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**EXEMPT FROM FILING FEES PURSUANT TO GOV'T. CODE § 6103**

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CITY OF LOS ANGELES, a California Municipal Corporation, Acting By and Through its Department of Water and Power,

Plaintiff,

v.

GREAT BASIN UNIFIED AIR POLLUTION CONTROL DISTRICT; CALIFORNIA AIR RESOURCES BOARD; STATE OF CALIFORNIA, *ex rel.* STATE LANDS COMMISSION; UNITED STATES BUREAU OF LAND MANAGEMENT; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Case No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF INVOLVING: (1) CLEAN AIR ACT PREEMPTION OF HEALTH AND SAFETY CODE § 42316; (2) EPA ACTION ON 2008 STATE IMPLEMENTATION PLAN ("SIP"); (3) VOIDING THE 2008 SIP AS UNENFORCEABLE; (4) VIOLATION OF 14TH AMENDMENT OF UNITED STATES CONSTITUTION – EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS; (5) BLM COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT; (6) PROHIBIT THE GREAT BASIN UNIFIED AIR POLLUTION CONTROL DISTRICT ("DISTRICT") FROM TAKING FURTHER ACTIONS AGAINST THE CITY; (7) MANDATE OF WATER USE FOR DUST CONTROL VIOLATES ARTICLE X,

SECTION 2 OF THE CALIFORNIA CONSTITUTION AND STATE MANAGEMENT POLICY; (8) VIOLATION OF THE NATIONAL HISTORIC PRESERVATION ACT OF 1966; (9) THE DISTRICT LACKS AUTHORITY TO IMPOSE FEES ON THE CITY OF LOS ANGELES TO FUND THE DISTRICT'S GENERAL GOVERNMENTAL EXPENSES; (10) THE DISTRICT'S RESERVE FUND POLICY IS ULTRA VIRES; (11) IMPOSITION OF FEES ON THE CITY OF LOS ANGELES TO PAY FOR THE DISTRICT'S ATTORNEYS' FEES IS UNLAWFUL; (12) VIOLATION OF DUE PROCESS AND BIAS EXHIBITED BY THE DISTRICT AND ITS AIR POLLUTION CONTROL OFFICER, THEODORE P. SCHADE; (13) VIOLATION OF RIGHT TO FAIR HEARING



## I. INTRODUCTORY ALLEGATIONS

1. Plaintiff City of Los Angeles, acting by and through its Department of Water and Power (hereinafter, "City" or "LADWP") seeks a declaratory judgment and injunctive relief prohibiting the Great Basin Unified Air Pollution Control District ("District") from continuing its systematic and unlawful issuance to the City of dust control orders and fee assessments. Notwithstanding the fact that the City has mitigated dust on over 42 square miles of Owens Lake playa, the District's Board, by and through its Air Pollution Control Officer ("APCO"), Theodore P. Schade, has undertaken the singular mission of holding the City and its water customers solely responsible for almost all dust arising in the Owens Valley, despite the fact that much of this dust is naturally occurring, and despite the existence of other responsible parties. The City's water customers must pay the costs associated with the District's orders and assessments through increased water rates.

2. Since 1998, the City, pursuant to the "mitigation" requirements of Health and Safety Code section 42316 ("Section 42316"), has constructed, implemented, and operated dust mitigation on 42 square miles of the Owens Lake playa, at a cost to the City's water customers of $1.2 billion. Approximately two months of each of the City's water customer's bills are needed to finance these costs. Additionally, at a cost of $200 million, the City is in the process of

constructing an additional 3.1 square miles of dust mitigation that the District has ordered it to complete in 2013. The City is committed to complete this work and to maintain its implemented mitigation.

3. The District and APCO's orders also compel the City to use water to control dust thereby causing the City to engage in the unconstitutional waste of water. Forcing the City through regulatory fiat to undertake water intensive projects for dust mitigation (when other reasonable feasible means of dust mitigation exist) also violates the City's legal and fiduciary responsibility to its water customers. Specifically, the mitigation measures ordered by the District, through the APCO, require and thereby deprive the City of 95,000 acre-feet of water that is wasted to control dust on the Owens Lake bed. 95,000 acre-feet of water is more water than is consumed by the City of San Francisco in one year.

4. The City's extensive construction and operation of dust mitigation measures on the Owens Lake playa was pursuant to Section 42316 or through settlement agreements entered into between the City and the District. After the City had embarked upon the comprehensive dust mitigation effort, the District switched its approach and asserted that its actions, with respect to the City, were pursuant to alleged authority under the federal Clean Air Act ("CAA"), 42 U.S.C. section 7400 et seq., authority. Additionally, rather than adhering fully to its settlement agreements with the City, the District chose selected provisions of those agreements and drafted them into "orders," simply ignoring the remaining provisions of those agreements, provisions that were favorable to the City. Either the District has exceeded its Section 42316 jurisdiction in its actions, or its application of Section 42316 violates and is preempted by the CAA.

5. In proceeding as they have, the District and the APCO have ignored the statutory limitations on their authority, and have acted in an arbitrary and capricious manner. The District and the APCO's orders and fee assessments purport to comply with state and federal law, but in fact, originate from convoluted and ultimately unenforceable legal theories. Additionally, the District's orders and assessments treat the City and its water customers differently than any other similarly situated entities or individuals in California or in the United States. Moreover, the City has appealed one additional order and the District is also in the process of developing even more

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orders for the control of dust on additional lands. The cost to the City's water customers of these threatened controls is estimated to range from $160 million to $400 million.

6. The District and the California Air Resources Board ("CARB") have also acted to deprive the City's water customers of due process by consistently refusing to conduct evidentiary hearings regarding its orders and assessments, thereby depriving the City of the opportunity to cross-examine witnesses and to produce its own evidence that would test evidence presented by the District or others against the City. In this context, the District and APCO's orders are also based upon flawed science.

7. Finally, in this regard, the District is required to, but has refused to consider any evidence relating to the City's actual mitigation responsibility for dust control in light of the historical climatological and geological conditions at Owens Lake, and has refused to issue even one dust control order to either of the actual landowners on Owens Lake, the Defendants California State Lands Commission ("CSLC") and the Bureau of Land Management ("BLM").

8. The City's significant efforts at Owens Lake have resulted in corresponding success in reducing dust in the Owens Valley. The District and Theodore Schade (its APCO), however, continue to impose additional requirements on the City. In this context, Mr. Schade has stated that the District does not need to pursue other responsible parties because he already has the City and its water customers where he wants them, as "[a] fish on a hook." In this context, Mr. Schade and the District have also demanded that the City's water customers continue to fund the District's general operations. These current operations include salaries, benefits and a fully funded public pension for every District employee, and legal fees of $750 an hour (paid to private lawyers selected without a public competitive bidding process) for legal work focused on the District's attempts to force the City to construct even more projects.

9. The District and CARB have improperly relied upon Section 42316 to regulate dust at Owens Lake, and to require the City to mitigate for such dust. The District is applying Section 42316, on its face, or as it is applied, in a manner that impermissibly conflicts with the enforcement mechanisms in the CAA because under the CAA only "owners" or "operators" of facilities that emit regulated air pollutants are required to comply with the permit obligations

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under the CAA. The City is neither an owner nor an operator of any emitting facilities at Owens Lake. Through improper enforcement, under the state statute and no enforcement under the CAA, the District has immunized the actual "owners" and "operators," including the BLM and the CSLC, and improperly shifted all responsibility for dust control at Owens Lake to the City and its water customers at a cost to date in excess of $1.2 billion.

10. During almost the entire time, the United States Environmental Protection Agency ("EPA") has been absent. It has refused to execute its duties under the CAA, it has allowed the District to enforce a State Implementation Plan ("SIP") unauthorized by EPA, and it has permitted the CAA statutory scheme to be co-opted by the District.

## II. THE PARTIES

11. The City of Los Angeles is a Charter City organized under the laws of the State of California. Among its other functions, the City is responsible for providing municipal water and power to the nearly four million residents in the City. The City holds water rights in Inyo and Mono Counties, and operates water diversion facilities in these counties that transport water to its water customers. The LADWP is the department within the City that is responsible for these functions.

12. The District is a unified air district formed under Health and Safety Code section 40150 et seq., and is responsible for controlling air pollution from all stationary sources located in Alpine, Mono, and Inyo Counties.

13. The CARB is the state agency charged with enforcing the CAA within the state of California. Therefore, under Rule 19 of the Federal Rules of Civil Procedure ("FRCP"), the CARB is a necessary party to this action.

