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Via Email and Federal Express

Office of External Civil Rights Compliance
United States Environmental Protection Agency (Mail Code 2310A)
1200 Pennsylvania Ave., NW
Washington, D.C. 20460
[Title VI Complaints@epa.gov](mailto:Title_VI_Complaints@epa.gov)

Re: **Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d**

EXECUTIVE SUMMARY

For over a decade, the South Coast Air Quality Management District (“SCAQMD”) has enabled the oil industry to pollute communities of color by giving major stationary sources a free pass on compliance with section 185 of the Clean Air Act. Instead of making some of the richest corporations on the planet pay a fee to help reduce emissions, for thirteen years the SCAQMD has used a toothless credit program that is supposed to curb air pollution, but in reality, does nothing to limit emissions of nitrous oxides and volatile organic carbon, exacerbating adverse health outcomes for communities of color to benefit major oil companies. What’s more, this credit program has deprived the people in this region of the remedies that Congress specifically provided to these frontline communities to provide relief when the regions neighboring large industrial polluters, like refineries, fail to meet their emissions reduction obligations.

To repair this broken system of limiting air pollution, the [REDACTED] Communities for Better Environment, [REDACTED] and Sierra Club (together, “Complainants”) bring this complaint under Title VI of the Civil Rights Act of 1964.

As a recipient of substantial federal financial assistance from EPA, SCAQMD and its discriminatory practices are subject to Title VI. Title VI prohibits recipients of federal funding from creating policies that have a disparate impact on communities of color. EPA’s Title VI analysis focuses on the consequences of the recipient’s policies rather than the recipient’s intent.

There are 400 major facilities in the South Coast Air Basin that are subject to the SCAQMD’s section 185 nonattainment fee regulation – SCAQMD Rule 317.¹ These facilities emit precursors to ozone: nitrous oxides and volatile organic compounds, which contribute to severe adverse health outcomes including asthma, respiratory illnesses, emphysema, and even cancer. These major stationary sources are overwhelmingly in low-income communities and communities of color, with nearly 75 percent of stationary sources adjacent to communities in the South Coast comprised of people of color and nearly 35 percent experiencing poverty.

¹ 42 U.S.C. § 7511d; S. Coast Air Quality Mgmt. Dist., *Rule 317*, <http://www.aqmd.gov/docs/default-source/rule-book/reg-iii/rule-317.pdf> (Adopted December 5, 2008) (Amended February 4, 2011).



South Coast's approach to the Clean Air Act penalty provision is especially egregious when considering the cumulative impacts on communities of color. Communities of color are especially sensitive 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 from transit corridors and port activity including particulate matter.

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 succumbed to industry manipulations and created a program (hereinafter "Industry and SCAQMD Plan") that allows them to take credit for a grab bag of programs untethered to limiting ozone pollution. They also rely on programs that would exist regardless of whether the South Coast Air Basin attained the 1-hour ozone standard or not. This approach does nothing to alleviate the serious air quality concerns surrounding major stationary sources, i.e., communities of color disproportionately burdened by toxic pollution. South Coast's fee equivalency program has contributed to a discriminatory pattern of perpetuating poor air quality in communities of color.

Simply, South Coast has found a way to avoid penalizing major stationary sources for their toxic emissions, and at the same time is taking credit for programs that would have been implemented anyway. As explained further herein, SCAQMD's fee program for the 1-hour ozone standard amounts to no penalty, but rather a paper exercise to provide the *veneer* of a penalty.

SCAQMD's practices have a disparate, adverse impact on communities of color. Furthermore, EPA has acquiesced in and promoted the practice of allowing major stationary sources to avoid paying fees. As a result, SCAQMD's practices violate Title VI, as well as EPA's implementing regulations, and warrant an investigation by EPA's Office of Civil Rights. This Title VI complaint provides SCAQMD with an opportunity to refresh its understanding of its decision to approve the freight industry and to cure its discriminatory plan from a decade ago.

DEMAND

Complainants request that the EPA Office of Civil Rights accept this complaint and investigate whether SCAQMD has violated and/or continues to violate Title VI of the Civil Rights Act, and to require SCAQMD to adopt a nonattainment fee program that reduces emissions in low-income communities and communities of color where these facilities are located. Furthermore, until such time that proper fee equivalency is established, complainants ask EPA to require SCAQMD to levy the fee on major stationary sources and reduce emissions 20% below baselines.

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I. INTRODUCTION

Earthjustice and Communities for a Better Environment submit this complaint on behalf of Complainants against the South Coast Air Quality Management District (“South Coast” or “SCAQMD”) for violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., and the U.S. Environmental Protection Agency’s (“EPA”) implementing regulations, 40 C.F.R. Part 7.

The complaint is filed on behalf of organizations listed herein whose members reside in the South Coast Air Basin and suffer from health impacts related to ozone pollution. The South Coast, which has the worst ozone pollution in the nation, has failed to meet the federal ozone standards since EPA promulgated the 1-hour ozone standard in 1979. It has been 40 years since EPA first started the clock for nonattainment areas to meet the 1-hour ozone standard.

Decades of insufficient air plans have failed to bring the South Coast into attainment of the 1-hour ozone standard. 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.

In the interest of safeguarding public health for overburdened communities of color, this complaint urgently requests EPA to exercise its authority under the Clean Air Act to determine that the South Coast’s fee program has contributed to a discriminatory pattern of perpetuating poor air quality in communities of color.

II. PARTIES

A. Complainants

(b)(6) Privacy, (b)(7)(C) Enf. Privacy 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. (b)(6) Privacy, (b)(7)(C) represents approximately 1,000 members in East Los Angeles, Southeast Los Angeles, Long Beach, Carson, and Wilmington. Through grassroots organizing and leadership-building skills, (b)(6) Privacy, (b)(7)(C) prepares community members to engage in policy issues of environmental justice and air quality at the regional, statewide, and national levels. For decades, (b)(6) Privacy, (b)(7)(C) 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, (b)(6) Privacy, (b)(7)(C) asks EPA to investigate South Coast’s fee program for its disproportionate impact on communities of color.

(b)(6) Privacy, (b)(7)(C) Enf. Privacy is an unincorporated nonprofit association dedicated to building community power in the Inland Empire to fight against pollution and environmental racism. Founded in 2020, (b)(6) Privacy, (b)(7)(C) represents over 1,000 community members in the Inland Empire who are impacted by ozone pollution. Since its inception, (b)(6) Privacy, (b)(7)(C) has advocated for strong financial incentives for major stationary sources to reduce precursors to ozone pollution. For the past five years, (b)(6) Privacy, (b)(7)(C) staff and members have advocated for well-



designed fee programs to incentivize stationary sources to reduce nitrous oxides (“NO_x”) and volatile organic carbon compounds (“VOC”) emissions. A well-functioning fee program is essential to reducing the pollution burdens shouldered by [REDACTED] 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 NO_x and VOC emissions.

Communities for a Better Environment (“CBE”) is a California nonprofit health and justice organization. Since 1978, CBE has been organizing 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 is seeking to require South Coast to implement a fee program that actually reduces ozone air pollution in communities seeking environmental justice where CBE has a vast membership base.

B. South Coast Air Quality Management District

Under the Clean Air Act (“CAA”)², the Environmental Protection Agency (“EPA”) sets national ambient air quality standards (“NAAQS”) for a number of pollutants, including ozone, at levels “requisite to protect the public health.”³ By submitting State Implementation Plans (“SIPs”), each state provides a plan to EPA explaining how it intends to implement and enforce the NAAQS.⁴

In California, local authorities have the primary responsibility for controlling air pollution from all sources other than motor vehicles.⁵ 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.⁶

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

² 42 U.S.C. § 7401 et seq.

³ 42 U.S.C. § 7409(b)(1).

⁴ 42 U.S.C. § 7410(a)(1); Health & Safety Code, § 39000 et seq.

⁵ Health & Safety Code, §§ 39002, 40000.

⁶ Health & Safety Code, §§ 40001, 40440.



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.

III. JURISDICTION

Under Title VI, all recipients of federal funds are prohibited from discrimination: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁷ Recipients of federal funds must comply with Title VI and the EPA’s implementing regulations.⁸ As discussed below, SCAQMD receives federal funding from EPA and is therefore subject to the requirements of Title VI and EPA’s implementing regulations.

Under Title VI and EPA’s implementing regulations, EPA is required to ensure that its funds are not used to support discrimination on the basis of race, color, or national origin. EPA’s External Civil Rights Compliance Office (“ECRCO”) is responsible for enforcing Title VI through complaint investigations, compliance reviews, technical assistance, community engagement, and policy formulation. ECRCO has jurisdiction to respond to Title VI complaints that implicate recipients of federal financial assistance, such as a state agency. As ECRCO noted, “many state environmental agencies receive federal funding for their regulatory and environmental protection functions. Those agencies should be aware that all actions, not just permitting decisions, taken by state agencies funded by EPA are subject to federal civil rights laws.”⁹

A. Program or Activity

A “program or activity” is defined as “all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance.”¹⁰ As a political subdivision of California in receipt of federal financial aid, any SCAQMD operation is considered a “program or activity” and must comply with Title VI.¹¹

B. Federal Financing

South Coast receives funding from EPA Section 103 and 105 grants (approximately \$5 million expected in reserve) to help support SCAQMD in its administration of active air quality

⁷ 42 U.S.C. § 2000d.

