Gary J. Smith (SBN 141393)
David H. McCray (SBN 169113)
BEVERIDGE & DIAMOND, P.C.
456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251
Telephone: (415) 262-4000
Facsimile: (415) 262-4040
Email: gsmith@bdlaw.com
dmccray@bdlaw.com

Attorneys for Petitioners/Plaintiffs Western States Petroleum Association; Valero Refining Company—California; Tesoro Refining & Marketing Company, LLC; and Phillips 66 Company

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF CONTRA COSTA

WESTERN STATES PETROLEUM ASSOCIATION; VALERO REFINING COMPANY—CALIFORNIA; TESORO REFINING & MARKETING COMPANY, LLC; and PHILLIPS 66 COMPANY,

Petitioners/Plaintiffs,

v.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT and DOES 1 through 20, inclusive,

Respondents/Defendants.

Case No. N16-0963

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE

(Code Civ. Proc §§ 1085, 1094.5)

CEQA CASE

APPENDIX A

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES **Page(s)**

CALIFORNIA CASES

FEDERAL STATUTORY AUTHORITIES & REGULATIONS

CALIFORNIA STATUTORY AUTHORITIES & REGULATIONS

ADDITIONAL AUTHORITIES

I. INTRODUCTION

In 2014, the Bay Area Air Quality Management District (the "District") adopted Resolution 2014-07, which defines several concrete objectives, including a "20% reduction in refinery emissions, or as much emissions reductions as are feasible . . . as expeditiously as possible" (the "Resolution"). (Admin. Record Doc. ("AR Doc.") 194, at 004394-95.) Shortly thereafter, District staff conceived of a "suite" of rules, developed in concert, that would work together to achieve the Resolution's objectives, an undertaking the District labeled as its "Refinery Emission Reduction Strategy." (AR Doc. 161, at 004069-70.) Two of those rules are challenged here: Regulation 12, Rule 15 ("Rule 12-15") and Regulation 9, Rule 14 ("Rule 9-14"). There is no dispute that Rules 12-15 and 9-14 were developed and adopted under the umbrella of the District's Refinery Strategy. (Answer at 6:4-7 (admitting that five rules, including Rule 12-15, were "characterized by the Air District as implementing different phases of the Refinery Strategy").)

Under the California Environmental Quality Act ("CEQA") [1], a series of actions undertaken to attain the same objective constitutes a single "project." (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1226-27) (hereinafter *Tuolumne County*).) The CEQA "project" at issue here—the Refinery Project—is the set of integrated suite of regulatory actions taken by the District to achieve the Resolution's objective. Each of these rules represents a step towards achieving the Resolution's focused and targeted objective: a 20% reduction in refinery emissions.

Agencies are prohibited from "chopping up" projects into smaller components to minimize impacts or evade review. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 396; Cal. Code Regs. tit. 14, § 15378(a).) The moment it adopted Rules 12-15 and 9-14 with individual negative declarations, the District segmented those rules *from each other* and from its broader Refinery Project. The District's improper segmentation of the Refinery Project violates CEQA

[1] CEQA is codified in sections 21000–21189 of the Public Resources Code. CEQA is implemented through the "Guidelines for Implementation of the California Environmental Quality Act," which are contained in California Code of Regulations, Title 14, Chapter 3, hereinafter referred to simply as the "CEQA Guidelines."

and subverts its core purpose of assuring a comprehensive assessment of "the whole of the action."

The District also failed to comply with important requirements of the California Health & Safety Code ("H&S Code") when adopting Rule 12-15, including the District's obligation to make findings of necessity, consistency, and non-duplication under H&S Code § 40727. The District must satisfy these requirements with "substantial evidence" that a "reasonable trier of fact could conclude. . . is reasonable, credible, and of solid value." (See *Plastic Pipe and Fittings Assn. v. Cal. Bldg. Standards Com* (2004) 124 Cal.App.4th 1390, 1406-07 (citations omitted).) Rather than proceed in a reasoned manner, the District based Rule 12-15 on unsubstantiated assumptions about what the rule *might* achieve, while arbitrarily ignoring inconvenient data and real-world facts.

Finally, the District lacks authority to adopt core provisions of Rule 12-15. It is black-letter law that "administrative agencies have only the powers conferred on them" and "may not act in excess of those powers." (*Am. Fed'n of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1042, n.9, citing *Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103-04). The District violated this principle when it adopted Rule 12-15 without authority for provisions related to refinery "crude slate" reporting and cargo carrier emissions. In doing so, the District ignored state and federal laws that preempt these provisions of Rule 12-15, and which render Rule 12-15 *ultra vires* and void.

Petitioners are the Western States Petroleum Association ("WSPA") and three individual refineries that will be significantly affected by Rules 12-15 and 9-14. Petitioners seek a writ of mandate from this Court ordering the District to (i) vacate and set aside the Initial Study/Negative Declarations for Rules 12-15 and 9-14; (ii) comply with CEQA and H&S Code requirements in any future Refinery Project rulemaking; and (iii) vacate and set aside Rule 12-15.

II. REGULATORY HISTORY & STATEMENT OF FACTS

In 2014, District staff recommended "approval of a resolution directing staff to develop a strategy to track and reduce emissions from Bay Area refineries." (AR Doc. 166 at, 004135; see also AR Doc. 168.) In late 2014, the District's Board expanded and codified this recommendation in the

form of Resolution 2014-07,[2] which directed District staff to develop an integrated strategy to track refinery emissions and to reduce refinery emissions by 20%, "or as much [] as are feasible." (AR Doc. 194, at 004394-95.)

Following issuance of the Board's Resolution, the District initiated significant planning and scoping efforts to evaluate how to implement the Resolution's directives. The District labeled this integrated effort its "Refinery Emission Reduction Strategy" (the "Refinery Strategy" or "Strategy"). (See generally AR Doc. 90.) The District's strategy incorporated four components: (1) reducing criteria pollutants and precursors; (2) reducing health risks from air toxics; (3) tracking greenhouse gas ("GHG") emissions; and (4) improving control technology and practices. (AR Doc. 161, at 004069-70.) The District planned to implement these components through a "suite" of coordinated rulemaking actions in 2015 and 2016. (*Id.*; see also AR Doc. 147, at 003909.) As the first step, the District planned to develop and adopt a single package of rules to address criteria pollutants (including sulfur dioxide ("SO_2"), particulate matter ("PM"), and PM precursors) and tighten requirements for equipment leaks. (AR Doc. 163, at 004096-97.) The District also planned a second package of rules to address the Refinery Strategy's second objective, reducing risk from air toxics. (AR Doc. 163, at 004098.) Two months after the Board passed Resolution 2014-07, it approved the Refinery Strategy as the District's mechanism for achieving the Resolution's objective of a 20% reduction in refinery emissions. (AR Doc. 162, at 004075-80.)

In January, 2015, at the District's "Refinery Emissions Reduction Strategy Kick-Off Meeting," the District identified 13 refinery-focused rules, including Rule 9-14 and Rule 12-15, as components of its Refinery Strategy. (AR Doc. 694, at 011577-78.) The District targeted seven of those rules for adoption by late 2015 and indicated that these seven rules may collectively require an Environmental Impact Report ("EIR") under CEQA. (AR Doc. 694-A.)

[2] At times, documents in the Administrative Record refer to Resolution 2014-07 as Resolution 2014-17. (*See, e.g.*, AR Doc. 47, employing both terms.) Petitioners believe this is a typographical error, and that the correct designation is Resolution 2014-07. For consistency and clarity, this brief will refer to "Resolution 2014-07" or simply the "Resolution."

In October 2015, the District proposed an initial package of six rules for adoption under the umbrella of the Refinery Strategy: Rules 8-18, 11-10, 6-5, 9-14, 12-15, and 12-16. (AR Doc. 53 (public hearing notice for Rules 8-18, 11-10, 6-5, and 9-14); AR Doc. 97 (public hearing notice for Rules 12-15 and 12-16).) The District prepared a single EIR for Rules 12-15 and Rule 12-16, but did not prepare an EIR for the other four rules. (AR Doc. 99.) The basis for this decision is unclear. The District first characterized Rules 8-18, 11-10, 6-5, and 9-14 as a separate individual CEQA "project" and prepared a single draft Negative Declaration covering all four rules. (AR Doc. 56, at 002194 (acknowledging that all four rules are "part of a concerted effort to reduce refinery emissions"); AR Doc. 57.) At the same time, this Negative Declaration evaluated each rule *separately* as an "individual action," based on the District's assertion that there were no "dependencies" between the four rules that comprised this "project." (AR Doc. 56, at 002194; AR Doc. 53, at 002190.)