14. The CSLC was established in 1938, and according to the District, manages 95 percent of the source land within the District from which PM-10 emanates. Therefore, under Rule 19 of the FRCP, the CSLC is a necessary party to this action.

15. The BLM is an agency of the United States, and is charged with managing lands owned by the United States. The Unites States owns, and the BLM manages, much of the source

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land within the District from which PM-10 emanates. Therefore, under Rule 19 of the FRCP, the BLM is a necessary party to this action.

16. The EPA is an agency of the United States, and it is charged with enforcing the CAA. The EPA reviews state SIP submissions and approves or rejects each element of the SIP. Therefore, under Rule 19 of the FRCP, the EPA is a necessary party to this action.

## III. JURISDICTION AND VENUE

17. The Court has jurisdiction over this action under title 28 of the United States Code sections 1331 and 1367, subdivision (a). The relief sought is authorized by title 28 of the United States Code sections 2201 and 2202.

18. Venue in this District Court is authorized under Eastern District Local Rule 120 and the Fresno Division of the Eastern District Court is the proper venue for this action.

## IV. GENERAL ALLEGATIONS

19. Paragraphs 1 through 18 are realleged and incorporated as if fully set forth herein.

### A. History of the Los Angeles Department of Water and Power and Owens Lake

20. The Los Angeles Department of Water and Power was formed in 1902 to supply water and electricity to the residents of Los Angeles, California. In 1905, the citizens of Los Angeles approved a $1.5 million bond issue to secure Owens Valley land and the corresponding water rights in order to provide a new, reliable source of water for the City. In October 1905, the City posted a Notice of Water Diversion and, by 1913, the City had completed a 233-mile long aqueduct that provided for the delivery of water from the Owens River to Los Angeles.

21. As it was before the LADWP began water gathering activities in 1905, the Owens Valley is a naturally arid desert situated near the Mojave Desert and Death Valley. The Owens Valley was largely under federal ownership until approximately 1850 when California was admitted to the Union. Over approximately the next 70 years, the federal government issued land patents transferring portions of the Owens Valley into private ownership. Today, however, the United States through the BLM remains one of the largest landowners in the Owens Valley. Among the property currently owned by the BLM are large areas of the Owens Lake shoreline.

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22. The Owens River, which has its headwaters in the rugged mountains in the Eastern Sierra, terminated in a saline sink called Owens Lake, located in Inyo County, California. Before the LADWP made its first entry in the Owens Valley, Owens Lake had been shrinking due to climactic influences, and due to increased irrigation by farmers and ranchers in the Owens Valley. By October 1905, Owens Lake had an elevation of 3,567 feet above sea level.

23. While the water level in Owens Lake was declining when the City began its water gathering activities, there is no dispute that some of the remaining water that was flowing to Owens Lake was diverted to provide Los Angeles with a reliable source of drinking water. The exposed lakebed (before any dust controls were installed by the City), both above and below 3,567 feet, contributed to the well-documented dusty nature of the Owens Valley.

24. Pursuant to Section 42316, the City is only responsible for air pollution mitigation that the District can prove, through substantial evidence, results from the City's water gathering activities. Therefore, only those portions of Owens Lake that were exposed **after** 1905 can be the subject of a mitigation order directed at the City. Any dust emissions that occur above the 1905 Owens Lake shoreline elevation are either caused by natural events, which should not be subject to any District orders, or are the responsibility, pursuant to the CAA, of others, including, but not necessarily limited to, the various lakebed property owners which include the CSLC, the BLM, and private landowners. The District has never issued a single order to any other party – except the City.

**B. The Alleged Basis for the District's Authority to "Regulate" the City**

25. At its heart, this Complaint concerns the District's refusal to follow either state or federal law in the execution of its duties as an air regulator within the State of California, all to the detriment of the City and its water customers.

26. The monitoring and control of dust, referred to as "particulate matter" or "PM-10" by the EPA, is regulated under the CAA.

27. Under the CAA, the EPA is required to establish the National Ambient Air Quality Standards ("NAAQS"). Once the EPA establishes the NAAQS, the CAA provides that states have the primary responsibility for achieving and maintaining the NAAQS within each air quality

control region within the state. The way in which the NAAQS will be achieved, maintained, and enforced is contained in a SIP prepared and submitted by each state, for each pollutant.

28. The CAA requires states to develop SIPs to comply with requirements to monitor and control particulate matter. The California Legislature delegated responsibility and authority to meet these requirements to the CARB, and authorized the CARB to implement this requirement through the creation of thirty-five (35) air pollution control districts. Health & Safety Code § 39500 et seq. The District is one of those local air pollution control districts.

29. The CAA does not impose liability on the City to control dust emissions at Owens Lake because of its water gathering activities. Only "owners" or "operators" of a "source" or "facility" that have a potential to emit regulated pollutants are liable under the CAA. 42 U.S.C. § 7413(b).

30. In the early 1980s, the District asserted jurisdiction under the CAA over the City based on air emissions from the Owens Lake bed. The City contested the District's allegation and filed a writ of mandamus lawsuit ("CAA Writ") challenging the District's authority to regulate its activities under the CAA. In the CAA Writ, the City alleged that the District had no jurisdiction over the City under the CAA because the City's water gathering operations from the Owens River do not qualify as a "facility" under the CAA, and that the City did not (and does not) own the property on which the Owens Lake bed is located.

31. In 1983, the CAA Writ, involving the unlawful application of the CAA to the City, was dismissed following enactment of Section 42316 by the California Legislature, which provides some clarity to the situation by describing the District's scope of authority with respect to the City. Section 42316 imposes a dust mitigation obligation on the City. It does not implicate, at all, the provisions of the CAA.

32. The District does not have authority or jurisdiction, under the CAA, to regulate the City, which is located 250 miles to its south and is outside of its jurisdictional boundaries. Moreover, as noted, there is nothing within Section 42316 that can be reasonably construed as providing the District with CAA authority over the City, even if this was possible. Instead, the District's narrow scope of authority is limited to conducting studies associated with the City's



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activities, and to insure that the City "mitigates" for dust that may be associated with certain of its actions, limited to the terms and conditions set forth in Section 42316.

33. Every order that the District issues to the City requiring mitigation measures or payment of fees must be a proper exercise of authority under Section 42316, and cannot be based on the CAA. The District must establish with substantial evidence a causal connection between the City's water gathering activities and each air quality violation before it has authority to require or amend dust controls, and may annually assess fees only when such fees are directly linked to the District's proper exercise of authority under Section 42316. There is no possible construction of Section 42316 that would lead to the District's obvious position that the City be responsible for the control of dust on 100 percent of the Owens Lake bed.

**C. The CAA and the SIP History at Owens Lake**

34. Under the CAA, the EPA is responsible for identifying air pollutants that may endanger public health and welfare, and for promulgating standards for the maximum allowable concentrations of each identified pollutant. These standards are referred to as the NAAQS. In 1971, the EPA identified PM-10 (in this situation "dust") as an air pollutant under the CAA, and established an applicable emission standard.

35. The CAA further requires the EPA to divide each state into air quality control regions ("AQCR"). One such AQCR is the Owens Valley Planning Area ("OVPA"). The OVPA is located in Inyo County, and incorporates the area of Owens Lake.

36. Each AQCR is characterized as either "attainment" or "nonattainment" for each identified air pollutant, depending on whether the average level of that air pollutant in that region is at or below (attainment) or above (nonattainment) the level mandated by the NAAQS. The EPA has designated the OVPA as a "serious nonattainment area" for PM-10.

37. For a serious nonattainment area, the CAA mandates that nonattainment areas shall reach attainment "as expeditiously as practicable but no later than the end of the tenth calendar year beginning after the area's designation as nonattainment, except that, for areas designated nonattainment for PM-10 under section 7407(d)(4) of this title, the date shall not extend beyond December 31, 2001." 42 U.S.C. § 7513(c)(1).

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38. Recognizing that certain nonattainment areas would not be able to achieve attainment under the CAA by the required date, title 42 of the United States Code section 7513(b)(1)(A) allows states to apply for up to a 5-year extension of the area attainment deadline of December 31, 2001. The EPA may only grant one extension under title 42 of the United States Code section 7513(e).

39. On August 7, 1987, the EPA designated the OVPA as one of the areas in the nation that violates the new PM-10 NAAQS.

40. Under the CAA, each state must submit to the EPA a SIP establishing "enforceable emission limitations and other control measures" designed to, among other things, achieve attainment in nonattainment AQCRs within the state. The SIP is a state obligation and is not enforceable against any other party.