⁸ 40 C.F.R. Part 7.

⁹ EPA, *U.S. EPA’s External Civil Rights Compliance Office Compliance Toolkit*, Chapter 1 at p. 2 (2017), https://www.epa.gov/sites/default/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf; Indeed as EPA recently acknowledged in a December 2022 memo, “Compliance with the federal civil rights laws by EPA recipients of federal financial assistance is mandatory and represents an important enforcement tool for achieving environmental justice.” EPA, *Principles for Addressing Environmental Justice in Air Permitting*, (2022), <https://www.epa.gov/system/files/documents/2022-12/EJ%20in%20Air%20Permitting%20Memo.pdf>.

¹⁰ 42 U.S.C. § 2000d—4a.

¹¹ 42 U.S.C. § 2000d.



control and monitoring programs. Other EPA grants provide funding for various air pollution reduction projects.¹² SCAQMD's 2020-2021 Annual Financial report indicates that \$2,746,000 was appropriated from the EPA for among other programs: National Air Toxics Monitoring Program, Enhanced Particulate Monitoring Programs, and Community Scale Air Toxics Mobile Monitoring.¹³

The following table lists the various EPA grants and their corresponding amounts for SCAQMD¹⁴:

Grant Title	Amounts
DERA Bus Administration	\$727,980
National Air Toxics Trend Station (NATTS)	\$25,703
Section 103 Community Scale Air Toxics Grant	\$268,801
Section 103 PM 2.5 Grant	\$302,676
Section 105 Air Grant	\$3,975,514
STAR Grant	\$156,062
Targeted Air Shed Grant Administration	\$374,890

C. Timeliness: Ongoing Action

This Title VI complaint is timely. ECRCO considers Title VI complaints to be timely when the complaint has been filed within 180 calendar days of the date of the last alleged act of discrimination, or if the complainant alleges a "continuing policy or practice" of discrimination.¹⁵

SCAQMD's conduct consists of continuing discriminatory policies and practices. SCAQMD has failed to implement a proper fee program as required by Section 185 of the CAA by allowing credit offsets from expense programs entirely unrelated to curtailing ozone pollution. *See infra*, Section IV.C.1. By relying upon a toothless credit program, SCAQMD has not collected a single fee from a major stationary source in nonattainment areas of the 1979 1-hour ozone standard. Additionally, SCAQMD has violated and continues to violate the annual reporting obligation under Rule 317 to provide reconciliation reports to CARB and EPA.

SCAQMD's multiple failures to collect a fee from any major stationary sources and to instead permit irrelevant credits to offset these federally mandated payments are ongoing

¹² S. Coast Air Quality Mgmt. Dist., *Budget Fiscal Year 2022-2023*, <http://www.aqmd.gov/docs/default-source/finance-budgets/fy-2022-23/adopted-fy-2022-23-budget.pdf?sfvrsn=12>

¹³ S. Coast Air Quality Mgmt. Dist., *Comprehensive Annual Financial Report*, at p. 18 (2021), https://www.aqmd.gov/docs/default-source/finance-budgets/fy-2020-21/comprehensive-2021_web-version_final.pdf?sfvrsn=31

¹⁴ *Id.* at p. 42.

¹⁵ 40 C.F.R. § 7.120(b)(2); EPA, *Case Resolution Manual*, at p. 8 (2021), https://www.epa.gov/sites/default/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf.



violations of Title VI. They are, therefore, timely for ECRCO to consider. SCAQMD has an ongoing duty to ensure that its fee program brings areas of nonattainment into attainment for the 1979 1-hour ozone standard.

In the alternative, ECRCO should waive the 180-day time limit given the longstanding harm caused by SCAQMD's discriminatory acts and failures to act, and EPA's failure to engage in oversight and ensure civil rights compliance by its federal grant recipient.¹⁶

D. Other Prudential Factors

This complaint satisfies all other prudential factors outlined in EPA's Title VI regulations manual and in its Interim Case Resolution Manual.¹⁷ Specifically, this complaint is submitted to the agency in writing by and on behalf of organizations authorized to submit such a complaint.

The complaint is ripe for review and not moot because of ongoing violations, as described further below. No other complaint has been filed or is pending before any other federal, state, or local agency regarding the racially discriminatory impacts of SCAQMD's fee credit program.

Moreover, this complaint seeks relief from EPA under Title VI. Complainants ask EPA to investigate this complaint and take steps to remedy noncompliance with Title VI by South Coast, including suspending or conditioning any and all future federal funding. This relief is not available through other means.

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.¹⁸ It is a secondary pollutant synthesized from precursors emitted by human activity in the presence of sunlight. The synthesis of ozone requires NO_x, which come primarily from fossil fuel combustion; VOCs which may be anthropogenic; and energy (heat and sunlight) from the sun. Ozone contributes to what we

¹⁶ See 40 C.F.R. § 7.120(b)(2).

¹⁷ See, e.g., EPA, *Case Resolution Manual*, Chapter 2 (2017), https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf

¹⁸ Pamela E. Padgett, Patricia L. Winter, Lee-Anne Milburn, Weimin Li, *Measuring Individual Ozone Exposure in Los Angeles Urban Parks*, U.S. Dep't of Ag. (2021), https://www.fs.usda.gov/psw/publications/documents/psw_gtr274/psw_gtr274.pdf; see also Am. Lung Assn., *About Ozone* (2022), [https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/ozone#:~:text=Ozone%20develops%20in%20the%20atmosphere.volatil%20organic%20compounds%20\(VOCs\).](https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/ozone#:~:text=Ozone%20develops%20in%20the%20atmosphere.volatil%20organic%20compounds%20(VOCs).)

typically experience as “smog” or haze when ground-level ozone combines with other gases and particle pollution.¹⁹

Thus, the primary ways to reduce ozone pollution involve reducing its precursors: NO_x and VOCs. With climate change and higher temperatures, scientists expect increases in ozone concentrations since higher temperatures hasten chemical interactions between NO_x and VOCs.²⁰ It is therefore imperative that stringent policies limit NO_x and VOC emissions from major stationary sources.

2. Residents of the South Coast Air Basin are disproportionately exposed to toxic air pollution

NO_x and VOCs are independently harmful to human health. Breathing air with a high concentration of NO_x can cause and aggravate respiratory diseases.²¹ People with asthma, children, and the elderly are generally at greater risk.²² Epidemiological studies have also demonstrated associations between NO_x exposure and premature death, cardiopulmonary effects, decreased lung function growth in children, respiratory symptoms, emergency room visits for asthma, and intensified allergic responses.²³ Over time, exposure to NO_x has been significantly associated with mortality owing to respiratory diseases.²⁴ Fatalities can be reduced between 10-18 percentage points simply by reducing NO_x exposure by 3 µg/m³.²⁵

Similarly, VOC exposure is associated with pulmonary diseases, including asthma and its symptoms, such as wheezing and throat irritation.²⁶ Additionally, oxidative stress and decreased lung function are related to chronic exposure to low VOC levels.²⁷ Studies also show that ambient exposure to VOCs exacerbate cardiovascular disease risk.²⁸ Elderly populations are particularly at risk, with studies showing that VOCs can impair pulmonary function especially in

¹⁹ EPA, *Ground-Level Ozone Standards Designations Frequent Questions*, <https://archive.epa.gov/ozonedesignations/web/html/faq.html>

²⁰ Rachel Morello-Frosch, Manuel Pastor, James Sadd, Seth B. Shonkoff, *The Climate Gap*, https://dornsife.usc.edu/assets/sites/242/docs/The_Climate_Gap_Full_Report_FINAL.pdf citing Jacobson, M. 2008. *On the causal link between carbon dioxide and air pollution mortality*, *Geophys Res. Let.* 35(L03809).

²¹ EPA, *Basic Information about NO₂* (2022), <https://www.epa.gov/no2-pollution/basic-information-about-no2>.

