

April 1, 2008

***Via certified mail, return receipt requested***

Barry Wallerstein, Executive Officer  
South Coast Air Quality Management District  
21865 Copley Drive  
Diamond Bar, CA 91765  
(909) 396-2500

Governing Board of the South Coast Air Quality Management District  
c/o Sandra McDaniel  
21865 Copley Drive  
Diamond Bar, CA 91765  
(909) 396-2500

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c/o Sandra McDaniel  
21865 Copley Drive  
Diamond Bar, CA 91765  
(909) 396-2500

***Re: Notice of Intent to Initiate Citizen Suit Action under Section 304 of  
the Clean Air Act***

Dear Dr. Wallerstein and Members of the Board:

The Clean Air Act (“CAA”) requires that notice of intent to sue be given to the alleged violator, the United States Environmental Protection Agency (“EPA”), and the state in which the alleged violations occur, at least 60 days prior to the filing of a citizens’ suit in federal district court under § 304(a) of the CAA.<sup>1</sup> Section 304(a)(1) authorizes commencement of a civil action against any person or governmental agency who is alleged to have violated or to be in violation of an emission standard or limitation under the CAA.<sup>2</sup> An emission standard or limitation includes “a schedule or timetable of compliance, emission limitation, standard of performance or emission standard” under the CAA, as well as “any other standard, limitation, or schedule established ... under any applicable State implementation plan approved by the Administrator...”<sup>3</sup>

Accordingly, the Natural Resources Defense Council, Coalition for a Safe Environment, Desert Citizens Against Pollution, and Communities for a Better Environment (collectively “Plaintiffs”) hereby give notice that they will commence an action against the South Coast Air Quality Management District (“AQMD”), its

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<sup>1</sup> 42 U.S.C.A. § 7604(b).

<sup>2</sup> 42 U.S.C.A. § 7604(a)(1).

<sup>3</sup> 42 U.S.C.A. § 7604(f)(1) and (4).

Governing Board, and executive officer Barry Wallerstein (collectively “Defendants”) not less than 60 days from today under § 304(a)(1) of the CAA.<sup>4</sup> This action will be based on AQMD’s distribution and sale of invalid emission reduction credits to polluting facilities in the United States’ dirtiest air basin, activities which constitute a violation of the CAA, the California State Implementation Plan (“SIP”), and implementing regulations and guidance.

The Natural Resources Defense Council (“NRDC”) is a not-for-profit membership corporation. NRDC is dedicated to the preservation, protection, and defense of the environment, including its wildlife and natural resources, and actively pursues effective enforcement of air quality rules and regulations and the reduction of air pollution in southern California on behalf of its members. Coalition for a Safe Environment (“CFASE”) is a not-for-profit membership corporation organized under the laws of the State of California. CFASE is dedicated to environmental justice, public health and public safety, and the reduction, elimination, and mitigation of air, land, and water pollution. CFASE actively pursues effective enforcement of air quality rules and regulations and the reduction of air pollution in southern California. Desert Citizens Against Pollution (“DCAP”) advocates with communities affected by pollution in the deserts of the Southwest, working on air pollution and related issues since its formation in 1986. DCAP challenges decisions by federal, state, and local governments that exacerbate air quality problems in California, including the burning of hazardous waste, and works with several coalitions fighting air pollution. CBE is a not-for-profit public benefit corporation that strives to bring about environmental justice by empowering underrepresented communities to fight pollution in their communities. CBE’s members in the South Coast Air Basin suffer the cumulative impacts of air pollution that Defendants allow to be emitted in and around their communities.