41. All SIPs developed in serious nonattainment areas must include contingency measures that shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date.

42. In November 1998, the District submitted to the EPA a SIP for the OVPA ("1998 SIP"). In September 1999, the EPA approved the 1998 SIP, and it remains the operative SIP for the OVPA. The 1998 SIP prescribes only three allowable mitigation control measures that can be used to control PM-10 within the OVPA: (1) shallow flooding; (2) managed vegetation; and (3) gravel cover. Despite numerous attempts by the City to expand this list of approved control measures, the District has consistently refused to approve additional control measures for the OVPA. In any event, pursuant to Section 42316, CAA-approved control measures are not relevant to how the City mitigates for dust.

43. The CAA does not impose liability on the City to control PM-10 emissions in the OVPA because the City's facilities do not emit PM-10 and the City does not own the land from which most of the PM-10 emanates. Only "owners" or "operators" of a "source" or "facility" that directly emits, or has a potential to emit, a regulated pollutant are liable under the CAA.

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42 U.S.C. § 7413(b). Those liable under the CAA are required to obtain permits to operate their facility.

44. The 1998 SIP identifies Owens Lake as a primary "source" of PM-10 dust emissions in the OVPA. According to the District, "[t]he bed of Owens Lake – most of which is owned by the State of California and managed by [the CSLC] – is the major source of PM-10 emissions contributing to air quality violations in the Owens Valley Planning Area."

45. The 1998 SIP further notes that Section 42316 is the sole legal basis for the District's authority to issue dust control orders to the City. Section 42316 does not prescribe that the City mitigation be limited to those means approved pursuant to the CAA. The 1998 SIP also acknowledges that the District will issue a dust control mitigation order to the City for the Owens Lake project, which is identified as a "35 square mile control area within the 100 square mile lakebed." Finally, in this regard, the 1998 SIP grants the District a one-time extension of attainment date pursuant to title 42 of the United States Code section 7513, subsection (e), until December 31, 2006.

46. The 1998 SIP provides that the City's mitigation responsibility, under Section 42316, will be specifically limited to a maximum area of 35 square miles to be outlined when the District revised the 1998 SIP in 2003.

47. In 2003, the District revised the 1998 SIP ("2003 SIP"). The 2003 SIP identifies a maximum control area on Owens Lake of 29.8 square miles, which was completed by the City by the December 31, 2006, deadline set by the EPA in the 1998 SIP.

48. In 2006, the District attempted to impose additional control requirements on the City, not under Section 42316, but instead, under the CAA. The City objected to these additional dust control orders. In order to resolve this dispute, the City and the District entered into a settlement agreement ("2006 Settlement Agreement") in which the City agreed to mitigation of a total of 43 square miles of the Owens Lake playa. The 2006 Settlement Agreement also required the District to amend the 2003 SIP for the OVPA, which was completed.

49. Like the 1998 SIP, the 2003 SIP imposes affirmative obligations to implement dust mitigation upon the City pursuant to Section 42316, not the CAA. In 2005, however, the



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District, for the first time, attempted to impose dust control requirements on the City pursuant to the CAA. The 2005 District order purported to be a "contingency measure" which is triggered under certain circumstances under the CAA. The 2005 District order did not relate to the City's obligations pursuant to Section 42316.

50. As noted, the 2006 Settlement Agreement also requires the District to amend the 2003 SIP for the OVPA. A SIP revision was also ordered by the EPA in 2007 based on a finding of nonattainment for the OVPA. The resulting 2008 SIP ("2008 SIP") incorporates the 2006 Settlement Agreement between the City and the District, and provides an attainment demonstration by March 2012.

51. During the District's Board meeting in December 2008, the APCO claimed that the 43 square miles of controls that were included in the 2008 SIP would achieve attainment within the OVPA.

52. The District eventually approved the 2008 SIP and District Board Order, which ordered the City to mitigate dust on an additional 13.2 square miles of the Owens Lake playa, bringing the total mitigation to 43 square miles. This new order included terms allowing the City to construct a 3.5 square mile area of waterless dust control that became known as Moat and Row. After CSLC staff raised various concerns about the environmental effects of the operation of Moat and Row, and refused to recommend a lease amendment allowing the City to construct it, the City prepared a Supplemental Environmental Impact Report demonstrating it would not significantly affect the environment; however, the CSLC ultimately rejected the City's request for a lease amendment allowing it to construct and operate Moat and Row. Because the additional negotiations and environmental analysis associated with its attempt to obtain permission to construct the waterless dust control method caused the City to miss a regulatory deadline for constructing Moat and Row, the City reluctantly agreed, upon threat of financial penalty, to construct two additional square miles of dust mitigation measures, which are known as "Phase 8."

53. The 2008 SIP also included contingency measures to be implemented by the District if portions of Owens Lake, beyond those the City agreed to control, continued to create exceedances of the federal air quality standards, and if the District found that its 2008 SIP had



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failed or that the District had failed to make reasonable further progress toward attainment under the CAA.

54. Neither the 2003 SIP, nor the 2008 SIP, were ever approved by the EPA. The 2008 SIP contained an attainment deadline of March 2012, unless an extension was granted. No extension has been granted by the EPA. It is unlikely that the EPA has the authority to grant an extension for the 2008 SIP attainment deadline because it has not acted to approve the plan. Moreover, the City is not subject to orders issued pursuant to a SIP because they emanate from the CAA and the CAA does not apply to the City. In this context, the 2003 and 2008 SIPs cannot be legally enforceable against the City, or anyone else. Notwithstanding this fact, the City continues to undertake construction on areas that it agreed to control under the 2006 Settlement Agreement it executed with the District (and that was incorporated into the 2008 SIP).

55. All dust control orders involving Owens Lake that were issued by the District to the City between 1998 and December 2010, were voluntarily agreed to by the City, but in doing so, it was expressly noted that implementation was pursuant to Section 42316 and not the CAA. (At no time, however, did the District present any "substantial evidence" demonstrating that the City was actually connected with the mitigation agreed to.) Moreover, all dust controls implemented by the City from 1998 through 2010 were, in some fashion, derived from the 1998 SIP. The 1998 SIP specifically states that the legal foundation that authorized the District's dust control orders to the City is found in Section 42316.

56. The extreme costs for the implementation of agreed upon dust control have a direct and significant adverse impact on the City and the City's water customers. Taken together, annual dust control operations and maintenance, and the purchase of replacement water, result in a direct cost, through increased rates, that are imposed upon the City's water customers.

57. The vast majority of dust controls ordered by the District, and constructed by the City on Owens Lake, involve placing high quality water on the saline lakebed to control dust. In this era of dwindling water supplies, the District's orders necessitate the City to replace up to 95,000 acre-feet of water from other sources. To satisfy municipal water demands, while its Los Angeles Aqueduct supplies have been reallocated to implement dust control projects, the City has

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been forced to increase its dependence on imported water supplies from the State Water Project ("SWP") and the Metropolitan Water District ("MWD"), resulting in increased energy usage and greenhouse gas emissions associated with the transportation of the SWP and the MWD water supplies from the Sacramento-San Joaquin Delta and Colorado River. The use of up to 95,000 acre-feet per year of water for dust control on Owens Lake generates approximately 83,505 tons of $CO_2$ greenhouse gas emissions that result from pumping replacement water via the SWP. The District's dust control orders, however, have only resulted in the control of approximately 76,000 to 78,000 tons of dust each year. Therefore, for every ton of dust pollution controlled on Owens Lake, at least one ton of greenhouse gas pollution is created by pumping replacement water via the SWP and the MWD. Moreover, and in any event, the use of up to 95,000 acre-feet of water for dust control, when other reasonable feasible methods of mitigation are available, is an unconstitutional waste of water pursuant to Article X, section 2, of the California State Constitution.

**D. The District's Most Recent Illegal Orders**

58. On August 1, 2011, the District issued a Supplemental Control Requirements Determination ("2011 SCRD"), which orders the City to install dust control measures on an additional 2.86 square miles of the Owens Lake bed, much of which exists above the 1905 Owens Lake shoreline of 3,567 feet above sea level. The 2011 SCRD was issued as a "contingency measure" under the 2008 SIP, despite the unenforceability of the 2008 SIP because of the lack of EPA approval. The 2011 SCRD includes the requirement to construct dust controls in excess of those specified in the 2008 SIP, which, by definition should have included controls sufficient to demonstrate containment. The estimated costs to complete the 2011 SCRD range from $177 million to $255 million, and will require the use of up to approximately 4,800 acre-feet of additional water.

