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1 ROCKARD J. DELGADILLO
City Attorney
2 RICHARD BROWN
General Counsel Water and Power
3 MARY DENNIS
Deputy City Attorney (Bar No. 149016)
4 JULIE CONBOY
Deputy City Attorney (Bar No. 197407)
5 111 North Hope Street, Suite 340
Los Angeles, California 90051-0100
6 Telephone: (213) 367-4500
7 CRAIG A. MOYER (Bar No. 094187)
MARK D. JOHNSON (Bar No. 135288)
8 LISA L. TRIFILETTI (Bar No. 236510)
MANATT, PHELPS & PHILLIPS, LLP
9 11355 West Olympic Boulevard
Los Angeles, CA 90064-1614
10 Telephone: (310) 312-4000
Facsimile: (310) 312-4224

11 *Attorneys for Petitioner and Plaintiff*
12 CITY OF LOS ANGELES, DEPARTMENT OF WATER AND
POWER

13
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 FOR THE COUNTY OF INYO

FAX FILED

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17 CITY OF LOS ANGELES
DEPARTMENT OF WATER AND
18 POWER,

Case No. SICVFT-06-41092

19 Petitioner and Plaintiff,

**FIRST AMENDED AND
SUPPLEMENTAL VERIFIED PETITION
FOR WRIT OF ADMINISTRATIVE AND
TRADITIONAL MANDAMUS AND
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

20 vs.

21 GREAT BASIN UNIFIED AIR
POLLUTION CONTROL DISTRICT,

22 Respondents and Defendant.

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MANATT, PHELPS &
PHILLIPS, LLP
ATTORNEYS AT LAW
604 N. WILSON

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FIRST AMENDED AND SUPPLEMENTAL VERIFIED PETITION FOR WRIT OF MANDATE

1 Petitioner and Plaintiff, the City of Los Angeles, by and through the Department of
2 Water and Power of the City of Los Angeles (the "City") submits its First Amended
3 Petition to this Court, seeking a writ of mandate, pursuant to Code of Civil Procedure §§
4 1094.5, 1085 and 1086, and Public Resources Code § 21100 and for injunctive and
5 declaratory relief under Code of Civil Procedure § 1060. The City alleges as follows:

6 **THE PARTIES**

7 1. The City is a Charter City and an incorporated city located in Los Angeles
8 County, California. The City implemented and is implementing, operating and
9 maintaining dust control measures on the Owens Lake bed, located in the County of Inyo.

10 2. Respondent and Defendant the Great Basin Unified Air Pollution Control
11 District (the "District") is created and organized under California Health and Safety Code
12 Section 40000 *et seq.* The District may not adopt a regulation or order or take any action
13 that exceeds the scope of, or is inconsistent with, its statutory authority. Additionally, to
14 the extent the court finds the District is authorized to implement supplemental air quality
15 control measures, the District is the lead agency responsible for such projects and
16 complying with the provisions of CEQA, the CEQA guidelines, and other applicable local
17 planning and zoning laws.

18 **JURISDICTION AND VENUE**

19 3. This Court has jurisdiction over this action pursuant to Code of Civil
20 Procedure §§ 1060, 1085, and 1094.5. Venue is proper in this Court pursuant to Code of
21 Civil Procedure § 395 because the property that is the subject of this action, the Owens
22 Lake bed, is located in the County of Inyo and the District maintains an office in the
23 County of Inyo.

24 4. The City has performed all conditions precedent to the filing of this action
25 by complying with Public Resources Code §21167.5 in serving written notice of this
26 action on the District. A true and correct copy of this notice is attached hereto as
27 Exhibit A.

28

1 **PROCEDURAL BACKGROUND**

2 5. This petition concerns the monitoring and control of particulate matter
3 measuring less than or equal to 10 microns or micrometers ("PM₁₀"). Under the Federal
4 Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, the United States Environmental
5 Protection Agency ("USEPA") developed National Ambient Air Quality Standards
6 ("NAAQS") for major air pollutants including PM₁₀.

7 6. The CAA required all states to submit State Implementation Plans (SIPs) to
8 the USEPA to document how the NAAQS would be met in the state by applicable
9 deadlines. The California Legislature delegated the responsibility and authority to meet
10 this requirement to the California Air Resources Board ("CARB") and authorized CARB
11 to implement this requirement through thirty-five (35) local air pollution control districts.
12 Health & Safety Code §§ 39500 *et seq.* The District is one of these local air pollution
13 control districts.

14 7. Owens Lake is located in Inyo County in eastern California, south of the
15 City of Lone Pine and north of the City of Olancho. The land on which the Owens Lake
16 bed is located is owned primarily by the State of California and managed by the State
17 Lands Commission.

18 8. Portions of Owens Lake have become dry allegedly due in part to diversions
19 of water from the Owens River beginning in the 1860s. The dry portions of the Owens
20 Lake bed, approximately two-thirds of the historic lake surface area, are comprised
21 primarily of dry "playa" soils and crusts. The "playa" soils and crusts are believed to be a
22 source of wind-borne sand during significant wind events, and this source is believed to
23 contribute to concentrations of PM₁₀.

