

October 6, 2006

VIA US AND ELECTRONIC MAIL

Catherine Witherspoon
Executive Officer
California Air Resources Board
P.O. Box 2815
Sacramento, CA 95812

**Re: Petition for SB 288 review of South Coast Air Quality Management District's
New Source Review Actions on Rule 1309.1 (Priority Reserve) and Rule 1315
(New Source Review Tracking)**

Dear Ms. Witherspoon:

On September 8, 2006, the Governing Board of the South Coast Air Quality Management District ("SCAQMD") approved amendments to Rule 1309.1, concerning its Priority Reserve, and adopted Rule 1315, concerning its tracking of New Source Review ("NSR") offset accounts. Communities for a Better Environment ("CBE"), Natural Resources Defense Council ("NRDC"), Coalition for a Safe Environment ("CFASE"), and California Communities Against Toxics ("CCAT") (collectively "Petitioners") commented on the rule changes. Petitioners respectfully request that the California Air Resources Board ("ARB") review Rules 1309.1 and 1315 and hold a public hearing to determine that these rules violate the anti-backsliding provisions of the Protect California Air Act of 2003 ("SB 288").¹

I. Regulation of New Sources, Including Offsetting New Emissions, Is Fundamental to New Source Review and to Protecting Air Quality

NSR regulates construction and modification of air pollution sources that result in significant increases of certain pollutants in areas that have been designated as being in non-attainment for those pollutants. The point of the program is to bring non-attainment areas into attainment and maintain an adequate level of air quality thereafter. A major component of NSR requires that all new non-attainment emissions be offset by emission reductions from other sources in the area. Federal law requires that emissions offsets be surplus, to avoid double counting the benefit of emission reductions and ensure

¹ Petitioners also request a public hearing prior to any determination that SB 288 does not apply to Rules 1315 or 1309.1, or that the rules do not violate the law. One critical purpose of SB 288 is to ensure "informed public participation in the decision-making process" when a rule change may increase air pollution. Health & Saf. Code § 42503(f). On its face, this applies to adverse decisions on public requests for review of NSR rules, and therefore Petitioners request the opportunity to be heard and present evidence before any final decision is made.

achievement of NSR's goals.² Because emission reductions sometimes occur well before they are used to offset new emissions, federal law requires that the surplus value of emission reductions be determined at the time they are to be used as opposed to the time they were generated.³

California law also recognizes the importance of these offsets "as a means of ensuring that . . . new and modified sources do not adversely affect air quality."⁴ While the technology requirements of the NSR program ensure that each individual new source operates as cleanly as possible, the offset requirement is what actually prevents non-attainment areas from suffering ever-dirtier air from additive effects of existing, modified and new emissions in an area. As a result, the offset requirement is the key to successful air pollution reduction efforts in non-attainment areas.

On December 31, 2002, EPA issued a final regulation that substantially weakened the federal NSR program in several ways.⁵ The California legislature responded to the federal rule changes by adopting SB 288.⁶ The statute's overriding purpose is to ensure that California's NSR requirements remain as protective as those in place on December 30, 2002, before EPA's rule changes. Thus, California law mandates that air districts maintain their NSR programs that are at least as protective as they were on December 30, 2002, when federal NSR protections shrank.

II. ARB Is Responsible for Ensuring Proper Implementation of SB 288

With respect to California's NSR program, ARB must ensure that district NSR rules and regulations are equivalent to, or more stringent than, those that existed on December 30, 2002. If ARB determines that the district is changing its NSR program to be less protective, ARB must promptly adopt rules necessary to establish equivalency.⁷ According to ARB guidance, proposed revisions to district NSR programs are reviewed in the context of the letter and spirit of SB 288.⁸

Health and Safety Code § 42504 establishes two standards by which ARB reviews district rules. First, § 42504(a) prohibits air districts from amending their new source review rules to be less stringent than those that existed on December 30, 2002. ARB has interpreted § 42504 to "apply on a programmatic basis" and therefore not allow districts to change their rules in a way that would "render the NSR rules less stringent in the aggregate."⁹

Second, SB 288 requires specific categories of rule change to meet a higher standard. Under § 42504(c), air districts may only amend their NSR rules if the new

² 42 U.S.C. § 7503(c)(2).

