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**VIA ELECTRONIC & USPS CERTIFIED MAIL**

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**Re: Petition to EPA to Require Revision of California SIP Provisions related to Fee Programs**

Dear Mr. Regan, Ms. Guzman Aceves, and Mr. Lakin:

The People’s Collective for Environmental Justice, Communities for Better Environment, East Yard Communities for Environmental Justice, and Sierra Club (together, “Petitioners”) submit this petition pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 551, *et seq.*; the Clean Air Act (“CAA”), 42 U.S.C. § 7401, *et seq.*; and the Environmental Protection Agency’s (“EPA”) CAA implementing regulations, to require the State of California to revise its State Implementing Plan (“SIP”) to address provisions that are contrary to the CAA. Specifically, Petitioners request the EPA to require the South Coast Air Quality Management District (“SCAQMD” or “South Coast”) to undertake the following and submit to the California Air Resources Board (“CARB”):

1. Revised fee program under Section 172(e) of the CAA for the 1979 one-hour Ozone National Ambient Air Quality Standards (“NAAQS”) (“Rule 317”);<sup>1</sup>
2. An adopted fee program under Section 185 of the CAA for the 1997 eight-hour Ozone NAAQS; and
3. An adopted fee program under Section 185 of the CAA for the 2008 eight-hour Ozone NAAQS.

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<sup>1</sup> 42 U.S.C. § 7511d; *Rule 317*, S. Coast Air Quality Mgmt. Dist. 5, <http://www.aqmd.gov/docs/default-source/rule-book/reg-iii/rule-317.pdf> (last amended February 4, 2011).

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## I. INTRODUCTION

There are 400 major facilities in the South Coast Air Basin that are subject to the SCAQMD's CAA Section 185 non-attainment fee regulation. The worst of these facilities, namely, refineries, power plants, major utilities, and large industrial facilities, emit precursors to ozone: nitrous oxides ("NOx") and volatile organic compounds ("VOCs"), which contribute to severe adverse health outcomes, including asthma, respiratory illnesses, emphysema, and even cancer.

For over a decade, South Coast has found a way to avoid penalizing major stationary sources for their toxic emissions, and at the same time, it is taking credit for programs that would have been implemented anyway. The largest beneficiaries of this approach are some of the most lucrative corporations in the world.<sup>2</sup>

The table below lists the top fifteen major sources of NOx and VOCs, which are typically refineries, utilities, power plants, and industrial facilities<sup>3</sup>:

Number	Facility Name
1.	TESORO REFINING AND MARKETING CO, LLC
2.	TORRANCE REFINING COMPANY, LLC
3.	ULTRAMAR, INC
4.	BETA OFFSHORE
5.	BREA PARENT 2007, LLC
6.	U.S. GOVT, DEPT OF NAVY
7.	TAMCO
8.	MOLSON COORS USA, LLC
9.	SOUTHERN CALIFORNIA EDISON
10.	PHILLIPS 66 CO/LA REFINERY WILMINGTON PL
11.	INSULFOAM
12.	SUNSHINE CYN LANDFILL REPUBLIC SERV, INC
13.	METAL CONTAINER CORP
14.	LA CO. SANITATION DIST
15.	SFPP, L.P.

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<sup>2</sup> Rule 317 - Clean Air Act Non-Attainment Fees, Section 172(e) Fee Equivalency Account (FEA), Fee Assessment Year (FAY) 2018 Reconciliation Report [CY 2017 Activity] for the South Coast Air Basin (SOCAB), S. Coast Air Quality Mgmt. Dist. at Attachment D (Sept. 3, 2020), [http://www.aqmd.gov/docs/default-source/rule-book/support-documents/rule-317/scaqmd-r317-172\(e\)-fea-fay2018-report.pdf?sfvrsn=6](http://www.aqmd.gov/docs/default-source/rule-book/support-documents/rule-317/scaqmd-r317-172(e)-fea-fay2018-report.pdf?sfvrsn=6) (hereinafter, "FEA Report").

<sup>3</sup> Based on the FEA Report, *supra* note 2, the top 5 beneficiaries are: Tesoro Refining And Marketing Co, LLC; Torrance Refining Company LLC; Ultramar Inc (a wholly owned subsidiary of Valero Energy Corporation); Beta Offshore (a subsidiary of Amplify Energy, one of the largest oil producers in Southern California); and Brea Parent 2007, LLC.

These major stationary sources are overwhelmingly in low-income communities and communities of color, with nearly 75% of stationary sources adjacent to communities with over 50% people of color and nearly 35% adjacent to communities with 50% of residents in low-income census tracts, as defined by the census.<sup>4</sup> South Coast's approach to the CAA penalty provision is especially egregious when considering the cumulative impacts on communities of color. Communities of color are especially sensitive<sup>5</sup> to exposure to additional ozone pollution because of pre-existing health conditions such as asthma and chronic respiratory illnesses. Furthermore, these communities are overburdened by other types of pollution, like particulate matter from adjacent transit corridors and ports.<sup>6</sup>

Despite deep pockets for polluters, SCAQMD's insufficient fee program for the one-hour ozone standard and the lack of a fee program for the eight-hour ozone standard amounts to no penalty and, in its place, a paper exercise to provide the veneer of a penalty. As a result, SCAQMD's practices violate the CAA, as well as EPA's implementing regulations, and thus fail to protect public health.

Studies have shown that it will be "challenging [for South Coast] to attain the NAAQS ozone standard" and that energy production needs to be shifted "to less or no NOx emission to meet the requirements of large NOx reduction" necessary to bring the region into compliance.<sup>7</sup> This will require well-aligned incentives, financial or otherwise, to reduce precursors to ground-level ozone. Yet, South Coast has failed to provide these financial incentives to curb precursors to ozone and smog formation.

There are two key deficiencies.

First, for the 1979 one-hour ozone standard, instead of instituting a fee program that incentivizes large industrial polluters in the South Coast region to cut their emissions of nitrous oxides and volatile organic compounds by 20%, SCAQMD has created a program that allows them to take credit for a grab bag of programs that would exist regardless of whether the South Coast Air Basin attained the one-hour ozone standard. This approach does nothing to alleviate the serious air quality concerns surrounding major stationary sources, such as communities of color disproportionately burdened by toxic pollution.

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<sup>4</sup> See Exhibit A, which compiles data regarding pollution and community demographics. The data is from Rule 317 - Clean Air Act Non-Attainment Fees, Section 172(e) Fee Equivalency Account (FEA), Fee Assessment Year (FAY) 2019 Reconciliation Report [CY 2018 Activity] for the South Coast Air Basin (SOCAB), S. Coast Air Quality Mgmt. Dist. at Attachment E (Sept. 3, 2020), [http://www.aqmd.gov/docs/default-source/rule-book/support-documents/rule-317/scaqmd-r317-172\(e\)-fea-fay2019-report.pdf?sfvrsn=6](http://www.aqmd.gov/docs/default-source/rule-book/support-documents/rule-317/scaqmd-r317-172(e)-fea-fay2019-report.pdf?sfvrsn=6); data pertaining to the distribution of low income communities and communities of color is from EPA's Environmental Justice Screening and Mapping Tool (Version 2.2), Env't Prot. Agency, <https://ejscreen.epa.gov/mapper/> (last visited February 26, 2023).

<sup>5</sup> Linda S. Adams & Joan E. Denton, *Cumulative Impacts: Building a Scientific Foundation*, Off. of Env't Health Hazard Assessment 12-13 (2010), <https://oehha.ca.gov/media/downloads/calenviroscreen/report/cireport123110.pdf>.

<sup>6</sup> James L. Sadd et al., *Playing It Safe: Assessing Cumulative Impact and Social Vulnerability through an Environmental Justice Screening Method in the South Coast Air Basin*, California, 8 Int'l J. of Env't Rsch. & Pub. Health 1441 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3108119/>.

