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DOCKET

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June 30, 2010

Via U.S. Mail and Electronic Service

California Energy Commission
Attn: Docket No. 07-AFC-03
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Re: *CPV Sentinel Energy Project; Docket No. 07-AFC-03*

Dear Sir or Madam:

Enclosed is the original Legal Argument of South Coast Air Quality Management District in Response to Intervenors' Testimony.

This document is being filed today via electronic mail and the original was deposited into the U.S. Mail for delivery to the Dockets Unit. All parties on the service list (last revised on 5/21/10) have also been served electronically and by U.S. Mail.

Very truly yours,

Barbara Baird
District Counsel

BB:pm

Encl.

e/share/bb/energy/sentinel63010.doc

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**STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION**

In the Matter of:)
)
Application for Certification for the) **Docket No. 07-AFC-03**
CPV SENTINEL ENERGY PROJECT) Legal Argument of South Coast Air
By CPV Sentinel, LLC) Quality Management District in
) Response To Intervenors'
) Testimony
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INTRODUCTION

Intervenor California Communities Against Toxics (CCAT) has filed the proposed testimony of Michael Harris in this matter. The South Coast Air Quality Management District (District) has moved to exclude Mr. Harris' testimony on the ground that the rules of legal professional responsibility preclude him from testifying by reason of his prior attorney-client relationship with the District. The District also moved to exclude his testimony on the further ground that his purported expert testimony is nothing of the sort and, instead, is merely legal argument on which expert testimony is not proper. The Commission should exclude the Harris testimony for both of these reasons.

Nevertheless, the District anticipates CCAT will make these same arguments in its legal brief. In addition, the testimony of Julia May filed on behalf of Communities for a Better Environment (CBE) is susceptible to the same objection regarding impermissible legal argument. The District hereby objects to the legal conclusions contained in the May testimony, namely that the offsets in issue need to be discounted to Best Available Control Technology (BACT), and that offsets are not available from a source that has exceeded its permit limit. As a result, the District addresses why the arguments made by Mr. Harris and Ms. May are mistaken as a matter of law. In addition, the District sets forth below a background section which explains the essential requirements for new source review under the Clean Air Act and describes the offsets being provided to CPV Sentinel by the District pursuant to AB 1318. This section also describes the revision to the State Implementation Plan (SIP) currently being processed, and sets forth how that SIP revision relates to this Commission's decision.

As detailed below, even if the Commission were to consider the improper legal opinions of Mr. Harris and Ms. May's testimony, which it should not, the Commission should nonetheless conclude that AB 1318 properly authorizes the transfer of the emission offsets to the Sentinel project and that these offsets meet the Commission's legal requirements for issuance of the certification. Contrary to their testimony, the credits are fully enforceable and there need not be any amendment to the SIP for them to be fully enforceable. Similarly, regardless of whether a SIP amendment may be needed in the future, this Commission is free to certify the CPV Sentinel project, and should do so.

I. BACKGROUND

A. Applicable New Source Review Requirements

The federal Clean Air Act (CAA), 42 U.S.C. §§ 7401 et seq., requires EPA to establish "national ambient air quality standards" for air pollutants that derive from diverse and numerous sources; the standards must be set at levels "requisite to protect the public health," and "allowing an adequate margin of safety." 42 U.S.C. § 7409(b). States are required to adopt "state implementation plans" (SIPs) to achieve and maintain the national ambient air quality standards. 42 U.S.C. § 7410. In the South Coast Air Basin, responsibility for the stationary source portions of the SIP rests with the District. Cal. Health & Safety Code § 40460(c). A SIP provision becomes "federally enforceable"

after it is approved by the United States Environmental Protection Agency (EPA). *Safe Air for Everyone v. U.S.EPA*, 488 F.3d 1088, 1096-97(9th Cir. 2007).

The CAA also includes “new source review” (NSR) requirements for new and modified major sources of pollutants for which an area has not yet attained the national ambient air quality standards, and the precursors to such pollutants. At issue in these proceedings is the requirement for such new and modified sources to “offset” their emissions increases with reductions from within the same source or from another source. This requirement derives from CAA § 173 (42 U.S.C. § 7503(a)(1)), which provides in pertinent part that “by the time the source is to commence operation, sufficient offsetting emission reductions have been obtained...so as to represent (when considered together with the plan provisions required under section 7502 of this title) reasonable further progress....”

An offset is an accounting of a reduction in a pollutant that must be equal to or greater than the emissions increase of that pollutant from the new or modified source. Offsets are generally created when a company shuts down equipment or installs control equipment to reduce emissions where that reduction is not otherwise required. Emission reductions may not generate offsets if they are otherwise required by any provision of the Clean Air Act, including state and local rules implementing the SIP. 42 U.S.C. § 7503(c)(2). This is generally referred to as a requirement that the emission reductions represented by an offset must be “surplus.” EPA has adopted regulations governing state new source review programs, which require that offsets be “surplus, permanent, quantifiable, and federally enforceable.” 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(ii).

As set forth in the March 2, 2010 “Addendum to the Determination of Compliance” for the Sentinel project, Appendix N, the project is providing necessary offsets of volatile organic compounds (VOCs) in the form of emission reduction credits obtained from the open market. It is obtaining nitrogen oxide (NOx) RTCs (RECLAIM Trading Credits) for its NOx emissions. It is not required to obtain offsets for particulate matter less than 2.5 microns in diameter (PM2.5) because the area of the Salton Sea Air Basin where it is to be located is not classified as “nonattainment” for PM2.5. Appendix N, p. 3. It is obtaining offsets for PM10 and its precursor sulfur oxides (SOx) from the District as required by AB 1318.

The CPV Sentinel project is not a federal major source for PM10, and thus does not require offsets for particulate matter smaller than 10 microns in diameter (PM10) or its precursors under federal law. Appendix N, page 4. However, CPV Sentinel and the District are providing offsets for PM10, a nonattainment pollutant and its precursor SOx, pursuant to AB 1318. Moreover, both federal law and District rules only require offsets for pollutants for which an area is in nonattainment. While the Coachella Valley (location of the proposed Sentinel plant) portion of the Salton Sea Air Basin is currently still designated as nonattainment for PM10, the District and the California Air Resources Board have already submitted to EPA a request that the area be redesignated as “attainment,” based on the required showing of monitoring data meeting the national clean air standards. Appendix N, p. 4. If the area is redesignated as “attainment” by

EPA, offsets would no longer be required for any source (major or non-major) located in this area. However, it is anticipated that the facility will want to receive its certification from this Commission before EPA decides on the redesignation request.

B. Offsets Being Provided to CPV Sentinel by the District

As discussed above, a facility eligible to obtain emission reduction credits (ERCs) as a result of equipment shutdown or overcontrol may create offsets which it may sell on the open market to new or modified facilities needing offsets. In the District, this is done by following District Rule 1309 and Rule 1306. In addition, the District maintains an “internal account” of offsets for each pollutant which it obtains from equipment shutdowns or overcontrol where the facility is either ineligible for ERCs (because it originally obtained its offsets from the District) or fails to claim ERCs in a timely manner. The District refers to these offsets as “orphan shutdowns” or “orphan reductions.” District Rule 1303(b)(2) provides that “unless exempt from offsets requirements pursuant to Rule 1304, emission increases shall be offset by either Emission Reduction Credits approved pursuant to Rule 1309, or by allocations from the Priority Reserve in accordance with the provisions of Rule 1309.1.” The District has used its internal accounts to provide offsets for federal major sources that are exempt under Rule 1304 or eligible for Priority Reserve offsets under Rule 1309.1 (principally essential public services).

Due to the electricity shortfall in southern California projected by state agencies and the scarcity and high price of offsets, particularly PM10, the District decided in 2006 to amend its Priority Reserve Rule to allow power plants for a limited period of time to obtain offsets from the Priority Reserve. Unlike essential public services, power plants were required to pay substantial mitigation fees to the District to use the offsets; the District was to spend the money to reduce emissions in areas impacted by the power plants. At the same time, the District codified its tracking system for internal offsets, including making improvements to the system, in Rule 1315. The Natural Resources Defense Council (NRDC) and others brought state-court litigation challenging these actions, which resulted in a ruling that the District had not adequately complied with the California Environmental Quality Act (CEQA) in adopting and amending the rules. As a result, the District could not supply offsets from its internal accounts for power plants or any other sources receiving offsets from the internal accounts. As a result, the District declared a permit moratorium.

In 2009 the legislature responded by adopting two bills, SB 827 and AB 1318. The first bill allowed the District to issue permits pursuant to Rule 1304 and Rule 1309.1 as it existed before the most recent power plant amendment. The second bill, AB 1318, specifically required the District to “credit to [its] internal emission credit accounts and transfer from [its] internal emission reduction accounts to eligible electrical generating facilities emission credits in the full amounts needed to issue permits for eligible electrical generating facilities to meet requirements for sulfur oxides (SOx) and particulate matter (PM2.5 and PM10) emissions.” Health & Safety Code § 40440.14(a).

Sentinel is the only known eligible facility under this bill. AB 1318 created a CEQA exemption for the crediting and transfer of the offsets it requires to be provided. Pub. Res. Code 21080(b)(16).

The AB 1318 Tracking System submitted as Appendix N to the March 2, 2010 Addendum to the Determination of Compliance relies on specific offsets from the District's internal accounts and quantifies the amount of offsets being provided by each shutdown source. "The amounts of emission offsets are based on actual PM10 and SOx emissions reported to AQMD under AQMD's Annual Emissions Reporting Program. In addition, for each source of credit, the equipment has been shutdown and the permits have been inactivated by AQMD." Appendix N, p. 7. Further, "[t]hese offsets are all [the] result of emission reductions from permitted equipment that permanently ceased operation in AQMD and the AQMD has not issued any ERCs to the companies who operated the equipment as a result of the reductions. These PM10 and SOx offsets have been removed from the AQMD's internal offset accounts and have not been used by any other source permitted by AQMD." Appendix N, pp. 6-7. A point that will be relevant in the discussion below is that these credits are not subject to the same legal requirements as emission reduction credits purchased and sold in the open markets.¹

The District initially filed with the Commission a list of offsets to be provided under AB 1318 on March 2, 2010. Appendix N to the Addendum, Tables A & B. On May 12, 2010, it filed a revised list that replaced the initial list. The primary difference between Tables A and B in the March 2nd version and the May 12th revised Addendum is that the revised list makes more conservative assumptions about the offsets associated with the emission reductions from equipment which have ceased operation. In particular, in the May 12th Revised Addendum the District used the average of the emissions from the last two years of operation of the equipment, rather than the highest two out of the last five years of operation used in the March 2nd Addendum, to calculate offsets. Because this more conservative assumption used in the May 12th Revised Addendum resulted in a smaller amount of emission offsets from the shutdown sources, it was necessary to include additional offsets in the AB 1318 Tracking System to ensure there would be adequate offsets available to meet CPV Sentinel's offset needs.

C. The Proposed CPV Sentinel SIP Revision

In order to implement AB 1318, the District has proposed a SIP revision for the CPV Sentinel offset. The purpose of the SIP revision is to "provide a mechanism for the transfer of credits to CPV Sentinel, and [to] establish the AB 1318 tracking system used

¹ A repeated misunderstanding in the testimony by Mr. Harris and Ms. May is that they assume that the rules applied to Emission Reduction Credits bought and sold in the private market place have application to the District's internal accounts. This argument, raised by CBE in yet another lawsuit relating to emission credits, was soundly rejected. *Natural Resources Defense Council, et al, v. South Coast Air Quality Management Dist., et al*, 2010 U.S. Dist. LEXIS 35865 (January 7, 2010), p. 14 (District Rules 1309 and 1306 which apply to the creation of private market "emission reduction credits" do not apply to the District's internal offsets accounts").

to account for such credits.” (SIP Revision, Attachment A; Preamble, p. 1.) The text of the SIP revision includes the following: “Notwithstanding District Rule 1303, this SIP revision provides a federally-enforceable mechanism for transferring offsets from the AQMD’s internal accounts to the CPV Sentinel Project.” The importance of the language “notwithstanding District Rule 1303” is two-fold.

First, this language makes clear that the transfer of offsets may occur in spite of language in Rule 1303(b)(2)(A) which says “Unless exempt from offsets requirements pursuant to Rule 1303, emission increases shall be offset by either Emission Reduction Credits approved pursuant to Rule 1309, or by allocations from the Priority Reserve in accordance with the provisions of Rule 1309.1....” The CPV Sentinel project is not exempt from offsets, it is not providing private market ERCs for PM or SOx, and is not eligible for Priority Reserve allocations under the version of Rule 1309.1 currently in effect (i.e., without the latest power plant amendments). Nevertheless, and “notwithstanding” Rule 1303, the AQMD is directed by AB 1318 to provide offsets from its internal accounts for the Sentinel project’s SOx and PM requirements. The text of the SIP revision further provides that the AQMD Executive Officer “shall transfer sulfur oxides and particulate emission credits from the CPV Sentinel AB 1318 Tracking System, attached...[to] the CPV Sentinel Power Plant...in the full amounts needed to issue permits to construct and to meet requirements for sulfur oxides and particulate matter emissions.” (SIP Revision, Attachment A hereto, pp. 2-3.)²

Second, Rule 1303 requires that emission offsets be obtained before a Permit to Construct is issued. (District Rule 1303(b) (2)(A).) However, under federal law, offsets must be obtained only before the beginning of operation. Section 173(a)(1)(A) provides that the permitting agency must assure that “by the time the source is to commence operation, sufficient offsetting emission reductions have been obtained....” 42 U.S.C. § 7503(a)(1)(A). Therefore, the reference to “Notwithstanding Rule 1303” in the SIP Revision allows CPV Sentinel to obtain offsets prior to the commencement of operation, rather than prior to issuance of the permit to construct.

The SIP revision for the CPV Sentinel offsets is scheduled to be heard before the District’s Governing Board on July 9. Once approved by the District Governing Board, the SIP revision will be forwarded through the California Air Resources Board (CARB) to EPA. The CARB Executive Officer is delegated the ability to forward this SIP revision to EPA for its approval. Health & Safety Code § 39516.

D. This Commission’s Decision Relative to Offsets

Public Resources Code § 25523 applies to the Commission’s written decision on an application for certification. Relative to air emission offsets, it provides “The

² As required by AB 1318, CPV Sentinel must pay specified mitigation fees to the District, which is required to use those funds to reduce emissions, with at least 30% used for reductions in areas in close proximity to CPV Sentinel and 30 % in Environmental Justice Areas as designated in former Rule 1309.1. Health & Safety Code. § 40440.14(e).

commission may not find that the proposed facility conforms with applicable air quality standards pursuant to paragraph (1) unless the applicable air pollution control district or air quality management district certifies, prior to the licensing of the project by the commission, that complete emissions offsets for the proposed facility have been identified and will be obtained by the time required by the district's rules....” Pub. Res. Code § 25523(d)(2). However, as discussed above, the District rule relative to the timing of offset requirements is not applicable to this project for PM10 and SOx offsets. Instead, the project is governed by the federal requirement that offsets be obtained prior to operation. Section 25523(d)(2) further provides: “The commission shall require as a condition of certification that the applicant obtain any required emission offsets within the time required by the applicable district rules, consistent with any applicable federal and state laws and regulations, and prior to the commencement of the operation of the proposed facility.” The PM10 and SOx offsets at issue here have all been identified in the AB 1318 Tracking System filed with this Commission. Therefore, this Commission may certify the proposed project on the condition that the project must actually obtain the offsets prior to commencement of operation.