²² *Id.*

²³ California Air Resources Board, *Nitrogen Dioxide & Health* (2022), <https://ww2.arb.ca.gov/resources/nitrogen-dioxide-and-health>

²⁴ A.C.G. César, J.A. Carvalho Jr., Nascimento LF, *Association between NO_x exposure and deaths caused by respiratory diseases in a medium-sized Brazilian city*, *Brazilian Journal of Medical and Biological Research* (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4661030/>

²⁵ *Id.*

²⁶ Kyle L. Alford, Naresh Kumar, *Pulmonary Health Effects of Indoor Volatile Organic Compounds-A Meta-Analysis*, *Int J Environ Res Public Health* (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7914726/>

²⁷ Gabriel-Petrică Bălă, Ruxandra-Mioara Răjnovanu, Emanuela Tudorache, Radu Motisan, Cristian Oancea, *Air pollution exposure—the (in)visible risk factor for respiratory diseases*, *Environ Sci Pollut Res* 28 (2021) <https://doi.org/10.1007/s11356-021-13208-x>

²⁸ Daniel W. Riggs, Marina V. Malocivhko, Hong Gao, Katlyn E. McGraw, Breandon S. Taylor, Tatiana Krivokhizhina, Shesh N. Rai, Rachel J. Keith, Aruni Bhatnagar, Sanjay Srivastava, *Environmental Exposure to Volatile Organic Compounds is Associated with Endothelial Injury*, *Toxicology and Applied Pharmacology* (2021) <https://www.medrxiv.org/content/10.1101/2021.08.25.21262556v2.article-info>

the elderly population.²⁹ 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.³⁰

VOCs and NO_x combine to form ozone which has been a longstanding environmental problem in Los Angeles.³¹

Historically, Los Angeles and the greater South Coast Air District have experienced the most severe ozone pollution in the nation.³² In the American Lung Association's 2022 State of the Air Report, the South Coast region's ozone pollution stayed the same or worsened over the past several years and was ranked number one for highest ozone out of 277 metropolitan areas.³³ 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.³⁴

South Coast violates the ozone standards more days each year than any other place in the country.³⁵ The South Coast exceeded the 1-hour ozone standard by 7% of all days in 2020.³⁶ More recent data shows that ozone concentrations in the South Coast Air Basin have been as high as 185 ppb.³⁷ 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

²⁹ H.I. Yoon, Y-C. Hong, S-H. Cho, H. Kim, Y.H. Kim, J.R. Sohn, M. Kwon, S-H. Park, M-H Cho, H-K. Cheong, *Exposure to volatile organic compounds and loss of pulmonary function in the elderly*, 36 *European Respiratory Journal* (2010) <https://erj.ersjournals.com/content/36/6/1270>

³⁰ James H. Ware, John D. Spengler, Lucas M. Neas, Jonathan M. Samet, Gregory R. Wagner, David Coultas, Haluk Ozkaynak, Margo Schwab, *Respiratory and Irritant Health Effects of Ambient Volatile Organic Compounds: The Kanawha County Health Study*, 137, Issue 12 *American Journal of Epidemiology* 1287 (1993) <https://doi.org/10.1093/oxfordjournals.aje.a116639>

³¹ Pamela E. Padgett, Patricia L. Winter, Lee-Anne Milburn, Weimin Li, *Measuring Individual Ozone Exposure in Los Angeles Urban Parks*, U.S. Dep't of Ag. (2021), https://www.fs.usda.gov/psw/publications/documents/psw_gtr274/psw_gtr274.pdf

³² *Id.*

³³ Am. Lung Assn., *State of the Air 2022*, at p. 11 (2022), <https://www.lung.org/getmedia/74b3d3d3-88d1-4335-95d8-c4e47d0282c1/sota-2022>

³⁴ Am. Lung Ass'n., *City Rankings* (2022), <https://www.lung.org/research/sota/city-rankings/states/california> (see Los Angeles, Orange, Riverside and San Bernardino counties).

³⁵ Am. Lung Assn., *State of the Air 2019*, at p. 69-70 (2019), <https://docs.house.gov/meetings/GO/GO28/20191029/110157/HHRG-116-GO28-20191029-SD006.pdf>

³⁶ S. Coast Air Quality Mgmt. Dist., *Historical Ozone Air Quality Trends* (2020), <https://www.aqmd.gov/home/air-quality/historical-air-quality-data/historic-ozone-air-quality-trends>

³⁷ Pratik Thakur, *California air pollution's health and economic costs*, USC Economics Review (2021), <https://usceconreview.com/2021/10/22/california-air-pollutions-health-and-economic-costs/>

the lungs, asthma attacks, and premature death. Ozone pollution can also cause permanent scarring of the lungs.³⁸

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.³⁹

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.⁴⁰ In addition, over 700,000 individuals in the region suffer from Chronic Obstructive Pulmonary Disease.⁴¹ Furthermore, the Los Angeles-Long Beach region is home to over 2.5 million individuals over the age of 65.⁴² 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.⁴³ Finally, emerging studies link behavioral and neurodegenerative diseases in children to ozone pollution.⁴⁴ As such, this number represents a considerably large at-risk population in a region with notoriously bad ozone problems.

Emphysema is the destruction of lung tissue leading to wheezing, coughing, and shortness of breath, and increases the risk of death. There is no cure. The average annual ozone level in most U.S. regions is about 10 to 25 ppb. For every 3-ppb increase in ambient ozone levels, there is a corresponding increase in rates of emphysema.⁴⁵ The concentration of ozone in areas where the major stationary sources are located in the South Coast is 51.79 ppb. This increased rate was roughly the same as smoking a pack of cigarettes every day for 29 years.⁴⁶ Estimated lifetime cancer risks associated with outdoor air toxics exposures in the South Coast

³⁸ Am. Lung Assn., *About Ozone* (2022), <https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/ozone>

³⁹ Victor Brajer, Jane V. Hall, Frederick W. Lurmann, *Valuing Health Effects: The Case of Ozone and Fine Particulates in Southern California*, 29, no. 4 *Contemp. Econ. Pol’y*, 524, 532 tbl. 7 (2010), <http://www.scientificintegrityinstitute.org/Brajer100111.pdf>.

⁴⁰ Am. Lung Assn., *State of the Air 2022—Report Cards* (2022), <https://www.lung.org/research/sota/city-rankings/states/california/los-angeles>

⁴¹ *Id.*

⁴² *Id.*

⁴³ Am. Lung Assn., *State of the Air 2022—Health Impact of Air Pollution* (2022), <https://www.lung.org/research/sota/health-risks>

⁴⁴ Yu Ni, Christine T. Loftus, Adam A. Szpiro, Michael T. Young, Marnie F. Hazlehurst, Laura E. Murphy, Frances A. Tylavsky, W. Alex Mason, Kaja Z. LeWinn, Sheela Sathyanarayana, Emily S. Barrett, Nicole R. Bush, Catherine J. Karr, *Associations of Pre- and Postnatal Air Pollution Exposures with Child Behavioral Problems and Cognitive Performance: A U.S. Multi-Cohort Study*, 130, No. 6 *Environmental Health Perspectives* (2022) <https://ehp.niehs.nih.gov/doi/10.1289/EHP10248?cookieSet=1>

⁴⁵ Meng Wang, Carrie Pistenmaa Aaron, Jaime Madrigano, *Association Between Long-term Exposure to Ambient Air Pollution and Change in Quantitatively Assessed Emphysema and Lung Function*, *JAMA* (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=tf&utm_term=081319

⁴⁶ *Id.*



Air Basin were found to be universally high, often exceeding the CAA goal of one in one million by between one and three orders of magnitude.⁴⁷

The COVID-19 pandemic has exacerbated the harms 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.⁴⁸ 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."⁴⁹ A study focusing on California found that higher COVID-19 deaths were associated with higher exposure to air pollution.⁵⁰

Based on the above-described health ailments, air pollution costs the communities in the South Coast Air Basin almost **\$2 billion to \$5 billion**.⁵¹

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
South Coast Air Basin							
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

⁴⁷ Rachel Morello-Frosch, Manuel Pastor Jr., Carlos Porras, James Sadd, Environmental Justice and Regional Inequality in Southern California: Implications for Future Research, 110, supp. 2 Environmental Health Perspectives (2022) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1241158/pdf/ehp110s-000149.pdf>

⁴⁸ X. Wu, R.C. Nethery, M.B. Sabath, F. Dominici, *Air pollution and COVID-19 mortality in the United States: Strengths and limitations of an ecological regression analysis*, 6(45) Science advances <https://projects.iq.harvard.edu/covid-pm>

⁴⁹ *Id.*

⁵⁰ Erika Garcia, Brittney Marian, Zhanghua Chen, Kenan Li, Fred Lurmann, Frank Gilliland, Sandra P. Eckel, *Long-term air pollution and COVID-19 mortality rates in California: Findings from the Spring/Summer and Winter surges of COVID-19*, 292 Environ Pollut. (2022) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8529382/>

⁵¹ Devoun R Stewart, Emily Saunders, Roberto A Perea, Rosa Fitzgerald, David E Campbell, William R Stockwell, *Linking Air Quality and Human Health Effects Models: An Application to the Los Angeles Air Basin*, 11 Environmental Health Insights (2017); see also Jane V. Hall, Victor Brajer, Frederick W. Lurmann, *The Benefits of Meeting Federal Clean Air Standards in the South Coast and San Joaquin Valley Air Basins*, Asthma Coalition (2008) https://admin.publichealth.lacounty.gov/mch/AsthmaCoalition/docs/BenefitsofMeetingCleanAirStandards_11_06_08.pdf.



communities.⁵² According to the American Lung Association, people of color are 3.6 times more likely than white people to live in a county with 3 failing grades for air quality.⁵³ African Americans are more likely to live in areas with high levels of PM2.5 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.⁵⁴

National studies have previously shown that populations living in EPA-designated air quality nonattainment areas for ozone are disproportionately Hispanic (71.2%) compared to Black populations (62.2%) or white populations (52.5%).⁵⁵ Studies have also shown that overall, communities of color and low socioeconomic 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.⁵⁶

As the California Air Resources Board recently confirmed, 99% of disadvantaged communities in California are located in nonattainment areas, and achieving ozone standards and reducing emissions helps reduce negative impacts in these communities.⁵⁷