59. Unlike previous mitigation orders issued by the District to the City, the 2011 SCRD was issued on the grounds that the District's 2008 SIP failed to achieve attainment under the CAA by the statutory deadline. The 2011 SCRD, however, is not accompanied by any District finding that the 2008 SIP, even if it is valid, failed to reach attainment. Additionally, the



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2011 SCRD does not contain an allegation that the District's dust control program has failed to achieve reasonable further progress, thereby triggering any contingency measures. Instead, the 2011 SCRD, relying on unfounded scientific dust identification models, and relying on the CAA for implementation, simply seeks to hold the City responsible for dust emissions that are allegedly occurring ***above*** the 45 square miles that the City has agreed to control under Section 42316, and ***above*** the regulatory shoreline for which the City is allegedly responsible for mitigation. The District's 2011 SRCD is unenforceable because it neither comports with the CAA, which the District contends it is acting under, nor does it fall within the ambit of Section 42316.

60. The District's order is even more egregious because it attempts to impose a "contingency measure" for dust control on the City who is neither an owner, nor an operator of the dust emission source at Owens Lake; despite the District's APCO admitting that the party responsible for dust control at Owens Lake is the landowner. Mr. Schade stated to his Board on September 14, 2009, at a Board meeting:

> I tried to subtly remind them (CSLC) that because it is their lake, it is their dust and to cut to the chase – we've got a fish on the hook called the DWP that's taking care of the State's dust for them. Why would you let the fish off the hook which is what [the State] seems to [] be doing. If the fish gets let off the hook at some point, then this board can, I would recommend would/should order the State of California to fix their dust problem. Where is the State going to [get] money to fix Owens Lake? In my mind, it's a small minded view by small minded bureaucrats.

61. On June 18, 2012, the District issued yet another Supplemental Control Requirements Determination ("2012 SCRD"), in draft form. Like the 2011 SCRD, the 2012 SCRD is an alleged "contingency measure" issued under the unapproved and unenforceable 2008 SIP.

62. The District, consistent with its behavior related to the 2011 SCRD, has denied the City, and its water customers, any due process in spite of the City repeatedly asking for some kind of evidentiary hearing on these significant issues.

63. On September 5, 2012, the District's Board President's response was that as long as dust blows from Owens Lake, the City will be responsible for installing dust controls. He also stated that while he believes the Board has the power and authority to hold an evidentiary hearing to vet the District's findings and allows the City to present exculpatory evidence, he is not in

favor of such a hearing because he does not need to hear the evidence, but is comfortable with his APCO's representations. The District Board voted to deny the City an evidentiary hearing.

64. Upon receipt of the 2011 SCRD, the City immediately voiced its objections to the District. The City provided several specific objections to the 2011 SCRD. The City repeated these same objections with respect to the draft 2012 SCRD.

65. Instead of addressing any of the City's responses, the District simply responded that the City has agreed to perform the 2011 SCRD under the 2006 Settlement Agreement, that the 2011 SCRD is a contingency measure under the CAA, and there is substantial evidence to show that the City is the responsible party.

66. The CARB has been complicit in the District's constant denial of the City's water customers' right to due process. It is unconscionable that a regulated agency like the City, which appropriately has a fiduciary responsibility to the citizens of Los Angeles, is continually denied the opportunity to challenge District evidence that imposes hundreds of millions of dollars in environmental mitigation on the backs of LADWP customers.

67. Although it is undisputed that the City's water diversion operations in the OVPA neither emit, nor have the potential to emit, air pollutants regulated under the CAA, the District maintains that the facilities cause the emission of PM-10. Specifically, the District argues that the City's diversion operations caused Owens Lake to recede, exposing dry lakebed to high winds which create the PM-10 pollution in the OVPA, therefore the City must implement the 2011 SCRD. During a Board meeting on September 5, 2012, the District's APCO, in the context of the 2012 SCRD, when faced with the question regarding whether his Board has any power to limit his ability to pursue the City under the 2012 SCRD, stated that the Board has no power to limit his actions, and that the CAA mandates that he issue the order.

68. The City has repeatedly, to no avail, asserted that, in the context of its water gathering activities in the Owens Valley, it is not subject to CAA jurisdiction, and that the District's jurisdiction to order the City to implement dust mitigation measures is limited to what is provided in Section 42316. The District, acting under the provisions of Section 42316, has limited authority to order the City to mitigate for dust associated with its water gathering

activities. Despite this fact, the APCO continues to issue orders to the City based on his purported authority under the CAA.

**E. The District's Unlawful Assessments**

69. The District has the authority under California Health and Safety Code section 40701.5 ("Section 40701.5") to assess the citizens of the District for the expenses incurred in its execution of its duties as an air pollution control district. Since 1992, the District has waived ***all*** collection of contributions pursuant to Section 40701.5.

70. Instead of collecting fees from the citizens who comprise the air pollution control district, the District has elected to assess the City for approximately 90 percent of the cost of its regulatory operations. The District's fee assessments to the City finance employee wages; retirement; insurance benefits; taxes; retiree medical insurance unfunded liability; worker's compensation insurance; dues; subscriptions; education; use tax and fees; liability, fire, and casualty insurance; leases and rents for equipment, offices, etc.; postage and shipping; professional and special services, supplies, and tools; transportation and travel; safety; scientific supplies; software; fuel and gasoline; project demonstration; control measure testing; vehicles; and equipment. During fiscal year 2012-2013, the District has budgeted as assessment fees to the City for these categories a total of $3,831,350. While the City has objected to these fee assessments as being outside of the scope of Section 42316, it has, under protest, paid these fees.

71. Section 42316 provides, in relevant part, that the District "may require the city to pay, on an annual basis, reasonable fees, based on an estimate of the actual costs to the district of its activities associated with the development of the mitigation measures and related air quality analysis with respect to those activities of the city [associated with the production, diversion, storage or conveyance of water . . .]."

72. Section 42316 only permits the District to assess the City, on an annual basis, fees based on actual costs for the District's activities "associated with the development of the mitigation measures and related air quality analysis with respect to those activities of the city."

73. The District has also unlawfully attempted to finance a litigation war fund chest through fee assessments. On December 5, 2011, the District's Board met and approved an order



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requiring the City to pay $500,000 in supplemental fees under Section 42316. The purpose of the supplemental fee request was to pay attorneys' fees associated with opposing the City's CARB Appeal of the 2011 SCRD. Before voting on the APCO's request for additional fees, District staff acknowledged that it held a "fund" of nearly $2 million, which was derived from overpayments of annual fees from the City to the District.

74. City staff stated to the District's Board that such a "fund" is not permitted by Section 42316, and that the money involved should be immediately returned to the City's water customers. Additionally, the City stated that, in the alternative, any District request for additional fees should be paid from the improperly held fund. Although the District's Board acknowledged that its fund was financed by the City's water customers, and that such money was amassed based on the District's overestimates of fees assessed under Section 42316 rather than on "actual costs," it refused to consider using such fund to satisfy its perceived need for additional monies. The District's Board eventually approved Board Order 111205-01a, issued on December 5, 2011, approving a "Supplemental SB270 Fee Assessment Order" ("Supplemental Fee Assessment") to Pay $250,000 for attorneys' fees for use in "defending and enforcing" the District's 2011 SCRD.

75. By letter dated December 20, 2011, the City informed the District that the Board's Supplemental Assessment Order was not authorized under Section 42316. Additionally, the City informed the District that while it objected to the Board Order, if the District insisted on payment of the Supplemental Fee Assessment, then it must withdraw the $250,000 from its improperly held fund to satisfy the City's obligation to pay fees in advance of any CARB appeal. The City also requested that the District issue an immediate refund of the balance of the illegal "fund."

76. On January 4, 2012, the City filed an appeal with CARB objecting to the Board Order approving the Supplemental Fee Assessment.

77. On or about January 9, 2012, the District retaliated against the City for its exercise of its statutory right to appeal, and then issued and mailed an unenforceable Notice of Violation ("NOV") to the City. The NOV, without making any findings of fact establishing that the NOV implicates failure to implement a properly ordered "measure," describes the alleged violation as

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the City's "failure to pay Section 42316 fees in the amount of $250,000.00 by close of business on January 4, 2012."

78. The District's NOV includes a request for attorneys' fees for purposes not contemplated by Section 42316 – specifically, it seeks attorneys' fees to defend the 2011 SCRD, which includes dust control measures on the dry Owens Lake lakebed that exist above the 3,567 foot elevation, and which are not supported by substantial evidence establishing that the City caused or contributed to the alleged air quality violations as required under Section 42316.