II. ARGUMENT

A. Summary of Argument

Mr. Harris argues that the District's Final Determination of Compliance (FDOC) was “invalid” because the offsets proposed to be provided to the CPV Sentinel project are not yet federally enforceable. The District's response is two-fold: first, the offsets are indeed already federally enforceable, as the permit system which ensures their enforceability has been SIP approved and nothing about AB 1318 altered that fact. Second, to the extent Mr. Harris is suggesting the FDOC is not valid until an amendment incorporating the AB 1318 Tracking System into the SIP is adopted by EPA, if that is even necessary, EPA guidance makes plain that a permit to construct may be issued prior to the offsets being made *federally* enforceable where: 1) the offsets have been identified and quantified; 2) they have been adopted as a matter of state law; and 3) they have been submitted to EPA for adoption into the SIP and the administrative process to approve the measure will be completed by the time the source seeks to commence operation. In such cases, the construction permit needs to include a federally-enforceable condition that expressly prohibits the commencement of actual operations until EPA has approved the SIP measure.

Ms. May contends that the offsets provided to CPV Sentinel need to be adjusted to reflect today's BACT. However, there is no federal requirement for offsets to be discounted to today's BACT. The BACT adjustment is a feature of the District Rule governing issuance of ERCs for private parties and is not applicable to credits from the District's internal accounts. The federal requirement is to assure that offsets are surplus to applicable legal requirements. Initially, the District had intended to perform a surplus adjustment prior to issuing its Title V permit to the CPV Sentinel project. However,

since this issue has been raised, the District will perform the appropriate surplus adjustment prior to the evidentiary hearing in this matter.

B. The Offsets to be Provided to CPV Sentinel Are Currently Federally Enforceable

Mr. Harris takes the position that the offsets to be transferred to CPV Sentinel are not federally enforceable because the EPA-approved SIP does not include any provision to authorize the use of internal offset accounts for the CPV Sentinel project. (Harris Decl., page 3; page 10.) He is wrong. His legal argument completely misses the important distinction between federal enforceability of offsets and the ability to transfer such federally-enforceable offsets. As discussed below, the offsets were federally enforceable both before and since enactment of AB 1318. The absence of a SIP-approved mechanism to transfer the offsets to CPV Sentinel -- assuming one is necessary at all -- says nothing about the enforceability of those credits. These are two distinct issues.

As stated in the Addendum to the Determination of Compliance (March 2, 2010) for the CPV Sentinel project, (Appendix N, p.7), “The amounts of emission offsets are based on actual PM10 and SOx emissions reported to AQMD under AQMD’s Annual Emissions Reporting Program. In addition, for each source of credit, the equipment has been shut down and the permits have been inactivated by AQMD.” Because the permits are inactivated, no one can operate the equipment. District Rules 201 and 203 prevent the construction or operation of equipment without a permit from the District. These rules have been approved into the SIP, 64 Fed. Reg. 25828 (July 12, 1999).

The SIP-approved version of Rule 201 provides in pertinent part “A person shall not build, erect, install, alter or replace any equipment, the use of which may cause the issuance of air contaminants or the use of which may eliminate, reduce or control the issuance of air contaminants without first obtaining written authorization for such construction from the Executive Officer.” (See Attachment B hereto, taken from EPA’s website listing of SIP rules.) The SIP-approved version of Rule 203 provides in pertinent part: “A person shall not operate or use any equipment, the use of which may cause the issuance of air contaminants, or the use of which may reduce or control the issuance of air contaminants, without first obtaining a written permit to operate from the Executive Officer....” (See Attachment C hereto, from EPA’s website listing of SIP rules.)³ Violation of these rules bring with them severe penalties.⁴

³ There is an exception in Rule 203 which is irrelevant here for equipment that already has a permit to construct. Since SIP approval, both rules have been amended to include agricultural permit units specifically, which was not the case previously, but again this is irrelevant here.

⁴ See, e.g., Health & Safety Code §42400.3(a), misdemeanor liability and criminal fine of up to \$75,000 per day for knowing violation of any rule or permit pertaining to emission regulations or limitations; §42402.3; civil penalty of up to \$75,000 per day for willfully emitting air contaminants in violation of any rule.

These rules assure that the equipment from which the offsets are generated cannot be operated without a permit, and the permits for all the listed equipment have been inactivated. Therefore, there is a federally-enforceable (i.e., SIP-approved) rule assuring that the shutdowns remain in effect. Accordingly, the offsets to be provided to CPV Sentinel are already federally enforceable.

The situation in the present case is therefore very different from the situation cited in Mr. Harris' argument. The Bauman Memo, October 11, 1985, cited by Mr. Harris, deals with the situation where "neither the operating permit program nor the specific operating permits, or conditions to the permits in question, have been approved by EPA as part of the applicable SIPs." (Bauman Memo, p. 1, Attachment D hereto.) In the present case, the permit program has been approved by EPA into the SIP; the permit program guarantees enforceability, and hence the offsets are federally enforceable. Mr. Harris further argues, based on the Bauman Memo, that "the federally-enforceable requirement is not met where enforceability of reduction credits depends on use of state banking regulations that are not part of the currently-approved SIP." (Harris Decl., p. 10.) However, in the present case, the federal enforceability of the offsets does NOT depend on any unapproved banking regulation. Instead, enforceability is already ensured by Rules 201 and 203.

C. EPA Allows Issuance of New Source Review Permits Before EPA Approval of the SIP Amendment Associated with Transfer of the Offsets to CPV Sentinel

As discussed above, the offsets are already federally enforceable. Moreover, even if they were not, EPA has made it clear that offsets need not be made federally enforceable prior to operation. As a preliminary matter, however, Mr. Harris' mistaken assertion regarding federal enforceability is really not about federal enforceability at all. Rather, he attempts to use the fact that currently there is not a provision in the SIP allowing the offsets to be transferred to CPV Sentinel as somehow defining enforceability. However, this issue is distinct from whether the credits are federally enforceable. Moreover, as noted above, the District is submitting a SIP revision to EPA, which will be heard by the District's Governing Board on July 9, 2010, which directly addresses this issue—by providing a federally-approvable mechanism for transferring the offsets. Thus, to the extent a SIP amendment is needed, it is underway and the Commission can condition the license for the Sentinel project on EPA approval of the amendment.

Mr. Harris would appear to disagree with this proposition, but even beyond the above distinction, his legal arguments with respect to enforceability miss the mark. He relies on an EPA memorandum signed by John Seitz (June 14, 1994)(Seitz Memo; Attachment E hereto)) for the proposition that the requirement for federal enforceability ensures that the criteria for fully-creditable offsets (quantifiable, surplus, permanent) are addressed. (Harris Decl., p. 10.) However, the Seitz Memo also clearly states that in some cases, "creditable offsets have been identified, quantified, adopted as a matter of state law, and submitted to EPA, but the EPA administrative process to approve the measure may not be completed by the time the source seeks to commence construction." (Seitz Memo, p.5.)

In such cases, “a construction permit may be issued on the basis of a federally-enforceable commitment that the source may not commence operation until the offsets are made federally-enforceable by EPA approval of the SIP measure.” (Seitz Memo, pp. 5-6)(emphasis added).

Furthermore, the Seitz Memo states: “The EPA recognizes that there may be circumstances other than SIP measures awaiting EPA approval where sufficient creditable offsets have been identified and certain administrative obstacles remain to making the offsets federally enforceable. The EPA believes that it may be appropriate, on a case-by-case basis, to extend similar treatment to these sources, allowing them to obtain a construction permit that contains an explicit condition prohibiting operations until the offsets are made federally enforceable.” (Seitz Memo, p. 6.)⁵

Mr. Harris ignores these portions of the Seitz Memo, both of which make clear that to the extent a SIP amendment is required, the Commission has authority to issue a license to CPV Sentinel even before the AB 1318 Tracking System used to account for the emission offsets has been adopted into the SIP. In this case that would mean imposing a condition requiring EPA adoption of the AB 1318 Tracking System before the Sentinel Project commences operation. District Rule 204 allows such conditions to be imposed on permits to construct to ensure compliance with applicable requirements. Such conditions are federally-enforceable because Rule 204 is approved in the SIP. 64 Fed. Reg. 25828. The CPV Sentinel project could therefore be subject to a condition prohibiting operation until all of its offsets are federally enforceable and obtained by CPV Sentinel. Accordingly, Mr. Harris’ legal arguments are not well taken and should be rejected to the extent his testimony is considered at all.

D. There is No Requirement That the Offsets Be Reduced to Levels Equivalent to Current “Best Available Control Technology”

CBE has presented the testimony of Julia May, which devotes a substantial amount of effort to arguing the offsets to be provided to CPV Sentinel have not been reduced to levels equivalent to current “BACT. As with the testimony of Mr. Harris, this is legal argument that is not the proper subject of “expert” testimony and should not be considered as testimony. In any event, the argument is not well taken because there is no requirement for such a discount.

There is a requirement for a “BACT discount” when the District issues tradable ERCs to private individuals for reductions at their facility, but this requirement is not required by

⁵ The Seitz Memo explains that this policy was originally derived from concerns relative to NOx offsets. It was not, however, limited to that pollutant and instead allows EPA to apply this policy to any appropriate permit, on a case-by-case basis. Moreover, it is the District’s understanding that Region IX of EPA considers this policy applicable to all pollutants.

federal law and does not apply to offsets from the District's internal accounts of the sort at issue here.

Thus, the District Rule that requires that when "ERCs" are issued to a private party applicant, the applicant must establish that the reductions are "not greater than the equipment would have achieved if operating with current 'Best Available Control Technology (BACT).'" District Rule 1309(b)(4)(E)) simply does not apply here. Similarly, the reference in Rule 1306(c) to "BACT adjusted annual emissions" is not applicable. This point was made clear by the U.S. District Court in litigation brought by CBE and others. "[I]n calculating the amount of offsets to be issued, emission reductions for ERCs are discounted to BACT levels, while emission reductions for internal offsets are not discounted to BACT levels." *Natural Resources Defense Council et al. v. South Coast Air Quality Management District, et al.*, 2010 U.S. Dist. LEXIS 35865, page 13 (Attachment F hereto).

There is, however, a federal requirement that offsets be "surplus." 40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(i). EPA interprets this requirement to mean that the offsets must be "surplus at the time of use," and generally has required that offsets be shown to be "surplus" at the time they are issued to the permit holder. The District had been planning to discount the offsets to be provided to CPV Sentinel, if necessary to assure they remain surplus, prior to issuing the District's Title V permit to Sentinel. However, since the issue has been raised here, the District now plans to adjust the offsets to assure that they remain surplus on or before the date of the District Governing Board adoption of the SIP revision for CPV Sentinel (July 9, 2010). The District will adjust each offset to reflect any control requirements that have become applicable for that source category since the time of shutdown. This requires a review of rules that would have become applicable to that source had it stayed in operation. (In contrast, the requirement for BACT applies to new sources, not existing sources. Health & Safety Code § 40440(b)(1).) The District staff has taken a preliminary look at the discounts that would be required, and is confident that the discounts will not result in reducing total available offsets below the amounts required by CPV Sentinel.

E. There is No Legal Basis for Discarding Offsets Generated From the Lawful Operations of a Source That at Times Exceeded Its Permitted Levels

Ms. May focuses on the emission credits associated with one facility, KMC Wheel Co., which allegedly operated at above its permitted levels for 2001-2002 before shutting down. (May Decl., para. 41.) Based on this assertion, Ms. May asserts: "Rather than allowing KMC Wheel's permitted emissions to retire to compensate for its large exceedances, AQMD is using its permitted emissions to allow new pollution to be emitted" (i.e., to provide offsets for CPV Sentinel). Ms. May is incorrect.

There is no provision in law which would prohibit the use by the District of KMC's lawful emissions to generate offsets. The only analogous requirement is that, as discussed above, offsets must be "surplus." The emission reductions must not be

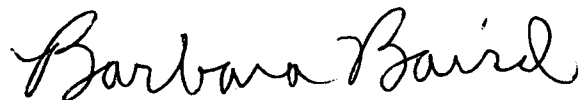
required by law. In this case, the shutdown of KMC Wheel was not required by law. The District proposes to issue offsets for only that amount of reductions that were lawful and authorized by the permit. Reductions that exceeded the permit limits would not be "surplus," because their elimination is required by law, and as a result the District has not proposed to issue offsets for such portion of reductions. To the extent Ms. May argues otherwise, she misunderstands the District's analysis. Simply put, the District conducted its analysis in a professional and responsible manner consistent with its state and federal obligations.⁶

III. CONCLUSION

The Commission should exclude Mr. Harris' testimony and those portions of Ms. May's testimony containing improper legal opinion. Even if the Commission considers the improper legal opinions contained therein, the Commission should find that AB 1318 properly authorizes the transfer of emission credits to the CPV Sentinel project and those credits meet the Commission's legal requirements for certification of the project.

June 30, 2010

Respectfully submitted,



Kurt R. Wiese, General Counsel
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Lauren Nevitt, Deputy District Counsel
South Coast Air Quality Management District

⁶ In her declaration, Ms. May also attempts to cast doubt on the offsets as a whole by claiming that "there are many instances where District staff had to estimate or guess about missing information..." (May Decl., para. 10) yet she does not provide examples of alleged "guesses," and where she does she supports the District's approach. For example, in the case of RRI Energy Etiwanda, she explains that District staff noted that the default emission factor was 7.6 lbs/mmcf for PM10, but that the facility had used a factor of 6.93. Staff noted that it did not have a copy of a source test which supported the lower factor. Nevertheless, the District staff used the lower emission factor. May concludes that "the District properly used the lower instead of the higher number." In short, May's Declaration does not cast doubt on whether the offsets meet the federal requirements, including that they be quantifiable. It instead shows the conservative manner in which District staff went about their work.

Declaration of Service

I, Patricia M. Anderson, declare that on June 30, 2010, I served and filed a copy of the attached Legal Argument of South Coast Air Quality Management District in Response To Intervenors' Testimony. 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/documents/index.html>].

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

(Check all that apply)

For service to all other parties:

- sent electronically to all email addressed on the Proof of Service list;
- by personal delivery;
- by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email preferred."

AND

For filing with the Energy Commission:

- sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);

OR

- depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION

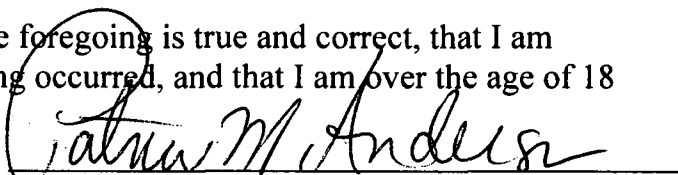
Attn: Docket No. 07-AFC-03

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, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.



