



January 11, 2010

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07-AFC-3	
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VIA U. S. Mail and Electronic Service

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-3
1516 Ninth Street, MS-4
Sacramento, California 95814-5512

Re: CPV Sentinel Energy Project
Issues Identification Report
Docket No. 07-AFC-3

Dear Sir or Madam:

Pursuant to the December 22, 2009 Committee Order Granting Petition to Intervene, attached hereto for filing please find the Intervenor's Issues Identification Report.

This filing was filed today via electronic mail in accordance with the December 22, 2009 Proof of Service List in addition to being deposited into the U.S. Mail for delivery to the Dockets Unit.

Sincerely,

ORIGINAL SIGNED BY

Angela Johnson Meszaros
Counsel to Intervenor
California Communities Against Toxics

Energy,
Air Quality,
and Climate Change
from an
Environmental Justice Perspective

1107 Fair Oaks Avenue #246
South Pasadena, CA 91030
Phone: 323-341-5868
Cell: 323-229-1145
Fax: 323-872-5212
E-mail: angela@CleanAirMatters.net
Twitter: [@CleanAirMatters](https://twitter.com/CleanAirMatters)
Web: www.CleanAirMatters.net

Angela Johnson Meszaros
1107 Fair Oaks Avenue, #246
South Pasadena, CA 91030
(323) 341-5868
Angela@CleanAirMatters.net

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

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)	
Application for Certification for the)	
CPV SENTINEL ENERGY PROJECT)	
By CPV Sentinel, L.L.C.)	Docket No. 07-AFC-03
)	Intervenor California Communities Against Toxics'
)	<i>Issues Identification Report</i>
)	
_____)	

Intervenor California Communities Against Toxics (hereinafter "CCAT") hereby submits the following *Issues Identification Report* as ordered by the Committee Order Granting Petition to Intervene dated December 22, 2009, in which CCAT was directed to "specify[] all matters regarding the Air Quality assessment and analysis of the CPV Sentinel Energy Project which are of concern, in dispute, or require further inquiry by the Intervenor":

1. The calculations for SO₂ and PM₁₀ emissions from the facility assume usage of natural gas with a sulfur content of .25 lb grains/100 scf (*see, e.g.*, Final Staff Assessment 4.1-17; SCAQMD Engineering Analysis/Evaluation ("EA/E") at 20 and 32; and Permit Condition B61.1)

On October 4, 2007 Commission Staff submitted numerous Data Requests to CPV Sentinel including the following:

Please provide specific documentation from Southern California Gas Company that the sulfur content of supplied natural gas would not exceed 0.25 gr/100 scf.

On November 5, 2007, CPV Sentinel responded:

Southern California Gas Company (SCGC) gas quality is regulated by Rule No. 30, Transportation of Customer-Owned Gas. Rule No. 30, Section I(e), specifies that gas *shall not contain more than 0.75 grain of sulfur per 100 standard cubic feet (scf)*.

Responses to Data Requests 3-1. (emphasis added) CPV Sentinel attached, in addition to Rule No. 30, a worksheet purportedly from SCGC apparently to support the statement that "In practice, the gas supplier, based on historical fuel analysis data, delivers gas to its customers with fuel sulfur contents well below 0.25 grain per 100 scf." The attached worksheet, however, clearly indicates:

The enclosed is provided for information purposes only. The Gas Company has made reasonable efforts to ensure all information is correct and consistent with the applicable Tariffs. To the extent there is any conflict with the Tariffs, the Tariffs shall govern in all cases. In addition, neither The Gas Company's publication nor verbal representations thereof constitutes any statement, recommendation, endorsement, approval or guaranty (either express or implied) of any product or service. Moreover, The Gas Company shall not be responsible for errors or omissions in this publication, for claims or damages relating to the use thereof, even if it has been advised of the possibility of such damages.

This worksheet does not support the use of .25 gr/100 scf standard for emissions calculations.