<sup>7</sup> Begie Perdignes et al., *Evaluating ozone attainment based on its dependency on precursor emissions in South Coast Air Basin (SoCAB), California*, AGU Fall Meeting 2021 (Dec. 2021), available online at <https://ui.adsabs.harvard.edu/abs/2021AGUFM.A32G..07P/abstract>.

Second, for the 1997 and 2008 eight-hour ozone standards, South Coast was required to adopt a fee program to incentivize major sources to limit precursor pollution by 2014. Although SCAQMD has had a decade to create such fee rules and submit them as part of their SIP revisions, SCAQMD has failed to adopt these standards.

As the state agency responsible for ensuring a valid SIP, CARB has failed in its duties to ensure that South Coast's programs meet the requirements of the CAA.

These SIP provisions are, at a minimum, inconsistent with Section 110(l) of the CAA, which prohibits approval of any SIP provision that would "interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 172), or any other applicable requirement of this Act."<sup>8</sup> To comply with the law and to advance environmental justice, EPA must require revision of the California SIP pursuant to Section 110(k) of the CAA, which states that the Administrator must call for the revision of a SIP "[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.

## **II. PARTIES**

### **A. Petitioners**

Petitioners' members reside in the South Coast Air Basin and suffer from health impacts related to ozone pollution. The South Coast has the worst ozone pollution in the nation and has failed to meet federal ozone standards. Decades of insufficient air plans have failed to bring the South Coast into attainment. Those most harmed are communities of color forced to breathe this noxious air. Short and long-term exposure to ozone has been linked to respiratory illnesses, premature death, and other serious health harms.

East Yard Communities for Environmental Justice ("EYCEJ"), founded in 2001, is an environmental health and justice nonprofit corporation working towards a safe and healthy environment for communities that disproportionately suffer the negative impacts of industrial pollution. EYCEJ represents approximately 1,000 members in East Los Angeles, Southeast Los Angeles, Long Beach, Carson, and Wilmington. Through grassroots organizing and leadership-building skills, EYCEJ prepares community members to engage in policy issues of environmental justice and air quality at the regional, statewide, and national levels. For decades, EYCEJ has advocated for holding major stationary sources accountable for their part in ozone pollution. Because the current credit program fails to reduce ozone pollution in areas where its members reside, EYCEJ seeks EPA enforcement of a strong fee program that will address the disproportionate impact on communities of color.

People's Collective for Environmental Justice ("PC4EJ") is dedicated to building community power in the Inland Empire to fight against pollution and environmental racism. Founded in 2020, PC4EJ represents over 1,000 community members in the Inland Empire who are impacted by ozone pollution. Since its inception, PC4EJ has advocated for strong financial incentives for major stationary sources to reduce precursors to ozone pollution. PC4EJ staff and members have advocated for well-designed fee programs to incentivize stationary sources to reduce NO<sub>x</sub> and VOC emissions. A well-functioning fee program is essential to reducing the

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<sup>8</sup> 42 U.S.C. § 7410(l).

pollution burdens shouldered by PC4EJ members.

Sierra Club is a national environmental organization founded in 1892 that is dedicated to exploring, enjoying, and protecting the planet; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out those objectives. Sierra Club currently has approximately 3.1 million members and supporters nationwide and around 47,000 members in the South Coast. Sierra Club has for years advocated for policies in California that relieve under-resourced communities from shouldering a disproportionate burden of toxic air pollution. For many years, Sierra Club has advocated for strong regulatory measures to control NOx and VOC emissions in the South Coast and throughout the country.

Communities for a Better Environment (“CBE”) is a California nonprofit health and justice organization. Since 1978, CBE has organized residents living in frontline communities around environmental, racial, and social justice issues. CBE has hundreds of members in Los Angeles, with a large representation in frontline communities like Southeast Los Angeles and Wilmington. Through organizing, education, and leadership development, CBE is committed to empowering communities to transform environmental conditions and improve health outcomes in low-income communities and communities of color. CBE seeks to require South Coast to implement a fee program that reduces ozone air pollution in communities seeking environmental justice, where CBE has a vast membership base.

## **B. South Coast Air Quality Management District and California Air Resources Board**

Under the CAA,<sup>9</sup> the EPA sets NAAQS for several pollutants, including ozone, at levels “requisite to protect the public health.”<sup>10</sup> By submitting SIPs, each state provides a plan to EPA explaining how it intends to implement and enforce the NAAQS.<sup>11</sup>

In California, local authorities have the primary responsibility to control air pollution from all sources other than motor vehicles.<sup>12</sup> Air pollution control and air quality management districts adopt and enforce rules and regulations to achieve and maintain federal and state NAAQS for the areas under their jurisdiction.<sup>13</sup> Once adopted, these rules (including fee rules) are submitted to CARB for approval and integration into the California SIP.

South Coast is the political subdivision responsible for air pollution control in the South Coast Air Basin, encompassing Orange County and portions of San Bernardino, Riverside, and Los Angeles Counties, including the Wilmington area. The basin encompasses 10,743 square miles and is home to over 17.8 million people. About half the population of the state of California lives within the South Coast region.

CARB is designated as the state agency responsible for the preparation of the SIP required by the CAA (42 U.S.C., Sec. 7401, *et seq.*) and, thus “coordinates the activities of all

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<sup>9</sup> 42 U.S.C. § 7401 *et seq.*

<sup>10</sup> 42 U.S.C. § 7409(b)(1).

<sup>11</sup> 42 U.S.C. § 7410(a)(1); Cal. Health & Safety Code § 39000 *et seq.*

<sup>12</sup> Cal. Health & Safety Code §§ 39002, 40000.

<sup>13</sup> Cal. Health & Safety Code §§ 40001, 40440.

districts necessary to comply with that act.”<sup>14</sup> CARB is also responsible for adopting non-attainment area plans and for approving district air quality plans as sufficient to meet state legal requirements. Specifically, CARB must review the non-attainment area plans as well as rules and regulations and programs submitted by the districts to determine whether they are sufficiently effective to achieve and maintain the state ambient air quality standards.<sup>15</sup> If the plans are deficient, CARB must notify the district of all deficiencies in writing.<sup>16</sup>

### III. JURISDICTION

This petition is filed pursuant to the APA.<sup>17</sup> The APA specifically requires that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”<sup>18</sup>

The SIP is the backbone for protecting and improving a state’s air quality. Pursuant to the CAA, individual states develop SIPs to attain and maintain health and welfare-based NAAQS promulgated by the EPA and meet other requirements under the CAA, including Prevention of Significant Deterioration (“PSD”) requirements.<sup>19</sup>

The SIP is a living document that the state and EPA can, from time to time, revise as necessary. EPA is authorized, pursuant to the CAA, to call for SIP revisions when a SIP is inadequate to attain or maintain the NAAQS or otherwise fails to meet the requirements of the CAA.<sup>20</sup> Further, EPA can “*require* the state to revise the SIP as necessary to correct such inadequacies.”<sup>21</sup> (emphasis added).

The APA requires EPA to conclude the matter raised in this petition within a reasonable time.<sup>22</sup> This petition asks the EPA to resolve SIP inadequacies to ensure full and legally adequate protection of air quality in the South Coast Air Basin.

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<sup>14</sup> Cal. Health & Safety Code § 39602.

<sup>15</sup> Cal. Health & Safety Code §§ 41500, 41650.

<sup>16</sup> Cal. Health & Safety Code § 41503.2.

<sup>17</sup> 5 U.S.C. § 551, *et seq.*

<sup>18</sup> 5 U.S.C. § 553(e).

<sup>19</sup> *See* 42 U.S.C. § 7410(a).

<sup>20</sup> *See* 42 U.S.C. § 7410(k)(5).