³ See 69 Fed. Reg. 27837, 27840 (May 17, 2004).

⁴ H&S § 42501(a).

⁵ H&S § 42501(e); see also 40 C.F.R. § 52.21 *et. seq.*

⁶ SB 288 is codified at California Health and Safety Code § 42500 *et seq.*

⁷ ARB Guidance, p. 4.

⁸ *Id.*

⁹ ARB Guidance, p.2.

requirements are “more stringent” than those that existed on December 30, 2002. This restriction applies to amendments affecting:

- 1) Any requirements to obtain new source review or other permits to construct, prior to commencement of construction;
- 2) Any requirements for BACT;
- 3) Any requirements for air quality impact analysis;
- 4) Any requirements for recordkeeping, monitoring and report in a manner that would make recordkeeping, monitoring, or reporting less representative, enforceable, or publicly accessible;
- 5) Any requirements for regulating any air pollutant covered by the new source review rules and regulations;
- 6) Any requirements for public participation, include a public comment period, public notification, public hearing, or other opportunities or forms of public participation, prior to issuance of permits to construct.¹⁰

In short, any district changes to NSR rules must be at least as stringent as the existing requirements, or, where a district amends its NSR rules regarding the enumerated items above, it may only do so if its new rules are more stringent than those in place on December 30, 2002.¹¹

III. SCAQMD NSR Rules 1315 and 1309.1 Violate SB 288

On December 30, 2002, SCAQMD was implementing the federal NSR program within the South Coast Air Basin. New or modifying facilities could purchase required NSR offsets in the public market or acquire them from SCAQMD’s internal accounts of emissions reductions credits (“ERCs”) for off-market use. SCAQMD established one of these accounts, the Priority Reserve, to ensure that ERCs were always available for constructing or expanding essential public services. For more than 4 years, EPA has criticized SCAQMD for failing to maintain adequate records for the ERCs SCAQMD claimed to have in its internal accounts. As discussed further below, Rules 1315 and 1309.1 regulate internal accounting and Priority Reserve access, respectively.

On September 8, 2006, the SCAQMD Governing Board adopted a new rule – Rule 1315 – and amended its existing Rule 1309.1. Both these actions violate the substantive requirements of SB 288. Specifically, SCAQMD weakened its NSR rules¹² as they existed on December 30, 2002, by 1) adopting Rule 1315 to reduce the offset ratio

¹⁰ H&S § 42504(b)(2)(A-F).

¹¹ SB 288 does provide a narrow set of exceptions to allow relaxing NSR rules, none of which apply here. They include rule changes to address: risk to public health; technical or engineering problems; substantial hardship to industry; emergencies (temporary changes only). H&S § 42504(d)(1). In addition, when an area is in attainment for all national ambient air quality standards, it may change a rule so long as the rule change will not impede the area’s ability to remain in attainment. *Id.* If an air district intends to take advantage of one of these narrow exceptions, it must submit the rule to ARB for a public hearing to determine that the exception is met. *Id.* SCAQMD has not submitted Rule 1315 or Rule 1309.1 to ARB for such a determination, and the rules do not meet the criteria SB 288 sets out for exceptions.

¹² SCAQMD Regulation XIII sets out SCAQMD’s NSR rules. As part of Regulation XIII, Rules 1315 and 1309.1 are part of the SCAQMD NSR program.

requirements and to fabricate ERCs from emission reductions previously retired; and 2) amending Rule 1309.1 to allow power plants access to a class of credits that were previously off-limits.

