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3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF CALIFORNIA
6

7 ASSOCIATION OF IRRITATED
8 RESIDENTS, an unincorporated
9 association

10 Plaintiff,

11 v.

12 C&R VANDERHAM DAIRY, a
13 California Proprietorship, and
14 RICK VANDERHAM and CORRIE
15 VANDERHAM, owners and
16 operators, CORRIE VANDERHAM
17 DAIRY, INC., a California
18 corporation, AG RESOURCES,
19 LLC, a California limited
20 liability company,

21 Defendants.

1:05-CV- 01593 OWW SMS

MEMORANDUM DECISION AND ORDER
GRANTING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT ON THE
FOLLOWING ISSUES

1. DEFENDANTS FAILURE TO OBTAIN AN AUTHORITY TO CONSTRUCT PERMIT
2. DEFENDANTS FAILURE TO INSTALL BEST AVAILABLE CONTROL TECHNOLOGY ("BACT")
3. DEFENDANTS' FAILURE TO PURCHASE OFFSETS

ALL IN VIOLATION OF THE
CALIFORNIA STATE
IMPLEMENTATION PLAN ("SIP")

19 **1. INTRODUCTION**

20 Plaintiffs' Association of Irritated Residents ("AIR") filed
21 a complaint against Defendants C&R Vanderham Dairy alleging
22 violations of the Federal Clean Air Act ("CAA"), 42 U.S.C. §§
23 7401 et. seq. Plaintiffs move for summary judgment arguing that
24 C&R Vanderham Dairy has violated and continues to violate
25 California's State Implementation Plan ("SIP") by violating of
26 San Joaquin Air Quality Management District ("District") Rules
27 2010 and 2201. Defendants oppose the motion.

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1 judgment. (Doc. 123, Motion for Summary Judgment.) On July 23,
2 2007 Plaintiffs filed a motion to strike and opposition to
3 Defendants' cross motion for summary judgment. (Doc. 139.) On
4 July 23, 2007 Defendants replied. (Doc. 143.)

5 **3. FACTUAL AND LEGAL BACKGROUND**

6 **A. Defendants Vanderham Dairy**

7 Defendants C&R Vanderham operate the dairy facility owned by
8 Corrie Vanderham Dairy, Inc. Rick Vanderham and Corrie Vanderham
9 Dairy, Inc. are partners in the C&R Vanderham Dairy.

10 The C & R Vanderham Dairy is located in Kern County, which is
11 within the San Joaquin Valley Air basin. As an operating dairy
12 farm, it generates certain emissions. As a result, it is subject to
13 regulation by the Air District.

14 On April 29, 2005, Defendant Ag Resources, LLC entered into a
15 site improvement construction agreement with Vander Weerd General
16 Construction, Inc. to build the C & R Vanderham Dairy. The dairy
17 was constructed to limit the project size to one thousand three
18 hundred twenty (1,320) milk cows, one hundred ninety-five (195) dry
19 cows, four hundred eighty-six (486) heifers aged over fifteen (15)
20 months, three hundred seventy-eight (378) heifers aged seven (7) to
21 fourteen (14) months, one hundred sixty-two heifers four (4) to six
22 (6) month and one hundred twenty (120) calves. This information
23 was provided to the Air District. (Doc. 98, Albers Declaration, Ex.
24 "A", "F", "G" and "H", Filed May 4, 2007.) The correspondence
25 between defendants and the Air District shows that the dairy would
26 in fact be constructed in such a way as to limit the cow numbers to
27 those levels.

28 On or about July 15, 2005, construction of the dairy

1 facility began. The dairy was completed in June 2006, and the C &
2 R Vanderham Dairy became operational at that time. At the time
3 construction began, the Air District used an emission factor of
4 12.8 pounds of VOC per cow head per year. In August 2005, the Air
5 District changed the emission factor to 19.3 pounds of VOC per
6 cow head per year. Since construction of the dairy began in July
7 2005, the District used the 12.8 pounds per cow head factor. A
8 permit to operate was issued to the C & R Vanderham Dairy in
9 April 2007. (Doc. 98, Albers Declaration, Ex "C.")

10 **B. The Clean Air Act**

11 The general purpose of the CAA is to enhance the nation's
12 air quality resources for the benefit of public health. The CAA
13 requires the United States Environmental Protection Agency
14 ("EPA") to set National Ambient Air Quality Standards ("NAAQS")
15 for certain pollutants. The CAA requires states to designate
16 areas within its boundaries as "attainment" areas if the air
17 quality meets the NAAQS for a particular criteria pollutant.
18 Areas where the air quality does not meet the NAAQS for a
19 particular criteria pollutant are designated as "non attainment"
20 areas for that pollutant.

21 Non attainment areas are required to adopt state
22 implementation plans ("SIP") to achieve the NAAQS by the
23 applicable attainment date. The CAA requires that a SIP shall
24 "require permits for the construction and operation of new or
25 modified major stationary sources anywhere in the non attainment
26 area." A preconstruction permit is a New Source Review ("NSR")
27 permit. The San Joaquin Valley Air Pollution Control District is
28 the state agency with primary responsibility for developing the

1 SIP for the San Joaquin Valley. Cal. Health & Safety Code §§
2 40600-40606.

3 "Although states retain significant flexibility in
4 establishing the details of these plans, the CAA, and EPA
5 regulations, outline many required features." *Safe Air for*
6 *Everyone v. EPA*, 475 F.3d 1096, 1100 (9th Cir. 2007). "Among
7 them is the mandate that state plans provide for regular
8 revisions to reflect evolving air quality conditions and
9 standards." *Id.* The revisions need not completely recast
10 provisions of the SIP. *Id.* The CAA allows for the submission
11 and review of piecemeal amendments that deal "with discrete SIP
12 provisions, leaving most of the plan untouched." *Id.* The EPA
13 must determine that the SIP meets the requirements under the CAA
14 before the SIP becomes effective. *Id.*; *See also*, 42 U.S.C. §
15 7410(k)(3). "The EPA must also approve the plan amendments and
16 'shall not approve a revision of a plan if the revision would
17 interfere with any applicable requirement concerning attainment
18 and reasonable further progress or any other applicable
19 requirement of the CAA." *Id.*; *See also*, 42 U.S.C. § 7410(l).

20 **C. SB 700**

21 Former California Health & Safety Code § 42310(e) ("section
22 42310(e)") exempted "any equipment used in agricultural
23 operations in the growing of crops or the raising of fowl or
24 animals" from the obligation to obtain a permit. Cal. Health &
25 Safety Code § 42310(e) (2003). After EPA found that the
26 agricultural equipment exemption in section 42310(e) conflicted
27 with the Act's permitting requirements, 67 Fed. Reg. 35990 (May
28 22, 2002); 68 Fed. Reg. 37746 (June 23, 2003), the California

1 Legislature passed Senate Bill 700 ("SB 700"), which took effect
2 January 1, 2004, and removed the agricultural exemption from
3 Health & Safety Code § 42310(e). Cal. Health & Safety Code §
4 42310(b); SB 700 § 11, 2003-2004 Sess. (Cal. 2003).

5 Among other things, SB 700 required agricultural sources'
6 compliance with already-adopted rules and preserved the authority
7 of an air district to regulate agricultural sources pursuant to
8 rules adopted before January 1, 2003. SB 700 § 2, 2003-2004 Sess.
9 (Cal. 2003); Cal. Health & Safety Code § 39011.5. "[F]rom the
10 express language of the statute, § 39011.5 intended to make
11 District rules applicable to stationary agricultural sources and
12 did not intend to limit the authority of districts to comply with
13 [Clean Air Act] requirements." *Association of Irrigated Residents*
14 *v. Fred Schakel Dairy*, No. 1:05:CV-00707-OWW-SMS (E.D. Cal. Dec.
15 2, 2005) (related case) (Order on Defendants' Motion to Dismiss,
16 at 18 (Docket # 36)). However, SB 700 also contained §
17 42301.16(c) in its provisions. This section created a narrower
18 exemption under state law to the requirement of obtaining an ATC
19 permit for non major stationary sources that emit below a 12.5
20 VOC ton/year threshold.

21 **D. Correspondence From the District to C& R Vanderham Dairy**

22 On July 25, 2005 C&R Vanderham Dairy received a letter from
23 David Warner, Director of Permit Services at the District which
24 stated, "Pursuant to Senate Bill 700 and District Rule 2201...
25 all agricultural operations including confined animal feeding
26 operations that commenced construction after January 1, 2004 with
27 emissions greater than one half the major threshold levels (12.5
28 tons of VOC) are required to obtain an ATC permit." The letter

1 proceeds to state that "the District has issued a draft report
2 which outlines a new emissions factor of 20.6 lbs/head/year based
3 on the latest studies and scientific papers. This new report
4 indicates that emissions from dairies were very likely to have
5 been significantly underestimated." The letter concludes that
6 "the District cannot condone the proposed construction activities
7 [of Vanderham dairy] until the emission factor issue is settled
8 on August 1, 2005 since permits may be required for the proposed
9 dairy. If C&R Vanderham Dairy continues with the construction,
10 they proceed at their own risk." (Doc. 141, Request for Judicial
11 Notice, Ex. 1, Filed July 23, 2007)

12 Mr. Warner then sent another letter on December 12, 2005
13 that stated, "based on all the information provided to the
14 District regarding [C&R Vanderham's] construction activities, the
15 determination was made that your dairy commenced construction
16 prior to the date that the District started requiring Authority
17 to Construct ("ATC") permits. Your dairy is therefore considered
18 an existing operation and no ATC is required." (Doc. 10,
19 Defendants Request for Judicial Notice, Filed February 14, 2006.)

20 However, the letter also states that "the emissions from
21 [the] dairy will exceed the new permitting levels, a permit to
22 operate is required for [the] dairy." The letter proceeds to
23 state that Defendants submitted an application for an operating
24 permit on October 31, 2005 which served as a temporary permit to
25 Operate until the final permit was granted.

26 **E. Allegations in the Complaint**

27 Plaintiffs assert three claims. Plaintiffs allege that
28 Defendants violated the plain language of the EPA approved SIP

1 and its approved versions of District Rules 2010 and 2201.

2 Plaintiffs now seek summary adjudication of the following:

- 3 1. Defendants failed to obtain an ATC permit
- 4 2. Defendants failed to install BACT at emissions
5 units that exceed thresholds and
- 6 3. Defendants failed to purchase offsets when
7 Vanderham exceeded thresholds

8 (Doc. 1, Complaint, Filed December 15, 2005.)

9 Rule 2010 states:

10 "Any person building, altering, or replacing any
11 operation, article, machine, or equipment... the use of
12 which may cause the issuance of air contaminants...
13 shall first obtain authorization for such construction
14 from an Air Pollution Control Officer ("APCO"). An
15 authority to construct shall remain in effect until the
16 Permit to Operate the source operation for which the
17 application was filed is granted or denied, or the
18 application is canceled..."

19 (Doc.84-2, Kar Declaration, Rule 2010 - amended December 17,
20 1992, Filed April 6, 2007.)

21 Rule 2201 applies to "all new stationary sources and all
22 modifications to existing stationary sources which are subject to
23 the District permit requirements and after construction emit or
24 may emit one or more affected pollutants." District Rule 2201, §
25 2.0. Section 3.25 defines a "major source" as the following:

26 "For each pollutant, a Stationary Source with post-
27 project emissions or a post-project Stationary Source
28 Potential to Emit (SSPE2), equal to or exceeding one or
29 more of the following threshold values

30 Section 3.25.1 of Rule 2201 states:

31 For determining major source, status, fugitives shall
32 only be included for calculating the air pollutant
33 post-project emissions or SSPE2 if the source is
34 included in the list of source categories identified in
35 the major source definition in 40 CFR Part 70.2, or
36 when determining if a stationary source is a major air
37 toxics source as defined in Rule 2520.

Table 3-2, Major Source Emissions Thresholds

| Pollutant | Threshold (Pounds Per Year) |
|------------------|-----------------------------|
| VOC | 50,000 |
| NO _x | 50,000 |
| CO | 200,000 |
| PM ₁₀ | 140,000 |
| SO _x | 140,000 |

Lastly, Section 4.1 of Rule 2201 states that Best Available Control Technology ("BACT") requirements shall be triggered on a pollutant by pollutant basis and on an emissions unit-by emissions unit basis." The rule further states that BACT shall be required for the following actions:

- 4.1.1 Any new emissions unit or relocation from one Stationary Source to another of an existing emissions unit with a Potential to emit exceeding 2.0 pounds in any one day;
- 4.1.2 Modification to an existing emissions unit with a valid Permit to Operate resulting in an Adjusted Increase in Permitted Emissions (AIPE) EXCEEDING 2.0 pounds in any one day;
- 4.1.3 Any new or modified emissions unit, in a stationary source project, which results in a Title I Modification as defined by in this rule.

An agricultural source is required to purchase offsets if post project Stationary Source Potential to Emit ("SSPE2") is above 20,000 pounds or 10 tons of VOC per year. Rule 2201 § 4.5.