2. CPV Sentinel proposes to use an Emergency Fire Pump Engine that meets EPA's Tier II standards. According to the SCAQMD Engineering Analysis/Evaluation, however, "EPA will require the engines to meet Tier III standards in 2009." EA/E at 35. Does the proposed Emergency Fire Pump Engine meet the applicable standards?
3. The EPA has proposed a NESHAPS for compression ignition engines. At the time the permit was written by the AQMD the rule language was not available and AQMD indicated that it would "evaluate[] at a later date" how this rule would impact this permit. EA/E at 53. Has this analysis been undertaken?
4. The District's Title V Permit seems to lack the "Statement of Basis" required by 40 C.F.R. § 70.7(a)(5)
5. "Since CPV Sentinel is a new facility with an emissions increase, offsets will be required for all criteria pollutants. CPV Sentinel has opted into AQMD's NOx RECLAIM program and as such, NOx increases will be offset with RTCs at a 1.0 to 1 ratio. *Non-RECLAIM criteria pollutants (VOC, SOx and PM10) will be offset by either the purchase of Emission Reduction Credits (ERCs) and/or other means, as allowed under AQMD Rules and Regulations at a 1.2 to 1 ratio. The facility may elect to offset emission increases using either purchased ERCs or other means or any combination thereof as allowed by AQMD Rules and Regulations.*" EA/E 39-40. (emphasis added.)

SCAQMD has not adopted any Rule or Regulation that allows for the transfer of ERCs to electrical generating facilities. In addition, any Rule or Regulation adopted or relied upon by the SCAQMD to allow such a transfer would require submission to, and approval by, the U.S. Environmental Protection Agency since any such change would be an amendment to the SCAQMD's portion of the State Implementation Plan. (See enclosed Exhibit A "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" included herewith for further discussion of this issue.)

6. CCAT is continuing the process of reviewing all emissions factors upon which the permit is relying including, but not limited to, those emissions factors used for the commissioning emissions rates found in permit conditions A63.1 and A63.2.
7. Although not reflected in any of the documentation related to this facility, there seems to be discussion of CPV Sentinel relying upon recently enacted state legislation to meet the federal offset requirements. That legislation is currently subject to litigation on two issues: 1) does the adoption of the legislation violate Section 3, Article 3 of the State Constitution (Separation of Powers); and 2) if Constitutional, do the AQMD's actions in reliance upon the statute violate the statute's requirement that "any necessary submissions" be made to U.S. EPA before crediting and use of emission reduction credits generated from "minor source shutdowns"? (See enclosed Exhibit B "Verified Petition for Writ of Mandate; Complaint for Declaratory and Injunctive Relief.) This permit should not move forward until these issues have been finally resolved by the court.
8. If CPV Sentinel is proposing to rely upon recently enacted state legislation to meet the federal offset requirements, then there are several requirements established in the statute including, but not limited to:
 - a. "The District shall make any necessary submission to the United State Environmental Protection Agency with regard to the crediting and use of emission reductions and shutdowns from minor sources;"
 - b. On or before March 1, 2010, the AQMD shall report to the CEC "the emission credits to be credited and transferred" to CPV Sentinel;
 - c. CPV Sentinel must have "a purchase agreement executed on or before December 31, 2008 to provide electricity to a public utility";
 - d. CPV Sentinel must pay "mitigation fees set forth in the south coast district's Rule 1309.1, as adopted on August 3, 2007;"
 - e. For any fees collected AQMD "shall ensure that at least 30 percent of the fees are used for emission reduction in areas with close proximity" to the facility and "at least 30 percent are used for emission reductions in areas designated as 'Environmental Justice Areas' in Rule 1309.1"; and
 - f. The CEC must determine if the credit and transfer "satisfy all applicable legal requirements," including those found in the federal Clean Air Act.

As of this date, there is no information about whether or how any of these conditions will be satisfied by the applicant making it impossible for CCAT to provide any comment as to whether the conditions have been met and therefore reserve the right to raise concern about, dispute, or further inquire into any documentation subsequently presented to the Commission on this issue. Intervenor CCAT does note, however:

- a. that CPV Sentinel and SCE were authorized by the CPUC to enter into a power purchase agreement as follows:

We authorize Southern California Edison Company (SCE) to enter into a power purchase agreement (PPA) selected in the standard track of its New Generation Request for Offers (New Gen RFO), with CPV Sentinel, LLC, for 273 megawatts (MW) of capacity and energy deliverable from May 1, 2012 through April 30, 2022. Decision of the California Public Utilities Commission 08-09-041, September 22, 2008, at 18.

