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## What is Good for the Market, Can be Bad for the Health: Emissions Trading Under SCAQMD's Rule 1610 and the Unjust Environmental Effects

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## COMMENT

# WHAT IS GOOD FOR THE MARKET, CAN BE BAD FOR THE HEALTH: EMISSIONS TRADING UNDER SCAQMD'S RULE 1610 AND THE UNJUST ENVIRONMENTAL EFFECTS

### I. INTRODUCTION

In his February 11, 1994 Executive Order, "Federal Action to Address Environmental Justice in Minority Populations and Low-Income Populations," President William Jefferson Clinton demonstrated his commitment to environmental justice.<sup>1</sup> This Order commanded that all federal agencies factor environmental justice into their long term goals.<sup>2</sup> The 1994 Order, which specifically seeks to combat environmental racism, is the federal government's response to the environmental justice

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1. Exec. Order No. 12,898, 3 C.F.R. 859 (Feb. 11, 1994), *reprinted in* 42 U.S.C.A. § 4321 (West 1998). "[E]ach Federal agency shall make achieving environmental justice part of its mission by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority population and low-income populations in the United States . . ." *Id.* § 4321.

2. *See id.*

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movement, an outgrowth of the civil rights and broader environmental movements that developed in the 1960s and 1970s.<sup>3</sup>

While environmental racism is not a new phenomenon, only recently has it been addressed as a separate issue within environmental law.<sup>4</sup> Rather than focusing solely on environmental issues, such as global warming or the rainforests, environmental justice advocates focus specifically on the disproportionate impact of environmental hazards on minorities.<sup>5</sup>

While civil rights activists struggled to find their role in the environmental justice movement, activists in the larger environmental community have also been in conflict over their role. Traditional environmentalists have relied on "rules and orders to control pollution, toxic wastes [and] chemical hazards."<sup>6</sup> Currently, the states and the U.S. Environmental Protection Agency (EPA) are moving toward market-based incentive systems. Proponents of the market-based incentive system claim these programs give industry greater flexibility and achieve environmental protection less expensively without violating federal standards. Rather than proscribing the means by which sources are to meet their pollution control requirements,

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3. See Omar Saleem, *Overcoming Environmental Discrimination: The Need For A Disparate Impact Test and Improved Notice Requirements In Facility Siting Decisions*, 19 COLUM. J. ENVTL. L. 211, 216 (1994) (quoting Robert Bullard, *The Threat of Environmental Racism*, 7 NAT. RESOURCES & ENV'T 23 (1993)). Environmental racism is defined as "any policy, practice, or directive . . . that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color [as well as] exclusionary and restrictive practices that limit participation by people of color in decision-making boards, commissions, and regulating bodies." *Id.*

4. See Alice Kaswan, Article, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice"*, 47 AM. U. L. REV. 221, 225 (1997) (discusses a plan for uniting environmental goals with social justice goals). See also *infra* notes 10-32 and accompanying text for discussion of the origins of the environmental justice movement.

5. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1440 (Merriam-Webster, Inc. 1986). The term "minority" or "minority group" is defined as "a group differing from the predominant section of a larger group in one or more characteristics (as ethnic background . . . ) and as a result often subjected to differential treatment and esp[ecially] discrimination." *Id.*

6. See generally Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 COLUM. J. ENVTL. L. 153 (1988) (discusses the transformation from the command and control system to the market-based incentive programs).

market-based incentive systems often allow polluters to buy and sell pollution like a commodity. For example, the Los Angeles area, noted for having the most polluted air in the country, has set the standard for market-based incentive systems through its Regional Clean Air Incentives Market program. The current debate in environmental circles pits these market-based incentive programs, deemed more efficient by industry, against the traditional command and control system.

In Section II, this Comment examines the development of both the environmental justice movement and the traditional environmental movement. Section II also describes the South Coast Air Quality Management District (SCAQMD) and its application of a market-based incentive program known as "emissions trading." This section explains SCAQMD's Old-Vehicle Scrapping Rule 1610 (Rule 1610) and Rule 1610's failure to address environmental justice issues. Section III examines the disparate effects of the program on minority communities. Section IV critiques the way in which oil companies were permitted to use Rule 1610 and how their use resulted in such disparate effects. Finally, Section V proposes that emissions trades be more closely monitored and that environmental justice be the primary factor in the environmental regulation decision-making processes.

## II. BACKGROUND

The environmental justice movement grew out of many civil rights activists' awareness that minority and low-income communities were consistently burdened with toxic environments.<sup>7</sup> During the same time period in which the environmental justice movement was formed, environmental law as a whole began to experiment with market-based incentive programs in-

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7. See United Church of Christ Commission For Racial Justice, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* (1987). The Commission for Racial Justice is the racial agency of the United Church of Christ which fights for the rights of African American and other racial minorities. See *id.* at ix. The study reports that "[b]lack are disproportionately burdened by environmental problems because they are more likely to hold industrial jobs where chemical processing or manufacturing poses health risks." *Id.* at 2.

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stead of following the traditional command and control system. After numerous complaints from industry regarding the command and control system, federal and state environmental agencies created newer, more flexible standards.<sup>8</sup> This transformation to a market-based environmental protection scheme allowed industry more control in implementing pollution prevention and in decreasing their economic burdens.<sup>9</sup> However, it has been minorities and low-income people who have remained overburdened with toxic hazards and whom environmental justice advocates have sought to protect under the existing civil rights laws.

### A. THE ENVIRONMENTAL JUSTICE MOVEMENT'S ORIGINS

In the late 1960s, as the civil rights movement continued to break down many of the racial barriers previously restricting African Americans and other minorities from equal access to employment and educational opportunities, the environmental justice movement developed.<sup>10</sup> In 1967, an eight year old African American girl drowned at a garbage dump next to an elementary school and city park in a predominantly African American neighborhood.<sup>11</sup> The girl's drowning triggered riots among the African American students at Texas Southern University.<sup>12</sup> These riots demonstrated an early awareness by civil rights activists of environmental justice issues.<sup>13</sup>

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8. See generally Stewart, *supra* note 6 (explains the conflicts between the command and control and the market-based incentive systems).

9. See *id.*

10. See Kaswan, *supra* note 4, at 221 (discusses the emergence of the environmental justice movement).

11. See Robert D. Bullard, *Environmental Justice For All: It's the Right Thing To Do*, 9 J. ENVTL. L. & LITIG. 281, 284 (1994) (quoting ROBERT D. BULLARD, *INVISIBLE HOUSTON: THE BLACK EXPERIENCE IN BOOM AND BUST* 110 (1987)). The author provides the reader with what he believes are the defining events that led to the creation of the movement. He cites the events subsequent to an African American girl drowning in a Houston, Texas dumpsite; the siting of a PCB landfill in a minority neighborhood in North Carolina; and the 1991 First National People of Color Environmental Leadership Summit. See *id.*

12. See *id.* at 284.

13. See *id.* at 285. The author discusses how Dr. Martin Luther King, Jr. traveled to Memphis, Tennessee on a mission to improve working conditions for African American garbage workers. See *id.*

While the civil rights movement focused primarily on achieving equal opportunity and social status for African Americans and other minorities, the child's drowning near Texas Southern University and the subsequent riots, as well as other related activism, served to cement the existence of the environmental justice movement.<sup>14</sup> Heightened awareness that minority and low-income people continued to live in unsafe and toxic environments, gave rise to the movement now known as environmental justice.<sup>15</sup>

The environmental justice movement progressed slowly during the 1970s because many ardent civil rights activists distrusted the broader environmental movement.<sup>16</sup> In particular, the National Association for the Advancement of Colored People (NAACP) viewed environmental causes with suspicion because members believed that environmentalists negatively impacted minorities.<sup>17</sup> In 1978, the NAACP claimed that environmental regulations hindered African American socio-economic progress because many environmental policies eliminated jobs primarily held by African Americans.<sup>18</sup>

Despite the initial activism of the 1960s, the slow progress in the 1970s delayed the environmental justice movement's rise to the national attention until 1982. At that time, citizens of Afton, Warren County, North Carolina protested the state's selection of their town as a Polychlorinated Biphenyl (PCB) landfill site.<sup>19</sup> North Carolina officials chose the poorest part of Warren County, which was eighty-five percent African American, as the location to dump PCB-contaminated oil.<sup>20</sup>

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14. *See id.* at 285-287.

15. *See id.* at 285.

16. *See generally* Edward Flattau, *Our Environment Column*, GANNETT NEWS SERVICE, Nov. 1, 1991, available in 1991 WL 5607311.

17. *See id.* The article reports that "in 1978, the NAACP released a policy paper denouncing energy conservation and anti-pollution regulations as barriers to blacks' socio-economic progress." *Id.*

18. *See id.*

19. *See* Bullard, *supra* note 11, at 281. The North Carolina protest represented the first time environmental racism was recognized as different from other environmental issues. *See id.*

20. *See id.* at 285.

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For the first time, environmental and civil rights activists, as well as labor and political leaders, joined together to oppose North Carolina's decision to build the toxic landfill.<sup>21</sup> Despite the protest, the state pursued the proposal.<sup>22</sup> The controversy surrounding the siting, however, compelled an investigation.<sup>23</sup> Outraged with North Carolina's site selection for the PCB landfill, the Chairman of the Congressional Black Caucus, Walter Fauntroy, and New Jersey Congressional Representative James J. Florio, requested that the United States General Accounting Office (GAO) investigate the correlation between the siting of hazardous waste facilities and the racial and economic makeup of the communities with hazardous waste sites.<sup>24</sup> In its subsequent 1983 report, the GAO found that in Region IV, comprised of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee, "black people make up the majority of the population in three of the four communities ... where hazardous waste landfills are sited."<sup>25</sup> In addition, at least twenty-six percent of the population within each of these four communities fell below the poverty level.<sup>26</sup> The protest to the Afton site and the GAO report marked the

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21. *See id.* In this instance the community specifically opposed North Carolina, which marked the first time any state was challenged on environmental justice grounds. Hence, this event has been attributed to the birth of the environmental justice movement. *See id.*

22. *See* Andrew Holmes and Larry B. Cowart, *Environmental Racism: The New Liability for Industrial Site Selection*, 21 AM. SOCIETY OF REAL ESTATE COUNSELORS, REAL ESTATE ISSUES, 1 (1996). This article discusses how industrial siting decisions complicate environmental justice issues since economic issues often come into conflict with public health issues. *See id.*

23. *See* U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-83-168, *Siting Of Hazardous Waste Landfills And Their Correlation With Racial And Economic Status Of Surrounding Communities* (1983). The ensuing investigation resulted in the publication of this named report. *See id.* at 3.

24. *See Majority of Landfills in EPA Region IV Located in Black Communities*, GAO says, [Jan.-June] Env't Rep. (BNA) No. 8, at 302 (June 24, 1983). Both men already believed that there was a correlation between the siting of these landfills and the racial and socio-economic makeup of the communities in which they were sited. *See id.*

25. U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-83-168, *Siting Of Hazardous Waste Landfills And Their Correlation With Racial And Economic Status Of Surrounding Communities* (1983).