Patricia M. Anderson



**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 5/21/2010)**

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Attachment A

REVISION TO THE STATE IMPLEMENTATION PLAN FOR THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, STATE OF CALIFORNIA: SULFUR OXIDES AND PARTICULATE MATTER OFFSET REQUIREMENTS FOR THE PROPOSED CPV SENTINEL POWER PLANT TO BE LOCATED IN DESERT HOT SPRINGS, CALIFORNIA, INCLUDING AB 1318 OFFSET TRACKING SYSTEM

PREAMBLE:

PURPOSE OF SIP REVISION

The purpose of this source-specific revision to the State Implementation Plan (SIP) for the South Coast Air Quality Management District (AQMD) is to implement California AB 1318 (2009, V.M. Perez) (Stats. 2009, Ch. 285), including California Health and Safety Code Section 40440.14. That section requires the Executive Officer of the AQMD to credit to the South Coast District's internal emission credit accounts and transfer to eligible electrical generating facilities emission credits in the full amounts needed to issue permits for eligible electrical generating facilities to meet requirements for sulfur oxides and particulate matter emissions. The proposed CPV Sentinel, LLC power plant has been found to be an eligible electrical generating facility under this section, and is the only known eligible facility. The proposed SIP revision will provide a mechanism for the transfer of credits to CPV Sentinel, and will establish the AB 1318 tracking system used to account for such credits.

DESCRIPTION OF PROPOSED POWER PLANT

CPV Sentinel, LLC has proposed to build an 850 megawatt (MW) natural gas-fired power plant, to be located at 62575 Power Line Road, Desert Hot Springs, California, 92440. The project has submitted an Application for Certification to the California Energy Commission (07-AFC-3) and has submitted a Title V Application for a Permit to Construct to the AQMD (Facility ID No. 152707). The proposed plant has been found to be an eligible electrical generating facility under Health and Safety Code section 40440.14(d) because it is (1) subject to the permitting jurisdiction of the State Energy Resources Conservation and Development Commission (also referred to as California Energy Commission or CEC), (2) it has a purchase agreement, executed on or before December 31, 2008, to provide electricity to a public utility, as defined in Section 216 of the Public Utilities Code, subject to regulation by the Public Utilities Commission, for use within the Los Angeles Basin Local Reliability Area, and (3) it is under the jurisdiction of the South Coast Air Quality Management District, but not within the South Coast Air Basin (it is proposed to be located in the Salton Sea Air Basin). In addition, the AQMD has found that the proposed CPV Sentinel project meets all the requirements of the applicable new source review rule and all other applicable district regulations that must be met under Section 1744.5 of Title 20 of the California Code of Regulations, as required by Health and Safety Code Section 40440.14(a).

REASON FOR SIP REVISION

California Health and Safety Code section 40440.14 in AB 1318 requires the Executive Officer of the AQMD to credit to the AQMD's internal emission credit accounts and to transfer to eligible electrical generating facilities, which includes only the CPV Sentinel power plant, emission credits in the full amounts needed for particulate matter and sulfur oxides to issue permits to the proposed CPV Sentinel power plant. To implement AB 1318, this SIP revision provides a federally-approved mechanism to transfer credits from the AQMD's internal accounts to offset the CPV Sentinel Energy Project proposed Power Plant because CPV Sentinel is not eligible for either Rule 1304 or the May 3, 2002 version of Rule 1309.1 and AB 1318 requires the transfer of the specified credits.

ESTABLISHMENT OF AB1318 TRACKING SYSTEM FOR CPV SENTINEL POWER PLANT

AQMD has decided to establish a new tracking system for the CPV Sentinel Energy Project specific to AB 1318 which consists of specific offsets credits that have been identified from reductions occurring from permitted equipment that permanently ceased operations in AQMD. The AQMD has not issued any ERCs for these specific emission reductions to the companies that operated the equipment as a result of the reductions. These SO_x and PM₁₀ offsets have been removed from the AQMD's internal offset accounts and have not been used by any other source, nor will they be used by any other projects in the future if they are used for the CPV Sentinel Energy Project. These offsets are also described in the documented entitled "CPV Sentinel Energy Project AB 1318 Tracking System" attached hereto.

The amounts of emission offsets contained in the AB 1318 Tracking System are based on actual SO_x and PM₁₀ emissions reported to AQMD under AQMD's Annual Emissions Reporting Program. In addition, for each source of credit, the equipment has been shut down and the permits have been inactivated by AQMD. The emission reductions for SO_x and PM₁₀ have occurred during calendar years 1999 through 2008. The offsets deposited in the AB 1318 Tracking System meet all the U.S. EPA's integrity criteria for qualifying as offsets, meaning they are all real, permanent, enforceable, quantifiable, and surplus. The AB 1318 Tracking System is being submitted to U.S. EPA for approval.

TEXT OF SIP REVISION – CPV Sentinel Energy Project AB 1318 Tracking System

The proposed text of the SIP revision is as follows:

The Executive Officer of the South Coast Air Quality Management District shall transfer sulfur oxides and particulate emission credits from the CPV Sentinel Energy Project AB 1318 Tracking System, attached hereto and incorporated by reference herein, to eligible electrical generating facilities pursuant to Health and Safety Code section 40440.14, as in effect January 1, 2010, (i.e. the CPV Sentinel Power Plant to be located in Desert Hot Springs, CA) in the full amounts

needed to issue permits to construct and to meet requirements for sulfur oxides and particulate matter emissions. Notwithstanding District Rule 1303, this SIP revision provides a federally enforceable mechanism for transferring offsets from the AQMD's internal accounts to the CPV Sentinel Project. The Executive Officer shall complete the transfer of credits to an electrical generating facility pursuant to this provision upon the receipt of payment of the mitigation fees set forth in the south coast district's Rule 1309.1, as adopted on August 3, 2007, regardless of the subsequent repeal of those provisions. This section shall remain in effect only until January 1, 2012, and sunsets as of that date. Such repeal does not affect the federal approvability of credits or the transfer of such credits that are transferred prior to the repeal.

OFFSET EVALUATION FOR CPV SENTINEL PROJECT

The offset evaluation for SO_x and PM₁₀ for the CPV Sentinel Project is included in the CPV Sentinel Energy Project AB 1318 Tracking System as authorized by AB 1318 and is being submitted to U.S. EPA for approval and inclusion into the SIP. The offset requirements for VOC and NO_x are being met by compliance with existing SIP-approved AQMD rules and do not require any additional approvals from U.S. EPA. The Salton Sea Air Basin is not designated as Nonattainment for either CO or PM_{2.5} and therefore offsets are not required for these pollutants.

CAA § 110(I) ANALYSIS

This SIP revision does not interfere with any applicable requirement concerning attainment or reasonable further progress or any other requirement of the Clean Air Act, as provided in CAA § 110(I), 42 U.S.C. § 7410(I). This SIP revision merely provides a mechanism for satisfying the offset requirements of CAA § 173, 42 U.S.C. § 7503, which fully satisfies that requirement. Even if the § 110(I) analysis included the air quality impacts of operation of the CPV Sentinel Energy Project, the accompanying "Air Quality Demonstration: SIP Revision for CPV Sentinel Energy Project" shows that operation of the plant does not violate § 110(I).

Attachment B

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

(Adopted January 9, 1976)(Amended January 5, 1990)

RULE 201. PERMIT TO CONSTRUCT

A person shall not build, erect, install, alter or replace any equipment, the use of which may cause the issuance of air contaminants or the use of which may eliminate, reduce or control the issuance of air contaminants without first obtaining written authorization for such construction from the Executive Officer. A permit to construct shall remain in effect until the permit to operate the equipment for which the application was filed is granted or denied, or the application is cancelled.

Attachment C

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

(Adopted January 9, 1976)(Amended January 5, 1990)

RULE 203. PERMIT TO OPERATE

- (a) A person shall not operate or use any equipment, the use of which may cause the issuance of air contaminants, or the use of which may reduce or control the issuance of air contaminants, without first obtaining a written permit to operate from the Executive Officer or except as provided in Rule 202.
- (b) The equipment shall not be operated contrary to the conditions specified in the permit to operate.

Attachment D

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

OCT 11 1985

MEMORANDUM

SUBJECT: Acceptability of Emission Offsets

FROM: Robert D. Bauman, Chief Standards Implementation Branch, CPDD (MD-15)

TO: James T. Wilburn, Chief Air Management Branch, Region IV

This is in response to your March 1, 1985, memorandum in which you sought a Headquarters ruling concerning the Federal enforceability of emission offsets being allowed by a local agency in Region IV. Your specific concern is with the Federal enforceability of emission reduction credits whose enforcement involves use of a banking regulation (not yet approved by EPA) and the operating permits of the sources providing the emissions reductions. My response, which supports the interpretation that you have already made and discussed with that agency, is based on the information provided by your memorandum and by additional facts learned in subsequent telephone conversations between Roger Pfaff of your staff, Ralph Colleli of OGC, and Dan deRoeck of my staff.

As I understand the situation, neither the operating permit program nor the specific operating permits, or conditions to the permits in question, have been approved by EPA as part of the applicable SIPS. (Moreover, the conditions in the affected operating permits apparently are not identical to any Federally enforceable controls or limitations.) In keeping with EPA's past practice regarding Federal enforceability, the operating permits at issue would not be considered Federally enforceable.

The lack of Federal enforceability of the operating permits is reason in itself to preclude EPA's acceptance of the resulting emission offsets. However, you also asked for comment concerning which NSR rule would apply until the local agency's new Part D submission is approved. Since the agency has an EPA-approved Part D SIP already in effect, the NSR regulations contained in the currently-approved SIP would continue to apply until EPA approved the new submission. Appendix S would not apply since the agency has an approved Part D plan.

I hope that this fully responds to your request. If I can be of further assistance, please let me know.

cc: R. Biondi
R. Colleli
D. deRoeck
T. Helms
G. McCutchen
R. Pfaff
M. Trutna

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region IV - Atlanta, Georgia

DATE: March 11, 1985
SUBJECT: Acceptability of Emission Offsets
FROM: Chief, Air Management Branch
TO: Robert Bauman Chief, Standards Implementation Branch

In the FY-84 mid-year audit of a local air pollution control agency, Region IV identified a deficiency related to use of the Agency's banking regulation. The regulation allows sources to bank and trade emission reductions, and use the reductions as offsets in the Part D new source review program. The primary issue is federal enforceability of offsets. The agency allows intersource trading of emission reduction credits. The only methods of enforcing some of the reductions leading to those credits are the banking regulation and the operating permits of the source providing the reductions. Region IV pointed out that the reductions are not federally enforceable because neither the banking regulation nor the operating permit program are part of the federally approved SIP. In discussing this issue with agency officials, Region IV agreed to request an official ruling from Headquarters on these decisions. Therefore, I am requesting that you provide a written response to the following questions:

- * If a condition in an operating permit requires a reduction in emissions, must that permit be submitted to EPA and approved as part of the SIP in order to be federally enforceable?
- * A SIP has a Part D NSR plan approved by EPA, which plan later needs to be revised according to the May 13, 1980, and August 7, 1980, EPA rule changes. Which regulation applies until the new Part D SIP is approved - Appendix S, the old Part D approved SIP or the new Part D SIP submitted but not yet approved?

Another point made by the agency was that they were being "singled out" while other agencies are following the same practice. We know this is not the case in Region IV, but the agency claims it is the case nationwide. In support of that claim the agency submitted the attached letter. According to a survey they conducted, four of eight permitting actions surveyed allowed offsets that were not federally enforceable. We have checked the information for the four sources in Region IV. Three of the sources were not subject to nonattainment review, so no offsets were required. The fourth used internal offsets which were made on condition of the new source construction permit. Based on that information it is apparent that the letter is inaccurate with respect to Region IV. However, we are enclosing it for your information.

James T. Wilburn

Attachment

Attachment E

June 14, 1994

MEMORANDUM

SUBJECT: Offsets Required Prior to Permit Issuance

FROM: John S. Seitz, Director
Office of Air Quality Planning and Standards (MD-10)

TO: Director, Air, Pesticides, and Toxics
Management Division,
Regions I and IV
Director, Air and Waste Management Division,
Region II
Director, Air, Radiation and Toxics Division,
Region III
Director, Air and Radiation Division,
Region V
Director, Air, Pesticides, and Toxics Division,
Region VI
Director, Air and Toxics Division,
Regions VII, VIII, IX, and X

This memorandum and Attachment A respond to the February 2, 1994 memorandum (Attachment B) from David Howekamp, Region IX, requesting a statement of the Environmental Protection Agency's (EPA's) position on the timing of offset requirements for permitting construction and operation of new or modified major sources under section 173 of the Clean Air Act. Attachment A provides a full discussion of the issues and current EPA policy. As discussed in Attachment A, in most cases offsets must be federally enforceable before a permit to construct and operate may be issued, although the offsetting emissions reductions need not be achieved until the permitted source commences operation. However, because of uncertainties surrounding NO_x reasonably available control technology requirements, EPA established an alternative approach which allowed sources to wait until commencement of operation to secure

federally-enforceable NO_x offsets, rather than require such offsets prior to issuance of a construction permit. See the Nitrogen Oxides Supplement to the General Preamble for Implementation of Title I ("NO_x Supplement") (57 FR 55620, Nov. 25, 1992).

The guidance in Attachment A elaborates on EPA's statements in the NO_x Supplement which enables States to issue new source review construction permits prior to the acquisition of federally-enforceable NO_x offsets. While EPA's guidance continues to allow for the acquisition of federally-enforceable NO_x offsets after permit issuance, it allows such delay primarily in cases where the Federal enforceability of a NO_x offset hinges on EPA approval of a State implementation plan (SIP) revision. Case-by-case situations may also be identified in the future where such a delay would be justified. In all other circumstances, including the draft permit identified in David Howekamp's memorandum, federally-enforceable NO_x offsets must be secured prior to issuance of a construction permit.

Today's policy does not supersede existing Federal or State regulations or approved SIP's. The policy set out in Attachment A is intended solely as guidance and does not represent final Agency action. The policy statement is not ripe for judicial review. Moreover, it is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. This policy is not binding on EPA or any regulated parties, and may be challenged in judicial review of final Agency action for which it is relevant. The EPA also may change this guidance at any time without public notice.

The Regional Offices should immediately distribute this memorandum with the attachments to States within their jurisdiction in order to provide notice of EPA's clarified NO_x offset policy. Questions concerning specific issues should be directed to the appropriate EPA Regional Office. Regional Office staff may contact Dan deRoeck of the New Source Review Section at (919) 541-5593, if they have any questions.

Attachments

cc: Air Branch Chief, Regions I-X

bcc: NSR Contacts
J. Martel, OGC
L. Wegman
E. Lillis
T. Helms
D. Solomon
D. deRoeck

ATTACHMENT A

DISCUSSION ON THE TIMING OF NITROGEN OXIDES (NO_x)
OFFSET REQUIREMENTS FOR PERMITTING NEW AND MODIFIED MAJOR SOURCES
UNDER SECTION 173 OF THE CLEAN AIR ACT(ACT)

Region IX has requested a statement of the Environmental Protection Agency's (EPA's) policy on the timing of offset requirements for construction permits issued under section 173 of the Act. The Yolo-Solano Air Quality Management District (Yolo-Solano AQMD) is challenging Region IX's position in connection with a permit to construct and operate a paper recycling plant that MacMillan-Bloedel, Haindl Papier, and HIPP Engineering are proposing to build. According to Region IX, this facility will have the potential to emit major amounts of NO_x and volatile organic compounds (VOC). Region IX further indicated that the Yolo-Solano AQMD and the California Air Resources Board are contesting Region IX's position that specific offsets must be federally enforceable before the permit may be issued and actually must be achieved by the time the source commences operation. This attachment clarifies current Agency policy concerning the timing of offsets.