In November 2015, Petitioners provided several hundred pages of substantive and technical comments on the six proposed rules, including Rules 9-14 and 12-15. These comments identified technical inaccuracies, legal issues, and the common objective of each rule as interrelated components of the Refinery Project. (AR Docs. 76-81; AR Doc. 146, at 003901-05.)

By the December 8, 2015 public hearing on these rules, the District changed course yet again, chopping up these six rules into multiple rulemaking actions. At the public hearing, the District announced that it would consider adoption of only three of the six originally-proposed rules: Rules 6-5, 8-18, and 11-10 (hereinafter referred to as the "Phase 1 Rules"). (AR Doc. 47, at 001819-20.) The remaining rules were delayed until 2016, although the District reiterated its intent to proceed with them, as they remained "important to meeting the Air District goals set forth in Resolution 2014-[0]7." (AR Doc. 47, at 001906.) The District subsequently adopted the Phase I Rules and approved the accompanying Initial Study/Negative Declaration. (AR Docs. 49 - 51; AR Doc. 68 (single negative declaration for Phase 1 Rules).) On January 22, 2016, three of the Petitioners in this case (Valero, Tesoro, and Phillips 66) filed a Petition and Complaint alleging that the District violated CEQA, failed to comply with the H&S Code, and acted in an arbitrary and capricious manner when it adopted the Phase 1 Rules. (See generally Case No. N16-0095; see also Case No. N16-0095, Amended Petition for Writ of Mandate, at 14:16-31:13.)

Less than two months after adopting the Phase 1 Rules, the District re-proposed Rules 9-14 and 12-15 (hereinafter referred to as the "Phase 2 Rules"). This time, instead of preparing an EIR for Rule 12-15, the District prepared individual Negative Declarations for both of the Phase 2 Rules. (AR Doc 15 (negative declaration for Rule 9-14); AR Doc 16 (negative declaration for Rule 12-15).) Despite significant changes to the rules and accompanying CEQA analyses, the District allowed only three weeks for submission of public comments on the re-proposed forms of Rules 9-14 and 12-15. Petitioners timely submitted detailed comments on the Phase 2 Rules that also addressed the broader Refinery Project and the District's lack of compliance with CEQA. (See AR Docs. 18-21.)

On March 21, 2016, the District posted further revisions to Rule 12-15, along with a 3-page document summarizing the changes made by the District, and on April 8, 2016, Petitioners submitted comments on this newly revised version of Rule 12-15. (See AR Docs. 23-25A.) On April 20, 2016, the District conducted a public hearing on Rules 9-14 and 12-15. (See AR Doc. 1 (transcript of hearing).) During the April 20 hearing, WSPA and the other Petitioners publicly commented on the Refinery Project, proposed Rule 12-15, and related issues. (*Id.*) At the end of the April 20 hearing, the District adopted both Phase 2 Rules and approved the accompanying IS/NDs. (AR Doc. 4 (Rule 12-15); AR Doc. 5 (adopting Rule 9-14).) On May 25, 2016, Petitioners timely filed this action, challenging the District's adoption of the Phase 2 Rules on multiple grounds.

III. STANDARD OF REVIEW

A. This Court Must Void Agency Decisions that Do Not Comply with CEQA.

CEQA requires all public agencies to conduct an environmental review of any "project" they carry out. (Pub. Res. Code § 21080.) A "project" is an "activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Pub. Res. Code, § 21065.) CEQA "projects" include an agency's adoption of a rule or regulation, including those aimed at environmental protection. (*Cal. Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 Cal.App.4th 1225, 1240 (citations omitted).)

A series of actions undertaken to attain the same objective constitutes a single project. (*Tuolumne County,* 155 Cal.App.4th at 1226-27.) When reviewing a project under CEQA, the lead

agency must consider the "whole of an action" and CEQA forbids an agency from "chopping a large project into many little ones" to evade a full environmental review. (*Laurel Heights Improvement Assn.*, 47 Cal.3d 376, 396 (quoting *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283-84); Cal. Code Regs. tit. 14 § 15378(a).)

The scope of a CEQA "project" is a question of law for the Court to decide. (*Tuolumne County*, 155 Cal.App.4th at 1224 ("The scope of a CEQA 'project' is a question of law to be reviewed de novo."); *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 271.) Upon finding that an agency has violated CEQA, a court may issue a writ of mandate voiding an action and requiring compliance with CEQA. (Pub. Res. Code § 21168.9(a).) "Directing an agency to void its approval of the project is a typical remedy [] for a CEQA violation." (*POET, LLC v. Cal. Air Res. Bd.* (2013) 218 Cal.App.4th 681, 759) (citation omitted).)

B. This Court Must Set Aside Rules That Fail to Comply With the H&S Code or Are Arbitrary, Capricious, or Lacking in Evidentiary Support.

The H&S Code imposes several substantive requirements on the District when it engages in rulemaking. Among other things, the District "shall" make findings and assure that rules meet the following criteria: "necessity, authority, clarity, consistency, nonduplication, and reference." (H&S Code § 40727.) The District also "shall consider . . . the cost effectiveness of a control measure." (*Id.* § 40703.) These are mandatory requirements that the District must comply with when adopting any regulation. (*Id.* § 16 (H&S Code use of the word "shall" imposes a "mandatory" obligation).) The District must satisfy each of these requirements with "substantial evidence in the administrative record." (*Plastic Pipe and Fittings Assn.*, 124 Cal.App.4th at 1406 (citations omitted).) Substantial evidence exists only when a "reasonable trier of fact could conclude that the evidence is reasonable, credible, and of solid value." (*Id.*, at 1407 (citation omitted).)

The District's decisions also must be fair and reasoned. If the District's actions are "arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair," this Court must set them aside. (*Am. Coatings Assn. v. S. Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 460.) When evaluating "whether a regulation is arbitrary, capricious, or lacking in evidentiary support, the court must ensure that an agency has 'adequately considered all relevant factors, and has demonstrated a

rational connection between those factors, the choice made, and the purposes of the enabling statute.'" (*Id.* (quotation and citation omitted).)

C. Agency Action Not Authorized by the Legislature is Void.

There are two fundamental limitations on agency action. First, administrative agencies have only the powers granted to them by the Legislature, and "may not act in excess of those powers." (*Am. Fed'n of Labor,* (1996) 13 Cal.4th 1017, 1042, n.9, citing *Ferdig,* (1969) 71 Cal.2d 96, 103-04.) Second, agency action is void if preempted by an act of the Legislature. (*County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, citing and quoting *Agricultural Labor Relations Bd. v. Super. Ct. Court* (1976) 16 Cal.3d 392, 419; *Tolman v. Underhill* (1952) 39 Cal.2d 708, 712.) Agency actions are preempted when they duplicate, contradict, or infringe upon an area already fully occupied by another statute, either expressly or by legislative implication. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 (citations and quotations omitted).) Agency actions that exceed an agency's authority are void, and courts may issue a writ of mandate to "nullify the void acts." (*Am Fed'n of Labor*, 13 Cal.4th at 1042 (citation omitted).)

IV. ARGUMENT

A. The District Violated CEQA by Illegally Segmenting the Refinery Project.

In late 2014, the District adopted Resolution 2014-07, which established the defined goals of tracking refinery emissions (in part through Rule 12-15) and reducing those emissions by 20%. (AR Doc. 194, at 004394-95.) To achieve these objectives, the District first conceived its overarching Refinery Strategy. Next, working under the umbrella of the Refinery Strategy, the District developed a coordinated set of regulatory actions, to be adopted in several phases, that *together* would achieve the Resolution's defined objectives. (AR Doc. 161, at 004066-70 (describing approach and specifically discussing Rule 12-15); AR Doc. 147, at 003909-12 (identifying "phases" of Refinery Project).) These rules—including the Phase 1 Rules and the Phase 2 Rules—constitute the District's Refinery Project and, as the District acknowledged, each rule adopted as part of its Refinery Project is "part of a concerted effort to reduce refinery emissions." (AR Doc. 56, at 002194.)