26. *See id.* at 1.

beginning of environmental justice awareness that would continue and grow throughout the 1980s.<sup>27</sup>

In 1987, the United Church of Christ Commission for Racial Justice released its own report that found “three out of every five black and Hispanic Americans live in a community with uncontrolled toxic waste sites.”<sup>28</sup> In contrast to the GAO report, the United Church of Christ study concluded that race, irrespective of socio-economic status, was the determinative factor in the siting of environmental hazards.<sup>29</sup>

Soon, other groups began to participate in the environmental justice struggle. In 1988, the Gulf Coast Tenants Association and Greenpeace led a march down Louisiana’s notorious “Cancer Alley,” a polluted area of the Mississippi River which extends from Baton Rouge to New Orleans.<sup>30</sup> These organizations were outraged by the dense concentration of accumulated hazardous waste along the Mississippi River.<sup>31</sup> Although the

27. See Marcia Coyle, *When Movements Coalesce; Empowerment; Civil Rights Meets Environmental Rights*, *NAT'L L. J.*, Sept. 21, 1992, at S10. The article also refers to the United Church of Christ Commission for Racial Justice study and the march in the polluted “Cancer Alley” portion of the Mississippi River. See *id.*

28. United Church of Christ Commission For Racial Justice, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites*, 1987, at xiv. The report defines uncontrolled toxic waste sites as “closed and abandoned sites on the EPA’s list of sites which pose a present and potential threat to human health and the environment.” *Id.* at xiii.

29. See *id.* at xiii. The United Church of Christ For Racial Justice (UCC), along with a New York-based research firm, Public Data Access, Inc., conducted studies that examined “[t]he racial and socio-economic characteristics of Americans living in residential areas surround[ed] [by] commercial hazardous waste facilities and uncontrolled toxic waste sites throughout the United States.” *Id.* at 9. After conducting two “cross-sectional” studies, the UCC and Public Data Access, Inc. concluded that race reoccurred as the predominant factor in decisions regarding the siting of hazardous waste facilities. See *id.*

30. See Coyle, *supra* note 27, at S10. The author elaborates on other defining events in the environmental justice movement. See *id.* See also Mary T. Schmich, ‘Chemical Soup’ of Mississippi River Worries Residents, *THE ORANGE COUNTY REGISTER*, Nov. 20, 1988, at A12, available in 1988 WL 4417815. The article discusses the “Cancer Alley” protests that occurred in the polluted Mississippi region and the lack of real results. See *id.*

31. See Schmich, *supra* note 30, at A12. In this area of the Mississippi River, “the catfish taste[d] oily, the river shrimp [had] vanished and, at night, acrid odors [drove] people inside off their porches. *Id.* See also J. Michael Kennedy, *Danger in Louisiana’s ‘Cancer Alley’! Druggist Questions Link Between Miscarriages, Plant Emissions on*



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protestors did not get any concessions from the companies who contributed to making Louisiana's rivers so heavily polluted, Louisiana later made efforts to work with several of these companies and convinced them to install monitors on the pollution discharge pipes that "run across River Road like bridges to the levee."<sup>32</sup>

### B. ENVIRONMENTAL JUSTICE MOVEMENT IN THE 1990S

The 1987 United Church of Christ Commission For Racial Justice report, together with additional overwhelming statistics documenting disproportionate amounts of industrial pollution in low-income and minority neighborhoods, served as a wake-up call to minority communities.<sup>33</sup> In 1991, minority group representatives from the United States, Canada, Latin America and the Pacific Rim gathered in Washington, D.C. for the First National People of Color Environmental Leadership Summit to confront environmental justice issues.<sup>34</sup> At this conference, the participants adopted seventeen environmental justice principles to combat environmental racism.<sup>35</sup>

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*River*, LOS ANGELES TIMES, May 14, 1989, at 1, available in 1989 WL 2738029. In 1987, according to data submitted to the Environmental Protection Agency from the chemical industry, "774 million pounds of toxics were dumped into Louisiana's waterways" and "another 134 million pounds of toxics were released into the air." *Id.*

32. Schmich, *supra* note 30, at A12. Interestingly, the city charged the protestors with violating the \$740 parade-permit fee requirement, but the article suggested that the city used this rule as a pretext for its disapproval of the protestors' message. *See id.* Some of the past plants located in this area were "petrochemical giants" such as Shell, Dow, Exxon, Occidental, Du Pont and Union Carbide. *See id.*

33. *See* Flattau, *supra* note 16.

34. *See* Principles of Environmental Justice, Proceedings of the First National People of Color Environmental Leadership Summit, xiii (1991) (on file with author).

35. *See id.* The seventeen principles are as follows:

- 1) Environmental justice affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction.
- 2) Environmental justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.
- 3) Environmental justice mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things.
- 4) Environmental justice calls for universal protection from the extraction, production and disposal of toxic/hazardous wastes and poisons and nuclear testing that threaten the fundamental right to clean air, land, water and food.
- 5) Environmental justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.
- 6)

The summit's theme became "our health is not negotiable" which marked a departure from previous NAACP claims that the environmental movement stunted the socio-economic growth of the African American community.<sup>36</sup>

Since the summit, however, not only do minority communities continue to suffer from the disproportionate effects of toxic environments, but their communities are also the last areas to have their toxic sites cleaned.<sup>37</sup> White communities with haz-

Environmental justice demands the cessation of the production of all toxins, hazardous wastes and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production. 7) Environmental justice demands the right to participate as equal partners at every level of decision making including needs assessment, planning, implementation, enforcement and evaluation. 8) Environmental justice affirms the right of all workers to a safe and healthy work environment, without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards. 9) Environmental justice protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care. 10) Environmental justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration on Human Rights and the United Nations Convention on Genocide. 11) Environmental Justice must recognize a special legal and natural relationship of Native Peoples to the US government through treaties, agreements, compacts and covenants which impose upon the US government a paramount obligation and responsibility to affirm the sovereignty and self-determination of the indigenous peoples whose lands it occupies and holds in trust. 12) Environmental justice affirms the need for urban and rural ecological policies to clean-up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and providing fair access for all to the full range of resources. 13) Environmental justice calls for the strict enforcement of principles of informed consent, and a halt to the testing of experimental reproductive and medical procedures and vaccinations on people of color. 14) Environmental justice opposes the destructive operations of multinational corporations. 15) Environmental justice opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms. 16) Environmental justice calls for the education of present and future generations which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives. 17) Environmental justice requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to insure the health of the natural world for present and future generations.

*Id.*

36. Flattau, *supra* note 16.

37. See United Church of Christ Commission For Racial Justice, *Toxic Wastes and Race Revisited, An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites* (1994) at 14 (quoting Marianne Lavelle and Marcia Coyle, *Unequal protection: the racial divide on environmental law*, NAT. L. J., (Sept. 21, 1993)). This update to the 1987 study

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ardous sites “see faster action, better results and stiffer penalties than communities where blacks, Hispanics and other minorities live.”<sup>38</sup> Thus, not only are these communities overburdened with the hazards, but they are also forced to live with these hazards for longer periods of time.<sup>39</sup>

C. AIR POLLUTION REGULATION

At the same time the environmental justice movement was forming, the Federal Clean Air Act regulations also went through their own transition, as industry protested that the laws were too rigid and costly.<sup>40</sup> Industry wanted the laws to focus more on market-based incentive programs which gave business more control over the mechanisms by which they would control pollution and reduce operation costs.<sup>41</sup> As evidenced in the environmental justice context, the ensuing changes in the Clean Air Act regulations marked a conflict between health issues and economic concerns.<sup>42</sup>

The Clean Air Act proscribes the National Ambient Air Quality Standards (NAAQS),<sup>43</sup> which consist of primary and

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discusses the discrepancy between the fines levied and the time it takes to dispose of toxic hazards in white communities versus minority communities. *See id.*

38. Luke W. Cole, *Empowerment as the Key to Environmental Protection: the Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619, 683 (1992) (quoting Marianne Lavelle and Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L. J., (Sept. 21, 1992)). Penalties in white communities affected by hazardous waste sites average \$335,566 in comparison to \$55,318 in minority communities. *See id.* at 683.

39. *See* Symposium, *Environmental Justice: the Merging of Civil Rights and Environmental Activism*, 9 *ST. JOHN'S J. LEGAL COMMENT* 445 (1994). The speaker refers to the *National Law Journal* which reports that it “uncovered glaring inequities in the way the federal EPA enforces its law.” *Id.* at 452.

40. *See* Stewart, *supra* note 6, at 153. Stewart discusses what he characterizes as the “indissoluble conflict between environmental goals . . . and economic growth . . . .” *Id.* at 153.

41. *See infra* notes 60-68 and accompanying text for a general discussion of the market-based incentive program.

42. *See generally* Stewart, *supra* note 6. *See also infra* notes 168-170; 186-189 and accompanying text for discussion of the conflict between health and cost issues.

43. *See generally* Clean Air Act of 1970, 42 U.S.C.A. § 7408 (West 1995) (amended 1990):

Air quality criteria and control techniques (a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants; (b) Issuance by Administrator of information on air pollution

secondary ambient air quality standards.<sup>44</sup> The Federal Environmental Protection Agency (EPA) Administrator determines these standards.<sup>45</sup> The Clean Air Act does not make these standards directly enforceable against the states.<sup>46</sup> Rather, it requires each state to develop a State Implementation Plan that describes how the state will attain the standards. In fact, a state may create a State Implementation Plan that is more stringent than the Clean Air Act's standards. Ultimately, each State Implementation Plan must meet EPA approval.<sup>47</sup> Once the EPA approves it, the Plan can be enforced by both state and federal authorities.<sup>48</sup>

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control techniques; standing consulting committees for air pollutants; establishment; and membership; (c) Review, modification, and reissuance of criteria or information; (d) Publication in Federal Register; availability of copies for general public; (e) Transportation planning and guidelines; (f) Information regarding processes, procedures, and methods to reduce or control pollutants in transportation; reduction of mobile source related pollutants; reduction of impact on public health; (g) Assessment of risks to ecosystems; and (h) RACT/BACT/LAER clearinghouse.

*Id.*

44. See 42 U.S.C.A. § 7409(b) (West 1995) (amended 1990). The Clean Air Act defines primary ambient air quality standards as those standards "[i]n the judgment of the EPA Administrator . . . [are] requisite to protect the public health." *Id.* § 7409(b)(1). The Clean Air Act defines secondary ambient air quality standards as "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." *Id.* § 7409(b)(2).

45. See *id.* All further reference to the "Administrator" is to the Federal Environmental Protection Agency Administrator.

46. See THEODORE L. GARRETT AND SONYA D. WINNER, A CLEAN AIR ACT PRIMER (The Environmental Law Reporter, Clean Air Deskbook 1992). The purpose of the Clean Air Act is to give the states general guidelines for developing their own plans. Once those plans are developed, then they can be enforced against the states. See *id.* at 11.

47. See 42 U.S.C.A. § 7410(a) (West 1995) (amended 1990).

State implementation plans for national primary and secondary ambient air quality standards (a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems. (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 . . . for any air pollutant, a plan which provides for the implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State.

*Id.* See also GARRETT AND WINNER, *supra* note 57, at 11.