The EPA's general policy is that emissions offsets for a major new or modified stationary source must be federally enforceable prior to the issuance of a part D new source review (NSR) construction permit. This position is consistent with congressional intent as reflected in the changes made to the Act under the 1990 Amendments. Nevertheless, on November 25, 1992, EPA published special guidance for obtaining NO_x offsets in the NO_x Supplement to the General Preamble for Implementation of Title I ("NO_x Supplement") [see 57 FR 55620 at 55624 (Nov. 25, 1992)]. Today's policy statement elaborates that the offset policy provided in the NO_x Supplement is generally limited to situations where States are generating offsets through State implementation plan (SIP) measures that EPA must process as a SIP submission in order for the measures to be fully enforceable by EPA. This policy may also apply in other specific circumstances for NO_x offsets, on a case-by-case basis. The EPA further intends to solicit comment on this policy in its forthcoming rulemaking implementing changes to the NSR program under the 1990 Amendments.

In the 1990 Amendments, Congress added or changed statutory language in section 173 in three places regarding the timing of offsets. In section 173(a)(1)(A), Congress added language to specify that the permitting authority may issue a permit to construct and operate if it determines that by the time the source is to commence operation "offsetting emissions reductions have been obtained." At the end of section 173(a)(1), Congress changed language to explicitly provide that the offsets required as a precondition of permit issuance under paragraph (a)(1) "shall be federally

enforceable before such permit may be issued." This clarified prior law which stated that the offsets must be "legally binding" before the permit may be issued. Finally, in new section 173(c)(1), Congress specified that offsetting emission reductions "shall be, by the time a new or modified source commences operation, in effect and enforceable."

The EPA had actually proposed to delete the federally-enforceable requirement pursuant to a settlement in Chemical Manufacturers' Association (CMA) v. EPA, (No. 79-1112) (D.C. Cir.); 48 FR 38742 (August 25, 1983) (proposal pursuant to "CMA Exhibit A"). While EPA ultimately rejected deleting the federally-enforceable requirement, 54 FR 27274 (June 28, 1989), Congress had reason to clarify this issue and codify its position.

The EPA's fundamental position, that offsets for nonattainment pollutants must be federally enforceable before a construction permit may be issued, pre-dates the 1990 Amendments; the Agency understands that most States have incorporated this requirement into their nonattainment NSR programs [see 40 CFR 51.165(a)(3)(ii)(E) and Appendix S]. As explained in the General Preamble for the Implementation of Title I:

The 1990 Amendments clarified the existing requirement by requiring that the offsets be federally enforceable before permit issuance [see revised section 173(a)]. Accordingly, while it is possible for a State to issue a permit to construct once sufficient emissions offsets have been identified and made federally enforceable (generally through a permit condition made to the permit of the existing source), the State must also ensure that the required emissions reductions actually occur no later than the date on which the new source or modified source would commence operation.

[see 57 FR 13498, 13553 (April 16, 1992)].

The requirement that offsets be federally enforceable is based on sound policy, as well. Federal enforceability for the source making the offsetting reductions ensures that the Agency may hold the reducing source responsible in an enforcement action for failure to make the reductions. It further ensures that the criteria for fully-creditable offsets (quantifiable, surplus, permanent) are addressed before construction may commence. After commencement of construction, the equity considerations shift in favor of the new or modified source needing offsets. Once constructed, it may become more difficult for EPA or a State to prevent that source from commencing operation even though the offsetting reductions are not yet identified, quantified, and secured with federally-enforceable restrictions.

As a result of new requirements established by the 1990 Amendments, NO_x emissions must be regulated similarly to VOC as precursors to ozone under the nonattainment NSR requirements. That is, sources of NO_x locating in a nonattainment area for ozone must meet the part D nonattainment permit requirements, including the applicable requirements for offsets. On

November 25, 1992, EPA published special guidance for obtaining NO_x offsets in the NO_x Supplement. There, the Agency explained that some sources had expressed concern that the delay in adopting rules for reasonably available control technology (RACT) applicable to utility boilers and other stationary sources might make efforts to locate offsets more difficult for new or modified major sources needing offsets. This was purportedly because uncertainty over the eventual NO_x RACT limit could lead existing NO_x sources to retain NO_x emissions reductions for their own use.

The EPA took the position that in order to ameliorate this situation, it would approve NSR SIP revisions that require the acquisition of federally-enforceable NO_x offsets, but allow sources to delay their acquisition up to the time that the new or modified source commences operation, thus enabling sources to wait out any initial uncertainties regarding the NO_x emissions reduction market. The EPA stated that it would not object if States were to issue permits to sources on the basis of an enforceable commitment to secure federally-enforceable offsets by the time the source is ready to commence operation. However, the NO_x Supplement further stated that construction permits would have to contain "federally-enforceable provisions that expressly prohibit the commencement of any actual operations until such time as the necessary offsetting emissions reductions have been identified, approved, and secured with appropriate permit restrictions on the source providing the offset." Finally, EPA intended in the NO_x Supplement that construction permits could be issued based on a commitment to secure offsets before commencement of operation only for NO_x offsets.

The EPA is concerned both about the consistency of this approach with Act requirements, and the potential abuse of it in practice. As discussed above, once a new or modified major source has completed construction and is ready to operate, it may be very difficult for reasons of equity for EPA or a State indefinitely to prevent the source from operating pending acquisition of sufficient creditable offsets that have been secured with federally-enforceable restrictions. In general, therefore, EPA does not believe it is appropriate to allow a construction permit to be issued until creditable offsets are identified, quantified, and made federally enforceable.

Still, EPA understands that in particular circumstances States have been prompted to adopt SIP measures to generate NO_x offsets, and that the only step remaining to ensure that EPA can enforce the measures is EPA approval of the SIP submission. In such circumstances, creditable offsets have been identified, quantified, adopted as a matter of State law, and submitted to EPA, but the EPA administrative process to approve the measure may not be completed by the time the source seeks to commence construction. This was precisely the situation recently in a case where the State of Maine adopted an extended enhanced vehicle inspection/maintenance program to generate NO_x offsets that would be used, in part, to provide offsets for new construction (see letter from Linda Murphy, EPA Region I, to Dennis Keschl, Maine Department of Environmental Protection, dated March 1, 1994). In such cases, it may not be feasible for EPA's administrative process needed to make the offsets federally enforceable to be completed within the ordinary timeframe for issuing a construction permit. Thus, EPA believes it is appropriate in these cases to retain the policy announced in the NO_x Supplement that a construction permit may be issued on the basis of a federally-enforceable commitment that the

source may not commence operation until the offsets are made federally enforceable by EPA approval of the SIP measure. That is, the construction permit would have to contain a federally-enforceable condition that expressly prohibits the commencement of any actual operations pending EPA approval of the SIP measure.

The EPA recognizes that there may be circumstances other than SIP measures awaiting EPA approval where sufficient creditable offsets have been identified and certain administrative obstacles remain to making the offsets federally enforceable. The EPA believes that it may be appropriate, on a case-by-case basis, to extend similar treatment to these sources, allowing them to obtain a construction permit that contains an explicit condition prohibiting operations until the offsets are made federally enforceable.

In the case of the Yolo-Solano AQMD's draft permit for the recycling plant, however, there is no pending SIP revision awaiting EPA approval that would generate federally-enforceable NO_x offsets. Indeed, apparently offsets have not yet even been identified. Further, the draft permit appears not to meet even the minimal guidance calling for a federally-enforceable condition prohibiting the commencement of operation until federally-enforceable offsets are actually accomplished, as set forth in the NO_x Supplement. The draft permit contains only a condition that, "[p]rior to initial reliability testing, [the source] shall submit to the District evidence of mitigation of all oxides of nitrogen and volatile organic compounds emitted." In light of the noted deficiencies in the Yolo-Solano AQMD's draft permit, the issuance of the final construction permit for the recycling facility is not acceptable.

Attachment F



7 of 100 DOCUMENTS

NATURAL RESOURCES DEFENSE COUNCIL, INC.; COMMUNITIES FOR A BETTER ENVIRONMENT; COALITION FOR A SAFE ENVIRONMENT; and DESERT CITIZENS AGAINST POLLUTION,, Plaintiff, v. SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; GOVERNING BOARD OF THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; and BARRY WALLERSTEIN, Executive Office, Defendants.

Case No: CV-08-05403-GW

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2010 U.S. Dist. LEXIS 35865

January 7, 2010, Decided

January 7, 2010, Filed

COUNSEL: [*1] For Natural Resources Defense Council, Inc., a non-profit corporation, Coalition for a Safe Environment, a California non-profit corporation, Plaintiffs: Adriano Martinez, LEAD ATTORNEY, Natural Resources Defense Council, Santa Monica, CA; Adrienne Bloch, LEAD ATTORNEY, Oakland, CA; Angela Johnson Meszaros, LEAD ATTORNEY, Angela Johnson Meszaros Law Offices, South Pasadena, CA; David R Pettit, LEAD ATTORNEY, Natural Resources Defense Council Inc, Santa Monica, CA; Shana D G Lazerow, LEAD ATTORNEY, Communities For A Better Environment, Oakland, CA.

For Communities for a Better Environment, a California non-profit corporation, Desert Citizens Against Pollution, a California non-profit corporation, Plaintiffs: Adrienne Bloch, LEAD ATTORNEY, Oakland, CA; Angela Johnson Meszaros, LEAD ATTORNEY, Angela Johnson Meszaros Law Offices, South Pasadena, CA; David R Pettit, LEAD ATTORNEY, Natural Resources Defense Council Inc, Santa Monica, CA; James Barton Lounsbury, Timothy R Grabiell, LEAD ATTORNEYS, Natural Resources Defense Council, Santa Monica, CA; Shana D G Lazerow, LEAD ATTORNEY, Communities For A Better Environment, Oakland, CA.

For South Coast Air Quality Management District, Barry Wallerstein, [*2] Executive Officer, Governing Board of the South Coast Air Quality Management District,

Defendants: Bradley R Hogin, LEAD ATTORNEY, Woodruff Spradlin and Smart, Orange, CA; Ricia R Hager, LEAD ATTORNEY, Woodruff Spradlin and Smart, Costa Mesa, CA.

For Southern California Edison Co, CPV Sentinel LLC, El Segundo Power LLC, Los Angeles County Business Federation, Los Angeles Area Chamber of Commerce, Walnut Creek Energy LLC, Intervenor Defendants: Ernest John Hahn, Michael G Romey, LEAD ATTORNEYS, Latham and Watkins LLP, Los Angeles, CA; Robert Arnold Wyman, Jr, LEAD ATTORNEY, Latham and Watkins, Los Angeles, CA.

For County Sanitation District No. 2 of Los Angeles County, Orange County Sanitation District, Intervenor Defendants: Daniel V Hyde, Raymond R Barrera, Paul John Beck, LEAD ATTORNEYS, Lewis Brisbois Bisgaard & Smith, Los Angeles, CA.

JUDGES: GEORGE H. WU, United States District Judge.

OPINION BY: GEORGE H. WU

OPINION

DECISION ON DEFENDANTS' MOTION TO DISMISS UNDER F.R.C.P 12(b)(1) and (6)

I. INTRODUCTION

This case is a citizen suit under *Section 304* of the Clean Air Act (sometimes referenced herein as the "Act"), 42 U.S.C. § 7604, brought by the Natural Resources Defense Council, Communities for a Better Environment, [*3] Coalition for a Safe Environment, and Desert Citizens Against Pollution (collectively "Plaintiffs") against the South Coast Air Quality Management District, its Governing Board and Executive Officer (collectively "Defendants"). The case involves the "offset" requirements of Defendants' "new source review" program required by Section 174 of the Act (42 U.S.C. § 7503(c)) for "nonattainment" regions. Under that program, before Defendants may allow construction of certain types of new and/or modified sources of air pollution, they must ensure that any emissions increases are offset by corresponding emissions reductions. Plaintiffs have challenged the validity of certain "internal" offsets (such as "priority reserve allocations") which Defendant South Coast Air Quality Management District ("SCAQMD") periodically utilizes and holds in an "internal bank."

On August 18, 2008, Plaintiffs filed this action seeking declaratory and injunctive relief after giving more than 60 days notice to the Defendants and the United States Environmental Protection Agency ("EPA"). On October 8, 2008, Defendants filed a motion to dismiss under Federal Rules of Civil Procedure ("F.R.C.P.") 12(b)(1) and 12(b)(6) [*4] on the grounds that this court lacks jurisdiction to hear the claims set forth in the Complaint, and/or the Complaint fails to state a claim for which relief can be granted. Hearings on that motion were held on December 11, 2008 and on February 2, March 19, May 5, July 6,¹ and August 31, 2009. After considering the moving, opposition, reply and supplemental briefs, the concomitant exhibits, the documents in the case file, materials subject to judicial notice, and the oral arguments at the hearings, the court grants Defendants' motion to dismiss for the reasons stated by this court at the hearings and as further memorialized herein.

¹ On July 6, 2009, a motion to intervene (as defendants) was granted as to Southern California Edison Co., Walnut Creek Energy LLC, Los Angeles Area Chamber of Commerce, Los Angeles County Business Federation, El Segundo Power, CPV Sentinel LLC, County Sanitation District No. 2 of Los Angeles County, and Orange County Sanitation District.

II. BACKGROUND

The Clean Air Act sets forth a comprehensive regulatory scheme for the reduction and prevention of air pollution by the States and the Federal Government. *General Motors Corp. v. United States*, 496 U.S. 530, 532, 110 S.Ct. 2528, 110 L.Ed.2d 480 (1990); [*5] *Latino Issues Forum v. United States EPA*, 558 F.3d 936, 938 (9th Cir. 2009). The scheme is designed to achieve and maintain compliance with the "National Ambient Air Quality Standards" ("NAAQS") established by the EPA.² For planning purposes, EPA has divided each state into separate "air quality control regions." 42 U.S.C. § 7407; 40 C.F.R. Part 81. EPA classifies each region based on whether the region meets the NAAQS. 42 U.S.C. § 7407(d); 40 C.F.R. Part 81, Subpart C. If a region has not achieved the NAAQS for a particular pollutant,³ EPA designates that region as "nonattainment" for that pollutant. 42 U.S.C. § 7501(2).

² The NAAQS are set at levels that are protective of human health, with an adequate margin of safety. 42 U.S.C. § 7409(b); 40 C.F.R. § 50.2(b).

³ EPA has established NAAQSs for six air pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter and sulfur dioxide. See 40 C.F.R. Part 50.