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⁵² Ned Helme, Stacey Davis, Suzanne Reed, Nancy Ginn Helme, Michelle Levinson, David Wooley, *Advancing Environmental Justice: A new State Regulatory Framework to Abate Community-Level Air Pollution Hotspots and Improve Health Outcomes*, Center for Environmental Public Policy, Goldman School of Public Policy, University of California at Berkeley (2017)

https://gspp.berkeley.edu/assets/uploads/page/CEPP_Advancing_Environmental_Justice.pdf

⁵³ Am. Lung Assn., *State of the Air 2022—Key Findings* <https://www.lung.org/research/sota/key-findings>

⁵⁴ https://www.energy.ca.gov/sites/default/files/2019-11/Statewide%20Reports-%20SUM-CCCA4-2018-012%20ClimateJusticeSummary_ADA.pdf; see also Food and Water Watch, Greenaction for Health and Environmental Justice, *Paying to Pollute—The Environmental Injustice of Pollution Trading* (2017) https://foodandwaterwatch.org/wp-content/uploads/2021/03/ibsp_1711_eipaytopollute-webfin2_0.pdf

⁵⁵ Dee R. Wernette and Leslie A. Nieves, *Minorities and air pollution: a preliminary geodemographic analysis*, ENV. ASSESSMENT AND INFORMATION SCI. DIV. ARGONNE NAT'L LAB. at p. 18 (1991), available online at <https://www.osti.gov/servlets/purl/5295546> (last accessed Feb. 21, 2023)

⁵⁶ Julian D. Marshall *Environmental inequality: air pollution exposures in California's South Coast Air Basin*, 42(21) *Atmospheric Environment* (2008); see also Rachel Morello-Frosch, Manuel Pastor Jr., Carlos Porras, James Sadd, *Environmental justice and regional inequality in southern California: implications for future research*, 110 *Environ Health Perspect.* (2002) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1241158/>

⁵⁷ 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>



Owners and operators of these facilities know about the adverse health consequences of ozone and ozone precursor pollution.⁵⁸ For years, the industry lobby has attempted to undermine SCAQMD's efforts to limit precursors to ozone as explained further below.

B. South Coast Residents Suffer from Cumulative Air Quality Impacts

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.”⁵⁹

Cumulative impacts matter because pollutants can a) accumulate in the body over time and b) interact (either in additive ways or in unknown and negative ways) with other pollutants in creating adverse effects.⁶⁰ Furthermore, socioeconomic stressors are associated with increased sensitivity to pollution⁶¹, which can result in worse health outcomes when combined with multiple pollution pathways.

In the South Coast, many residents live in close proximity to multiple sources of pollution. In addition to major stationary sources emitting VOCs and NOx, the South Coast Air Basin also has high levels of cumulative emissions of criteria pollutants from mobile source emissions from motor vehicles, including tailpipe and evaporative emissions, as well as from area-wide sources, such as space and water heating, landscape maintenance from leaf blowers and lawn mowers, and consumer products. Pollution in these areas also comes from refineries, ports, truck traffic, oil drilling, production, and railyards. Diesel exhaust and railyards are major

⁵⁸ For instance, FrackTracker identified leaks and sources of uncontrolled emissions in South Coast Air Quality Management District. 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, *FrackTracker Finds Widespread Hydrocarbon Emissions From Active & Idle Oil And Gas Wells And Infrastructure In California*, FracTracker Alliance (2022) <https://www.fracktracker.org/2022/08/fracktracker-finds-widespread-hydrocarbon-emissions-from-active-idle-oil-and-gas-wells-and-infrastructure-in-california/>

⁵⁹ Linda S. Adams, *Cumulative Impacts: Building a Scientific Foundation*, Office of Environmental Health Hazard Assessment (2010) <https://oehha.ca.gov/media/downloads/calenviroscreen/report/cireport123110.pdf>

⁶⁰ Vanessa Galaviz, *CalEnviroScreen: Identifying Communities with Cumulative Impacts*, Cal. EPA (2021) <https://www.swlaw.edu/sites/default/files/2021-02/Galaviz%20-%20Vanessa%20-%20CalEnviroScreen-%20Identifying%20Communities%20with%20Cumulative%20Impacts.pdf>

⁶¹ Linda S. Adams, *Cumulative Impacts: Building a Scientific Foundation*, Office of Environmental Health Hazard Assessment (2010) <https://oehha.ca.gov/media/downloads/calenviroscreen/report/cireport123110.pdf>

sources of PM and NO_x⁶²; refineries and oil wells are major sources of SO_x and methane; and auto body shops and waste facilities are major sources of VOCs.⁶³

Areas with high hazard proximity tend to cluster around major industrial centers or follow major transportation corridors.⁶⁴ High hazard scores in the South Coast are typical in areas with populations characterized by communities of color, low-income populations.⁶⁵

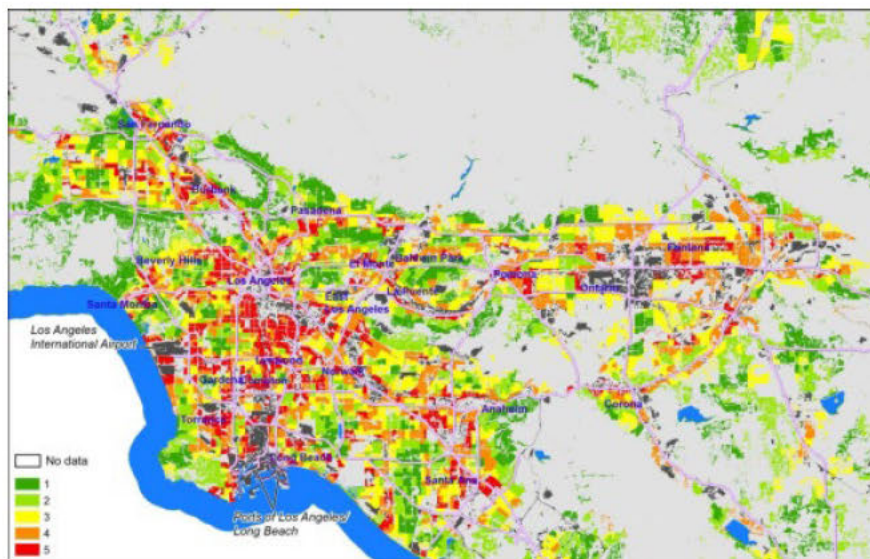


Figure 1: Hazard proximity at the census tract level in the South Coast Air Quality Management District

For example, the Wilmington, West Long Beach, and Carson community represents an area of 48 square miles with a population of approximately 261,000 people.⁶⁶ Refineries, seaport activities, nine rail yards, warehouses, and four major freeways surround the community.⁶⁷ The

⁶² 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 oxides of nitrogen (NO_x) and 0.27 tpd of particulate matter (PM) in the South Coast Air Basin. See, Cal. Air. Res. Board, *Emissions Impact of Recent Congestion at California Ports* (2021) https://ww2.arb.ca.gov/sites/default/files/2021-09/port_congestion_anchorages_locomotives_truck_emissions_final_2800229.pdf

⁶³ Payam Pakbin, Sina Hasheminassab, Julia Montoya-Aguilera, Mohammad H. Sowlat, Steven Boddeker, Avi Lavi, Faraz E. Ahangar, Christopher Y. Lim, *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*, SCAQMD (2021) https://intlexposurescience.org/wp-content/uploads/2021/04/ISES-Course-Slides_EJ-AQ-Monitoring.pdf-2020-10-1-12.22.54-1.pdf

⁶⁴ James L. Sadd, Manuel Pastor, Rachel Morello-Frosch, Justin Scoggins, Bill Jesdale, *Playing It Safe: Assessing Cumulative Impact and Social Vulnerability through an Environmental Justice Screening Method in the South Coast Air Basin, California*, 8(5) Int J Environ Res Public Health 1441–1459 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3108119/>

⁶⁵ *Id.*

⁶⁶ Deborah Behles, Neena Mohan, Gladys Limón, *Lessons From California's Community Emissions Reduction Plans: AB 617's Flawed Implementation Must Not Be Repeated*, California Environmental Justice Alliance (2021) https://caleja.org/wp-content/uploads/2021/05/CEJA_AB617_r4-2.pdf

⁶⁷ *Id.*



Port of Long Beach is located adjacent to the communities of Wilmington and West Long Beach.⁶⁸ 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.⁶⁹ The community is also impacted by neighborhood oil drilling.⁷⁰ The lack of localized emission controls must be seen in the context of the cumulative exposures that these communities face.

C. South Coast's Program Fails to Curb Ozone Pollution

Studies have shown that it will be “challenging [for South Coast] to attain the National Ambient Air Quality Standards (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.⁷¹ 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.

1. Section 185 Fee Program

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.

As described above, EPA is required to set NAAQS to protect public health and welfare.⁷² At issue here is the section 185 fee rule for the 1979 1-hour Ozone NAAQS.⁷³ EPA set the standard as 0.12 ppm (or 125 parts per billion). In November 1991, EPA designated the South Coast region as in extreme nonattainment and provided an attainment deadline of November 2010. SCAQMD continues to fail to meet this standard established 43 years ago.

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 nonattainment areas of the 1979 1-hour ozone standard. 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 percent of the “baseline amount,” i.e., the lower of the

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Begie Perdignes, Soojin Lee, Ronald Cohen, Jeonghoo Park, Kyung-Eun Min, *Evaluating ozone attainment based on its dependency on precursor emissions in South Coast Air Basin (SoCAB), California*, AGU Fall Meeting 2021 (2021) <https://ui.adsabs.harvard.edu/abs/2021AGUFM.A32G..07P/abstract>

⁷² 42 U.S.C. § 7409.