48. See 42 U.S.C.A. § 7410 (West 1995) (amended 1990).

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State Implementation Plans permit each state to devise and implement plans that suit its particular area and problems.<sup>49</sup> Each state may incorporate requirements that mirror the more traditional command and control system which would entail EPA monitoring the methods states use to attain NAAQS.<sup>50</sup> Alternatively, the states have the option to develop market-based incentive programs in which the states, with the input of regulated industry, not the EPA, devise the methods for meeting NAAQS requirement.<sup>51</sup>

### 1. *The Command and Control System*

The command and control system is a form of air pollution regulation that “specifies a precise compliance method rather than simply an emissions level.”<sup>52</sup> The command and control system imposes “legally enforceable limits, conditions and affirmative requirements on industrial operations, generally controlling sources that generate pollution on an individual basis.”<sup>53</sup> Each state must devise and implement a plan that complies with the command measures and control techniques approved by the Administrator.<sup>54</sup> These compliance requirements

49. See ROBERT V. PERCIVAL, ENVIRONMENTAL REGULATION LAW, SCIENCE, AND POLICY 792 (2d ed. 1996).

50. See 42 U.S.C.A. § 7410 (West 1995) (amended 1990). States have less flexibility under the command and control system. See *id.*

51. See 42 U.S.C.A. § 7410 (West 1995) (amended 1990). See also *infra* notes 168—170; 186; 189; and accompanying text for discussion of how the problems arise when states develop market-based incentive programs that fail to consider public health issues.

52. See David M. Driesen, *Is Emissions Trading An Economic Incentive Program: Replacing the Command and Control/Economic Incentive Dichotomy*, 55 WASH. & LEE L. REV. 289, 297 (1998). Despite this perceived difference, Driesen argues that the traditional command and control system is more similar to the market-based incentive system than its critics are willing to admit. See *id.*

53. Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey From Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 104 (1998). For example, pollutant air emissions from “each regulated source are limited to specified amounts, with the regulated entity further required to install a technology to meet those limitations and to monitor its emissions continuously.” *Id.* (construing 42 U.S.C.A. § 7408 (West 1995) (amended 1990)).

54. See 42 U.S.C.A. § 7410(a)(1) (West 1995) (amended 1990). These requirements include specific control techniques and time tables by which to accomplish the state’s plan. See *id.* § 7410(a)(2)(A-B).

must be met within a specific time period.<sup>55</sup> Each regulated industry must conform to the Clean Air Act's standards under the regulatory plan devised by the state in which its operations are located.<sup>56</sup> Some of these standards are "technology-forcing" because they require industry to implement technological controls regardless of whether such technology yet exists.<sup>57</sup> The command and control approach also forces regulated companies to pay identical costs regardless of how much each company actually contributes to pollution.<sup>58</sup> The traditional command and control environmental regulations are, however, not the only method used by states to control emissions in order to comply with the Clean Air Act.<sup>59</sup>

## 2. *Market-Based Incentive Programs*

The Clean Air Act provides for an alternative pollution control method known as the market-based incentives approach.<sup>60</sup> The Clean Air Act included market-based incentives at its inception, but the incentive method has not been utilized to the extent of the command and control regulations until relatively recently.<sup>61</sup> The concept behind the market-based incentive approach to pollution control is to provide less expensive alternatives to the command and control system through programs

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55. See 42 U.S.C.A. § 7410(a)(1) (West 1995) (amended 1990). For example, each state is required to adopt or submit a plan within three years after the NAAQS are set. See *id.*

56. See generally 42 U.S.C.A. § 7410 (West 1995) (amended 1990).

57. See *Union Elec. Co. v. EPA*, 427 U.S. 246, 264 (1976). The Supreme Court interpreted the "as may be necessary language" of 42 U.S.C.A. § 7410 to permit the EPA to require industry to develop technology, whether or not it yet exists, to achieve NAAQS. Furthermore, the Court found technology-forcing requirements were consistent with the Clean Air Act's language. See *id.*

58. See Jeremy B. Hockenstein et al., *Crafting the Next Generation of Market-Based Environmental Tools*, 39 ENV'T 4, 14 (1997). For example, a company that contributes five percent to the overall level of pollution pays the same amount to implement the pollution control measures as a company that contributes seventy-five percent of the overall pollution. See *id.*

59. See *infra* notes 60-80 and accompanying text for discussion of alternatives to the command and control system.

60. See 42 U.S.C.A. § 7410(a)(2)(A) (West 1995) (amended 1990).

61. See Hockenstein, *supra* note 58, at 13. Market-based environmental tools "have been part of the environmental policy landscape (though with varying degrees of prominence) for the past two decades because they are attractive in both theory and practice." *Id.*

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that “provide an economic benefit for pollution reductions and an economic penalty for pollution.”<sup>62</sup> The market-based incentive programs may be directed toward stationary or mobile sources<sup>63</sup> and are designed to create more flexible, less expensive techniques for emissions reduction.<sup>64</sup> Market-based incentives are designed to reduce emissions without setting specific limits “that individual sources or even all sources in the aggregate are required to meet.”<sup>65</sup> In contrast to the command and control system, the market-based incentive approach does not specify how industry will attain the NAAQS.<sup>66</sup> Rather, the market-based incentives system provides various economic enticements tailored to the individual companies that, in theory, will reduce the state’s pollution output at a lower cost.<sup>67</sup> Emissions trading is one example of such a market-based incentive program.<sup>68</sup>

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62. Driesen, *supra* note 52, at 323. The author outlines the arguments as to why the market-based incentive system is preferred over the command and control system. *See id.*

63. *See* 42 U.S.C.A. § 7411(a)(3) (West 1995) (amended 1990). A stationary source is defined as: “any building, structure, facility, or installation which emits or may emit any air pollutant.” *Id.* Section 7521 categorizes mobile sources in terms of what they emit and whether they are light- or heavy-duty vehicles. *See id.* § 7521.

64. *See* 40 C.F.R. § 51.491 (1997). Market-based incentive programs are defined as:

[*Market-based incentive program*] . . . means a program which may include State established emission fees or a system of marketable permits, or a system of State fees on sale or manufacture of products the use of which contributes to O<sub>3</sub> [oxide] formation, or any combination of the foregoing or other similar measures, as well as incentives and requirements to reduce vehicle emissions and vehicle miles traveled in the area, including any of the transportation control measure . . . . Such programs may be directed toward stationary, area, and/or mobile sources, to achieve emissions reductions milestones, to attain and maintain ambient air quality standards, and/or to provide more flexible, lower-cost approaches to meeting environmental goals.

*Id.*

65. *See id.*

66. *See* Daniel J. Dudek and John Palmisano, *Emissions Trading: Why is this Thoroughbred Hobbled?*, 12 COLUM. J. ENVTL. L. 217 (1988).

67. *See* Hockenstein, *supra* note 58, at 15.

68. *See* Hockenstein, *supra* note 58, at 14 for further discussion of other EPA approved programs, such as pollution charges, tradeable permits, reducing market barriers and elimination of government subsidies.

### 3. *Emissions Trading*

In its 1986 "Emissions Trading Policy Statement," the EPA provides Clean Air Act and federal regulation compliance guidelines for industrial emissions trading.<sup>69</sup> The EPA endorses the use of emissions trading and it maintains that "these alternatives do not alter overall air quality requirements."<sup>70</sup> The policy provides companies with alternative methods of achieving pollution control compliance in accordance with the Clean Air Act requirements.<sup>71</sup>

Emissions trading has its own "currency" known as emissions reduction credits (ERCs).<sup>72</sup> Facilities involved in emissions trading earn ERCs, which are stored in "banks." The various emissions trading programs determine how the ERCs are created, banked and distributed.<sup>73</sup> Trading ERCs is not limited to the same facility, nor to the same type of pollution source.<sup>74</sup> A new pollution source that generates 100 tons of hydrocarbon emissions "would be obligated to obtain more than 100 tons of emissions reductions in order to obtain a permit to construct."<sup>75</sup> In order to reach these emission reductions, the

69. See Emissions Trading Policy Statement: General Principles for Creation, Banking and Use of Emission Reduction Credits, 51 Fed. Reg. 43,814 (1986).

70. *Id.* EPA seeks to ensure that when facilities attempt to utilize more economically beneficial techniques, the Clean Air Act requirements will not suffer as a consequence. See *id.*

71. See *id.*

72. See *id.* See also 40 C.F.R. pt. 51, App. X (1998). Emissions trading programs use either rate-based emission limits or overall emission limits "on a source's total mass emissions per unit of time" to compel compliance, placing emissions limits on either individual sources or facilities as a whole. Rate-based emission limits are also called "emissions averaging" while overall limits are referred to as "an emissions cap," or the total emissions limit. *Id.*

73. See Perry S. Goldschein, *Going Mobile: Emissions Trading Gets A Boost From Mobile Source Emission Reduction Credits*, 13 UCLA J. ENVTL. L & POL'Y 225, 229 (1994/1995) (identifies specifics of mobile source emissions reduction credits).

74. See 40 C.F.R. pt. 51, App. X (1998). "Stationary . . . and mobile sources both can participate in the same emissions trading market." For example, those areas that have a restricted stationary market in comparison to the constraints placed upon its mobile sources, benefit by including both stationary and mobile sources in "a single emissions trading market." *Id.*

75. Dudek and Palmisano, *supra* note 66, at 224. In 1975, the EPA grappled with how to permit new sources of pollutants in areas that have either failed to attain the National Ambient Air Quality Standards (NAAQS) or failed to demonstrate they could



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new source may utilize what is known as the Offset Policy “so long as overall emission reductions [are] achieved within the airshed leaving the area better off than before.”<sup>76</sup> Under the Offset Policy, this new source must offset its pollution by trading with an already existing source.<sup>77</sup> These offsets are designed to allow continued industrial growth while ensuring an overall emissions reduction, particularly in polluted nonattainment areas where the offset ratios are higher than the new source actually needs for its planned emissions.<sup>78</sup>

The EPA generally views emissions trading as a more flexible method for reducing pollution control costs and reaching compliance more quickly as opposed to the time-consuming and bureaucratic command and control system.<sup>79</sup> Nonattainment regions, such as the Los Angeles region, have reconfigured their methods of pollution control to take advantage of the flexibility and economic efficiency of the emissions trading system.<sup>80</sup>

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meet the NAAQS at a future date. The remedy came in the form of the Offset Policy. *See id.*

76. *Id.* Therefore, these “new emissions would need to be more than ‘offset’ by emissions reductions.” *Id.*

77. *See* PERCIVAL, *supra* note 49, at 808. The offset policy “envisions ... creating an emissions trading market, with firms that are building new plants or expanding existing plants purchasing pollution reductions from existing facilities.” *Id.*

78. *See* Emissions Trading Policy Statement: General Principles for Creation, Banking and Use of Emission Reduction Credits, 51 Fed. Reg. 43,814 (1986). Industry will still be allowed to expand even though it may not have met the National Ambient Air Quality Standards required under its State Implementation Plan. *See id.* *See also* PERCIVAL, *supra* note 49, at 808. “Emissions trading programs provide firms with flexibility and then with an incentive to take advantage of that flexibility, because any successful trade ends up costing the parties less than implementing a uniform level of pollution controls . . . .” *Id.*

79. *See* Emissions Trading Policy Statement: General Principles for Creation, Banking and Use of Emission Reduction Credits, 51 Fed. Reg. 43,814 (1986). *See also* Stewart, *supra* note 6, at 153. The command and control system is criticized for its bureaucratic centralization, costs and delay. Proponents of the market-based incentives system prefer it to the traditional command and control system because they believe market-based incentives provide industry with more flexibility in making pollution control decisions that impact them. Proponents argue that industry is better qualified to make decisions as to the means by which to comply with the NAAQS. *See id.*