<sup>21</sup> *Id.*

<sup>22</sup> 5 U.S.C. § 555(b).

## IV. FACTUAL BACKGROUND

### A. The Community and Residents of South Coast

#### 1. Ground-Level Ozone Origins

Ozone is not emitted from any source at ground level.<sup>23</sup> It is a secondary pollutant synthesized from precursors emitted by human activity in the presence of sunlight.<sup>24</sup> Ozone synthesis requires NO<sub>x</sub>, primarily from fossil fuel combustion; VOCs, which may be anthropogenic; and energy (heat and sunlight) from the sun.<sup>25</sup> Ozone contributes to what we typically experience as “smog” or haze when ground-level ozone combines with other gases and particle pollution.<sup>26</sup>

Thus, the primary ways to reduce ozone pollution involve reducing its precursors, NO<sub>x</sub>, and VOCs. With climate change and higher temperatures, scientists expect increases in ozone concentrations since higher temperatures hasten chemical interactions between NO<sub>x</sub> and VOCs.<sup>27</sup> It is therefore imperative that stringent policies limit NO<sub>x</sub> and VOC emissions from major stationary sources.

#### 2. Residents of the South Coast Air Basin are disproportionately exposed to toxic Air Pollution

NO<sub>x</sub> and VOCs are independently harmful to human health. Breathing air with a high concentration of NO<sub>x</sub> can cause and aggravate respiratory diseases.<sup>28</sup> People with asthma, children, and the elderly are generally at greater risk.<sup>29</sup> Epidemiological studies have also demonstrated associations between NO<sub>x</sub> exposure and premature death, cardiopulmonary effects, decreased lung function growth in children, respiratory symptoms, emergency room visits for asthma, and intensified allergic responses.<sup>30</sup> Over time, exposure to NO<sub>x</sub> has been

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<sup>23</sup> Pamela E. Padgett et al., *Measuring Individual Ozone Exposure in Los Angeles Urban Parks*, U.S. Dep’t of Agric. 2 (Oct. 2021), [https://www.fs.usda.gov/psw/publications/documents/psw\\_gtr274/psw\\_gtr274.pdf](https://www.fs.usda.gov/psw/publications/documents/psw_gtr274/psw_gtr274.pdf); see also *Ozone*, Am. Lung Ass’n (2022), [https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/ozone#:~:text=Ozone%20develops%20in%20the%20atmosphere,volatile%20organic%20compounds%20\(VOCs\).](https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/ozone#:~:text=Ozone%20develops%20in%20the%20atmosphere,volatile%20organic%20compounds%20(VOCs).)

<sup>24</sup> *Ground-level Ozone Basics*, U.S. Env’t Prot. Agency, <https://www.epa.gov/ground-level-ozone-pollution/ground-level-ozone-basics> (last updated June 2, 2023).

<sup>25</sup> *Id.*

<sup>26</sup> *Ground-Level Ozone Standards Designations Frequent Questions*, U.S. Env’t Prot. Agency Web Archive (Mar. 2016), <https://archive.epa.gov/ozonedesignations/web/html/faq.html>.

<sup>27</sup> Rachel Morello-Frosch et al., *The Climate Gap Report*, Univ. of S. Cal. Dornsife Coll. of Letters, Arts & Sci. 13, [https://dornsife.usc.edu/assets/sites/242/docs/The\\_Climate\\_Gap\\_Full\\_Report\\_FINAL.pdf](https://dornsife.usc.edu/assets/sites/242/docs/The_Climate_Gap_Full_Report_FINAL.pdf) (citing M. Jacobson, *On the causal link between carbon dioxide and air pollution mortality*, L03809 *Geophys. Res. Lett.* 35 (2008)).

<sup>28</sup> *Basic Information about NO<sub>2</sub>*, U.S. Env’t Prot. Agency (Aug. 2022), <https://www.epa.gov/no2-pollution/basic-information-about-no2>.

<sup>29</sup> *Id.*

<sup>30</sup> *Nitrogen Dioxide & Health*, Cal. Air Res. Bd. (2022), <https://ww2.arb.ca.gov/resources/nitrogen-dioxide-and-health>.



significantly associated with mortality owing to respiratory diseases.<sup>31</sup> Fatalities can be reduced between ten and eighteen percentage points simply by reducing NOx exposure by three micrograms per cubic meter of air.<sup>32</sup>

Similarly, VOC exposure is associated with pulmonary diseases, including asthma and its symptoms, such as wheezing and throat irritation.<sup>33</sup> Additionally, oxidative stress and decreased lung function are related to chronic exposure to low VOC levels.<sup>34</sup> Studies also show that ambient exposure to VOCs exacerbates cardiovascular disease risk.<sup>35</sup> Elderly populations are particularly at risk, with studies showing that VOCs can impair pulmonary function, especially in the elderly population.<sup>36</sup> Children are also particularly vulnerable to VOC exposures. Children enrolled in schools with higher ambient VOC concentrations were found to have higher rates of doctor-diagnosed asthma and a higher score on a composite indicator of five chronic lower respiratory symptoms.<sup>37</sup>

VOCs and NOx combine to form ozone, which has been a longstanding environmental problem in Los Angeles with its own set of health impacts.<sup>38</sup>

Historically, Los Angeles and the greater South Coast Air District have experienced the most severe ozone pollution in the nation.<sup>39</sup> All the counties that make up the South Coast Air Basin (Los Angeles, San Bernardino, Riverside, and Orange) received a score of “F” on the American Lung Association’s air quality report because of ozone pollution.<sup>40</sup> The 2023 report by the American Lung Association ranks the Los Angeles region as the worst in the nation for ozone pollution.<sup>41</sup> In fact, areas in the South Coast violate the ozone standards more days each year than any other place in the country: Los Angeles had 175 high ozone days; Riverside had

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<sup>31</sup> A. C. G. César et al., *Association between NOx exposure and deaths caused by respiratory diseases in a medium-sized Brazilian city*, 48 *Braz. J. of Med. & Biological Rsch.* 1130 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4661030/>.

<sup>32</sup> *Id.*

<sup>33</sup> Kyle L. Alford & Naresh Kumar, *Pulmonary Health Effects of Indoor Volatile Organic Compounds - A Meta-Analysis*, 18 *Int’l J. Env’t Res. Pub. Health* 1578 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7914726/>.

<sup>34</sup> Gabriel-Petrică Bălă et al., *Air pollution exposure—the (in)visible risk factor for respiratory diseases*, 28 *Env’t Sci. Pollut Rsch.* 19615 (2021), <https://doi.org/10.1007/s11356-021-13208-x>.

<sup>35</sup> Daniel W. Riggs et al., *Environmental Exposure to Volatile Organic Compounds is Associated with Endothelial Injury*, 437 *Toxicology & Applied Pharmacology* 115877 (2021), <https://www.medrxiv.org/content/10.1101/2021.08.25.21262556v2.article-info>.

<sup>36</sup> H. I. Yoon et al., *Exposure to volatile organic compounds and loss of pulmonary function in the elderly*, 36 *Eur. Respiratory J.* 1270 (2010), <https://erj.ersjournals.com/content/36/6/1270>.

<sup>37</sup> James H. Ware et al., *Respiratory and Irritant Health Effects of Ambient Volatile Organic Compounds: The Kanawha County Health Study*, 137 *Am. J. of Epidemiology* 1287 (1993), <https://doi.org/10.1093/oxfordjournals.aje.a116639>.

<sup>38</sup> Padgett et al., *supra* note 17, at 7.

<sup>39</sup> *Id.*

<sup>40</sup> *Report Card: California*, Am. Lung Ass’n (2023), <https://www.lung.org/research/sota/city-rankings/states/california> (see Los Angeles, Orange, Riverside, and San Bernardino counties).