⁷³ 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. 62 Fed. Reg. 38,856 (July 18, 1997)



amount of actual or allowable emissions under the permit applicable to the source. The fee must be adjusted for inflation based on the Consumer Price Index (CPI) on an annual basis.⁷⁴

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, 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 185.⁷⁵

In its initial promulgation of a fee program for the 1979 1-hour ozone standard, SCAQMD provided that major polluters in nonattainment areas can either pay a fee representative of 20% of their NO_x and VOCs emissions or reduce their emissions by 20% to comply. 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.”⁷⁶

Instead, South Coast instituted an alternative fee program pursuant to Section 172(e) called Rule 317, as outlined in the next section.

2. The Rule 317 Fee Equivalency Program Fails to Reduce Ozone Pollution and Consequently Fails to Protect Public Health

SCAQMD has failed to sufficiently reduce ozone emissions and, in doing so, has not only violated the attainment dates under the CAA but has also failed in its duty to protect public health.

Rule 317, as amended on February 4, 2011, and approved as a revision to the California State Implementation Plan 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”).

⁷⁴ 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

⁷⁵ *Id.* at p. 3.

⁷⁶ *Id.*



Under the Rule 317 FEA, SCAQMD tracks expenditures from “qualified programs” and uses them as credits to offset any Section 185 nonattainment fee obligation incurred by major stationary sources. The expenditures that SCAQMD could take credit for were “designed to result or have resulted in direct VOC or NO_x reductions in the South Coast AQMD; or have facilitated VOC or NO_x reductions in the SCAQMD through vehicle/engine fueling infrastructure or advanced technology development and demonstration efforts for implementation within the next 10 years.”⁷⁷ *In theory*, the hope was that these credits would avoid the need for a facility-specific fee.

Stated differently, instead of charging a fee on 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.⁷⁸ These polluting industries aligned with the SCAQMD to seek to achieve leniency over its fee program.⁷⁹

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, the SCAQMD’s fee program for the 1-hour ozone standard amounts to no penalty, but rather a paper exercise to provide the veneer of a penalty.

The factual predicate that formed the basis for the Rule 317 credit approach was informed by incorrect data. 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_x reductions through additional control.”⁸⁰ 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

⁷⁷ SCAQMD, *Rule 317 Fee Equivalency Account (FEA) Reconciliation Report FAY 2018* at p.4 (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).

⁷⁸ *Id.*

⁷⁹ SCAQMD, Proposed Amended Rule 317 Staff Report, at p. 317-2 (Feb. 4, 2011), <http://www.aqmd.gov/docs/default-source/Agendas/Governing-Board/2011/2011-feb4-029.pdf?sfvrsn=2>.

⁸⁰ *Id.* at p. 4; p. 317-1



some of the largest NO_x emitting facilities in the Basin.”⁸¹ 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 for polluting industries might try to point to the ongoing dismantling of the RECLAIM program, but we remind EPA that many compliance dates for RECLAIM facility equipment are 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 8-hour ozone standard. Furthermore, the 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 extremely outdated compliance deadlines.⁸²

It is also worth noting that even the dismantling of the RECLAIM program has been plagued with industry opposition, including comments that the word “retrofit” in “Best Available Retrofit Control Technology” precludes the South Coast AQMD from requiring emissions limits that can only be cost-effectively met by replacing the basic equipment with new equipment.

Although AQMD has since squashed this comment⁸³, one thing is clear: industry cares more about their bottom lines than clean air. Industry will continue using its outdated and inefficient equipment to pollute and poison frontline communities until regulatory interventions put an end to it.

Rule 317 also contains specific reporting requirements with respect to the FEA. Annually, a reconciliation report (outlining the debits: fee obligation incurred by major stationary sources vis-a-vis the credits: expenditures from qualified programs) must be generated and submitted to both the California Air Resources Board (CARB) and the U.S. EPA. However, for the past four years, unless prompted by the public, SCAQMD has routinely failed to submit these annually required reports.

V. South Coast Violated Title VI In Implementing Rule 317

Under Title VI and EPA’s implementing regulations, recipients of financial assistance cannot carry out activities that create a disparate impact on protected groups, including communities of color.

Complainants must: “(1) identify the specific policy or practice at issue; (2) establish adversity/harm; (3) establish disparity; and (4) establish causation” in order to demonstrate a

⁸¹ SCAQMD, RECLAIM Transition Plan Draft 2.0, at vii (December 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.”)

⁸² *Id.*

⁸³ AQMD, NO_x Reclaim Working Group Meeting, at p. 34 (Mar. 18, 2021), http://www.aqmd.gov/docs/default-source/rule-book/Proposed-Rules/regxx/final-draft-reclaim---wgm-march-18-2021_v2.pdf?sfvrsn=6



prima facie case of disparate impact.⁸⁴ EPA's analysis focuses on the consequences of the recipient's policies rather than the recipient's intent.⁸⁵ If the evidence establishes a prima facie case of adverse disparate impact, EPA determines "whether the recipient has articulated a 'substantial legitimate justification' for the challenged policy or practice."⁸⁶ If a recipient shows a "substantial legitimate justification," EPA must determine whether there are comparably effective alternative practices that would result in less adverse impact.⁸⁷ EPA has recognized that an agency may be in violation of Title VI when there is an adverse health impact on protected groups.⁸⁸

SCAQMD's practices with respect to Rule 317 have a disparate, adverse impact on communities of color. SCAQMD has failed to implement less discriminatory alternatives. As a result, SCAQMD's practices violate Title VI and EPA's implementing regulations and warrant an investigation by ECRCO.

A. Discriminatory Acts

The South Coast has a long history of inadequate ozone plans, and as a result, millions of California residents have suffered from pervasive ozone pollution for decades. In 1979 EPA adopted NAAQS for ozone, limiting the maximum 1-hour average ozone concentrations to 0.12 parts per million. The South Coast is the only region that has yet to meet this standard.

As described above, instead of instituting a Section 185 fee program for major facilities in nonattainment areas of the 1979 1-hour ozone standard, the South Coast fee equivalency program credits expenditures from "so-called" qualified programs:

- Fund 22 and Fund 23: Motor vehicle registration fees
- Fund 31: Clean Fuels Fund
- Fund 32: Carl Moyer Incentives Program
- Fund 33: DERA School Bus Retrofit Funding Grant
- Fund 40: Natural Gas Vehicle Partnership
- Fund 56: Enhanced Fleet Modernization Program
- Fund 59: Voucher Incentive Program
- Fund 61: Advanced Technology Goods Movement
- Fund 80: Carl Moyer Incentives Program
- Fund 81: Prop 1B Goods Movement

Many of these programs pre-date the fee rule. As such, there is no evidence that the programs were implemented specifically *for* curbing ozone precursor pollution. However, this

⁸⁴ U.S. Env't. Prot. Agency – External Civil Right Compliance Office, Office of General Counsel, at p. 8, (Jan. 18, 2017), https://www.epa.gov/sites/default/files/2020-02/documents/toolkit_ecrco_chapter_1-letter-faqs_2017.01.18.pdf.

⁸⁵ *Id.* at p. 9.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Id.* at pp. 18-19.



fee equivalency credit program amounts to disparate and adverse impacts on communities of color for several reasons.

First, the approval of the above credits fails to consider the localized impacts of ozone and its precursor emissions. The program accounts for credits that might (at best) have a diffuse benefit across various areas of the South Coast region but does not account for the fact that NO_x and VOCs are localized pollutants that impact the areas immediately surrounding the major facilities: areas that are predominantly communities of color. Using credits untethered to the ozone standard creates a system that allows South Coast to do nothing about the harm major stationary sources are causing. Thus, the unabated pollution continues to disproportionately burden communities of color, as described above.

Second, even with respect to the alleged diffuse benefits, SCAQMD has provided no proof in the past decade to demonstrate specifically how these funds benefit the environmental justice communities surrounding major stationary sources.

Finally, the agency has failed to publicly provide its annual reconciliation reports and annual compliance plans for the past four years. These reports allow the public to understand the credits and debits accounted for and South Coast's progress in attaining the 1979 1-hour NAAQS. This lackadaisical approach on compliance and equivalency has delayed and denied the public's right to gain information about South Coast's programs to curb ozone pollution.

EPA's direct approval of the SIP amendment and fee equivalency program constitutes an egregious federal acquiescence of this discriminatory "do-nothing" structure. EPA has also not required SCAQMD to correct its failure to submit its annual compliance plans. But, it is not too late for EPA to turn course on this failed experiment of leniency.

B. Adverse Impacts are Felt Disproportionately by Communities of Color in the South Coast Region

According to the Census Bureau, Orange County, San Bernardino, Riverside, and Los Angeles Counties, including the Wilmington area, are on average 50% Hispanic or Latino and approximately 12% live in poverty.⁸⁹ In 2018, South Coast calculated a non-zero fee for 206 major stationary sources. Of these, 22 facilities were located in industrially zoned areas (with no residential populations). On average, the remaining 184 facilities were located in communities with 75% people of color and 34% living in poverty.⁹⁰

As demonstrated by the following maps, the major stationary sources continue to emit an abundance of NO_x and VOCs in high percentile communities of color.