F. Timeline of Relevant Events

| | |
|--------------------|---|
| September 17, 1998 | San Joaquin Valley Unified Air Pollution Control District ("District") adopts Rule 2020 (Exemptions) that exempts "any equipment used in agricultural operations in the growing of crops or the raising of fowl or animals" from obtaining an authority to construct permit. 66 Fed. Reg. 37587, 37587 (July 19, 2001). |
|--------------------|---|

| | | |
|----------------------|--------------------|--|
| 1 2 | July 23, 1999 | EPA approves Rule 2010 (Permits Required) as part of the State Implementation Plan. 64 Fed. Reg. 39920 (July 23, 1999). |
| 3 4 | September 14, 1999 | Corrie Vanderham applies to Kern County for a conditional use permit for the C&R Vanderham Dairy. PSUF ¶ 33. |
| 5 6 7 | July 19, 2001 | The U.S. Environmental Protection Agency ("EPA") disapproves Rule 2020 because the exemption for agricultural equipment in Rule 2020 is inconsistent with the Clean Air Act. 66 Fed. Reg. 37587, 37589-90 (July 19, 2001). |
| 8 9 | December 19, 2002 | The District adopts an amended version of Rule 2020 that eliminates the agricultural equipment exemption. 68 Fed. Reg. 7330, 7335 (Feb. 13, 2003). |
| 10 11 12 13 | January 1, 2004 | EPA finds that California's State Implementation Plan is substantially inadequate and requires California to revise the State Implementation Plan by removing the agricultural equipment exemption in Cal. Health & Safety Code § 42310(e) (2003). 68 Fed. Reg. 37746 (June 25, 2003). |
| 14 15 16 | June 16, 2004 | Effective date of Senate Bill 700, which amended Cal. Health & Safety Code § 42310(e) to remove the agricultural equipment exemption. SB 700 § 11, 2003-2004 Sess. (Cal. 2003). |
| 17 18 19 | August 24, 2004 | Effective June 16, 2004, EPA approves the December 19, 2002 versions of Rule 2020 and 2201 (New and Modified Stationary Source Review) as part of the State Implementation Plan. 69 Fed. Reg. 27837 (May 17, 2004). |
| 20 21 22 | April 29, 2005 | Ag Resources, LLC enters into "Site Improvement Construction Agreement" to build a freestall dairy "for C&R Vanderham Dairy" at current site. Ag Resources owned the site at the time. PSUF ¶ 25. |
| 23 24 25 | July 15, 2005 | Letter from Defendants' counsel to the District stating that C&R Vanderham Dairy is developing a dairy project, that the dairy will produce 12.4 tons of VOC per year, and is under construction. PSUF ¶ 29. |
| 26 27 28 | July 29, 2005 | Vanderham obtains building permits for milking barn, freestall structures, shade structures, hoof trimming shade, hay barn structures, and commodity barn. PSUF ¶ 35. |

| | | |
|----------|-----------------------|--|
| 1 2 | September 20, 2005 | AIR mails 60-day notice of intent to sue to Rick Vanderham, Corrie Vanderham, and C&R Vanderham Dairy. PSUF ¶ 17. |
| 3 4 | October 28, 2005 | Rick Vanderham files application with District for Permit to Operate to be issued to C&R Vanderham Dairy. PSUF ¶ 26. |
| 5 6 | December 15, 2005 | AIR files Complaint (Docket # 1). |
| 7 8 | February 2, 2006 | Corrie Vanderham Dairy, Inc. enters into agreement to purchase C&R Vanderham Dairy property from Ag Resources, LLC. PSUF ¶ 23. |
| 9 10 | February 14, 2006 | Vanderham files motion to dismiss for lack of subject matter jurisdiction for failure to exhaust administrative remedies (Docket # 11). |
| 11 12 | June 15, 2006 | Court denies Vanderham's motion to dismiss for lack of subject matter jurisdiction for failure to exhaust administrative remedies (Docket # 36). |
| 13 14 | July 7, 2006 | Vanderham files motion to dismiss for failure to state a claim upon which relief can be granted (Docket # 37). |
| 15 16 | July 10, 2006 | AIR mails 60-day notice of intent to sue to Corrie Vanderham Dairy, Inc. PSUF ¶ 18. |
| 17 18 | August 29, 2006 | AIR mails 60-day notice of intent to sue to Corrie Vanderham Dairy, Inc., and Ag Resources, LLC. PSUF ¶ 19. |
| 19 20 | September 13, 2006 | Court denies Vanderham's motion to dismiss for failure to state a claim upon which relief can be granted (Docket # 50). |
| 21 | October 31, 2006 | AIR files First Amended Complaint (Docket # 58). |

22 **G. Undisputed Facts**

23 **i. San Joaquin Valley Air Basin**

24 The EPA designated the San Joaquin Valley a serious
25 nonattainment area for the federal eight-hour ozone standard.
(PSUF No. 5.)

26 The San Joaquin Valley Air Basin includes all of San
27 Joaquin, Stanislaus, Merced, Madera, Fresno, Kings, Tulare, and
28

1 the Valley portions of Kern County, as defined by District Rule
2 ("Rule")1020 § 3.44. (PSUF No. 6.)

3 **ii. Health Effects of VOC**

4 VOCs react with oxides of nitrogen ("NOx") in the presence
5 of heat and sunlight to form ground-level ozone. (PSUF No. 1.)

6 A document prepared jointly by the California Air Resources
7 Board and the American Lung Association states that ozone
8 pollution damages lung tissue, damages crops and vegetation,
9 exacerbates asthma, reduces lung capacity, increases respiratory
10 and cardiovascular hospital admissions, and increases school and
11 work absenteeism. It also states that recent research suggests a
12 causal connection between ozone pollution and asthma. (PSUF No.
13 3.)

14 EPA statements confirm that ozone damages lung tissue,
15 reduces lung function, exacerbates respiratory ailments such as
16 asthma, increases hospital admissions, reduces productivity, and
17 is a significant health concern, particularly for children and
18 people with respiratory ailments. (PSUF No. 4.)

19 **iii. District Rules**

20 Vanderham admits that the District rules, including Rules
21 2010 and 2201, are "emission standards or limitations" as defined
22 by 42 U.S.C. §§ 7604(f), 7604(k), which define an "emission
23 standard or limitation" to include any standard or limitation
24 approved as part of the State Implementation Plan ("SIP"). (PSUF
25 No. 8.)

26 Vanderham did not obtain an Authority to Construct ("ATC")
27 permit from the District. (PSUF No. 36.)

28 In August 2005, the District established a VOC emission

1 factor for dairies of 19.3 pounds per cow per year. (PSUF No.
2 49.)

3 The District is responsible for determining what Best
4 Available Control Technology ("BACT") is on a case by case basis.
5 (PSUF No. 50.)

6 The District has not undertaken a BACT analysis for the C&R
7 Vanderham Dairy. (PSUF No. 52.)

8 **iv. AIR**

9 AIR is an unincorporated association that advocates for
10 clean air and environmental health in the San Joaquin Valley.
11 (PSUF No. 10.)

12 On September 20, 2005, AIR mailed a 60-day notice of intent
13 to sue to Rick Vanderham, Corrie Vanderham, and C&R Vanderham
14 Dairy for failure to comply with Rules 2010 and 2201. (PSUF No.
15 17.)

16 On July 10, 2006, AIR mailed a 60-day notice of intent to
17 sue to Corrie Vanderham Dairy, Inc. (PSUF No. 18.)

18 **iv. Vanderham Dairy**

19 The C&R Vanderham Dairy emits VOC from manure decomposition,
20 enteric processes (cow digestion), and feed decomposition. (PSUF
21 No. 2.)

22 The C&R Vanderham Dairy is located near Shafter in the
23 Valley portion of Kern County. (PSUF No. 7.)

24 EPA approved the December 17, 1992 version of Rule 2010 and
25 the December 19, 2002 version of Rule 2201 as part of the SIP.
26 (PSUF No. 9.)

27 C&R Vanderham Dairy is a general partnership between Corrie
28 Vanderham Dairy, Inc., and Rick Vanderham. (PSUF No. 11.)

1 Corrie Vanderham Dairy, Inc. is a California corporation.
2 (PSUF No. 12.)

3 Ag Resources, LLC is a California limited liability company.
4 (PSUF No. 13.)

5 Rick Vanderham is an individual within the meaning of the
6 Clean Air Act. (PSUF No. 14.)

7 Corrie Vanderham is an individual within the meaning of the
8 Clean Air Act. (PSUF No. 15.)

9 The Vanderham defendants are persons within the meaning of
10 the Clean Air Act. (PSUF No. 16.)

11 On August 29, 2006, AIR mailed a 60-day notice of intent to
12 sue to Corrie Vanderham Dairy, Inc., and Ag Resources, LLC.
13 (PSUF No.19.)

14 Corrie Vanderham is the president of Corrie Vanderham Dairy,
15 Inc. (PSUF No. 20.)

16 The C&R Vanderham Dairy partnership operates the dairy.
17 (PSUF No. 21.)

18 Corrie Vanderham Dairy, Inc., owns the C&R Vanderham Dairy
19 infrastructure and property, and leases them to the C&R Vanderham
20 Dairy partnership. (PSUF No. 22.)

21 Corrie Vanderham Dairy, Inc. purchased the C&R Vanderham
22 Dairy property from Ag Resources, LLC on February 2, 2006. (PSUF
23 No. 23.)

24 Ag Resources, LLC, purchased the property from John
25 Ohanesson on April 15, 2003. (PSUF No. 24.)

26 On April 29, 2005, Ag Resources, LLC entered into a "Site
27 Improvement Construction Agreement" with Vander Weerd General
28 Construction, Inc. to build a freestall dairy "for C&R Vanderham

1 Dairy" at the site at which the C&R Vanderham Dairy has been
2 constructed and which Ag Resources owned at the time. (PSUF No.
3 25.)

4 On October 28, 2005, Vanderham applied for a Permit to
5 Operate for the C&R Vanderham Dairy, and identified the milking
6 barn, cow housing, solid manure handling, and liquid manure
7 management as "equipment" for which it sought a permit to
8 operate. (PSUF No. 26.)

9 The Application for Permit to Operate also lists "land
10 application" in the waste handling category of operations and
11 equipment and identifies "feed storage/commodity barns" and
12 "silage piles" as "other dairy equipment." (PSUF No. 27.)

13 Rick Vanderham signed the Application for the Permit to
14 Operate as the applicant. (PSUF No. 28.)

15 In a July 15, 2005 letter to Mr. Sheraz Gill at the
16 District, Vanderham's counsel David Albers represented to the
17 District that his law firm "represent[s] C & R Vanderham Dairy,
18 which is developing a new dairy project."

19 The letter stated that the project would be built for 1320
20 milk cows, 195 heifers, 486 heifers over 15 months, 378 heifers
21 aged 7 to 14 months, 162 heifers 4 to 6 months, and 120 calves.
22 *Id.* According to the letter, which used a worksheet downloaded
23 from the District website, the dairy would produce 24,861.9
24 pounds or 12.4 tons per year of VOC. The worksheet attached to
25 the letter used an emission factor of 12.8 pounds per head per
26 year for milk cows. The letter indicated that the dairy was
27 under construction. (PSUF No. 29.)

28 Rick Vanderham, one of the defendants, wrote a letter to the

1 District on C&R Vanderham Dairy letterhead, in which he
2 represented to the District that "we will take certain steps . .
3 . to construct the dairy for the cattle listed in this letter."
4 (PSUF No. 30.)

5 In a letter dated December 8, 2005, Mr. Albers, on behalf of
6 "our client Rick Vanderham," represented to the District that
7 "the Vanderhams have agreed to construct permanent barriers . . .
8 to limit the dairy herd size." (PSUF No. 31.)

9 The December 8 letter identifies that copies were sent to
10 defendants Rick Vanderham and Corrie Vanderham. (PSUF No. 32.)

11 A 1999 Conditional Use Permit application from the Kern
12 County Planning Department for the defendant C&R Vanderham Dairy
13 identifies John Ohanneson as the property owner, defendant Corrie
14 Vanderham as the applicant, and defendant Richard Vanderham as
15 the applicant's individual representative. (PSUF No. 33.)

16 On the Conditional Use Permit application, Corrie
17 Vanderham's interest in the property is identified as "Buyer" and
18 under the "reason for request" section, Corrie Vanderham
19 indicates, "I would like to build a dairy on this property" above
20 his signature. (PSUF No. 34.)

21 On July 29, 2005, Vanderham obtained building permits for a
22 milk barn, two freestall barns, and two hay barns, shade
23 structures, a hoof trimming shade, and a commodity barn at the
24 dairy site. (PSUF No. 35.)

25 A construction timeline submitted with Vanderham's first
26 motion to dismiss states that construction commenced on July 18,
27 2005. (PSUF No. 37.)

28 Vanderham has constructed, or is in the process of

1 constructing, a milk barn, two freestall barns, two solid
2 separation lagoons, two liquid manure storage lagoons, corrals,
3 and the feed storage area. (PSUF No. 38.)

