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Air quality: CEQA exemptions: emission reduction credits.				

BILL ANALYSIS

SB 696

SENATE COMMITTEE ON ENVIRONMENTAL QUALITY
 Senator S. Joseph Simitian, Chairman
 2009-2010 Regular Session

BILL NO: SB 696
 AUTHOR: Wright
 AMENDED: June 17, 2009
 FISCAL: Yes HEARING DATE: August 26,
 2009
 URGENCY: Yes CONSULTANT: Randy Pestor

SUBJECT : EMISSION REDUCTION CREDITS

SUMMARY :

Existing law :

- 1) Provides the California Air Resources Board (ARB) with primary responsibility for control of mobile source air pollution, including adoption of rules for reducing vehicle emissions and the specification of vehicular fuel composition. (Health and Safety Code 39000 et seq. and 39500 et seq.). The ARB must coordinate efforts to attain and maintain ambient air quality standards. (39003).
- 2) Provides that air pollution control districts (APCDs) and air quality management districts (AQMDs) have primary responsibility for controlling air pollution from all sources, other than emissions from mobile sources, and establishes certain powers, duties, and requirements for those districts. (40000 et seq.).
- 3) Creates certain AQMDs, with related authority, including the South Coast Air Quality Management District (SCAQMD) under the Lewis-Presley Air Quality Management Act. SCAQMD covers portions of Los Angeles, Orange, Riverside, and San Bernardino counties within the South Coast Air Basin. (40400 et seq.).
- 4) Requires every air pollution control district in a federal nonattainment area for any national ambient air quality standard to establish by regulation a system by which air contaminant emission reductions that are to be used to

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offset future emission increases can be banked prior to use to offset future emission increases. The system must provide that only those emission reductions not otherwise required by any federal, state, or district requirement are approved by the district before they may be banked and used to offset future emission increases. (40709). The system must meet certain requirements (e.g., identification of tracking sources possessing emission credit balances, periodic analysis of increases or decreases in emissions occurring when credits are used, procedures for emission reductions credited to the bank or accruing to internal accounts). (40709.5).

- 5) Under the California Environmental Quality Act (CEQA), requires lead agencies with the principal responsibility for carrying out or approving a proposed project to prepare a negative declaration, mitigated declaration, or environmental impact report (EIR) for this action, unless the project is exempt from CEQA (CEQA includes various statutory exemptions, as well as categorical exemptions in the CEQA guidelines). (Public Resources Code 21000 et seq.).

This bill :

- 1) Abrogates the decisions of the court in Natural Resources Defense Council v. South Coast Air Quality Management District (Super. Ct. Los Angeles County, 2007, No. BS 110792), where the court declared SCAQMD actions in promulgating SCAQMD Rule 1315 (seeking to create emission reduction credits from previous air quality gains and placed into SCAQMD administered accounts) and amending SCAQMD Rule 1309.1 (allowing power plants to access credits in these accounts) violated CEQA.
- 2) Requires SCAQMD Rules 1309.1 and 1315, relating to, among other things, creation of internal accounts for essential public services, small sources, exempt sources, and eligible powerplants to be continued in full force and effect without interruption.
- 3) Exempts adoption and implementation of SCAQMD Rules 1309.1, 1315, and 1304 (relating to exempt facilities), and any

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amendments to these rules required by the U.S. Environmental Protection Agency, from CEQA.

- 4) Establishes two accounts of offset credits (operating account and set-aside account), sets the account balances by type of pollutant, and exempts use of credits in the operating account from CEQA if certain conditions are met. The CEQA exemption does not apply to the licensing or permitting of any project.
- 5) Authorizes any amendment to the operating offset account to increase the amount of emission credits above amounts established by this bill, and requires a powerplant to receive offset credits from amounts added to the operating account beyond the starting balances set in this bill, if the power plant: a) will provide power to southern California customers and the capacity is authorized by the Public Utilities Commission (PUC) in accordance with certain requirements, and b) has entered into a binding contract for purchase of the power by an electrical corporation subject to PUC regulation and certain conditions are met.
- 6) Requires SCAQMD to establish a fee paid by the powerplant for use of offset credits.
- 7) Contains related legislative intent.
- 8) Contains an urgency clause.