80. *See generally* Matthew Polesetsky, *Comment, Will A Market in Air Pollution Clean the Nation's Dirtiest Air? A Study of the South Coast Air Quality Management*

## D. THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

The California Legislature created pollution control districts to control air pollution at the regional level.<sup>81</sup> One such district, the South Coast Air Quality Management District (SCAQMD), implements the air quality requirements for the Los Angeles metropolitan area, home of the United State's dirtiest air.<sup>82</sup> The SCAQMD Board of Directors encountered difficulties complying with its attainment standards and took steps to convert from a command and control system to a market-based incentive program.<sup>83</sup>

The SCAQMD created the Regional Clean Air Incentive Market (RECLAIM) in 1993.<sup>84</sup> Under RECLAIM, SCAQMD allows polluting industries to earn ERCs or "pollution rights" by reducing their emissions below overall annual caps.<sup>85</sup> Once a polluter earns pollution rights, it may either preserve those rights for future use, lower its present emissions caps or it may

*District's Regional Clean Air Incentives Market*, 22 *ECOLOGY L.Q.* 359 (1995). The South Coast Air Quality Management District developed this program in 1993. *See id.*

81. *See* CAL. HEALTH & SAFETY CODE § 40410 (West 1996). *See also* Polesetsky, *supra* note 80, at 362-363. EPA created regional districts to allow states to have more control. *See id.*

82. *See* Shipra Bansal and Scott Kuhn, *Stopping An Unfair Trade: Environmental Justice, Pollution Trading, and Cumulative Impacts in Los Angeles*, *ENVTL L. NEWS*, Spring 1998, at 16, 17. This area includes a 6600-square-mile basin consisting of Orange, San Bernardino, and Riverside Counties and the non-desert portions of Los Angeles. *See id.*

83. *See* Polesetsky, *supra* note 80, at 364. The author presents a detailed history of the development of the SCAQMD's market-based incentives program. *See id.*

84. *See* Pat Leyden, *The Price of Change: The Market Incentive Revolution*, 12 *NAT. RESOURCES & ENV'T* 160 (1998). In 1991, "[r]epresentatives from the California Air Resources Board, EPA, large and small businesses, environmental groups, labor representatives, academia, economists, and the stock and commodities markets went to work with the AQMD to write a 'constitution'." *Id.*

85. *Regional Air District's Market Approach for Stationary Emissions Upheld by Court*, [Jan.-June] *Env't Rep. (BNA) No. 34*, at 1675 (Jan. 2, 1998). *See also* *Do market-based emissions controls mean the poor breathe the dirtiest air?*, *CAL. LAW.*, July 1995, at 39. RECLAIM specifically imposes these emissions caps on nitrogen oxides and sulfur oxides. *See id.* *See also* 42 U.S.C.A. § 7409(c); 7473(a) (West 1995) (amended 1990). These sections discuss nitrogen oxides and sulfur oxides. Both are criteria pollutants under the Clean Air Act. *See id.*

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sell the rights to other companies that exceed their emissions caps.<sup>86</sup>

Another method SCAQMD uses to accomplish emission reductions is the use of rules implementing specific programs designed to aid companies in achieving lower emissions rates.<sup>87</sup> One such rule allows industrial polluters to scrap vehicles as an emissions reduction method.<sup>88</sup>

### 1. *The Old-Vehicle Scrapping Rule 1610*

The Old-Vehicle Scrapping Rule 1610 (Rule 1610) is one of SCAQMD's mobile source offset programs.<sup>89</sup> Rule 1610 allows industries to meet their pollution discharge limits by reducing motor vehicle emissions instead of merely controlling their own emissions.<sup>90</sup>

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86. See *Regional Air District's Market Approach for Stationary Emissions Upheld by Court*, [Jan.-June] Env't Rep. (BNA) No. 34, at 1675 (Jan. 2, 1998).

87. See *id.*

88. See *Los Angeles, Cal., South Coast Air Quality Management District Rule 1610* (amended Feb. 12, 1999) (visited April 5, 1999) < <http://www.aqmd.gov> > (on file with author) [hereinafter SCAQMD Rule 1610]. See also *Communities for a Better Env't v. South Coast Air Quality Dist.*, Complaint ¶¶ 12-13 (No. 10R-97-R9) (U.S. EPA filed July 23, 1997). Industries, especially the major oil companies, use the vehicle scrapping rule as an alternative to a rule that would require them to place vapor-recovery equipment on their vessels, which would nearly eliminate harmful emissions. See *id.*

89. See *Los Angeles, Cal., South Coast Air Quality Management District Regulation XVI Mobile Source Offset Programs* (visited Feb. 21, 1999) < <http://www.aqmd.gov/rules/html/tofc16.html> > (on file with author). See also *ARB-EPA Exchange Casts Doubts on Emissions Trading Rules*, 11 CAL ENVTL. INSIDER 7 (1998). The Air Resources Board's Executive Officer announced that he has suspended approval of emissions trading rules, specifically citing Rule 1610 and its environmental justice implications. See *id.* See also *California: Group [Communities for a Better Environment] Files Civil Rights Complaint Against Automobile Scrappage Program*, [July-Dec.] Env't Rep. (BNA) No. 14, at 639 (August 1, 1997). The Environmental Protection Agency decided in March 1997 that Rule 1610 "does not conform with federal rules for economic incentive measures." *Id.*

90. See SCAQMD Rule 1610(a). The District divides the various rules into different regulations categories. For instance, Regulation XI are source specific standards and Regulation XX represent the Regional Clean Air Incentives Market regulations. See *id.* Adopted on January 8, 1993, Rule 1610's goal is to:

reduce motor vehicle volatile organic compounds (VOC), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO), and particulate matter (PM) exhaust emissions by issuing mobile source emission reduction credits in exchange for the scrapping of old, high emitting vehicles. Procurement of old vehicles could be

To be eligible to use Rule 1610, however, the vehicles must: be pre-1981 models; be in compliance with smog inspections; be registered with the California Department of Motor Vehicles for the past two years; be adequately mobile so that its owner can drive it to the “scrappage” facility; and have at least three years useful remaining life prior to scrapping.<sup>91</sup> Under Rule 1610, a polluter can purchase motor vehicles from the public. These cars are destroyed and then SCAQMD “translates” them into smog credits, called Mobile Source Emissions Reductions Credits (MSERCs), and these MSERCs can be banked or sold to other polluters.<sup>92</sup> Polluters may not use the MSERCs to offset emission increases that arise when the polluters have either removed the Clean Air Act required emissions controls or failed to install the requisite controls as required on stationary sources.<sup>93</sup>

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accomplished by persons voluntarily giving up their vehicle for scrapping upon receiving an incentive payment. This rule provides a mechanism through which stationary source emissions can be brought into compliance with District regulations through mobile source emission reductions. Mobile source emissions reduction credits (MSERCs) generated may only be applied towards compliance with designated rules with future compliance dates within District Regulation XI, Source Specific Standards; Regulation XXII, On-Road Motor Vehicle Mitigation; Regulation XIII, New Source Review; Regulation XX, Regional Clean Air Incentives Market (RECLAIM); or any other District regulations that allow the use of credits. MSERCs may not be applied towards compliance with federal requirements that do not authorize compliance through emissions trading including those promulgated by U.S. EPA as authorized . . . that do not authorize compliance through emissions trading. The value of these credits is based on old vehicles having at least three years useful remaining life prior to scrapping. The effective date for Rule 1610 amendments relating to the permanent destruction of engine components approved by the Governing Board on February 12, 1999 shall be March 1, 1999.

*Id.*

91. See SCAQMD Rule 1610. See also *South Coast AQMD*, 11 CAL. ENVTL. INSIDER 13 (1998) (describes some of the vehicle eligibility requirements).

92. See SCAQMD Rule 1610. The rule defines MSERCs as “credit for real, quantified emission reductions, approved by the Executive Officer or designee, as authorized by this rule, and surplus to emission reductions required by ARB, District, and U.S. EPA regulations and the most recent District or U.S. EPA approved Air Quality Management Plan, whichever is more stringent.” See *id.* at Rule 1610(b)(1).

93. See *id.* at Rule 1610(a). Regulation XI does not allow oil companies to substitute a Clean Air Act requirement, such as Marine Tank Vessel Operations Rule 1142, for a proposed emissions trading program like Rule 1610. See *id.*

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2. *The Marine Tank Vessel Operations Rule 1142*

Another emissions control rule in effect in the Los Angeles basin is known as the Marine Tank Vessel Operations Rule 1142 (Rule 1142).<sup>94</sup> Rule 1142 applies to marine tank vessels<sup>95</sup> engaged in loading, lightering, ballasting, or housekeeping events in which either the vessel's tank or cargo is filled with organic liquid.<sup>96</sup> Rule 1142 requires marine vessels, such as those used by oil companies, to install marine vapor recovery equipment that reduces the amount of harmful vapor emissions.<sup>97</sup>

When the marine vapor recovery equipment is not used, volatile organic compounds, such as benzene, are released into

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94. See *Los Angeles, Cal., South Coast Air Quality Management District Rule 1142* (adopted July 19, 1991) (visited Feb. 21, 1998) <<http://www.aqmd.gov>> (on file with author) [hereinafter SCAQMD Rule 1142]. Rule 1142 was adopted in 1991 and approved by the EPA for submission into SCAQMD's State Implementation Plan, effective January, 1992. See *id.* at Rule 1142(c)(1)(A).

95. See *id.* at Rule 1142(b)(11). Marine tank vessels include tugboats, tankers and watercraft. See *id.*

96. See *id.* at Rule 1142(b). Ballasting refers to "the loading of water or other liquid into a marine tank vessel's cargo tank to obtain proper propeller, rudder and hull immersion." *Id.* at Rule 1142(b)(2). Housekeeping refers to the "altering of the composition of gases contained within marine vessel tanks by tank washing, gas freeing, or purging." *Id.* at Rule 1142(b)(7). Lightering means "the transfer of organic liquid into a cargo tank from one marine tank vessel to another." *Id.* at Rule 1142(b)(9). Loading means "an incident or occurrence beginning with the connecting of marine terminal storage tanks or a marine tank vessel to marine tank vessel cargo tank(s) with pipes or hoses followed by the transfer of liquid cargo and ending with the disconnecting of the pipes or hoses; or any other means of placing liquid into cargo tanks." *Id.* at Rule 1142(b)(10). Organic liquid includes various forms of gasoline, crude oil and other liquids that contain volatile organic compounds. See *id.* at Rule 1142(b)(13).

97. See *id.* at Rule 1142(c)(1)(A). "Effective January 1, 1992, an owner or operator of a marine tank vessel equipped with emissions control equipment shall operate such equipment while conducting a loading, lightering, ballasting, or housekeeping event in South Coast Waters." The emissions control equipment "shall be designed and operated to collect, store, and process all emissions of volatile organic compounds resulting from a loading, lightering, ballasting, or housekeeping event." *Id.* at 1142(c)(3). Furthermore, such events:

shall not be conducted in South Coast waters unless: (i) the emissions of volatile organic compounds are limited to 5.7 grams per cubic meter (2 lbs. per 1,000 barrels) of liquid loaded into a marine tank vessel; or (ii) the emissions of volatile organic compounds are reduced by at least 95 percent by weight from uncontrolled conditions.