4 The C&R Vanderham dairy facility contains two "freestall
5 barns," that will confine the milk cow herd. Each barn is 500
6 feet long and 107 feet wide and equipped with a system that uses
7 wastewater from the liquid manure storage lagoons to "flush" the
8 manure from the freestall barns twice a day. The flush system
9 captures 80% or more of the urine and feces of the cows housed in
10 the freestall barns and flushes the waste to the solid separation
11 lagoons and the liquid manure storage lagoons. (PSUF No. 39.)

12 The corrals and milk barn also utilize a flush system,
13 except that the milk barn system uses fresh water to flush the
14 manure to the liquid manure storage lagoon. (PSUF No. 40.)

15 The two liquid manure storage lagoons each measure 110 feet
16 wide and 860 feet long, together storing 108 acre-feet of
17 liquified waste to be used for dairy flushings and to irrigate
18 and fertilize crops on 362 acres of the project site. (PSUF No.
19 41.)

20 The C&R Vanderham Dairy also contains several solid
21 separation lagoons, which are used to remove a portion of manure
22 solids from the liquified manure. (PSUF No.42.)

23 The C&R Vanderham Dairy is a stationary source of air
24 pollution, within the meaning of the Clean Air Act and Rule 2201.
25 (PSUF No. 43.) It is undisputed that C&R Vanderham Dairy are a
26 non major stationary source.

27 Dairy farms have a specific standard industrial
28 classification ("SIC") designation (0241), and all activities

1 associated with a dairy fall under SIC code major group "02"
2 which covers "agriculture production livestock." (PSUF No. 44.)

3 Vanderham admits that the cow housing and feeding areas, the
4 milking center, the liquid manure handling area, the solid manure
5 handling area, and the land application area are emissions units
6 as defined by § 3.18 of Rule 2201. (PSUF No. 45.)

7 The District also recognizes the areas listed in ¶ 45 as
8 emissions units at a dairy. (PSUF No. 46.)

9 The C&R Vanderham Dairy, as designed, includes the following
10 components - each of which will hold cows, manure, or feed -
11 located on one or more contiguous or adjacent properties:

12 freestall barns, corrals with flushed lanes, and feed storage
13 facilities (cow housing and feeding area), solid separation
14 lagoons and liquid manure storage lagoons (liquid manure handling
15 area), and milk barn (milking center). (PSUF No. 47.)

16 The C&R Vanderham Dairy will compost manure onsite (solid
17 manure handling area) and apply liquid and solid manure to land
18 at the dairy site (land application area), each of which will
19 involve manure. (PSUF No. 48.)

20 On August 24, 2004, Kern County approved the Conditional Use
21 Permit for C&R Vanderham Dairy, authorizing a maximum of 1,456
22 milk cows and 1,408 "support stock" (non-lactating or dry cows,
23 heifers, and calves). (PSUF No. 53.)

24 Defendants Rick Vanderham, Corrie Vanderham, and C&R
25 Vanderham Dairy claim that the "maximum operational design for
26 physical construction of the dairy is as follows":

27 1,320 milk cows, 195 dry cows, 540 cows aged 15-25
28 months, 378 cows aged 7-14 months, 162 cows aged 4-6

1 months, and 120 calves aged under 3 months.

2 (PSUF No. 54.)

3 Blueprints for the C&R Vanderham Dairy show a maximum
4 operational capacity at the dairy, as follows: either 1,568 milk
5 cows (overall site plan) or 1,624 milk cows (individual freestall
6 barn site plans), 280 dry cows, 470 cows aged 15-24 months, 348
7 cows aged 7-14 months, 84 cows aged 5-7 months, and 150 calves.

8 (PSUF No. 55.)

9 Vanderham has not purchased "emission reduction credits" or
10 "offsets" for VOC. (PSUF No. 64.)

11 On December 7, 2005, the Air District notified Vanderham
12 that it had completed review of the Permit to Operate, but would
13 not issue the Permit to Operate until the completion of
14 construction and a District inspection of the dairy. (PSUF No.
15 65.)

16 On April 3, 2007, the District issued the Permit to Operate.
17 (PSUF No. 66.)

18 **H. Disputed Facts**

19 Plaintiffs argue that the District does not use the document
20 "Preliminary Draft, Best Available Control Technology, Dairy
21 Operation," dated April 27, 2004 to determine BACT for New Source
22 Review. (DSDF, No. 51.)

23 Defendants argue that while the District does not use the
24 "Preliminary Draft" for guidance, it is updated by the District
25 and may be used for non-guidance purposes.

26 Also, according to Plaintiffs, the C&R Vanderham Dairy will
27 house the milk cows in the freestall barns and the support stock
28 in corrals. (DSDF, No. 56.) Defendants dispute this by arguing

1 that some support stock are housed in free stall barns as well.

2 Defendants also dispute that, dairies emit VOC from each of
 3 the emissions units at different rates based on the age of the
 4 cow and the type of housing (freestall barns for milk cows and
 5 corrals for support stock), as follows:

6

7 **Emissions Factor by Type of Cow (age) (lbs/hd/year)**

8

| Emissions Unit | Milk cows | Dry Cows | 14-24 mths | 7-14 mths | 4-6 mths | >3 mths |
|------------------------|--------------|-------------|---------------|--------------|-------------|------------|
| Cow Housing and Feed | 12.4 | 8.2 | 5.7 | 4.9 | 4.5 | 4.3 |
| Milking Center | 0.9 | N/A | N/A | N/A | N/A | N/A |
| Liquid Manure Handling | 2.7 | 1.4 | 1.0 | 0.9 | 0.8 | 0.7 |
| Land Application | 5.0 | 2.3 | 1.6 | 1.4 | 1.3 | 1.2 |
| Total | 21.0 | 11.9 | 8.3 | 7.2 | 6.6 | 6.2 |

17
 18 (DSDF, No. 57.)

19 The Potential to Emit for VOC from the cow housing and
 20 feeding emissions unit exceeds 2 pounds a day; the Potential to
 21 Emit is 76.3 lbs/day based on the maximum capacity shown by the
 22 blueprints for the C&R Vanderham Dairy and 65.2 lbs/day based on
 23 the maximum capacity provided by Vanderham. (DSDF, No. 58.)

24 The Potential to Emit for VOC from the milking center
 25 emissions unit exceeds 2 pounds a day; the Potential to Emit is
 26 4.0 lbs/day based on the maximum capacity shown by the blueprints
 27 for the C&R Vanderham Dairy and 3.3 lbs/day based on the maximum
 28 capacity provided by Vanderham. (DSDF, No. 59.)

1 The Potential to Emit for VOC from the liquid manure
2 handling emissions unit exceeds 2 pounds a day; the Potential to
3 Emit is 15.7 lbs/day based on the maximum capacity shown by the
4 blueprints for the C&R Vanderham Dairy and to 13.3 lbs/day based
5 on the maximum capacity provided by Vanderham. (DSDF, No. 60.)

6 The Potential to Emit for VOC from the land application
7 emissions unit exceeds 2 pounds a day; the Potential to Emit is
8 28.2 lbs/day based on the maximum capacity shown by the
9 blueprints for the C&R Vanderham Dairy and to 23.8 lbs/day based
10 on the maximum capacity provided by Vanderham. (DSDF, No. 61.)

11 The C&R Vanderham Dairy operation's post-project Stationary
12 Source Potential to Emit VOC exceeds ten tons per year; Vanderham
13 calculates the "total annual emissions" at the C&R Vanderham
14 Dairy as 24,861.9 pounds or 12.4 tons of VOC per year, based on
15 an outdated emission factor of 12.8 tons of VOC per head per
16 year. (DSDF, No. 62.)

17 The C&R Vanderham Dairy's post-project Stationary Source
18 Potential to Emit VOC equals 22.6 tons per year based on the
19 maximum capacity shown by the blueprints for the C&R Vanderham
20 Dairy and 19.2 tons per year based on the maximum capacity
21 provided by Vanderham. (DSDF, No. 63.)

22 Defendant dispute facts Nos. 58-63 arguing that there is no
23 basis for the "blueprint" capacity. However, Defendants offer no
24 alternative calculations or any other contrary evidence.

25 Defendants merely argue that they could not have possibly been
26 required to install BACT since the BACT determination process is
27 so closely tied to the ATC permitting process. Defendants also
28 argue that District Rule 4.6.9 exempts agricultural sources from

1 the requirement to purchase offsets.

2 **4. REQUESTS FOR JUDICIAL NOTICE**

3 "A judicially noticed fact must be one not subject to
4 reasonable dispute in that it is either (1) generally known
5 within the territorial jurisdiction of the trial court or
6 (2) capable of accurate and ready determination by resort to
7 sources whose accuracy cannot reasonably be questioned." Fed. R.
8 Evid. 201(b) (1984). "A court shall take judicial notice if
9 requested by a party and supplied with the necessary
10 information." Fed. R. Evid. 201(d) (1984). Judicially noticed
11 facts often consist of matters of public record, such as prior
12 court proceedings, see, e.g., Emrich v. Touche Ross & Co., 846
13 F.2d 1190, 1198 (9th Cir. 1988); administrative materials, see,
14 e.g., Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994); city
15 ordinances, see, e.g., Toney v. Burris, 829 F.2d 622, 626-27 (7th
16 Cir. 1987) (holding that federal courts may take judicial notice
17 of city ordinances); official maps, see, e.g., Aiello v. Town of
18 Brookhaven, 136 F. Supp. 2d 81, 86 n.8 (E.D.N.Y. 2001) (taking
19 judicial notice of geological surveys and existing land use
20 maps); or other court documents, see, e.g., Rothman v. Gregor,
21 220 F.3d 81, 92 (2d Cir. 2000) (taking judicial notice of a filed
22 complaint as a public record). Federal courts may "take notice
23 of proceedings in other courts, both within and without the
24 federal judicial system, if those proceedings have a direct
25 relation to the matters at issue." U.S. ex rel Robinson
26 Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248
27 (9th Cir. 1992).

28 Defendants request judicial notice of the following

1 documents:

- 2 1. *Finding of Substantial Inadequacy of*
3 *Implementation Plan; Call for California State*
4 *Implementation Plan Revision, Proposed Rule, 68*
5 *Fed. Reg. 7327 (February 13, 2003). (Doc. 112,*
6 *Defendants' Request for Judicial Notice, Ex. A,*
7 *Filed May 29, 2007; See also, Doc. 126,*
8 *Defendants' Request for Judicial Notice, Ex B,*
9 *Filed June 15, 2007.)*
- 10 2. *Finding of Substantial Inadequacy of*
11 *Implementation Plan; Call for California State*
12 *Implementation Plan Revision, Final Rule, 68 Fed.*
13 *Reg. 37746 (June 25, 2003). (Id. at Ex. B; See*
14 *also, Doc. 126 at Ex D.)*
- 15 3. *Revisions to the California State Implementation*
16 *Plan, San Joaquin Valley Unified Air Pollution*
17 *Control District, Proposed Rule, 68 Fed. Reg. 7330*
18 *(February 13, 2003). (Id. at Ex. C; See also,*
19 *Doc. 126 at Ex C.)*
- 20 4. *Revisions to the California State Implementation*
21 *Plan; San Joaquin Valley Unified Air Pollution*
22 *Control District, Final Rule, 69 Fed. Reg. 27837*
23 *(May 17, 2004), a true and correct copy of which*
24 *is attached hereto as Exhibit "D." (Id. at Ex. D;*
25 *See also, Doc. 126 at Ex E.)*
- 26 5. *San Joaquin Valley Unified Air Pollution Control*
27 *District, Final Draft Staff Report: Rules 2020 and*
28 *2201 (August 17, 2006). (Id. at Ex. E.)*
- 1 6. Letter for the California Air Resources Board
2 ("CARB") to Brent Newell dated May 30, 2007,
3 available at
4 <http://www.arb.ca.gov/nsr/sb288/sb288ltr1.pdf>.
5 (Doc. 150, Defendants' Request for Judicial
6 Notice, Ex. A, Filed July 30 2007.)
- 7 7. *Notice of Deficiency for 34 Clean Air Act*
8 *Operating Permit Programs in California, 67 Fed.*
9 *Reg. 35990 (May 22, 2002). (Doc. 126 at Ex A.)*
- 10 8. A verified complaint filed by plaintiff
11 Association of Irrigated Residents ("Plaintiff")
12 on or about June 18, 2004 in the action entitled
13 *Western United Dairymen, et al. v. San Joaquin*
14 *Valley Unified Air Pollution Control District, et*
15 *al., Superior Court of the State of California in*
16 *and For the County of Fresno, Case No. 04 CE CG*
17 *01596 (the "State Action"). (Doc. 126 at Ex F.)*
- 18 9. A Memorandum of Points and Authorities in

1 Opposition to Order to Show Cause Re: Preliminary
2 Injunction and Stay filed by Plaintiff on or about
3 June 18, 2004 in the State Action. (Doc. 126 at
4 Ex G.)

5 10. San Joaquin Valley Unified Air Pollution Control
6 District, Final Draft Staff Report: Amendments to
7 Rule 2020 (Exemptions) and 2201 (August 17, 2006).
8 (Doc. 126 at Ex H.)

