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County of Los Angeles

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Sherri R. Carter, Executive Officer/Clerk
By Shaunya Bolden, Deputy

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COMMUNITIES FOR A BETTER
ENVIRONMENT, CENTER FOR BIOLOGICAL
DIVERSITY, SIERRA CLUB, and NATURAL
RESOURCES DEFENSE COUNCIL

Petitioners/Plaintiffs,

v.

SOUTH COAST AIR QUALITY MANAGEMENT
DISTRICT

Respondents/Defendants,

DOES 1 through 30, inclusive,

Real Parties in Interest.

Case No: **BS161399**

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

[Code Civ. Proc. §§ 1060 & 1085]

I. INTRODUCTION

1
2 1. On December 4, 2015, the South Coast Air Quality Management District (“Air District” or
3 “SCAQMD”) Governing Board voted on the most significant smog-fighting proposal within its
4 jurisdiction in a decade. Prior to the start of the meeting, as the Governing Board members
5 assembled in the auditorium, an Air District promotional video noted the following – “[t]here is a
6 direct relationship between the quality of the air we breathe and the quality of the life we live . . .
7 from the day we are born until the day we die.” The video also noted that “[e]very year more people
8 will die in Southern California from air pollution-related diseases than from all traffic accidents and
9 crime-related deaths combined.”

10 2. The South Coast air basin consistently has the worst air pollution levels in the nation. The
11 region has never met any state or federal clean air standards for ozone pollution. Scientific studies
12 have found an association between exposure to particulate matter and ozone and significant health
13 problems, including asthma, chronic bronchitis, reduced lung function, irregular heartbeat, heart
14 attack, and premature death in people with heart or lung disease.

15 3. To meet ozone standards, the Air District has focused on reducing oxides of nitrogen
16 (“NOx”), which is a key component in the formation of ozone. The cornerstone program that the Air
17 District uses to control NOx pollution from the largest stationary sources of pollution like refineries
18 and power plants is the NOx Regional Clean Air Incentives Market (“NOx RECLAIM”) program.
19 The NOx RECLAIM program is a regional market-based emissions credit trading program.

20 4. On December 4, 2015, the Air District held a public hearing to review a proposed
21 amendment to the admittedly inadequate NOx RECLAIM program. The Air District staff spent three
22 years developing this proposal, and the Governing Board had before it significant technical analysis
23 in the form of a staff report, a California Environmental Quality Act (“CEQA”) analysis, and a staff
24 presentation. The supporting documentation for this proposal exceeded two thousand pages.

25 5. Instead of adopting the staff proposal which was supported by significant evidence before it,
26 the Governing Board that morning introduced a new alternative developed by industry interests. The
27 evidence presented to the Governing Board failed to support the industry proposal. The industry
28

1 alternative ensured that it would remain cheaper for certain large companies to buy pollution credits
2 rather than install life-saving pollution controls over the next seven years.

3 6. Over the objections of its own staff, the Governing Board approved this industry-proposed
4 plan. In doing so, the Board left in place a NOx RECLAIM program that is indefensible under State
5 law.

6 7. Because of the urgent need to clean up pollution in the South Coast air basin and the harsh
7 consequences associated with this pollution, including causing more deaths than all traffic accidents
8 and crime-related deaths in the region, Petitioners Communities for a Better Environment, Center for
9 Biological Diversity, Sierra Club, and Natural Resources Defense Council (collectively
10 “Petitioners”) challenge the unlawful NOx RECLAIM program that the Air District currently
11 implements. Importantly, as codified in the Health and Safety Code, the California Legislature
12 requires that if air districts implement market-based programs, like NOx RECLAIM, these programs
13 must achieve emissions reductions equivalent to direct pollution reduction programs (sometimes
14 referred to as “command and control” programs). The NOx RECLAIM program does not live up to
15 this mandated standard, and instead perpetuates a program where some of the largest polluting
16 sources like refineries simply pay to pollute, instead of installing life-saving pollution controls.
17 California’s Health and Safety Code demands more. While the Governing Board of the Air District
18 has discretion to make quasi-legislative decisions, this discretion is not boundless. The Governing
19 Board’s discretion, just like any other government agency, is bounded by law and fact. Here, the
20 Governing Board deviated far outside the bounds of what is allowed under California law —
21 specifically, California’s Health and Safety Code. As such, judicial intervention is needed to correct
22 this injustice.

23 II. PARTIES

24 8. Petitioner COMMUNITIES FOR A BETTER ENVIRONEMNT (“CBE”) is a membership-
25 based California non-profit environmental health and justice organization with offices in Northern
26 and Southern California. CBE’s mission is to build people’s power in California’s communities of
27 color and low income communities to achieve environmental health and justice by preventing and
28 reducing toxics, air and water pollution, and building green, healthy and sustainable communities.

1 CBE specifically works to equip residents of California who are disproportionately impacted by
2 industrial pollution with the tools to monitor and transform their immediate environment. CBE
3 works with communities living in the shadow of oil refineries, which have weighed in on the design
4 and implementation of the RECLAIM program. These members, and others, are directly impacted
5 by the failure to require refineries and other facilities to install life-saving pollution controls.

6 9. Petitioner CENTER FOR BIOLOGICAL DIVERSITY (the "Center") is a non-profit
7 corporation with offices in San Francisco, Los Angeles, and elsewhere throughout California and the
8 United States. The Center is actively involved in environmental protection issues throughout
9 California and North America and has over 50,000 members, including many throughout California
10 and in the South Coast air basin. The Center's mission includes protecting and restoring the habitat
11 and populations of imperiled species; reducing greenhouse gas pollution to preserve a safe climate;
12 and protecting air quality, water quality, and public health. The Center's members and staff include
13 individuals who regularly live, work, recreate and visit the South Coast air basin.