⁸⁹ *Quick Facts: Orange County, California; San Bernardino County, California; Riverside County, California; Los Angeles County, California*, U.S. CENSUS, available online <https://www.census.gov/quickfacts/fact/table/orangecountycalifornia.sanbernardinocountycalifornia.riversidecounty-california.losangelescountycalifornia/INT100221> (last accessed Feb. 21, 2023)

⁹⁰ For comparison, 68.9 percent of the entire South Coast Air Basin are communities of color and 33 percent are living in poverty.

Figure 2 uses fees levied but unpaid by major facilities as a proxy for the amount of NO_x and VOC emissions created by each individual stationary source.⁹¹ The size of the circles reflect the amount of fees and, therefore, the concentration of emissions. The shading on the map reflects the concentration of communities of color – where the darkest regions reflect populations that are 87 – 100% communities of color.⁹² Blue circles represent facilities in industrially zoned areas (with no residential populations).

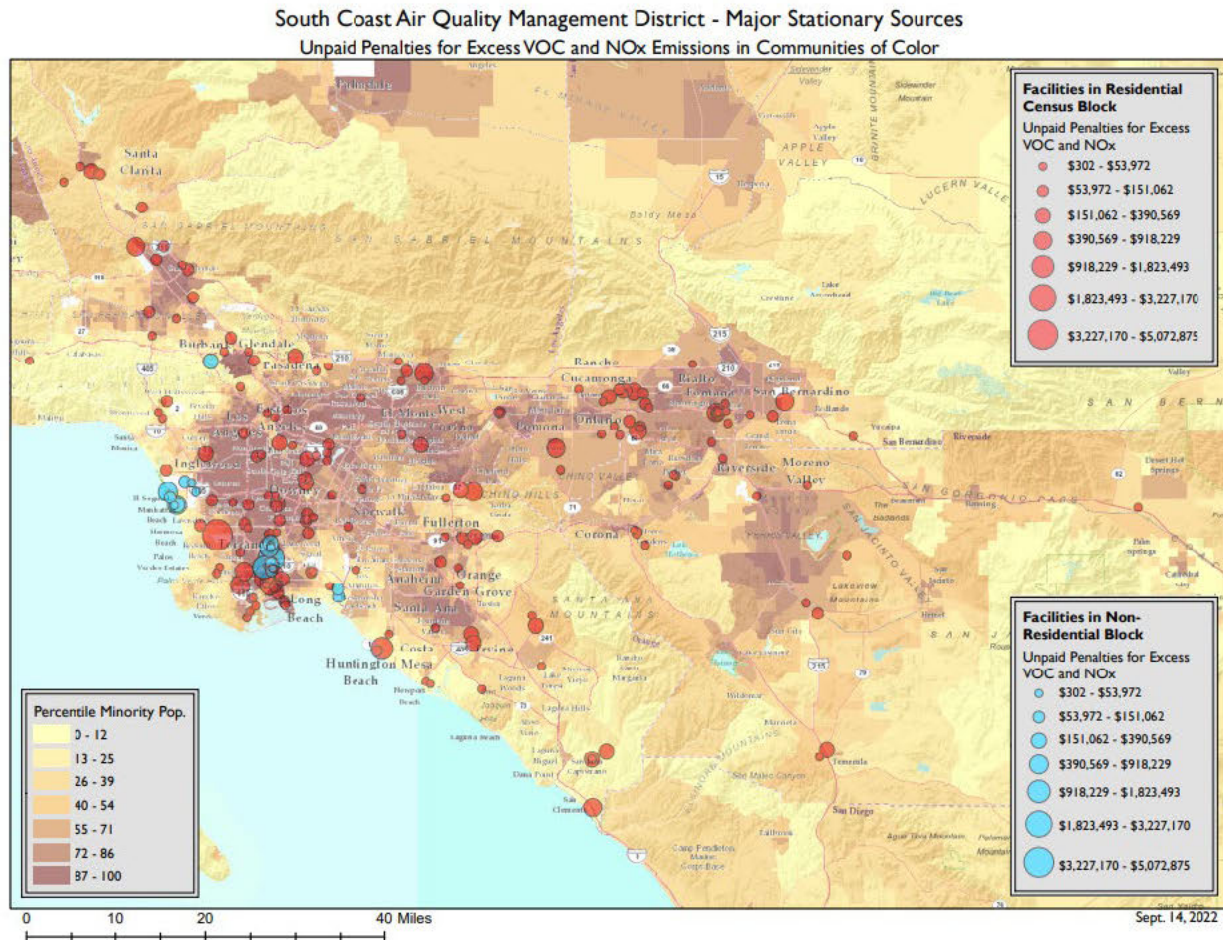


Figure 2: Communities of Color are Disproportionately Impacted by Larger and More Polluting Stationary Sources

⁹¹ This 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)* at Attachment E (Sept. 3, 2020), available online [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) (last accessed Feb. 21, 2023).

⁹² Data pertaining to distribution of communities of color is from the *Environmental Justice Screening and Mapping Tool Version 2.1*, EPA available online here <https://ejscreen.epa.gov/mapper/>.

As Figure 2 demonstrates, 75% of all major stationary sources (137 out of 184 facilities) are concentrated in areas with the highest concentration of communities of color and low-income populations. Furthermore, the largest polluters (as demonstrated by the size of the circles) are concentrated in the populations that are 87 – 100% communities of color. Figure 2 also demonstrates that while there are a minority of facilities in areas that are industrially zoned (the blue circles), communities of color bear the disproportionate burden of toxic emissions from stationary sources.

Figures 3 and 4 plot the size of NO_x and VOCs by tons of emissions from each individual stationary source. As demonstrated by Figures 3 and 4 below, the same pattern as with the total ozone pollution also holds true for the precursors to Ozone – NO_x and VOCs. The largest emitters of NO_x and VOCs are concentrated in populations that are 87 – 100% communities of color.

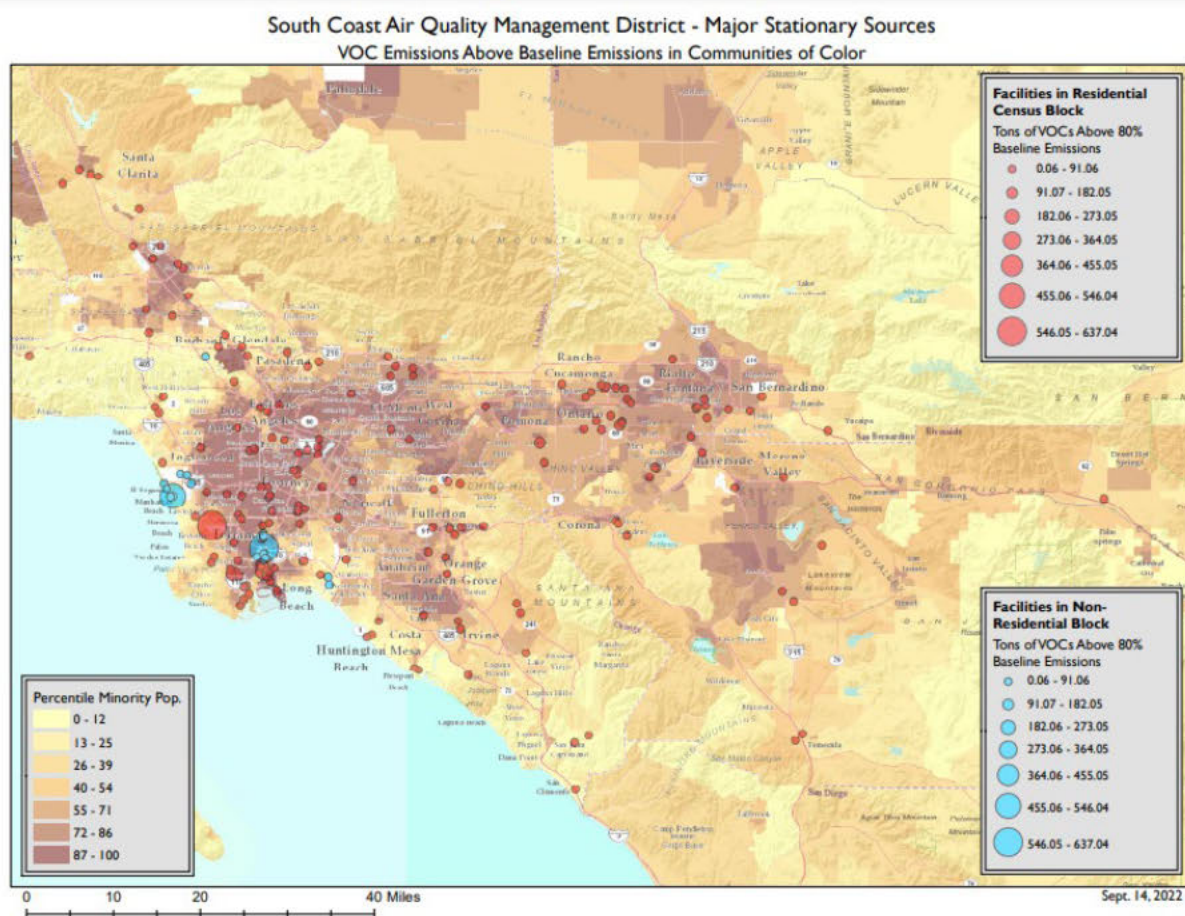


Figure 3: Communities of Color are Disproportionately Impacted by Larger and More Polluting Stationary Sources emitting VOCs.