## **I. Background**

The South Coast Air Basin is the most polluted air basin in the country. A layer of smog and haze obstructs the once-spectacular views of the Santa Monica, San Gabriel and San Bernardino Mountains, and San Pedro Bay, and on a daily basis, its residents inhale dangerous suspended particles and ozone that penetrate their lungs, causing respiratory diseases and cancer. The air basin has the dubious distinction of experiencing the worst air quality in the United States, according to American Lung Association’s report, *State of the Air 2007*, a county-level report card on the two most pervasive air pollutants: ozone (smog) and particle pollution (soot).<sup>5</sup> In fact, on May 4, 2007, “citing a public health crisis caused by Southern California’s severe air pollution, [AQMD] called upon the President and the Governor to declare a state of emergency to address the problem” and “its serious health toll.”<sup>6</sup> Yet these are the same pollutants for which emission offsets have been unlawfully distributed and sold by AQMD.

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<sup>4</sup> 42 U.S.C.A. § 7604(a)(1).

<sup>5</sup> American Lung Association, *STATE OF THE AIR 2007*, located at <http://lungaction.org/reports/stateoftheair2007.html> (last visited March 31, 2008).

<sup>6</sup> May 4, 2007, Southland Air Quality Officials Join Regional Agency in Declaring Air Pollution State of Emergency; the statement can be found at: [http://www.aqmd.gov/news1/2007/bs5\\_04\\_2007.html](http://www.aqmd.gov/news1/2007/bs5_04_2007.html)

Excessive air pollution has caused a public health crisis in the South Coast Air Basin, with devastating lifelong impacts on the health of both children and adults. Exposure to particulate matter (“PM”) aggravates respiratory and cardiovascular diseases (as indicated by increased hospital admissions, emergency room visits, absences from school or work, and restricted activity days) and causes lung disease, decreased lung function, asthma attacks, and premature death.<sup>7</sup> Exposure to elevated levels of PM can trigger acute symptoms such as irregular heart beat and heart attacks.<sup>8</sup> In one of the nation’s most comprehensive studies on the impact of pollution on children, preventive medicine researchers from USC’s Keck School of Medicine demonstrated the significant relationship between PM and slow lung growth in children.<sup>9</sup> The elderly, women of child-bearing age, people with existing heart and lung disease, and other subpopulations with limited access to healthcare are also particularly vulnerable to the adverse health impacts of PM.

Ozone causes irreversible changes in lung structure, leading to premature aging of the lungs and/or chronic respiratory illnesses such as emphysema and chronic bronchitis. Children and adults who work outdoors and individuals with respiratory illnesses such as asthma are among those most at risk. Ozone also reduces visibility.<sup>10</sup> Increases in oxides of nitrogen (“NO<sub>x</sub>”) and volatile organic compounds (“VOCs”) culminate in the formation of ground level ozone.<sup>11</sup> NO<sub>x</sub> is typically created during combustion processes and is a major contributor to smog formation and acid deposition. In addition, NO<sub>x</sub> may result in numerous adverse health effects, including aggravation of chronic respiratory disease and respiratory symptoms. VOCs are carbon-containing compounds that evaporate into the air, contributing to the formation of smog, and may be independently toxic.<sup>12</sup>

Sulfur oxides (“SO<sub>x</sub>”) are pungent, colorless gases formed primarily by the combustion of sulfur-containing fossil fuels, especially coal and oil. Considered major air pollutants, SO<sub>x</sub> may impact human health and damage vegetation.<sup>13</sup> Carbon monoxide

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<sup>7</sup> See <http://www.epa.gov/pmdesignations/faq.htm#0> as viewed on May 25, 2007.

<sup>8</sup> Annette Peters, Douglas W. Dockery, James E. Muller, Murray A. Mittleman, “Increased Particulate Air Pollution and the Triggering of Myocardial Infarction,” *Circulation* (2001) 2001;103:2810, located at <http://www.circ.ahajournals.org/cgi/content/abstract/103/23/2810> (last visited May 31, 2008).

<sup>9</sup> W. James Gauderman, Frank Gilliland, Hita Vora, Edward Avol, Daniel Stram, Rob McConnell, Duncan Thomas, Fred Lurmann, Helene G. Margolis, Edward B. Rappaport, Kiros Berhane and John M. Peters, “Association between Air Pollution and Lung Function Growth in Southern California Children: Results from a Second Cohort,” *American Journal of Respiratory and Critical Care Medicine*. Vol. 165, No. 13, July 1, 2002.

