San Francisco CA 94111-4067, phone (415) 393-2000, fax (415) 393-2286 will appear on behalf of the District. Thomas Heller and Noah Golden-Krasner, Deputy Attorneys General , 300 S Spring St Ste 1700, Los Angeles, CA 90013, phone (213) 897-2614, fax (213) 897-2802, represent the State of California.

VI. RECOMENDED BRIEFING AND HEARING SCHEDULE

In the interest of the court's efficient management of this matter, Petitioners recommend that the hearing on the Order to Show Cause be heard on February 3, 2010.

Assuming this hearing date is acceptable to the Court, Respondents' brief(s), if any, should be served by e-mail and filed no later than January 22, 2010, and Petitioners' reply brief similarly served and filed by January 28, 2010.

VII. CONCLUSION

Emission reduction crediting and issuance is not just some an arcane and complex accounting process. Each credit represents the release of emissions that are harmful to public health and the environment. Once retroactive minor source reductions and shutdowns are turned into credits for future pollution, they will be very difficult to disaggregate from the District's other, purported valid, internal credits—and impossible to remove from the air. Interim relief is appropriate to preserve the status quo and ensure these credits are not generated or distributed unless the Court determines AB 1318 and SB 827 comport with the constitution, and that the District has acted in compliance with their conditions.

Petitioners have demonstrated the probability of success on the merits, and established irreparable harm they and the public will suffer if the District is not restrained. The harm to the District is nominal, and thus a balancing favors issuance of the requested temporary restraining order.

DATED: January 14, 2010

Respectfully Submitted,

LAW OFFICES OF ANGELA JOHNSON MESZAROS

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Angela Johnson Meszaros

COMMUNITIES FOR A BETTER ENVIRONMENT

_____

Shana Lazerow

Attorneys for Petitioners