*Id.* at Rule 1142(c)(1)(b)(i -ii).

the air.<sup>98</sup> The marine vapor recovery process is extremely effective because it reduces toxic chemical vapors by over ninety-five percent and reduces or eliminates the escape of other harmful vapors.<sup>99</sup> However, oil companies claim that installing the equipment is extremely costly.<sup>100</sup> Thus, if they could rely on another emissions reduction rule, such as Rule 1610, oil companies believe they would be more economically benefited.<sup>101</sup>

SCAQMD allowed five oil companies to employ Rule 1610 instead of implementing Rule 1142.<sup>102</sup> While oil companies who substitute other emission control rules for Rule 1142 may be saving money by not installing the marine vapor recovery equipment, the oil companies do so at the cost of people living in the San Pedro and Wilmington South Coast Air Basin (air basin) who breathe the benzene-filled air.<sup>103</sup> Latino's comprise

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98. See *Communities for a Better Env't v. South Coast Air Quality Dist.*, Complaint ¶ 12 (No. 10R-97-R9) (U.S. EPA filed July 23, 1997). See also SCAQMD Rule 1610(b)(8). Rule 1610 defines volatile organic compounds as "any volatile compound of carbon, excluding: methane, carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate, and exempt compounds as defined in District Rule 102." *Id.*

99. See *id.*

100. See Memorandum from Richard Toshiyuki Drury, Legal Director, Communities for a Better Environment (July 18, 1997) (on file with author). The estimated cost of installing the marine vapor recovery equipment per company would total approximately \$5 Million. See *id.*

101. See *id.* The oil companies argue that instead of spending the approximately \$5 Million for the vapor control equipment, they should be allowed to buy MSERCs. Drury asserts, however, that even though the oil companies would have to pay this price, the "cost per pound of pollution reduced is actually low in comparison to other control technologies." *Id.*

102. See *Communities for a Better Env't v. South Coast Air Quality Dist.*, Complaint ¶ 23-24 (No. 10R-97-R9) (U.S. EPA filed July 23, 1997). Communities for a Better Environment (CBE) also filed civil complaints against individual oil companies it alleged violated the Clean Air Act. The original Clean Air Act civil complaints named five oil companies: GATX Corp., Unocal (now owned by Tosco), Tosco, Chevron and Ultramar. See *Communities for a Better Env't v. GATX Terminals Corp.*, Complaint, (No. 98-1282 ER (BQRx)) (C.D. Cal. Filed March 26, 1998) (GATX has a consent decree settlement; Tosco's complaint was dismissed; and Unocal's complaint was dismissed without prejudice). See also *Communities for a Better Env't v. South Coast Air Quality Management Dist.*, Order (No. 98-5877 DT(BQRx)) (C.D. Filed Feb. 1, 1999). Tosco filed a defamation suit CBE based on the original complaint which alleged that Tosco violated the federal and state environmental laws. The court granted CBE's 12(b)(1) motion to dismiss without prejudice.

103. See Bansal and Kuhn, *supra* note 82, at 17-18.

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a majority of the air basin population.<sup>104</sup> When federally funded programs, such as SCAQMD's emission control rules, specifically impact members of a minority group, these programs may violate Title VI of the Civil Rights Act and its implementing regulations.<sup>105</sup>

E. TITLE VI OF THE CIVIL RIGHTS ACT

Title VI of the 1964 Civil Rights Act (Title VI) was not designed to operate as a penalty, but rather to ensure that recipients of government funds do not use these funds in a discriminatory manner.<sup>106</sup> The Civil Rights Act authorizes each agency to promulgate regulations that will satisfy the statute's goals.<sup>107</sup> Federal agencies have used Title VI to address the environmental justice concerns raised in the 1983 GAO report and the President's Executive Order 12,898 by tying money to environmental equality in funded programs.<sup>108</sup>

The EPA administers many financial assistance programs and has created its own implementing regulations that forbid federal financial assistance recipients, such as SCAQMD, to use criteria or methods that have discriminatory effects on

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104. See Bansal and Kuhn, *supra* note 82, at 16.

105. See Civil Rights Act of 1964, §601, as amended 42 U.S.C.A. § 2000d (West 1994).

106. See *id.* Title VI of the Civil Rights Act provides that "[n]o 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." *Id.* See also *Lau v. Nichols*, 414 U.S. 563 (1974). The Supreme Court found that despite the absence of intentional discrimination, non-English speaking Chinese students were disparately affected when they were denied equal educational benefits. The court interpreted Title VI to bar practices that had a discriminatory effect, irrespective of whether intentional discrimination was present. See *id.* at 568.

107. See Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 312 (1995). Litigants are starting to prefer Title VI over the Equal Protection Clause because Title VI allows suits to be brought when the complainant can demonstrate discriminatory effects, while the Equal Protection Clause requires proof of intentional discrimination. See *id.* at 311.

108. See generally U.S. COMMISSION ON CIVIL RIGHTS, FEDERAL TITLE VI ENFORCEMENT TO ENSURE NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS 415 (1996). The Commission on Civil Rights took the findings of the GAO Report and President Clinton's Executive Order on environmental justice very seriously. See *id.* at 417.

groups because of race, color, national origin or sex.<sup>109</sup> Actions taken by recipients of EPA financial assistance, including the recipient's choice of locating its facilities, are subject to these requirements.<sup>110</sup> The EPA's environmental justice role is coordinated with the Office of Civil Rights.<sup>111</sup>

When bringing a Title VI claim, a claimant need not demonstrate intentional discrimination if the claimant is able to provide evidence of a disparate impact on minorities.<sup>112</sup> Hence, even though a company may not have intended a harmful impact on a minority community, it is still subject to Title VI claims and violations because a company's intent is irrelevant.<sup>113</sup>

Because the SCAQMD qualifies as an EPA recipient of federal financial assistance, it is subject to Title VI and EPA's corresponding implementing regulations.<sup>114</sup> Therefore, minority claimants who have complaints against rules implemented by

109. See generally Fisher, *supra* note 107, at 285. The EPA provides funding for many state hazardous waste enforcement programs. See *id.* at 312. See also 40 C.F.R. § 7.30 (1997). This statute grants the EPA authority to create its own promulgating regulations. See *id.* According to section 7.35(b) a federal financial assistance recipient can be a local government entity such as the SCAQMD. Furthermore, the recipient "shall not use criteria or methods ... which have the effect of subjecting individuals to discrimination ...." *Id.* at § 7.35(b).

110. See 40 C.F.R. § 7.35(b) (1997).

111. See 40 C.F.R. §§ 7.120, 7.130(b) (1997). To pursue a Title VI claim, the complainant must submit a complaint to the Office of Civil Rights (OCR), which will in turn investigate the claim. During the first twenty days after receipt of the complaint, OCR will make a decision as to whether to go forward with the complaint. If the OCR accepts the complaint, it will notify both the complainant and the federal funds recipient and provide the recipient thirty days to respond, rebut or deny the allegations in the complaint. Should OCR make a final determination that the recipient is in noncompliance with Title VI, OCR will begin its procedure to "deny, annul, suspend or terminate" its financial assistance. In order to reach this determination, OCR will have sent the recipient various correspondence in accordance with 40 C.F.R. § 7.115. After the recipient has had an opportunity to respond to, rebut or deny the complaint's claims, OCR will notify the recipient of its preliminary findings and provide it with recommendations or give it the right to engage in voluntary compliance. OCR will continue to have contact with the recipient and will only withdraw funds as a last resort. This process shall be completed within 180 days from the start of the compliance review or complaint investigation. See *id.* §§7.120, 7.130(b).

112. See 40 C.F.R. § 7.35(b) (1997).

113. See *id.*

114. See *id.* § 7.15.



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SCAQMD may file Title VI complaints with the EPA against SCAQMD, and allege that the SCAQMD rules create a disparate impact on racial minorities.<sup>115</sup>

CBE filed an administrative complaint with the EPA against the SCAQMD on July 23, 1997.<sup>116</sup> CBE's administrative complaint represents the first time Title VI, EPA's Title VI implementing regulations and Executive Order 12,898 have been used to challenge the distributional consequences of emissions trading.<sup>117</sup>

### III. DISCUSSION

By filing its complaint, Communities for a Better Environment (CBE) sought to stop oil companies from using the Old-Vehicle Scrapping Rule 1610 (Rule 1610) in lieu of the Marine Tank Vessel Operations Rule 1142 (Rule 1142).<sup>118</sup> CBE contended that Rule 1610 was illustrative of the problems with emissions trading programs and that these programs ignored cumulative environmental impacts and environmental justice concerns.<sup>119</sup> Instead of employing Rule 1142, which would have captured nearly ninety-five percent of the harmful vapors in the South Coast Air Quality Management District (SCAQMD), CBE stated that the companies used Rule 1610 as a "loophole" for cost efficiency.<sup>120</sup>

On July 23, 1997, on behalf of minorities living in the San Pedro and Wilmington South Coast Air Basin (air basin), CBE

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115. See 42 U.S.C.A. § 2000d-1 (West 1994).

116. See *Challenges Filed To Implementation of SCAQMD Scrapping Rule*, 11 CAL. ENVTL. INSIDER 5 (1997). Communities for a Better Environment (CBE) is a non-profit organization that litigates environmental and environmental justice issues. CBE filed the complaint along with Los Angeles Comunidades Asambladas Unidas para un Sostenible Ambiente, CBE's community organizing project.

117. See Memorandum from Richard Toshiyuki Drury, Legal Director, Communities for a Better Environment (July 18, 1997) (on file with author).

118. See *Communities for a Better Env't. v. South Coast Air Quality Management Dist.*, Complaint ¶ 2 (No. 10R-97-R9) (U.S. EPA filed July 23, 1997). CBE's major concern is the grave environmental justice impact on the minority communities in the South Coast Air Quality Management District. See generally *id.*

119. See *id.* at ¶¶ 1-3.

120. See *id.* See also notes 100-101 and accompanying text for a discussion of costs to install the vapor recovery equipment.

filed an administrative complaint with the U.S. Environmental Protection Agency (EPA).<sup>121</sup> This complaint alleged that SCAQMD and the California Air Resources Board (CARB) violated Title VI of the 1964 Civil Rights Act (Title VI), EPA's Title VI implementing regulations and Executive Order 12,898.<sup>122</sup> CBE's goal was to force the oil companies to comply with SCAQMD Rule 1142.<sup>123</sup> CBE also filed Clean Air Act civil complaints against each of the oil companies who did not install the marine vapor recovery equipment, alleging their actions violated the Clean Air Act.<sup>124</sup>

#### A. THE ADMINISTRATIVE COMPLAINT

In its complaint, CBE alleged that SCAQMD and CARB<sup>125</sup> violated Title VI by allowing the oil companies to misuse the emissions trading Rule 1610 which in turn created a disparate impact on the surrounding minority community.<sup>126</sup> In addition,

121. See *Communities for a Better Env't. v. South Coast Air Quality Management Dist.*, Complaint (No. 10R-97-R9) (U.S. EPA filed July 23, 1997).