COMMENTS :

1) Purpose of Bill . According to the author, "Under the Federal Clean Air Act, air pollution agencies must adopt programs to require that major new or modified sources of contaminants for which the area has not attained the federal standards must provide emissions offsets for their emissions increases. They must also meet stringent emission limits requiring the best available technology. Offsets are equivalent emission reductions from other sources that go beyond legal requirements, and are usually generated from equipment shutdowns. Offsets can be either privately owned 'Emission Reduction Credits', where the

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source shutting down or overcontrolling applies to the SCAQMD for a credit. Alternatively, if a source fails to

apply for an ERC, the SCAQMD claims the offsets as 'orphan shutdowns' and deposits them in its internal bank."

The author notes that "The SCAQMD uses these offsets to supply the needed offsets for essential public services and for projects that are exempt from offsets under SCAQMD, primarily small facilities, including small businesses, and equipment replacements, relocations, and pollution control projects, as well as emergency equipment. In addition, in 2006 SCAQMD amended its rules to allow power plants meeting specified requirements, and paying significant mitigation fees, to access the SCAQMD bank."

The author also notes that certain environmental groups "filed a lawsuit challenging the SCAQMD's rules under CEQA . . . the court ruled that the SCAQMD's CEQA document was inadequate . . . the court ordered the SCAQMD to stop issuing permits relying on the internal bank, and to set aside several permits already issued . . . [and] Legislation is needed to correct the situation."

SB 696 establishes "starting balances" for five air pollutants under two accounts. The operating account contains a balance that SCAQMD believes is needed to accommodate expected activities over a four-year period, including three large powerplants - NRG El Segundo, Sentinel, and Walnut Creek Energy Center. The set aside account is not defined, but seems to be what the SCAQMD believes is the remainder of what would be available if the balance in the account was established using the methodology in the disputed Rule 1315. SB 696 also allows any amendment of the operating account to increase the emission credits above the operating account limits for power plants meeting certain conditions.

2) SCAQMD rule changes . Emission Reduction Credits (ERCs) can be created when pollution is reduced in certain ways, and those ERCs can later be sold or used to allow other pollution to occur at a later time or in a different place - a practice referred to as "offsetting" pollution.

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Several years ago, under SCAQMD Rule 1309.1, SCAQMD exempted essential public services (e.g., schools, hospitals, fire stations) from the need to obtain ERCs, allowing offsets to instead be provided through a Priority Reserve without charge. SCAQMD adopted Rule 1315 a second time on August 3, 2007, after a Court found that the rule must undergo CEQA analysis, to establish a process for adding additional credits to their internal accounts. These credits could then be distributed to facilities under Rule 1304 (exempt facilities) and 1309.1. SCAQMD also amended Rule 1309.1 on August 3, 2007, so that new electrical generating facilities could also access credits from the Priority Reserve.

3) Challenging rule changes - Natural Resources Defense Council v. South Coast Air Quality Management District . Certain environmental justice and environmental organizations subsequently challenged the adequacy of SCAQMD's project description, analysis, and mitigation measures under CEQA when adopting Rule 1315 and amending Rule 1309.1. The Superior Court found on July 28, 2008, that SCAQMD violated CEQA by failing to adequately describe, analyze, and mitigate the impacts of this action.

According to the court, "Rule 1315 is much more than a simple codification of the District's existing tracking system. As acknowledged by the District, the passage of Rule 1315, with the interplay of 1309.1, results in the anticipated emission of hundreds of tons of pollution into the Basin every day . . . Rule 1315 has expanded exponentially the universe of pollution credits available to entities needed to increase emissions into an already polluted Basin . . . How big to make the Priority Reserve, whether to allow certain credits historically unavailable for use as credits to be captured and re-sold, and whether to take credits retroactively from clean air improvements already attained

have real, foreseeable and substantial consequences."