14 10. Petitioner SIERRA CLUB is a national nonprofit organization of approximately 600,000
15 members. Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the earth;
16 to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating
17 and encouraging humanity to protect and restore the quality of the natural and human environment;
18 and to using all lawful means to carry out these objectives. Sierra Club's particular interest in this
19 case stems from its many members residing in the South Coast air basin. The members of the
20 Angeles, San Geronio, and Orange County Chapters live, work, and recreate in the air basin
21 impacted by this decision to not require a program equivalent to Best Available Retrofit Control
22 Technology.

23 11. Petitioner NATURAL RESOURCES DEFENSE COUNCIL ("NRDC") is a national non-
24 profit membership organization with approximately 250,000 members and activists in California, the
25 majority of whom live in the South Coast. NRDC's purpose is to safeguard the earth, its people,
26 plants, and animals; and the natural systems upon which all life depends. NRDC works in California
27 cities and counties, including those in the South Coast air basin.

1 12. By this action, Petitioners seek to protect the health, welfare, and economic interests of their
2 members and the general public. Petitioners' members and staff have an interest in their health and
3 well-being, and in the health and well-being of others, including the residents in the South Coast air
4 basin. Unless the relief requested in this case is granted, Petitioners' staff and members, as well as
5 the general public in the South Coast, will continue to be adversely affected and irreparably injured
6 by the Air District's failure to have a lawful NO_x RECLAIM program. They will not be afforded the
7 regulatory protections of a program that is equivalent to command and control. This means
8 Petitioners' members and staff will be compelled to breathe air less pure than what would be in place
9 if the Air District Governing Board complied with California's Health and Safety Code.

10 13. Respondent SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT is an air quality
11 management district organized and existing under Chapter 5.5 of Part 3, Division 26 of the
12 California Health and Safety Code section 40440 et seq. The Air District plays a role in
13 implementing both the federal Clean Air Act, 42 U.S.C. section 7401 et seq., and the California
14 Clean Air Act, Stats. 1988, ch. 1568, in the South Coast air basin. The South Coast air basin includes
15 all of Orange County, and the urban portions of Los Angeles, Riverside and San Bernardino
16 counties. (Cal. Code Regs., tit. 17, § 60104.)

17 14. Petitioners do not know the true names and capacities, whether individual, corporate,
18 associate, or otherwise, of Real Parties in Interest DOE 1 through DOE 30, inclusive, and therefore
19 sues said Real Parties in Interest DOE 1 through DOE 30, inclusive, under such fictitious names.
20 Petitioner will amend this Petition and Complaint to show their true names and capacities when they
21 are known.

22 III. JURISDICTION AND VENUE

23 15. This Court has jurisdiction over the matters alleged in this Petition under Code of Civil
24 Procedure sections 526, 1060 and 1085.

25 16. Venue is proper in the Superior Court of California, County of Los Angeles under Code of
26 Civil Procedure section 395 because the Air District headquarters is located in Los Angeles County.

27 17. Los Angeles County Superior Court Rule 2.3(a) authorizes the filing of this Petition in the
28 Central District of Los Angeles County Superior Court.

1 18. Petitioners have performed any and all conditions precedent to filing this instant action and
2 have exhausted any and all available remedies to the extent required by law.

3 19. Petitioners do not have a plain, speedy, or adequate remedy at law unless this Court grants
4 the requested writ of mandate to require the Air District to adopt a regulation that complies with
5 California's Health and Safety Code and to set aside its December 4, 2015 decision.

6 **IV. STATUTORY BACKGROUND**

7 20. The federal Clean Air Act establishes a comprehensive scheme "to protect and enhance the
8 quality of the Nation's air resources so as to promote the public health and welfare and the
9 productive capacity of its population." (42 U.S.C. § 7401, subd. (b)(1).)

10 21. As one of its central features, the federal Clean Air Act requires the Administrator of the U.S.
11 Environmental Protection Agency ("EPA") to set national ambient air quality standards ("NAAQS")
12 for certain air pollutants at a level "requisite to protect the public health" with an adequate margin of
13 safety. (42 U.S.C. § 7409, subd. (b)(1).)

14 22. California has a parallel process of establishing California Ambient Air Quality Standards
15 ("CAAQS"). (*See* Health & Saf. Code § 39606, subd. (a)(2).)

16 23. Relevant to this petition, ozone and particulate matter less than 2.5 micrometers in diameter
17 ("PM2.5") have been designated NAAQS and CAAQS pollutants.

18 24. Ground-level ozone is formed in the atmosphere by the reaction of nitrogen oxides ("NOx")
19 and volatile organic compounds ("VOCs") in the presence of heat and sunlight. NOx is emitted from
20 refineries, power plants, motor vehicles and other combustion sources. VOCs are emitted from a
21 variety of sources, including refineries, motor vehicles, chemical plants, factories, and other
22 industrial sources, and consumer and commercial products.

23 25. Even relatively low levels of ozone can cause health effects. People with lung disease,
24 children, older adults, and people who are active outdoors may be particularly sensitive to ozone.
25 However, children are at greatest risk from ozone exposure because their lungs are still developing
26 and they are more likely to be active outdoors when ozone levels are high, which increases their
27 exposure. Children are also more likely than adults to have asthma.

1 26. Breathing ozone can trigger a variety of health problems in children and adults including
2 chest pain, coughing, throat irritation, and congestion. It can worsen bronchitis, emphysema, and
3 asthma. Ground-level ozone also can reduce lung function and inflame the linings of the lungs.
4 Repeated exposure may permanently scar lung tissue, aggravate lung diseases such as asthma,
5 emphysema, and chronic bronchitis, lead to hospital admissions and emergency room visits and
6 impair the body's immune system defenses.

7 27. Both the federal Clean Air Act and California's Clean Air Act provide a classification system
8 that describes the severity of the ozone problem for areas that have failed to meet ozone standards.
9 The classifications are "Moderate," "Serious," "Severe," and "Extreme" in ascending order of
10 severity.