24 9. The District has regulatory authority over air quality issues with respect to
25 the portion of Inyo County where Owens Lake is situated, and is responsible for
26 developing a SIP to address PM₁₀ levels for an area known as the Owens Valley Planning
27 Area ("OVPA"), which encompasses Owens Lake.

28 10. In the early 1980s, the District asserted jurisdiction under the CAA over the

1 City based on air emissions from the Owens Lake bed. The City contested this assertion
2 by filing a writ of mandamus lawsuit (the "CAA Lawsuit"). In the CAA Lawsuit the City
3 alleged that the District had no jurisdiction over the City under the CAA because the
4 City's water gathering operations from the Owens River do not qualify as a "facility"
5 under the CAA and the City does not own the property on which the Owens Lake bed is
6 located.

7 11. In 1983, the District and the City agreed to a settlement and dismissal of the
8 CAA Lawsuit based on the enactment of Health and Safety Code Section 42316 ("Section
9 42316") by the California Legislature. The District has no authority over the City except
10 the limited authority granted in Section 42316. Pursuant to Section 42316(a), the District
11 may require the City to "undertake reasonable measures, including studies to mitigate the
12 air quality impacts of its activities in the protection, diversion, storage or conveyance of
13 water" Section 42316(a) further provides that the mitigation measures imposed by
14 the District "may only be required or amended on the basis of substantial evidence
15 establishing that water production, diversion, storage, or conveyance by the City causes or
16 contributes to violations of state or federal ambient air quality standards." Section
17 42316(b) provides the City with the right to appeal to CARB regarding any measure
18 imposed on the City by the District.

19 12. On August 7, 1987, the USEPA identified the OVPA as an area not meeting
20 the PM₁₀ NAAQS. In January 1993, the OVPA was reclassified by USEPA as a serious
21 nonattainment area under the CAA. Under the CAA, the District was required to submit a
22 PM₁₀ Attainment SIP to the USEPA by February 8, 1997.

23 13. The District released a proposed PM₁₀ Attainment SIP in 1997. Portions of
24 the District's PM₁₀ Attainment SIP were challenged by the City. On July 27, 1998, the
25 District approved a Memorandum of Agreement ("MOA") with the City resolving the
26 City's challenge and describing the actions the City would take at the Owens Lake bed as
27 part of the District's PM₁₀ Attainment SIP. The actions that the City agreed to take
28 include implementation of dust control measures on 16.5 square miles of Owens Lake bed

1 by December 31, 2003. The MOA provides that it “in no way prejudices future actions on
2 similar issues.”

3 14. On November 16, 1998, the District adopted the PM₁₀ Attainment SIP (the
4 “1998 SIP”). The 1998 SIP was approved by the USEPA on August 17, 1999. The 1998
5 SIP incorporated the requirement of the MOA that the City implement actions on 16.5
6 square miles of Owens Lake bed by the end of 2003. The actions on these 16.5 square
7 miles are referred to as “Increment 1.” The City fully complied with all of its timing and
8 implementation obligations with respect to the Increment 1 dust control measures. The
9 1998 SIP also provided that the District would submit a Revised SIP in 2003 (“2003
10 RSIP”). The 2003 RSIP was to determine a final control strategy to attain the PM₁₀
11 NAAQS by December 31, 2006.

12 15. The 2003 RSIP was adopted by the District on November 13, 2003 and
13 approved on February 27, 2004 by the CARB. It has not been approved by the USEPA.
14 The 2003 RSIP required the City to implement dust control measures on an additional
15 13.3 square miles of Owens Lake bed. The supplemental controls on the 13.3 square
16 miles are referred to as “Increment 2”. The 2003 RSIP also included a provision whereby
17 the District would determine at least once per year, starting in 2004, whether there have
18 been any monitored or modeled exceedances of the PM₁₀ NAAQS after 2002 from areas
19 on the Owens Lake bed not included in Increment 1 or Increment 2. According to the
20 2003 RSIP, those areas that are determined by the District to have been the source of a
21 NAAQS exceedance will be included in “Supplemental Control Requirements (SCR)” and
22 referred to as “Increment 3.”

23 16. The 2003 RSIP established a three-step process for determining the need for
24 supplemental controls. First, the Air Pollution Control Officer of the District (“APCO”)
25 will make a determination regarding the need for supplemental controls. Second, the City
26 has 60 days to respond in writing to the District regarding the APCO’s determination by
27 presenting alternative analysis of the data relied on by the APCO in his determination.
28 Finally, the District has 90 days from the APCO’s determination to take action to accept,

1 modify, reject or take no action on the City's analysis.