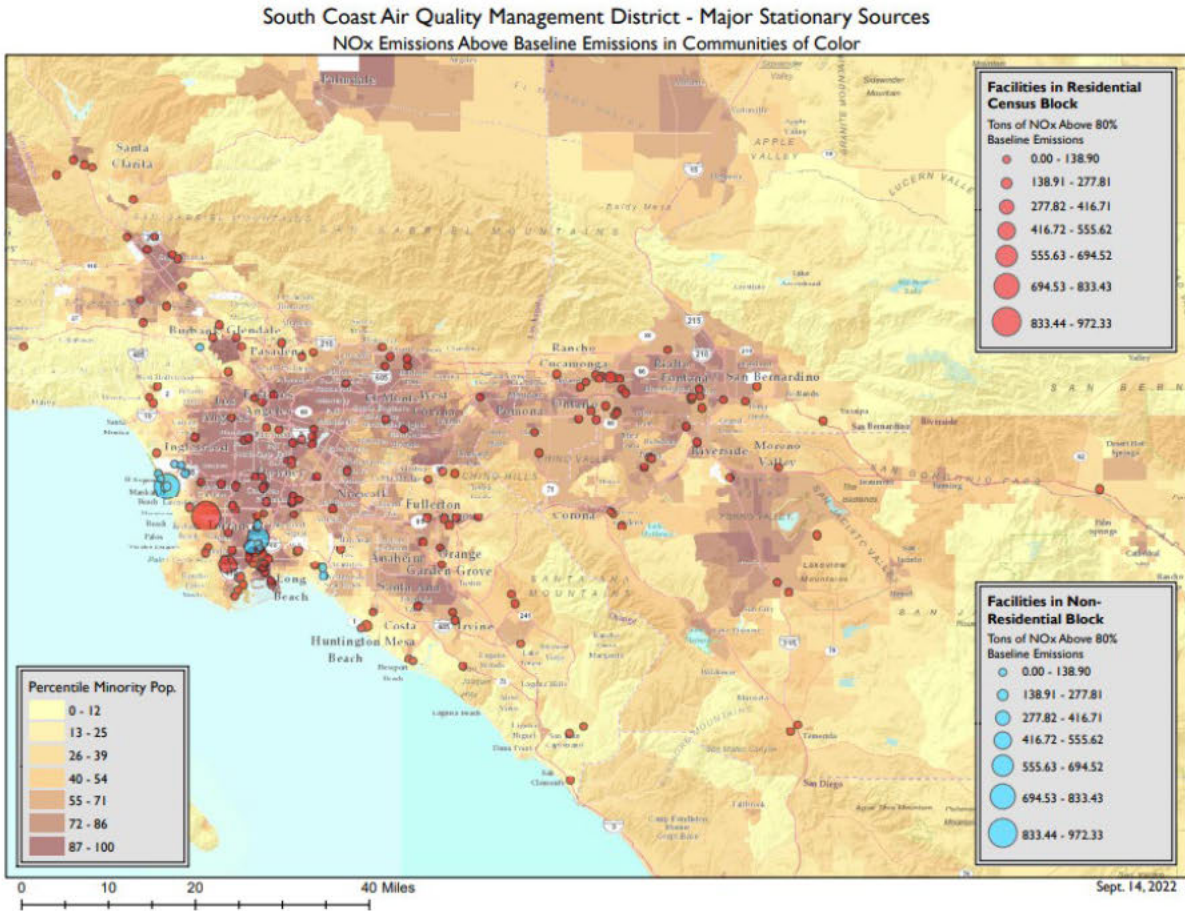


Figure 4: Communities of Color are Disproportionately Impacted by Larger and More Polluting Stationary Sources emitting NOx.

These patterns are repeated in low-income communities. Figure 5 also uses fees levied but unpaid by major facilities as a proxy for the amount of NOx and VOC emissions created by each individual stationary source. The size of the circles reflects the amount of fees and, therefore, the concentration of emissions. However, in Figure 5, the shading on the map reflects the concentration of low-income populations – where the darkest regions reflect populations that are 86 – 100% low-income communities. Figure 5 demonstrates that major stationary sources are concentrated in low-income communities.

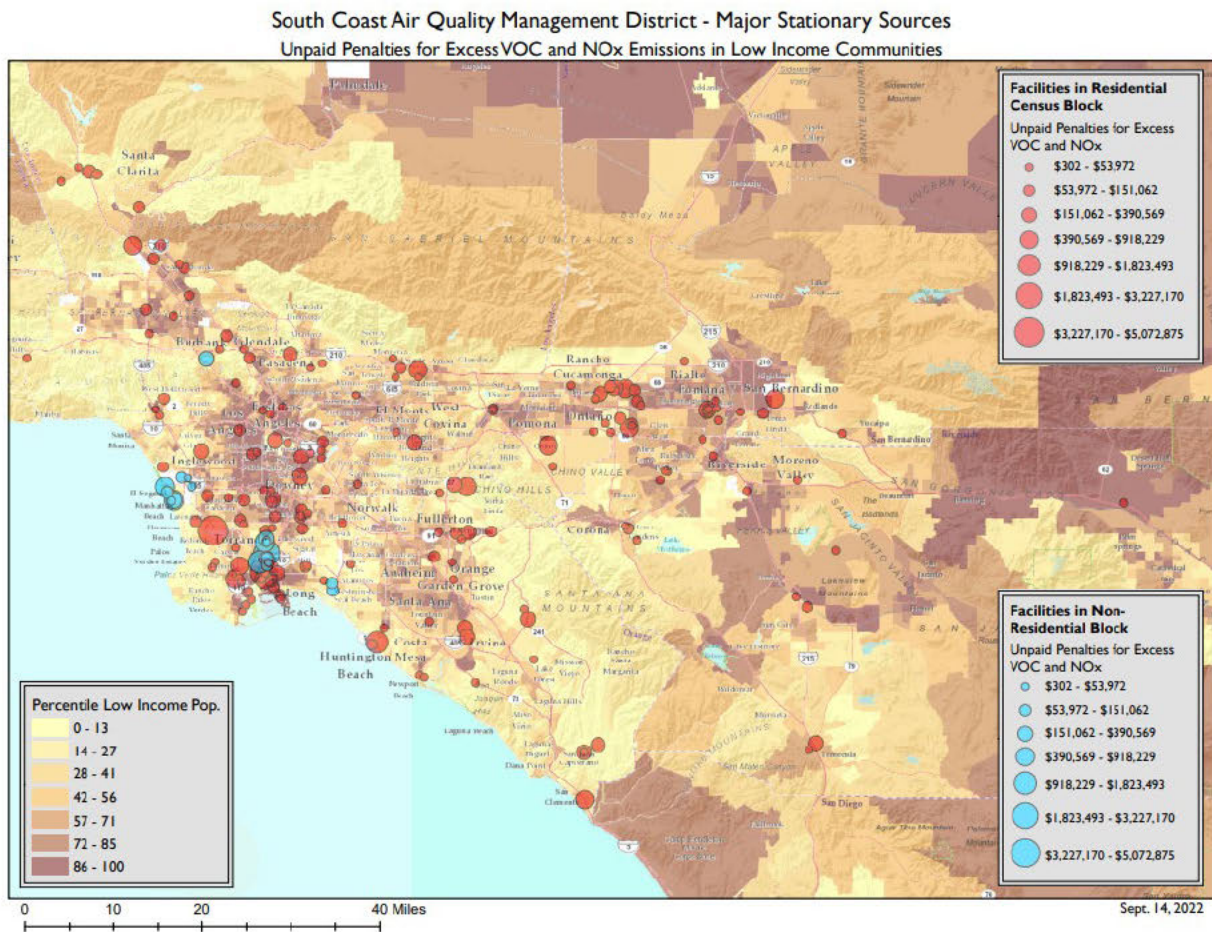


Figure 5: Low-Income Communities are Disproportionately Impacted by Larger and More Polluting Stationary Sources.

As described above, ozone pollution results in various chronic health harms, including asthma, emphysema, respiratory illnesses, and cancer risks. These health hazards disproportionately impact these communities of color who live, work, and go to school near major stationary sources. The actual exposures in communities located near pollution sources could be much worse than we know, since the reported exposure levels are based on ambient air monitors, which are intentionally sited away from individual pollution sources in order to capture the ambient air across a large area.⁹³

In a recent South Coast AQMD Governing Board Meeting, South Coast executives noted that while precursors for ozone such as NO_x and VOCs are generated in these communities, ozone itself may be more dispersed because of sunlight, time, and other atmospheric

⁹³ Ned Helme et al., *Advancing Environmental Justice: A New State Regulatory Framework to Abate Community-Level Air Pollution Hotspots and Improve Health Outcomes*, at p. 10 (Aug. 13, 2017), https://gspp.berkeley.edu/assets/uploads/page/CEPP_Advancing_Environmental_Justice.pdf.

conditions.⁹⁴ They further elaborated that the reason for the difference between ozone levels in Environmental Justice (“EJ”) and non-EJ communities is that on “average there is higher ozone in the Inland Empire relative to LA county” and that there are “less environmental justice communities in the Inland Empire relative to LA County.”⁹⁵ But the averages that South Coast executives use masks the truth of how ozone continues to impact communities of color. Even in the Inland Empire, according to EJScreen, the ozone dispersion continues to impact communities of color.⁹⁶ This is in addition to the localized health impacts of NOx and VOCs that are being emitted in their backyards.