11 28. The South Coast air basin is classified as "Extreme" for all ozone standards under California
12 and federal clean air laws. There is no classification more polluted than "Extreme."

13 29. Particulate matter pollution, or PM, refers to particles suspended in the air. Particles less than
14 2.5 micrometers in diameter ("PM2.5") pose a health threat because they are respirable. PM2.5 is
15 regulated under the Clean Air Act.

16 30. PM2.5 is considered by EPA to pose the greatest health risks. Finer particles are typically
17 composed of more toxic materials, like heavy metals and carcinogenic organic compounds, than
18 larger particles. And these tiny particles—less than 1/30 the width of a human hair—can be easily
19 inhaled deep into the lungs, where they can remain embedded and absorbed into the bloodstream.
20 These lighter particles also stay in the air longer and travel further than larger particles; whereas
21 larger particles can stay in the air for minutes or hours and travel up to 30 miles, PM2.5 can stay in
22 the air for days or weeks and travel hundreds of miles. Moreover, NOx emissions are a key
23 contributor to the secondary formation of PM2.5.

24 31. According to EPA, exposure to PM2.5 has been linked to premature death, heart attacks,
25 irregular heartbeat, aggravated asthma, decreased lung function, and increased
26 respiratory symptoms. Many of these impacts are suffered most acutely by our most vulnerable,
27 including people with heart or lung disease, children, and the elderly.

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1 32. Based on monitoring data, EPA has found that the South Coast air basin did not attain the
2 2006 NAAQS for PM2.5 by the air basin’s statutory deadline set for the year 2015. (*See* 81 Fed.
3 Reg. 1514, 1514 n.3 (Jan. 16, 2016).)

4 33. Every year more people will die in Southern California from air pollution-related diseases
5 than from all traffic accidents and crime-related deaths combined.

6 34. The Air District is specifically responsible for clean air planning in and throughout the South
7 Coast air basin, pursuant to both the federal and state Clean Air Act. The planning document
8 developed to attain these federal and state air quality standards is called the Air Quality Management
9 Plan. The South Coast Air District is responsible for adopting regulations to control emissions from
10 stationary sources of pollution (i.e., refineries, power plants, and manufacturers). (Health & Saf.
11 Code § 40000 [noting “local and regional authorities have the primary responsibility for control of
12 air pollution from all sources, other than emissions from motor vehicles”].)

13 35. In adopting regulations, California’s Health and Safety Code mandates that all regulations
14 “[r]equire the use of best available retrofit control technology [“BARCT”] for . . . existing sources”
15 of air pollution. (*Id.* at § 40440, subd. (b)(1).)

16 36. BARCT is defined as “an emission limitation that is based on the maximum degree of
17 reduction achievable, taking into account environmental, energy, and economic impacts by each
18 class or category of source.” (*Id.* at § 40406.)

19 37. California’s Health and Safety Code also sets forth parameters for market-based programs in
20 section 39616. That provision requires that “[t]he program will result in *an equivalent or greater*
21 *reduction in emissions* at equivalent or less cost compared with current command and control
22 regulations and future air quality measures that would otherwise have been adopted as part of the
23 district’s plan for attainment.” (*Id.* at § 39616, subd. (c)(1); italics added.) Moreover, the program
24 must not “delay, postpone, or otherwise hinder the district compliance” with the provisions of
25 California’s Health and Safety Code dealing with attainment of CAAQS. (*Id.* at § 39616, subd.
26 (c)(6).)

1 38. California’s Health and Safety Code also requires that air districts “shall adopt and enforce
2 rules and regulations to achieve and maintain the state and federal ambient air quality standards in all
3 areas affected by emission sources under their jurisdiction” (*Id.* at § 40001, subd. (a).)

4 V. FACTUAL BACKGROUND

5 A. The NO_x RECLAIM Program.

6 39. The Air District originally adopted the NO_x RECLAIM program in October 1993. The Air
7 District codified this program in Regulation XX – SCAQMD Rules 2000 to 2020.

8 40. The NO_x RECLAIM program replaced a series of existing and future “command and
9 control” regulations. A “command and control” regulation “commands specific polluters to reduce
10 emissions of defined substances to specified levels by installing specific control systems on the
11 individual pieces of equipment or processes which generate the polluting substances.” (*Alliance of
12 Small Emitters/Metal Industry v. South Coast Air Quality Management Dist.* (1997) 60 Cal.App.4th
13 55, 57.)

14 41. In contrast to a “command and control” program, the NO_x RECLAIM program uses a
15 market-based approach that sets an emissions cap and a declining balance of RECLAIM Trading
16 Credits (“RTC” or “credits”) for the largest NO_x emitting stationary sources in the South Coast air
17 basin.

18 42. Under the program, facilities must hold RTCs equal to their actual emissions, but they can
19 sell excess credits they have been granted. Theoretically, a facility could generate credits to sell by
20 installing pollution control equipment that reduces its overall emissions.

21 43. When the program was first adopted, the NO_x RECLAIM facilities were issued NO_x annual
22 allocations (also called facility caps), which declined between 1993 and 2003. In the original rule,
23 after 2003, the facility caps remained constant. The facility caps were derived by assessing the level
24 of emissions that would be achieved if the facilities had installed BARCT as those controls existed in
25 1993 (hereinafter “1993 BARCT Assessment”). The Air District then added compliance margins.
26 The result was that overall RTCs issued under the program allowed more total emissions than what
27 would have resulted from implementation of BARCT at each individual facility.

1 44. A BARCT assessment surveys all technologies available to control pollution at the facilities
2 under the NOx RECLAIM program. If that survey identifies any new, cost-effective controls to
3 reduce pollution from specific equipment, the Air District establishes a new BARCT level for that
4 source of emissions. The BARCT assessment is supposed to provide the basis for how many RTCs
5 exist in the NOx RECLAIM program.