A. Rule 1315 Retroactively Creates Emission Reduction Credits from Reductions that Previously Were Taken Out of Use under SCAQMD's NSR Program

Rule 1315 attempts to address long-standing shortcomings in the accounting system that tracks emission reduction credits in SCAQMD's internal accounts. In the process of "formalizing" its accounting system, however, SCAQMD also made significant changes that weakened the NSR offset requirements by retroactively changing the rules governing the generation and distribution of ERCs for its internal accounts in two key ways: 1) by retroactively changing the NSR offset requirements; and 2) by retroactively crediting minor source shutdowns to the NSR account for use as offsets.

i. The Retroactive Change of NSR Offset Requirements

SCAQMD was under extreme pressure from EPA to provide evidence that the credits it claimed in internal ERC accounts met the federal requirements of real, permanent, enforceable, quantifiable, and surplus. Ultimately, despite some 6,000 staff hours of work on the problem, SCAQMD was unable to make this showing for any of its pre-1990 credits, resulting in the elimination of all pre-1990 credits and causing significant reductions to its internal ERC accounts.¹³ Faced with these reductions, SCAQMD developed a scheme through which it would retroactively--back to 1990--reduce the 1.2 to 1.0 offset to a 1.0 to 1.0 offset, and then credit the "surplus" .2 offset credit to the internal Priority Reserve account.¹⁴ ARB staff has already acknowledged that such a change would backslide, triggering SB 288. "There is little doubt that reducing or eliminating offset requirements will reduce the stringency of an NSR rule unless the effect of those changes is offset by other amendments making the NSR rule more stringent."¹⁵ SCAQMD did not establish any rule changes to offset this change. Further, the .2 offset credit has already been credited to the SCAQMD's SIP required air quality advancements and even if it was creditable 16 years ago, is no longer surplus.¹⁶

ii. The Retroactive Offset Credit from Minor Source Shutdowns

The same pressure that drove SCAQMD to attempt to collect, retroactively, 16 year old air quality benefits for use today, drove it retroactively to gather and apply offset credits from minor source shutdowns. SCAQMD's Staff Report states that "AQMD has

¹³ The reductions eliminated up to as much as 92% of the pre-1990 credits. Staff report at 3.

¹⁴ The Staff Report states that before Rule 1315, the SCAQMD did to take credit for minor source shutdowns. Staff Report at 9.

¹⁵ Letter from W. Thomas Jennings, ARB Chief Counsel to Barbara Baird, Principal Deputy District Counsel, South Coast Air Quality Management District at 5 (April 11, 2006).

¹⁶ Further, the .2 credits cannot be verified as being real, permanent, enforceable, or quantifiable therefore not meeting the definition of a creditable offset.

not previously used these [minor source emission reduction] credits . . . in AQMD's offset accounts."¹⁷ Rule 1315 does exactly that. It substantively shifts from an existing NSR program that advances air quality goals by applying the benefit of minor source shut downs to air quality improvements, to a practice of forgoing those benefits.

iii. These Rule Actions Would be Violate SB 288 Even if They Were not Retroactive

By SCAQMD's own admission, on December 30, 2002, SCAQMD's internal accounts were not stocked with credits generated from minor source shutdowns or from offset credits. Both prongs of SB 288 prohibit adopting Rule 1315 in its current form. The general prohibition on weakening a district's NSR program applies to the overall effect Rule 1315 will have. Rule 1315 will have the effect of stocking SCAQMD's internal accounts with credits that would not have existed in 2002. Without Rule 1315, these emission reductions would simply have benefited air quality, furthering NSR's overall purpose of ensuring progress toward air quality goals is not overwhelmed by the addition of new or expanded sources of non-attainment pollutants. SCAQMD makes no defense of the rule from a programmatic perspective, and indeed, there is no justification for breathing life into these dead credits.¹⁸

In essence the rule converts air quality benefits into rights to pollute. Certain stationary sources may access these pollution credits, and therefore the rule changes the requirements for these stationary sources by making pollution credits more available where none would otherwise be available. Finally, because it regulates NSR air pollutants, the rule is subject to SB 288's more rigid prohibition on individual rule changes. Under this section, ARB should not weigh the effects of Rule 1315 against the aggregate condition of the SCAQMD NSR program, but ask only whether Rule 1315 strengthens to NSR air protections concerning individual permittees that existed on December 30, 2002. Because it does not, Rule 1315 violates SB 288.