<sup>41</sup> *American Lung Association State of the Air 2023*, Am. Lung Ass’n 18 (2023), <https://www.lung.org/getmedia/338b0c3c-6bf8-480f-9e6e-b93868c6c476/SOTA-2023.pdf>.

232 high ozone days; San Bernardino had 194 high ozone days.<sup>42</sup> More recent data shows that ozone concentrations in the South Coast Air Basin have been as high as 185 parts per billion (ppb).<sup>43</sup> As a result, people living in the South Coast suffer from high rates of health ailments.

The consequences of the South Coast's extreme ozone problem can be deadly. Though atmospheric ozone protects individuals from harmful ultraviolet radiation, ground-level ozone can be extremely hazardous to human health. According to the American Lung Association, inhaling ozone can lead to shortness of breath, chest pain, coughing, wheezing, inflammation of the lungs, asthma attacks, and premature death. Ozone pollution can also cause permanent scarring of the lungs.<sup>44</sup>

Unsurprisingly, ozone pollution has seriously impacted residents of the South Coast. A 2010 study found that ozone pollution in the South Coast was associated with a high number of school absences, emergency room visits, asthma attacks, premature deaths, and "restricted activity" days.<sup>45</sup> Estimated lifetime cancer risks associated with outdoor air toxics exposures in the South Coast Air Basin were also found to be universally high, often exceeding the CAA goal of one in one million by between one and three orders of magnitude.<sup>46</sup>

Moreover, due to this high level of air pollution, the South Coast Air Basin puts significantly large populations at risk. For example, the American Lung Association estimated that in the Los Angeles-Long Beach region, more than 250,000 children and 1.3 million adults have asthma.<sup>47</sup> In addition, over 700,000 individuals in the region suffer from Chronic Obstructive Pulmonary Disease.<sup>48</sup> Furthermore, the Los Angeles-Long Beach region is home to over 2.5 million individuals over the age of sixty-five.<sup>49</sup> Elderly individuals are among the most affected by ozone because their immune system is weakened and because their lung tissue has thinned and weakened over time.<sup>50</sup> As such, this number represents a considerably large at-risk population in a region with notoriously bad ozone problems.

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<sup>42</sup> *Id.* at 60.

<sup>43</sup> Pratik Thakur, *California air pollution's health and economic costs*, Univ. of S. Cal. Econ. Rev. (2021), <https://usceconreview.com/2021/10/22/california-air-pollutions-health-and-economic-costs/>.

<sup>44</sup> *Ozone*, Am. Lung Ass'n (2022), <https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/ozone>.

<sup>45</sup> Victor Brajer et al., *Valuing Health Effects: The Case of Ozone and Fine Particulates in Southern California*, 29 *Contemp. Econ. Pol'y* 524, 532 tbl.7 (2010), <http://www.scientificintegrityinstitute.org/Brajer100111.pdf>.

<sup>46</sup> Rachel Morello-Frosch et al., *Environmental Justice and Regional Inequality in Southern California: Implications for Future Research*, 110 *Env't Health Persp.* 149, 151 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1241158/pdf/ehp110s-000149.pdf>.

<sup>47</sup> *Los Angeles-Long Beach, CA*, Am. Lung Ass'n (2023), <https://www.lung.org/research/sota/city-rankings/msas/los-angeles-long-beach-ca>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Health Impact of Air Pollution*, Am. Lung Ass'n (2023), <https://www.lung.org/research/sota/health-risks>.

Emphysema is the destruction of lung tissue leading to wheezing, coughing, and shortness of breath, and increases the risk of death.<sup>51</sup> Increases in ambient ozone levels increase rates of emphysema (an increase similar to smoking a pack of cigarettes every day for 29 years).<sup>52</sup>

The COVID-19 pandemic has exacerbated the harm from exposure to toxic air pollution. South Coast residents have increased vulnerability to mortality from COVID-19. A Harvard study found a correlation between long-term exposure to air pollution and COVID-19 mortality rates.<sup>53</sup> The study’s results “underscore the importance of continuing to enforce existing air pollution regulations to protect human health both during and after the COVID-19 crisis.”<sup>54</sup> A study focusing on California found that higher COVID-19 deaths were associated with higher exposure to air pollution.<sup>55</sup> Based on the above-described health ailments, air pollution costs the communities in the South Coast Air Basin almost **\$2 billion to \$5 billion**.<sup>56</sup>

Ozone-Related Economic Benefits by County

	RESPIRATORY HOSPITAL ADMISSIONS (ALL AGES)	ASTHMA ATTACKS ASTHMATIC POPULATION	EMERGENCY ROOM VISITS	DAYS OF SCHOOL ABSENCES	MINOR RESTRICTED ACTIVITY DAYS	MORTALITY	TOTAL
<b>South Coast Air Basin</b>							
Los Angeles	\$15,400,000	\$3,183,000	\$54,120	\$58,630,000	\$31,790,000	\$79,510,000	\$188,600,000
Orange	\$3,530,000	\$916,000	\$16,240	\$22,300,000	\$9,350,000	\$19,880,000	\$56,000,000
Riverside	\$7,210,000	\$1,210,000	\$19,840	\$12,170,000	\$10,810,000	\$99,390,000	\$130,800,000
San Bernardino	\$6,870,000	\$1,205,000	\$19,840	\$12,880,000	\$11,220,000	\$72,890,000	\$105,100,000

### 3. Residents of Communities Surrounding Major Stationary Sources are Disproportionately Communities of Color

Even as California’s air quality continues to improve on average, statewide, elevated exposures persist in many California locales, disproportionately affecting disadvantaged

<sup>51</sup> Parul Pahal et al., *Emphysema*, Nat’l Lib. of Med., <https://www.ncbi.nlm.nih.gov/books/NBK482217/> (last updated Jan. 26, 2023).

<sup>52</sup> Meng Wang et al., *Association Between Long-term Exposure to Ambient Air Pollution and Change in Quantitatively Assessed Emphysema and Lung Function*, 322 J. of the Am. Med. Ass’n 546 (2019), [https://jamanetwork.com/journals/jama/fullarticle/2747669?guestAccessKey=cfba7399-ed6b-4ff3-abcd-260039916cd9&utm\\_source=For\\_The\\_Media&utm\\_medium=referral&utm\\_campaign=ftm\\_links&utm\\_content=tfl&utm\\_term=081319](https://jamanetwork.com/journals/jama/fullarticle/2747669?guestAccessKey=cfba7399-ed6b-4ff3-abcd-260039916cd9&utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_content=tfl&utm_term=081319).

<sup>53</sup> X. Wu et al., *Air pollution and COVID-19 mortality in the United States: Strengths and limitations of an ecological regression analysis*, 6 Sci. Advances 1 (2020), <https://projects.iq.harvard.edu/covid-pm>.

<sup>54</sup> Id.

<sup>55</sup> Erika Garcia et al., *Long-term air pollution and COVID-19 mortality rates in California: Findings from the Spring/Summer and Winter surges of COVID-19*, 292 Env’t Pollution 118396 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8529382/>.