6 **B. The 2005 NOx RECLAIM Shave.**

7 45. The 2003 Air Quality Management Plan included a commitment to achieve 3 tons per day
8 (“tpd”) of NOx emissions reductions by 2010 from the NOx RECLAIM program.

9 46. In 2005, the Air District implemented a “shave” (cap reduction) of the RTCs in the NOx
10 RECLAIM system. To establish the “shave,” the Air District staff conducted a new BARCT
11 assessment (hereinafter “2005 BARCT Assessment”).

12 47. The 2005 BARCT Assessment demonstrated that new technologies existed for certain
13 categories of equipment, and the Air District updated the BARCT levels from the 1993 BARCT
14 Assessment. The Air District established new BARCT levels for the following equipment at NOx
15 RECLAIM facilities – miscellaneous combustion, metal melting/heat treating, industrial boilers and
16 heaters (non-refinery), utility boilers, refinery boilers and heaters, and fluid catalytic cracking units
17 (“FCCUs”).

18 48. The staff then used the newly established BARCT levels for this equipment to establish a
19 shave of RTCs.

20 49. The 2005 shave eliminated a total of 7.7 tpd of RTCs between 2006 and 2012. Importantly,
21 the 2005 Proposed Amendments to the NOx RECLAIM program concluded there was a need to
22 reduce RTCs because “[t]he current RECLAIM market has a surplus of 6.6 tons per day when
23 comparing total RTC holdings to 2003 reported emissions.” (SCAQMD Staff Report, Proposed
24 Amendments to Regulation XX – Regional Clean Air Incentives Market (RECLAIM), p. 81 (Jan.
25 2005).) The Staff Report further concluded that “[t]his has resulted in low credit prices.” (*Ibid.*)

26 50. Recently, the Air District staff looked back at the efficacy of the 2005 shave in achieving
27 actual emission reductions. The Air District staff concluded that the 7.7 tpd shave in RTCs resulted
28 in only 4 tpd of actual emissions reductions. Of that 4 tpd of reductions, 65% (2.6 tpd) came from

1 shutdowns of facilities and 35% (1.4 tpd) came from controls, process changes, or recessionary
2 production levels. Thus, Air District staff concluded that only the 1.4 tpd of reductions were
3 arguably attributable to the NOx RECLAIM program (even though “recessionary production levels,”
4 meaning reduction in emissions caused by the nationally recognized slow-down in the economy,
5 were not caused by the NOx RECLAIM program).

6 51. A principal reason for this low level of reductions seen in the NOx RECLAIM program was
7 the significant amount of credits that flooded into the market. Instead of installing pollution controls,
8 some larger facilities bought the less-expensive credits that entered the market.

9 52. As this and other evidence established, there is not a 1:1 correlation between the RTC shave
10 amount and actual emission reductions.

11 **C. The 2015 NOx RECLAIM Shave.**

12 53. The 2012 Air Quality Management Plan for the South Coast air basin included a control
13 measure called CMB-01, which committed to achieving additional reductions in NOx from the NOx
14 RECLAIM program. This NOx reduction was necessary to move the South Coast closer to one day
15 achieving compliance with the Clean Air Act.

16 54. In June 2011, there were 276 facilities in the NOx RECLAIM program. Refineries accounted
17 for 59% of the emissions from NOx RECLAIM facilities, followed by power plants with 10% of the
18 emissions.

19 55. The Air District initiated the rulemaking process in the fourth quarter of 2012. In 2013, the
20 Air District formed a RECLAIM working group to discuss the amendments to the program. The
21 working group included many from the regulated industry, in addition to a handful of community
22 and environmental representatives.

23 56. Between January 2013 and December 2015, fourteen working group meetings were held. In
24 addition, the staff held a CEQA and Socioeconomic Scoping Meeting, a Public Workshop, and a
25 Public Consultation Meeting. The issue was also presented five times to the Stationary Source
26 Committee, a committee comprised of a subset of Governing Board members. Overall, the Air
27 District staff spent thirty-seven months in rule development.

28

1 57. The most important component of the rulemaking process was an updated BARCT
2 assessment. The staff commenced the BARCT analysis in October 2012. The process took more than
3 two years to complete. This petition refers to this new BARCT analysis as the “2015 BARCT
4 Assessment.”

5 58. The Air District has confirmed that the “BARCT assessment is required by California Health
6 & Safety Code (H&SC) § 40440 to assess the advancement in control technology, to ensure that
7 RECLAIM facilities achieve the same emission reductions that would have occurred under a
8 command-and-control approach, and that emission reductions from the program fully contribute to
9 the efforts in the air basin to achieve the federal National Ambient Air Quality Standards
10 (NAAQS).” (SCAQMD Staff Report, Proposed Amendments to NOx RECLAIM Program
11 (Regulation XX), at p. 5 (Dec. 4, 2015).)

12 59. During the 2015 BARCT Assessment, new BARCT levels were identified for equipment in
13 the refining and non-refining sectors.

14 60. The Final Program Environmental Assessment (“Final PEA”), which is what the Air District
15 developed to comply with its CEQA obligations, included the 2015 BARCT Assessment in its
16 analysis. In particular, Table 1-3 on pages 1-27 and 1-28 of the Final PEA included a summary of
17 the new BARCT levels for the equipment referenced in paragraphs 64 to 80. In addition, the Final
18 PEA noted that one of the Air District’s objectives of the revisions to the NOx RECLAIM program
19 was to “[c]omply with the requirements in Health and Safety Code (HSC) § 40440 by conducting a
20 BARCT assessment of the NOx RECLAIM program and reducing the amount of available NOx
21 RTCs to reflect emission reductions equivalent to implementing available BARCT.” (Final PEA, at
22 p. 2-4.)