2 17. On December 21, 2005, the APCO of the District issued his 2004/2005
3 Preliminary Determination regarding the need for additional supplemental controls on the
4 Owens Lake bed (the "Preliminary Determination"). The APCO made the Preliminary
5 Determination based on data obtained during the last half of 2002 through the first half of
6 2004. In its Preliminary Determination, the APCO notified the City that the supplemental
7 controls measures are required on an additional 9.31 square miles of the Owens Lake bed,
8 in excess of the 29.8 square miles of controls required under the 2003 RSIP. The APCO
9 also notified the City that an additional 0.66 square miles of the Owens Lake bed had been
10 identified for preliminary air pollution control measure design. The Preliminary
11 Determination also stated that the City could not appeal to CARB under Section 42316
12 regarding the measures imposed on the City.

13 18. In response to the Preliminary Determination, on January 20, 2006, the City
14 invoked its right under Section 42316 and submitted an appeal to CARB (the "January 20
15 CARB Appeal"). The City appealed the Preliminary Determination on various grounds,
16 including: (1) the failure of the District's modeling approach to address the impact of dust
17 temporarily created as a result of the construction activities necessary to implement the
18 dust control measures required by the 2003 RSIP, (2) the defective data used with the
19 modeling approach or the Preliminary Determination, which led to inaccurate
20 identification of emissive (dust source) areas, (3) the premature issuance of Preliminary
21 Determination before the City completed implementation on the 29.8 square miles
22 identified in the 2003 RSIP, and (4) the failure of the Preliminary Determination to take
23 into account greatly improved air quality results from the control measures implemented
24 by the City. To date, CARB has taken no action with respect to the City's January 20
25 CARB Appeal.

26 19. The District responded to the January 20 CARB Appeal with a letter to the
27 City dated January 26, 2006 ("January 26 Letter"). Despite the statutory right to appeal
28 provided by the California Legislature to the City under Section 42316, the January 26

1 letter asserts that the City has violated a District Order by filing and maintaining the
2 January 20 CARB Appeal. Specifically, in the January 26 Letter, the District states that
3 District Order No. 03113-01 (the "2003 Order") which is incorporated into the 2003 RSIP
4 prevents the City from appealing the Determination to CARB and trumps or voids the
5 right to appeal to CARB afforded to the City under Section 42316.

6 20. The January 26 Letter states that the City is barred from asserting an appeal
7 to CARB and states that if the City does not withdraw the January 20 CARB Appeal, the
8 District plans to issue a Notice of Violation to [the City] for violations of [the 2003
9 Order]." The District has stated that the City is subject to a \$10,000 a day fine for every
10 day the City refuses to withdraw the January 20 CARB Appeal.

11 21. In response to the January 26 Letter and repeated threats of civil penalties,
12 on March 21, 2006, the City filed with this Court a Verified Petition for Writ of Mandate,
13 pursuant to Code of Civil Procedure §§ 1094.5, 1085 and 1086, and for injunctive and
14 declaratory relief under Code of Civil Procedure § 1060.

15 22. On April 4, 2006, the APCO of the District issued its 2004/2005 Final
16 Determination regarding the need for supplemental controls (the "Final Determination").
17 The Final Determination was based on data obtained during the last half of 2002 through
18 the first half of 2004 and the City's alternative analysis. The APCO notified the City that
19 it modified its SCR determination and that SCR measures would be required on an
20 additional 8.66 square miles instead of the 9.31 square miles identified in the Preliminary
21 Determination. The APCO also notified the City that an additional 0.79 square miles of
22 the Owens Lake bed had been identified for preliminary air pollution control measure
23 design under Section 2.3 of Exhibit 2 of Board Order 031113-01 instead of the .66 square
24 miles identified in the Preliminary Determination.

25 23. Additionally, in the Final Determination, the APCO ordered the City to
26 choose one of the Best Available Control Measures (BACM) described in the 2003 RSIP,
27 prepare 30 percent construction design documents, complete an environmental analysis
28 document, and apply for all necessary permits for construction. Moreover, the APCO

1 ordered the City (1) to have all infrastructure for BACM constructed and operational on
2 the 8.66 square miles by April 8, 2008 and (2) to have BACM fully operational and
3 compliant on this area by two and half years (by October 4, 2008) if implementing
4 Shallow Flood, otherwise within four years (by April 4, 2010) if implementing any other
5 BACM.

6 24. In response to the Final Determination, the City invoked its right to appeal
7 under Section 42316 and submitted an additional appeal to CARB regarding the Final
8 Determination (the "Final Determination Appeal"). CARB has not yet responded to the
9 City's Final Determination Appeal.

10 25. This Petition seeks to invalidate the District's determination with respect to
11 this City's right to appeal to CARB. As noted above, through the January 26 Letter and
12 subsequent statements, the District has stated its position that the City is barred from filing
13 and maintaining the CARB Appeal and by doing so, the City has violated the 2003 Order.
14 To date, the District has not altered its position regarding the City's right to appeal and
15 has not rescinded its threats of civil fines or penalties against the City for filing and
16 maintaining its appeals to CARB.