9 11. Letter from the California Air Resources Board to
10 the United States EPA dated November 5, 2004
11 available at
12 www.arb.ca.gov/fcaa/tv/tvinfo/overview.htm. (Doc.
13 126 at Ex I.)

14 12. Opinion letter from the State of California Office
15 of the Attorney General to the United States
16 Environmental Protection Agency dated November 3,
17 2003, available at
18 www.arb.ca.gov/fcaa/tv/tvinfo/overview.htm. (Doc.
19 126 at Ex J.)

20 13. San Joaquin Valley Unified Air Pollution Control
21 District Rule 2010. (Doc. 126 at Ex K.)

22 14. San Joaquin Valley Unified Air Pollution Control
23 District Rule 2201. (Doc. 126 at Ex H.)

24 Plaintiffs request judicial notice of the following records:

25 1. Exhibit 19 is a document entitled "Ground-level
26 Ozone: Basic Information," The attached document
27 is also posted on the United States Environmental
28 Protection Agency's web-site at
<http://www.epa.gov/air/ozonepollution/basic.html>,
last updated March 6, 2007. (Doc. 86, Plaintiffs'
Request for Judicial Notice, Filed April 6, 2007.)

2. Exhibit 20 is a document entitled "Ground-level
Ozone: Health and Environment," The attached
document is also posted on the United States
Environmental Protection Agency's web-site at
<http://www.epa.gov/air/ozonepollution/health.html>,
last updated March 6, 2007. (*Id.*)

3. Exhibit 21 is a document entitled "Major Group 02:
Agriculture production livestock and animal
specialties." The attached document is also
posted on the United States Environmental
Protection Agency's web-site at
[http://www.osha.gov/pls/imis/sic_manual.display?id
=2&tab=group](http://www.osha.gov/pls/imis/sic_manual.display?id=2&tab=group), last visited Feb. 20, 2006. (*Id.*)

4. Exhibit 28 is a letter on Air District letterhead

1 notifying Defendants C&R Vanderham Dairy, *et al.*
2 ("Vanderham") that the Permit to Operate will be
3 issued on or after December 7, 2005 after
4 Vanderham completes construction and the District
5 conducts an inspection of the dairy facility.
6 (Doc. 87, Plaintiffs' Request for Judicial Notice,
7 Filed April 6, 2007.)

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5. Exhibit 29 is a document entitled "Permit to Operate," issued on April 3, 2007. (*Id.*)

Plaintiffs also seek judicial notice of a letter dated July 25, 2005 on Air District letterhead notifying Defendants that due to an imminent change in the emissions factor, Defendants proceeded in their planned construction "at their own risk." (Doc. 146, Plaintiffs Request for Judicial Notice, Filed July 26, 2006.)

There are no objections by either party to the requests for judicial notice. The records are undisputed matters of public record. All letters transmitted by a government agency on agency letterhead are self authenticating pursuant to Fed. R. Ev. 902(8). However, the contents of these exhibits may contain matters subject to dispute. A disputed fact is not the proper subject of judicial notice. The judicial notice taken here is of the existence of these documents and the fact that the documents contain the contents represented, not necessarily that opinions and information published are true.

Plaintiffs' request for Judicial Notice is **GRANTED IN PART.**

5. APPLICATION TO FILE AMICUS BRIEF BY MILK PRODUCERS COUNCIL

Late in the evening of Friday, May 18, 2007, Milk Producers Council filed an untimely Application for leave to file an Amicus Curiae Brief on behalf of Defendants. The initial hearing on Plaintiffs' motion for summary judgment was held on Monday, May

1 21, 2007. The application was filed after the close of business
2 and did not give the parties the minimal due process opportunity
3 to respond in any meaningful way to the issues raised in the
4 Application. Further, the untimeliness of the application did
5 not provide the court with sufficient time to address the
6 request.

7 Milk Producer Council's application to file an Amicus Curiae
8 Brief is **DENIED WITHOUT PREJUDICE**.

9 **6. DISCUSSION**

10 **A. Summary Judgment Standard**

11 Summary judgment is warranted only "if the pleadings,
12 depositions, answers to interrogatories, and admissions on file,
13 together with the affidavits, if any, show that there is no
14 genuine issue as to any material fact." Fed. R. Civ. P. 56©;
15 *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998).
16 Therefore, to defeat a motion for summary judgment, the non-
17 moving party must show (1) that a genuine factual issue exists
18 and (2) that this factual issue is material. *Id.* A genuine
19 issue of fact exists when the non-moving party produces evidence
20 on which a reasonable trier of fact could find in its favor
21 viewing the record as a whole in light of the evidentiary burden
22 the law places on that party. *See Triton Energy Corp. v. Square*
23 *D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995); *see also Anderson v.*
24 *Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986). Facts are
25 "material" if they "might affect the outcome of the suit under
26 the governing law." *Campbell*, 138 F.3d at 782 (quoting *Anderson*,
27 477 U.S. at 248).

28 The nonmoving party cannot simply rest on its allegations

1 without any significant probative evidence tending to support the
2 complaint. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir.
3 2001).

4 [T]he plain language of Rule 56(c) mandates the
5 entry of summary judgment, after adequate time
6 for discovery and upon motion, against a party
7 who fails to make a showing sufficient to
8 establish the existence of an element essential
9 to the party's case, and on which that party
10 will bear the burden of proof at trial. In such
11 a situation, there can be "no genuine issue as
12 to any material fact," since a complete failure
13 of proof concerning an essential element of the
14 nonmoving party's case necessarily renders all
15 other facts immaterial.

16 *Celotex Corp. v. Catrell*, 477 U.S. 317, 322-23 (1986). The more
17 implausible the claim or defense asserted by the nonmoving party,
18 the more persuasive its evidence must be to avoid summary
19 judgment. See *United States ex rel. Anderson v. N. Telecom,*
20 *Inc.*, 52 F.3d 810, 815 (9th Cir. 1996). Nevertheless, the
21 evidence must be viewed in a light most favorable to the
22 nonmoving party. *Anderson*, 477 U.S. at 255. A court's role on
23 summary judgment is not to weigh evidence or resolve issues;
24 rather, it is to determine whether there is a genuine issue for
25 trial. See *Abdul-Jabbar v. G.M. Corp.*, 85 F.3d 407, 410 (9th
26 Cir. 1996).

27 **B. AIR Has Standing to Bring This Case**

28 The Association of Irritated Residents has standing to

1 prosecute Vanderham's violations of the SIP. These violations
2 directly affect AIR members' health, aesthetic, and procedural
3 interests. Organizations have standing to bring an action on
4 behalf of their members if (1) neither the claim asserted nor the
5 relief requested requires their members to participate directly
6 in the lawsuit, (2) they seek to protect interests that are
7 germane to their purpose, and (3) their members would have
8 standing to sue individually. See *United States v. San Francisco*,
9 979 F.2d 169, 171 (9th Cir. 1992).

10 **i. AIR Members Need Not Participate Directly in the**
11 **Lawsuit**

12 Direct participation of any of AIR's members is unnecessary
13 because AIR may bring this action. The Clean Air Act allows any
14 "person" to bring an action to enforce an emission standard or
15 limitation. 42 U.S.C. § 7604(a)(1). The Act defines "person" to
16 include individuals, corporations, partnerships, and
17 associations. 42 U.S.C. § 7602(e). AIR is an unincorporated
18 association. Declaration of Tom Frantz ("Frantz Dec.") ¶ 2.
19 Thus, AIR may bring this action without the direct participation
20 of its members.

21 **ii. AIR Seeks to Protect Interests Germane to its Purpose**

22 AIR's mission is to advocate for clean air and environmental
23 health in the San Joaquin Valley. Frantz Dec. ¶ 3. The interests
24 of clean air and environmental health that AIR seeks to protect
25 using this citizen suit fall squarely within its mission.

26 **iii. AIR's Members Have Standing to Sue Individually**

27 Finally, AIR members have standing to bring this suit
28 individually. To satisfy the final prong of the test, an

1 organization must show that (1) at least one of its members has
2 suffered an injury in fact, (2) the injury is fairly traceable to
3 Vanderham's illegal conduct, and (3) it is likely, as opposed to
4 merely speculative, that the injury will be redressed by a
5 favorable decision. *Friends of the Earth, Inc. v. Laidlaw Env'tl.*
6 *Servs., Inc.*, 528 U.S. 167, 180-81 (2000). AIR member and
7 President of its Board of Directors, Tom Frantz, offers a
8 standing declaration here, to establish the injury in fact prong
9 of standing because he suffers physical, aesthetic, and
10 procedural harm. Vanderham's illegal conduct caused this harm,
11 which a favorable decision from the Court will redress.

12 **a. AIR Members Suffer Injury in Fact**

13 Physical, aesthetic, and procedural harms all satisfy the
14 injury in fact requirement. The Ninth Circuit has held that a
15 plaintiff "will suffer injury if compelled to breathe air less
16 pure than that mandated by the Clean Air Act." *See, Hall v.*
17 *Norton*, 266 F.3d 969, 976 (9th Cir. 2001) ("evidence of a credible
18 threat to the plaintiff's physical well being from airborne
19 pollutants" establishes injury in fact); *See also, Natural*
20 *Resources Defense Council v. EPA*, 507 F.2d 905, 910 (9th Cir.
21 1974). Frantz resides in the San Joaquin Valley air basin, which
22 EPA has designated nonattainment for the eight-hour ozone
23 standard. PSUF ¶ 5; Frantz Dec. ¶ 6. The C&R Vanderham Dairy
24 emits VOC in the San Joaquin Valley air basin. PSUF ¶¶ 2, 6, 7.
25 VOC reacts with oxides of nitrogen emissions to form ozone. PSUF
26 ¶ 1. Ozone has substantial adverse health effects. PSUF ¶¶ 3,
27 4. Frantz's home for the last 16 years lies 2.3 miles west of
28 the dairy. Frantz Dec. ¶ 5. Frantz breathes air that contains

1 ozone, which harms him. PSUF ¶¶ 3, 4; Frantz Dec. ¶ 6. For
2 instance, Frantz suffers from breathing difficulties which are
3 exacerbated by ozone pollution. Frantz Dec. ¶ 6. Ozone
4 pollution causes Frantz to be concerned about his health, his
5 family's health, and the health of his friends and students, many
6 of whom also live near the C&R Vanderham Dairy. Frantz Dec. ¶¶ 5,
7 6.

8 Further, aesthetic harm establishes injury in fact. *Laidlaw*,
9 528 U.S. at 183; *Environmental Rights Foundation v. Pacific*
10 *Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000). Ozone pollution
11 harms Frantz's aesthetic interest because on most summer days,
12 ozone haze obscures the view of the Sierra Nevada, Coastal Range,
13 and Sierra Madre mountains from his home in Shafter. Frantz Dec.
14 ¶ 7. Frantz has enjoyed the view of these mountains since
15 childhood. *Id.* On the extremely infrequent clear days, Frantz
16 enjoys the beauty of the San Joaquin Valley and the surrounding
17 mountains. *Id.* Vanderham's failure to obtain a preconstruction
18 permit has also deprived AIR members, including Frantz, of
19 procedural rights, which provide an independent basis for
20 standing. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007),
21 *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7
22 (1992). The "injury in fact requirements are adjusted for
23 plaintiffs raising procedural issues in that although they must
24 show a 'concrete interest' at stake, they need not show that the
25 substantive environmental harm is imminent." *Covington v.*
26 *Jefferson County*, 358 F.3d 626, 641 n.21 (9th Cir. 2004).
27 Vanderham has failed to obtain a required permit before
28 constructing the C&R Vanderham Dairy. See Section VI, *infra*.

1 The evasion of these requirements constitutes a procedural injury
2 to Frantz, as it removes safeguards specifically designed to
3 ensure that environmental consequences are properly considered.
4 *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 931 (9th Cir.
5 1988) (procedural harm where construction on project proceeded
6 without a required permit). Moreover, Rule 2201 requires that
7 the District provide the public with notice and opportunity to
8 comment on tentative permitting decisions for projects like the
9 C&R Vanderham Dairy which have a post-project Stationary Source
10 Potential to Emit that exceeds 10 tons per year. Rule 2201 §§
11 5.4, 5.5; see Section IX, *infra*. Frantz would have participated
12 in the permitting decision, and has been deprived of the
13 procedural rights to receive notice, provide comment, and
14 otherwise participate in the District's decision to permit the
15 C&R Vanderham Dairy by Vanderham's failure to obtain a permit.
16 Frantz Dec. ¶ 8. Because the Frantz Declaration establishes a
17 concrete interest at stake - air quality that contains unhealthy
18 levels of ozone - these procedural failures also establish injury
19 in fact.