122. See *id.* at ¶ 1.

123. See Memorandum from Richard Toshiyuki Drury, Legal Director, Communities for a Better Environment (July 18, 1997).

124. See *Communities for a Better Env't v. GATX Terminals Corp.*, Complaint (No. 98-1282 ER (BQRx)) (C.D. Cal. Filed July 23, 1997); *Communities for a Better Env't v. Unocal*, Complaint (C.D. Cal. Filed July 23, 1997); *Communities for a Better Env't v. Tosco*, Complaint (No. 98-5877 DT(BQRx)) (C.D. Cal. Filed July 23, 1997); *Communities for a Better Env't v. Chevron*, Complaint (No. 98-5173 DT (BQRx)) (C.D. Cal. Filed July 23, 1997); *Communities for a Better Env't v. Ultramar*, Complaint (No. 98-5174 DT (BQRx)) (C.D. Cal. Filed July 23, 1997).

125. See *Communities for a Better Env't. v. South Coast Air Quality Management Dist.*, Complaint ¶ 13 (No. 10R-97-R9) (U.S. EPA filed July 23, 1997). The complaint names both the South Coast Air Quality Management District and the California Air Resources Board (CARB). CARB is the state agency that works with both the U.S. and California EPA to approve environmental emissions control programs. See *id.*

126. See generally *Communities for a Better Env't. v. South Coast Air Quality Management Dist.*, Complaint (No. 10R-97-R9) (U.S. EPA filed July 23, 1997). CBE filed this administrative complaint with the EPA with hopes that the EPA would also find that the SCAQMD violated Title VI. See *id.* See also Letter from David P. Howekamp, Director, Air Division, United States Environmental Protection Agency, to Barry Wallerstein, Executive Officer, South Coast Air Quality Management District, (February 10, 1999) (on file with author). In this letter, Mr. Howekamp's comments regarding SCAQMD Rule 1610 references the May 1997 version of the rule, but he also states that the February 1999 version of SCAQMD Rule 1610 still does not address all of EPA's concerns and therefore would also not be approved. See *id.* EPA's concerns are that: 1) SCAQMD Rule 1610, May 1997 version, does not "lead to old car emissions

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by allowing the oil companies to use Rule 1610, SCAQMD ignored the pleas for environmental justice.<sup>127</sup>

SCAQMD's application of Rule 1610 creates a disparate impact on the Latinos who live and work in the affected area and also contributes to an uneven distribution of harmful vapors in the air basin.<sup>128</sup> CBE requests that the EPA prohibit SCAQMD from operating the Rule 1610 program and if SCAQMD refuses, then CBE requests the EPA to withdraw its financial assistance from the SCAQMD.<sup>129</sup>

## B. CLEAN AIR ACT SUITS AGAINST THE OIL COMPANIES

On July 23, 1997, CBE also filed civil suits against five oil companies it considered responsible for releasing harmful volatile organic compounds into the air basin in violation of the Clean Air Act.<sup>130</sup> The named oil companies used Rule 1610 as

being taken out of the air"; 2) SCAQMD Rule 1610, May 1997 and February 1999 versions, still "allow the use of credits generated in the past through the use of engine sanding at facilities for compliance with federal requirements such as new source review (NSR) offsets ... and reductions necessary to demonstrate attainment of and progress towards the national ambient air quality standard for ozone"; and 3) SCAQMD Rule 1610, May 1997 and February 1999 versions, do not address that "Rule 1610 does not require a careful examination of how the program is operating and whether cleaner air results from its implementation." *Id.* Furthermore, EPA notes that it is currently reviewing the market-based incentive program policy to address environmental justice. When these revisions are complete, "EPA expects that [SCAQMD] Rule 1610 will need to incorporate those [environmental justice] elements. [However, the EPA] would not cite [environmental justice] issue[s] as a reason for disapproving Rule 1610 until [EPA's] policy has been revised." *Id.*

127. See generally Bansal and Kuhn, *supra* note 82.

128. See *Communities for a Better Env't v. South Coast Air Quality Management Dist.*, Complaint ¶ 2 (No. 10R-97-R9) (U.S. EPA filed July 23, 1997). See also Smog and Health, Health Effects Studies, (visited Feb. 21, 1999) <<http://www.aqmd.gov>> (on file with author) [hereinafter Smog and Health]. Smog and Health reports from a 1991 study, conducted by Dr. Jane Hall of Cal State Fullerton, that minorities as a whole were "exposed more often to poor air quality since they tend to live in more polluted air where housing is affordable. African Americans and Hispanics . . . [also] tend to work in outdoor occupations." *Id.*

129. See *Communities for a Better Env't v. South Coast Air Quality Management Dist.*, Complaint ¶ 1 (No. 10R-97-R9) (U.S. EPA filed July 23, 1997).

130. See *Communities for a Better Env't v. GATX Terminals Corp.*, Complaint (No. 98-1282 ER (BQRx)) (C.D. Cal. Filed July 23, 1997); *Communities for a Better Env't v. Unocal*, Complaint (C.D. Cal. Filed July 23, 1997); *Communities for a Better Env't v. Tosco*, Complaint (No. 98-5877 DT(BQRx)) (C.D. Cal. Filed July 23, 1997); *Communities for a Better Env't v. Chevron*, Complaint (No. 98-5173 DT (BQRx)) (C.D.

an alternative to the perceived more costly Rule 1142, which required them to install vapor control equipment used during tanker loadings.<sup>131</sup> CBE asserted that by trading Mobile Source Emissions Reduction Credits (MSERCs) in this manner, the oil companies violated the Clean Air Act requirements.<sup>132</sup> By using Rule 1610 in lieu of Rule 1142, the oil companies contributed to negative cumulative impacts on air quality in the air basin.<sup>133</sup> Although the aggregate level of air pollution in the Los Angeles area was reduced, because Rule 1142 was not employed in the air basin, the people who live and work in that area were still subjected to harmful vapors.<sup>134</sup>

Despite the success of the marine vapor control equipment in other regions, and the harm caused by failure to use this method, the oil companies continued to claim that their use of Rule 1610 contributed to the reduction of emissions in the entire Los Angeles region in a more economical fashion.<sup>135</sup> By using Rule 1610, they claimed they contributed to the reduction of emissions in the entire Los Angeles region.<sup>136</sup>

### C. STATUS OF THE ADMINISTRATIVE AND CIVIL COMPLAINTS

Currently, the Title VI Complaint is still under investigation by the EPA.<sup>137</sup> This investigation, however, has prompted

Cal. Filed July 23, 1997); *Communities for a Better Env't v. Ultramar*, Complaint (No. 98-5174 DT (BQRx)) (C.D. Cal. Filed July 23, 1997).

131. *See id.*

132. *See id.*

133. *See Communities for a Better Env't. v. South Coast Air Quality Management Dist.*, Complaint ¶ 2 (No. 10R-97-R9) (U.S. EPA filed July 23, 1997). When small regions of an air district are subjected to harmful vapors while the rest of the region becomes cleaner, such an area is known as a "toxic hotspot." *Id.* at ¶ 17.

134. *See Bansal and Kuhn, supra* note 82, at 17.

135. *See Bansal and Kuhn, supra* note 82, at 17-18. *See also* Memorandum from Richard Toshiyuki Drury, Legal Director, *Communities for a Better Environment* (July 18, 1997) (on file with author). For example, by relying on Rule 1610, the oil companies spent \$4.4 million total as opposed to the \$5 million it would cost to install the marine vapor recovery equipment. *See id.*

136. *See Communities for a Better Env't. v. South Coast Air Quality Management Dist.*, Complaint ¶¶ 21-24 (No. 10R-97-R9) (U.S. EPA filed July 23, 1997).

137. *See* Letter from David P. Howekamp, Director, Air Division, United States Environmental Protection Agency, to Barry Wallerstein, Executive Officer, South Coast Air Quality Management District, (February 10, 1999) (on file with author).

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EPA review of both Rules 1610 and 1142.<sup>138</sup> With respect to the Clean Air Act civil complaints, of the five originally named oil companies: GATX Corp. has signed a consent decree; the complaint against Unocal (now owned by Tosco) was dismissed without prejudice; the complaint against Tosco was dismissed; and the complaints against Chevron and Ultramar are still pending.<sup>139</sup>

#### IV. CRITIQUE

As both of the Communities for a Better Environment (CBE) complaints illustrate, the oil companies' and the South Coast Air Quality Management District's (SCAQMD) behavior has further exasperated this struggle for environmental justice.<sup>140</sup> While the aggregate Los Angeles area may have a reduction in vehicle emissions due to the implementation of the Old-Vehicle Scrapping Rule 1610 (Rule 1610), the overall harmful emissions in the San Pedro and Wilmington South Coast Air Basin (air basin) have not been reduced.<sup>141</sup> In fact, the SCAQMD's decision to allow the oil companies to use Rule 1610 in lieu of the Marine Tank Vessel Operations Rule 1142 (Rule 1142) has had the effect of concentrating harmful emissions in the air basin.<sup>142</sup> As a result, the primarily Latino community in the air basin suffers disproportionate harm in comparison with other communities throughout the SCAQMD.<sup>143</sup> Because of the environmental justice problems

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138. *See id.*

139. *See* Communities for a Better Env't v. GATX Terminals Corp., Joint Stipulation on Consent Decree, (No. 98-1282 ER (BQRx)) (C.D. Cal. Filed March 26, 1998).

140. *See Challenges Filed to Implementation of SCAQMD Scrapping Rule*, 11 CAL. ENVTL. INSIDER 5 (1997).

141. Bansal and Kuhn, *supra* note 82, at 18. In taking older, high-emitting vehicles off the road, the oil companies contribute to cleaning up the air in the entire SCAQMD. However, the oil companies purchased the mobile source emission reduction credits, instead of installing the equipment. Thus, the primarily Latino population in the air basin felt and continues to feel the harmful effects. *See id.*

142. *See* Communities for a Better Env't v. South Coast Air Quality Dist., Complaint ¶¶ 18-26 (No. 10R-97-R9) (U.S. EPA filed July 23, 1997).

143. *See id.* at 22.

created by this policy, SCAQMD's decisions need reevaluation.<sup>144</sup>

#### A. ENVIRONMENTAL JUSTICE AND TITLE VI IMPLICATIONS OF RULE 1610

If the oil companies had installed the vapor emissions control equipment as required under Rule 1142, they would have prevented most, if not all, of the harmful vapors from dispersing into the air.<sup>145</sup> Instead, the Latino community in the air basin continues to be subjected to a toxic environment.<sup>146</sup> If the oil companies still desire to simultaneously accumulate Mobile Source Emission Reduction Credits (MSERCs) to engage in permissible emissions trades, they could do so by making sure that their trades reduce emissions throughout the Los Angeles area, including the air basin.<sup>147</sup> Hence, the oil companies could have reduced the severe impacts on the neighboring communities and still have engaged in emissions trading.<sup>148</sup>

#### B. THE BROADER ENVIRONMENTAL CONSEQUENCES OF RULE 1610

Rule 1610's primary environmental consequences stem from its initial implementation.<sup>149</sup> The industrial polluters who

144. See generally Bansal and Kuhn, *supra* note 82.

145. *Communities for a Better Env't v. South Coast Air Quality Dist.*, Complaint ¶ 13 (No. 10R-97-R9) (U.S. EPA filed July 23, 1997).