17 26. This Petition also challenges the underlying basis of the District's Final
18 Determination. First, the City contends that the District abused its discretion by requiring
19 supplemental control measures on an additional 8.66 square miles of Owens Lake and
20 identifying an additional 0.79 square miles for preliminary air pollution control measure
21 design in the absence of substantial evidence to support the Final Determination. Second,
22 the City challenges the Final Determination on the grounds that the District failed to
23 proceed in the manner proscribed by the 2003 RSIP. Third, to the extent that the Court
24 finds that District has complied with the 2003 RSIP, the City challenges the methodology
25 for evaluating the need for supplemental controls on the grounds that it is inconsistent
26 with provisions of the CAA. Finally, the City contends that the District's Final
27 Determination violates provisions of the California Environmental Control Act (CEQA).

28 27. Because the District has issued a final determination with respect to all of

1 these legal questions, this Petition is ripe for review. Moreover, the District continues to
2 threaten the City with substantial daily fines for appealing to CARB.

3 28. The City has performed any and all conditions precedent to the filing of this
4 Petition, and has exhausted all available administrative remedies, if and to the extent such
5 remedies existed. Thus, the City has no other plain, speedy and adequate remedy at law,
6 other than this proceeding to compel the District to take the actions requested by this
7 Petition.

8 FIRST CAUSE OF ACTION

9 [Writ of Administrative Mandamus – Code of Civil Procedure § 1094.5]
10 The District’s Denial of the City’s Right to Appeal to CARB
is Expressly Preempted by Health & Safety Code § 42316

11 29. The City re-alleges and incorporates herein by reference each and every
12 allegation contained in paragraphs 1 through 28, inclusive.

13 30. It is well established under California law that “otherwise valid local
14 legislation which conflicts with state law is preempted by such law and is void.”
15 *Hogoboom v. Superior Court*, 51 Cal. App. 4th 653, 657 (1996); *Grossmont Union High*
16 *School Dist.*, 39 Cal. 3d 878, 885 (1985); *Lancaster v. Municipal Court*, 6 Cal. 3d 805,
17 807 (1972). Moreover, “administrative regulations which exceed the scope of the
18 enabling statute are invalid and have no force or life.” *Clean Air Constituency v. State Air*
19 *Resources Board*, 11 Cal. 3d 801, 813 (1974).

20 31. As explained above, the District’s assertion that the City is barred from
21 filing and maintaining an appeal to CARB and is violating a District order and subject to a
22 \$10,000 per day fine for maintaining an appeal to CARB is in direct conflict with state
23 law. Section 42316 is the sole basis of authority for the District to require the City to
24 undertake any dust control measures with respect to the Owens Lake bed and, therefore, is
25 the only basis of authority for the District’s issuance of the Preliminary Determination and
26 the Final Determination. Pursuant to Section 42316(b), the City may appeal any measure
27 or fee imposed by the District under Section 42316 to CARB within 30 days of the
28 adoption of any measures or fee, such as the Final Determination. The District has no

1 authority to modify or abrogate the substantive or procedural requirements of Section
2 42316.

3 32. Therefore, any statement or order by the District that the City is prohibited
4 from appealing to CARB regarding any measure or fee imposed on the City by the
5 District under Section 42316 exceeds the District's jurisdiction and is void because it is
6 expressly preempted by Section 42316.

7 33. The District's repeated threats of civil penalties against the City for
8 exercising its statutory right to file and maintain its appeals to CARB are in direct conflict
9 with state law. This Court's intervention is therefore required to remedy the District's
10 action in this regard. Accordingly, the Court should issue a writ of mandate directing the
11 District to rescind and invalidate the District's determination that City is prohibited from
12 filing and maintaining any appeal to CARB.

13 SECOND CAUSE OF ACTION

14 [Writ of Mandamus – Code of Civil Procedure §§ 1085 and 1086]
15 The District's Denial of the City's Right to Appeal to CARB
16 is Expressly Preempted by Health & Safety Code § 42316

17 34. The City re-alleges and incorporates herein by reference each and every
18 allegation contained in paragraphs 1 through 33, inclusive.

19 35. Courts may rely upon mandamus under the Code of Civil Procedure § 1085
20 to review the validity of a quasi-legislative action. If an administrative agency has
21 exceeded its authority in the exercise of its quasi-legislative powers, a court may issue a
22 writ of mandate. *See Clean Air Constituency v. State Air Resources Board*, 11 Cal. 3d
23 801, 809 (1974).

24 36. Pursuant to Health & Safety Codes §§ 40001, 42300, 42301 and Code of
25 Regulations § 60008, the District has discretion to adopt and enforce its own rules to
26 combat air pollution affecting its local district. However, the District has a duty to
27 comply with applicable federal and State requirements. The District has had, and
28 continues to have, the ability to perform its legal duties, but has instead refused to do so.

37. Section 42316 expressly provides the City with the right to appeal any

1 measure or fee imposed by the District under Section 42316 to CARB within 30 days of
2 the adoption of any measures or fee, such as the Determination. The City filed the
3 January 20 CARB Appeal and the Final Determination Appeal within this time period.
4 Accordingly, the City has performed any and all conditions precedent to the filing of this
5 Petition, and has exhausted all administrative remedies available with respect to its right
6 to file and maintain its appeals to CARB. The City does not have a plain, speedy and
7 adequate remedy at law, other than this proceeding to compel the District to take the
8 actions requested by this Petition.