B. Rule 1309.1 Allows Power Plants to Use Emission Reduction Credits that Were Retired, and Together with Rule 1315, Changes SCAQMD's Offset Ratio

Rule 1309.1 amends SCAQMD rules governing the Priority Reserve to allow power plants access to these ERCs. The specific violations to SB 288 stem from Rule 1309.1 itself, as well as the interplay between Rules 1309.1 and 1315.

Under Rule 1309.1, as it existed on December 30, 2002,¹⁹ only power plants that completed applications to the California Energy Commission in the years 2000-2003 had

¹⁷ *Id.*

¹⁸ The fact that EPA has forced SCAQMD to abandon use of credits for which it has no documentation is not a programmatic counterweight. Those credits were always elicited since they did not even meet federal requirements.

¹⁹ Rule 1309.1 was amended and submitted to EPA for inclusion in the SIP in 2002, so as of December 30, 2002, it met the SB 288 criteria of having been submitted to EPA for SIP approval by that date.

access to the Priority Reserve. The current amendment makes Priority Reserve credits available to power plants that submit applications in 2005, 2006, 2007 and 2008. In addition, Rule 1309.1 allows power plants outside the South Coast Air Basin access to VOC credits from the Priority Reserve, access that was not allowed in December 2002. These changes violate SB 288 by allowing power plants access to below-market ERCs, altering the market structure established by SCAQMD's new source review rules and thereby weakening NSR protections.

When reviewed in combination with Rule 1315, Rule 1309.1 also presents an aggregate rollback of SCAQMD's NSR program. The Priority Reserve is an internal SCAQMD account that SCAQMD feeds from its general pool of internal credits.²⁰ When previously made available to power plants from 2000-2003, the Priority Reserve credits were not generated from minor source shutdowns or additional offset reductions because, as discussed above, SCAQMD did not generate credits in its internal accounts from these sources. Nevertheless, as a result of Rule 1315, these credits are now being made available to major sources at below-market prices where none existed before.

In addition, when viewed together, Rule 1309.1 and Rule 1315 eliminate the additional .2 offset. As noted above, SCAQMD has historically required a 1.2-to-1 offset for ERCs purchased on the open market, with the additional .2 accruing to the benefit of air quality. Power plants must still purchase this additional offset for purchases from the Priority Reserve. But rather than having the additional .2 accrue to the benefit of air quality, SCAQMD re-captures the additional .2 offset and generates entirely new credits, credits that may be given to power plants (or other sources) again. As a result, from an air quality perspective, power plants will actually be operating at an offset ratio of 1-to-1, not 1.2-to-1. This ratio is significantly less protective of air quality than the ratio the SCAQMD NSR rules required in December 2002, and therefore violates SB 288's specific requirement that any rule change concerning a specific source strengthen the regulation of that source.²¹

IV. Rule 1315 and 1309.1 Negatively Affect Petitioners

CBE is an environmental justice public interest organization and a California not-for-profit corporation. CBE has approximately 20,000 members throughout the state of California, many of whom reside in the Los Angeles metropolitan area. CBE's mission is to achieve environmental health and justice for communities of color and working-class communities. CBE strives to accomplish its mission by organizing in traditionally disempowered communities, by facilitating public participation in administrative decision-making processes, and by ensuring implementation of laws that protect public health and the environment, like the Protect California Clean Air Act. For nearly 30 years, CBE has advocated for meaningful protection of California's air. Full enforcement of state environmental laws is critical to achieving CBE's mission, because air pollution has a disparate impact on people from poor communities and communities of color in the

²⁰ Rule 1309.1(a).

²¹ H&S § 42504(b).