The NAAQS are maintained in part through "State Implementation Plans" or "SIPs." 42 U.S.C. § 7410(a)(1). SIPs contain specific control measures that are designed to achieve compliance with the NAAQS within the designated air quality control regions. The Act sets forth [*6] a number of general requirements for the content of SIPs. 42 U.S.C. § 7410(a)(2). SIPs must contain certain types of control measures including, *inter alia*, emissions limitations, compliance schedules, monitoring requirements, and enforcement mechanisms. *Id.* Within these general parameters, however, the states have substantial discretion to determine the specific air pollution control strategies set forth in their SIPs. See *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 470, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004); *Union Electric Co. v. EPA*, 427 U.S. 246, 250, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976). Each state is free to determine the particular "mix of emissions limitations" set forth in a SIP, as long as the SIP will achieve and maintain compliance with the NAAQS. *Train v. Natural Res. Defense Council*, 421 U.S. 60, 79, 95 S.Ct. 1470, 43 L.Ed.2d 731(1975); see also *Union Electric Co.*, 427 U.S. at 250.

The Act sets forth a detailed process for the preparation, adoption, and revision of SIPs. 42 U.S.C. § 7410. Each state must prepare a proposed SIP and submit it to EPA for review and approval. *Id.* at § 7410(a). EPA must consider whether the SIP meets all applicable requirements [*7] under the Act. *Id.* at § 7410(k)(3). Once

EPA approves a SIP, the SIP "has the force and effect of federal law. *Safe Air for Everyone v. U.S. EPA*, 488 F.3d 1088, 1096-97 (9th Cir. 2007); *Oregon Envtl. Council v. Oregon Dep't of Envtl. Quality*, 775 F.Supp. 353, 355 (D. Or. 1991). After approval, EPA can require revisions to an existing SIP if EPA determines that the SIP is substantially inadequate to achieve or maintain the NAAQS, or otherwise fails to comply with the Clean Air Act. 42 U.S.C. § 7410(k)(5). EPA requests for SIP revisions are commonly referred to as "SIP calls." See e.g. *Sierra Club v. Georgia Power Co.*, 443 F.3d 1346, 1348 (11th Cir. 2006).

A. The Clean Air Act's Offsets Requirement for SIPs

The Act sets forth certain requirements for nonattainment area SIPs. See Clean Air Act, Subchapter I, Part D, 42 U.S.C. §§ 7501-09a. Among other control measures, each nonattainment area SIP must contain a permitting program governing the construction and operation of "new and modified major stationary sources." 42 U.S.C. § 7502(c)(5). Such permit programs are often referred to as "new source review" or "NSR" programs. Each new source review program must set forth "pre-construction [*8] review" requirements that applicants must meet before the permitting agencies may issue permits to construct or operate any equipment that will increase nonattainment emissions. 40 C.F.R. § 51.165(a)(2).

This case involves the Act's "offset" provision, set forth in Section 173 of the Act (42 U.S.C. § 7503). Section 173(a)(1) provides that each new source review permit program set forth in a nonattainment area SIP must require that emission increases from new and modified major sources be offset by corresponding emissions reductions. Section 173(a)(1) states in relevant part as follows:

The permit program required by section 7502(b)(6)⁴ of this title shall provide that permits to construct and operate may be issued if--

(1) . . . the permitting agency determines that--

(A) by the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained, such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facili-

ties, and from the proposed source will be sufficiently less than total emissions from existing sources (as determined in accordance with the regulations under this paragraph) [*9] prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 7502 of this title) reasonable further progress (as defined in section 7501 of this title)

4 This citation in the current version of the statute is a typographical error. The citation should refer to 42 U.S.C. § 7502(c)(5), not 7502(b)(6).

An "offset" is a reduction of nonattainment pollutant emissions in an amount equal to, or somewhat greater than, the emissions increase of the same pollutant from the proposed new or modified stationary source or equipment. 42 U.S.C. § 7503(c)(1). A company might be allowed to create offsets, for example, by permanently shutting down a permitted piece of equipment, or curtailing production or operating hours. 40 C.F.R. § 51.165(a)(3)(i)(C)(1). Once created, companies may also be able to "bank" offsets, use them at a later time, and/or sell them to other companies.⁵

5 U.S. Environmental Protection Agency "Emissions Trading Policy Statement; General Principles for Creation, Banking and Use of Emission Reduction Credits," 51 Fed. Reg. 43814 (December 4, 1986).

Each specific SIP offset requirement [*10] adopted pursuant to Section 173(a)(1) must meet the general criteria set forth in Section 173(c). Section 173(c) generally states that permit programs in the SIP must provide, *inter alia*, that: 1) the offsets come from the same geographic area as the new source (Section 7503(c)(1)), 2) the offsets be "in effect and enforceable" by the time that the new source commences operation (*id.*), and 3) the offsets be "surplus" in the sense that they are not otherwise required by the Clean Air Act. 42 U.S.C. § 7503(c)(2). In

adopted regulations, EPA has provided further guidance on the required content of new source review programs, and offset requirements in particular. *See generally*, 40 C.F.R. § 51.165.

If the EPA determines that a State is not adequately implementing the provisions of its SIP for the nonattainment region in which a proposed new source of air pollutant emissions is to be constructed or modified, the EPA can order that no permits be issued by the State or its designee within the area until the problem is remedied. 42 U.S.C. § 7503(a)(4).⁶

6 As provided in 42 U.S.C. § 7413(a)(2), if the EPA finds that violations of an applicable SIP or an approved permit program are so widespread [*11] that such violations appear to result from a failure of the State to enforce its plan or program effectively, the EPA "shall so notify the State" and, if such failure extends beyond the 30th day after such notice (or 90 days in the case of a permit program), the EPA is to give public notice of such finding and the EPA will thereafter enforce the SIP requirements and/or permit program until such time as the State satisfies the EPA that it will adequately enforce the plan and/or program.

B. Regulation XIII's Offset Requirements for Sources

EPA has designated the "South Coast Air Basin" ("South Coast Basin" or "Basin") as an air quality region under the Act. It consists of the urban portions of Los Angeles, Riverside, and San Bernardino Counties, and all of Orange County. 40 C.F.R. § 81.305. The South Coast Basin is currently in attainment for nitrogen dioxide, sulfur dioxide, lead and carbon monoxide. 40 C.F.R. § 81.305. Because of its large population and unique meteorology,⁷ however, the Basin is currently nonattainment for ozone and particulate matter ("PM[10]"). 40 C.F.R. § 81.305.

7 *Cf.* CAL. HEALTH & SAFETY CODE § 40402(b) (acknowledging the "critical air pollution problems" in the [*12] South Coast Air Basin caused by millions of motor vehicles, stationary sources, atmospheric inversion layers, and large amounts of sunshine).

Pursuant to state law, SCAQMD is responsible for preparing and implementing the South Coast Basin SIP.⁸ To a large degree, the South Coast Basin SIP consists of SCAQMD's adopted Rules, to the extent that those Rules have been approved by EPA as part of the SIP. Because the South Coast Basin remains in nonattainment for certain pollutants, the South Coast Basin SIP contains a new source review program. This program is set forth in the

SIP-approved portions of SCAQMD's Regulation XIII.⁹ EPA approved the then-existing version of Regulation XIII as part of the SIP in 1996.¹⁰ *See* "Approval and Promulgation of Implementation Plan for South Coast Air Quality Management District" ("1996 SIP Approval") 61 Fed. Reg. 64291 (December 4, 1996), attached as Exhibit L, at page 79 of Defendants' Request for Judicial Notice re Supplemental Brief in Support of Motion to Dismiss ("DRJN"), Docket Item No. 44. Thus, Regulation XIII establishes the new source review SIP requirements for the South Coast Basin and, as approved by the EPA, has the force and effect [*13] of federal law. *See Communities for a Better Environment v. Cenco Refining Co.*, 180 F.Supp.2d 1062, 1068 (C.D. Cal. 2001).

8 SCAQMD must prepare and adopt an "air quality management plan" ("AQMP") for the South Coast Basin. CAL. HEALTH & SAFETY CODE §§ 40408 and 40460. The AQMP serves as the South Coast Basin SIP under the Clean Air Act. *Id.* at § 40460(d).

9 The EPA SIP-approved portions of Regulation XIII currently consists of the following Rules, as adopted by SCAQMD on the dates noted in parentheses: Rule 1301 (December 7, 1995); Rule 1302 (December 7, 1995); Rule 1303 (May 10, 1996); Rule 1304 (June 14, 1996); Rule 1306 (June 14, 1996); Rule 1309 (December 7, 1995); Rule 1309.1 (December 7, 1995 and modified on May 3, 2002); Rule 1310 (December 7, 1995); and Rule 1313 (December 7, 1995). *See* 61 Fed. Reg. 64291.

10 Since 1996, the SCAQMD has promulgated and implemented an additional provision into Regulation XIII, e.g. Rule 1315, which have not yet received EPA's approval.

Regulation XIII is designed to "achieve no net increases from new or modified permitted sources of nonattainment air contaminants or their precursors." *See* Rule 1301(a), Exhibit A, page 9 of DRJN. To that end, Regulation [*14] XIII sets forth preconstruction review requirements for new and modified sources of nonattainment emissions. The requirements of Regulation XIII are triggered by an application for a permit to construct under SCAQMD's Regulation II. *See generally* 64 Fed. Reg. 25828 (May 13, 1999).

Rule 1303 identifies the specific requirements that an applicant must meet before the District will issue a permit to construct for a new or modified source of nonattainment emissions. Rule 1303(b)(2) sets forth SCAQMD's basic offset requirements. That section provides in pertinent part as follows:

The Executive Officer or designee shall, except as Rule 1304 applies, deny the Permit to Construct for any new or modified source which results in a net emission increase of any nonattainment air contaminant at a facility, unless each of the following requirements is met:

(2) Emission Offsets

Unless exempt from offsets requirements pursuant to Rule 1304, emission increases shall be offset by either Emission Reduction Credits approved pursuant to Rule 1309, or by allocations from the Priority Reserve in accordance with the provisions of Rule 1309.1.

Rule 1303(b)(2) (emphasis added), Exhibit C, pages 31-32 of [*15] DRJN.

Pursuant to Rule 1303(b)(2), it is possible to satisfy the emission offset requirement through two different types of offsets. *Id.* at page 31. The first type of offset is created pursuant to Rule 1309, when a private company applies to SCAQMD to convert emission reductions into marketable "emission reduction credits" ("ERCs"). *See* Exhibit G, page 56 of DRJN. Upon approval of an application under Rule 1309(c), the ERCs are registered in the applicant's name. *Id.* at page 58. The ERCs then become a marketable commodity that can be used, banked, or sold. *See id.*, and Rule 1309(d) and (e). Rule 1309(b) sets forth the requirements for issuing ERCs to private applicants. *Id.* at pages 56-57. Under Rule 1309(b)(1), each application must contain a variety of specified information. ¹¹ Rule 1309(b)(4) sets forth eligibility requirements for emissions reductions that the applicant seeks to convert into ERCs. *Id.* at page 57.

11 The applicant for an ERC must supply documentation regarding: (a) the amount and type of emission reductions; (b) the date on which the emission reduction took place or is planned to take place; (c) the Regulation Zone from which the ERC is to originate; (d) the reason [*16] for the emission reduction, such as a process change, addition of control equipment or facility shutdown; and (e) the surrender of applicable operating permits whenever emission reductions are the result of either equipment or facility shutdown. Rule 1309(b)(1).

The second type of offset recognized in Rule 1303(b)(2) are "allocations from the Priority Reserve [issued] in accordance with provisions of Rule 1309.1." *See* Exhibit C, page 32 of DRJN. Rule 1309.1 provides

for the establishment of a "Priority Reserve" to provide offset credits for certain specified "priority sources" *See* Exhibit H, pages 61-62 of DRJN. Rule 1309.1 does not delineate how the Priority Reserve credits are to be generated.

In September of 2006, SCAQMD promulgated Rule 1315 to establish "procedures [to be] . . . used by the Executive Officer to demonstrate that the sources . . . which obtain emission credits through allocation from District Rule 1309.1-Priority Reserve . . . are fully offset by valid emission credits." Exhibit K, page 72 of DRJN. Pursuant to Rule 1315(c)(3), the SCAQMD, on its own initiative, identifies or "tracks" emissions reductions that have not been converted into private ERCs. *Id.* at pages 74-75. [*17] The term "tracking" as used in this context refers to the process of identifying emissions reductions and determining that they are eligible to be converted into offsets. *Id.* Emission reductions tracked by SCAQMD result from "orphan shutdowns," "orphan reductions," and certain other activities. ¹² *Id.* Those reduction amounts are placed in a category referenced in Rule 1315(c)(3) as "Offset Account Credits for Federal NSR Equivalency." *Id.* at page 74. Since 1990, SCAQMD has been converting orphan emissions reductions into offsets and depositing the resulting offsets into an internal bank. Pursuant to Rule 1315(c)(1), in addition to the Offset Account Credits for Federal NSR Equivalency, SCAQMD also had a "separate District offset account" for five specified pollutants which was established effective October 1, 1990 with initial balances listed in Table A of Rule 1315. *See id.* at page 73. However, any of those credits which had not been used by the end of 2005 were to be withdrawn and deemed unavailable for utilization thereafter. ¹³

12 An "orphan shutdown" occurs when a piece of equipment is permanently shut down and the owner does not apply to the SCAQMD for ERCs. Rule 1315(b)(3). An [*18] "orphan reduction" occurs when there is a reduction in actual emissions due to a physical change to the permitted source or its method of operations so long as the change is not otherwise required by law and does not otherwise result in the issuance of an ERC. Rule 1315(b)(2).

13 As stated in Rule 1315(c)(1):

Any portions of the initial account balances identified in Table A remaining in the District offset accounts at the end of calendar year 2005 shall be removed from the District offset accounts by the Executive Officer and shall not be used for purposes of demonstrat-

ing equivalency between federal NSR offset requirements and the District's NSR program.

See Exhibit K to DRJN at page 73.

SCAQMD periodically withdraws offset credits from the internal bank and utilizes them for one of two purposes: 1) to counterbalance emissions from new and modified sources that are exempt from Rule 1303(b)(2)'s offsets requirement pursuant to Rule 1304 (see Exhibit D to DRJN); and 2) to provide offsets to certain "priority" sources that are eligible to receive offsets pursuant to Rule 1309.1 (see Exhibit H to DRJN). Rule 1304 provides, *inter alia*, that certain types of specified projects are exempt from [*19] Rule 1303(b)(2)'s emission offset requirements. Since federal law contains no such exemption, SCAQMD provides offsets for these sources from its internal bank when issuing permits for those projects. ¹⁴ Rule 1309.1 allows specified sources to obtain internal offsets from an account in the internal bank known as the "priority reserve account." *Id.* Under the original version of Rule 1309.1, priority reserve offsets were available for innovative technology companies, research operations, and "essential public services" such as sewage treatment, police and firefighter facilities. Rule 1309.1 was later amended to allow access for certain power plant projects. *Id.*; see also 71 Fed. Reg. 35157, attached as Exhibit M to DRJN.

¹⁴ See generally U.S. EPA, Region IX, Air and Toxics Division, "Technical Support Document for EPA's Notice of Final Rulemaking for the California State Implementation Plan, South Coast Air Quality Management District, New Source Review" ("10/29/96 EPA Technical Support Document"), Gerardo C. Rios, October 29, 1996, at pages 15-16. The 10/29/96 EPA Technical Support Document is attached as Exhibit A to Plaintiffs' Request for Judicial Notice in Support of Opposition to [*20] Motion to Dismiss, Docket Item No. 23.