9 38. The District has claimed that the City does not have the right to file and
10 maintain its appeals to CARB and is in violation of a District order and subject to
11 significant fines and penalties for filing and maintaining its appeals to CARB. To date,
12 the District has not altered its position. This position by the District is in violation of the
13 law and contrary to the plain language of Section 42316(b). Therefore, the Court should
14 issue a writ of mandate directing the District to rescind and invalidate the District's
15 determination that City it is prohibited from filing and maintaining its appeals to CARB.

16 THIRD CAUSE OF ACTION

17 [Writ of Administrative Mandamus – Code of Civil Procedure § 1094.5]
18 The Final Determination Is Not Supported by Substantial Evidence

19 39. The City re-alleges and incorporates herein by reference each and every
20 allegation contained in paragraphs 1 through 38, inclusive.

21 40. To the extent that the Court finds that the City has no right to appeal the
22 supplemental control measures imposed by the District to CARB, the City contends that
23 the District, at all relevant times mentioned herein, proceeded without and in excess of its
24 jurisdiction and prejudicially abused its discretion. The District has not proceeded in the
25 manner required by law, the Final Determination is not supported by the findings, and the
26 findings are not supported by substantial evidence.

27 41. The District lacks substantial evidence to support the Final Determination
28 which requires supplemental controls on an additional 8.66 square miles in excess of the

1 29.8 square miles of controls required under the 2003 RSIP and identifies 0.79 square
2 miles for preliminary air pollution control measure design.

3 42. The Final Determination contains no evidence, analysis, or explanation that
4 would support the conclusion that the areas of the Owens Lake bed have become newly
5 emissive as a result of natural changes. The manner in which the District has used the
6 model fails to properly address or account for construction-related sources of sand and/or
7 dust that (1) are temporary in nature and/or (2) will be eliminated following the City's
8 completion of Increment 2 actions at the end of 2006. Thus, the District's data are biased
9 by construction-related activities and do not represent the natural condition of the Playa

10 43. The Final Determination fails to properly address or account for PM₁₀
11 generated in areas of the Owens Lake bed that will be subjected to dust control measures
12 as part of Increment 2 by the end of 2006.

13 44. The District relied improperly utilized old, inaccurate data to model recent
14 events where sand motion monitors have been removed or are no longer functioning. This
15 substitution skews model results.

16 45. The District lacks sufficient monitoring data to determine that the dust
17 control measures required under Increments 1 and 2 will not be sufficient to eliminate
18 NAAQS violations. The Final Determination ignores evidence that demonstrates that the
19 implemented dust control measures have provided air quality improvement that is two
20 years ahead of the pace projected by the 2003 RSIP, despite negative ramifications of
21 construction-generated sand and dust.

22 46. The measures imposed by the Final Determination are not reasonable within
23 the meaning of Section 42316, as there is inadequate evidence to support the imposition of
24 supplemental control measures before construction of dust control measures is completed
25 and the cost to implement such measures outweighs any actual air quality benefits from
26 implementation of the measures.

27 47. In sum, the District's Final Determination fails to properly identify the
28 underlying causes, mechanisms, and locations of dust source areas, and applies an

1 improper standard to measure progress towards attainment. These flagrant defects in the
2 District's analytical methods and implementation of additional SCRs illustrate that the
3 District abused its discretion and the Final Determination has no real evidentiary support.
4 Accordingly, the District should be ordered to rescind the Final Determination.

5 **FOURTH CAUSE OF ACTION**

6 [Writ of Administrative Mandamus – Code of Civil Procedure §§ 1085 and 1086]
7 The District's Failure to Comply with the 2003 RSIP

8 48. The City re-alleges and incorporates herein by reference each and every
9 allegation contained in paragraphs 1 through 47, inclusive.

10 49. Code of Civil Procedure § 1085(a) authorizes courts to issue a writ of
11 mandate to compel the performance of an act that the law specifically requires. *US*
12 *Ecology v. Cal.*, 92 Cal. App. 4th 113, 138 (2001). Writ relief is available to compel a
13 public officer to perform a mandatory, ministerial act. *Id.* Pursuant to Code of Civil
14 Procedure § 1085, writ relief is also available to correct a legislative decision that is
15 arbitrary, capricious, entirely lacking in evidentiary support, contrary to established public
16 policy, unlawful, or procedurally unfair. *Wal-Mart Stores, Inc. v. City of Turlock*, 2006
17 Cal. App. LEXIS 474, *53-54 (2006).

18 50. To the extent that the court finds that the 2003 RSIP complies with state and
19 federal law, the District, at all relevant times, is obligated to carry out its responsibilities
20 required by the 2003 RSIP. However, the District's Final Determination fails to comply
21 with procedural and substantive requirements of the 2003 RSIP, as follows:

- 22 a. The District failed to address construction-related impacts.
23 b. The District used unauthorized substitute data for areas of the Playa where
24 data is unavailable (referred to as "data filling").
25 c. The District improperly used data from areas that will be subject to dust
26 control measures by the end of 2006. Such data are not representative of the
27 controlled conditions that the model is intended to evaluate.
28 d. The District failed to account for sand flux data (one of the fundamental data

1 sets used in the supplemental control areas delineation process) that has
2 been impaired by man-made disturbances.