79. On January 19, 2012, the District reiterated its demand found in the NOV by issuing a "Settlement Offer" requesting that the City pay the $250,000 Supplemental Fee Assessment and penalties in the amount of "$7,500 per day starting on the day after the fee due date (January 5, 2012) and ending on the day the fee and total settlement amount are received."

80. On January 19, 2012, the City again informed the District that its Board Order was not authorized under Section 42316, and that if the District insisted on collecting the supplemental fees in advance of the January 4, 2012 CARB appeal, such payment should be withdrawn from the improperly held $2 million "reserve fund." The City further informed the District that the NOV was improper, and the City believed it was issued in retaliation for its appeal of the Board Order to the CARB. On August 31, 2012, the District filed litigation in Inyo Superior Court seeking to enforce the NOV.

81. Section 42316 neither provides a mechanism for the District to overestimate annual fees in order to create a "reserve fund," nor a mechanism to assess fees in addition to the annual assessment.

82. The District has no authority in this context, to issue an NOV. An NOV is not a proper vehicle for the District to enforce any order to the City to pay fees under Section 42316.

**F. The BLM and the CSLC – "Owners" and "Operators"**

83. Under the "Equal Footing Doctrine," when a state is admitted to the Union, it arrived on the same "footing" as the United States. Because the United States owned all lands submerged beneath navigable waterways when it acquired those waterways, those ownership rights transferred to the individual states upon entry to the Union. In 1850, when California was



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admitted to the Union, it took title to the submerged lands beneath Owens Lake. The CSLC is the state agency with jurisdiction over these lands.

84. When, however, navigable waters gradually recede, a question arises regarding who owns those "relicted" lands. At common law, the shoreline owner adjoining the newly exposed land took title, as a matter of law, to the newly exposed property. California abrogated common law, and legislatively mandated that relicted lands underlying a navigable lake become the property of the state of California, regardless of who owns the adjoining shoreline property.

85. Federal law however provides that land exposed by gradual changes in navigable water bodies, whatever the cause, belong to the upland owner. Federal law is to be applied in all cases involving ownership of exposed lands abutting federally-owned land. Thus, when the federal government owns shoreline property that adjoins a navigable waterway, and the waters recede, the United States takes title to the newly exposed property as a matter of law. The BLM is the federal agency with jurisdiction over relicted lands at Owens Lake.

**G. Other Statutory Provisions**

86. The District, in its zeal to impose regulatory obligations on the City, has issued orders that conflict with mandates imposed by other controlling, statutory provisions. Among these are the National Historic Preservation Act ("NHPA"), title 16 of the United States Code section 470 et seq., to the extent that federal lands owned by the BLM are involved, and the National Environmental Policy Act ("NEPA"), title 42 of the United States Code section 4321 et seq.

## V. CLAIMS FOR RELIEF

### FIRST CLAIM FOR RELIEF
### (CAA Preemption of Section 42316)

87. Paragraphs 1 through 86 are realleged and incorporated as if fully set forth herein.

88. Under the CAA, states are charged with the primary responsibility for controlling air pollution at the source "consistent with the provisions" of the CAA. 42 U.S.C. § 7401(b)(4).

89. The CAA specifies certain enforcement mechanisms, and empowers the EPA and private citizens to enforce its provisions.



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90. Furthermore, subject to the powers and duties of the CARB, local air districts are responsible for enforcing state and federal air quality standards consistent with the CAA.

91. Under the CAA, an "owner" or "operator" of a stationary air emission source is responsible for compliance with the CAA.

92. Furthermore, under the CAA, the "owner" or "operator" of a stationary emission source is required to obtain a permit to operate the source.

93. The term "source" is specifically defined at various places in the CAA to mean a physical entity that emits, or has the potential to emit, a regulated air pollutant. For example, title 42 of the United States Code section 7412 states, in part, the following:

> **(a) Definitions**. For purposes of this section, except subsection (r) -
>
> **(1) Major source.** The term 'major source' means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.

Bold in original.

94. The EPA has claimed that the Owens Lake bed emits in excess of ten tons of PM-10 per year.

95. According to the District, 95 percent of the Owens Lake bed is owned by the state of California and managed by the CSLC.

96. Currently, the District maintains that under Section 42316, the City is obligated for CAA compliance related to PM-10 emitting from the Owens Lake bed, despite the fact that the City neither owns nor operates the land that constitutes the emission source.

97. The 1998 SIP only allows three control measures (shallow flooding, managed vegetation, and gravel cover) for compliance with the PM-10 emission standard, each of which is designated to reduce emissions from the Owens Lake bed.

98. The District has not, however, required the owners or operators of the land comprising the Owens Lake bed to implement these measures. Instead, the District demands that the City implement these measures in contradiction to the express provisions of the CAA. Furthermore, because the City does not own the land from which the PM-10 originates, it must

enter into lease agreements with the landowners allowing the City to install and maintain control measures. In most of these lease agreements, the landowners will only allow the City to use the shallow flooding control measure, which is the most expensive control measure and requires the waste of water.

99. Section 42316, either on its face or as it is being applied by the District, conflicts with the CAA's enforcement mechanism, which expressly places responsibility on "owners" or "operators" of stationary emission sources to comply with the CAA.

100. Furthermore, enforcement of Section 42316 has been applied to immunize owners and operators of the land comprising the Owens Lake bed from CAA liability, thus creating an unauthorized defense to their express liability under the CAA, which is inconsistent with the provisions of the CAA. Thus, the enforcement provisions of the CAA preempt Section 42316, rendering it unenforceable.

101. The City seeks a declaration that Section 42316, either on its face or as it is being applied, is preempted by the CAA, rendering Section 42316 unenforceable.

**SECOND CLAIM FOR RELIEF**
**(The EPA's Failure to Perform a Non-Discretionary Duty Under Title 42 of the United States Code Section 7410)**

102. Paragraphs 1 through 101 are realleged and incorporated as if fully set forth herein.

103. Title 42 of the United States Code section 7410(k)(1)(B) requires the EPA to make a completeness finding on any SIP or SIP revision submitted by a state within six months of receipt. If the EPA does not act within six months, the SIP or SIP revision is deemed complete by operation of law.

104. Title 42 of the United States Code section 7410(k)(2) imposes a non-discretionary duty on the EPA to act within 12 months of the completeness finding to approve or disapprove of the plan. In total, the CAA gives the EPA 18 months to act from submission of a state plan or revision to an approval or disapproval.

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105. The EPA approved the 1998 SIP in September 1999, but took no action on either the 2003 SIP and the 2008 SIP, in direct violation of the 18-month legislative time limit specified in title 42 of the United States Code section 7410.

106. The City seeks a declaration and injunction ordering the EPA to take action on the 2008 SIP submittal as required by the CAA.

**THIRD CLAIM FOR RELIEF**
**(The 2008 SIP Is Unenforceable Because It Fails to Meet the Requirements of the CAA)**

107. Paragraphs 1 through 106 are realleged and incorporated as if fully set forth herein.

108. The 2008 SIP was prepared by the District in response to a finding by the EPA that the OVPA did not attain the 24-hour NAAQS for PM-10 by December 31, 2006, as mandated by the CAA. The 2008 SIP must demonstrate that the NAAQS for PM-10 can be attained by March 23, 2012, unless the EPA grants an extension to March 23, 2017, under title 42 of the United States Code section 7509(d)(3). The 2008 SIP does not include enforceable emissions limitations and other control measures and schedules for compliance as may be necessary or appropriate to meet the applicable NAAQS requirements by the designated deadline.

109. The underlying premise of the 2008 SIP is fundamentally flawed and inadequate to achieve the NAAQS for PM-10 for the OVPA. The 2008 SIP is premised on the theory that if the City controls the PM-10 emissions that are the result of its water producing activities in compliance with Section 42316, then the NAAQS for PM-10 will be achieved in the OVPA. The City's implementation of dust control mitigation measures on over 42 square miles of the OVPA since 2000 (and a commitment to measures on 45 square miles), and the District's continued failure to meet the NAAQS, clearly demonstrates that the underlying premise of the 2008 SIP is false.

110. The District has failed to maintain the NAAQS in spite of the City's intensive mitigation efforts to control dust on 45 square miles of the Owens Lake playa. Naturally occurring sources of dust, as well as actions of others, are thus the root cause of the failure to meet the NAAQS.