The Court also noted that "The environmental effects of Rule 1315, in conjunction with the current and future amendments to Rule 1309.1 are real, capable of being quantified and not remote or speculative."

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4) SCAQMD response to Court decision . SCAQMD responded to the decision in three ways. First, SCAQMD appealed the case - although on June 9, 2009, parties stipulated to an extension of the briefing schedule with an August 11, 2009, deadline for the Appellant. Second, SCAQMD issued a notice of preparation for a new environmental document on March 17, 2009, and a consulting firm is preparing the document - although that document is not yet complete. Third, SCAQMD sponsored SB 696 to abrogate the Court decision and exempt the issuance and use of offsets from CEQA - thereby seeking to avoid the Court's direction while also involving the Legislature in pending litigation.

5) SCAQMD and plaintiffs seek to resolve concerns over essential public services and small businesses following Energy, Utilities, and Commerce Committee hearing . When SB 696 was heard by the Energy, Utilities, and Commerce Committee, some committee members discussed whether essential public services and small businesses relying on SCAQMD ERCs should proceed while issues relating to SCAQMDs compliance with state and federal requirements are under review by the courts.

SCAQMD and the plaintiffs exchanged letters on these issues between June 19, 2009, and July 7, 2009.

SCAQMD also wanted to address existing permits. According to the plaintiffs, "Our position is, and always has been, that nothing in Judge Jones' Writ and Injunction requires the district to revoke permits issued between the time the District adopted Rule 1315 and the date of final issuance of the Writ and Injunction." Nevertheless, SCAQMD and the plaintiffs agreed on language to clarify this issue.

With regard to essential public services and small businesses, disagreement focused on two issues. First, plaintiffs referred to "small business" as those facilities qualifying for assistance offered by SCAQMD's Small Business Assistance Office as defined Rule 102 (total gross receipts of \$5 million or less, or a business with 100 or fewer employees) and public agencies. SCAQMD disagreed, believing this to be too narrow.

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Second, SCAQMD wanted to rely on Rule 1315 in accounting for the ERCs. According to the plaintiffs, "Rule 1315 is the subject of ongoing litigation, and a vital, non-severable part of the project the District must analyze under CEQA. The District's proposal to rely on Rule 1315 as the vehicle to 'account for' credits in the internal bank during this interim period is unacceptable."

The SCAQMD and plaintiffs could therefore not agree on a way to address the essential public services and small businesses while issues relating to SCAQMDs compliance with state and federal requirements are under review by the courts.

Nevertheless, there is continuing interest by various parties in addressing essential public services and small

businesses, rather than powerplants, in a manner that does not affect the NRDC decision, pending litigation, or federal litigation.

There are also concerns that allowing credits for these powerplants will adversely affect efforts to encourage renewable energy sources - and place the Legislature in a decision-making role with litigation pending.

6) Federal court actions . The plaintiffs also filed a complaint in federal court on August 18, 2008, for Declaratory and Injunctive Relief under the federal Clean Air Act, arguing that the SCAQMD credits violate requirements that credits be real, surplus, enforceable, quantifiable, and permanent - and are therefore invalid. SCAQMD filed a Motion to Dismiss this action on October 8, 2008, asserting that the court did not have jurisdiction to hear the Complaint. The parties made various appearances before the federal court on the SCAQMD's motion.

Plaintiffs informed the Court on July 9, 2009, that they do not intend to amend the complaint and would appeal a final decision to dismiss the case for lack of jurisdiction, and the Judge indicated it would take about 90 days to issue a final decision on the matter. The Plaintiffs assert that the decision does not mean the proposed Rule 1315 is legal

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and does not mean SCAQMD has legal credits in its bank. A status conference in the case is scheduled for August 31, 2009.