The District first violated CEQA when it adopted the Phase 1 Rules without any form of unified CEQA review, effectively segmenting those three rules from each other and from the District's broader Refinery Project. The District repeated this failure when it adopted the Phase 2 Rules challenged here (Rules 9-14 and 12-15), again segmenting these rules from each other and failing to consider the cumulative impacts of the Phase 2 Rules and other Refinery Project actions, including the previously-adopted Phase 1 Rules. This approach enabled the District to artificially minimize the total environmental impact of the Refinery Project as a whole, which in turn allowed the District to avoid preparing an EIR assessing *all* environmental impacts of the Refinery Project. These actions violate CEQA and frustrate its core purposes of informing the public as to the true scope of a project and assuring a comprehensive review of "the whole of the action."

1. There is a Single CEQA Project At Issue—the Refinery Project—Which Encompasses Each Regulatory Step The District Takes to Achieve the Resolution's 20% Refinery Emissions Reduction Objective.

Collectively, the suite of rules adopted by the District to achieve the common, well-defined objectives of the Resolution constitute a single CEQA project—the Refinery Project. (*Tuolumne County*, 155 Cal.App.4th at 1226-27 (all of the "various steps which taken together obtain an objective" comprise a single CEQA project).) CEQA defines a "project" as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is . . . [a]n activity directly undertaken by any public agency." (Pub. Res. Code § 21065.) The District's approval of multiple refinery regulations to achieve a common objective is "an activity" that, by design, will cause a physical change in the environment and is subject to CEQA. (See *id.*)

It is abundantly clear that there is a CEQA "project" at issue. The only remaining question is to determine the proper *scope* of that project. (*Nelson*, 190 Cal.App.4th 252, 267 ("a correct determination of the nature and scope of the project is a critical step in complying with the mandates of CEQA") (citations and quotations omitted).) The key inquiry thus becomes: is the scope of the District's CEQA project limited to each individual rule, or does it include—in the District's own words—the entire "suite" of regulations adopted by the District to achieve the unified goals of the Board's Resolution?

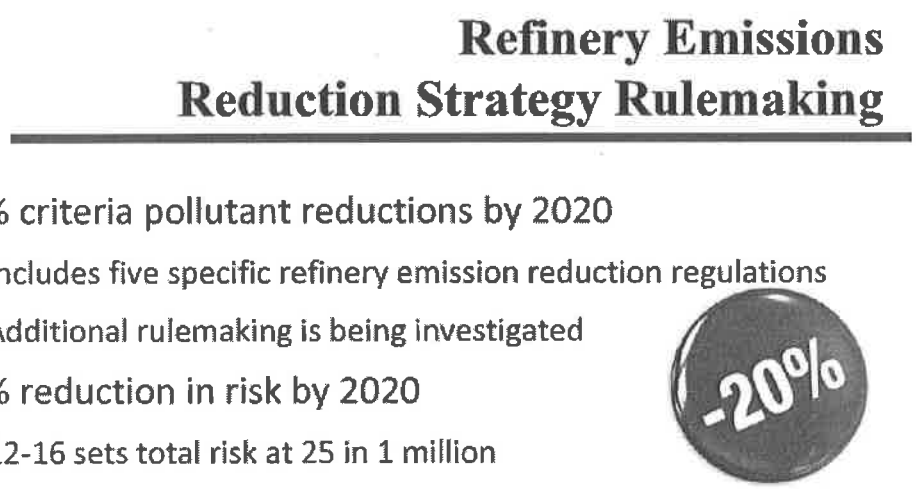
The correct answer is the latter. The District itself admits that both the Phase 1 Rules and the Phase 2 Rules challenged here were adopted as part of a concerted effort by the District to achieve the Resolution's objective of reducing refinery emissions by 20%. (Compl. at 4:24-27, Answer at 3:21 (District admitting that it "adopted [] Rules 12-15 and 9-14 as part of its Refinery Strategy"); see also AR Doc. 56, at 002194.) The District also admits that its approval of Rules 12-15 and 9-14 is subject to CEQA. (Compl. 17:13-16; Answer 8:26.) And the District further admits that its previously-adopted Phase 1 Rules "have been characterized by the Air District as implementing different phases of the Refinery Strategy." (Answer at 6:5-7.) In short, the District admits that all five of these rules are steps towards achieving the concrete emissions reduction objective of Resolution 2014-07, and that these steps are subject to CEQA.[3]

The Record in this case further supports the conclusion that there is a single CEQA project at issue. From the moment the Board issued Resolution 2014-07 in late 2014, the District began to develop a unified approach and holistic plan to achieve the Resolution's goals. Within two months, the District had developed a multi-phased "Refinery Emission Reduction Strategy," which it intended to implement over the following two years. (AR Doc. 161, at 004069-70.) Within three months, the District held a "Refinery Emissions Reduction Strategy Kick Off Meeting" to discuss its "rule development efforts" and a unified approach to developing up to twenty individual rules as components of the Refinery Project—including the Phase 1 Rules, the Phase 2 Rules, and others. (AR Doc. 694, at 011575-83.) To manage this significant and coordinated undertaking, the District created a project workflow chart assigning roles and responsibilities to twenty-two District staff members tasked with handling specific aspects of the District's Refinery Project rulemaking effort. (*Id.* at 011583.)

While the timing and details of the Refinery Project changed over the following months, this holistic approach—the District's plan to develop a number of interrelated rules, in multiple phases, to collectively achieve the objectives set forth by the Resolution—did not. In March 2015, the District reported that its staff had "developed a Refinery Emission Reduction Strategy in response to Resolution

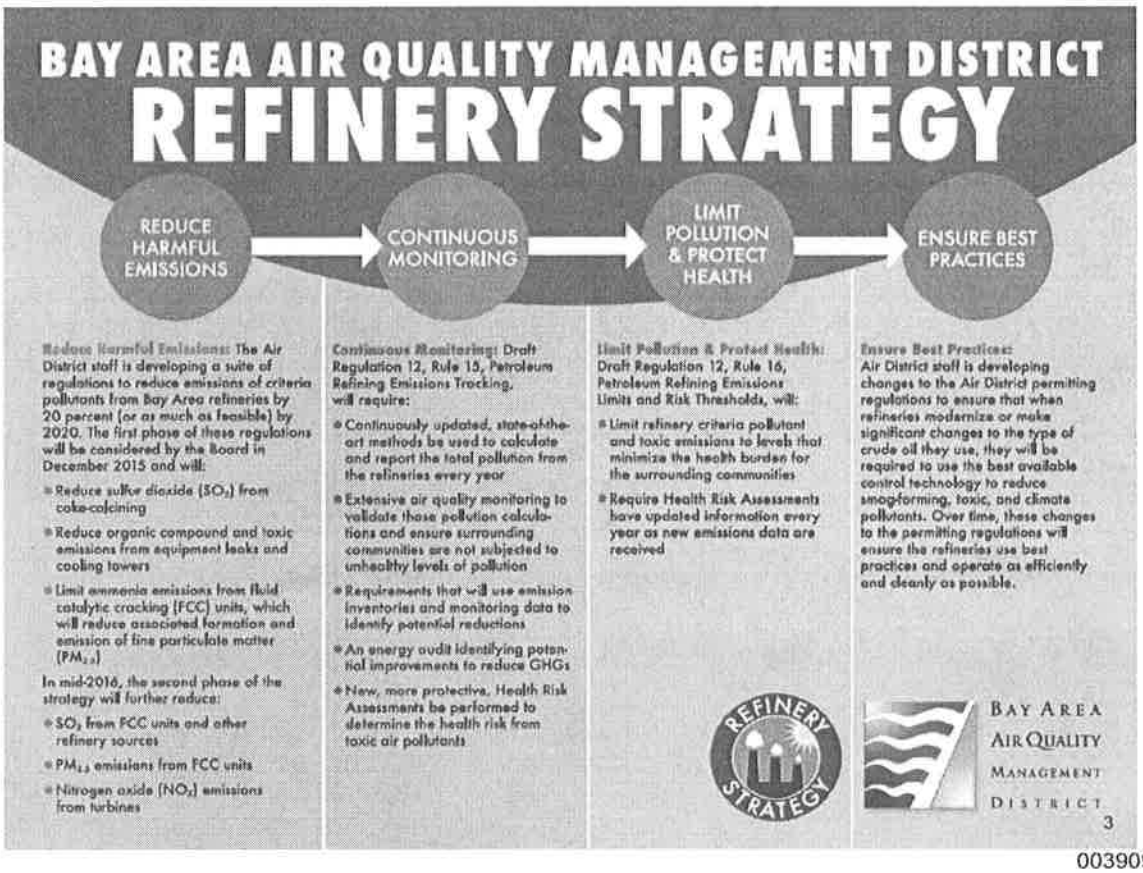
[3] In litigation challenging the Phase 1 Rules, the District admitted that its approval of those rules is subject to CEQA and that each of the Phase 1 Rules was "intended to help achieve the 20% emissions reduction goal" set forth in Resolution 2014-07. (Case No. N16-0095, Answer at 7:7-9; 10:22-24.)