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111. The 2008 SIP's Emission Inventory fails to properly account for emissions from sources other than the City, including natural emissions and emissions of others. The District's belief that it can achieve the NAAQS, exclusively looking to the City, is thus fundamentally flawed.

112. The City seeks a declaration voiding the 2008 SIP as unenforceable and requiring the District to provide for the proper investigation, identification, and mitigation for those emissions for which the City is not responsible and to attribute them to the appropriate sources.

**FOURTH CLAIM FOR RELIEF**
**(Violation of Fourteenth Amendment of the United States Constitution – Equal Protection and Substantive Due Process)**

113. Paragraphs 1 through 112 are realleged and incorporated as if fully set forth herein.

114. The Fourteenth Amendment to the United States Constitution prohibits states from depriving "any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

115. Article I, section 7 of the California Constitution states that "[a] person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws . . . ."

116. Section 42316 denies the City and its water customers of the equal protection of the laws by creating an arbitrary classification that treats one entity, the City and its water customers, differently than other entities who are regulated as "sources" of air pollution under the CAA.

117. While the Fourteenth Amendment does not prevent states from resorting to classification for the purposes of legislation, the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

118. The City and its water customers are being subjected to a scheme of regulation under Section 42316 that is preempted by federal law, and mandates regulation of the City in a manner that is different from how other "sources" are regulated in California and throughout the



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United States under the CAA. The City and its water customers are "similarly circumstanced" to other local public entities and their ratepayers, but are being treated differently. No other City in the United States or its water customers, nor any other water diversion, regardless of whether it causes or contributes to the drying up of land with resulting dust related problems, is treated in the manner that the City and its water customers are treated. This classification is arbitrary and capricious, and thus deprives the City and its water customers of their equal protection rights.

119. Section 42316 unconstitutionally deprives the City and its water customers of their property rights without due process of law in violation of the Fourteenth Amendment of the United States Constitution, and Article I, section 7 of the California Constitution, because the application of Section 42316 constitutes arbitrary, capricious, and unreasonable state action through creation and enforcement of a regulatory scheme that is in direct conflict with the CAA.

120. Substantive due process is a guarantee against arbitrary legislative acts by state or local governments. The state and federal Constitutions prohibit government from depriving a person of property without due process of law, and these provisions place some substantive limitations on legislative measures designed to prevent government from enacting legislation that is arbitrary, discriminatory, or lacks a reasonable relation to a proper legislative purpose.

121. Because of the requirements of Section 42316, the City and its water customers have been required to spend more than $1.2 billion to address air pollution in the OVPA, despite the fact that the City is neither an "owner" nor an "operator" of a stationary emission source as defined under the CAA.

122. The City and its water customers are being denied property rights as the result of a statute that is unreasonable, arbitrary, and not rationally related to a proper public purpose in violation of their substantive due process rights under the Fourteenth Amendment and the California Constitution.

123. The City and its water customers are directly and adversely affected by Section 42316 due to the increased costs incurred by the City and its water customers (as well as constraints on the availability of and access to water) in complying with the mandates of Section 42316.

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124. A political subdivision of the state may challenge the constitutionality of a statute or regulation on behalf of its constituents where the constituents' rights under the challenged provision are "inextricably bound up with" the subdivision's duties under its enabling statutes.

125. The enjoyment of a water customer's right to be treated equally under the Fourteenth Amendment, and not to be deprived of property in an arbitrary and capricious manner, is inextricably bound with the actions of the City challenging the validity of Section 42316, and the City is fully as effective a proponent of the rights being asserted as its individual water customers. Moreover, individual water customers would face several genuine obstacles to asserting their constitutional rights in this matter, including the absence of notice to water customers of the actions taken by the District under Section 42316, as well as the fact that individual water customers are not themselves directly subject to the requirements of Section 42316. The City is, by default, the best available proponent of its water customers' constitutional right to equal protection and substantive due process under the Fourteenth Amendment, and the California Constitution.

126. Thus, Section 42316, on its face and as applied to, the City and its water customers, violates the Fourteenth Amendment of the United States Constitution and Article I, section 7 of the California Constitution, and the City has the right to bring such a claim on behalf of its constituent water customers.

127. The City seeks a declaration that Section 42316 denies the City and its water customers their constitutional rights to equal protection and due process.

**FIFTH CLAIM FOR RELIEF**
**(Violation of the National Environmental Policy Act)**

128. Paragraphs 1 through 127 are realleged and incorporated as if fully set forth herein.

129. Section 102 of the National Environmental Policy Act requires every federal agency to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" a detailed statement assessing the environmental impacts of the action. 42 U.S.C. § 4332(c).

130. "Major federal actions" are actions that may have major effects and which may be subject to federal control. 40 C.F.R. § 1508.18. Federal actions include actions by federal agencies and "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18.

131. If it is not clear whether an action meets the trigger for an Environmental Impact Statement ("EIS"), the agency is required to prepare an Environmental Assessment ("EA") to determine whether an EIS is required. An EA is a publicly available brief document that describes whether an action significantly affects the human environment, triggering the need for an EIS.

132. The BLM is a federal agency subject to NEPA. NEPA applies to all activities on Owens Lake because some or all of the land is owned by the BLM.

133. Because the District has failed to involve the BLM, to date, all of the dust mitigation projects on Owens Lake have been constructed without any compliance with NEPA procedures and thus in violation of federal law.

134. The BLM has neither performed an EA nor an EIS for all dust mitigation measures occurring on federal property in violation of NEPA.

135. The City seeks a declaration requiring the BLM to comply with the mandate of NEPA and formally consider the environmental impact of dust control measures on its property.

**SIXTH CLAIM FOR RELIEF**
**(Imposition of Unreasonable Mitigation Measures Under Section 42316)**

136. Paragraphs 1 through 135 are realleged and incorporated as if fully set forth herein.

137. In 1983, the California Legislature enacted Section 42316, which states, in part, the following:

> (a) The Great Basin Air Pollution Control District may require the City of Los Angeles to undertake reasonable measures, including studies, to mitigate the air quality impacts of its activities in the production, diversion, storage, or conveyance of water and may require the city to pay, on an annual basis, reasonable fees, based on an estimate of the actual costs to the district of its activities associated with the development of the mitigation measures and related air quality analysis with respect to those activities of the city. The mitigation measures shall not affect the



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> right of the city to produce, divert, store, or convey water and, except for studies and monitoring activities, the mitigation measures may only be required or amended on the basis of substantial evidence establishing that water production, diversion, storage, or conveyance by the city causes or contributes to violations of state or federal ambient air quality standards.

138. Section 42316 contains no description of what type of mitigation measures the City must undertake, nor does it contain any reference to air quality standards that must be achieved. Section 42316, on its face, does not reference, nor does it imply, any direct or indirect relationship to the CAA.

139. Section 42316 contains no requirement that the City lease property, or acquire license agreements, from property owners to conduct mitigation efforts.

140. Section 42316's requirement of "mitigation measures" is not an authorization to impose "air quality standards."

141. Currently, the City maintains mitigation measures on 42 square miles within the OVPA at a cost exceeding $1.2 billion. The City is also under current orders to undertake mitigation measures on an additional 3.1 square miles within the OVPA.

142. According to the District, after the City completes the mitigation measures on the additional 3.1 square miles (for a total of 45 square miles – an area nearly the size of San Francisco), the City will have reduced 96 percent of all PM-10 emission in the District.

143. The District has recently issued Supplemental Control Requirements Determinations, ordering the City to undertake measures on an additional 2.86 square miles, and to undertake 30 percent design on an additional 1.87 square miles at an additional estimated cost of up to $440 million.

144. Controversy exists between the City and the District regarding the City's obligation under Section 42316 to undertake additional mitigation measures.

145. The City seeks a declaration that it has no obligation under Section 42316 to undertake further mitigation measures in the District.

146. The City seeks an injunction prohibiting the District from requiring the City to undertake any further mitigation measures in the District.

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**SEVENTH CLAIM FOR RELIEF**
**(Mandate of Water Use for Dust Control Violates**
**Article X, Section 2 of the California Constitution and State Water Management Policy)**

147. Paragraphs 1 through 146 are realleged and incorporated as if fully set forth herein.

148. The District has currently approved only three methods of dust control at Owens Lake: (1) shallow flooding; (2) managed vegetation (which requires irrigation water); and (3) gravel cover.

149. Tilling of soil is also an effective method of control dust, but it has not yet been approved by the District as a control measure in the OVPA. Other non-water intensive means to control dust exist, but have not been approved by the District.