23 61. The Final PEA also stated an objective of “[e]nsur[ing] that RECLAIM facilities, in
24 aggregate, achieve the same emission reductions that would have occurred under a command-and-
25 control approach.” (*Ibid.*) The Air District Governing Board certified this document on December 4,
26 2015, prior to taking action on the proposed NOx RECLAIM amendments.

27 62. The BARCT assessment identified new BARCT levels for ten types of equipment. For the
28 other equipment used at NOx RECLAIM facilities, the BARCT levels remained the same.

1 63. The NOx RECLAIM program codified new BARCT levels in Table 6 of SCAQMD Rule
2 2002.

3 **i. Revisions to BARCT Levels for Refining Sector**

4 64. The first new BARCT level in the refining sector was for FCCUs. An FCCU converts heavy
5 oils into gasoline and lighter products. The new BARCT level proposed for FCCUs was 2 parts per
6 million by volume (“ppmv”) at 3% oxygen levels. The BARCT analysis also demonstrated one
7 refinery in the region achieved this standard in practice. This new BARCT level would impact five
8 facilities in the NOx RECLAIM program.

9 65. The second new BARCT level in the refining sector was for Boilers and Process Heaters.
10 This equipment is used extensively in the refining process for processes such as alkylation,
11 reforming, delayed coking, hydrotreating, and distillation. The new BARCT level proposed was 2
12 ppmv at 3% oxygen levels. The BARCT analysis also showed several examples of this type of
13 equipment with pollution controls achieving low levels. In addition, it noted that commercially
14 available technologies can be designed to reach the 2 ppmv level at 3% oxygen levels. This new
15 BARCT level covered equipment at eight facilities.

16 66. The third new BARCT level in the refining sector was for Refinery Gas Turbines. These
17 turbines are used in the refinery process to produce electricity. The BARCT assessment showed that
18 this level had been achieved in the South Coast air basin. The new BARCT level proposed was 2
19 ppmv. This new BARCT level covered equipment at five facilities.

20 67. The fourth new BARCT level for the refining sector covered Coke Calciner. This equipment
21 is used to improve the quality of “green coke” produced at a delayed coker in a refinery. The new
22 BARCT level proposed was 10 ppmv. This new BARCT level would affect one facility in the basin.

23 68. The fifth new BARCT level covered Sulfur Recovery Units and Tail Gas Incinerators. The
24 new BARCT level proposed was 2 ppmv. This new BARCT level covered equipment at four
25 facilities in the basin.

26 69. In total, the Air District staff and their consultants estimated that if all refiners installed
27 equipment at BARCT levels, the refiners would reduce their collective NOx emissions by 6 tpd
28

1 compared to what their emissions would be if all their equipment were already operating at the 2005
2 BARCT level.

3 **ii. BARCT Assessment for Non-Refining Sector**

4 70. The first new BARCT level for the non-refining sector covered Glass Metal Furnaces. This
5 equipment works at a facility that produces container glass from dry, solid raw materials. The new
6 BARCT level proposed an 80% reduction. This new BARCT level would affect one facility in the
7 basin.

8 71. The second new BARCT level for the non-refining sector covered Sodium Silicate Furnaces.
9 This equipment is located at a facility that produces sodium silicate. The new BARCT level
10 proposed an 80% reduction. The new BARCT level would affect one facility in the basin.

11 72. The third new BARCT level for the non-refining sector covered Metal Heat Treating. The
12 new BARCT level proposed was 9 ppmv. This new BARCT level would affect one facility.

13 73. The fourth BARCT level in the non-refining sector was for Gas Turbines (non-Outer
14 Continental Shelf (“OCS”). The new BARCT level proposed was 2 ppmv. This new BARCT level
15 would affect three facilities in the air basin.

16 74. The fifth BARCT level in the non-refining sector covered Internal Combustion Engines not
17 located on the OCS. The new BARCT level proposed was 11 ppmv. This new BARCT level would
18 affect seven facilities in the air basin.

19 75. Overall for the non-refining sector, the BARCT analysis demonstrated if the affected
20 facilities installed equipment to achieve these emissions levels, they would collectively reduce their
21 emissions by 2.77 tpd compared to emissions if all their equipment was already operating at the
22 2005 BARCT levels.

23 **iii. Cement Kiln BARCT**

24 76. The South Coast air basin had one facility operating two cement kilns – the California
25 Portland Cement facility. This facility, when operational, was one of the largest NOx emitters in the
26 NOx RECLAIM program. The facility has surrendered its operating permits for the cement kilns.

1 77. The BARCT assessment estimated that cement kilns emitted 1.69 tpd of NOx in 2008.
2 Because there were no emissions from cement kilns in 2011, the staff used 1.69 tpd for the emissions
3 level.

4 78. The 2015 BARCT assessment demonstrated that 1.29 tpd could be reduced from the RTCs
5 held by facilities operating cement kilns.

6 79. When the California Portland Cement closed, it put 2.5 tpd of RTCs back into the market.

7 80. Thus, even though there are currently zero (0) emissions from cement kilns in the basin, the
8 RTCs from the California Portland Cement kilns are still being used by several facilities, including
9 many refineries, to offset emissions.

10 **D. Staff Proposed RTC Shave**

11 81. On December 4, 2015, Dr. Philip M. Fine, the SCAQMD's Deputy Executive Officer for
12 Planning, Rule Development & Area Sources presented the staff report and proposed amendments to
13 the Governing Board. Dr. Fine was a Research Assistant Professor at the University of Southern
14 California where he taught courses and conducted extensive research on particulate pollution and its
15 health effects. He received his Ph.D. from the California Institute of Technology in Environmental
16 Engineering Science, and his bachelor's degree in Mechanical Engineering and Material Science
17 Engineering from the University of California, Berkeley. He provided an overview of how the Air
18 District staff developed its proposal for a shave of RTCs from the NOx RECLAIM program.