2014-[0]7, ***identifying specific rulemaking to meet the goal of reducing refinery emissions by 20%***," and which included "a five-point action plan to provide a path forward to quickly and effectively address [refinery emissions]." (AR Doc. 156, at 004028 (specifically linking Rule 12-15 and other rules to the 20% emissions reduction goal) (emphasis added).) In June 2015, the District presented that plan—again specifically linking each set of regulatory actions to the Project's objective of achieving a 20% reduction in refinery emissions and health risks. (See generally AR Doc. 155.) The District's presentation explains this link quite clearly:



(AR Doc. 155, at 004006).

The District continued to treat these rules as related parts of a single effort, both internally and in presentations to the public. Shortly before adopting the Phase 1 Rules, the District again explained its Refinery Project using a straightforward chart:



(AR Doc. 147, at 003909.)

This chart bears a striking resemblance to the District's initial description of its Refinery Strategy: multiple components, each relying on several regulatory steps that build upon each other to achieve the District's unified emissions reduction objective.

In early 2016, just before adopting the Phase 2 Rules, the District again affirmed the interrelated nature of each Refinery Project rulemaking phase. (AR Doc. 28, at 001069 (describing how District staff "discussed the refinery strategy" which it then contemplated as encompassing at least ten rules adopted in four phases).) A few weeks later, on February 25, 2016, the District gave a presentation noting that the combination of the Phase 1 Rules it had previously adopted and the Phase 2 Rules it had (at that time) recently proposed put the District "on track to meet the 20% reduction goal." (AR Doc. 30 at 001091.)

Refinery Strategy – Criteria Pollutants

Actions to Date

- Three rules adopted December 2015 resulting in significant emissions reductions

Upcoming Actions

- Rules 12-15 and 9-14 proposed for Board action April 20, 2016
- Additional rules in development to realize further emissions reductions

On track to meet 20% reduction goal

Bay Area Air Quality Management District
Stationary Source Committee Meeting
Agenda 5

February 25, 2016
Slide 5

001091

(AR Doc. 30 at 001091.)

As the District's actions and documents demonstrate, each of the Refinery Project's rules, including the Phase 2 Rules challenged here, are aimed squarely at achieving the specific objective described in the Resolution: reduce refinery emissions and health risks by 20%, or as much as feasible. (AR Doc. 147, at 003909.) The District intended its suite of rules—the entire Refinery Project—to work *together* to achieve this common goal. (*Id.*; see also AR Doc. 147, at 003911; AR Doc. 30 at 001090-91.) As the District's Staff Report for Rule 9-14 makes clear:

> [The District] has developed a four-part strategy for addressing air pollution from Bay Area petroleum refineries (known as the Refinery Strategy). This strategy stems from a resolution (2014-17) the Air District Board of Directors adopted in October 2014, instructing staff to develop a regulatory strategy that would further reduce emissions from petroleum refineries, with a goal of an overall reduction of 20 percent (or as much as feasible) no later than 2020.

(AR Doc. 2, at 000561.) The District went on to note that its Phase 1 Rules are "expected to reduce overall emissions from petroleum refineries by approximately 14 percent" while Rule 9-14 is expected to "reduce overall refinery emissions by an additional 1 percent." (*Id.*) And the District has repeatedly emphasized the role of Rule 12-15 as a component of its Refinery Project that is key to achieving the goals of Resolution 2014-07. (See, e.g., AR Doc. 30 at 001090, AR Doc. 147, at 003909.)

Given the interdependence of the District's regulatory actions and their common underlying purpose, it is plain that they are "various steps which taken together obtain an objective" and comprise a single "project" for purposes of CEQA—the Refinery Project. (*Tuolumne County*, 155 Cal.App.4th at 1226-27.)

2. The District Violated CEQA By Chopping Up the Refinery Project and Failing to Conduct a Unified Review of All Refinery Project Actions.

The District understood the integrated nature of its Refinery Project rulemaking efforts but took a cavalier approach to its CEQA obligations. The fact that a specific project may occur through multiple components or phases does not excuse an agency from CEQA's mandate to evaluate "the whole of the action." (*Cal. Union for Reliable Energy*, 178 Cal.App.4th at 1242) (citing 1 Kostka Zischke, Prac. Under the Cal. Envt'l Quality Act, § 6.31, 329-330).) "This prevents agencies from chopping a large project into little ones, each with a minimal impact on the environment, to avoid full environmental disclosure. . . . Piecemeal environmental review that ignores the environmental impacts of the end result is not permitted." (*Id.*) But this is exactly what the District did here.

The District did not prepare an EIR for the Phase 1 Rules, the Phase 2 Rules, or the Refinery Project as a whole. Instead, the District reviewed each of its five adopted rules in isolation from the others, concluded that each rule had no significant environmental impact, and adopted negative declarations in each instance. (See AR Doc. 68 (single negative declaration for Phase 1 Rules); AR Doc 15 (negative declaration for Rule 9-14); AR Doc 16 (negative declaration for Rule 12-15).)

At the same time, District staff had previously recognized that "it would be good to consider the cumulative impacts of the whole suite of regulatory efforts" under CEQA. (AR Doc. 831, at 012657.)

This apparent disconnect appears to derive from the District's shifting views of its CEQA obligations, with the District reformulating its approach on at least three different occasions (so far):

- October, 2015: the District proposes its Phase 1 Rules, along with Rules 9-14, 12-15, and 12-16, concluding that (i) Rules 12-15 and 12-16 are a single "project" requiring an EIR and (ii) the remaining four rules are a separate individual CEQA "project." (AR Doc. 98; AR Doc. 56, at 002194.)

- December, 2015: the District severs the three Phase 1 Rules and adopts them with a single Negative Declaration, treating each of the three rules as separate CEQA "projects." (AR Doc. 68; see also AR Doc. 47, at 002003.)

- April, 2016: the District adopts Rules 9-14 and 12-15 as a single "project," ignoring both its prior EIR for Rule 12-15 and prior grouping of Rule 9-14 with the Phase 1 Rules and concluding instead that each of these two rules requires only a stand-alone Negative Declaration. (AR Docs. 15, 16 (negative declarations for Rules 9-14 and 12-15).)

At each stage, the District redefined its CEQA obligations based on expediency, resulting in an artificial compartmentalization of various Refinery Project rules and CEQA reviews structured for—in the District's own words—"administrative convenience." (AR Doc. 68, at 002312.) But CEQA requirements are driven by substance, not logistics.

When a set of actions is aimed at a common objective—such as tracking and reducing refinery emissions by 20%—CEQA requires the agency to evaluate those actions *together*:

> One way to evaluate which acts are part of a project is to examine how closely related the acts are to the overall objective of the project. The relationship between the particular act and the remainder of the project is sufficiently close when the proposed physical act is among the various steps which taken together obtain an objective.

(*Tuolumne County*, 155 Cal.App.4th at 1226-27 (citation and quotation omitted).)

Given CEQA's core "purpose of informing the public about *potential* environmental consequences, it is quite clear that an EIR is required even if the project's ultimate effect on the environment is far from certain." (*Cal. Bldg. Indus. Assn. v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 382 (emphasis original).) This requirement is designed to assure that *all* of a project's impacts are considered at the same time, since a set of smaller actions may result in a significant cumulative effect on the environment. (*Laurel Heights Improvement Assn.*, 47 Cal.3d at 396.)

Because the Phase 1 and Phase 2 Rules—and numerous other rules still under development—were collectively designed to achieve a defined, targeted objective (*i.e.*, the goals of Resolution 2014-07) they are part of a single CEQA project. (*Tuolumne County*, 155 Cal.App.4th at 1226-27.) By analyzing the Phase 2 Rules in isolation from each other and from the other Refinery Project rules, the District addressed only a fraction of the entire Refinery Project. That action subverts CEQA's fundamental purpose of assuring a comprehensive environmental review of "the whole of an action." (Cal. Code Regs. tit. 14 § 15378(a); *Bozung*, 13 Cal.3d at 283-84; *Nelson*, 190 Cal.App.4th at 271.)