Los Angeles region. CBE's members are among the people who will be impacted by weakening the NSR system through rules 1315 and 1309.1 because the rules will allow deterioration of air quality in their communities, exacerbating the health impacts of air pollution in these communities.

NRDC is a not-for-profit membership corporation organized under the laws of the State of New York, with offices in Los Angeles, San Francisco, New York and Washington, D.C. NRDC has 551,650 members throughout the United States, including 102,599 members in the State of California. Approximately 35,194 of NRDC's members live in the South Coast Air Basin. The health, well-being, and enjoyment of these members have been, and continue to be, adversely affected by Rules 1315 and 1309.1. NRDC is dedicated to the preservation, protection and defense of the environment, its wildlife and natural resources. NRDC actively pursues effective enforcement of air quality rules and regulations, and the reduction of air pollution in Southern California on behalf of its members.

CFASE is a not-for-profit membership corporation organized under the laws of the State of California. CFASE has approximately 500 members that live within the regulatory jurisdiction of the AQMD. The health, well-being, and enjoyment of these members have been, and continue to be, adversely affected by Rules 1315 and 1309.1. CFASE is dedicated to environmental justice, public health and public safety, and the reduction, elimination and mitigation of air, land and water pollution. CFASE actively pursues effective enforcement of air quality rules and regulations, and the reduction of air pollution in Southern California on behalf of its members, to reduce, eliminate and mitigate public exposure to carcinogenic, respiratory, reproductive and developmental toxicants and pollutants caused by air, land, water pollution and manufactured products. CFASE is further dedicated to protect, promote, preserve and restore our nature's delicate ecology through the protection of environment, natural resources, wildlife and habitats.

CCAT was founded in 1989 at the Santa Isabel church after a march on a proposed hazardous waste incinerator in Vernon. Over 25 environmental justice groups from across California came together to form a statewide coalition that would help the environmental justice community in California network, learn from each other's struggles, and advocate for policy change in state and federal government. CCAT now has 70 members, holds a conference in a different part of the state each year, and is active in a number of efforts to advance community based environmental health protections across the state. CCAT's mission is pollution prevention, environmental justice, and world peace.

The South Coast Air Basin suffers some of the worst air quality in the nation. Indeed, the Basin is in non-attainment for particulate matter less than 2.5 and 10 microns and in severe non-attainment for ozone ("severe-17 non-attainment"). In addition, downwind air districts such as the Mojave and Antelope Valley are also in non-attainment for ozone. These proposed rule amendments will have devastating region-wide impacts.

Petitioners' members are affected by poor and deteriorating air quality in their communities in both the South Coast Air Basin and the Mojave Air Basin. Petitioners therefore respectfully request that ARB review Rules 1309.1 and 1315, determine that they are subject to SB 288, and pursuant to ARB's Guidance, hold a public hearing to determine that SB 288 anti-backsliding provisions have been violated. Petitioners also request a public hearing prior to an adverse determination on these questions by the ARB.²²

V. Conclusion

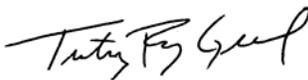
In sum, SCAQMD's September 8, 2006, versions of rules 1315 and 1309.1 violate both the spirit and the letter of SB 288 by backsliding from SCAQMD's NSR program as it existed on December 30, 2002. Petitioners respectfully request that ARB hold a public hearing on the rules, determine that they violate SB 288, and revise the rules in a way that does not backslide. Petitioners further request that while it decides whether to hold such a public hearing, ARB refrain from forwarding either rule to EPA for inclusion in the SIP, or taking any other action regarding the rules.

Thank you for your assistance in this matter.

Sincerely,



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²² As noted above, Health and Safety Code § 42503(f) identifies one of the purposes of SB 288 as ensuring "that any decision to permit increased air pollution in any area to which this chapter applies is made only after careful evaluation of all the consequences of that decision and after adequate procedural opportunities for informed public participation in the decision-making process." This ideal applies to adverse decisions on public requests for review of NSR rules, and Petitioners reiterate their request for an the opportunity to be heard and present evidence before any final decision is made.