7) Support and opposition concerns . According to the SCAQMD, "Unless SB 696 is passed, many upgrade projects at aging facilities will be stopped. That means many of these facilities won't be able to replace older equipment with cleaner and more energy efficient equipment and modern pollution control equipment. Consequently, neither the air quality goals of the State Implementation Plan (SIP) nor the greenhouse gas emission reductions planned for in the AB 32 Scoping Plan can be implemented."

According to opponents, "Because of the District's failure to ensure that its pollution credit system complies with federal law, there is a shortfall of credits in its banks. We are actively trying to solve this problem, but SB 696 does not provide a viable path forward. Instead, it increases air pollution in the most polluted area of the country by allowing the construction of fossil-fueled power plants."

8) Related legislation . AB 1318 (V. Manuel Perez) abrogates the Natural Resources Defense Council v. South Coast Air Quality Management District decision, requires SCAQMD to transfer credits up to specified limits for a powerplant meeting certain requirements (i.e., Sentinel powerplant) and essential public services, and exempts these actions from CEQA.

SB 579 (Lowenthal) allows Rule 1304 exempt facilities, and Rule 1309.1 (as amended May 3, 2002 - prior to the 2007 litigated amendment) Priority Reserve essential public services, to continue to operate if they are operating under a permit in reliance on those rules; authorizes SCAQMD to issue permits in reliance on Rule 1304 and Rule 1309.1 (as amended May 3, 2002); provides that nothing in this bill affects the adoption, readoption, amendment, or environmental review of Rule 1315; requires SCAQMD to track offsets or credits relating to these actions; and requires these provisions to be inoperative under certain conditions.

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SOURCE : South Coast Air Quality Management District

SUPPORT : Adgraphics, Alston & Bird, Annex Group, Ameresco, Archetype Design, Arevalo Tortilleria, Inc.; Armorcast Products, Association of California Water Agencies, Azkel Nobel Coatings, Baker Furnace, Inc.; Bay Valve Service & Engineering, Black Chamber of Commerce of Orange County, BlueScape Environmental, Boilermakers Local 92, Bricklayers Local 4, Buena Park Area Chamber of Commerce, Burbank Chamber of Commerce, C T Finishing, Inc.; California Manufacturers and Technology Association, California State Association of Electrical Workers, California Auto Body Association (JK Sandoval Enterprises), California Black Chamber of Commerce, California Chamber of Commerce, California Cleaners Association, California Construction & Industrial, California Contract Cities Association, California Council for Environmental & Economic Balance, California Dump Truck Owners Association, California Farm Bureau Federation, California Fence Contractors' Association
California Furniture, California Hispanic Chamber of Commerce, California Hospital Association, California Independent Oil Marketers Association, California Independent Petroleum Association, California League of Food Processors, California Manufacturers & Technology Association, California Metals Coalition, California-Nevada Conference of Operating Engineers, California Public Utilities Commission, California Retailers Association, California Small Business Alliance, California Small Business Association, California State Association of Electrical Workers, California State Council of Laborers, California State Pipe Trades Council, California Steel Industries, Inc.; CalPortland Company, Camino Cleaners, Career Partners, Carson Black Chamber

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of Commerce, Carson Chamber of Commerce, Celebrity Cleaners, Cement Masons Local 600, CEMEX, Chemical Industry Council of California, Circle Dry Cleaners