19 82. Combined, the BARCT analysis demonstrated a need for an 8.77 tpd reduction from the 2005
20 BARCT levels. The Air District Staff derived this number by adding the 6 tpd incremental emissions
21 reductions from the refining sector if all of their equipment had been operating at 2015 BARCT
22 assessment levels with the 2.77 incremental emissions reductions from the non-refining sector if all
23 of their equipment had been operating at the 2015 BARCT assessment levels.

24 83. From there, the staff calculated the amount of NOx emissions that would occur from the
25 covered facilities if their collective emissions were equal to NOx emissions that would occur if each
26 covered facility emitted NOx at the levels in line with the 2015 BARCT. Staff assumed that all the
27 affected facilities had reduced their emissions to the 2005 BARCT levels by 2011 as required under
28 the 2005 shave. Had those facilities done so, then those facilities would have had a total of 18.3 tpd

1 of emissions. Staff then subtracted the 8.77 tpd from that number to achieve 9.5 tpd. This amount,
2 9.5 tpd, should have been the new emissions cap for the RECLAIM covered sector of facilities.

3 84. Put another way, if a command and control program were in place to control emissions, these
4 NOx RECLAIM facilities would have been emitting a total of 18.3 tpd in 2011, and emitting a total
5 of 9.5 tpd of emissions at the end of this current shave period in 2011 at 2015 BARCT levels.

6 85. To address industry's desire for large margins between overall RTCs in the system and actual
7 emissions, staff proposed several "flexibilities" that improperly allowed for an increase in the overall
8 NOx emissions from the covered facilities.

9 86. These "flexibilities" are described in paragraphs 87 to 90.

10 87. First, the Air District added .85 tpd to the BARCT assessment as an adjustment to account
11 for uncertainties and provide some additional compliance margin. This modification was not
12 supported by the technical analysis of reductions in emissions that could be achieved by
13 implementing BARCT.

14 88. Second, the Air District staff added "growth factors" to the 9.5 tpd that adjusted for projected
15 growth in various industries by 2023 in the South Coast air basin. "Growth factors" have nothing to
16 do with BARCT and achievable emissions levels from equipment at the identified covered sources.
17 These "growth factors" increased the 9.5 tpd of 2011 at 2015 BARCT to 10.23 tpd of 2023
18 emissions at 2015 BARCT.

19 89. Third, staff added a 10% "compliance margin" above and beyond what the emissions levels
20 would be if the covered facilities emissions levels were in compliance with BARCT.

21 90. Finally, staff included an adjustment for "uncertainties."

22 91. Instead of the 9.5 tpd of emissions, the facility cap proposed to be 12.5 tpd of 2023 at 2015
23 BARCT levels.

24 92. The Air District Staff then subtracted the 12.5 tpd target for 2023 from the 26.5 tpd of RTCs
25 currently in the NOx RECLAIM system to determine that a 14 tpd shave was what the evidence
26 supported and what was needed to achieve pollution reductions equivalent to BARCT.

27 93. The Air District staff proposal of the 14 tpd shave analyzed and described how the shave
28 amount tied to the 2015 BARCT Assessment.

1 94. The staff proposed to remove the 14 tpd on the following schedule –

2 2016 – 4 tpd

3 2018 – 2 tpd

4 2019 – 2 tpd

5 2020 – 2 tpd

6 2021 – 2 tpd

7 2022 – 2 tpd

8 95. When addressing how the Air District staff derived this schedule, Dr. Phillip Fine noted the
9 following – “We also put four tons up front because right now there is an extra six tons in the market
10 that would not require--necessarily--controls to go on.” Dr. Fine also noted the staff crafted this
11 implementation schedule in light of several deadlines to meet clean air standards under the federal
12 Clean Air Act – namely, 2019 for the 24-hour PM2.5 standard; 2021 for the Annual PM2.5 standard;
13 2022 for the 1-hour ozone standard; and 2023 for the 8-hour ozone standard. The Air District staff
14 wanted these emissions reductions to be in place by the time these deadlines arrived.

15 96. The staff proposal also included other important provisions. Perhaps most significantly, the
16 proposal sought to remove RTCs generated from the future shutdowns of facilities from the NOx
17 RECLAIM program. The main basis for this decision stemmed from experiences related to the
18 shutdown of the largest NOx emitter in the region – California Portland Cement – which flooded the
19 RECLAIM market with RTCs. Several refineries and other facilities purchased these RTCs to add to
20 their RTC stockpiles.

21 97. The Air District staff recommended the shutdown proposal because the availability of
22 shutdown credits threatened to make the program fail to be equivalent to command and control, or
23 direct pollution reduction programs because existing facilities could “comply” with the requirements
24 of the RECLAIM program without doing anything to reduce its emissions.

25 **E. Industry Proposal.**

26 98. On December 4, 2015, the morning of the Governing Board meeting, the Western States
27 Petroleum Association (“WSPA”), the primary trade association for the oil and gas industries here in
28 California, indicated it had developed with its industry allies a new “compromise” proposal for the

1 NOx RECLAIM shave (hereinafter “industry proposal”). The industry proposal differed from the
2 prior proposals submitted during the rulemaking process. The industry proposal was initially
3 disclosed by Catherine Reheis Boyd, President of WSPA, during public comment. Her description of
4 the proposal presented during her public comment was the same as the motion ultimately read by
5 Governing Board member Supervisor Nelson of Orange County and adopted by the Governing
6 Board.

7 99. The industry proposal included a 12 tpd shave. There was no description how this proposed
8 shave related to the 2015 BARCT levels.

9 100. In fact the 12 tpd shave had not been analyzed in the staff report, the staff presentation or the
10 Final PEA.