3 e. The District placed data collection equipment in locations that did not
4 accurately represent the areas to which they apply or that are impacted by
5 irregularities.

6 f. The District failed to comply with requirements for the conduct of
7 inspections to verify boundaries of emissive areas.

8 51. By issuing the Final Determination, the District abused its discretion and
9 proceeded in a capricious manner that is contrary to law and factually deficient.

10 Accordingly, the City requests this Court to order the District to rescind and invalidate the
11 Final Determination.

12 **FIFTH CAUSE OF ACTION**

13 [Writ of Administrative Mandamus – Code of Civil Procedure § 1085]
14 The District's Failure to Comply with the CAA

15 52. The City re-alleges and incorporates herein by reference each and every
16 allegation contained in paragraphs 1 through 51, inclusive.

17 53. To the extent that the court finds that the District acted in accordance with
18 the 2003 RSIP, and the City submits it did not, the City contends that the District's
19 methodology for evaluating the necessity of supplemental controls is inconsistent with the
20 CAA and is therefore expressly preempted by federal law.

21 54. For PM₁₀ nonattainment areas, CAA § 172(c)(9) provides that a SIP shall
22 contain contingency measures that will automatically go into effect if "the area fails to
23 make reasonable further progress [RFP] or to attain the [NAAQS] by the applicable
24 attainment date." In other words, under the CAA, the RFP milestones, and not the
25 NAAQS, serve as a basis for determining whether sufficient progress is being made
26 towards attainment during the period leading up to the attainment.

27 55. Section 171(1) of the CAA defines RFP as: "such annual incremental
28 reductions in emissions of the relevant air pollutant as are required by this part or may

1 reasonably be required by the Administrator for the purpose of ensuring attainment of the
2 applicable national ambient air quality standards by the applicable date.” The USEPA
3 has promulgated the following guidance for development of RFP for PM₁₀ nonattainment
4 areas: “PM₁₀ nonattainment area SIPs must include quantitative emissions reductions
5 milestones which are to be achieved every three years and which demonstrate RFP . . .
6 until the area is redesignated attainment.” (USEPA, 1992).

7 56. Pursuant to CAA, Section 172(c)(9), unless RFP milestones have not been
8 met, contingency measures would not be triggered unless and until it is determined that
9 the SIP has failed to achieve attainment. Section 179(c) provides that the determination of
10 attainment occurs within six months after the attainment deadline, not before the deadline.
11 USEPA policy conforms to this approach (USEPA, 1992).

12 57. Contrary to federal law, the 2003 RSIP contains an unauthorized approach
13 to implementation of contingency measures. The District’s methodology for evaluating
14 the necessity of supplemental controls is not consistent with CAA requirements for a
15 contingency measure to be gauged by RFP or attainment following the applicable
16 deadline. Assuming *arguendo* that the District’s assertion of authority to impose
17 supplemental controls is legally permissible under the CAA, and City submits that it is
18 not, it cannot be fairly characterized as implementation of a “contingency measure.”

19 58. Because available evidence confirms that the overall levels of dust emitted
20 from the Owens Lake bed on an annual basis are declining ahead of pace with the RFP
21 milestone projections, any imposition of supplemental controls before the applicable
22 attainment deadlines under the CAA exceeds the District’s jurisdiction and is rendered
23 null and void.

24 59. For these reasons, this Court should issue a writ of mandate pursuant to
25 Code of Civil Procedure § 1085, directing the District to rescind and invalidate the Final
26 Determination.
27
28

1 **SIXTH CAUSE OF ACTION**

2 [Writ of Administrative Mandamus – California Environmental Quality Act]
3 The District’s Failure to Comply with CEQA, Public Resources Code §§ 21000 *et seq.*

4 60. The City re-alleges and incorporates herein by reference each and every
5 allegation contained in paragraphs 1 through 59, inclusive.

6 61. The City seeks the issuance of a writ of mandate ordering the District to
7 vacate and set aside the Final Determination because, in requiring the City to implement
8 supplemental controls on an additional 8.66 square miles on the Owens Lake bed without
9 conducting any environmental analysis, the District has failed to comply with its duties
10 under CEQA. *See* Pub. Res. Code §§ 21000 *et seq.*

11 62. The District’s decision to require supplemental controls on an additional
12 8.66 square miles of the Owens Lake bed is a discretionary action that has the potential to
13 result in significant environmental impacts. Accordingly, the Final Determination
14 constitutes a “project” under CEQA. Pub. Res. Code, § 21065; Cal. Code Regs., tit. 14, §
15 15378.

16 63. Because the District has the principal responsibility for requiring, carrying
17 out and approving the supplemental control measures which may have significant effect
18 upon the environment, the District is the lead agency. Pub. Res. Code § 21067. The
19 District, as lead agency, is responsible for considering the environmental effects, both
20 individual and collective, of all activities involved in the implementation of the
21 supplemental control measures. Pub. Res. Code § 21002.1.