<sup>10</sup> U.S. Environmental Protection Agency, National Center for Environmental Assessment, *Air Quality Criteria for Ozone and Related Photochemical Oxidants* (Feb. 2006), available at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=149923>.

<sup>11</sup> U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, *NOx: How Nitrogen Oxides Affect the Way We Live and Breathe* (EPA 456-F-98-005, Sept. 1998), available at <http://www.epa.gov/air/urbanair/nox/noxfltr.pdf>.

<sup>12</sup> California Air Resources Board: Glossary of Air Pollution Terms (last updated June 4, 2007), available at <http://www.arb.ca.gov/html/gloss.htm>.

<sup>13</sup> California Air Resources Board: Glossary of Air Pollution Terms (last updated June 4, 2007), available at <http://www.arb.ca.gov/html/gloss.htm>.

(“CO”) is a colorless, odorless gas resulting from the incomplete combustion of hydrocarbon fuels. CO interferes with the blood’s ability to carry oxygen to the body’s tissues and results in numerous adverse health effects.<sup>14</sup>

For each pollutant describe above, AQMD has unlawfully distributed invalid pollution credits and, in some cases, credits that never existed in the first place. Described below are: the emission standards and limitations alleged to be violated; activities constituting violations; persons responsible for the violations; location of violations; dates of the alleged violations; and the persons giving notice of intent to sue.

## II. Standards Alleged To Be Violated

By distributing and selling invalid emission reductions credits, AQMD has violated and continues to violate CAA § 173(c), the California SIP (AQMD Regulation XIII, including, but not limited to, Rule 1303(b)(2), Rule 1306, and Rule 1309(b)), and implementing regulations and guidance (including 40 C.F.R. Pt. 51, App. S and 51 FR 43814), which require new or modified facilities to fully offset their emissions with *valid* emission reductions or credits.<sup>15</sup> Under CAA § 173(c), the California SIP, and implementing regulations and guidance, a valid emission reduction credit or offset (hereinafter “credit”) must be *real, surplus, enforceable, quantifiable, and permanent*:

(1) The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant only by obtaining emission reductions of such air pollutant from the same source or other sources in the same nonattainment area ... Such emission reductions shall be, by the time a new or modified source commences operation, *in effect and enforceable and shall assure that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions* of such air pollutant from the same or other sources in the area.<sup>16</sup>

(2) Emission reductions otherwise required by this chapter *shall not be creditable as emissions reductions* for purposes of any such offset requirement. Incidental emission reductions which are not otherwise required by this chapter shall be creditable as emission reductions for such purposes if such emission reductions meet the requirements of paragraph (1).<sup>17</sup>

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<sup>14</sup> U.S. Environmental Protection Agency, Office of Mobile Sources, *Automobiles and Carbon Monoxide* (EPA 400-F-92-005), available at <http://www.epa.gov/otaq/consumer/03-co.pdf>.

<sup>15</sup> The offset requirement is “enforceable by private parties under section 304 [of the Clean Air Act] as an emission limitation.” 40 C.F.R. Pt. 51, App. S.

<sup>16</sup> 42 U.S.C.A. §7503(c)(1).

<sup>17</sup> 42 U.S.C.A. §7503(c)(2); 51 FR 43814; 40 C.F.R. Pt. 51, App. S; *see also* 40 C.F.R. §§ 51.493, 51.852; SCAQMD Regulation XIII; U.S. EPA, IMPROVING AIR QUALITY WITH ECONOMIC INCENTIVE PROGRAMS, EPA-452/R-01-001 (January 2001) pp.38-40.