3. The District Failed to Justify Its Illegal Segmentation of the Refinery Project.

Given the clear relationship of the District's Refinery Project rules and the integrated regulatory process undertaken by the District, Petitioners repeatedly asked the District to conduct a comprehensive CEQA analysis that incorporated *all* Refinery Project actions. (See AR Doc 18 at 000856; AR Doc. 20 at 000918-19; AR Doc. 23 at 000943.) In response, the District asserted that its Refinery Project rules are simply business-as-usual rulemaking. (AR Doc. 7, 000749-52.) That argument is a strawman and grossly oversimplifies the scope and unified nature of the Refinery Project. This is not "business-as-usual" rulemaking: the Refinery Project envisions ten to twenty individual rules, all aimed at the unified, common objectives of Resolution 2014-07. (See AR Doc. 694, at 011575-83 (discussing a unified approach to developing up to twenty individual rules under the Refinery Project); see also AR Doc. 28, at 001069 (describing ten rules the District has either already adopted or considered for adoption in the near future as components of the Refinery Project).)

Projects often occur in multiple phases or components, but that does not excuse an agency from CEQA's mandate to evaluate "the whole of the action." (*Cal. Union for Reliable Energ,* 178 Cal.App.4th 1225, 1242.) Taken to its logical conclusion, the District's approach to the Refinery Project would permit it to segment any regulatory effort into many smaller regulations, minimize the perceived impacts by reviewing each component in isolation, and avoid a cohesive review of the entire project. This is exactly what CEQA prohibits. (See *Laurel Heights Improvement Assn.*, 47 Cal.3d at 396; see also *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209 at 1223 (citing numerous examples of improper segmentation).)

The District further claimed that while the Refinery Project may represent a "quantitative difference" from the District's past rulemaking practices, there is no "qualitative difference" because of the theoretical "independent utility" of each rule. (AR Doc. 7, at 000749-52.)[4] The District is wrong. Determining the scope of a CEQA project depends on evaluating how closely related different "acts are to the overall objective of the project." (*Tuolumne County*, 155 Cal.App.4th at 1226.) Multiple regulatory actions constitute a single project when they are "various steps which taken together obtain an objective." (*Id.* (citation and quotation omitted).) And, crucially: "[t]heoretical independence is not a good reason for segmenting the environmental analysis of the two matters." (*Id.* at 1230.) No amount of "theoretical independence" can alter the basic fact that the Phase 2 Rules—along with the Phase 1 Rules and the rest of the District's "suite of regulations"—were conceived and adopted to achieve a single, common objective: tracking and reducing refinery emissions by 20%.

As the Record in this case amply demonstrates, there is one CEQA project at issue here—the Refinery Project—which necessarily encompasses the entire "suite" of regulatory actions taken by the District to achieve the objectives of Resolution 2014-07.[5] (See *Tuolumne County*, 155 Cal.App.4th at 1224). The District violated CEQA by chopping up the Refinery Project into multiple pieces and analyzing each of those pieces in isolation, an action that undermines CEQA's dual purpose of informing the public and assuring review of "the whole of the action."

[4] The District simultaneously admits that two Refinery Project Rules—Rules 12-15 and 12-16—"arguably did have a functional interdependence" but that the District fixed that problem by removing "links to Rule 12-16" from Rule 12-15 and by "re-examin[ing]" Rule 12-16. The District does not explain exactly what "links" it removed, or precisely why the two rules no longer have "functional interdependence." (AR Doc. 7, at 000751.)

[5] At times, the District has attempted to frame Petitioners' concerns as related to Resolution 2014-07 and the District's corresponding planning process to design a set of actions to achieve the Resolution's goals. (See AR Doc. 7 at 000749-52.) Petitioners do not take issue with the District's internal planning process, and do not allege that the Resolution itself constitutes a CEQA "project." But once the District actually adopted specific regulations resulting from that process (regulations that each work together to achieve a unified, concrete and focused objective), the District's inchoate "Refinery Strategy" became a CEQA "project"—the Refinery Project—triggering its CEQA obligations.

B. Rule 12-15 is Arbitrary, Capricious, and Fails to Comply With the H&S Code.

The District is required to demonstrate the "necessity" of each new or amended rule it adopts while also assuring that such rules do not duplicate or interfere with requirements already imposed under federal or state law. (H&S Code § 40727(b)(1),(4)-(5).) The District must base these determinations on substantial evidence in the record that is "reasonable, credible, and of solid value." (*Plastic Pipe and Fittings Assn.*, 124 Cal. App. 4th at 1407.) Here, the District failed to demonstrate a "rational connection" between the requirements imposed by Rule 12-15 and the District's purported justification for the rule, rendering Rule 12-15 arbitrary, capricious, and void. (*Am. Coatings Assn.*, 54 Cal.4th 446, 460 (citation omitted).)

Rule 12-15 is a new regulation that is intended to track air emissions from petroleum refineries and to characterize the properties of crude oil processed by the refineries. (Rule 12-15, § 12-15-101.) Rule 12-15 has three main requirements: (1) an annual emissions inventory; (2) a monthly crude slate report; and (3) operation of a fence-line monitoring system. The annual emissions inventory component requires petroleum refineries to submit a detailed accounting of the types and quantities of emissions of criteria pollutants, toxic air contaminants, and GHGs released from (i) all stationary source processes at the petroleum refinery, and (ii) cargo carriers during loading and unloading operations. (Rule 12-15, § 12-15-206; § 12-15-401.) Beginning in calendar year 2018, refineries also will need to report year-to-year variations in emissions. (Rule 12-15, § 12-15-401.4.) The monthly crude slate reporting component requires petroleum refineries to summarize the volume and properties[6] of the crude oil and non-crude oil feedstock blends processed at a refinery in each calendar month. (Rule 12-15, § 12-15-408.) Lastly, to "complement" the emissions inventory and monthly crude slate reporting requirements, petroleum refineries must prepare air monitoring plans and operate fenceline monitoring systems to measure air pollutant concentrations at refinery fencelines. (Rule 12-15, § 12-15-403; § 12-15-501.) At its core, Rule 12-15 is an expansive reporting rule—it does not reduce emissions from petroleum refineries or otherwise solve an identified emissions problem.

[6] The properties to be reported are total volume processed, API gravity, sulfur content, vapor pressure, benzene, toluene, ethylbenzene, and xylenes ("BTEX") contents, and iron, nickel, and vanadium. (Rule 12-15, § 12-15-408, Table 1.)

The District attempted to justify the necessity of Rule 12-15 based on its hypothesis that the crude slate data collected by Rule 12-15 *might* relate to actual refinery emissions and therefore *might* help the District identify future emissions reductions. But the District has not demonstrated any link between monthly crude slate data and refinery emissions; nor has the District explained how data related to emissions from third-party cargo carriers (over which a refinery has no control) relates to emissions from refinery facilities themselves. The District is obligated by the H&S Code to demonstrate the necessity of each of its rules with "substantial evidence" and cannot adopt rules based on mere hypotheses. (See *Plastic Pipe and Fittings Assn.*, 124 Cal. App. 4th at 1407.) Rule 12-15 also contains numerous provisions that overlap, duplicate, and conflict with existing regulatory programs, contrary to the requirements of H&S Code § 40727. These failings render Rule 12-15 arbitrary, capricious, and void. (*Am. Coatings Assn.*, 54 Cal.4th 446, 460.)

1. The District Failed to Demonstrate the Necessity of Rule 12-15.

The District's primary justification for adopting Rule 12-15 is that—according to the District—Rule 12-15 is "necessary to ensure the maintenance of the NAAQS and ensure protection of the public from toxic air contaminants given the size and impact of the refineries and the possibility of changes to the properties of crude oil processed at these refineries." (AR Doc. 2, at 000301.) By its terms, however, Rule 12-15 is an emissions tracking rule. It does not require *any* reductions in emissions of criteria pollutants or toxic air contaminants.

Nor does the District claim that Rule 12-15 will itself affect refinery emissions in any manner. Rather, the District identifies the emissions inventory, monthly crude slate report, and fenceline monitoring requirements in Rule 12-15 as components of an "investigation" that the District would like to initiate regarding potential sources of emissions. This investigation will purportedly enable the District to "decide whether such changes should be addressed in future regulations" or, conversely, whether "resources should be focused elsewhere." (AR Doc. 2, at 000281.) In particular, the District asserts that if there is a "significant" relationship between the processing of heavier crude oil and higher emissions, then Rule 12-15 "will help alleviate an air quality problem" through additional rulemakings targeting the issue. (AR Doc. 7, at 000766.) But the record contains no support for the District's hypothesis that monthly crude slate data will shed any light on changes in refinery emissions, which

vary (within the parameters of a facility's operating permit) on a continual basis and depend on numerous physical and operational factors. (See, e.g., AR Doc. 2, at 000281 (speculating, without proof, as to relationship between crude slate data and emissions).)