150. According to the District, the state owns, and the CSLC manages, 95 percent of the bed of Owens Lake from which PM-10 emanates. As the manager of the state-owned lakebed, the CLSC has the authority to prevent or allow activities on the lakebed.

151. Under the terms of the lease agreement with CSLC, the CSLC has allowed only limited tillage of the Owens Lake bed to control dust. Instead, in most instances, the CSLC has and is requiring the City to use shallow flooding.

152. The actions and/or inactions of the District and/or the CSLC result in a mandate that the City apply significant quantities of water on the Owens Lake bed to control dust. In fact, the actions of the District and the CSLC currently require the City to apply up to 95,000 acre-feet of water in and around the Owens Lake bed to control dust.

153. The water used for dust control purposes, absent that mandate, could be used for other beneficial uses, including municipal and industrial water supply in the City's service area.

154. To the extent the City is required to continue to apply water for dust control purposes, additional water supplies are required to serve the City's customers. These additional water supplies increase demand on water taken from California's Sacramento-San Joaquin Delta ("Delta").

155. In 2009, the California Legislature found and declared that the Delta watershed and California's water infrastructure are in crisis; that existing Delta policies are not sustainable; that resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources; and, that the Delta is a critically important natural resource for California and the nation. The Delta serves Californians concurrently as both the hub of the California water system, and the most valuable estuary and wetland ecosystem on the west coast of North and South America.

156. The California Legislature codified, at Water Code section 85021, that the policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Water Code section 85021 mandates that each region that depends on water from the Delta watershed improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts.

157. The California Constitution, Article X, section 2, mandates that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The California Constitution prohibits the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

158. The Legislature further directs that the long-standing constitutional principle of reasonable use shall be the foundation of state water management policy.

159. The District's requirement that the City apply water to areas of the Owens Lake bed for dust control purposes, when other reasonable, feasible means of dust control exist as they do in the instant situation, results in the unreasonable use or unreasonable method of use of water in violation of Article X, section 2 of the California Constitution.



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160. The District's requirement that the City apply water to areas of the Owens Lake bed for dust control purposes violates state water management policy by increasing reliance on the Delta and unreasonably using water for dust control purposes when other methods are available.

161. The CSLC's actions or inactions through its lease requirements, together or separate from the District's actions, which result in the City being required to apply water for dust control purposes, violates Article X, section 2 of the California Constitution and state water management policy because the use of water for dust control purposes constitutes an unreasonable use of water, and increases reliance on the Delta. No other legal doctrine exists that would excuse this constitutional violation.

162. A controversy exists between the City, the District, and the CSLC regarding the use of water for dust control, and the District's refusal to allow extensive tilling as a method of dust control.

163. Furthermore, a controversy exists between the City and the CSLC regarding the use of control measures, other than water intensive shallow flooding or water intensive managed vegetation, on state-owned land.

164. The City seeks a declaration that the requirement to apply water for dust control purposes on Owens Lake bed, given that alternate methods of dust control are available, constitutes an unreasonable use of water and violates state water management policy, and that it also violates the provisions of Section 42316 which prohibit the District from affecting the right of the City to divert, store, or convey water. The use of 95,000 acre-feet of water to mitigate dust deprives the City of that water, and thereby affects the right of the City to divert, store, or convey water.

165. The City seeks an injunction prohibiting the District from requiring the City to apply water for dust control purposes on Owens Lake bed, and mandating that the CSLC allow the City to till for dust control purposes as well as use other existing and feasible non-water intensive methodologies.

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**EIGHTH CLAIM FOR RELIEF**
**(Violation of the National Historic Preservation Act of 1966)**

166. Paragraphs 1 through 165 are realleged and incorporated as if fully set forth herein.

167. Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, requires any Federal agency with "direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking" to "prior to approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register."

168. Section 106 of the NHPA applies to federal agencies or state or local governments that are acting as a "federal agency" under a specific federal law. The District, when implementing the CAA, is a state or local government acting as a "federal agency" under a specific federal law.

169. Section 106 applies to "undertaking[s]" that are "subject to State or local regulation administered pursuant to a delegation for approval by a federal agency." 16 U.S.C. § 470w(7)(D). The District's dust control mitigation measures are "undertaking[s]" subject to the requirements of the NHPA.

170. Before approving an "undertaking," the agency must identify historic properties at the project site, evaluate the potential impact of the "undertaking" on the historic properties, and develop mitigation measures in the case of adverse effects. 36 C.F.R. §§ 800.4, 800.5, 800.6. Additionally, the agency must consult with tribes that may attach historic cultural or religious significance to an area. 36 C.F.R. § 800.3(2).

171. Defendants have unlawfully failed to complete the consultation and consideration procedures required by section 106 prior to implementation of dust control in the Owens Valley. In particular, Defendants have failed to properly consider the destruction of cultural resources, as required by the NHPA. During recent archeological investigations on the Owens Lake playa,

significant ethnohistoric habitation and other archeological resources have been identified. Dust control measures ordered by the District threaten these resources.

172. The City seeks a declaration requiring the Defendants to comply with the mandate of the NHPA and formally consider the impact of dust control measures on historic, cultural, and tribal resources.

**NINTH CLAIM FOR RELIEF**
**(The District Lacks Authority to Impose Fees on the City to Fund the District's General Governmental Expenses)**

173. Paragraphs 1 through 172 are realleged and incorporated as if fully set forth herein.

174. The District annually adopts a budget that includes charges imposed solely on the City. These charges constitute nearly all the District's entire annual budget.

175. On or about May 24, 2012, the District's governing board adopted the District's Fiscal Year 2012-2013 budget ("Budget"), which includes $4,619,314 of costs imposed solely on the City.

176. The District imposes charges on the City for employee wages; retirement; insurance benefits; taxes; retiree medical insurance unfunded liability; worker's compensation insurance; dues; subscriptions; education; use tax and fees; liability, fire, and casualty insurance; leases and rents for equipment, offices, etc.; postage and shipping; professional and special services, supplies, and tools; transportation and travel; safety; scientific supplies; software; fuel and gasoline; project demonstration; control measure testing; vehicles; and equipment. Budgeted charges for fiscal year 2012-2013 for these categories total $3,831,350.

177. On or about May 24, 2012, the District issued an Order ("B/O #120524-01a") directing the City to pay the $3,831,350.

178. The District lacks the statutory authority to impose the costs of all wages, retirement costs, insurance, unfunded liabilities, rents, dues, postage, transportation, services, vehicles, equipment, and other general costs of government.

179. B/O #120524-01a provides that payment was due by July 2, 2012.

180. On or about July 2, 2012, the District issued Notice of Violation 500 ("NOV 500"), alleging a violation of B/O #120524-01a, and otherwise threatening fines, criminal punishment, and civil liability.

181. A controversy exists between the District and the City regarding the District's ability to impose the general costs of government on the City through "fees."

182. The City seeks a declaration that the District does not have the authority to recover the general costs of government on the City.

183. The City seeks an injunction prohibiting the District from imposing the general costs of government on the City or to collect any "penalties" pursuant to its NOV 500.

**TENTH CLAIM FOR RELIEF**
**(The District's Reserve Fund Policy is Ultra Vires)**

184. Paragraphs 1 through 183 are realleged and incorporated as if fully set forth herein.

185. The District has regularly imposed fees on the City in excess of the actual cost of the activities contemplated by Section 42316. The District has not returned those excess fees to the City, or adjusted subsequent annual fees to account for surpluses, but has instead maintained an undisclosed reserve fund with the City's funds.

186. On or About March 26, 2012, after the existence of the reserve fund was disclosed, the District adopted an "official" Reserve Fund Policy. According to this official policy, the District will strive to maintain 20 percent of its full annual operating costs in a reserve fund.

187. As a result of the informal policy prior to March 26, 2012, and the official policy after March 26, 2012, the District has withheld funds paid by the City in excess of the actual costs to the District to carry out the activities enumerated in Section 42316. The City is informed, and believes, that the reserve funds exceed $1.6 million.

188. The District lacks the statutory authority to maintain a reserve fund.

189. The District lacks the statutory authority to impose fees on the City to maintain a reserve fund.



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190. As a result of this unauthorized policy, the District has withheld in excess of $1.6 million of fees overpaid by the City. The District refuses to return these funds to the City, or adjust subsequent annual fees to account for the surplus funds.

191. By letter dated March 21, 2012, the City sought the return of funds unlawfully held in the District's informal reserve fund. In response, the District's governing board unlawfully adopted its formal Reserve Fund Policy. By letter dated March 30, 2012, Theodore P. Schade, the District's APCO, informed the City of the District's new Reserve Fund Policy, and refused to return any of the funds overpaid by the City.