CITIES OF: Artesia, Azusa, Baldwin Park, Bellflower, Bradbury, Calabasas, Carson, Cathedral City, Cerritos, Chino, Claremont, Colton, Compton, Corona, Covina, Diamond Bar, Downey, Duarte, El Monte, El Segundo, Fontana, Glendale, Glendora, Huntington Beach, Indio, Industry, Irwindale, La Mirada, La Puente, La Quinta, Laguna Hills, Lakewood, Lomita, Long Beach, Lynwood, Monrovia, Montebello, Monterey Park, Moreno Valley, Murrieta, Newport Beach, Norco, Ontario, Paramount, Pasadena, Pico Rivera, Pomona, Rancho Cucamonga, Rancho Palos Verdes, Redlands, Rialto, Riverside, Rosemead, San Juan Capistrano, Santa Clarita, Santa Fe Springs, Sierra Madre Department of Public Works, Signal Hill, South El Monte, South Gate, Temple City, Tustin, Walnut, West Covina Public Works Department, Westminster

Coachella Valley Association of Governments, Coachella Valley Water District, Coalition of California Utility Employees, Conloo, Inc.; Construction Industry Air Quality Coalition,

Bernardino, Courtesy Cleaners, Crescenta Valley

Corona Chamber of Commerce, County of San

Water District, Crown Cleaners, Culver City Chamber of Commerce, DM Auto Body, Dallas Finer Cleaners, Davenport Engineering, Inc.; Del Rey Sandblasting, Del Amo Cleaners, Desert Contractors Association, Diversified printers, Inc.; Downey Unified School District, Dress for Success Cleaners, Dulin and Boynton, Eastern Municipal Water District, El Camino Cleaners, El Monte / South El Monte Chamber of Commerce, El Segundo Chamber of Commerce, Elsinore Valley Municipal Water district, EMBEE, Inc.;

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Engineering Contractors' Association, Evergreen Cleaners, Fifth Avenue Cleaners, Inc., Flasher/Barricade Association, FuturePorts, Gallerie Cleaners, GEM Mobile Treatment Services, Granite Construction Company, Greater Corona Hispanic Chamber of Commerce, Greater Lakewood Chamber of Commerce, Greater Los Angeles African American Chamber of Commerce, Greater Riverside Chambers of Commerce, Gruma Corporation - Mission Foods, Happy Cleaners, Harvey Cleaners, Hawthorne Cleaners, Heat & Frost Insulators Local 5, Hillcrest Beverly Oil Corp., Hilton Auto Collision Center, Holly Park Cleaners, Huntington Memorial Hospital, Hyde Park Cleaners, IBEW Local 441, Ironworkers Local 453, Independent Cities Association, Independent Energy Producers, Indio Chamber of Commerce, Industrial Environmental Association, Industry Compressor Co., Inland Action, Inland Empire Utilities Agency, Irvine Ranch Water District, Irwindale Chamber of Commerce, IUEC Local 18, Joseph's Cleaners, Justice Brothers, Inc.; Kaiser Permanente, Kern County Black Chamber of Commerce, Korean Drycleaners-Laundry Association + 284 individual members, KS 4000, Inc.; L to Z Enterprises, Inc.; LA Works, Laborers Local 300, Laborers Local 802, Lake Arrowhead Communities Chamber of Commerce, Lake Hemet Municipal Water District, Las Virgenes Municipal Water District, League of California Cities (Inland Empire Div), League of California Cities (Los Angeles Co. Div), League of California Cities (Riverside Div), Lindus West, Local 345 Pipefitters, Local Union 105 Sheet Metal Workers, Long Beach Area Chamber of Commerce, Los Angeles Area Chamber of Commerce, Los Angeles County Business Federation, Los Angeles County Sanitation District, Los Angeles County Sheriff's Department, Los Angeles Unified School District, Los Angeles/Orange Counties Building and Construction Trades Council, Lucky Cleaners, Manhattan Beach Chamber of Commerce, Marin Builders'

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Association, Marty Village Cleaners, Maximum Technical Services, Modern Way Cleaners, Monrovia Chamber of Commerce, Nomura Dry Cleaners, Moreno Valley Chamber of Commerce, Norge Cleaners and Alterations, Norwalk-La Mirada Unified School District, Orange County Board of Supervisors, Orange County Business Council, Orange County Fire Authority, Orange County Sanitation District, Orange County Water District, Pacific Energy Resources, Ltd.; Pacific Graphics, Pacific States Environmental Contractors, Inc., Palm Desert Chamber of