Throughout the rulemaking process, the District's explanation of the necessity of Rule 12-15 repeatedly changed, ranging from the possibility that, as unspecified new sources of crude oil become available, the changes might, at some unspecified future time, result in increased emissions; to hypothesizing that "refineries may not be properly attributing exceedances of emissions limits to changes in crude characteristics" such that refineries "may be proceeding with alterations, and possibly modifications, without the proper [New Source Review] permit"; before finally landing on the justification set forth in the final Staff Report. (See AR Doc. 7, at 000766-67 (discussing justifications for Rule 12-15).) This game of regulatory whack-a-mole demonstrates that Rule 12-15 is a solution in search of a problem.

Rule 12-15 is designed solely to research "ideas for changes" to the District's rules applicable to petroleum refineries. (AR Doc. 7, at 00767.) The District cannot justify the necessity of Rule 12-15 based on the mere *hunch* that a correlation exists between the rule's requirements (*i.e.* crude slate reporting) and the District's stated justification for Rule 12-15: reducing emissions of criteria and toxic air contaminants. (See AR Doc. 2, at 000301.) By basing its finding of necessity on little more than the District's own hypotheses, the District failed to demonstrate the "necessity" of Rule 12-15 with substantial evidence that is "reasonable, credible, and of solid value." (*Plastic Pipe and Fittings Assn.*, 124 Cal. App. 4th at 1407.)

2. The District Violated the H&S Code By Adopting Rule 12-15 Provisions That Duplicate And Conflict With Numerous Existing Laws.

Prior to adopting a new rule, the District must demonstrate that the requirements of that rule harmonize with and do not duplicate requirements already imposed under federal or state law. (H&S Code § 40727(b)(4)-(5).) A duplicative regulation is only authorized if it is necessary for the District to execute its powers and duties. (*Id.* § 40727(b)(4).) The emissions inventory requirement in Rule 12-15 duplicates a variety of emissions reporting obligations already required under existing federal and state law, while also requiring inconsistent emissions reporting and calculations methodologies.

The emissions inventory requirement in Section 12-15-401 covers criteria pollutants, toxic air contaminants, and GHGs. (Rule 12-15 §§ 12-15-401.2-3) Each of these three categories of air pollutants are already regulated under various federal, state, and District programs, and each of these programs already have emissions inventory requirements. (See AR Doc. 18, at 000867-68 (Petitioners' written comments identifying existing programs).) For example, the District already requires permitted facilities in the Bay Area to complete an annual "permit renewal questionnaire" which requires facilities to quantify their emissions of criteria pollutants, toxic air contaminants, and GHGs, among other information. (AR Doc. 7, at 000753.) Petroleum refineries also must submit an array of emissions information to regulatory agencies, which, together, would provide the District with the very information it seeks under Rule 12-15. (See AR Doc. 18, at 000867-68.) Refineries have developed tracking and reporting systems to implement these various existing programs, but Rule 12-15 imposes overlapping and at times conflicting reporting methodologies—adding a new layer of bureaucracy while generating no new benefits. (AR Doc. 18, at 000868.)

The record does not support the need for the duplicative and inconsistent requirements of Rule 12-15. As support for its nonduplication finding, the District provides only a conclusory assertion that "there is overlap with state and federal requirements but no duplication[,]" and that this overlap was justified because "the Air District's requirements are more specific . . . and are thus appropriate to carrying out the Air District's power and duties." (AR Doc. 7, at 000754; see also AR Doc. 2, at 000473-75 (District's Regulatory Analysis).) The District also failed to evaluate whether the other sources of emissions information cited by Petitioners may provide some or all of the information it requires, or whether Rule 12-15 could be streamlined to minimize duplicative or inconsistent reporting requirements; the record contains no "substantial evidence" that the District evaluated—much less addressed—Petitioners' concerns related to overlapping and conflicting requirements.

The District has the means to obtain the underlying emissions data for criteria pollutants, toxic air contaminants, and GHGs that it seeks through existing channels. Rule 12-15 imposes duplicative monitoring and reporting requirements on the Bay Area refineries. The District's cursory and conclusory evaluation of these issues fails to satisfy the District's obligation to make H&S Code

findings based on "substantial evidence." (See *Plastic Pipe and Fittings Assn.*, 124 Cal. App. 4th at 1407; *Am. Coatings Assn.*, 54 Cal.4th 446, 460.)

C. The Legislature Did Not Authorize the District to Adopt Numerous Provisions of Rule 12-15 That Are Preempted by State and Federal Law.

The District has no statutory authority for two core provisions of Rule 12-15 that require refineries to submit to the District (i) "crude slate" information and (ii) emissions data from locomotives and marine vessels owned and operated by third parties (collectively "cargo carriers"). Not only does the District lack express statutory authority to impose these requirements, its actions are preempted by numerous state and federal statutes that entirely occupy these fields. (*Sherwin-Williams Co.*, 4 Cal.4th at 897 (agency action is void when it duplicates, contradicts, or infringes upon an area already fully occupied by another statute); see also *Am. Fed'n of Labor*, 13 Cal.4th 1017, 1042, n.9 (agencies "may not act in excess of [the] powers" granted to them by the Legislature).) Because Rule 12-15's core provisions exceed the District's authority and are preempted by numerous California and federal laws, Rule 12-15 is void. (*Am. Fed'n of Labor*, 13 Cal.4th at 1039.)

1. The District Has No Authority to Adopt Core Provisions of Rule 12-15.

Legislative authorization is a fundamental prerequisite to agency action and actions taken without a grant of Legislative authority are void. (*Am. Fed'n of Labor*, 13 Cal.4th at 1039.) To enforce this limitation on agency action, courts must "conduct independent review of whether [an agency has] exceeded the scope of authority delegated by the Legislature to [it]." (*S. Cal. Gas Co. v. S. Coast Air Quality Mgmt. Dist.*, (2011) 200 Cal.App.4th 251, 268 (citation omitted); see also *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11, n. 4 ("A court does not . . . defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature.") (citation and quotation omitted).)

California law requires the District to identify the basis for its "authority" to adopt any rule or regulation. (H&S Code 40727(a),(b)(2)). As its authority for Rule 12-15, the District points to H&S Code Sections 42303 ("Section 42303") and 41511 ("Section 41511"). (AR Doc. 7, at 000767 (asserting that the District's "information-gathering authority pursuant to Health & Safety Code

Sections 41511 and 42303 is broad enough to allow this type of investigatory inquiry").) Section 42303 provides that:

> An air pollution control officer, at any time, may require from an applicant for, or the holder of, any permit provided for by the regulations of the district board, such information, analyses, plans, or specifications which will disclose the nature, extent, quantity, or degree ***of air contaminants*** which are, or may be, ***discharged by the source*** for which the permit was issued or applied.

(H&S Code § 42303 (emphasis added).) And Section 41511 provides that:

> For the purpose of carrying out the duties imposed upon the state board or any district, the state board or the district, as the case may be, may adopt rules and regulations to require the owner or the operator of any air pollution emission source to take such action as the state board or the district may determine to be reasonable for the determination of the amount ***of such emission from such source***.

(H&S Code § 41511 (emphasis added).) Neither of these provisions grants the District any authority to adopt the crude slate and cargo carrier provisions of Rule 12-15.

Rule 12-15 is not a "typical" air quality rule measuring smokestack emissions or imposing emissions limits. Instead, Rule 12-15 is aimed at several aspects of refinery operations that the District believes *might* relate to air emissions (such as a refinery's "crude slate" and third-party operations that refineries have no control over (*i.e.*, cargo carriers). (See AR Doc. 2 at 000287-91.) The District's purported authority for Rule 12-15, however, is based on H&S Code provisions that expressly limit their scope to "*air contaminants*" and "*emissions*" from the "source" itself. (H&S Code §§ 42303, 41511 (emphasis added).) These provisions do not confer *any* express authority to collect crude slate data which has, in the District's own words—an "uncertain[]" relationship to "refinery air emissions." (AR Doc. 2 at 000291.) Nor do they confer any authority to require refineries to provide emissions data from cargo carriers, which are not part of the refinery "source," and which are owned and operated by unrelated third parties over whom the refineries have no control.