The legislation, if valid, indicates emission reduction credits may be transferred only for generation for which there was a PPA in place on or before December 31, 2008 (e.g., 273 MW of generation and for energy that is deliverable by May 1, 2012); and

- b. AQMD Rule 1309.1 as adopted on August 3, 2007, has been rescinded by the District in accordance with the November 2008 Writ of Mandate issued by the Superior Court of Los Angeles and therefore no longer exists; and
 - c. if “mitigation fees” are paid to the AQMD by the applicant, the CEC is responsible for ensuring that those fees are spent in accordance with the requirements detailed in the statute necessitating submission of a plan by the AQMD for those expenditures upon which CCAT reserves the right to comment.
9. Numerous permit conditions, see for example K67.1, allows the operator to undertake an action “approved by the District” or as in K67.4 “in a manner approved by the Executive Officer” or other such wording. CCAT is undertaking further inquiry as to whether such language is “practically enforceable” as required by the Clean Air Act.

Conclusion

Given that a great deal of documentation is still lacking from the project application regarding Air Quality issues, Intervenor CCAT respectively reserves the ability to raise issues that may not be apparent now but become relevant as this Proceeding moves forward. Further, CCAT notes that to date we have not received the full Application for Certification, including all exhibits and additional data submitted by the Applicant regarding Air Quality Issues.

Dated January 11, 2010

Respectfully submitted,

ORIGINAL SIGNED BY

Angela Johnson Meszaros
Counsel to
California Communities Against Toxics

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 PM_{2.5}, 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 PM_{2.5} standards were met.¹ Her report also noted that “[i]n Los Angeles County, PM_{2.5}-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

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

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

⁵ See SCAQMD Press Release, Governor Lifts Air Permit Moratorium, *available at* <http://www.aqmd.gov/news/1/2009/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

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 strategies⁸ 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 Rule 1315, with the interplay of 1309.1, results in the anticipated emission of hundreds of tons of pollution into the Basin every day. Whether used by electric generating plants, bio-solid facilities or any other polluters that the District might allow to access the Priority Reserve, Rule 1315 has expanded exponentially the universe of pollution credits available to entities needed to increase emissions into an already polluted

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.*

//

//

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.

Coalition for a Safe Environment & Natural Resources Defense Council

By: [Signature]
Adriano Martinez (State Bar # 237152)
Natural Resources Defense Council
1314 Second St.
Santa Monica, CA 90405
Attorney for CFSE and NRDC

Communities for a Better Environment

By: [Signature]
Shana Lazerow (State Bar #195491)
Communities for a Better Environment
1440 Broadway, Suite 701
Oakland, CA 94612
Attorney for CBE

California Communities Against Toxics & Desert Citizens Against Toxics

By: [Signature]
Angela Johnson Meszaros (State Bar #174130)
Law Offices of Angela Johnson Meszaros
1107 Fair Oaks Avenue, #246
South Pasadena, CA 91030
Attorney for CCAT and DCAP

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Los Angeles Superior Court

DEC 30 2009

John A. Clarke, Executive Officer/Clerk
By Dorothy Swain, Deputy
DOROTHY SWAIN

1 Angela Johnson Meszaros, SBN 174130
Angela@CleanAirMatters.net
2 Law Offices of Angela Johnson Meszaros
1107 Fair Oaks Avenue, #246
3 South Pasadena, California 91030
tel 323/341-5868 • fax 323-872-5212
4 Attorneys for Petitioners
5 California Communities Against Toxics and
Coalition for a Safe Environment
6

7 Shana Lazerow, SBN 195491
slazerow@cbeccal.org
8 Adrienne L. Bloch, SBN 215471
abloch@cbeccal.org
9 Communities for a Better Environment
1440 Broadway, Suite 701
10 Oakland, CA 94612
11 tel 510/302-0430 • fax 510/302-0437
Attorneys for Petitioner
12 Communities for a Better Environment
13
14

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

16 CASE NO.: BS124264

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

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

21 Plaintiffs and Petitioners,
22 v.

(California Code of Civil Procedure 1085)

23 STATE OF CALIFORNIA; SOUTH COAST AIR
QUALITY MANAGEMENT DISTRICT
24

25 Defendants and Respondents
26
27
28

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

7 INTRODUCTION

8
9 [I]t is difficult to see how the legislature could more palpably invade the judicial
10 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.

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

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

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

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

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

1 **JURISDICTION AND VENUE**

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

4 6. Venue is proper in this court pursuant to Code of Civil Procedure sections 393 and
5 394 because the District is located and operates in the County of Los Angeles. Further, the
6 effects of the pollution and the illegal usurpation of power will be felt most intensely in the
7 County of Los Angeles. Although the Legislature and Governor are located in Sacramento,
8 the California Attorney General maintains an office in the County of Los Angeles.