Under the California SIP, AQMD maintains “offset accounts” containing credits that are distributed to privileged facilities. These facilities include, but are not limited to: (i) new or modified facilities that emit below certain thresholds; (ii) essential public services such as hospitals, schools, and fire stations; and (iii) power plants.<sup>18</sup> When allocating credits from its offset accounts, AQMD, not the applicant, has the responsibility for ensuring the credits’ validity.<sup>19</sup>

### **III. Activities Constituting Violations of the Clean Air Act and the California SIP**

AQMD’s offset accounts are populated by credits that violate one or more of the CAA requirements set forth above. In 1990, AQMD transferred into the federal New Source Review program invalid credits.<sup>20</sup> Since 1990, AQMD has distributed and sold invalid emission reduction credits to polluting facilities, credits that are then used to emit unlawful pollution. Among these are credits for which AQMD recently acknowledged that it has “no records and cannot re-verify.”<sup>21</sup> Even credits distributed after that acknowledgment violate the law, including, but not limited to, the requirement that credits be quantifiable. Moreover, according to its own records, AQMD has distributed and continues to distribute *non-existent* PM and CO credits following their depletion from the offset accounts in 1994 and 1995, respectively, in violation of the CAA and the California SIP.<sup>22</sup>

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<sup>18</sup> See SCAQMD Rule 1304 and 1309.1.

<sup>19</sup> SCAQMD, STAFF REPORT: PROPOSED RULE 1315 – FEDERAL NEW SOURCE REVIEW TRACKING SYSTEM (September 8, 2006) p. III-6 (“AQMD has assumed the responsibility of providing the necessary offsets for exempt sources, the Priority Reserve, and the Community Bank”); see also SCAQMD, FINAL PROGRAM ENVIRONMENTAL ASSESSMENT FOR: PROPOSED AMENDED RULE 1309.1 – PRIORITY RESERVE AND RE-ADOPTION OF RULE 1315 – FEDERAL NEW SOURCE REVIEW TRACKING SYSTEM (July 10, 2007) p. 4-17 (“AQMD has assumed the responsibility of providing the necessary offsets for exempt sources, the Priority Reserve, and the Community Bank”)

<sup>20</sup> See AQMD’s NSR Offset Tracking – Update Running Balances, Table I-1, Sept. 8, 2006; SCAQMD, STAFF REPORT: PROPOSED RULE 1315 – FEDERAL NEW SOURCE REVIEW TRACKING SYSTEM (September 8, 2006) p. 7.

<sup>21</sup> SCAQMD, STAFF REPORT: PROPOSED RULE 1315 – FEDERAL NEW SOURCE REVIEW TRACKING SYSTEM (September 8, 2006) p. 7.

<sup>22</sup> While AQMD has attempted to repopulate its internal accounts by adopting a new rule that generates new credits, the credits generated under that rule, Rule 1315, are not valid. Distribution of Rule 1315 credits not only cannot redress the past and continuing violations described above, it compounds the violations of the Clean Air Act. *First*, the credits generated under Rule 1315 violate the real, surplus, enforceable, quantifiable, and permanent requirements. 42 U.S.C.A. §7503(c)(2); 51 FR 43814; 40 C.F.R. Pt. 51, App. S; see also 40 C.F.R. §§ 51.493, 51.852; SCAQMD Regulation XIII; U.S. EPA, IMPROVING AIR QUALITY WITH ECONOMIC INCENTIVE PROGRAMS, EPA-452/R-01-001 (January 2001) pp.38-40; *Second*, the rule constitutes unlawful backsliding under state law. California Health and Safety Code § 42500 et seq. *Third*, the rule is not “in accordance with regulations issued by the [EPA] Administrator for the determination of baseline emissions in a manner consistent with the assumptions underlying the applicable implementation plan...” 42 U.S.C.A. § 7503(a)(1). *Fourth*, the rule has not received state and federal approval.

AQMD's actions in distributing and selling credits that are not real, surplus, enforceable, quantifiable, and permanent violates CAA § 173, the California SIP, as found in SCAQMD Regulation XIII, and implementing regulations and guidance.<sup>23</sup>

**IV. Persons Responsible for the Violations**

The South Coast Air Quality Management District, through its executive officer Barry Wallerstein and its Governing Board, are responsible for the violations.