The SIP for the South Coast Basin distinguishes between privately held "ERCs" created pursuant to Rule 1309, and offsets held in SCAQMD's internal bank. ¹⁵ See, e.g., Rule 1303(b)(2), Exhibit C to DRJN at page 32. Thus, the term "ERC" will be used herein to refer to privately held offsets created pursuant to the application process set forth in Rule 1309. The term "internal offsets" will be used to refer to offsets created by SCAQMD on its own initiative and contained in SCAQMD's internal bank.

¹⁵ Regulation XIII, as EPA SIP-approved, consistently uses the term "ERC" to refer to privately held offset credits that result from an application under Rule 1309. In contrast, depending on the context, Regulation XIII refers to internal offsets as "Priority Reserve allocations," "Priority Reserve Credits," "Priority Reserve Offsets," or "offsets obtained pursuant to the exemption provisions of Rule 1304." Rule 1306(e)(3) explicitly excludes "Priority Reserve allocations" from the calculation of "Emission Reduction Credits." See Exhibit F to DRJN at page 53.

As explained above, ERCs and internal offsets are used for the same basic purpose -- to satisfy Rule 1303(b)(2)'s [*21] offset requirement. The creation of ERCs and internal offsets, however, are subject to different, and in some cases conflicting, requirements. The requirements for creating ERCs are codified in Rules 1309 and 1306. Rule 1309(b)(4) sets forth the "emission reduction eligibility requirements" that applicants must meet in order to obtain ERCs. It provides, *inter alia*, as follows:

The applicant must demonstrate to the Executive Officer or designee that all stationary and mobile source reductions are:

- (A) real;
- (B) quantifiable;
- (C) permanent;
- (D) federally enforceable; and
- (E) not greater than the equipment would have achieved if operating with current Best Available Control Technology.

Rule 1309(b)(4), Exhibit G, page 57 of DRJN. In addition, Rule 1309(b)(5) sets forth what is commonly known as a "surplus" requirement for offsets. When an applicant proposes to convert an emission reduction into an ERC, the emission reduction cannot otherwise be required by existing federal requirements. The emission reduction must, in other words, be "surplus" to existing federal requirements. Rule 1309(b)(4) also provides that ERCs must be calculated pursuant to Rule 1306. Rule 1306(e) sets forth the method [*22] for calculating the amount of ERCs to be granted to an ERC applicant under Rule 1309. ¹⁶ See Exhibit F to DRJN. Rule 1306(c) fur-

ther describes a specific methodology that must be used for calculating emission decreases.

16 Rule 1306(a) also sets forth requirements for calculating emissions increases and decreases in connection with determining (1) whether Regulation XIII applies to a particular proposed new or modified source; and (2) the amount of offsets required for a particular proposed new or modified source.

In contrast to ERCs, the requirements for creating internal offsets are not codified in the EPA SIP-approved portions of Regulation XIII. The requirements for creating internal offsets are set forth in SCAQMD's offset "tracking system." From 1990 to 2006, this tracking system was utilized but uncoded. In September of 2006, SCAQMD codified the tracking system by promulgating SCAQMD Rule 1315. While Rule 1315 is part of Regulation XIII, it is not part of the federally enforceable SIP because it has not yet been approved by EPA.

When SCAQMD submitted the then-existing Regulation XIII to EPA for SIP approval in 1995, the submission included a summary of SCAQMD's internal offset [*23] tracking system.¹⁷ Because Regulation XIII as proposed in 1995 would allow SCAQMD to utilize internal offsets in connection with Rules 1304 and 1309.1, EPA specifically considered whether SCAQMD's internal offset tracking system met the requirements of Section 173. See 10/29/96 EPA Technical Support Document at pages 15-16. EPA determined at that time that the tracking system did in fact satisfy the legal requirements of Section 173(c). *Id.*; see also 1996 SIP Approval, 61 Fed. Reg. 64291. In 2006, in approving the most recent version of Rule 1309.1, EPA reiterated its determination that SCAQMD's tracking system and internal offsets meet the requirements of Section 173. See "Revisions to the California State Implementation Plan, South Coast Air Quality Management District," 71 Fed. Reg. 35157 (June 19, 2006), attached as Exhibit M to DRJN. EPA explained as follows: "In approving Rule 1309.1 in 1996, we determined that the District's implementation of a tracking system demonstrated that the Priority Reserve bank's emission reduction credits complied with the requirements of section 173(c) [of the Clean Air Act]." ¹⁸ *Id.* at 35158.

17 See 10/29/96 EPA Technical Support Document at page [*24] 16; see also 71 Fed. Reg. 35157, 35158.

18 In connection with EPA's 2006 approval of modifications to Rule 1309.1, an organization called "California Unions for Reliable Energy" ("CURE") filed written comments objecting to Rule 1309.1 as revised. With those comments,

CURE made the same basic allegation which is set forth in Plaintiffs' Complaint -- that SCAQMD's internal offsets do not meet the requirements of Section 173(c). As the cited passage shows, EPA rejected that contention.

III. F.R.C.P. 12(b)(1) AND 12(b)(6)

F.R.C.P. Rule 12(b)(1) authorizes a motion to dismiss based on lack of subject matter jurisdiction. Both the Constitution and Congress place limits on the jurisdiction of federal courts. These limits "[m]ust be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). The plaintiff has the burden to establish that subject matter jurisdiction is proper, and, "[i]f [it] does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment." *Kokkonen v. Guardian Life Ins. Co.* 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); [*25] *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001).

F.R.C.P. Rule 12(b)(6) authorizes a motion to dismiss based on failure to state a claim for which relief can be granted. A motion to dismiss for failure to state a claim is properly granted where the plaintiff fails to plead a cognizable legal theory, or where the plaintiff fails to plead sufficient facts under a cognizable legal theory. *Johnson v. Riverside Healthcare System*, 534 F.3d 1116, 1121 (9th Cir. 2009); see also *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-62, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (dismissal for failure to state a claim does not require the appearance, beyond a doubt, that the plaintiff can prove "no set of facts" in support of its claim that would entitle it to relief). Under Rule 12(b)(6), a court must 1) construe the complaint in the light most favorable to the plaintiff, and 2) accept all well-pleaded factual allegations as true, as well as all reasonable inferences to be drawn from them. See *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), amended on denial of reh'g, 275 F.3d 1187 (9th Cir. 2001); *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). [*26] The court need not accept as true "legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). "Although conclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations; rather, it must plead enough facts to state a claim to relief that is plausible on its face." *Cousins v. Lockyer*, 568 F.3d 1063, 1067-68 (9th Cir. 2009) (omitting internal quotation marks and citations). In its consideration of the motion, the court is limited to the alle-

gations on the face of the complaint (including documents attached thereto), matters which are properly subject to judicial notice, and "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." See *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001); *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir.), cert. denied, 512 U.S. 1219, 114 S. Ct. 2704, 129 L. Ed. 2d 832 (1994).

IV. DISCUSSION

A. Introduction

Plaintiffs here proceed under Section 304(a) of the Clean Air Act, 42 U.S.C. § 7604(a)(1). [*27] Section 304(a) provides in relevant part that "any person may commence a civil action on his own behalf" in a federal district court:

... against any person (including ... any other governmental instrumentality or agency ...) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter. ...

42 U.S.C. § 7604(a). An "emission standard or limitation under this chapter" is defined, in relevant part, at 42 U.S.C. § 7604(f) as follows:

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

....

(3) any condition or requirement of a permit under ... part D of subchapter I [42 USCS §§ 7501 et seq.] (relating to non-attainment), ... any condition or requirement under an applicable implementation plan relating to ... air quality maintenance plans ...; or

(4) any other standard, limitation, or schedule established under any permit issued pursuant to ... any

applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition [*28] of operations[.]

which is in effect under this Act (including a requirement applicable by reason of section 118 [42 USCS § 7418]) or under an applicable implementation plan.

Any challenge to review the EPA "Administrator's action in approving or promulgating any implementation plan under [42 U.S.C.] section 7410 ... or under regulations thereunder ... or any other final action of the Administrator under [42 U.S.C. Chapter 85, §§ 7401-7671q] ... which is locally or regionally applicable may be filed *only* in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1) (emphasis added).

Plaintiffs' Complaint herein asserts that SCAQMD does not have any tracking system or other means of verifying the validity of the emission reduction credits which it monitors and/or distributes. See Complaint at P 31. Consequently, Plaintiffs contend that "SCAQMD cannot now or in the future, and may never have been able to, demonstrate that those credits are real, surplus, enforceable, quantifiable, and permanent, as required by the Act, implementing regulations and guidance, and California SIP requirements." Id. Plaintiffs also charge that within the "SCAQMD's offset accounts" [*29] are credits which were initially recognized in the SCAQMD's original "state trading program, which existed before the 1990 Amendment [to the Act]." Id. at P 38 ("When Congress amended the Act in 1990, SCAQMD purportedly deposited the credits from its state account into the new federal NSR program accounts."). Id. Plaintiffs refer to those items as "pre-1990 credits." ¹⁹ Id.

19 Plaintiffs claim that "[i]n the early 00's, EPA requested that SCAQMD provide records to confirm the validity of its pre-1990 credits, but after investing 6,000 person-hours, SCAQMD was unable to provide the necessary verification for a substantial portion of these credits." Complaint at P 39.

Plaintiffs have raised the following four overlapping causes of action: 1) SCAQMD has failed to comply with (and therefore violated) the Clean Air Act's offset requirements in 42 U.S.C. § 7503(c) because it continues

to utilize the pre-1990 credits when it has not and cannot verify their validity; 2) SCAQMD has failed to comply with § 7503(c) and the EPA-approved portions of the relevant SIP (i.e. Regulation XIII) because "SCAQMD cannot demonstrate that credits in SCAQMD's offset accounts comply with the CAA offset requirements, [*30] including but not limited to, the surplus requirement and SCAQMD Regulation XIII [see Complaint at P 59]"; 3) SCAQMD has violated § 7503(c) and 61 Fed.Reg. 64291-64292 because - "as part of SIP approval, SCAQMD is required to track both emission credits and debits from its offset accounts to ensure that credits are equal to, or greater than, debits resulting in a positive balance [see Complaint at P 63]" - the SCAQMD cannot verify the validity of its pre-1990 credits or otherwise demonstrate that it has (or has had) a positive account balance necessary to permit its distribution of emission offset credits; and 4) SCAQMD violated § 7503(c) and 61 Fed. Reg. 64291-64292 because it has failed to adopt and utilize a tracking system which: a) verifies that the offset credits in its accounts are "real, surplus, quantifiable, enforceable, and permanent," b) would show that SCAQMD's offset accounts have a positive balance at all relevant time frames, and c) would allow "citizens, state regulators, or EPA to verify independently the source of credits either upon deposit into SCAQMD's offset accounts or upon the credits redistribution to polluting facilities [see Complaint at P 71]." At the March [*31] 19, 2009 hearing, Plaintiffs' counsel stated that Plaintiffs were "not challenging open-market ERCs that are held by private parties. We are challenging the ERCs [the internal offsets] that are in the district's accounts." See March 19, 2009 Reporter's Transcript of Proceedings at pages 26-27.

In their Prayer for Relief, Plaintiffs seek, *inter alia*, injunctive relief directing the SCAQMD to: 1) "cease distributing and remove invalid credits from its offset accounts," 2) "retire invalid credits from its offset accounts," 3) "implement a program, subject to Plaintiffs' approval, that reduces emissions in an amount equivalent to, or greater than, the emissions that were unlawfully allowed by SCAQMD's distribution and sale of invalid credits from its offset accounts," and 4) "adopt a tracking system that complies with the requirements of 42 U.S.C. § 7503(c) and 61 Fed. Reg. at 64291." See Complaint at page 18.

C. This Court Lacks Jurisdiction over the Alleged Violations of Section 173(c)

The Complaint alleges in a number of places (and Plaintiffs' first cause of action rests upon the claim) that the SCAQMD directly violated Section 173(c) of the Act, 42 U.S.C. § 7503(c). See, e.g., Complaint [*32] PP 49, 64 and 71. Upon that basis, Plaintiffs seek to bring

this action pursuant to Section 304(a) of the Act, 42 U.S.C. § 7604(a)(1). Plaintiffs, however, misconstrue the nature of Section 173 and its function within the Clean Air Act scheme. Section 173 does not set forth "emissions standards or limitations" within the meaning of Section 304 as such. Rather, Section 173 describes the general types of emissions standards and limitations that a SIP must contain. Simply put, Section 173 establishes requirements for SIPs, not sources. This court lacks jurisdiction to consider a violation of Section 173 (which deals with the contents of permit programs in a SIP²⁰), because the Courts of Appeal have exclusive jurisdiction to hear any challenge to the content (or lack of appropriate content) of a SIP. See 42 U.S.C. § 7607(b)(1). Since EPA, not SCAQMD, is responsible for approving SIPs, it is clear that the first claim for relief does not state a valid cause of action against SCAQMD.

20 Admittedly, however, a challenge based upon a violation of an emission standard or limitation contained in a SIP could be brought in a district court under 42 U.S.C. § 7604.

Part D of Subchapter 1 of the Clean [*33] Air Act is entitled "Plan Requirements for Nonattainment Areas" and it sets forth a variety of provisions relating to SIPs. 42 U.S.C. §§ 7501-09a. Sections 172 and 173, both contained within Part D, together establish general requirements for the content of SIPs for nonattainment areas. 42 U.S.C. §§ 7502, 7503. Section 172 is entitled "Nonattainment Plan Provisions in General." Under Subsection 172(c), each SIP must contain, *inter alia*, the following types of prerequisites:

- . provisions requiring the implementation of all reasonably available control measures as expeditiously as practicable - Section 7502 (c)(1);

- . provisions designed to achieve attainment of the national ambient air quality standards - *Id.*;

- . provisions requiring "reasonable further progress" toward attainment of the national ambient air quality standards - Section 7502 (c)(2);

- . an inventory of emissions within the SIP area - Section 7502 (c)(3);

- . emissions limitations - Section 7502 (c)(6);

- . other "control measures, means, or techniques" - *Id.*;

- . schedules and timetables for compliance - *Id.*; and

a permit program "in accordance with" Section 173 - Section 7502(c)(5).

plaintiff's own notion of proper environmental policy.

Section 173, entitled "Permit Requirements," sets [*34] forth the general parameters for the permit programs mandated by Section 172(c)(5). Under Section 173(a), permit programs must impose various types of conditions on new and/or modified sources of air pollution. For example, such programs must provide that permits to construct and operate a new or modified source may only be issued if the applicant, *inter alia*: 1) obtains offsets (Section 7503(a)(1)(A)), 2) complies with the lowest achievable emission rate (Section 7503(a)(2)), and 3) demonstrates that all of its other facilities are (or are scheduled to be) in compliance with all applicable emission limitations and standards of the Clean Air Act (Section 7503(a)(3)). The language of Section 173 clearly contemplates that specific offset requirements applicable to sources will be set forth in the individual SIPs.²¹

21 See 42 U.S.C. § 7503(a) ("The permit program required by section 7502[(c)(5)] shall provide . . ."). Section 173(c)(1) describes how applicants may comply "with any offset requirement in effect under this part." 42 U.S.C. § 7503(c)(1) (emphasis added). Section 173(c)(2) imposes additional requirements "for purposes of any such offset requirement." 42 U.S.C. § 7503(c)(2) [*35] (emphasis added).