20 **b. The AIR Member's Injury in Fact is Traceable to**
21 **Vanderham's Illegal Conduct**

22 These physical, aesthetic, and procedural harms to a member
23 of the plaintiff organization are traceable to Vanderham's
24 illegal conduct. Vanderham's dairy releases VOC into the San
25 Joaquin Valley air basin. PSUF ¶¶ 2, 6, 7. The VOC reacts with
26 nitrogen oxides to form ozone. PSUF ¶ 1. Ozone levels in the
27 air basin exceed the federal health-based 8-hour ozone NAAQS and
28 cause adverse health and aesthetic injuries. PSUF ¶¶ 3, 4; Frantz

1 Dec. ¶¶ 6, 7. Thus, Frantz's injuries are traceable to
2 Vanderham's failure to obtain a preconstruction permit and
3 failure to comply with pollution control requirements.

4 **c. Injunctive Relief and Civil Penalties Will Redress**
5 **the AIR Member's Injury in Fact**

6 Finally, a favorable order by this Court will redress the
7 members' injuries from Vanderham's violations of the Clean Air
8 Act. An order that compels Vanderham to obtain a permit, to
9 reduce the dairy's air pollution by installing BACT, and to buy
10 offsets will ensure a net reduction of VOC in the Valley. An
11 order requiring Vanderham to obtain a permit will also redress
12 Frantz's procedural injury. An order that imposes civil
13 penalties will deprive Vanderham of the benefit of its violations
14 and deter future violations of the Clean Air Act, also redressing
15 Frantz's injuries. *Covington*, 358 F.3d at 641, *citing Laidlaw*,
16 528 U.S. at 185-86. ("Redressability is satisfied . . . by the
17 fines and penalties applicable for violations of [the Clean Air
18 Act]"). Because Frantz has injuries in fact traceable to
19 Vanderham's redressable illegal conduct, he has standing to sue.
20 The organizational plaintiff, AIR, thus meets all three *Hunt*
21 criteria, and has standing.

22 **C. District Rule 2010 Governs the Permit Requirements for**
23 **Agricultural Source with the Force and Effect of Federal Law**

24 The first issue is the legal question of whether the Cal.
25 Health and Saf. Code § 42301.16(c)¹ exemption applies to

26 ¹ Cal. Health & Saf. Code § 42301.16(c) provides:

27 "Prior to requiring a permit for an agricultural source of air
28 pollution with actual emissions that are less than one-half of
any applicable emissions threshold for a major source in the

1 agricultural sources in light of San Joaquin Valley Air Pollution
2 District's ("District") Rule 2010's incorporation in the
3 California SIP.² There is no dispute that under state law
4 Defendants are a non major stationary source emitting less than
5 12.5 tons of VOC/year. According § 42301.16(c), non major
6 stationary sources with less than a 12.5 VOC/year emission
7 threshold are exempt from obtaining an ATC permit. Defendants
8 argue that the state law exemption applies to them because it was
9 enacted prior to the EPA's approval of the SIP, the EPA had
10 knowledge of the exemption, and the EPA expressly referenced SB
11 700 in promulgating documents it used to approve the SIP.
12 Defendants argue that they fall under the § 42301.16(c) exemption
13 because the dairy's actual emissions were 12.4 tons VOC per year,
14 which is less than the rule's threshold of 12.5 tons VOC per
15 year.

16 _____
17 district, for any air contaminant, but excluding fugitive dust, a
18 district shall, in a public hearing, make all of the following
19 findings:

- 20 (1) The source is not subject to a permit requirement pursuant
21 to Section 40724.6
- 22 (2) A permit is necessary to impose or enforce reductions of
23 emission of air pollutants that the district show cause or
24 contribute to a violation of a state or federal ambient air
25 quality standard.
- 26 (3) The requirement for a source or category of sources to
27 obtain a permit would not impose a burden on those sources
28 that is significantly more burdensome than permits required
for other similar sources of air pollution."

26 ² California's SIP includes December 17, 1992 version of
27 District Rule 2010, as well as the December 19, 2002 version of
28 Rules 2201 and 2020 that are also at issue in this case. 64 Fed.
Reg. 39920 (July 23, 1999); 69 Fed. Reg. 27837 (May 17, 2004); 40
C.F.R. § 52.220(c) (199) (i) (D); 40 C.F.R. § 52.220(c) (311) (i) (B).

1 Plaintiffs argue that under District Rule 2010, as
2 incorporated into the California SIP, any agricultural source
3 emitting air contaminants must obtain an ATC. There is no
4 dispute that § 42301.16 was ever mentioned in the provisions of
5 the California SIP. Plaintiffs argue, based on the plain
6 language of the SIP that the § 42301.16(c) exemption does not
7 apply to Defendants. Based on the plain language of the
8 California SIP, Plaintiffs argue that District rule 2010³ governs
9 the permitting the Vanderham Dairy.

10 **i. The California SIP Which was Approved By the EPA**
11 **Functions as Federal Law**

12 An EPA-approved SIP is federal law and does not change
13 unless and until EPA approves a revision requested by a state.
14 *Safe Air*, 475 F.3d at 1105. States are free to revise their EPA
15 approved SIPs, subject to certain Clean Air Act ("Act")
16 restrictions, but unless and until EPA approves a revision,
17 states are "relegated to a lone option: compliance." *El Comité*
18 *para el Bienestar de Earlimart v. Helliker*, 416 F. Supp. 2d 912,
19 934 (E.D. Cal. 2006) ("*El Comité*"), quoting *Friends of the Earth*
20 *v. Carey*, 535 F.2d 165, 178 (2nd Cir. 1976); see also *Sierra Club*
21 *v. TVA*, 430 F.3d 1337, 1346 (11th Cir. 2005) ("If a state wants
22 to add, delete, or otherwise modify any SIP provision, it must
23

24 ³ Rule 2010 § 3.0 provides: "Any person building, altering,
25 or replacing any operation, article, machine, or equipment... the
26 use of which may cause the issuance of air contaminants... shall
27 first obtain authorization for such construction from an Air
28 Pollution Control Officer ("APCO"). An authority to construct
shall remain in effect until the Permit to Operate the source
operation for which the application was filed is granted or
denied, or the application is canceled..."

1 submit the proposed change to EPA for approval.”).

2 Once “a SIP is adopted by a state and approved by the EPA,
3 it becomes controlling and must be carried out by the state” and
4 the SIP’s “requirements and commitments become binding upon the
5 state as a matter of federal law.” *AIR v. C&R Vanderham Dairy*,
6 435 F. Supp. 2d 1078, 1085 (E.D. Cal. 2006), citing *Bayview*
7 *Hunters Point Cmty. Advocates v. Metro. Transp. Comm’n*, 366 F.3d
8 692, 695 (9th Cir. 2004) and *Beentjes v. Placer County Air*
9 *Pollution Control Dist.*, 254 F. Supp. 2d 1159, 1162 (E.D. Cal.
10 2003). The Act “precludes the right of any state to ‘adopt or
11 enforce any emission standard or limitation which is less
12 stringent than the standard or limitation’ contained in an EPA
13 approved SIP.” Order on Defs.’ Mot. to Dismiss (Docket 50) at 18
14 (emphasis added), quoting *Kentucky Res. Council, Inc. v. EPA*, 304
15 F. Supp. 2d 920, 926 (W.D. Ky. 2004); see *Safe Air*, 475 F.3d at
16 1105; 42 U.S.C. § 7416 (expressly preempting state law less
17 stringent than an EPA-approved SIP). Where state and federal
18 laws conflict, the state law must yield, pursuant to the
19 Supremacy Clause. U.S. CONST. art. VI, cl. 2; *McCulloch v.*
20 *Maryland*, 17 U.S. 316, 436-437 (1819).

21 Defendants fail to address the law established in *Safe Air*.
22 Instead, Defendants first argue that the incorporation of rule
23 2020 in the SIP did not remove the agricultural exemption for
24 agricultural sources altogether. They argue that the exemption
25 still applies for sources whose actual emissions are less than
26 half of the major source threshold of 12.5 tons VOC/year.
27 Defendants assert, without any support in law that the EPA
28 approval of the SIP cannot require the district to ignore the

1 state exemption of § 42301.16(c) "because the EPA states in the
2 SIP approval that the states give the district authority to carry
3 out the provisions of the SIP." (Doc. 113, Supplemental Brief in
4 Opposition to Summary Judgment, Filed May 30, 2007.) This
5 language does not grant the states complete autonomy to determine
6 CAA regulations without regard to federal law. The states'
7 authority is still subject to the conditions outlined by the
8 State SIP. While the State of California is free to revise the
9 EPA approved SIP, the revisions must be approved by the EPA.
10 Until there is approval of the revisions, California is relegated
11 to compliance.

12 Defendants provide no evidence that the § 42301.16(c)
13 exemption was ever expressly approved by the EPA. Defendants
14 instead argue that because the EPA approved the SIP after
15 §42901.16 was enacted and because the SIP references SB 700,
16 which included § 42901.16, the EPA must have approved the SIP
17 subject to the exemption. However, at the August 13, 2007
18 hearing on the supplemental briefs to this motion, Defendants
19 revealed that § 42301.16(c) is currently pending for approval
20 with the EPA. This fact necessarily means that § 42301.16(c)
21 could not have been previously approved by the SIP, either
22 expressly or impliedly as defendants argue.

23 Defendants also contend that EPA's only recourse is to
24 disprove the SIP "like it did when it found the SIP conflicted
25 with the major source threshold." Doc. 113, Supplemental Brief
26 in Opposition to Summary Judgment, Filed May 30, 2007.) This
27 argument is legally incorrect. Once the California SIP was
28 adopted it became controlling and binding upon the State of

1 California as a matter of federal law. If the California SIP
2 contains regulations for the permitting of agricultural sources,
3 those regulations govern over any other state or district rules
4 that may conflict on the same issue. To interpret the California
5 SIP, we look to the plain meaning of its language.

6 **ii. Based on The Plain Meaning of California's SIP,**
7 **Defendants Were Required to Obtain an ATC Permit At the**
8 **Time of Construction**

9 The recent decision in *Safe Air for Everyone v. EPA* speaks
10 directly to the legal issue of whether the § 42301.16(c)
11 exemption applies. *Safe Air* involved a conflict between an
12 Idaho State regulation governing field burning and the provisions
13 of the Idaho SIP. The original Idaho SIP was approved by the EPA
14 in May of 1972. *Safe Air*, 475 F.3d at 1101. The original SIP
15 incorporated an Idaho state regulation on open burning that
16 included field burning as a type of allowable burning, although
17 containing significant limitations. *Id.* In 1993, the EPA
18 approved amendments to the Idaho SIP that included an Idaho air
19 pollution regulation containing a general prohibition on open air
20 burning and substantially changed those provisions. *Id.* The
21 regulation incorporated into the SIP listed categories of
22 allowable burning that no longer included field burning. *Id.* at
23 1102. In 2003, the EPA approved another set of amendments that
24 only updated the open field burning regulations to reflect a
25 recodification. *Id.* However, in 2005 the EPA approved
26 amendments to the SIP that incorporated Idaho Administrative Code
27 § 58.01.01.617 adding field burning as a category of allowed
28 burning. *Id.* This amendment was the first explicit reference to
those statutes in the SIP. *Id.* Plaintiffs submitted comments to

1 the EPA during the 2005 rule-making process and challenged the
2 approval of the amendments permitting field burning. *Id.* at
3 1103.

4 The issue before the Court was whether EPA's approval of the
5 field burning amendment in 2005 on the premise that the pre
6 existing Idaho SIP did not ban field burning, so that the
7 amendment only clarified what was already the case, was legally
8 sustainable. *See, Id.* at 1099. The court ruled that the EPA did
9 not have the authority to incorporate the amendments adding field
10 burning as a permissible category. The court rejected EPA's
11 arguments that in passing the amendment to the Idaho SIP it
12 considered Idaho's intent in drafting the SIP, conducted an
13 examination of the state's overall approach to field burning,
14 considered the legislative history of Idaho's provisions related
15 to agricultural burning⁴, and considered various reports and
16 plans prepared by the State and various agreements signed by the
17 State. *Safe Air*, 475 F.3d at 1104. The court also rejected the
18 EPA's argument that its own past actions indicated it understood
19 agricultural burning to be allowed in Idaho and the SIP did not
20 prohibit it. *Id.*

21 Instead the court applies the well-established
22 interpretation rule to the SIP, that the first look is to the
23

24
25 ⁴ Like *Safe Air*, Defendants also point to the legislative
26 history of SB 700 in support of their argument. However, it is
27 the plain meaning of the SIP that governs. *Safe Air*, 475 F.3d at
28 1103. Other interpretive material such as the legislative
history or an agency's interpretation of the regulation should
not be considered in light of the SIP's plain and unambiguous
meaning. *Id.*

1 plain meaning of the plan. See, *id.* at 1103 (citing to *Bayview*
2 *Hunters Point Community Advocates v. Metropolitan Transportation*
3 *Commission (BHPCA)*, 366 F.3d 692 (9th Cir. 2004).)⁵ To determine
4 the requirements of the SIP the court examined the standards
5 governing the interpretation of federal regulations. *Id.* "As a
6 general interpretative principle, the plain meaning of regulation
7 governs." *Id.* "Other interpretative materials, such as the
8 agency's own interpretation of the regulation, should not be
9 considered when the regulation has a plain meaning." *Id.* "The
10 state's interpretation of the regulations incorporated into the
11 SIP, even if binding as a matter of state law, is not directly
12 dispositive of the meaning of the SIP." *Id.* "A SIP once
13 approved by EPA, has the force and effect of federal law." *Id.*
14 at 1105. "In accord with this general proposition, a state may
15 not unilaterally alter the legal commitments of its SIP once EPA
16 approves the plan." *Id.* Based on this reasoning, the court
17 determined that the EPA did not justify or explain its approach
18 in interpreting the SIP and the approach in amending the SIP
19 could not be reconciled with the role of SIP's in the federal
20 regulatory scheme. *Id.* at 1104.