Under long-standing principles of statutory interpretation, "[t]he expression of some things in a statute necessarily means the exclusion of other things not expressed." (*Gikas v. Zolin*, (1993) 6 Cal.4th 841, 852.) By conferring authority to collect *emissions* data while remaining silent on other types of information the Legislature manifestly did *not* grant the District any authority to require

reporting on operational matters, such as a refinery's crude slate. Similarly, by conferring authority to collect data from the "source" itself, the Legislature plainly did *not* grant the District the authority to compel refineries to report data from mobile sources such as cargo carriers that are *not* part of the refinery "source."[7]

2. Crude Slate Requirements Are Preempted by California's Petroleum Industry Information Reporting Act.

The crude slate reporting requirements of 12-15 are preempted by California's Petroleum Industry Information Reporting Act ("PIIRA"), which establishes a comprehensive system for reporting the very type of crude slate data that the District seeks here to the California Energy Commission ("CEC"). (Pub. Res. Code §§ 25350-25366; C.C.R. Title 20 §§ 1361-1371; see also *Sherwin-Williams Co.*, 4 Cal.4th at 897 (agency action preempted when it "enters an area fully occupied by general law").) The California Legislature enacted PIIRA in 1980 with the purpose of creating "a complete and thorough understanding of the operations of the petroleum industry." (Pub. Res. Code § 25350(b).) Among other things, PIIRA was established in order to collect "information and data concerning ***all aspects of the petroleum industry***." (Pub. Res. Code § 25350(c) (emphasis added).) Indeed, PIIRA applies to nearly all entities in California who engage in commerce related to petroleum products, and which are required by the statute to submit petroleum product and crude oil data to CEC on a periodic basis. (Pub. Res. Code § 25354.) As the Legislature made abundantly clear, this type of information was of paramount state concern because "the petroleum industry is an essential element of the California economy and is therefore of vital importance to the health and welfare of all Californians." (Pub. Res. Code § 25350(a).)

---

[7] Section 42303 also is inadequate for another reason: it grants the District authority to request information on a case-by-case basis as part of a permitting process or enforcement action; it does not give the District a blank check to pass new regulatory reporting requirements that apply collectively and on an ongoing basis. Section 42303 appears in the chapter of regulations that governs "enforcement," in the Article governing "permits," and grants authority only to an "air pollution control officer," not to the District at large. (H&S Code § 42303.) This limitation on Section 42303 is underscored by the context of the only case addressing it. (See *Soranno's Gasco, Inc. v. Morgan*, (9th Cir. 1989) 874 F.2d 1310 (suspending source's operating permit "under the authority of California Health & Safety Code §§ 42303 and 42304" after facility failed to respond to an information request).)

While PIIRA requires refineries to submit extensive data to the CEC, the Legislature also acknowledged the extremely sensitive nature of this information by including in PIIRA extremely detailed and thorough protections related to confidentiality of crude slate and other data. All information submitted to the CEC under PIIRA is presumptively confidential and is aggregated to further ensure confidentiality. (Pub. Res. Code § 25364(b).) If the release of non-aggregated information is requested, PIIRA requires notice to the entity who submitted the information, an opportunity to respond, and a written explanation by CEC of any determination to release or not release non-aggregated data. (Pub. Res. Code § 25364(c).) The CEC also is prohibited from utilizing non-aggregated data on petroleum products and blendstocks for any purpose other than the statistical analysis, and is prohibited from disclosing that information to anyone other than CEC members and staff. (Pub. Res. Code § 25364(f); see also C.C.R. Title 20 § 1370(a) (PIIRA regulations clarifying that "CEC staff and support staff assigned to collect or analyze data submitted in confidence, pursuant to this article, will hold unaggregated PIIRA data confidential.").)

In short, when it enacted PIIRA, the Legislature created an extensive, economy-wide, state-level reporting system for petroleum products and crude oil that "fully occupies" the area of petroleum products and crude oil reporting across California and preempts local and regional agency action directed at the same type of data. (See *Cal. Water & Tel. Co. v. Los Angeles County* (1967) 253 Cal.App.2d 16, 27 ("[i]f the subject matter or field of the legislation has been fully occupied by the state, there is no room for supplementary or complementary local legislation.").)

The Legislature's intent to establish PIIRA as the *exclusive* mechanism for reporting petroleum product and crude oil information is plain on the face of the statute. The *only* agency authorized to receive this information is the CEC; PIIRA further expressly limits CEC's disclosure of this information to *only* the California Air Resources Board ("ARB"), and then *only* "if [ARB] agrees to keep the information confidential." (Pub. Res. Code § 25364(g).) Had the Legislature intended to grant local air district access to this data, it could easily have done so when it amended PIIRA over the years, but it chose not to.

The information required by Rule 12-15 is nearly identical to the data that refineries are required to report to the CEC (including, among other things, monthly data related to crude oil,

blendstocks, and refined products, along with related information such as sulfur content and API[8] gravity). (*Compare* C.C.R. Title 20 App. A, B (describing contents of weekly and monthly PIIRA reports) *with* AR Doc. 4, at 000706 (Rule 12-15, § 12-15-408, describing requirements for monthly crude slate reports).) At the same time, Rule 12-15 undermines PIIRA's confidentiality protections by first requiring refineries to identify any confidential information, and then placing the burden on refineries to justify and defend the confidentiality of that information if the data is requested. (See AR Doc. 4 at 000702-07 (Rule 12-15).) This is exactly backwards of how the California Legislature structured the confidentiality protections of PIIRA to avoid disclosure of sensitive information by treating crude slate data as presumptively confidential. Rule 12-15's lack of confidentiality provisions creates a real risk that the District will disclose individualized petroleum and crude oil data that could be used by Petitioners' competitors or suppliers to engage in anti-competitive behavior, fix crude oil prices, or otherwise harm the California petroleum markets.[9]

Rule 12-15 intrudes upon an area of law wholly occupied by PIIRA and directly conflicts with fundamental provisions designed by the California Legislature to protect the confidentiality of petroleum data and limit its disclosure. As the Court of Appeal has explained, "[i]f the preemption doctrine means anything, it means that a local entity may not pass an ordinance, the effect of which is to completely frustrate a broad, evolutional statutory regime enacted by the Legislature." (*Fiscal v. City and County of S.F.* (2008) 158 Cal.App.4th 895, 911.) For all of the foregoing reasons, the crude

[8] American Petroleum Institute specific gravity, or "API gravity," is an inverse measure of a petroleum liquid's density relative to that of water.

[9] This is not an idle concern. Petitioners and other participants in petroleum markets are highly regulated by federal antitrust laws, and disclosure of the type of information collected by the CEC under PIIRA by two or more participants in petroleum markets, without the confidentiality protections provided by PIIRA, could expose those entities to allegations under the Sherman Act (15 U.S.C. §§ 1–7), the Clayton Act (15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53), or Federal Trade Commission rules related to the energy market manipulations (16 C.F.R. 317), among other laws. The confidentiality provisions in Rule 12-15 are wholly inadequate to guarantee against disclosure of sensitive information by the District, which could expose Petitioners and other entities to anticompetitive behavior at best and antitrust liability at worst. (See also *324 Liquor Corp. v. Duffy* (1987) 479 U.S. 335, 345, n. 8 ("federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior.").)

slate requirements of Rule 12-15 are preempted by PIIRA and void. (*Id.*, *Sherwin-Williams Co.*, 4 Cal.4th at 897; *Cal. Water & Tel. Co.*, (1967) 253 Cal.App.2d at 27.)

3. Federal Law Preempts the District's Efforts to Impose Requirements Related to Rail Carriers and Marine Vessels.

The District's efforts to compel refineries to report emissions from cargo carriers are similarly preempted by federal law. Rule 12-15 requires refineries to submit an "emissions inventory" to the District that includes both facility emissions and "cargo carriers (e.g. ships and trains), excluding motor vehicles, during loading or unloading operations at a Petroleum Refinery." (AR Doc. 4 at 000702 (adopting Rule 12-15 provisions).) But Petitioners have no control over independent cargo carriers and cannot force them to report emissions to refineries for purposes of passing that data along to the District. More importantly, federal law preempts any local regulation of ships and trains, as Petitioners repeatedly informed the District during rulemaking. (AR Doc. 18, at 000870-71.) Because the District cannot compel Petitioners to do what the District itself cannot, the cargo carrier provisions of Rule 12-15 are void. (*Sherwin-Williams Co.*, 4 Cal.4th at 897.)

a. *The Interstate Commerce Commission Termination Act Expressly Preempts State and Local Laws Related to Rail Transportation.*

The Interstate Commerce Commission Termination Act ("ICCTA") includes an express preemption clause that grants the federal Surface Transportation Board ("STB") "exclusive" jurisdiction over "transportation by rail carriers" and the "operation" of rail "facilities, even if the tracks are located, or intended to be located, entirely in one State." (49 U.S.C. § 10501(b)(1)-(2).) The STB's exclusive jurisdiction over rail carriers and related operations is "exclusive and preempt the remedies provided under Federal or State law." (49 U.S.C. § 10501(b).) This plain Congressional preemption of state and local laws was affirmed by the Ninth Circuit, which held that the "ICCTA 'preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation.'" (*Assn. of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.* (9th Cir. 2010) 622 F.3d 1094, 1098 (internal citation omitted).)