11 101. In addition, the industry proposal provided a schedule, which was called “backloaded” by the
12 WSPA president and clearly benefited the industry significantly. The industry proposed to remove
13 the 12 tpd on the following schedule –

14 2016 – 2 tpd

15 2017 – 0 tpd

16 2018 – 1 tpd

17 2019 – 1 tpd

18 2020 – 2 tpd

19 2021 – 2 tpd

20 2022 – 4 tpd

21 102. The industry proposal did not mention how this schedule supported the ability of the South
22 Coast air basin to attain any NAAQS beyond a vague reference to the 2023 deadline to attain the 8-
23 hour ozone standard (80 ppb).

24 103. Despite the three-year process and analysis involved in developing the Air District’s staff
25 proposal of a 14 tpd shave, this new industry proposal was first presented to the public on December
26 4, 2015.

27 104. When discussing what would happen if the shave differed from the Air District’s staff
28 proposal of 14 tpd, Dr. Fine stated the following at the December 4, 2015 hearing – “[i]f we shave

1 less than [14 tpd], the margin in the market would be too large. The prices of RTCs would [be] too
2 low and there would be no incentive to put on these controls.”

3 105. The industry proposal also removed the provision in the Air District’s staff proposal to
4 eliminate RTCs associated with facilities that shut down in some circumstances. The industry
5 proposal remanded this issue back to the NOx RECLAIM working group.

6 106. When asked about the industry proposal as reflected in Supervisor Nelson’s motion, the
7 Executive Officer of the SCAQMD at that time, Dr. Barry Wallerstein, stated: “I don’t believe the
8 record would support 12 [tpd], and I don’t believe the record supports such a significant backloading
9 of the reductions as requested in the Industry/WSPA proposal as reflected in Supervisor Nelson’s
10 motion.”

11 107. On December 4, 2015, despite staff’s recommendations and warnings, the Air District’s
12 Governing Board adopted the industry proposal by a vote of seven in favor and five opposed, with
13 one abstention. In addition to this decision, the Governing Board determined that “the SCAQMD
14 Governing Board prior to voting on Proposed Amended Regulation XX – Regional Clean Air
15 Incentives Market (RECLAIM), has reviewed, considered, and approved the Final PEA, including
16 responses to comments, prior to its certification.” Thus, the Governing Board claimed that the Final
17 PEA informed its decision.

18 108. On March 4, 2016, the Governing Board heard an agenda item concerning a request by the
19 State Senate Environmental Quality Committee and other members of the State Senate to reconsider
20 the Board’s December 2015 amendments to the NOx RECLAIM program. The motion to reconsider
21 received five votes. To be adopted at the Air District, a proposal must receive seven votes.

22 **FIRST CAUSE OF ACTION**

23 **(Violation of Health & Saf. Code §§ 39616, 40001, and 40440)**

24 109. Petitioners hereby re-allege and incorporate herein by reference the allegations contained in
25 paragraphs 1 through 107.

26 110. The NOx RECLAIM program, as adopted, is not equivalent to BARCT emission levels as
27 required by Health and Safety Code section 40440, subdivision (b)(1), because staff concluded
28 BARCT emission levels would equal 9.5 tpd in 2023. The program adopted allows for 14.5 tpd in

1 2023. Thus, the total emissions allowed in the program are more than what would be emitted if the
2 facilities were required to comply with BARCT.

3 111. The staff of the Air District confirmed that excess credits reduce incentives to install controls
4 and ensure BARCT equivalents are not met, saying: “If we shave less than [14 tpd], the margin in
5 the market would be too large. The prices of RTCs would be too low and there would be no
6 incentive to put on these controls.”

7 112. The NO_x RECLAIM program is further not equivalent to BARCT because it includes RTCs
8 from emissions that no longer exist. For example, the program includes RTCs from facilities that are
9 not operational and have shut down, such as the California Portland Cement Facility. Under a
10 “command and control” program, a nonoperational facility would emit zero pounds of pollution. The
11 program inexplicably allows other facilities to emit more by treating the emissions from the cement
12 plant and other source categories as continuing to exist even though the facilities were shut down.

13 113. The NO_x RECLAIM program is also not equivalent to BARCT because the program
14 includes a 10% compliance margin. There is no basis for a 10% compliance margin in command and
15 control programs.

16 114. The NO_x RECLAIM program is not equivalent to BARCT because the program includes a
17 margin for projected growth. A command and control program does not allow additional emissions
18 before the facilities are actually sited and allowed to emit.

19 115. Finally, the NO_x RECLAIM program does not achieve emissions reductions consistent with
20 the efforts in the air basin to achieve the NAAQS and CAAQS, including PM_{2.5} NAAQS and
21 CAAQS. (Health & Saf. Code §§ 40402, subd. (e), and 40001, subd. (a).)

22 116. Based on these flaws, the Air District is violating California’s Health and Safety Code
23 requirements, and the Court should require compliance with these legislative mandates. Petitioners
24 have no remedy at law to enforce such compliance.

25 **SECOND CAUSE OF ACTION**

26 **(Violation of Code of Civ. Proc. § 1085 – Arbitrary and Capricious Rulemaking)**

27 117. Petitioners incorporate by reference the allegations set forth in paragraphs 1 through 115
28 above.

1 118. In making its decision, an agency must adequately consider “all relevant factors” and
2 demonstrate “a rational connection between those factors, the choice made, and the purposes of the
3 enabling statute.” (*American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th
4 446, 460.) The agency’s action must not be “arbitrary, capricious, entirely lacking in evidentiary
5 support, unlawful, or procedurally unfair.” (*Ibid.*)

6 119. The Air District’s approval of the industry proposal was arbitrary, capricious, entirely lacking
7 in evidentiary support, unlawful and procedurally unfair. In particular, the Governing Board certified
8 the Final PEA, and yet the material contained in that document contradicts the industry proposal
9 because it confirms that this proposal does not achieve equivalent BARCT level of emissions.

10 120. Moreover, there is no evidence in the record, including the Staff Report, CEQA analysis and
11 presentation to justify the industry proposal adopted by the Governing Board. Importantly, the
12 record before the Governing Board did not provide any connection to how the 12 tpd shave connects
13 to the 2015 BARCT Assessment.