21
22
23 ⁵ According to *Bayview Hunters*, "a regulation should be
24 construed to give effect to the natural and plain meaning of its
25 words." *Bayview Hunters*, 366 F.3d at 698 (holding that the
26 expected ridership increase was never described in the SIP as
27 anything more than a target.); See also, *Crown Pac v. OSHRC*, 197
28 F.3d 1036, 1038 (9th Cir. 1999) (Because the SIP did "not on its
face, require a ridership increase of 15%... by its plain
language the SIP does not establish a mandatory requirement to
increase transit ridership by a specified percentage weights
heavily [and] weighs heavily against the conclusion that such an
obligation can be imposed based upon the SIP.)

1 As in *Safe Air*, this case involves a conflict between a
2 California State exemption for non major agricultural sources and
3 the provisions of the California SIP. On July 23, 1999 the EPA
4 approves Rule 2010 as part of the SIP, making it federal law. On
5 June 25, 2003, upon the EPA's review of the California SIP, the
6 EPA found that the plan is substantially inadequate and required
7 California to revise it by removing the agricultural equipment
8 exemption in Cal. Health & Saf. Code § 42301(e). California
9 passed SB 700 which amended Cal. Health & Saf. Code § 42301(e) to
10 remove the agricultural exemption. The bill was effective on
11 January 1, 2004. However, the bill also included the passage of
12 Cal. Health and Saf. Code § 42301.16(c) and its exemption to
13 permitting requirements for agricultural sources that emit below
14 12.5 tons VOC head/year. There is no evidence that § 42301.16(c)
15 was approved by the EPA. There is no reference to § 42301.16(c)
16 in the California SIP. On June 15, 2004, the EPA approved the
17 SIP which included the December 19, 2002 versions of Rule 2020
18 and 2201.⁶

19 As in *Safe Air*, the issue is whether California's §
20 42301.16(c) passed in SB 700 governs Defendants' permitting
21 rather than District Rule 2010, as incorporated by the California
22 SIP. Defendants arguments are as follows:

- 23 1. The state exemption controls because the SIP
24 approval process cannot grant the District
25 authority to require agricultural air permits in
26 contravention of state law since the District

27 ⁶ Per *Safe Air*, District Rules 2020 and 2201 also have the
28 force and effect of federal law.

1 obtains its authority from the State.⁷

2 2. States have absolute authority to enact state laws
3 that establish how the national standards will be
met before the EPA's approval of the SIP

4 3. The only limitations that can be imposed on a
5 state's ability to enact laws in connection with a
6 SIP is that a state cannot amend a previously
approved SIP through enactment of a state law
after EPA approves the SIP.⁸

7 4. The one half major source threshold exemption was
8 contained in a state statute almost 8 months prior
to the EPA's approval of the SIP

9 5. The EPA had knowledge of this statute and
10 expressly referenced that statute in its
promulgating document.

11 In interpreting the SIP, the plain meaning of the plan

12
13 ⁷ Defendants cite *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d
14 1028 (7th Cir. 1984.) in support of their claims. *Bethlehem*
15 *Steel* is distinguishable because it involves a partial approval
16 by the EPA of an air pollution control regulation that applied to
the polluter's non combustion emissions. *Bethlehem Steel*
17 involved the EPA's partial approval of a single regulation. This
18 case involves the different issue of the EPA's incorporation of
district rules in their approval of the California SIP and how,
as a result, the SIP conflicts with state exemptions for
agricultural sources.

19 ⁸ In support of this argument, Defendants cite *Citizens for*
20 *a Better Environment v. Deukmejian*, 731 F.Supp 2d 1159 (E.D. Cal.
21 2003). The *CBE* Court only stated that "[s]tates may not amend a
22 SIP through the enactment of subsequent state law." 731 F. Supp.
23 at 1455 n.10. The court relied on another decision which held
24 that the "procedure set forth in Clean Air Act for obtaining
modification of a SIP is [the] exclusive method by which a SIP
25 amendment can be effected." *Id.* (emphasis in original). The
26 decision does not state the "only" limitation that can be imposed
on states' abilities to enact laws in connection with a SIP. Not
27 only does *CBE* prevent a state from amending a SIP by enacting
state law contrary to an EPA-approved SIP after the approval of
the SIP, but *CBE* also prevents a state from amending a SIP at all
28 except by following the procedures outlined in the Clean Air Act.
Vanderham's reliance on *CBE* is misplaced.

1 governs. *Safe Air* establishes that California's interpretation
2 of regulations incorporated into the SIP, even if binding as a
3 matter of state law, is not directly dispositive of the meaning
4 of the SIP. *See, Safe Air*, 475 F.3d at 1103. Once the EPA
5 approved the SIP which included District Rule 2010, the rule had
6 the same force and effect as federal law. *See, Id.* Accordingly,
7 California may not unilaterally alter the legal requirements of
8 Rule 2010 as adopted in the state SIP and approved by the EPA.
9 *Id.* The ruling in *Safe Air* directly contravenes Defendants'
10 arguments that States have "absolute authority" to enact state
11 laws that establish how NAQOS will be met before the EPA's
12 approval of the SIP. A state's authority to enact laws for non
13 attainment areas to meet the requirements of the CAA is not
14 absolute. State authority is subject to federal law as
15 established by the CAA and the provisions of the SIP. *See, El*
16 *Comité*, 416 F. Supp. at 934, quoting *Carey*, 535 F.2d at 178.

17 Defendants rejoin that *Safe Air* was not a preemption case
18 and does not apply here. According to Defendants, *Safe Air* was a
19 case involving the narrow question of whether the EPA had
20 misunderstood the previous SIP to allow field burning since it
21 did not expressly prohibit it, and, as a result, went beyond the
22 scope of its authority by incorporating Idaho Administrative Code
23 § 58.01.01.617 in to the SIP. Defendants argue that *Safe Air*
24 found the EPA misread the SIP's prohibition on field burning and
25 remanded to the District court to consider Plaintiffs'
26 objections. However, in its reasoning *Safe Air* expressly holds:

- 27 1. the plain meaning of the SIP governs,
- 28 2. a SIP, once approved by EPA, has the force and

1 effect of federal law, and

2 3. a state may not unilaterally alter the legal
3 commitments of its SIP once EPA approves the plan.

4 *Safe Air*, 475 F.3d at 1105. The court in *Safe Air* held that
5 because the prohibitory language of the preexisting Idaho SIP
6 plainly applies to field burning, federal law banned field
7 burning in Idaho prior to the EPA's 2005 approval of the SIP
8 amendment. *Id.* at 1108. Similarly, because the language of Rule
9 2010 was adopted in the California SIP and plainly applies an ATC
10 requirement to any agricultural source emitting VOC's, federal
11 law currently requires an ATC for those agricultural sources
12 prior to construction.

13 Based on a plain reading of the SIP, there is no ATC permit
14 exemption for stationary sources which have actual emissions less
15 than half the major source thresholds.

16 **iii. There Is No Clearly Expressed Administrative
17 Intent to the Contrary and Interpreting the Plain
18 Meaning Will Not Lead to Absurd Results.**

19 "The plain language of the Regulation will not control if
20 'clearly expressed administrative intent is to the contrary or if
21 such plain meaning would lead to absurd results.'" *Id.* "The
22 notice requirements of the APA, 5 U.S.C. §§ 552(a)(1), 553(b),
23 require that some indication of the regulatory intent that
24 overcomes plain language must be referenced in the published
25 notices that accompanied the rulemaking process." *Id.* at 1105-
26 1106. "Otherwise, interested parties would not have the
27 meaningful opportunity to comment on proposed regulations that
28 the APA contemplates because they would have had no way of
knowing what was actually proposed." *Id.* at 1106. "Such a mode

1 of interpretation is particularly sensible under the CAA which
2 requires that judicial challenges be filed within sixty days of
3 [a] SIP approval." *Id.*; *See also*, 42 U.S.C. 7607(b)(1). "If an
4 agency can promulgate a regulation with plain language that
5 dictates one meaning but later interpret it according to an
6 intent indicated neither in the regulatory language nor in the
7 promulgation documents, parties may depend on the plain meaning
8 of the regulation in deciding not to launch a challenge within
9 the prescribed time limit." *Id.* "If, later, the agency relies
10 on an undisclosed intended meaning, interested parties might be
11 foreclosed from challenging the regulation, contrary to the
12 statutory permission to launch such challenges." *Id.* at 1106-
13 1107.

14 In support of their argument that they were exempt under §
15 42301.16(c) from obtaining a permit, Defendants further argue
16 that the EPA had knowledge of the statute, that the statute was
17 enacted almost eight months prior to the EPA's approval of the
18 SIP, and that the EPA referenced SB 700 in its final approval.
19 As a result, the EPA must have meant to approve the exemptions in
20 SB 700 since it referenced the bill in the SIP. This argument
21 has no legal merit in the Ninth Circuit.

22 Defendants have provided no persuasive authority to justify
23 departure from the requirement that the plain language of the SIP
24 governs. Defendants do not show any clearly expressed
25 administrative intent that is contrary to a plain reading of the
26 SIP. Defendants do not argue that a plain reading of the SIP
27 would lead to absurd results. Here, the EPA's approval of Rule
28 2010 in 1992 predates SB 700 by more than a decade so that the

1 operative version of Rule 2010 could not possibly include the
2 provisions of SB 700. There is no indication that the public
3 notices of proposed rulemaking to approve Rules 2020 and 2201 as
4 part of the SIP included any discussion of SB 700 in compliance
5 with the notice requirements of the APA. 68 Fed. Reg. 7330 (Feb
6 13, 2003); *See also, Safe Air*, 475 F.3d at 1105-1106. EPA's
7 passing mention of SB 700 in the final rule approving rules 2020
8 and 2201 does not satisfy the *Safe Air* criteria that the intent
9 must be expressed in the published notices to allow for
10 meaningful public comment on regulations. *Safe Air*, 475 F.3d at
11 1105-1106.

12 The Ninth Circuit emphasized that the public must be made
13 aware of the proposed contents of the SIP in order to have an
14 opportunity to meaningfully comment on them. *Id.* Mentioning SB
15 700 in the final rule approving 2020 and 2201 after the public
16 comment period had closed did not provide the opportunity for
17 public comment contemplated by *Safe Air*. Because the EPA did not
18 provide for public comment on SB 700 exemptions in the notices
19 for the approval of the rules, the EPA did not express an intent
20 to include the exemptions in the SIP.

21 The passing reference to SB 700 in the final rule does not
22 express an intent to include the SB 700 exemptions in the SIP.
23 In *Safe Air*, Idaho law allowed field burning, but the plain
24 language of the Idaho SIP at issue did not. The EPA argued, as
25 Defendants in this case argue, that the approval of an Idaho anti
26 pollution strategy in a separate rulemaking that referenced
27 Idaho's field burning statute demonstrated that the EPA
28 understood field burning to be allowed by the SIP. *Safe Air*, 475

1 F.3d at 1107. n.11, 1103 n.3. Such a passing mention was not
2 enough; the Court noted that "EPA... did not refer to the
3 provisions on field burning when explaining its decision to
4 approve the strategy." *Id.* at 1107, n. 11. Similarly, here,
5 although the EPA mentioned SB 700 in the final rule, it did not
6 refer to the exemptions that Vanderham raises in either its
7 published notices or in the final rule. See 68 Fed. Reg. 7330;
8 69 Fed. Reg. 27837. The Final rule noted that SB 700 removed an
9 illegal blanket exemption for all agricultural sources from CAA
10 requirements. 69 Fed. Reg. 27838. Such a mention of SB 700 in
11 the final rule, approving Rules 2020 and 2201 in connection with
12 the removal of a separate exemption, does not express an intent
13 to nor does it provide notice about the inclusion of other
14 exemptions.

15 According to the plain meaning of the California SIP and its
16 incorporation of Rule 2010, Defendants were required to obtain an
17 ATC permit at the time of construction. It is undisputed that
18 Defendants did not obtain an ATC permit.

19 Motion for summary judgment on the ATC permit issue is
20 **GRANTED IN FAVOR OF PLAINTIFFS.**⁹

21 _____
22 ⁹ The applicability of Rule 2010 is a legal issue that is
23 resolved by *Safe Air*. In the original motion for summary
24 judgment, Defendants did not address the legal issue and instead
25 attempted to raise triable issues of fact by producing the
26 following evidence:

- 27 1. A December 12, 2005 letter from the District to Defendants
28 where the District reasons that the ATC permit program came
into effect after Defendants commenced construction of their
dairy. Even though it is undisputed that the Dairy is a
"new source" the District treated the Dairy as an existing
source.