146. See *id.* at ¶ 10 (quoting *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L. J., Sept 21, 1992). The National Law Journal article discusses the inequities minorities face with regard to EPA's enforcement of these groups' environmental rights. See *id.*

147. See generally *id.*

148. See Bansal and Kuhn, *supra* note 82, at 18-20. Thus, the severe impacts on the Latino community in the air basin could have been avoided. See *id.* See also Smog and Health, Health Effects Studies, (visited Feb. 21, 1999) <<http://www.aqmd.gov>> (on file with author). The impact includes increased cancer rates of workers and residents in the polluted region. See *id.*

149. See generally *South Coast AQMD*, 11 CAL. ENVTL. INSIDER 13 (1998). This article lists some proposed solutions to address the problems with SCAQMD Rule 1610. Some of the proposed solutions include:

a visual and functional inspection of the vehicle by the scrapper when an owner volunteers it for scrapping. The staff proposal outlines a number of requirements that the scrapper must verify, including that the doors are

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qualify under and participate in the emissions trading program undermine the goals of Rule 1610 by violating its requirements.<sup>150</sup> In addition, the “vehicle scrappers” often fail to completely destroy the vehicles and instead dismantle the vehicles for spare parts.<sup>151</sup> Further, SCAQMD has also overestimated the value of the MSERCs, as the vehicle owner probably would have taken the car out of circulation despite the program.<sup>152</sup> With such evidence, SCAQMD should recognize these inherent problems and address them so that the goals of the program will be attained.<sup>153</sup>

## C. INCOMPATIBILITY OF RULE 1610 AND RULE 1142

In addition to the problems associated with its implementation, Rule 1610’s plain language does not permit oil companies to use Rule 1610 in lieu of Rule 1142.<sup>154</sup> Rather, MSERCs may be used only to comply with Rule 1142 to the extent that they are not used to offset emissions increases resulting from either removal of or noncompliance with emissions control equipment.<sup>155</sup> SCAQMD’s policy does just that: it allows the oil com-

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present, that the windshield wipers work, that all pedals are present and operational, that bumpers are present and functional, etc. The scrapper must put the vehicle through a driver test that demonstrates that it is in good working condition. Criteria that the vehicle must meet during the test are specified. There are provisions for retesting a vehicle that initially fails the test.

*Id.*

150. *See CBE Sues SCAQMD Over Amendments to Car Scrapping Rule*, 12 CAL. ENVTL. INSIDER 10 (1998). For instance, SCAQMD Rule 1610 requires the cars to have at least three years of useful life left in them, yet more often than not, the car barely works enough to make it to the scrapper. *See id.*

151. *See id.* A SCAQMD inspector noted that a car engine obtained from a scrapped Volkswagen was resold for use in another car, thereby defeating the purpose of scrapping the car. *See id.*

152. *See South Coast AQMD*, 11 CAL. ENVTL. INSIDER 13 (1998). Thus, the car owner probably would have removed the car anyway because of new insurance requirements or “natural attrition.” *Id.*

153. *See id.*

154. *See supra* note 90 for discussion of SCAQMD Rule 1610’s purpose.

155. *See Los Angeles, Cal., South Coast Air Quality Management District Rule 1610(a)* (amended Feb. 12, 1999) (visited April 5, 1999) <<http://www.aqmd.gov>> (on file with author) [hereinafter SCAQMD Rule 1610]. The SCAQMD Regulation XI sets forth these specific trade requirements so that such trades will actually decrease emissions. *See id.*

panies to trade MSERCs instead of installing the vapor recovery equipment. In addition, the Clean Air Act requires SCAQMD to enforce Rule 1142, as it is already part of its State Implementation Plan, while Rule 1610 has not been approved by the EPA.<sup>156</sup> Thus, SCAQMD's choice not to enforce Rule 1142, while simultaneously implementing Rule 1610, is contrary to the requirements of the Clean Air Act.

Furthermore, the use of MSERCs to offset mobile source emissions limitations is questionable, as source offsets traditionally refer only to stationary sources to ensure actual emissions reductions.<sup>157</sup> The inherently different natures of marine tank vessels, as stationary sources, and motor vehicles, as mobile sources, result in disparate effects from their emissions.<sup>158</sup> Thus, the use of Rule 1610 by the oil companies allows incompatible trades.<sup>159</sup>

In addition, removing high-emitting cars from the pollution source pool, rather than installing the marine vapor recovery equipment, the oil companies claim that the entire region benefits. Given the mobile nature of cars, the reduction of vehicle emissions has a cumulative impact in the Los Angeles region as a whole.<sup>160</sup> However, three of the marine terminal sites are lo-

156. See *Challenges Filed to Implementation of SCAQMD Scrapping Rule*, 11 CAL. ENVTL. INSIDER 13 (1997). See also Letter from David P. Howekamp, Director, Air Division, United States Environmental Protection Agency, to Barry Wallerstein, Executive Officer, South Coast Air Quality Management District, (February 10, 1999) (on file with author). As of April 5, 1999, the EPA still had not approved Rule 1610. See *id.*

157. See David M. Driesen, *Trade as a Technique, Not a Religion*, at 6-7, presented at Air Management Advisory Committee Stationary Source Subcommittee New York State Department of Environmental Conservation (Jan. 5, 1993) (on file with author). In his presentation, Driesen argued that "Congress did not intend to authorize offsets from mobile sources or the use of credits outside the regulated source toward [Reasonably Available Control Technology] compliance when it amended the Act in 1990." Furthermore, he argued that if Congress had intended to allow mobile source reductions to be used in this manner, it would have "raised the offset ratios, since the scarcity of offsets would diminish." *Id.*

158. See Bansal and Kuhn, *supra* note 82, at 18-20.

159. See *id.*

160. See *id.* at 17. Cumulative impact refers to the overall effect on air quality. See *id.*



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cated in the predominantly Latino air basin.<sup>161</sup> Thus, while reducing pollution in the Los Angeles region, the harmful emissions from the oil companies' activities remain concentrated in the air basin.<sup>162</sup> Therefore, the alleged success of the use of Rule 1610 in lieu of Rule 1142 is deceptive because the oil companies can claim they contribute to the aggregate decrease of harmful emissions in the Los Angeles area, yet the real harm caused by their operating in the air basin where they have failed to make reductions persists.<sup>163</sup>

Furthermore, the pollutants reduced from mobile source emissions are not equivalent to the stationary source emissions because cars primarily emit carbon monoxide whereas the marine vessels emit volatile organic compounds, such as benzene. Thus, SCAQMD too contributes to the cumulative impact of emissions pollution in the air basin by allowing the oil companies to operate in this manner.

## V. PROPOSAL

Environmental justice advocates attempt to ensure that minority communities do not continue to be unfairly laden with environmental hazards.<sup>164</sup> At the same time, industry regulated under the Clean Air Act will attempt to comply with the Act in the most economical manner.<sup>165</sup> To protect the interests of both of these two competing ideologies, the market-based incentive programs, such as emissions trading, must be monitored.<sup>166</sup> Additionally, environmental justice concerns must be addressed at the forefront of emissions trading program decisions.<sup>167</sup>

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161. *See id.* at 18. Thus, the Latino community is subjected to the toxic vapors. *See id.*

162. *See id.* at 18-19.

163. *See generally* Bansal and Kuhn, *supra* note 82.

164. *See generally* Bansal and Kuhn, *supra* note 82. CBE is one example of an environmental justice advocate. *See id.*

165. *See supra* notes 60-68 and accompanying text for a discussion of why industry views the market-based incentive programs as more economically efficient.

166. *See* Bansal and Kuhn, *supra* note 82, at 21-22.

167. *See id.* at 21.

#### A. EMISSIONS TRADES MUST BE MORE CLOSELY MONITORED

Industry must recognize that emissions trading and command and control regulations can actually work together.<sup>168</sup> Oil companies weighed only the economic savings of not installing the vapor control equipment, rather than considering the compatibility of the trades in which they engaged.<sup>169</sup> In order to ensure that industry will act responsibly and ethically, industry trades should be extensively monitored by groups outside the polluting industry.<sup>170</sup>

Also, as demonstrated with the Old-Vehicle Scrapping Rule 1610 (Rule 1610), the emissions trading programs do not always work as designed.<sup>171</sup> Thus, the trades must be more closely monitored, by groups like Communities for a Better Environment (CBE), to prevent the creation of future toxic hot-spots.<sup>172</sup>

#### B. ALL INTERESTED PARTIES SHOULD BE CONSULTED

The U.S. Environmental Protection Agency (EPA) states that, aside from such market considerations, other issues must be considered such as enforcement issues and public acceptance.<sup>173</sup> Having primarily consulted with business interests instead of environmental or other public interest groups, the South Coast Air Quality Management District (SCAQMD) insured that no voices of dissent or alternative suggestions would

168. See Driesen, *supra* note 52, at 311.

169. See Memorandum from Richard Toshiyuki Drury, Legal Director, Communities for a Better Environment (July 18, 1997) (on file with author). The oil companies were more concerned about the money they saved by not installing the \$5,000,000 marine vapor recovery equipment. Thus, the oil companies saved only approximately \$600,000. See *id.* See also *supra* notes 100-101.

170. See SCAQMD Chair Unveils Environmental Justice Initiatives, 11 CAL. ENVTL. INSIDER 9 (1997). Approximately a month and a half after CBE challenged the SCAQMD's practices, SCAQMD's chair came up with a plan to prevent further environmental injustice. See *id.*

171. See South Coast AQMD, 12 CAL. ENVTL. INSIDER 18 (1998).

172. See Challenges Filed to Implementation of SCAQMD Scrapping Rule, 11 CAL. ENVTL. INSIDER 5 (1997). See also *supra* notes 150-153 and accompanying text for evidence of Rule 1610's ineffectiveness.

173. See 40 C.F.R. pt. 51, App. X (1998).

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stall or dispose of the proposed program.<sup>174</sup> SCAQMD should have consulted a diverse group of parties before having implemented the rule.<sup>175</sup>

With the advice of such groups, SCAQMD officials could better monitor emissions trading techniques at their inception to ensure that each emission trade is viable and that it does not result in discriminatory effects in certain regions.<sup>176</sup> In order to have an effective program, SCAQMD must be certain that the program achieves pollution control and is properly implemented.<sup>177</sup> Finally, new methods, such as Rule 1610, must be more closely evaluated before implementation, because a trading program will not be effective unless it actually decreases pollution.<sup>178</sup>

C. EMISSIONS TRADES SHOULD BE ALLOWED ONLY WHEN THEY COMPLY WITH THE CLEAN AIR ACT

If industry wants to purchase emissions credits under Rule 1610 to reduce emissions in other parts of the Los Angeles region, industry should be allowed to do so only if its local emissions are at an emissions level that comply with the Clean Air Act.<sup>179</sup> Rule 1610 states that Mobile Source Emission Reduc-

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174. See *Challenges Filed to Implementation of SCAQMD Scrapping Rule*, 11 CAL. ENVTL. INSIDER 5 (1997). Environmental groups are disconcerted by what they see as an "aggressively pro-business, anti-environmental" District Governing Board who makes the decisions as to how such programs will be implemented. *Id.*

175. *Id.*

176. See *South Coast AQMD*, 12 CAL. ENVTL. INSIDER 18 (1998). As a matter of fact, the SCAQMD Board called a meeting to devise methods for best ensuring the future success of such programs. *See id.*

177. See *CBE Sues SCAQMD Over Amendments to Car Scrapping Rule*, 12 CAL. ENVTL. INSIDER 10 (1998).

178. See David M. Driesen, *Trade as a Technique, Not a Religion*, at 1 presented at Air Management Advisory Committee Stationary Source Subcommittee New York State Department of Environmental Conservation (Jan. 5, 1993). In order to ensure the system works, it needs to be properly measured. *See id.* at 1.