**V. Location of Violations**

The violations have occurred, and continue to occur, throughout the South Coast Air Basin, which includes portions of Los Angeles, Riverside and San Bernardino counties, all of Orange County, and wherever AQMD has distributed or sold invalid or non-existent credits. In addition, violations will occur in the future because of by-right access to the offset accounts under Regulation XIII (Rules 1304, 1309.1, and 1309.2). Violations will also occur in downwind air basins to which AQMD has transferred invalid credits.

**VI. Dates of the Alleged Violations**

The violations have occurred every day since AQMD began distributing invalid credits from its internal accounts, and the violations are ongoing.

**VII. Persons Giving Notice of Intent to Sue**

<p>Natural Resources Defense Council 1314 Second Street Santa Monica, CA 90401 (310) 434-2300</p> <p>Through its attorneys: David Pettit Tim Grabiell Natural Resources Defense Council 1314 Second Street Santa Monica, CA 90401 (310) 434-2300</p>	<p>Coalition for a Safe Environment 140 West Lomita Boulevard Wilmington, CA 90744 (310) 704-1265</p> <p>Through its attorneys: David Pettit Tim Grabiell Natural Resources Defense Council 1314 Second Street Santa Monica, CA 90401 (310) 434-2300</p>
<p>Desert Citizens Against Pollution P.O. Box 845 Rosamond, CA 93560</p>	<p>Communities for a Better Environment 5610 Pacific Boulevard, Suite 203 Huntington Park, CA 90255 (323) 826-9771</p>

<sup>23</sup> See 42 U.S.C.A. §7503(c)(1); AQMD Regulation XIII (including, but not limited to, Rule 1303(b)(2), Rule 1306, and Rule 1309(b)); 40 C.F.R. Pt. 51, App. S; 51 FR 43814.

Through its attorney: Angela Johnson Meszaros 1107 Fair Oaks Avenue, #246 South Pasadena, CA 91030 (323) 229-1145	Through its attorneys: Shana Lazerow Adrienne Bloch Communities for a Better Environment 1440 Broadway, Suite 701 Oakland, CA 94612 (510) 302-0430 x 18
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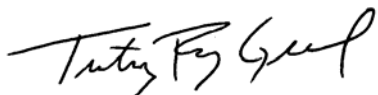
Please direct all communications to Plaintiffs' attorneys at the addresses and phone numbers listed above.

### VIII. Conclusion

This action seeks declaratory and injunctive relief. Plaintiffs will seek a court declaration that AQMD violated and continues to violate the Clean Air Act and the California SIP by distributing invalid or non-existent credits from its offset accounts. Plaintiffs will further seek injunctive relief prohibiting AQMD from distributing these invalid credits in the future. To address the past and continued *use* of invalid or non-existent credits, Plaintiffs will seek a court order that: (i) phases out in-use, invalid credits; (ii) quantifies the aggregate unlawful emissions resulting from AQMD's distribution and sale of invalid credits; and (iii) requires AQMD to implement a program to reduce emissions in an amount equivalent to, or greater than, the emissions that were unlawfully allowed by AQMD's offset program. To the extent possible, these emission reductions should take place in the same communities that were impacted by the unlawful emissions. In addition, Plaintiffs will seek reimbursement of all litigation costs, including, but not limited to, attorneys' fees and expert witness fees.

During the 60-day notice period, we would be willing to discuss effective remedies for the violations noted in this letter. However, if you wish to pursue such discussions in the absence of litigation, we suggest that you initiate these discussions within the next 20 days so that they may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are ongoing when the notice period ends.

Sincerely,



Timothy Grabiell (CA Bar # 231045)



Angela Johnson Meszaros (CA Bar # 174130)



Shana Lazerow (CA Bar # 195491)

**Service of Notice via Certified Mail:**

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