1 **D. There Is No Dispute that Defendants Are in Violation of Rule**
2 **2201 for Failing to Install BACT Technology and Purchase**
3 **Offsets.**

4 **i. Defendants Have Violated Rule 2201 § 4.1.1 by Emitting**
5 **Above the 2 lbs/day Allowable Threshold for Emissions**
6 **Units**

7 Section 4.1.1 of Rule 2201 states that BACT shall be
8 required for "any new emissions unit or relocation from one
9 Stationary Source to another of an existing emissions unit with a
10 potential to emit exceeding 2.0 lbs in any one day." In their
11 motion for summary judgment, Plaintiffs argue that Defendants
12 potential for VOC emissions exceeds the daily allowable threshold
13 for emissions units. Defendants contest Plaintiffs' calculations
14 and Plaintiffs' use of blueprint capacity to determine the daily

15 2. In the "White Paper" issued by the California Air Pollution
16 Control Officers Association ("CAPCOA"), the admissibility
17 of which is also in dispute in this order, which discusses
18 post SB 700 rules. Plaintiffs moved to strike the White
19 Paper for Defendants' failure to properly authenticate the
20 White Paper. According to the White Paper "agricultural
21 sources that were in existence prior to January 1, 2004 and
22 are now being permitted will be considered 'grand fathered'
23 under NSR, which means they are not subject to review until
24 they are modified... New agricultural sources which initiate
25 construction or installation after January 1, 2004, may be
26 subject to NSR if their emissions reach the applicable
27 thresholds for a 'major source'. The timeline for
28 submitting permit applications, and the specific
requirements that apply will be determined by the local air
districts."

The White Paper is an advisory document that is not legally
binding. Because the issue of Rule 2010 is a legal one,
arguments surrounding the admissibility of the letter and the
White Paper are moot. Further at the May 21, 2007 hearing the
parties were informed that the White Paper would be considered
only for the limited purpose of understanding the implementation
of District Rules.

1 allowable thresholds. However, Defendants do not offer any
 2 evidence to rebut the sworn affidavit by Plaintiffs' expert
 3 testifying to the accuracy of the calculations.

4 In support of their argument, AIR provides calculations
 5 using both the emissions factors advocated by Vanderham¹⁰ as well
 6 as their own:

7 Table 1: VOC Emissions Per Day (lbs/day) Based on Current
 8 Emissions Factor (19.3 lbs VOC/head/year)

9 BACT Threshold = 2 lbs/day of VOC

| 10 Emissions Unit | Vanderham Cow Count(1320 milk cows + support stock) | Blueprint Capacity(1624 milk cows + support stock) |
|------------------------------|---|---|
| 12 Cow Housing and Feed | 64.2 | 76.3 |
| 13 Milking Center | 3.3 | 4.0 |
| 14 Liquid Manure Handling | 13.3 | 15.7 |
| 15 Land Application | 23.8 | 28.2 |

17 Table 2: VOC Emissions Per Day (lbs/day) Based on Old Emissions
 18 Factor (12.8 lbs/VOC/head/year)

19 BACT Threshold = 2 lbs/day of VOC

| 20 Emissions Unit | Vanderham Cow Count (1320 milk cows + support stock) | Blueprint Capacity (1624 milk cows + support stock) |
|-------------------------|--|---|
| 22 Cow Housing and Feed | 43.2 | 50.6 |
| 23 Milking Center | 2.2 | 2.7 |

25 ¹⁰ Vanderham argues that Plaintiffs' calculations are
 26 inaccurate because they are based on a new emissions factor of
 27 19.3 lbs/VOC/head/year. According to Vanderham, the emissions
 28 threshold that applied at the time of construction was 12.8
 lbs/VOC/head/year. Both emissions factors yield emissions above
 2 lbs/day thus triggering the requirement to install BACT.

| | | | |
|---|------------------|------|------|
| 1 | Liquid Manure | 8.8 | 10.4 |
| 2 | Handling | | |
| 3 | Land Application | 15.8 | 18.7 |

4 Based on the evidence provided by the Plaintiffs, even using
5 the emissions factor advocated by the Defendants, the Dairy's VOC
6 emission for three of the four emissions units far exceeds the 2
7 lbs/day threshold. Only the milking center slightly exceeds the
8 threshold. However, Defendants dispute the calculations arguing
9 that the emission factor they use has not been approved by the
10 Air District or EPA. Defendants have not presented any evidence
11 to support their arguments.

12 Defendants also argue that AIR has not proved Vanderham's
13 non-fugitive emissions meet the major source threshold.
14 Defendants misunderstand the issue. AIR has not pleaded a claim
15 against Defendants that Vanderham is a major source. Whether
16 Vanderham is a major source is not material to AIR's claims. AIR
17 claims that Vanderham has emissions units that exceed the daily
18 VOC thresholds of 2 lbs/day. The issue is whether the
19 Defendants' emissions units exceed the BACT threshold of two
20 pounds per day of VOC, not whether Vanderham, emits less than the
21 12.5 ton/year threshold which triggers the § 42301.16(c)
22 exemption under state law. The exemption does not apply to
23 Defendants in this case because it is not included in the
24 federally approved SIP.

25 Even viewing the evidence in a light most favorable to
26 Defendants, there is no material issue of fact disputed that four
27
28

1 of their emissions units exceed the 2.0 lbs/day threshold.¹¹

2 **ii. There is No Triable Issue of Fact that Defendants Were**
3 **Required to Install BACT Pursuant to District Rule 2201**
4 **as Incorporated in the California SIP.**

5 Rule 2201 defines BACT as the most stringent emission
6 limitation or control technique of the following:

- 7 1. Achieved in practice for such category or class of
8 source;
- 9 2. Contained in any State Implementation Plan
10 approved by the Environmental Protection Agency
11 for such category and class of source. A specific
12 limitation technique or control technology shall
13 not apply if the owner of the proposed emissions
14 unit demonstrates to the satisfaction of the APCO
15 that such a limitation or control technique is not
16 presently achievable; or
- 17 3. Contained in an applicable federal New Source
18 Performance Standard; or
- 19 4. Any other emission limitation or control
20 technique, including process and equipment changes
21 of basic or control equipment, found by the APCO
22 to be cost effective and technologically feasible

23 ¹¹ Defendants filed an objection to Plaintiff's expert
24 testimony of William Powers. The objection was filed the Friday
25 evening before the May 21 hearing. Defendants objection was
26 denied as untimely at the May 21, 2007 hearing on this motion.
27 However, the parties were assured that Powers' opinion would not
28 be considered to the extent that it exceeded the scope of his
expertise. Powers' calculations have not been contradicted by
any evidence from Defendants. Defendants have failed to provide
further evidence to rebut Powers' calculations.

1 for such class or category of sources or for a
2 specific source.

3 Rule 2201 § 3.9. Potential to Emit is defined as the "maximum
4 capacity of any emissions unit to emit a pollutant under its
5 physical and operational design." Rule 2201 § 3.27. The
6 Potential to Emit from the dairy's emissions units includes
7 fugitive emissions. Rule 2201 § 3.19 ("Fugitive emissions shall
8 be included in all calculations, except as provided in Section
9 3.24 [major modifications]")

10 Plaintiffs argue that C&R Vanderham Dairy has four emissions
11 units which have a Potential to Emit more than two pounds of VOC
12 per day and that Defendants have failed to install BACT on the
13 four emissions units. Vanderham admits that the District rules,
14 including Rules 2010 and 2201, are "emission standards or
15 limitations" as defined by 42 U.S.C. §§ 7604(f), 7604(k), which
16 define an "emission standard or limitation" to include any
17 standard or limitation approved as part of the State
18 Implementation Plan ("SIP"). (PSUF No. 8.) There is no dispute
19 that the District has not undertaken a BACT analysis for the C&R
20 Vanderham Dairy. (PSUF No. 52.). There is no dispute that C&R
21 Vanderham Dairy is a stationary source of air pollution, within
22 the meaning of the Clean Air Act and Rule 2201. (PSUF No. 43.)
23 There is also no dispute that C&R Vanderham Dairy is a non major
24 stationary source pursuant to state law. Vanderham admits that
25 the cow housing and feeding areas, the milking center, the liquid
26 manure handling area, the solid manure handling area, and the
27 land application area are emissions units as defined by § 3.18 of
28 Rule 2201. (PSUF No. 45.)

1 According to Plaintiffs, Defendants cannot have installed
2 BACT if the APCO has not determined what is cost-effective or
3 technologically feasible for the dairy. Plaintiffs have
4 submitted sworn testimony by District staff that states the
5 District Staff determines BACT requirements on a case-by-case
6 basis during the ATC permit process. (PSUF NO. 50) Plaintiffs
7 argue that the District has not issued a permit to Defendants and
8 has therefore not undertaken a BACT analysis. As a result,
9 Defendants cannot have installed BACT when it constructed the
10 Dairy.

11 Defendants respond by arguing that they could not possibly
12 have installed BACT without a determination of BACT by the Air
13 District. Defendants contend the Air District determined that an
14 ATC permit was not required but that a permit to operate was
15 required. Accordingly, because the District issued Defendants a
16 Permit to Operate, the District must have implicitly determined
17 that no BACT was needed. This argument does not necessarily
18 follow. Defendants provide no evidence from the District or by
19 an APCO that they were not required to install BACT. Nor do
20 Defendants offer evidence that a BACT analysis can only be
21 undertaken alongside an ATC permit determination.

22 Section 4.1.2 of Rule 2201 requires BACT for an existing
23 source with a permit to operate if the source exceeds 2.0
24 lbs/day. It is undisputed that Defendants applied for a permit
25 to operate on October 28, 2005 and were granted a permit on April
26 3, 2007. BACT analysis applies independent of the ATC permit
27 requirement because obligations are independent and required
28 under different rules. There is no indication in the record

1 whether, in practice, the District separates the permitting
2 process from the BACT evaluation. Also, while the parties'
3 dispute over the calculations raises an issue of fact as to
4 whether C&R Vanderham Dairy indeed emits more than 2.0 pounds in
5 any one day, Defendants have provided no evidence to the
6 contrary.

7 Defendants' viable argument is that it is unclear whether
8 the Dairy can install BACT when the District has failed to
9 conduct a BACT analysis. While, technically, the evidence shows
10 that Defendants violated the SIP, it is unclear in the record
11 whether they could have installed BACT without the District
12 conducting the analysis. Plaintiffs have submitted a letter to
13 Defendants from the Air District that states "the District cannot
14 condone the proposed construction activities until the emission
15 factor issue is settled on August 1, 2005, since permits may be
16 required for the proposed dairy. If C&R Vanderham Dairy
17 continues with the construction, they proceed at their own
18 risk."]

19 Absent evidence to the contrary, which Defendants have not
20 provided, Defendants have exceeded the allowable emissions
21 threshold of 2 lbs/day and were required to install BACT for four
22 of their emissions units.

23 Plaintiffs motion for summary judgment on the BACT issue is
24 **GRANTED.**

25
26 **iii. There is No Triable Issue that Defendants Were Required
27 to Purchase Offsets**

28 District Rule 2201 requires agricultural sources to purchase

1 offsets if their Post-Project Stationary Source Potential to Emit
2 ("SSPE2") is above 20,000 pounds (10 tons) of VOC per year. Rule
3 2201 § 4.5. Plaintiffs argue that Defendants' SSPE2 for VOC is
4 greater than 20,000 pounds (10 tons) per year and were thus
5 required to purchase offsets. Plaintiffs claim that according to
6 Defendants' own calculations C&R Vanderham Dairy's "total annual
7 VOC emissions" are at 24,861.9 pounds or 12.4 tons, above the
8 offsets threshold of 10 tons a year. Vanderham's calculations
9 used an outdated emission factor of 12.8 pounds of VOC per head
10 per year. The current emission factor is 19.3 pounds per head
11 per year. Using the current emission factor, Plaintiffs' expert
12 places the C&R Vanderham Dairy's SSPE2 for VOC much higher, at
13 22.6 tons per year based on the maximum capacity shown by the
14 blueprints for the C&R Vanderham Dairy and at 19.2 tons per year
15 based on the maximum capacity provided by Vanderham. By any of
16 these measures, the C&R Vanderham Dairy has an SSPE2 greater than
17 10 tons per year. Therefore, Vanderham was required to purchase
18 offsets.

19 Defendants argue that there is a genuine issue of fact as to
20 whether they were required to purchase offsets. Defendants
21 dispute Plaintiffs' calculations of C&R Vanderham Dairy's daily
22 VOC emissions. According to Defendants, Plaintiffs run through
23 any number of calculations to get there and that Plaintiffs
24 completely ignore Section 4.6.9 of Rule 2201 which exempts
25 agricultural sources.¹² Defendants continue to argue that

26
27 ¹² District Rule Section 4.6 governs emissions offset
28 exemptions. According to the rules, "Emission offsets shall not
be required for... agricultural sources to the extent provided by

1 Plaintiffs have provided no authority that requires C&R Vanderham
2 Dairy to obtain offsets when federal law requires permits, of
3 which offsets are a part, for only major stationary sources.