179. See Driesen, *supra* note 52, at 310. Driesen states that:

[i]f a buyer of pollution credits produces emissions with strong local health effects, for example, cancer-causing hazardous air pollutants, and is distant from the seller of credits, then ethical considerations may preclude allowing the buyer to avoid making reductions at her own plant, even if she purchases an equal quantity of emissions reduction elsewhere.

*Id.*

tion Credits (MSERCs) “may not be [used] toward[ ] compliance with federal requirements that do not authorize compliance through emissions trading” and the MSERCs value is determined by the vehicle having at least three years useful remaining life prior to scrapping.<sup>180</sup> By forcing the oil companies to use Rule 1610 only if their use actually decreases emissions everywhere, SCAQMD could begin to decrease the excessive emissions in the air basin.<sup>181</sup>

In addition, the demand made by environmental justice advocates, that oil companies comply with the Marine Tank Vessel Operations Rule 1142 (Rule 1142), is not unreasonable and can also serve the companies’ best interests.<sup>182</sup> Regions including the San Francisco Bay Area, Louisiana and New Jersey have successfully installed such equipment.<sup>183</sup>

#### D. ENVIRONMENTAL JUSTICE MUST BE FACTORED INTO EMISSIONS TRADING

In its “Requirements for Preparation, Adoption, and Submittal of Implementation Plans,” the EPA discussed market-based incentive programs and provided general implementation guidelines while considering the different challenges faced by each district.<sup>184</sup> SCAQMD ignored the EPA requirements

180. *Los Angeles, Cal., South Coast Air Quality Management District Rule 1610(a)* (amended Feb. 12, 1999) (visited April 5, 1999) < <http://www.aqmd.gov> > (on file with author).

181. *See* *Communities for a Better Env’t v. South Coast Air Quality Dist.*, Complaint ¶ 2 (No. 10R-97-R9) (U.S. EPA filed July 23, 1997). The oil companies’ previous use of Rule 1610 did nothing to reduce the harmful vapors in the air basin; if they were forced to make such trades only when the emissions will actually be reduced, SCAQMD will be one step closer to cleaning up the air basin. *See id.*

182. *See* *Bansal and Kuhn, supra* note 82, at 17. The equipment has safety incentives such as reducing the risk of fires and explosions. *See id.*

183. *See* *Bansal and Kuhn, supra* note 82, at 17 and fn 18. The article describes a study done by the Bay Area Air Quality Management District which “concluded that vapor recovery systems ‘would have a beneficial impact on tanker safety .... A risk analysis done for an oil company ... indicates that controlling these vapors may improve safety by as much as eight orders of magnitudes (sic) (100,000,000).” *Id.* at n. 18.

184. *See* 40 C.F.R. pt. 51, App. X (1998):

The [market-based] [i]ncentive [p]rograms are comprised of several elements that, in combination with each other, must insure that the fundamental

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that market-based incentive programs meet standards of accountability, enforceability and noninterference with other requirements of the Clean Air Act.<sup>185</sup> Consequently, as alleged in the CBE Title VI administrative complaint, the result is that another minority community is burdened with toxic hazards, the very harm that environmental justice advocates have been working so hard to cease.<sup>186</sup>

The goals of the environmental justice movement and those of a market-based system are often in direct conflict.<sup>187</sup> Businesses want the flexibility to meet their pollution control requirements at the lowest cost possible, while environmental justice advocates want to decrease, or eliminate entirely, the harmful effects of pollution on minorities.<sup>188</sup> To lessen the conflict between the two, SCAQMD should push forward with its environmental justice initiatives and the EPA, along with the SCAQMD, should ensure that economic goals are not preferred at the expense of environmental justice concerns.<sup>189</sup>

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principles of any regulatory program (including accountability, enforceability and noninterference with other requirements of the Act) are met .... Also it is important to emphasize that the effectiveness of an [market-based] incentive program is dependent upon the particular area in which it is implemented. No two areas face the same air quality circumstances and, therefore, effective strategies and programs will differ among areas.

*Id.* The EPA further qualifies its statements in the Appendix and states “[b]ecause of these considerations, the EPA is not specifying one particular design or type of strategy as acceptable for any given EIP ....” *Id.* Thus, the examples given are general in nature to avoid limiting a state’s innovation in developing programs tailored to individual State needs. *See id.*

185. *See id.*

186. *See id.* These goals must be met “in terms of the costs that the design imposes upon market transactions and the impact of those costs on market efficiency.” *Id.* Furthermore, the EPA contends that in designing emissions trading programs, states should evaluate the programs to ensure environmental goals will be met, yet EPA makes no mention of health cost considerations. The EPA should include health cost considerations and balance them with their economic goals. *See id.*

187. *See Challenges Filed to Implementation of SCAQMD Scrapping Rule*, 11 CAL. ENVTL. INSIDER 5 (1997). These struggles are a direct result of the conflicts between environmental justice and pollution trading programs. *See id.*

188. *See Communities for a Better Env’t v. South Coast Air Quality Dist., Complaint* (No. 10R-97-R9) (U.S. EPA filed July 23, 1997).

189. *See SCAQMD Unveils Environmental Justice Initiatives*, 11 CAL. ENVTL. INSIDER 9 (1997).

## E. FUTURE PROGRESS

Because of CBE's complaint, the EPA, SCAQMD and the California Air Resources Board have been alerted to the environmental justice issues raised by SCAQMD's use of Rule 1610 in lieu of Rule 1142.<sup>190</sup> In fact, since the filing of both the Clean Air Act and Title VI complaints, SCAQMD has attempted to address these environmental justice concerns.<sup>191</sup> SCAQMD's new chairman asked his staff to investigate several initiatives to combat the perception that the SCAQMD has been insensitive to environmental justice considerations.<sup>192</sup> This program highlights environmental justice advocates' concerns, including problems that have arisen with the oil companies' failure to follow Rule 1142.<sup>193</sup>

Regardless of the outcome of the pending CBE suits, CBE's complaints have already made an impact, as seen in SCAQMD's recent efforts.<sup>194</sup> While SCAQMD's environmental justice initiatives are still in their initial stages, SCAQMD's efforts are one step toward achieving the balance between economic and environmental justice interests.<sup>195</sup> The success of the initiatives will be tested when environmental justice advo-

190. *See id.*

191. *See SCAQMD Unveils Environmental Justice Initiatives*, 11 CAL. ENVTL. INSIDER 9 (1997). These initiatives include:

[r]e-examining AQMD toxics rules to see if they need to be toughened and expanded; creating rapid deployment community response teams to immediately investigate community emergencies related to airborne emissions, starting with concerns in the San Pedro area about port activities; creating incentives to clean up or remove diesel engines in the region . . . said to disproportionately impact low-income communities; reorganizing the AQMD's environmental impact reports to comment on projects which may create community air pollution and toxic concerns to help cities in their land-use decision-making; launching a series of town hall meetings through the AQMD's four-county jurisdiction to increase residents' access and participation in the development of air pollution control programs; and convening a task force to investigate local environmental justice concerns, starting with concerns about disproportionate risks related to emissions credits trading programs, such as those expressed recently by Communities for a Better Environment over emissions trading by port oil loading operations.

*Id.*

192. *See id.*

193. *See generally* Bansal and Kuhn, *supra* note 82. *See also supra* note 191.

194. *See SCAQMD Unveils Environmental Justice Initiatives*, 11 CAL. ENVTL. INSIDER 9 (1997).

195. *See id.*

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cates witness SCAQMD's response to polluters who want to use emissions trading rules in the future in ways that have disproportionate impacts on minority communities.

### VI. CONCLUSION

Although the environmental justice movement has developed slowly, environmental justice concerns now command more attention.<sup>196</sup> The movement still has a long way to go, especially in light of the increasing use of market-based systems that are not designed to consider effects on people.<sup>197</sup> To remove all sources of hazardous emissions and all hazardous waste sites from every minority community is no doubt impractical. However, at a minimum, companies should make concessions for health and welfare over simply minimizing costs.<sup>198</sup> Unless the U.S. Environmental Protection Agency and the South Coast Air Quality Management District factor both economic and environmental justice implications into its rules, market-based incentives, like emissions trading, should not be used at all.<sup>199</sup> Realistically, powerful groups like the Regulatory Flexibility Group, who lobbied for the Old-Vehicle Scraping Rule 1610, will not permit the full-scale elimination of emissions trading. Industry, however, must be required to weigh the disproportionate impacts of these programs against their economic benefits.<sup>200</sup> In addition, in many cases this balance is best maintained through the current command and control system framework.<sup>201</sup>

The current scheme of emissions trading essentially allows industry to buy the right to pollute.<sup>202</sup> Viewing pollution trad-

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196. *See id.*

197. *See* PERCIVAL, *supra* note 49, at 190. The authors assert that it is easier to see who bears the costs of regulations, than who bears the burden of the problems. *See id.*

198. *See id.* Regulated targets have an incentive to exaggerate costs of complying with proposed regulations since industry does not want to comply with the control measures, such as installing the marine vapor recovery equipment. *See id.*

199. *See generally* Bansal and Kuhn, *supra* note 82. The authors also view pollution trading as allowing the right to pollute and they assert that they "firmly believe that no one should be able to 'buy' the right to pollute." *Id.* at 20.

200. *See id.* at 17.

201. *See* Driesen, *supra* note 52, at 311.

202. *See* Bansal and Kuhn, *supra* note 199.

ing programs in this light means that industry must merely factor the cost of pollution into its overall production costs.<sup>203</sup> If companies need only factor in economic pollution penalties, environmental justice issues lose force since social consequences are disguised when pollution credits are bought and sold.<sup>204</sup> When companies are allowed to operate in this manner, environmental justice problems will continue and government and business response will remain reactive, not proactive.<sup>205</sup>

While the current Title VI lawsuit spurred the South Coast Air Quality Management District to create environmental justice initiatives and the California Air Resources Board to suspend approving credit rules, the future is unclear.<sup>206</sup> Only if environmental justice advocates, affected communities and polluters are all involved in the process can the public be sure that environmental justice goals will move closer to realization.

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203. *See id.*

204. *See id.* at 20. The authors quote Michael Sandel who sees the purchasing of pollution rights as turning pollution into "a commodity to be bought and sold, remov[ing] the social stigma that is properly associated with pollution." *Id.*

205. *See* United Church of Christ Commission for Racial Justice, *Toxic Wastes and Race Revisited, An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites* (1994) at 14 (quoting Marianne Lavelle and Marcia Coyle, *Unequal protection: the racial divide on environmental law*, NAT. L. J., (Sept. 21, 1993)). Despite the increased awareness of environmental justice issues, this updated study shows that the placement of toxic waste sites in minority communities has increased. Therefore, one step toward decreasing this phenomenon is to prevent siting toxic waste sites in these communities, instead of dealing with the effects afterward. *See id.*

206. *See ARB to Suspend Approval of Credit Rules*, 11 CAL. ENVTL. INSIDER 4 (1997).

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