192. The District's informal and formal reserve policies are ultra vires acts, because the District does not have the statutory authority to create and maintain a reserve fund.

193. A controversy exists between the District and the City regarding the District's refusal to refund / return excess fees paid by the City.

194. The City seeks a declaration that the District does not have the authority to create and maintain a reserve fund with fees paid by the City.

195. The City seeks an injunction prohibiting the District from collecting funds from the City to maintain a reserve fund, and to require the District to return all such funds.

**ELEVENTH CLAIM FOR RELIEF**
**(Imposition of Fees on the City to Pay for the District's Attorneys' Fees Are Unlawful)**

196. Paragraphs 1 through 195 are realleged and incorporated as if fully set forth herein.

197. The state statutes creating and governing the District do not provide for the recovery of legal fees, costs, or other expenses by the District.

198. The District's Budget includes a charge imposed on the City entitled a "Special Legal Fee."

199. The Special Legal Fee purports to fund the District's defense of challenges brought by the City under Section 42316. The Special Legal Fee, which the District seeks to collect from the City, is $1,000,000.



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200. On or about May 24, 2012, the District issued an Order ("B/O #120524-01b") directing the City to pay the $1,000,000 Special Legal Fee. The $1,000,000 was offset by $212,036 purported to be credited from the District's unlawful reserve fund.

201. B/O #120524-01b provides that payment was due by July 2, 2012.

202. On or about July 2, 2012, the District issued Notice of Violation 501 ("NOV 501"), alleging a violation of B/O #120524-01b, and otherwise threatening fines, criminal punishment, and civil liability.

203. The Special Legal Fee is imposed on the City regardless of whether the District prevails in any of its challenges as set forth in this Complaint. Moreover, the fees are based on private rates charged by a private law firm. These rates reach $750 per hour and greatly exceed the rates received by government lawyers similarly situated with other local air districts.

204. As a result, the City is required by the District to pay, not only all of its own legal fees and costs to protect it and its water customers' rights, but is also required to pay all of the District's legal fees and costs.

205. A controversy exists between the District and the City regarding the District's ability to recover all of its legal costs from the City through "fees."

206. The City seeks a declaration that the District does not have the authority to recover its legal costs from the City.

207. The City seeks an injunction prohibiting the District from imposing its legal costs on the City.

**TWELFTH CLAIM FOR RELIEF**
**(California Government Code Section 11425.10 et seq. – Violation of Procedural Due Process and Bias Exhibited by the District and APCO Theodore P. Schade)**

208. Paragraphs 1 through 207 are realleged and incorporated as if fully set forth herein.

209. California Government Code section 11425.10 et seq. mandates specific due process requirements for an agency conducting an adjudicative proceeding. These requirements apply to all agencies of the state. California Health and Safety Code section 40700 defines an air



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pollution control district such as the District as "a public agency of the state." Thus, the District is subject to the requirements of California Government Code section 11425.10 et seq. when conducting an adjudicative proceeding.

210. California Government Code section 11405.20 defines an adjudicative proceeding as "an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." Section 42316, which governs the relationship between the District and the City, provides that "mitigation measures may only be required or amended on the basis of substantial evidence establishing that water production, diversion, storage, or conveyance by the city causes or contributes to violations of state or federal ambient air quality standards." By requiring that substantial evidence exist prior to the imposition of mitigation measures, Section 42316 contemplates a decision-making process by which evidence is presented and findings of fact are made prior to the District issuing a decision prescribing mitigation measures. Thus, hearings held before the District and related adjudicatory decisions made by the District and its APCO, Theodore Schade, are "adjudicative proceedings" as defined in California Government Code section 11405.20, and thus subject to the due process requirements of California Government Code section 11425.10 et seq.

211. California Government Code section 11425.10 provides that the "presiding officer" in an adjudicative proceeding is subject to disqualification for bias, prejudice, or interest as provided in California Government Code section 11425.40. Furthermore, a presiding officer is subject to disqualification if he has performed any investigative, prosecutorial, or advocacy functions within the agency, as provided in California Government Code section 11425.30.

212. A "presiding officer" is an "agency head, . . . or other person who presides in an adjudicative proceeding." An "agency head" is a person with ultimate legal authority to act on behalf of the agency, whether that power be vested by statute or delegated. Cal. Gov't. Code § 11425.30. Theodore Schade, as the APCO for the District, serves as a "presiding officer" for decisions made pursuant to Section 42316 because he exercises authority delegated to him to oversee the process by which the District reviews evidence and issues final mitigation measures (i.e., an "adjudicative proceeding") to the City.

213. Theodore Schade has exhibited bias, prejudice, or interest in the proceedings that have imposed measures upon and determined the rights of the City. As an example, Mr. Schade has told City staff that the City should not expect unbiased consideration by the District at any hearing until, unless, the City pays all fees demanded by the District.

214. The City has been and continues to be denied its procedural due process rights before the District as provided in California Government Code section 11425.10 et seq. through the continued imposition of measures and fees adopted at adjudicatory proceedings of the District that are improper due to the bias and prejudice of its presiding officer.

215. For the reasons described above, the City respectfully requests this court issue a writ of mandate prohibiting the District from allowing Theodore Schade to preside over decisions that affect the City.

**THIRTEENTH CLAIM FOR RELIEF**
**(Violation of Right to a Fair Hearing – CARB Appeal Process)**

216. Paragraphs 1 through 215 are realleged and incorporated as if fully set forth herein.

217. Section 42316 gives the City the right to "appeal any measures or fees imposed by the district to the [CARB] within 30 days of the adoption of the measures or fees. The [CARB], on at least 30 days' notice, shall conduct an independent hearing on the validity of the measures or reasonableness of the fees which are the subject of the appeal."

218. A person or entity has the right to a tribunal that meets the standards of impartiality. Principles of procedural due process apply to quasi-judicial decision-making. Where procedural due process protections apply, a person or entity is entitled to a hearing before a reasonably impartial, non-involved reviewer.

219. Principles of due process may be offended where the decision-maker, because of his institutional responsibilities, has a motive to rule in a way that would aid the institution.

220. Appeals brought by the City before the CARB pursuant to Section 42316 are quasi-judicial decision-making processes and subject to the general requirements of impartiality and procedural due process.

221. The CARB has not provided and/or is unable to provide an impartial hearing that conforms to principles of due process. Instead, the CARB continuously misallocates the burden of proof, misapplies the standard of review, and refuses to accept evidence during appeals made by the City under Section 42316. Additionally, the CARB allows its staff to advocate against the City in hearings before the CARB brought under Section 42316.

222. Thus, the City has been and continues to be denied its right to an impartial, non-involved reviewer as part of the CARB appeal process prescribed in Section 42316.

223. For the reasons described above, the City respectfully requests this court declare that the procedures utilized by the CARB during hearings under Section 42316 are improper and violate the statute.

## VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

1. A declaration that Health and Safety Code section 42316 impermissibly conflicts with the enforcement provisions of the CAA, and therefore is preempted by the CAA, rendering section 42316 unenforceable;

2. A declaration requiring the EPA to take action the 2008 SIP as required by the CAA;

3. A declaration voiding the 2008 SIP as unenforceable under the CAA;

4. A declaration that Health and Safety Code section 42316 denies the City and its water customers their constitutionally protected rights of equal protection and due process;

5. A declaration requiring the BLM to comply with NEPA;

6. An injunction prohibiting the District from ordering the City from undertaking any further mitigation measures in the District;

7. A declaration that the use of shallow flooding as a control measure in the OVPA when other reasonable feasible means of dust control exist violates Article X, section 2, of the California Constitution;

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8. A declaration requiring the Defendants to comply with the mandate of the NHPA and formally consider the impact of dust control measures on historic, cultural, and tribal resources.

9. An injunction prohibiting the District from imposing on the City fees for the District's general governmental expenses;

10. An injunction prohibiting the District from retaining surplus fees received from the City under Health and Safety Code section 42316;

11. An injunction prohibiting the District from assessing the City for the District's general attorneys' fees;

12. An injunction prohibiting the District's APCO, Theodore Schade, from presiding over District matters affecting the City;

13. A declaration that the hearing procedures used by the CARB to hear appeals under Health and Safety Code section 42316 violate the express provisions of that statute;

14. Award costs and attorneys' fees to the City; and

15. Grant such other relief as this court deems just and proper.

SOMACH SIMMONS & DUNN

DATED: October 12, 2012

By /s/ Stuart L. Somach
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