Commerce, Pass Area Legislative Council, Pemaco-Alhambra, Pemaco Metal Processing, Performance Mechanical, Plains All American Pipeline-L.P., Plasterers Local 200, Plaza Cleaners, PRI Real Estate Services, Printing Industries Association of California, Processes Unlimited International, Inc., Redlands Chamber of Commerce, Redman Equipment and Manufacturing Co., Regional Black Chamber of Southern California, Regional Chamber of Commerce of San Gabriel Valley, Regional Hispanic Chamber of Commerce, Rio Hondo Community College, Riverside County Board of Supervisors, Rix Business Sales, Robertson's, Roofers Local 36, Rosemead Chamber of Commerce, Sacramento Black Chamber of Commerce, Saint John's Health Center, San Bernardino Area Chamber of Commerce, San Bernardino Associated Governments, San Bernardino County Board of Supervisors, San Gabriel Valley Coalition of Chambers, San Gabriel Valley Council of Governments, San Gabriel Valley Economic Partnership, San Pedro Cleaners, San Pedro Chamber of Commerce, Sanitation Districts of Los Angeles County, Santa Clarita Valley Chamber of Commerce, Santa Monica Chamber of Commerce, Satin Enterprises/Norge Cleaners, Sea Shield Marine Products, Inc.; Semptra Energy, Silicon Valley Black Chamber of Commerce, Solar Turbines, Inc.; South Bay Association of Chambers of Commerce, South Bay Cities Council

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of Governments, South Orange County Chambers of Commerce, South Orange County Wastewater Authority, South Pasadena Chamber of Commerce, Southern California Alliance of POTWs, Southern California Association of Governments, Southern California Edison, Southern California Valve, Southwest California Legislative Council, SunWest Engineering
Sprinkler Fitters UA Local 709, Teamsters Joint Council 42
Teamsters Local 986, Techmer PM, Three Valleys Municipal Water District, Thyssenkrupp Safeway, Inc.; Tile, Marble & Terrazzo Local 18, Torrance Area Chamber of Commerce, Tracey's Cleaners, Turf Cleaners, Tustin Unified School District, UA Plumbers Local Union 78, United Association, United Union of Roofers, Water Poofers & Allied Workers Local 220, Upland Chamber of Commerce, Valley Industry and Commerce Association, Valley Sanitary District, View Cleaners, Villa Dry Cleaners, Village Dry Cleaners, Vulcan Materials Company, West Covina Chamber of Commerce, West San Gabriel Valley Consortium (Career Partners), Western Electrical Contractors Association, Western Municipal Water District, Western Riverside Council of Governments, Western States Council of Sheet Metal Workers, Western States Petroleum Association, Willow Cleaners, Wilmington Chamber of Commerce, Woodwest Concepts Inc., Wright Graphics, Wyatt-Bennett Equipment Co., Inc.; 10 individuals

OPPOSE:

Asian Pacific Environmental Network, Breathe California, California Communities Against Toxics, California Environmental Rights Alliance, California League of Conservation Voters, California Safe Schools, Center for Race, Poverty and the Environment, City of Commerce, Clean Power Campaign, Coalition for a Safe Environment, Coalition for Clean Air, Comite Del Amo, Communities for a Better Environment, County of Los Angeles, Desert

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Citizens Against Pollution, Desert Communities
Against Pollution, Environmental Health
Coalition, Just Transition Alliance, LA
Community Legal Center and Educational Inc.,
Los Angeles County Board of Supervisors,
Natural Resources Defense Council, Pacific
Environment, Pacoima Beautiful, People
Organized to Demand Environmental and Economic
Rights, Physicians for Social
Responsibility-Los Angeles, Planning and
Conservation League, Sierra Club California,
Union of Concerned Scientists, Urban Assessment
Planners, Urban Semillas