14 121. This approach does not comport with the Health and Safety Code’s push to clean the air
15 sufficient to protect public health. Dr. Barry Wallerstein, the Executive Officer stated: “I don’t
16 believe the record would support 12 [tpd], and I don’t believe the record supports such a significant
17 backloading of reductions as requested in the Industry/WSPA proposal as reflected in Supervisor
18 Nelson’s motion.”

19 122. The Board’s adoption of the industry proposal was also arbitrary and capricious because
20 there is no basis for concluding that emission reductions from the program are, or have been,
21 consistent with the efforts in the air basin to achieve the NAAQS and CAAQS, including PM2.5
22 NAAQS and CAAQS. (Health and Saf. Code §§ 40402, subd. (e), and 40001, subd. (a).) In fact, in
23 making the arguments about this proposal, the proponents only vaguely mentioned the 2023
24 attainment deadline for the 1997 8-hour ozone standard. The proposal adopted by the Board fails to
25 explain how its approach aids in attaining the 24-hour PM2.5 standard by 2019, Annual PM2.5
26 standard by 2021, and the 1-hour ozone standard by 2022. It was arbitrary and capricious to ignore a
27 relevant factor like the attainment dates for PM2.5 standards and the 1-hour ozone standard.

28

1 123. Finally, approval of the industry proposal was procedurally unfair because after a three-year
2 rulemaking process, the public only became aware of this proposal during the hearing.

3 124. Given that the Air District's Governing Board did not adequately consider the relevant
4 information before it, and failed to comply with Health and Safety Code section 40440, subdivision
5 (b)(1), by promulgating a NOx Reclaim program that does meet BARCT equivalent emissions, the
6 Court should set aside the December 4, 2015, decision of the Air District. Petitioners have no
7 remedy at law to force the Air District to set aside this decision.

8 **PRAYER FOR RELIEF**

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

10 I. As to the FIRST CAUSE OF ACTION:

11 1. For a writ of mandate or peremptory writ issued under the seal of this Court pursuant
12 Code of Civil Procedure section 1085 commanding the South Coast Air District to set
13 aside its December 4, 2015 approval of the industry proposal and to do the following:

- 14 i. Replace the NOx RECLAIM program with a command and control
15 program that achieves BARCT levels for existing sources; or
16 ii. Implement a NOx RECLAIM program that actually achieves
17 BARCT equivalence. This entails implementing a shave that is
18 tethered to the 2015 BARCT Assessment and does not artificially
19 inflate the program cap by establishing -

- 20 a. RTC levels that do not include a BARCT adjustment at .85
21 tpd;
22 b. RTC levels that do not include RTCs attributable to growth
23 before that growth actually occurs;
24 c. RTC levels that do not allow for compliance margins;
25 d. RTC levels that do not include RTCs from facilities that
26 shut down in the future;
27 e. RTC levels that do include RTCs associated with
28 "uncertainties;" and

1 f. RTC levels that do not include RTCs from cement kilns
2 and glass metal furnaces, which are currently
3 nonoperational and lack permits to operate in the South
4 Coast air basin.

5 iii. Implement a program that proceeds on a timeline that ensures
6 reductions align with the several attainment deadlines in the next
7 seven years, including PM2.5 standards; and

- 8 2. For a declaration under Code of Civil Procedure section 1060 that the South Coast
9 Air District is violating California's Health and Safety Code by failing to implement a
10 NOx RECLAIM program that achieves the same emission reductions that would have
11 occurred under a command and control approach implementing BARCT, and that
12 emission reductions from the program fully contribute to the efforts in the air basin to
13 achieve the federal NAAQS and CAAQS; and
- 14 3. For injunctive relief consistent with section I, subdivision 1, above ordering
15 compliance with California's Health and Safety Code.

16 II. As to the SECOND CAUSE OF ACTION:

- 17 1. For a writ of mandate or peremptory writ under the seal of this Court pursuant to
18 Code of Civil Procedure section 1085 as detailed under section I, subdivision, 1
19 above;
- 20 2. For a declaration under Code of Civil Procedure section 1060 that the approval of the
21 industry proposal was arbitrary and capricious; and
- 22 3. For injunctive relief in consistent with section I, subdivision 1, above ordering
23 compliance with California's Health and Safety Code.

24 III. As to ALL CAUSES OF ACTION:

- 25 1. For costs of the suit;
- 26 2. For attorneys' fees under Code of Civil Procedure section 1021.5 and other applicable
27 authority; and
- 28 3. For such other legal and equitable relief as this Court deems appropriate and just.

1
2 DATED: March 9, 2016

Respectfully submitted,



3
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VERIFICATION

I, Maya Golden-Krasner, hereby declare:

I am a Climate Staff Attorney at the Center for Biological Diversity, a non-profit corporation with offices in Los Angeles, California and elsewhere in the United States. I have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF and am familiar with its contents. The facts alleged in it are true to my personal knowledge and belief.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this verification is executed on this 9th day of March 2016 at Los Angeles, California.



Maya Golden-Krasner

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VERIFICATION

I, Gladys Limón, hereby declare:

I am a Staff Attorney at Communities for a Better Environment, a non-profit corporation with offices in Huntington Park, California and elsewhere in the United States. I have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF and am familiar with its contents. The facts alleged in it are true to my personal knowledge and belief.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this verification is executed on this 9th day of March 2016 at Huntington Park, California.



Gladys Limón

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VERIFICATION

I, Evan Gillespie, hereby declare:

I am Deputy Director of the Beyond Coal Campaign at the Sierra Club, a non-profit corporation with offices in Los Angeles, California and elsewhere in the United States. I have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF and am familiar with its contents. The facts alleged in it are true to my personal knowledge and belief.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this verification is executed on this __ day of March 2016 at Los Angeles, California.



Evan Gillespie