22 64. Public Resources Code § 21100 and CEQA Guidelines § 15064 require a
23 lead agency, such as the District, to conduct an environmental analysis whenever there is
24 substantial evidence in the record or it can be fairly argued based on such evidence that a
25 project may have significant impacts on the environment. Pub. Res. Code, § 21100; Cal.
26 Code Regs., tit. 14, § 15064.

27 65. The District’s failure to conduct an environmental analysis of the potential
28 environmental impacts before approving the supplemental control measures (i.e. the

1 “project”) constitutes a prejudicial abuse of discretion. The District did not proceed in the
2 manner required by law and the District’s statement that the supplemental control
3 measures fall under statutory and categorical exemptions to CEQA is not supported by
4 substantial evidence. The Final Determination states that the District has agreed to
5 prepare an EIR addendum and conduct a “CEQA type review” within the next six months.
6 However, that statement does not relieve the District of its duties to fully comply with
7 requirements of CEQA and the CEQA guidelines prior to approving the project.

8 66. Failure to comply with CEQA before approving a discretionary project is a
9 violation of law. Therefore, the Court should issue a writ of mandate directing the District
10 to rescind and invalidate the Final Determination.

11 SEVENTH CAUSE OF ACTION

12 [Declaratory and Injunctive Relief]

13 67. The City re-alleges and incorporates herein by reference each and every
14 allegation contained in paragraphs 1 through 66, inclusive.

15 68. An actual controversy has arisen between the City and the District
16 concerning their respective rights and duties.

17 69. In violation of state law, the District has refused the City’s request to
18 invalidate its determination that the City is barred from seeking CARB review of the
19 Preliminary and Final Determination. The District continues to unlawfully assert that the
20 City is in violation of a District order and subject to significant civil fines and penalties for
21 every day that the City continues to maintain the January 20 Appeal and the Final
22 Determination Appeal.

23 70. The District has also unlawfully sought to expand the City’s obligations to
24 implement supplemental control measures and target additional square miles for
25 preliminary air pollution control measure design for several reasons: First, the Final
26 Determination does not comply with Section 42316, because it lacks evidentiary support
27 and is not reasonable on a cost-effective basis. Second, the District has failed to follow
28 procedural and substantive requirements proscribed by the 2003 RSIP. Third, the

1 District's methodology for evaluating the need for supplemental control measures violates
2 the CAA. Finally, the District has provided no information demonstrating that it has
3 complied with CEQA.

4 71. The City seeks a judicial declaration of the rights and duties of the
5 respective parties. The City has no plain, speedy and adequate remedy at law, other than
6 this proceeding to compel the District to take the actions requested by this Petition.
7 Unless and until the District is enjoined from continued violation of the law by order of
8 this Court, the City will suffer great and irreparable injury. The City seeks declaratory
9 and injunctive relief to prevent continued harm and to protect the City and the residents of
10 the City from the District's unlawful conduct.

11 72. Accordingly, the City requests this Court declare (1) the District's
12 determination that the City is barred from filing and maintaining its appeals to CARB
13 exceeds the District's jurisdiction and authority and is null and void, and that Section
14 43216 preempts the District's attempt to deny the City its right to file and maintain its
15 appeals to CARB; (2) the District's Final Determination amounts to an abuse of
16 discretion, and is null and void, as it violates Health & Safety Code § 42316, the 2003
17 RSIP, and the CAA; and (3) the District, as the lead agency, failed to conduct an
18 environmental analysis before ordering and approving the supplemental control measures,
19 and has therefore violated CEQA.

20 **RELIEF REQUESTED**

21 WHEREFORE, the City respectfully prays for relief as follows:

22 1. That the Court issue a preemptory writ of mandate ordering the District to
23 (1) invalidate the District's determination that the City has no right to file and maintain its
24 appeals to CARB, (2) invalidate the District's determination that the City is subject to
25 civil fines or penalties for refusing to withdraw its appeals to CARB, (3) invalidate the
26 Final Determination, requiring supplemental controls on the 8.66 square miles and
27 preliminary pollution control measure design for 0.79 square miles designated as "watch"
28 areas.

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2. That the Court declare the respective rights and duties of the parties, and that by such declaration and judgment it be declared that the District must perform its legally mandated duties under state and federal law and invalidate as null and void its decision that the City has no right to file and/or maintain its appeals to CARB, and overturn or render null and void the Final Determination.

3. That the Court grant a preliminary and permanent injunction enjoining the District from denying the City its right under Section 42316 to file and maintain its appeals to CARB, enjoining the District from requiring supplemental control measures on the 8.66 square miles and preliminary pollution control measure design for 0.79 square miles, and enjoining the District to wait to assess the need for supplemental controls until construction of dust control measures is completed at the end of December of 2006.