4 It appears the exemption for ag sources does not apply as it
5 was not included in the SIP. Defendants have not offered
6 evidence to the contrary. Defendants have not offered contrary
7 evidence that rebut Plaintiffs' expert's calculations.

8
9 **D. Amount of Days in Violations**

10 According to Plaintiffs, the number of days of violation is
11 determined by the language of the SIP. *Nat'l Parks Conservation*
12 *Assoc. v. TVA*, 480 F.3d 410, 418 (6th Cir. 2007.) Courts
13 interpret the SIP "based on its plain meaning when such meaning
14 is apparent, not absurd, and not contradicted by the manifest
15 intent of the EPA, as expressed in the promulgating documents
16 available to the public. *Safe Air*, 475 F.3d at 1108. Pursuant
17 to the SIP, Plaintiffs claim that Vanderham is liable for a total
18 of 4,008 days of violations.¹³

19 _____
20 California Health and Safety Code § 42301.18(c)..." District
21 Rule 4.6.9 However, it is undisputed that section 4.6.9 does not
22 exist in the EPA approved SIP, which includes the December 19,
23 2002 version of Rule 2201 but not the September 21, 2006 version
24 on which Vanderham bases its argument. See 40 C.F.R. §
52.220(c)(311)(i)(B)(1). Per *Safe Air*, the agricultural
exemption of Section 4.2.9 does not apply to Defendants.

25 ¹³ According to Plaintiffs, the number of days of violation
26 is determined by the language of the SIP. It is undisputed that
27 Vanderham initiated construction on or after July 15, 2005. PSUF
28 ¶¶ 29, 35, 37. Therefore, Plaintiffs seek summary judgment on at
least 2,704 days of violation for the ongoing failure to install
BACT at four emissions units (676 x 4) and at least 676 days of
violation for the ongoing failure to purchase offsets.

1 Defendants alternatively argue that if violations are found,
2 they should be limited to a single point in time because the
3 requirement to secure a pre-construction permit applies only
4 prior to construction. Defendants further argue that installing
5 BACT and purchasing Offsets are functions of the Air District and
6 are so embedded in the permit process that Defendants could not
7 have satisfied such requirements without the Air District's
8 assistance. In support of their argument Defendants cite to *New*
9 *York v. Niagra Mohawk Power Corp.*, 263 F. Supp. 2d 650, 662
10 (W.D.N.Y. 2003).¹⁴

11 Plaintiffs argue that the violations of the SIP proven here
12 are not limited to a single day. The number of days of violation
13

14 Plaintiffs calculate the number of days as the total days from
15 July 15, 2005 through May 21, 2007, the date of oral argument on
16 this Motion. See 42 U.S.C. § 7413(e)(2) (days of violation
17 presumed to continue until violator establishes "continuous
18 compliance has been achieved"). However, violations may continue
19 past that date. Moreover, Plaintiffs seek summary judgment on
20 628 days of violations for the failure to obtain an ATC permit.
AIR calculates the number of days as all days from July 15, 2005
through April 3, 2007, when the District issued a Permit to
Operate to the C&R Vanderham Dairy.

21 ¹⁴ Defendants argue that "[a] given construction or
22 modification only occurs once. If a Permit is not obtained for
23 that particular project then the preconstruction permit
24 requirement of the Clean Air Act has been violated. However, the
25 requirement to secure a pre-construction permit applies prior to
26 construction or modification..., thus, a violation of the Clean
27 Air Act pre-construction permit requirement is singular in nature
28 and does not constitute an on going violation." *Niagra Mohawk*
263 F. Supp. 2d at 662; See also, *United States v. Campbell Soup,*
Co., 1997 U.S. Dist. LEXIS 3211, *5-8 (E.D. Cal. 1997).
Defendants argue that because the BACT analysis is embedded in
the permit process and the District determined that Defendants
were not required to obtain a permit, the violation should be
limited to one day.

1 is determined by the language of the SIP. *Nat'l Parks*
2 *Conservation Assoc. v. TVA*, 480 F.3d 410, 418 (6th Cir. 2007).
3 Courts interpret the SIP "based on [the SIP's] plain meaning when
4 such a meaning is apparent, not absurd, and not contradicted by
5 the manifest intent of EPA, as expressed in the promulgating
6 documents available to the public." *Safe Air for Everyone*, 475
7 F.3d at 1108. Plaintiffs argue that Vanderham does not address
8 the language of the SIP it must abide by; it instead relies on
9 authority interpreting different language in the Act.

10 Vanderham relies on *Niagara Mohawk* and *Campbell Soup Co.* to
11 assert that because the construction only occurs once,
12 Vanderham's failures to comply with law constitute only a single
13 violation of the SIP. *Opp.* at 20-21. The cases do not support
14 Vanderham's assertion. First, *Niagara Mohawk* does not interpret
15 the California SIP; rather, it interprets the language of the Act
16 itself. 263 F. Supp. 2d at 661-62 (interpreting pre-construction
17 permit requirement for major sources in the Act). However, AIR
18 is suing under the SIP's requirements. The SIP may be more
19 stringent than the CAA, as it is here. Second, the *Campbell Soup*
20 decision states that "when violation of a regulation subjects
21 private parties to criminal or civil sanctions, a regulation
22 cannot be construed to mean what an agency intended but did not
23 adequately express." 1997 U.S. Dist. LEXIS 3211, *7 (E.D. Cal.
24 1997).

25 Here, Rule 2010 expressly states that an ATC "shall remain
26 in effect until the Permit to Operate the source operation for
27 which the application was filed is granted or denied, or the
28 application is cancelled." Rule 2010 § 3.0. Unlike in *Campbell*

1 *Soup*, by the very terms of the regulation, Vanderham's violations
2 here continued until its application for Permit to Operate was
3 granted on April 3, 2007. Vanderham does not cite any authority
4 that holds that BACT and offset violations are singular
5 violations. The BACT provision simply states that BACT "shall be
6 required" for any emissions unit exceeding emissions of two
7 lbs/day of VOC. Similarly, offsets "shall be required" if the
8 SSPE2 exceeds 10 tons a year of VOC. These requirements apply
9 any time the thresholds are exceeded; the rule places no further
10 restriction on their application. Thus, the requirements
11 continue to apply, and a violation of the requirements continues
12 until rectified. No Ninth Circuit cases assess the number of
13 days of violations under the California SIP. The CAA 42 USC §
14 7413(e)(2) states the following:

15 For purposes of determining the number of days of
16 violation for which a penalty may be assessed under
17 subsection (b) or (d)(1) of this section, or section
18 304(a) [42 U.S.C. § 7604 (a)], or an assessment may be
19 made under section 120 [42 USCS § 7420], where the
20 Administrator or an air pollution control agency has
21 notified the source of the violation, and the plaintiff
22 makes a prima facie showing that the conduct or events
23 giving rise to the violation are likely to have
24 continued or recurred past the date of notice, the days
25 of violation shall be presumed to include the date of
26 such notice and each and every day thereafter until the
27 violator establishes that continuous compliance has
28 been achieved, except to the extent that the violator

1 can prove by a preponderance of the evidence that there
2 were intervening days during which no violation
3 occurred or that the violation was not continuing in
4 nature.

5 The determination of this issue depends largely on disputed
6 issues of fact. There is no indication that, prior to this
7 litigation, the dairy was notified by the District or an APCO
8 that they were in violation.

9 The summary judgment motion as to days of violation is
10 DENIED.

11
12 **7. MOTION TO STRIKE DEFENDANTS CROSS MOTION FOR SUMMARY JUDGMENT**

13 Fed. R. Civ. P. 12(f) provides that "redundant, immaterial,
14 impertinent, or scandalous matters" may be "stricken from any
15 pleading." Fed. R. Civ. P. 12(f). "[O]nly pleadings are
16 subject to motions to strike." See *Sidney-VinSTEIN v. A.H.*
17 *Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). However, a
18 "motion to strike" materials that are not part of the pleadings
19 may be regarded as an "invitation" by the movant "to consider
20 whether [proffered material] may properly be relied upon."
21 *United States v. Crisp*, 190 F.R.D. 546, 551 (E.D. Cal. 1999)
22 (quoting *Monroe v. Board of Educ.*, 65 F.R.D. 641, 645 (D. Conn.
23 1975).

24 Motions to strike are disfavored and infrequently granted.
25 See *Pease & Curran Ref., Inc. v. Spectrolab, Inc.*, 744 F. Supp.
26 945, 947 (C.D. Cal. 1990), abrogated on other grounds by *Stanton*
27 *Road Ass'n v. Lohrey Enters.*, 984 F.2d 1015 (9th Cir. 1993).
28

1 "[M]otions to strike should not be granted unless it is clear
2 that the matter to be stricken could have no possible bearing on
3 the subject matter of the litigation. *Colaprico v. Sun*
4 *Microsystems, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991)
5 (citation omitted).

6 **A. Defendants' Motion for Summary Judgment is Untimely and**
7 **in Violation of Local Rule**

8 Local Rule 78-230(e) states:

9 "Any counter-motion or other motion that a party may
10 desire to make that is related to the general subject
11 matter of the original motion shall be served and filed
12 with the Clerk in the manner and on the date prescribed
13 for the filing of opposition. In the event such
14 counter-motion or other related motion is filed, the
15 Court may continue the hearing on the original and all
16 related motions so as to give all parties reasonable
17 opportunity to serve and file oppositions and replies
18 to all pending motions."

19 Air filed its motion on April 19, 2007. Defendants filed
20 their Opposition on May 4, 2007. The hearing on the motion for
21 summary judgment was held on May 21, 2007. Based on the local
22 rule, any opposition should have been filed at least by May 7,
23 2007 or 14 calendar days before the May 21 hearing. At the May
24 21, 2007 hearing, Defendants' request to file a supplemental
25 brief on the sole issue of whether Rule 2010 applied to them was
26 granted. Defendants were notified by minute order on May 21,
27 2007 that upon filing the supplemental briefs the matter would be
28 deemed submitted. Defendants were not given leave to file a
cross motion for summary judgment at the hearing on May 21, 2007.

25 **B. Defendants' Motion for Summary Judgment Has No Possible**
26 **Bearing on the Subject Matter of the Litigation**

27 Defendants have parlayed the opportunity to file a
28 supplemental brief into filing an additional cross motion for

1 summary judgment. Defendants cross motion for summary judgment
2 raises no new argument and merely repeats, albeit at greater
3 length, the arguments set forth in their opposition to
4 Plaintiffs' motion for summary judgment (Doc. 96) and in their
5 supplemental brief (Doc. 113).

6 Defendants' first argument in their cross motion for summary
7 judgment is that the EPA acknowledged that state law establishes
8 an Air District's permitting authority and expressly considered
9 SB 700 when it gave final approval to Rules 2020 and 2201. In
10 support of their argument, Defendants provide the entire
11 legislative history of the approval process for SB 700.¹⁵
12 Defendants also reiterate that the District cannot exceed the
13 permitting authority granted to it by state law. However,
14 Defendants have submitted no legal authority to show that *Safe*
15 *Air* does not control this case. Defendants attempt fails to
16 reframe the issue to one that solely involves whether the EPA's
17 approval of the SIP can modify or enlarge the permitting
18 authority granted to the air district by the state of California.
19 This, is not the issue. The first issue is whether the language
20 of the California SIP superceded state regulations not
21 incorporated into its provisions. The Ninth Circuit in *Safe Air*,
22 a case with facts almost identical to this one, addressed the
23 issue and held that the language of the SIP functions with the

24
25 ¹⁵ However, according to *Safe Air*, "As a general
26 interpretative principle, the plain meaning of regulation
27 governs." *Safe Air*, 475 F.3d at 1103. "Other interpretative
28 materials, such as the agency's own interpretation of the
regulation, should not be considered when the regulation has a
plain meaning." *Id.*

1 same "force and effect" as federal law and supercedes any
2 conflicting state law. Defendants present no new arguments or
3 law in their untimely cross motion for summary judgment on the
4 arguments previously addressed.

5 Plaintiffs' motion to strike Defendants' cross motion for
6 summary judgment is **GRANTED**.

7
8 **8. CONCLUSION**

9 Motion for summary judgment on the issue of whether
10 Defendants violated rule 2010 by failing to obtain an ATC permit
11 is **GRANTED in favor of Plaintiffs**.

12 Motion for summary judgment on the issue of whether
13 Defendants violated Rule 2201 § 4.1.1 by failing to install BACT
14 is **GRANTED in favor of Plaintiffs**.

15 Motion for summary judgment on the issue of whether
16 Defendants violated District Rule 2201 § 4.5 by failing to
17 purchase offsets is **GRANTED in favor of Plaintiffs**.

18 The days of Defendants' violations cannot be determined as a
19 matter of law.

20 **IT IS SO ORDERED.**

21 **Dated: September 24, 2007**

22 **/s/ Oliver W. Wanger**
UNITED STATES DISTRICT JUDGE