<sup>56</sup> Devoun R Stewart et al., *Linking Air Quality and Human Health Effects Models: An Application to the Los Angeles Air Basin*, 11 Env’t Health Insights 1 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5692127/>; see also Jane V. Hall et al., *The Benefits of Meeting Federal Clean Air Standards in the South Coast and San Joaquin Valley Air Basins*, Asthma Coal. (2008), [https://admin.publichealth.lacounty.gov/mch/AsthmaCoalition/docs/BenefitsofMeetingCleanAirStandards\\_11\\_06\\_08.pdf](https://admin.publichealth.lacounty.gov/mch/AsthmaCoalition/docs/BenefitsofMeetingCleanAirStandards_11_06_08.pdf).

communities.<sup>57</sup> According to the American Lung Association, people of color are 3.7 times more likely than white people to live in a county with three failing grades for air quality.<sup>58</sup> African Americans are more likely to live in areas with high levels of particulate matter (“PM”) 2.5 and ozone, and Asians and Latinos are more than 50% more likely than their white counterparts to live in counties that exceed the federal standards for PM2.5 and ozone.<sup>59</sup>

National studies have previously shown that populations living in EPA-designated air quality non-attainment areas for ozone are disproportionately Hispanic (71.2%) compared to Black populations (62.2%) or white populations (52.5%).<sup>60</sup> Studies have also shown that overall, communities of color and low socio-economic groups often live in areas that are air pollution hot spots and may suffer greater health risks associated with ambient air pollution than the general population.<sup>61</sup> As the California Air Resources Board recently confirmed, 99% of disadvantaged communities in California are located in non-attainment areas, and achieving ozone standards and reducing emissions helps reduce negative impacts in these communities.<sup>62</sup> Owners and operators of these facilities know about the adverse health consequences of ozone and ozone precursor pollution.<sup>63</sup> For years, the industry lobby has attempted to undermine SCAQMD’s efforts to limit precursors to ozone, as explained further below.

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<sup>57</sup> Ned Helme et al., *Advancing Environmental Justice: A New State Regulatory Framework to Abate Community-Level Air Pollution Hotspots and Improve Health Outcomes*, Ctr. for Env’t Pub. Pol’y, Goldman Sch. Of Pub. Pol’y, U.C. at Berkeley 10 (2017), [https://gspp.berkeley.edu/assets/uploads/page/CEPP\\_Advancing\\_Environmental\\_Justice.pdf](https://gspp.berkeley.edu/assets/uploads/page/CEPP_Advancing_Environmental_Justice.pdf).

<sup>58</sup> *Key Findings*, Am. Lung Ass’n (2023), <https://www.lung.org/research/sota/key-findings>.

<sup>59</sup> Michelle Roos, *California’s Fourth Climate Change Assessment*, E4 Strategic Sol. 41 (2018), [https://www.energy.ca.gov/sites/default/files/2019-11/Statewide%20Reports-%20SUM-CCCA4-2018-012%20ClimateJusticeSummary\\_ADA.pdf](https://www.energy.ca.gov/sites/default/files/2019-11/Statewide%20Reports-%20SUM-CCCA4-2018-012%20ClimateJusticeSummary_ADA.pdf); see also *Paying to Pollute: The Environmental Injustice of Pollution Trading*, Food & Water Watch & Greenaction for Health & Env’t Just. 2 (2017), [https://foodandwaterwatch.org/wp-content/uploads/2021/03/ibsp\\_1711\\_ejpaytopollute-webfin2\\_0.pdf](https://foodandwaterwatch.org/wp-content/uploads/2021/03/ibsp_1711_ejpaytopollute-webfin2_0.pdf).

<sup>60</sup> Dee R. Wernette & Leslie A. Nieves, *Minorities and air pollution: a preliminary geodemographic analysis*, Env’t Assessment & Info. Sci. Div., Argonne Nat’t Lab’y 18 (1991), <https://www.osti.gov/servlets/purl/5295546>.

<sup>61</sup> Julian D. Marshall, *Environmental inequality: air pollution exposures in California’s South Coast Air Basin*, 42 Atmospheric Env’t 5499 (2008), <https://www.sciencedirect.com/science/article/abs/pii/S1352231008001350>; see also Morello-Frosch et al., *supra* note 45 at X.

<sup>62</sup> S. Coast Air Quality Mgmt. Dist., *Governing Board Meeting*, Agenda Item 22 at 58:14 (Oct. 7, 2022), <https://www.youtube.com/watch?v=mQOlxYZ-Cm4&t=1s>.

<sup>63</sup> For instance, FracTracker identified leaks and sources of uncontrolled emissions in SCAQMD. The report highlighted how the emissions of VOCs present

“. . . an immediate risk to the frontline communities with homes and schools located near these . . . sites. The composition of volatilized emissions from crude oil and natural gas production has been thoroughly studied, and the presence of toxic and carcinogenic BTEX (benzene, toluene, ethylbenzene, and xylenes) chemicals is well established. Prolonged (chronic) exposure to BTEX compounds can affect the kidney, liver, and blood systems. Long-term exposure to high levels of the benzene compound can lead to leukemia and cancers of the blood-forming organs. These chemicals are also neurotoxins and respiratory and skin irritants.”

Kyle Ferrar, *FracTracker Finds Widespread Hydrocarbon Emissions From Active & Idle Oil And Gas*

## B. South Coast Residents Suffer from Cumulative Air Quality Impacts

The Cal/EPA Interagency Working Group on Environmental Justice (IWG) adopted a working definition of cumulative impacts:

“the exposures, public health or environmental effects from the combined emissions and discharges, in a geographic area, including environmental pollution from all sources, whether single or multi-media, routinely, accidentally, or otherwise released. Impacts will take into account sensitive populations and socio-economic factors, where applicable and to the extent data are available.”<sup>64</sup>

Cumulative impacts matter because pollutants can accumulate in the body over time and interact (either in additive ways or in unknown and negative ways) with other pollutants in creating adverse effects.<sup>65</sup> Furthermore, socio-economic stressors are associated with increased sensitivity to pollution,<sup>66</sup> which can result in worse health outcomes when combined with multiple pollution pathways.

In the South Coast, and as demonstrated by the map below, many residents live near multiple sources of pollution. In addition to major stationary sources emitting VOCs and NO<sub>x</sub>, the South Coast Air Basin also has high levels of cumulative emissions of criteria pollutants from mobile source emissions from vehicles, refineries, ports, truck traffic, oil drilling, production, and railyards.<sup>67</sup> Diesel exhaust and railyards are major sources of PM and NO<sub>x</sub>;<sup>68</sup> refineries and oil wells are major sources of SO<sub>x</sub> and methane; and auto body shops and waste facilities are major sources of VOCs.<sup>69</sup>

Areas with high-hazard proximity tend to cluster around major industrial centers or follow major transportation corridors.<sup>70</sup> High hazard scores in the South Coast are typical in

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*Wells And Infrastructure In California*, FracTracker Alliance (Aug. 22, 2022), <https://www.fractracker.org/2022/08/fractracker-finds-widespread-hydrocarbon-emissions-from-active-idle-oil-and-gas-wells-and-infrastructure-in-california/>.

<sup>64</sup> Adams & Denton, *supra* note 4, at vii.

<sup>65</sup> Vanessa Galaviz, *CalEnviroScreen: Identifying Communities with Cumulative Impacts*, Cal. Env't Prot. Agency 5 (2021), <https://www.swlaw.edu/sites/default/files/2021-02/Galaviz%2C%20Vanessa%20-%20CalEnviroScreen-%20Identifying%20Communities%20with%20Cumulative%20Impacts.pdf>.

<sup>66</sup> Adams & Denton, *supra* note 4, at ix.