9 **PARTIES**

10 7. Petitioner and Plaintiff California Communities Against Toxics (“CCAT”) was
11 founded in 1989 at the Santa Isabel Church after a march on a proposed hazardous waste
12 incinerator in Vernon. Over 25 environmental justice groups from across California came
13 together to form a statewide coalition that would help the environmental justice community
14 in California network, learn from each other's struggles, and advocate for policy change in
15 state and federal government. CCAT now has 70 member organizations holds a conference in
16 a different part of the state each year, and is active in a number of efforts to advance
17 community based environmental health protections across the state. CCAT's mission is
18 pollution prevention, environmental justice, and world peace. CCAT was a petitioner in the
19 cases that this legislation seeks to overturn.

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

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

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

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

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

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

17
18 **STATEMENT OF FACTS**

19 **Background**

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

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

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

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

18 15. Simultaneous with its adoption of Rule 1315, the District amended its Rule
19 1309.1 to allow it to sell the newly created credits to new power plants.

20

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

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

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

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

8 19. The Superior Court found the District’s CEQA document inadequate. In its July
9 28, 2008 dispositive decision, the Court observed, *inter alia*, that Rule 1315 expanded
10 “exponentially the universe of pollution credits” that would allow new emissions “into an
11 already polluted Basin.” Decision on Ruling on Respondent’s Motion for Summary
12 Adjudication, *NRDC et al. v. South Coast AQMD et al.*, Los Angeles Super. Ct. No. BS
13 110792, July 28, 2008, p. 8 (“Decision”) (incorporated in full as if set out fully herein.)

14 20. The Court opined that decisions such as “whether to allow certain credits
15 historically unavailable for use as credits to be captured and re-sold, and *whether to take*
16 *credits retroactively from clean air improvements already attained*” were indisputably
17 decisions that would “have real, foreseeable and substantial environmental consequences.”
18 *Id.* (emphasis added)

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

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

27 //

28 //

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

4 The mischief in the PEA begins with the District’s repeated assertion that Rule
5 1315 will have no environmental impacts and, therefore, need not be evaluated in
6 the PEA. But, *it is the universe of emission credits . . . that is at the heart of the*
7 *rule-making*. Whether it is for electric generation, or bio-solid treatment facilities
8 or some other project of importance to the region, it cannot be doubted that in a
9 world of ever-scarcer emission credits that [sic] a huge cache of district-held
10 credits in a now-accessible Priority Reserve will be used. This foreseeable
11 consequence is particularly apparent where, as in this case, the District has
12 articulated a willingness to open the Priority Reserve for uses far removed from
13 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
14 programmatic basis – limited to the eleven power plants currently in line for
15 Priority Reserve access.
16 Decision, pp. 11-12. (emphasis added)

17 In this project, the District has amended its New Source Review program with the
18 articulated commitment of *retroactively generating 111 tons/day of credits and*
19 *making them available* now and in the future to all facilities through access to the
20 Priority Reserves accounts....
21 *Id.* pp. 13-14. (emphasis added)

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

25 IT IS FURTHER ORDERED that the District is enjoined from undertaking any
26 action to implement the Project unless and until such time as the District has
27 complied with the California Environmental Quality Act (California Public
28 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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1 25. Minor source shutdowns were a significant part of Rule 1315, generating
2 approximately 90% of the new emission reduction credits, and therefore included in the
3 Program.

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

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

9 27. Assembly Bill 1318 (M. Perez, 2009) orders the District to “make use of”
10 emission reduction credits from “minor sources since 1990” (“minor source shutdowns”).
11 Further, it explicitly orders the District to set aside the Court’s mandate to undertake CEQA
12 prior to relying on any part of the Program, by providing that CEQA “does not apply” to
13 “[t]he selection, credit, and transfer of emission credits by the South Coast Air Quality
14 Management District pursuant to Section 40440.14 of the Health and Safety Code, until the
15 repeal of that section on January 1, 2012, or a later date.” Public Res. Code § 21080(b)(16).

16 28. AB 1318 amends Section 40440.14 of the Health and Safety Code to require that
17 the District credit to its “internal emission credit accounts and transfer from [its] . . . accounts
18 to eligible electrical generating facilities emission credits in the full amounts needed to issue
19 permits for eligible electrical generating facilities to meet requirements for sulfur oxides
20 (SOx) and particulate matter (PM2.5 and PM10) emissions.” Health & Saf. Code §
21 40440.14(a).