Sections 172 and 173 of the Act are not themselves emission standards or limitations; they simply delineate the required contents of SIPs for nonattainment areas. The only way in which a State or its designee could possibly violate either section would be by promulgating a SIP which infringes on or omits a mandatory provision of those statutes. However, under the Clean Air Act, a review of a SIP's contents cannot be made in the context of a 42 U.S.C. § 7604(a) action in district court. As observed in *Communities for a Better Env't*, 180 F.Supp.2d at 1077:

"Citizen suits . . . are authorized to enforce SIP provisions." *Coalition for Clean Air v. South Coast Air Quality Management District*, 1999 U.S. Dist. LEXIS 16106, *6 (C.D. Cal.) Plaintiffs seeking to bring a citizen suit for violation of an emission standard or limitations contained in a SIP must allege a violation of a specific strategy or commitment in the SIP; suit may not be maintained solely to force regulators to attain the NAAQs or to modify or amend a SIP to conform to a

Before a SIP can be adopted, a State must give "reasonable notice" of the proposed [*36] SIP and allow for public hearings. 42 U.S.C. § 7410(a).²² Persons (who believe that a proposed SIP or revision to a SIP by a State or its designee is defective or in violation of the Act) are obligated to raise their objections at the state level so that the matter can be considered and rectified before the plan or revision is reviewed by the EPA Administrator. See generally *Sierra Club v. Indiana-Kentucky Electric Corp.*, 716 F.2d 1145, 1149-51 (7th Cir. 1983); *Appalachian Power Co. v. EPA*, 579 F.2d 846, 854-55 (4th Cir. 1978). Once adopted by the State, the SIP is reviewed by the EPA Administrator who can either approve it or disapprove it in whole or in part. 42 U.S.C. § 7410(c). If the Administrator disapproves the SIP in whole or in part, unless the State corrects the deficiencies and the Administrator approves the plan revision, the Administrator can promulgate a "Federal implementation plan" for the particular nonattainment area. *Id.*; see also 42 U.S.C. § 7602(y). Further, "[w]henver the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, . . . or to otherwise [*37] comply with any requirement of [the Clean Air Act], the Administrator shall require the State to revise the plan as necessary to correct such inadequacies" using the same process as required for the initial adoption of the SIP. 42 U.S.C. § 7410(k)(5). As noted above, it is only upon the approval of the SIP by the EPA Administrator that the provisions of a SIP become enforceable federal law. Therefore, a claim that a State or its designee has violated 42 U.S.C. § 7503(c) can only be based upon the EPA Administrator's approval of the SIP or its revision, and that decision is only reviewable in the Courts of Appeal pursuant to Section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1). In addition, as further stated in 42 U.S.C. § 7607(b)(2): an "[a]ction of the Administrator with respect to which review could have been obtained under [§ 7607(b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement." Consequently, if a claim or objection could have been raised to the EPA Administrator prior to final action being taken, then that claim/objection cannot thereafter be brought through a citizen suit in the district court via 42 U.S.C. § 7604. See generally [*38] *Romoland School District v. Inland Empire Energy Center, LLC*, 548 F.3d 738, 755 (9th Cir. 2008).

22 See California Health & Safety Code §§ 40460, 40463 and 40466 which provide for pub-

lic hearings and comment periods prior to the adoption of a SIP or revisions thereto by the SCAQMD and the State Air Resources Board.

In their first cause of action, Plaintiffs contend that the SCAQMD's distribution of pre-1990 credits constitutes a violation of Section 173(c) of the ACT (42 U.S.C. § 7503(c)). However, as discussed above, this district court would have no jurisdiction to entertain that claim against the SCAQMD under 42 U.S.C. § 7604(a) based solely upon a purported violation of Section 173(c) - as opposed to a claim of a violation of a specific provision of a SIP that was promulgated pursuant to Section 173 and approved by the EPA Administrator. First, any violation of Section 173 would have to be brought against EPA in the Ninth Circuit pursuant to Section 307 of the Act (42 U.S.C. § 7607). Section 307 is the exclusive means for challenging the content of a SIP or where the dispute as to the agency action is "embedded in a challenge to the validity of an implementation plan." *Abramowitz v. EPA*, 832 F.2d 1071, 1075-76 (9th Cir. 1987). [*39] Since Section 173 consists entirely of requirements for the content of SIPs, it follows that Section 307 is the exclusive means of alleging a violation of Section 173. Such an action must be brought in the applicable Court of Appeals. 42 U.S.C. § 7607(b); *Action for Rational Transit v. West Side Highway Project*, 699 F.2d 614 (2d Cir. 1983).²³

23 As stated in *Action for Rational Transit*, what the plaintiffs really sought from their lawsuit was "not relief from violations of the existing SIP so much as revisions of the SIP by way of relief to make that document conform to [plaintiffs'] notion of proper environmental policy. But to the extent that [plaintiffs] desire to augment or amend the SIP to correct perceived inadequacies, their arguments were not properly addressed to the district court. The courts of appeals have exclusive jurisdiction to review SIPs approved by the Environmental Protection Agency...." 699 F.2d at 616.

Second, the gravamen of the Plaintiffs' first cause of action is that the District's internal offsets do not meet the requirements of Section 173(c). This court is without jurisdiction as to that claim for the separate reason that EPA determined in 1996 that SCAQMD's [*40] internal offsets met the requirements of Section 173(c) and reiterated that finding in 2006. See 71 Fed. Reg. at 35158. This determination was based on the District's use of an uncodified tracking system to ensure the validity of the credits. *Id.* Plaintiffs could have challenged EPA's determinations in 1996 and 2006 in the Ninth Circuit under Section 307, and sought the same relief that they seek here -- a judicial determination that the internal offsets

do not meet the requirements of Section 173(c). Having failed to do so, the Plaintiffs are precluded from filing an action on the same ground now. Sections 304 and 307 of the Act do not allow concurrent jurisdiction in the Ninth Circuit and district court. See generally *Romoland School District*, 548 F.3d at 755. The Ninth Circuit has exclusive jurisdiction to hear any suit that it could have heard at any point in the past regarding the EPA's approval of SCAQMD's internal offsets and its use of pre-1990 credits. *Missouri v. U.S.*, 109 F.3d 440, 441 (8th Cir. 1997); *Virginia v. U.S.*, 74 F.3d 517, 523-25 (4th Cir. 1996).

This case is similar to *Delaware Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256 (3d Cir. 1991). In *Delaware* [*41] *Valley Citizens*, an environmental group brought a citizen suit against the state of Pennsylvania under Section 304. The first, third, and fourth claims in the complaint therein, respectively, alleged that the state violated statutory duties set forth in the Clean Air Act to: 1) adopt a motor vehicle emissions control program in areas that did not meet the ozone standard; 2) revise the SIP periodically based on new methods that would expedite attainment; and 3) attain the ozone standard for certain areas by certain dates. *Id.* at 262. The plaintiff, in other words, sought to directly enforce the Clean Air Act provisions through a Section 304 suit.

The court in *Delaware Valley Citizens* upheld the dismissal of these claims on a *Rule 12(b)(1)* motion. The court determined that Section 304 "is not available for purely statutory violations" of the Clean Air Act. *Id.* at 266. The court explained as follows:

Counts One, Three and Four of the Citizens' complaint against Pennsylvania rest on *direct* violations of . . . the statute itself, not violations of any version of the Plan involved in this case. The Citizens' right to bring those claims in the district court must rest on a specific violation [*42] of an emission standard or limitation that is in effect under or in accordance with these sections of the Act. Neither § 7410(a)(2)(H)(i) nor § 7502(b)(11)(B) deal with emission standards or limitations. They outline what an implementation plan must contain to get EPA approval. They do not support a citizens' suit under § 7604.

Id. at 266 (emphasis added). Section 173 is functionally the same as the statutory provisions at issue in *Delaware Valley Citizens*. Section 173 on its face "outlines what an

implementation plan must contain to get EPA approval." That Section does not directly impose any specific offset requirement that can be enforced by Section 304.

Plaintiffs cite *Conservation Law Foundation v. Federal Highway Administration*, 24 F.3d 1465 (1st Cir. 1994) ("CLF I") and *Conservation Law Foundation v. Busey*, 79 F.3d 1250 (1st Cir. 1996) ("CLF II") in support of their argument that this district court has jurisdiction over Section 173(c) claims. According to the Plaintiffs, these cases stand for the proposition that Section 173 can be directly enforced under Section 304 because Section 173 is purportedly a "standard of performance" within the meaning of Section 304(f) (42 U.S.C. 7604(f)). [*43] The CLF I and CLF II decisions, however, in no way support Plaintiffs' argument. To the contrary, the cited holding in CLF I is not controlling law, and the CLF II decision actually supports Defendants' position.²⁴

24 The court in CLF I held that Section 176 (42 U.S.C. § 7506) is subject to direct enforcement under Section 304 because it constitutes a "performance standard" within the meaning of Section 304(f). This holding, however, was merely dicta because, as the court explained, "the outcome of this case does not depend on our jurisdictional ruling." 24 F.3d at 1478 n.6. Thus, that court stated that it "remain[ed] free to revisit the issue in a future case where it may be decisive." *Id.* Moreover, that same court did in fact revisit the issue later, and held that Section 176 is not an "emission standard or limitation" subject to direct enforcement under Section 304. CLF II, 79 F.3d at 1257-60.

In CLF II, environmental groups brought a citizen suit against the Federal Aviation Administration ("FAA") and other defendants under Section 304. The suit challenged an Air Force base redevelopment project. The plaintiffs in CLF II argued that the FAA's approval of the base project violated [*44] Section 176 of the Act (42 U.S.C. § 7506). Section 176 prohibits federal agencies from taking any action that "does not conform" to the applicable SIP. Section 176 is commonly known as the Clean Air Act's "conformity provision." The court in CLF II expressly considered whether the conformity provision constitutes an "emissions standard or limitation" within the meaning of Section 304(a). CLF II, 79 F.3d at 1257.

The court in CLF II held that Section 304 can only be used to directly enforce compliance with a provision of the Act if two criteria are met. First, as a "threshold" matter, the provision in question must constitute an "emissions standard or limitation" in effect "under" the Clean Air Act or a SIP. Second, the claim must be

brought to enforce "specific measures, strategies, or commitments designed to ensure compliance with" the national ambient air quality standards. *Id.* at 1258. The court described this second criteria as the "specificity test." *Id.*

The court in CLF II concluded that the plaintiffs' claim did not pass the threshold test under Section 304, because the Section 176 conformity provision does not constitute an "emissions standard or limitation" within the meaning [*45] of Section 304(a). The court rejected the argument that the Section 176 conformity provision is a "standard of performance" within the meaning of Section 304(f). Section 302(1) defines "standard of performance" as "a requirement of continuous emission reduction." 42 U.S.C. § 7602(l). The court in CLF II noted that "nothing in [Section 176] imposes an emissions reduction requirement." *Id.* at 1259. The court explained that Section 176 merely prohibits a federal agency from supporting activities that do not conform to emissions reduction requirements. The specific emissions reduction requirements themselves are set out elsewhere, such as in a SIP. *Id.* at 1259-60; accord *Audubon Naturalist Society v. U.S. Dept. of Trans.*, 524 F.Supp.2d 642, 695-96 (D. Md. 2007). Because the plaintiffs' claim did not pass the "threshold" test, the court in CLF II expressly did not consider the "specificity" issue. *Id.* at 1259 n.2.

Plaintiffs' claim here does not pass the threshold test set forth in CLF II because Section 173 does not impose any "emissions standards or limitations" on sources. As explained above, Section 173 imposes requirements on SIPs, not sources.

Plaintiffs' claim also fails the "specificity" [*46] test set forth in CLF II because the general requirements set forth in Section 173 can be accomplished in different ways. In order to show how offset requirements under Section 173 can differ, one need look no further than Regulation XIII. The internal offset tracking system currently set forth in Rule 1315 imposes very different requirements than those set forth for privately held ERCs in Rule 1309. Under Rule 1309, for example, ERCs are individually validated and registered. In contrast, SCAQMD's internal offset tracking system tracks offsets in the aggregate, because individual offsets become undifferentiated once they are "deposited" or credited into the District's internal bank.²⁵ The internal offsets are validated based on specified "reporting periods" (*i.e.* 10/1/90 to 7/31/95; individual years from 8/95 to 7/04; 8/04 to 12/05; and each calendar year beginning with 2006). Rule 1315(d). In addition, SCAQMD's internal offset tracking system requires that internal offsets be discounted annually in order to ensure that they are "surplus." Rule 1315(c)(4). In contrast, surplus determinations for privately held ERCs are made on an individual basis under Rule 1309(b)(5).

25 Rule 1315 [*47] is designed to ensure that "the District's offset accounts meet in aggregate the federal nonattainment NSR offset requirements." See Rule 1315(a); see also, 10/29/96 EPA Technical Support Document at page 15 (indicating approval of SCAQMD's tracking system "which will continuously show that in the aggregate the District, will be able to provide for the necessary offsets required to meet the appropriate statutory offset ratio"). The internal offsets are, of course, differentiated based on the nature of the pollutant. In other words, the District separately accounts for PM₁₀ offsets, VOC offsets, etc.

Some of the requirements set forth in Rule 1309 and 1315 are in direct conflict. Under Rule 1306(c), for example, the amount of ERCs issued to a private applicant is based on the actual emission decrease at a source which is modified or removed from service, reduced to the amount that would be actual if "best available control technology" ("BACT") were applied. In contrast, under Rule 1315, the amount of internal offsets resulting from an orphan shutdown or orphan reduction is based on eighty percent of the source's permitted emission levels. Rule 1315(c)(3)(B). Thus, the calculation [*48] of ERCs and internal offsets is different in two key respects. First, ERCs are based on actual emissions, while internal offsets are based on permitted emissions. Second, in calculating the amount of offsets to be issued, emission reductions for ERCs are discounted to BACT levels, while emission reductions for internal offset are not discounted to BACT levels.

Finally, Plaintiffs allege that SCAQMD violated offset requirements established by the EPA regulations set forth in 40 C.F.R. Part 51. Like Section 173, however, the Part 51 regulations merely specify the required content of SIPs. This is abundantly clear from the plain language of the regulations. See, e.g., 40 C.F.R. § 51.160 ("each plan must set forth legally enforceable procedures . . ."); 40 C.F.R. § 51.161 ("the legally enforceable procedures in section 51.160 must also require the State or local agency to provide opportunity for public comment on information submitted by owners and operators"); 40 C.F.R. § 51.161 ("each plan must identify the State or local agency which will be responsible for meeting the requirements of this subpart in each area of the State"). In particular, Plaintiffs cite a provision of 40 C.F.R. § 51.165 [*49] relating to offsets. Section 51.165, however, clearly prescribes the required content of a SIP. Section 51.165(a) generally provides that "State Implementation Plan . . . provisions satisfying sections 172(c)(5) and 173 of the Act shall meet the following

conditions" The specific section cited by Plaintiffs provides as follows:

(3)(i) Each plan shall provide that for sources and modifications subject to any preconstruction review program adopted pursuant to this subsection the baseline for determining credit for emissions reductions is the emissions limit under the applicable State Implementation Plan in effect at the time the application to construct is filed

...