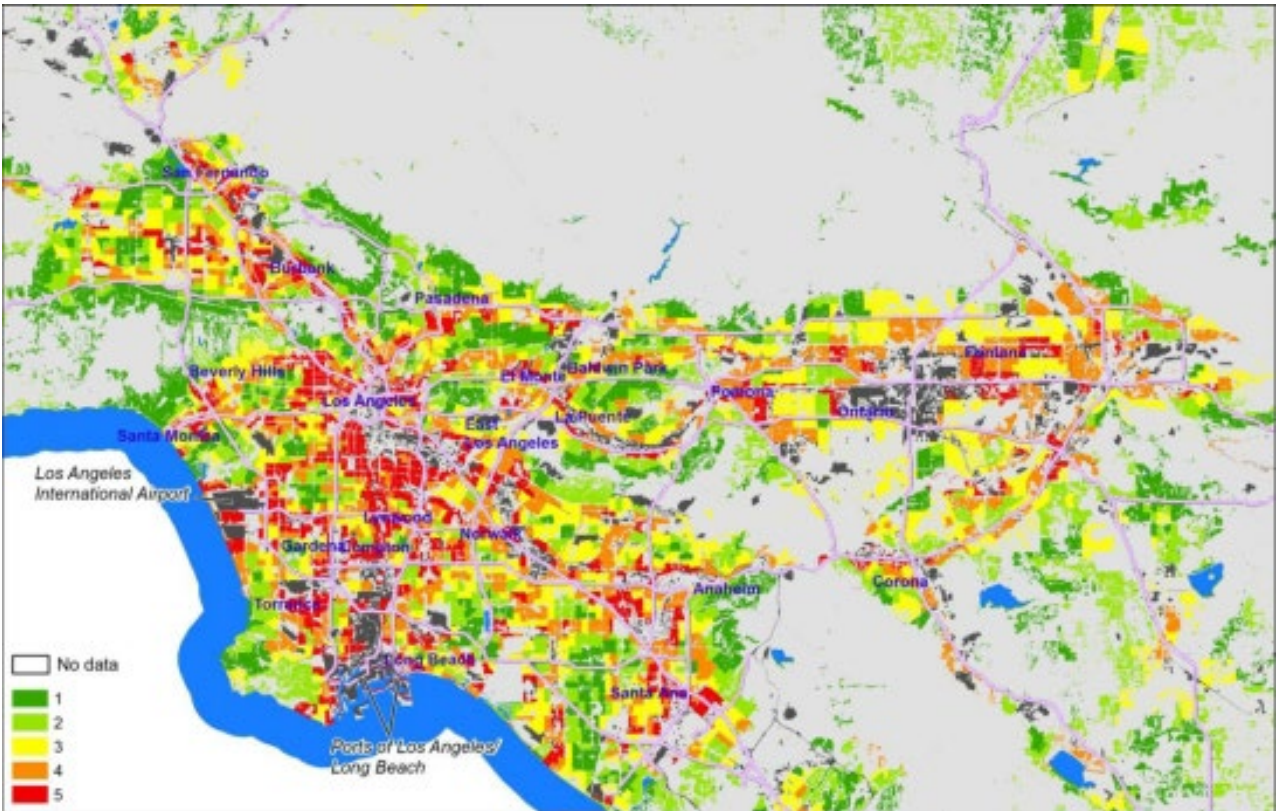
<sup>67</sup> Sadd et al., *supra* note 5.

<sup>68</sup> For instance, combining container vessels, locomotives, and heavy-duty trucks, as of March 2021, the increased cargo movement and congestion has resulted in overall emissions increases of 14.5 tons per day (tpd) of NO<sub>x</sub> and 0.27 tpd of PM in the South Coast Air Basin. *See Emissions Impact of Recent Congestion at California Ports*, Cal. Air Res. Bd. 1 (2021), [https://ww2.arb.ca.gov/sites/default/files/2021-09/port\\_congestion\\_anchorages\\_locomotives\\_truck\\_emissions\\_final\\_%28002%29.pdf](https://ww2.arb.ca.gov/sites/default/files/2021-09/port_congestion_anchorages_locomotives_truck_emissions_final_%28002%29.pdf).

<sup>69</sup> Payam Pakbin et al., *Advancing Air Quality Monitoring in Environmental Justice Communities of the South Coast Air Basin, CA: Overview of Approaches, Community Engagement, Monitoring Technologies, Preliminary Results, and Lessons Learned*, S. Coast AQMD 34 (2021), [https://intlexposure.science.org/wp-content/uploads/2021/04/ISES-Course-Slides\\_EJ-AQ-Monitoring.pdf-2020-10-1-12.22.54-1.pdf](https://intlexposure.science.org/wp-content/uploads/2021/04/ISES-Course-Slides_EJ-AQ-Monitoring.pdf-2020-10-1-12.22.54-1.pdf).

<sup>70</sup> Sadd et al., *supra* note 5.

areas with populations characterized by communities of color and low-income populations.<sup>71</sup>



**Figure 1:** Hazard proximity at the census tract level in the South Coast Air Quality Management District

For example, the Wilmington, West Long Beach, and Carson communities represent an area of 48 square miles with a population of approximately 261,000 people.<sup>72</sup> Refineries, seaport activities, nine rail yards, warehouses, and four major freeways surround the communities.<sup>73</sup> The Port of Long Beach is located adjacent to the Wilmington and West Long Beach communities.<sup>74</sup> Highways 110, 710, and 91 and Interstate 405 run through the community along with the Alameda Corridor, which connects the port to the rail yard near downtown Los Angeles.<sup>75</sup> The community is also impacted by neighborhood oil drilling.<sup>76</sup> The lack of localized emission controls must be seen in the context of the cumulative exposures that these communities face.

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<sup>71</sup> *Id.*

<sup>72</sup> Deborah Behles et al., *Lessons From California’s Community Emissions Reduction Plans: AB 617’s Flawed Implementation Must Not Be Repeated*, Cal. Env’t Just. All. 11 (2021), [https://caleja.org/wp-content/uploads/2021/05/CEJA\\_AB617\\_r4-2.pdf](https://caleja.org/wp-content/uploads/2021/05/CEJA_AB617_r4-2.pdf).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

## V. REGULATORY BACKGROUND

The EPA is required to set NAAQS to protect public health and welfare.<sup>77</sup> EPA will designate certain areas as being in “Severe” or “Extreme” non-attainment. Under Section 185 of the CAA, states must develop a fee program for such areas and submit this fee program with its SIP to EPA within ten years of the effective date of designation.<sup>78</sup>

This obligation is non-discretionary.

Under Section 185 of the CAA, areas that fail to meet ozone NAAQS must adopt a fee rule applying to the region’s largest stationary sources (e.g., refineries, powerplants, etc.) emitting precursors to ozone (NOx and VOCs) in non-attainment areas of any given NAAQS standard.<sup>79</sup> In 1990, the CAA set the fee as \$5,000 per ton of VOC and NOx emitted by the source during the calendar year in excess of 80% of the “baseline amount,” i.e., the lower of the amount of actual or allowable emissions under the permit applicable to the source.<sup>80</sup> The fee must be adjusted for inflation based on the Consumer Price Index (CPI) on an annual basis.<sup>81</sup> Simply, major stationary sources of VOCs and NOx in non-attainment areas must pay an annual fee to the state for every year after the area fails to meet the attainment deadline.<sup>82</sup>

Thus, the clear purpose of Section 185 was to create a drastic incentive for the largest stationary polluters in an area to help solve the ozone problem. However, EPA has claimed states may also adopt an alternative fee program for revoked standards if, pursuant to Section 172(e) of the CAA, the EPA Administrator determines that the alternative program is “not less stringent” than the mandated program outlined in section 185.<sup>83</sup> EPA’s Section 185 guidance memorandum does not provide a template or provide a pre-approved alternative when using the Section 172(e) equivalency program. In fact, EPA makes it clear that a case-by-case approval will be a part of the EPA’s review.<sup>84</sup>

## VI. REASONS FOR THE ADMINISTRATOR TO CALL FOR A SIP REVISION

The SIP provisions suffer from three fatal flaws: 1) Rule 317 does little to mitigate precursor pollution; 2) the 1997 eight-hour ozone fee program has not been implemented despite nearly 20 years of non-attainment; and 3) the 2008 eight-hour ozone fee program has not been adopted despite over ten years of non-attainment.

Through SIPs containing unlawful equivalency measures and omitting mandated fee programs, South Coast and CARB have allowed large polluters to violate CAA emission limitations and pollute surrounding communities with impunity. The SIP provisions at issue in

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<sup>77</sup> 42 U.S.C. § 7409(b).