4. That the Court grant such other and further legal and equitable relief as it deems just and proper.

Dated: May 3, 2006

ROCKARD J. DELGADILLO
City Attorney

By: *Julie Conboy*
Julie Conboy
Deputy City Attorney

Dated: May 4, 2006

MANATT, PHELPS & PHILLIPS, LLP
CRAIG A. MOYER (Bar No. 094187)
MARK D. JOHNSON (Bar No. 135288)
LISA L. TRIFILETTI (Bar No. 238510)

By: *M. Johnson*
Mark D. Johnson
Attorneys for
CITY OF LOS ANGELES
Department of Water and Power

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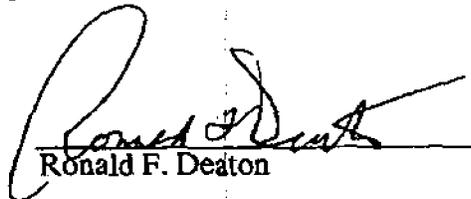
VERIFICATION

I have read the foregoing **FIRST AMENDED AND SUPPLEMENTAL VERIFIED PETITION FOR WRIT OF ADMINISTRATIVE AND TRADITIONAL MANDAMUS AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** and know its contents.

I am the General Manager of the Department of Water and Power of the City of Los Angeles, a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I have read the foregoing document(s). I am informed and believe and on that ground allege that the matters stated in it are true.

Executed at Los Angeles, California on this 3rd day of May, 2006.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Ronald F. Deaton

EXHIBIT A

May 3, 2006

Client-Matter: 23731-061

VIA FACSIMILE AND U.S. MAIL

Theodore D. Schade
Great Basin Unified Air Pollution Control District
157 Short Street
Bishop, CA 93514-3537

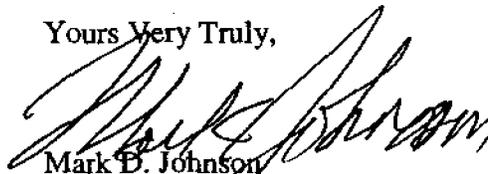
Re: NOTICE OF INTENT TO COMMENCE ACTION

Dear Mr. Schade:

The City of Los Angeles is in receipt of your letter dated April 4, 2006 (the "Final Determination") stating the response of the Great Basin Unified Air Pollution Control District ("District") to the alternative analysis provided by the City of Los Angeles, by and through the Department of Water and Power of the City of Los Angeles ("City"), to your letter of December 21, 2005 stating the Air Pollution Control Officer's 2004/2005 Determination under the 2003 Owens Valley PM-10 Planning Area Demonstration of Attainment State Implementation Plan.

The purpose of this letter is to comply with the requirements of the California Public Resources Code and provide notice of the City's intent to file a Petition for Writ of Mandate, on or about May 4, 2005, under the California Environmental Quality Act and the California Public Resources Code challenging the District's adoption of the Final Determination and associated actions.

Yours Very Truly,



Mark D. Johnson
Manatt, Phelps & Phillips, LLP

MDJ/cg

40998120.1

SUM-100

FIRST AMENDED SUMMONS
(CITACION JUDICIAL)

NOTICE TO RESPONDENT AND DEFENDANT:
(AVISO AL DEMANDADO):
GREAT BASIN UNIFIED AIR POLLUTION CONTROL DISTRICT

YOU ARE BEING SUED BY PETTIKINER AND PLAINTIFF
(LO ESTÁ DEMANDANDO EL DEMANDANTE):
CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER



You have 60 CALENDAR DAYS after this summons and legal papers are served on you to file a written response to this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not have an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.legalhelpforlos.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

The name and address of the court is:
(El nombre y dirección de la corte es):

Inyo County Superior Court
168 North Edwards Street
Independence, CA 93526

COURT NUMBER:
Número del Caso:
SICVPT-06-41082

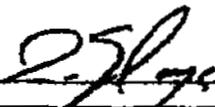
FAX FILED

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Mark D. Johnson
Maratt, Phelps & Phillips, LLP
11355 West Olympic Boulevard
Los Angeles, CA 90084-1614

Tel: (310) 312-4000 Fax: (310) 312-4224

DATE:
(Fecha) MAY 04 2006

NANCY A. MORSEY  Deputy
(Secretaria) (Adjunta)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, POS-010).

NOTICE TO THE PERSON SERVED: You are served

- 1. as an individual defendant.
- 2. as the person sued under the fictitious name of (specify):
- 3. on behalf of (specify): **Great Basin Unified Air Pollution Control District**
under: CCP 416.10 (corporation) CCP 416.20 (minor)
 CCP 416.20 (defunct corporation) CCP 416.70 (conservatee)
 CCP 416.40 (association or partnership) CCP 416.90 (authorized person)
 other (specify): **ccp 416.50 (public entity)**
- 4. by personal delivery on (date): **5-15-06**



Filed and Served by Sherwood Lee
Judicial Council of California
2004-2005 Form JWS-001 (Rev. 1/03)

SUMMONS

Page 1 of 1
Order of Case Preparation No. 016126, 066
Approved by the Judicial Council, 1/03
www.courtinfo.ca.gov/selfhelp

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05/04/2006 10:30 FAX 2107595988

MAY 15 2006