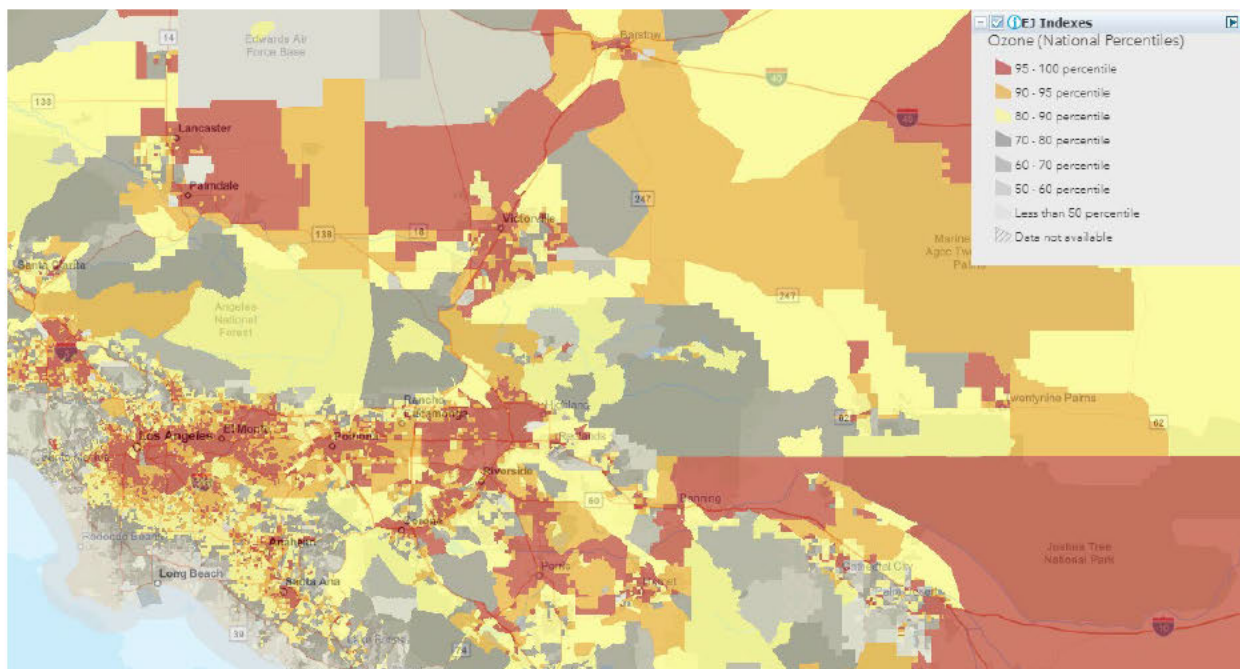


Figure 6: Environmental Justice Index – Ozone (EJScreen).

Communities of color, low-income communities, people with LEP, and certain immigrant groups (especially those who are undocumented) have higher rates of chronic medical conditions, such as cardiovascular and kidney disease, diabetes, asthma, and chronic obstructive pulmonary diseases.⁹⁷ One of the reasons that low-income communities and communities of color have greater rates of health issues is due to lower rates of health insurance.⁹⁸ People of

⁹⁴ *South Coast AQMD Governing Board Meeting, Agenda Item 22 at 1:23:21 (Oct. 7, 2022)*, <https://www.youtube.com/watch?v=mQOlXYZ-Cm4&t=1s>.

⁹⁵ *Id.*

⁹⁶ Ozone National Percentiles, EPA Environmental Justice Screening and Mapping Tool (Version 2.1) available online at <https://ejscreen.epa.gov/mapper/> (last accessed March 3, 2023).

⁹⁷ Public Health Alliance of Southern California, *California Healthy Places Index* (last accessed Nov. 14, 2022) <https://map.healthyplacesindex.org/?redirect=false>; *California's Fourth Climate Change Assessment (Aug. 27, 2018)* https://www.energy.ca.gov/sites/default/files/2019-11/Statewide%20Reports-%20SUM-CCCA4-2018-012%20ClimateJusticeSummary_ADA.pdf.

⁹⁸ *Id.*



color make up a majority of uninsured Californians. These groups are often uninsured due to affordability, employment, and citizenship/immigration status, resulting in a lack of access to basic health care services. This lack of access results in higher rates of adverse birth outcomes and chronic health conditions.⁹⁹

Although South Coast's Rule 317 fee equivalency program claims it was designed to reduce ozone pollution, the NO_x and VOC precursors to ozone in communities surrounding major facilities remain high. Trucks, seafaring vessels, trains, and drayage equipment spew carbon monoxide, volatile organic compounds, ozone precursors, and diesel particulate matter into the lungs of South Coast residents.¹⁰⁰ These emissions also translate to disproportionate health impacts. The average cancer risk (i.e., probability of contracting cancer over the course of a lifetime, assuming continuous exposure) is 32% in areas with major facilities in the South Coast region. The average air toxics respiratory hazards index (i.e., non-cancer respiratory risk due to cumulative air toxics) is 0.43 in areas with major facilities.

SCAQMD has ignored their duty to reduce these emissions to a level that provides basic protection to South Coast residents.

C. Causation

Causation may be demonstrated by the failure to take action or to adopt an important policy.¹⁰¹

The structure and administration of the Rule 317 credit program causes residents in communities comprising mostly people of color to suffer adverse health impacts at comparatively higher rates than other, white, communities. This is a viable disparate impact claim.

D. Less Discriminatory Alternatives

The following less discriminatory alternatives are and have been available to SCAQMD:

1. Implement a fee program that requires major stationary sources of NO_x and VOC in nonattainment areas of the 1979 1-hour ozone standard to pay a fee representative of 20% of their emissions or reduce emissions by 20% to comply.
2. In the alternative, demonstrate how any fee equivalency or credit program would serve to reduce NO_x and VOC emissions by 20% or how such programs would reduce ozone and precursor pollution in overburdened communities.

⁹⁹ *Id.*

¹⁰⁰ U.S. Env't. Prot. Agency, Ports Primer: 7.2 Air Emissions (last assessed Feb. 16, 2023)

<https://www.epa.gov/community-port-collaboration/ports-primer-72-air-emissions>

¹⁰¹ *N.Y.C. Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (plaintiffs must "allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on communities of color").



3. Sharing the final reconciliation reports of fee equivalency programs with the public, in a timely manner, along with any recommendations regarding ways to protect the community's health.
4. Ensure reporting clearly articulates which polluting industries should pay a fee, and how much. Currently, the gatekeeping compliance plan requires immense work by the public, given that all emitters are listed with "facility ID" and not by names and addresses.

VI. Request for Relief

Complainants request that the EPA Office of Civil Rights accept this complaint and investigate whether South Coast has violated and/or continues to violate Title VI of the Civil Rights Act.¹⁰² Complainants request that SCAQMD be brought into full compliance and ask EPA to provide the following relief:

1. Conduct a full and fair analysis of whether the Rule 317 credit program disproportionately harms communities on the basis of race, color, or national origin; and identify alternatives that would avoid, minimize, or mitigate this harm.
2. Require any qualifying credit program to include actual expenditures to ameliorate the negative impacts of the facility's emissions on communities of color. Involve affected community members in ensuring that any remedies tangibly protect and mitigate harm to the community by seeking input and participation to determine corrective remedies for any current or future violations for the next 5 years.
3. Conduct a study of the equivalency programs to ensure that credits that may be accounted for are tethered to reducing precursors to ozone.
4. Require SCAQMD to submit annual reconciliation reports for the past three years to CARB and EPA.
5. Until such time that proper fee equivalency is established, require South Coast to levy the fee on major stationary sources and reduce emissions 20% below baselines.
6. Perform any other action EPA deems appropriate to remedy the disparate impact caused by the conduct of SCAQMD.

We further request the EPA place conditions on all future grants and awards on adequate assurances that the actions of both recipients will comply with Title VI and meaningfully incorporate community input. If SCAQMD does not comply voluntarily, Complainants request that EPA suspend or terminate financially assisting South Coast.¹⁰³ Complainants request that they be involved in the investigation and resolution of this complaint. We look forward to

¹⁰² See 40 C.F.R. § 7.130.

¹⁰³ *Id.*



working with EPA's ECRCO to remedy the harm caused, and to prevent further harm to South Coast communities by SCAQMD.

VII. Conclusion

The sad reality is that over a decade of failing to collect these fees means that hundreds of millions of dollars could have been collected or emissions benefits achieved in disadvantaged communities. We cannot get that decade of failure back, but what we can do is rectify this problematic program moving forward. We need your help to vindicate the rights of some of California's most overburdened communities.

Sincerely,

/s/ Radhika Kannan

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