<sup>78</sup> Clean Air Act § 185.

<sup>79</sup> *Id.*

<sup>80</sup> Memorandum from U.S. Env’t Prot. Agency Off. of Air Quality Plan. & Standards on Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS to Reg’l Air Div. Dir., Regions I-X 2 (Jan. 5, 2010), [https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20100105\\_page\\_section\\_185\\_fee\\_programs.pdf](https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20100105_page_section_185_fee_programs.pdf).

<sup>81</sup> *Id.*

<sup>82</sup> 40 C.F.R. § 51.1117.

<sup>83</sup> Memorandum from U.S. Env’t Prot. Agency, *supra* note 72, at 3.

<sup>84</sup> *Id.* at 5.

this petition are inconsistent with the CAA. The Administrator must call for the revision or elimination of these provisions for the reasons that follow.

#### **A. Rule 317 Does Not Mitigate Ozone Precursor Pollution**

At issue here is the Section 185 fee rule for the 1979 one-hour Ozone NAAQS.<sup>85</sup> EPA set the standard as 0.12 ppm (or 125 parts per billion).<sup>86</sup> In November 1991, EPA designated the South Coast region as in extreme non-attainment and provided an attainment deadline of November 2010.<sup>87</sup> SCAQMD continues to fail to meet this standard established 43 years ago.

In its initial promulgation of a fee program for the 1979 one-hour ozone standard, SCAQMD provided that major polluters in non-attainment areas can either pay a fee representative of 20% of their NOx and VOCs emissions or reduce their emissions by 20% to comply.<sup>88</sup> However, fossil fuel lobbyists invented and sold the air district on a credit equivalency program – fundamentally a Ponzi scheme under which no polluting facility would have to pay a single cent for their emissions.

In promulgating the final rule, SCAQMD admitted to the fossil fuel lobby's efforts stating:

“[T]here is substantial opposition to [an initial 2010] fee rule by the regulated community as the fee burden is significant while the relative contribution by major stationary sources to ground level ozone is small relative to area and mobile sources. Further, the applicability of the fee solely to major stationary sources is seen as unfair given the fact that major stationary sources in the South Coast air basin are subject to the nation's most stringent regulations and have reduced their emissions significantly over the years.”<sup>89</sup>

Ignoring calls for stronger fee provisions, South Coast capitulated to fossil fuel lobbyists and instituted an alternative fee program pursuant to Section 172(e), called Rule 317. Rule 317, as amended on February 4, 2011, and approved as a revision to the California SIP by U.S. EPA on December 14, 2012, provides the framework for implementing an alternative fee program to Section 185, as authorized under CAA Section 172(e). Rule 317 requires the Executive Officer (“EO”) to establish and maintain a Section 172(e) fee equivalency account (“FEA”).<sup>90</sup>

Under Rule 317 FEA, SCAQMD tracks expenditures from “qualified programs” and uses

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<sup>85</sup> Prior to 1997, EPA established a one-hour NAAQS for ozone. The one-hour standard was subsequently revoked, and EPA implemented the 1997 eight-hour standard to better protect against the human health impacts of exposure to ambient levels of ozone pollution. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997).

<sup>86</sup> *Id.* at 38,857.

<sup>87</sup> Designation of Areas for Air Quality Planning Purposes, 40 C.F.R. Part 81 (1991).

<sup>88</sup> Memorandum from EPA Office of Air Quality Planning and Standards, *Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS* (Jan. 5, 2010)

[https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20100105\\_page\\_section\\_185\\_fee\\_programs.pdf](https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/20100105_page_section_185_fee_programs.pdf)

<sup>89</sup> *Id.*

<sup>90</sup> *Rule 317, supra* note 1, at 5.



them as credits to offset any Section 185 non-attainment fee obligation incurred by major stationary sources.<sup>91</sup> The expenditures for which SCAQMD could take credit were “designed to result or have resulted in direct VOC or NO<sub>x</sub> reductions in the South Coast AQMD; or have facilitated VOC or NO<sub>x</sub> reductions in the SCAQMD through vehicle/engine fueling infrastructure or advanced technology development and demonstration efforts for implementation within the next 10 years.”<sup>92</sup> *In theory*, the hope was that these credits would avoid the need for a facility-specific fee.

Stated differently, instead of collecting a fee from large stationary sources like refineries, SCAQMD decided to take credit for a grab bag of programs fundamentally untethered to limiting ozone precursors. For example, instead of making Tesoro Refinery pay a fee, SCAQMD took credit for programs like California Natural Gas Vehicle Partnership to promote the greater deployment of natural gas vehicles in California, the “Prop 1B Program,” which provides funding for projects that reduce emissions from goods movement operations, and the Carl Moyer Program, a voluntary program that provides incentives to private companies to purchase cleaner than-required engines, equipment, and emission reduction technologies.<sup>93</sup> Tesoro paid no fee and did not even have to find and fund the programs that it was credited for itself.

Since no fees are levied on major stationary sources, there is no incentive mechanism to undertake abatement actions that would reduce emissions by 20%. Thus, SCAQMD’s fee program for the one-hour ozone standard amounts to no penalty and instead a paper exercise to provide the veneer of a penalty.

Worse yet, incorrect data informed the Rule 317 credit approach. In the 2011 Staff Report supporting the revisions to Rule 317, staff noted the following: “Staff’s approach builds on that concept as major stationary sources are already at BACT [“Best Available Control Technology”] or BARCT [“Best Available Retrofit Control Technology”] with limited potential for further VOC/NO<sub>x</sub> reductions through additional control.”<sup>94</sup> We now know that this was absolutely incorrect, as many of the largest stationary sources were not at BACT/BARCT in 2011 and continue to not be at BACT/BARCT today.

In fact, in its effort to dismantle the Regional Clean Air Incentives Market (“RECLAIM”), staff noted the following: “Based on South Coast AQMD’s permit database, well over half of the equipment at RECLAIM facilities is currently not at BARCT. Much of this equipment resides at some of the largest NO<sub>x</sub> emitting facilities in the Basin.”<sup>95</sup> Thus, this failure to impose a fee or compel cleanup of these highly toxic and polluting facilities was based on an error that gravely understated the extent of uncontrolled emissions in the South Coast.

Proponents of polluting industries might try to point to the ongoing dismantling of the

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<sup>91</sup> FEA Report, *supra* note 2, at 2.

<sup>92</sup> *Id.* at 4.

<sup>93</sup> *Id.* at 5-7.

<sup>94</sup> SCAQMD, Proposed Amended Rule 317 Staff Report, at p. p. 317-1 (Feb. 4, 2011), <http://www.aqmd.gov/docs/default-source/Agendas/Governing-Board/2011/2011-feb4-029.pdf?sfvrsn=2>.

<sup>95</sup> *RECLAIM Transition Plan Draft Version 2.0*, S. Coast AQMD vii (Dec. 2020), <http://www.aqmd.gov/docs/default-source/rule-book/Proposed-Rules/regx111/reclaim-transition-plan-draft-version-2-0.pdf?sfvrsn=6> (“South Coast AQMD retains broad statutory authority to adopt emission-control requirements for stationary sources, and that authority may include equipment replacement, as long as the requirement is not arbitrary and capricious”).

RECLAIM program as evidence that South Coast is on track to rectifying its ozone pollution problem. We remind EPA, however, that many compliance dates for RECLAIM facility equipment have been outdated for a decade or more, so this deadly and archaic equipment will continue to poison communities for years, as the South Coast Air Basin fails to achieve both the 1979 standard and the 1997 eight-hour ozone standard. Furthermore, BARCT schedules provide a deadline of December 31, 2023, which allows polluting technologies to continue emitting and suffocating communities for another year on top of existing outdated compliance deadlines.<sup>96</sup>

Ultimately, Rule 317 has failed to sufficiently reduce ozone emissions, and South Coast, in relying upon it, has violated the attainment obligations under the CAA and failed in its duty to protect public health. To make matters worse, South Coast fails to produce reports in a timely manner, hampering transparency. Rule 317 has clearly failed to meet the requirements of a Section 185 fee program.