(ii) The plan shall further provide that:

...

(C)(1) Emissions reductions achieved by shutting down an existing emission unit or curtailing production or operating hours may be generally credited for offsets if they meet the requirements in paragraphs (a)(3)(ii)(C)(1)(i) through (ii) of this section.

(i) Such reductions are surplus, permanent, quantifiable, and federally enforceable.

40 C.F.R. § 51.165(a)(3)(ii)(C)(1)(i) (emphasis added). Like Section 173, the Part 51 regulations plainly do not themselves establish [*50] enforceable emissions standards or limitations, but rather identify the types of emissions standards and limitations that must be set forth in a SIP.

C. First Claim for Relief -- Pre-1990 Credits

Assuming *arguendo* that this Court had jurisdiction over Plaintiffs' first cause of action (that the SCAQMD violated Section 173(c) because it distributed pre-1990 credits when it cannot verify their validity), that claim would be dismissed pursuant to *F.R.C.P. 12(b)(6)* as moot. In this action, Plaintiffs seek inter alia to have the SCAQMD "cease distribution and remove invalid credits from its offset accounts." Plaintiffs have not requested that the pre-1990 offsets currently in use by third party facilities to be recalled, but simply to have the offsets "retired" when the facilities shut down or otherwise cease their utilization of the credits.

The SCAQMD in September of 2006 adopted Rule 1315 which deals in part with the pre-1990 offsets. Rule 1315(c)(1) states:

The District offset accounts are established with valid credits effective October 1, 1990 for the air contaminant and with the initial account balances as listed in Table A. Any portions of the initial account balances identified in [*51] Table A remaining in the District offset accounts at the end of calendar year 2005 shall be removed from the District offset accounts by the Executive Officer and shall not be used for purposes of demonstrating equivalency between federal NSR offset requirements and the District's NSR program.

Under Rule 1315(c)(1), pre-1990 credits have already been removed from the SCAQMD's offset accounts and are not being issued/distributed. See July 6, 2009 Reporter's Transcript of Proceedings at page 6-7. Consequently, the first cause of action attacking the SCAQMD's prior distributions of pre-1990 credits is, at this time, moot.

D. Second Claim for Relief - Alleged Violation of Regulation XIII

The Complaint's second claim for relief alleges in relevant part as follows: "Under the SIP-approved requirements of SCAQMD Regulation XIII, SCAQMD has the responsibility to ensure the validity of credits distributed from its offset accounts pursuant to Rules 1304 and 1309.1." Complaint, P55. Contrary to what Plaintiffs allege, however, that the EPA-approved portions of Regulation XIII contain no requirements that apply to the creation of internal offsets. The second claim for relief must fail because a citizen [*52] suit under Section 304 must allege violations of a *specific duty or duties* set forth in a SIP. *Bayview Hunters Point Community Advocates v. Metropolitan Transportation Commission*, 366 F.3d 692, 703 (9th Cir. 2004) (citizen suits under Section 304 may only be "brought to enforce specific measures, strategies, or commitments designed to ensure compliance with the NAAQS.")²⁶ A citizen suit cannot be used to enforce "a SIP's overall objectives or aspirational goals." *Id.* at 701.

²⁶ See also, *Wilder v. Thomas*, 854 F.2d 605, 614 (2d Cir. 1988) ("[P]laintiffs are limited under § 7604 to seeking relief from specific violations of existing SIPs"); *Council of Commuter Orgs. v. Metro. Transp. Authority*, 683 F.2d 663, 670 (2d Cir. 1982) (citizen suits under Section 304 "must allege a violation of a specific strategy or commitment in the SIP and describe, with

some particularity, the respects in which compliance with the provision is deficient").

The Plaintiffs maintain that Rules 1309 and 1306 apply to SCAQMD's internal offsets. It is clear from the language and context of these Rules, however, that they only apply to ERCs. On its face, Rule 1309 sets forth a process by which a private company [*53] files an application with SCAQMD for ERCs. Rule 1309. The validation requirements that the Plaintiffs seek to enforce here, for example, are set forth in Rule 1309(b). Rule 1309(b) is entitled "*Application for an ERC for a New Emission Reduction.*" *Id.* (emphasis added). Every subsection of Rule 1309(b) refers to the "application" or the "applicant." In particular, Rule 1309(b)(4) states that "*the applicant must demonstrate to the Executive Officer or his designee*" that the emission reductions are "real," "quantifiable," "permanent," and "federally enforceable." Rule 1309(b)(4) (emphasis added). The requirements of Rule 1309 plainly do not apply to the internal offsets because the internal offsets do not result from an application. As explained above, the internal offsets are generated on SCAQMD's own initiative through the tracking of orphan shutdowns, orphan reductions, and other types of emission reductions. Rule 1315(c)(3). Similarly, the relevant provisions in Rule 1306 apply only to the calculation of "Emission Reduction Credits." Rule 1306(e).

The context of Rules 1309 and 1306 within Regulation XIII also confirms that those Rules do not apply to the District's internal offsets. [*54] Rule 1303(b)(2), for example, sets forth the District's basic offset requirement, and provides in pertinent part as follows:

The Executive Officer or designee shall, except as Rule 1304 applies, deny the Permit to Construct for any new or modified source which results in a net emission increase of any nonattainment air contaminant at a facility, unless each of the following requirements is met:

...

(2) Emission Offsets

Unless exempt from offsets requirements pursuant to Rule 1304, emission increases shall be offset by *either Emission Reduction Credits approved pursuant to Rule 1309, or by allocations from the Priority Reserve in accordance with the provisions of Rule 1309.1.*

Rule 1303(b)(2) (emphasis added).

Rule 1303(b)(2) provides essentially three distinct ways that a new or modified source may satisfy the offset requirement: 1) by showing that they the source is exempt from offset requirements under Rule 1304; 2) by obtaining "Emission Reduction Credits *approved pursuant to Rule 1309*"; or 3) by receiving "allocations from the Priority Reserve in accordance with the provisions of Rule 1309.1. (Emphases added)." The language of Rule 1303(b)(2) belies Plaintiffs entire argument. If the [*55] District's internal offsets were "Emission Reduction Credits approved pursuant to Rule 1309," there would be no need to add the phrase "allocations from the Priority Reserve in accordance with the provisions of Rule 1309.1." The only logical conclusion that one can draw from the language of Rule 1303(b)(2) is that the District's internal offsets are *not* "approved pursuant to Rule 1309." As explained above, this interpretation is consistent with the plain language of Rule 1309, which governs applications from private companies for ERCs.

Furthermore, while Plaintiffs assert that all emission reduction credits are to be calculated pursuant to Rule 1306, Rule 1306(e)(3) itself states that in calculating ERCs one does not include items such as "all Priority Reserve allocations" and "all offsets obtained pursuant to the exemption provisions of Rule 1304." Given the fact that Regulation XIII recognizes that there are differences between ERCs and other types of offsets such as Priority Reserve allocations (which are part of SCAQMD's internal offsets), Plaintiffs' contention -- that all offsets must be treated as emission reduction credits and subject to the provisions in Rules 1306 and 1309 [*56] -- must be rejected.

In addition, the language and very existence of Rule 1315 belie Plaintiffs' argument. As explained above, different requirements apply to the creation of ERCs and internal offsets. Under Rule 1309, ERCs are validated individually; under Rule 1315, internal offsets are validated in the aggregate based on specified "reporting periods." Surplus determinations for privately held ERCs are made on an individual basis under Rule 1309, while internal offsets are discounted in the aggregate on an annual basis to ensure that they remain "surplus." Rule 1315(c)(4). The amount of ERCs is based on the decrease below actual emissions, while the amount of internal offsets is based on the decrease below permitted emissions. ERCs are based on discounting emissions to BACT levels, while internal offset are not based on BACT discounting.

In sum, Plaintiffs' second cause of action fails to state a claim upon which relief can be granted because it is based on the faulty premise that the SCAQMD's internal offsets must comply with the requirements of Rules 1306 and 1309. Internal offsets are not the same as ERC's and are not governed by Rules 1306 and 1309, but

rather by Rule 1309.1 (which [*57] is part of the EPA-approved SIP) and Rule 1315 (which is not).

E. The Third and Fourth Claims for Relief-SCAQMD's Alleged Failure to Adopt an Adequate Tracking System

The Complaint's third and fourth claims for relief are based on the contention that the SCAQMD has violated 42 U.S.C. § 7503(c), Regulation XIII and 61 Fed. Reg. 64291 because it has failed to adopt a tracking system as to its internal credits that meets the criteria that Plaintiffs assert is required by the Act, the SIP and the EPA (*e.g.* that would show that the SCAQMD has maintained a positive balance as to its offset accounts). However, nothing in Subchapter 1 of the Clean Air Act (42 U.S.C. §§ 7401-7515) delineates any requirement that a SIP (or a permit program contained within the SIP) include a tracking system as to emission reduction credits or other offsets. Likewise, as conceded by Plaintiffs' counsel, the EPA has not promulgated any regulation with respect to offset tracking systems. *See* December 11, 2008 Reporter's Transcript of Proceedings at page 9. The SIP herein (*i.e.* Regulation XIII) also does not contain such a provision. Rule 1315(c)(3) (which is not part of the EPA-approved SIP) does provide for "Tracking [*58] of Offset Account Credits for Federal NSR" but Plaintiffs contend that that rule's tracking scheme fails to ensure that the SCAQMD is complying with applicable federal requirements such as verifying that offset credits be "real, surplus, quantifiable [and] enforceable" and that the SCAQMD offset accounts maintain a positive balance.

Plaintiffs' contention as to the tracking system prerequisite is based upon the language set forth in the federal register preamble to EPA's 1996 approval of Regulation XIII. That provision reads as follows:

[T]his approval [of Regulation XIII] is based on the understanding that the District will apply a tracking system which will continuously show in the aggregate that the District: (1) will provide for the necessary offsets required to meet the appropriate statutory offset ratio; and (2) will mitigate emissions from those sources exempted from offsets under Rule 1304 which are not exempt from federal regulation.

61 Fed. Reg. at 64292. Plaintiffs allege essentially that 1) this preamble provision requires Defendants to track the internal offsets and "maintain positive account balances" and 2) Defendants violated this provision by failing to

utilize a tracking [*59] system and failing to maintain positive account balances.

Contrary to Plaintiffs' assertions, however, the cited preamble passage in no way creates a SIP requirement that can be enforced through a citizen suit under Section 304. As the Ninth Circuit has confirmed, a federal register preamble issued in connection with SIP approval is not part of the approved SIP. *El Comité Para El Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1070 (9th Cir. 2008) ("*El Comité*").²⁷ Thus, the 1996 preamble is not part of the EPA-approved SIP and, therefore, does not create a SIP duty that can be enforced under Section 304. Consequently, Plaintiffs' third and fourth claims for relief fail to state a claim for which relief can be granted.

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27 Plaintiffs cite *Safe Air for Everyone v. EPA*, 488 F.3d 1088 (9th Cir. 2007), but that case is inapposite. As recognized by the Ninth Circuit in *El Comité*, the *Safe Air* decision "did not address which documents were and were not part of the SIP." *El Comité*, *supra*, 539 F.3d at 1072. Rather, the *Safe Air* opinion "involved the interpretation of a SIP whose contents were already established." *Id.*

28 In dismissing Plaintiffs' third and fourth causes of action, this court [*60] is *not* rejecting the contention that a sufficient tracking system would be necessary to assure that SCAQMD's utilization of its internal offsets comports with the requirements of the Clean Air Act. However, Congress in *Section 502(b)* of the Act, 42 U.S.C. § 7661a(b), assigned to the EPA Administrator the task of "promulgating . . . regulations establishing the minimum elements of a permit program to be established by any air pollution control agency." Those elements were to include "monitoring and reporting requirements." *Id.* The EPA's failure to set out within its regulations a provision for a tracking system and its determination in 1996 that the SCAQMD's "implementation of a tracking system demonstrated that the Priority Reverse bank's emission reduction credits complied with the requirements of section 173(c)" are both matters which can only be raised by the Plaintiffs pursuant to Section 307 (42 U.S.C. § 7607) before the Court of Appeals and not to this district court.

V. CONCLUSION

Defendants' Motion to Dismiss under *F.R.C.P. 12(b)(1)* and *(b)(6)* is granted.²⁹

29 The Motion to Dismiss under *Rule 12(b)(6)* was originally granted with leave to amend. See July 6, 2009 Reporter's Transcript [*61] of Proceedings at pages 45-47.

Plaintiffs cannot maintain a citizen suit action under Section 304 of the Act based on the allegations in the Complaint asserting a violation of Section 173(c). Section 173(c) does not contain "emissions standards or limitations" within the meaning of Section 304. Rather, it sets forth general requirements for SIPs that can be implemented in different specific ways. Thus, the first cause of action is dismissed under *F.R.C.P. Rule 12(b)(6)* for failure to state a claim for which relief can be granted. In addition, Section 173(c) can only be enforced against EPA, and any such action would have to be brought in the Ninth Circuit pursuant to Section 307(b)(1). Finally, EPA specifically approved the SCAQMD's use of the pre-1990 credits in 1996 and reiterated that approval in 2006. Therefore, any challenge to the validity of that utilization should have been brought against EPA in the Ninth Circuit earlier. Thus, the first cause of action is dismissed pursuant to *F.R.C.P. Rule 12(b)(1)* on the additional ground that this court lacks jurisdiction over it.

Regulation XIII does not contain any of the validation requirements for internal offsets which Plaintiffs seek [*62] to impose upon the SCAQMD. Contrary to what plaintiffs assert, Rules 1309 and 1306 do not apply to SCAQMD's internal offsets. In the absence of any enforceable EPA-approved SIP requirements, the second claim for relief is dismissed under *F.R.C.P. 12(b)(6)* for failure to state a claim for which relief can be granted.

Finally, there is no delineated provision for a tracking system as to internal offsets in the Clean Air Act, EPA's regulations or the EPA-approved SIP herein. The federal register preamble to the 1996 SIP approval is not part of the SIP. Thus, the third and fourth causes of action must be dismissed under *F.R.C.P. Rule 12(b)(6)*.

In conclusion, it bears noting that the absence of any validation requirements for internal offsets in the SIP does not mean that SCAQMD is free to ignore the uncodified validation requirements. Under the Act, EPA exercises continuing authority over SCAQMD in accordance with, *inter alia*, the "SIP call" provision described above. Under Section 110(k)(5) of the Act (42 U.S.C. § 7410(k)(5)), EPA can and will exercise its SIP call authority to require revisions to an adopted SIP if EPA determines that the SIP is inadequate. Thus, the effect of this ruling [*63] is not that internal offset validation provisions cannot be enforced; it is simply that Plaintiffs cannot enforce those provisions in the district court through *Section 304* in the absence of any specific requirements in the SIP.

2010 U.S. Dist. LEXIS 35865, *

IT IS SO ORDERED.

Dated: This 7th day of January, 2010.

/s/ George H. Wu

GEORGE H. WU

United States District Judge