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

24 30. SB 827 includes the following language “Nothing in this section affects the
25 decision in the case described in subdivision (a) concerning the adoption, readoption, or
26 amendment, or environmental review, of south coast district Rule 1315.” Despite this
27 language, the Legislature also orders that “the district shall also make use of any emission
28 credits that have resulted from emission reductions and shutdowns from minor sources since

1 1990” to issue permits under its existing rules, a vital aspect of Rule 1315, and a key concern
2 in the Decision and Writ.

3 **FIRST CAUSE OF ACTION**

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

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

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

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

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

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

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

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

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

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

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

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

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

19
20 **SECOND CAUSE OF ACTION**

21 VIOLATION OF HEALTH AND SAFETY CODE SECTIONS 40440.13(b)(2) AND
22 40440.14(c)(2)

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

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

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

28 //

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

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

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

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

17 47. The District has indicated that it will begin crediting and using emission
18 reductions and shutdowns from minor sources as emission reduction credits on January 1,
19 2010, or very soon thereafter. Crediting and issuing this category of emission reduction
20 credits without “submissions to the United States Environmental Protection Agency” violates
21 Health and Safety Code sections 40440.13(b)(2) and 40440.14(c)(2), and is therefore
22 arbitrary, capricious, and not accordance with the law.

23
24 **THE NEED FOR INJUNCTIVE RELIEF**

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

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Petitioners pray for judgment as set forth below:

3 A. A temporary restraining order, preliminary and permanent injunction enjoining
4 Defendant and Respondent South Coast Air Quality Management District, its agents,
5 employees, assigns, and all persons acting in concert or participating with it from crediting or
6 using any of the credits generated by minor source shutdowns and reductions dating back to
7 1990 until the District:

- 8 i. adopts and submits to United State Environmental Protection Agency a rule
9 allowing it use any such credits, and
10 ii. complies with the Decision, Judgment and Writ issued by the Superior Court of
11 the County of Los Angeles;

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

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

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

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

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

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

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1 Respectfully submitted,

2 Dated: December 30, 2009

3 LAW OFFICES OF ANGELA JOHNSON MESZAROS

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Original signed by _____
Angela Johnson Meszaros

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12 Attorneys for Petitioners

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COMMUNITIES FOR A BETTER ENVIRONMENT

Original signed by _____
Shana Lazerow



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV**

**APPLICATION FOR CERTIFICATION FOR THE
CPV SENTINEL ENERGY PROJECT
BY THE CPV SENTINEL, L.L.C**

DOCKET No. 07-AFC-3

**PROOF OF SERVICE
(Revised 12/22/2009)**

APPLICANT

CPV Sentinel, LLC
Mark O. Turner, Director
Competitive Power Ventures, Inc.
55 2nd Street, Suite 525
San Francisco, CA 94105
mturner@cpv.com

APPLICANT'S CONSULTANT

Dale Shileikis - URS Corporation
221 Main Street, Suite 600
San Francisco, CA 94105-1916
dale_shileikis@urscorp.com

COUNSEL FOR APPLICANT

Michael J. Carroll
LATHAM & WATKINS LLP
650 Town Center Drive, 20th Floor
Costa Mesa, CA 92626-1925
michael.carroll@lw.com

INTERESTED AGENCIES

California ISO
e-recipient@caiso.com

Mohsen Nazemi, PE
South Coast AQMD
21865 Copley Drive
Diamond Bar, CA 91765-4178
mnazemi@aqmd.gov

INTERVENORS

Angela Johnson Meszaros
CA Communities Against Toxics
1107 Fair Oaks Avenue, #246
South Pasadena, CA 91030
Angela@CleanAirMatters.net

ENERGY COMMISSION

JAMES D. BOYD
Vice Chair and Presiding Member
jboyd@energy.state.ca.us

JULIA LEVIN
Commissioner and Associate Member
jlevin@energy.state.ca.us

Kenneth Celli, Hearing Officer
kcelli@energy.state.ca.us

John Kessler, Project Manager
jkessler@energy.state.ca.us

Caryn Holmes, Staff Counsel
cholmes@energy.state.ca.us

Public Adviser
publicadviser@energy.state.ca.us

DECLARATION OF SERVICE

I, Angela Johnson Meszaros, declare that on, January 11, 2010, I served and a filed copy of the attached Interveners' Issues Identification Report. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [<http://www.energy.ca.gov/sitingcases/sentinel/index.html>]

The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

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CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 07-AFC-3
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

I declare under penalty of perjury that the foregoing is true and correct.

ORIGINAL SIGNED BY

Angela Johnson Meszaros