### **B. South Coast Has Failed to Meet Rule 317 Reporting Obligations**

Because Rule 317 stemmed from an obligation to ensure the South Coast did not backslide as a result of the revocation of the one-hour ozone standard, Rule 317 requires the agency to submit annual fee equivalency/reconciliation reports.

Annually, a reconciliation report must be generated and submitted to both the California Air Resources Board (“CARB”) and the EPA.<sup>97</sup> This report outlines the debits, i.e., the fee obligation incurred by major stationary sources against the credits, i.e., expenditures from qualified programs. However, for the past four years, unless prompted by the public, SCAQMD has routinely failed to submit these annually required reports.

In a letter sent to South Coast on May 20, 2019, Earthjustice requested all annual reports filed with the EPA and CARB between September 3, 2012, and May 20, 2019, under Rule 317(c)(5). Thereafter on September 3, 2020, South Coast released a batch of fee reconciliation reports for fiscal years 2012-2019. Earthjustice sent a new PRA request in 2021 and received a response on July 28, 2021, that produced reports from 2009-2019.

Furthermore, following a Title VI complaint to EPA’s civil rights office in March 2023, SCAQMD released new reports from 2019-2022 in July 2023.

This pattern and practice of releasing reports only when asked does not provide the public with the necessary transparency for this broken program.

### **C. The SIP Does Not Contain a Fee Program for 1997 or 2008 Eight-hour Ozone Standards**

The EPA designated the South Coast as non-attainment for the 1997 eight-hour ozone standard on April 15, 2004.<sup>98</sup> The designations and classifications became effective on June 15, 2004.<sup>99</sup> SCAQMD was required to adopt a fee rule within ten years of their non-attainment

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<sup>96</sup> *Id.*

<sup>97</sup> *Rule 317, supra* note 1, at (c)(3), (c)(5).

<sup>98</sup> *See* Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards, 69 Fed. Reg. 23,858, 23,888-89 (April 30, 2004); 40 C.F.R § 81.305.

<sup>99</sup> *Id.*

designation for the 1997 eight-hour ozone standard. Thus, the fee program must have been implemented by June 15, 2014.

Similarly, EPA designated the South Coast as non-attainment for the 2008 eight-hour ozone standard on May 21, 2012.<sup>100</sup> The designations and classifications became effective on July 20, 2012.<sup>101</sup> SCAQMD was required to adopt a fee rule within ten years of their non-attainment designation for the 2008 eight-hour ozone standard. Thus, the fee program must have been implemented by July 20, 2022.

The D.C. Circuit ruled in *South Coast Air Quality Management District v. EPA* that when the EPA revokes an ozone standard, the Section 185 fee program requirement is subject to an anti-backsliding provision and therefore continues to apply.<sup>102</sup>

As such, when EPA transitioned from the 1997 to the 2008 ozone standards and from the 2008 to the 2015 ozone standards, the Section 185 fee program still applies to non-attainment for both the 1997 and the 2008 eight-hour ozone standards.<sup>103</sup>

South Coast has yet to adopt a fee rule after its non-attainment designations for the 1997 or the 2008 eight-hour ozone standards. However, because EPA revoked the 1997 standard, South Coast has the flexibility to adopt a Section 172(e) fee equivalency program.<sup>104</sup> They have neither adopted a fee rule nor a fee equivalency program for the 1997 standard. No such flexibility to adopt an equivalency program exists for the 2008 standard because EPA has not revoked the 2008 standard. The failure to perform this non-discretionary duty clearly violates the CAA. To this day, and as described above, eight-hour ozone concentrations in the South Coast frequently exceed healthy and legal levels, especially during summer.

SCAQMD failed to institute a fee program that incentivizes major stationary sources to curb their NOx and VOC emissions and thus limit ozone pollution in the region. This is a clear violation of a non-discretionary duty under the CAA.

#### **D. CARB's Failure to Remedy a Deficient SIP**

CARB is responsible for ensuring that the final statewide SIP complies with the CAA.<sup>105</sup> CARB failed to notify South Coast of its deficient plan and failed to require South Coast to amend Rule 317 and adopt the necessary fee rules for the 1997 and 2008 8-hour ozone standards.<sup>106</sup> CARB therefore approved a deficient plan that fails to meet air quality requirements.

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<sup>100</sup> See Air Quality Designations for the 2008 Ozone National Ambient Air Quality Standards, 77 Fed. Reg. 30,088, 30,101 (May 21, 2012).

<sup>101</sup> *Id.* at 30,088.

<sup>102</sup> *S. Coast Air Quality Mgmt. Dist. v. Env't Prot. Agency*, 472 F.3d 882, 902 (D.C. Cir. 2006).

<sup>103</sup> 40 C.F.R. § 51.1100(o)(15); National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436 (Mar. 27, 2008).

<sup>104</sup> See Implementation of the 2008 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications Approach, Attainment Deadlines and Revocation of the 1997 Ozone Standards for Transportation Conformity Purposes, 77 Fed. Reg. 8,197 (Feb. 14, 2012); see also Memorandum from U.S. Env't Prot. Agency, *supra* note 72.

<sup>105</sup> Cal. Health & Safety Code § 39602.

<sup>106</sup> Cal. Health & Safety Code §§ 41500, 41503.2, 41650.

## **VII. THE EPA MUST ISSUE A SIP CALL**

Rule 317 allows major polluters to avoid penalties for continuing to emit precursors to ozone pollution. These provisions directly conflict with the CAA because they fail to incentivize polluters to reduce emissions, impeding attainment for NAAQS. Furthermore, given the severe and disproportionate adverse impact of the Rule 317 SIP loopholes on environmental justice communities, Region IX has good reasons to prioritize reconsidering Rule 317.

Failure to include Section 185 fee programs (or well-structured alternatives under Section 172(e)) for the 1997 and 2008 8-hour Ozone NAAQS also violates non-discretionary requirements under the CAA.

All SIPs must comply with the requirements of the CAA, and § 7410(k)(5) requires the EPA to issue a SIP call directing a state to revise its SIP whenever the EPA finds the SIP is “substantially inadequate” “to comply with any requirement of” the Act. The absence of fee programs and the presence of a wholly inadequate Rule 317 in the California SIP are unlawful and must be subject to a SIP call.

## **VIII. REQUEST FOR RELIEF**

Petitioners request that EPA Region IX accept this SIP Call Petition and require SIP revisions to bring the South Coast into compliance with the Clean Air Act. Petitioners ask EPA to provide the following relief:

1. Conduct a study of the equivalency programs to ensure that credits are tethered to reduce precursors to ozone.
2. Until such time that proper fee equivalency is established for the 1979 ozone NAAQS, require South Coast to levy fees on major stationary sources and reduce emissions 20% below baselines per the 1979 standards.
3. Establish a proper fee program for the 1997 and 2008 8-hour ozone standards.

## **IX. CONCLUSION**

Over a decade, uncollected pollution fees have resulted in hundreds of millions of dollars of emissions benefits that could have been achieved in disadvantaged communities. We cannot undo that decade of failure, but what we can do is rectify this unjust program moving forward. We need your help to vindicate the rights of California’s most overburdened communities.

For the aforementioned reasons, the California SIP is substantially inadequate in a number of regards and fails to comply with several requirements of the Clean Air Act. The Administrator must therefore call for its revision, as explained in this petition.

Thank you for your time and consideration of this petition.

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Sincerely,

*/s/ Radhika Kannan*

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