In *Assn. of Am. Railroads* the Ninth Circuit considered whether three rules adopted by the South Coast Air Quality Management District ran afoul of the ICCTA. (*Id.* at 1096-97.) One of the rules at

issue imposed emissions limits on idling trains, while the other two rules imposed various related "reporting requirements" on railyard operators. (*Id.* at 1096.) The Ninth Circuit held that the ICCTA preempted all of these regulations because they are aimed "directly [at] railroad activity, requiring the railroads to reduce emissions and to provide . . . specific reports on their emissions and inventory." (*Id.* at 1098.)[10]

Rule 12-15 imposes precisely the same kinds of requirements that the Ninth Circuit rejected. Just like the rules at issue in *Assn. of Am. Railroads*, Rule 12-15 imposes various reporting requirements on third parties (here, refineries) aimed directly at train emissions. (AR Doc. 4 at 000702.) Rule 12-15 thus has the direct "effect of managing or governing" the activity of a railway—an act that is expressly preempted by *Assn. of Am. Railroads* and the plain language of the ICCTA. (*Id.*; 49 U.S.C. § 10501(b).) The District cannot use Rule 12-15 to skirt the express preemption provisions of the ICCTA by requiring refineries to report railway emissions that the District cannot require railways themselves to report. (*Sherwin-Williams Co.*, 4 Cal.4th at 897.)

b. *The Federal Clean Air Act Preempts State and Local Laws Related to Marine Vessel Emissions.*

The District also lacks authority to regulate emissions or require reporting from marine vessels. Marine vessels are regulated by Section 209(e)(2) of the federal Clean Air Act, which requires California to obtain authorization from the EPA in advance of adopting any "standards and other requirements relating to the control of emissions" from marine vessels. (42 U.S.C. § 7543(e)(2)(A).) This is a special status conferred on California by the Clean Air Act; no other state is given a commensurate ability (nor are local air districts), and Clean Air Act Section 209 contains additional

[10] The scope of preemption under the ICCTA is broad. The Ninth Circuit has expressly rejected the argument that preemption under the ICCTA is limited to economic regulation and has recognized that environmental regulations are preempted as well. (See e.g., *City of Auburn v. U.S.* (9th Cir. 1998) 154 F.3d 1025, 1029-32; see also *id.* at 1032 (affirming a Surface Transportation Board ruling that a railroad was not subject to local environmental permitting laws because those laws were preempted by the ICCTA).) In recognizing the breadth of preemption intended by Congress in promulgating the ICCTA, one court noted that "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." (*CSX Transportation, Inc. v. Georgia Public Service Com* (N.D. Ga. 1996) 944 F.Supp. 1573, 1581.)

express preemption provisions that underscore Congressional intent to preempt a wide range of state action aimed at mobile sources except in defined, narrow circumstances—and then only with EPA's permission. (See generally 42 U.S.C. § 7543.)

When ARB adopted marine vessel emissions standards *without* seeking EPA authorization, the Ninth Circuit held that its actions were preempted and barred by Section 209 of the Clean Air Act. (*Pacific Merchant Shipping Assn. v. Goldstene* (9th Cir. 2008) 517 F.3d 1108.) The same holds true here. The Clean Air Act preempts state action to regulate marine vessel emissions without advance authorization from EPA, and the District received no such authorization with respect to the marine vessel emissions reporting requirements of Rule 12-15.[11] (*Id.*; see also 42 U.S.C. § 7543(e)(2)(A).) Again, the District is attempting to impose requirements on refineries that the District cannot directly impose on the actual source of the emissions at issue. But because CAA Section 209 and Ninth Circuit precedent preempt the District's attempted regulation of marine vessel emissions, such provisions of Rule 12-15 are void.

V. CONCLUSION

For all of the foregoing reasons, this Court should grant the Petition and issue a writ of mandate finding Rule 12-15 preempted by state and federal law and requiring the District to: (i) vacate and set aside the Initial Study/Negative Declarations for Rules 12-15 and 9-14; (ii) comply with CEQA and H&S Code requirements in any future Refinery Project rulemaking; and (iii) vacate and set aside Rule 12-15.

[11] The District cannot argue that marine vessel emissions are attributable to refineries and therefore exempt from the scope of Clean Air Act Section 209. The D.C. Circuit Court of Appeals has already ruled that "it is entirely implausible that a vessel's 'to-and-fro' emissions could be attributed to a marine terminal owner under any approach that the [Clean Air Act] would tolerate[.]" (*NRDC v. EPA* (D.C. Cir. 1984) 725 F.2d 761, 764.) And EPA has concluded that "[t]he 'to and fro' emissions and 'hotelling' emissions from the vessels are associated with the normal seagoing activities of the vessels and not with the industrial activities associated with the port[.]" (See AR Doc. 18 at 000871, citing Letter from C. Sheehan (EPA Region 6) to M. Cathey, El Paso Energy, and D. Dutton, Akin, Gump (Oct. 28, 2003).)

Dated: December 21, 2016

Respectfully submitted,

BEVERIDGE & DIAMOND, P.C.

By: David H. McCray

Gary J. Smith (SBN 141393)
David H. McCray (SBN 169113)
456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251
Telephone: (415) 262-4000
Facsimile: (415) 262-4040
gsmith@bdlaw.com
dmccray@bdlaw.com

Attorneys for Petitioners/Plaintiffs WESTERN STATES PETROLEUM ASSOCIATION; VALERO REFINING COMPANY—CALIFORNIA, TESORO REFINING & MARKETING COMPANY, LLC, AND PHILLIPS 66 COMPANY

PROOF OF SERVICE

I, the undersigned, declare that I am employed in the County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is Beveridge & Diamond, P.C., 456 Montgomery Street, Suite 1800, San Francisco, CA 94104-1251.

On December 21, 2016, I served the following document(s): **PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE** on the interested party(ies) in this action.

Adan Schwartz
Senior Assistant Counsel
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109
E-mail: aschwartz@baaqmd.gov

The documents were served by the following means:

☒ BY ELECTRONIC TRANSMISSION: Based on an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the person at the electronic notification address set forth above.

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

DATED: December 21, 2016

BY: Robin Onaka
ROBIN ONAKA

Gary J. Smith (SBN 141393)
David H. McCray (SBN 169113)
BEVERIDGE & DIAMOND, P.C.
456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251
Telephone: (415) 262-4000
Facsimile: (415) 262-4040
Email: gsmith@bdlaw.com
dmccray@bdlaw.com

Attorneys for Petitioners/Plaintiffs Western States Petroleum Association; Valero Refining Company—California; Tesoro Refining & Marketing Company, LLC; and Phillips 66 Company

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF CONTRA COSTA

WESTERN STATES PETROLEUM ASSOCIATION; VALERO REFINING COMPANY—CALIFORNIA; TESORO REFINING & MARKETING COMPANY, LLC; and PHILLIPS 66 COMPANY,

Petitioners/Plaintiffs,

v.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT and DOES 1 through 20, inclusive,

Respondents/Defendants.

Case No. N16-0963

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE

(Code Civ. Proc §§ 1085, 1094.5)

CEQA CASE

APPENDIX B

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES — **Page(s)**

CALIFORNIA CASES

FEDERAL STATUTORY AUTHORITIES & REGULATIONS

STATE STATUTORY AUTHORITIES

ADDITIONAL AUTHORITIES

I. INTRODUCTION

The Bay Area Air Quality Management District (the "District") violated the California Environmental Quality Act ("CEQA") by segmenting its analysis of multiple actions that collectively comprise the District's Refinery Project. CEQA demands unified review of "the whole of the action," and a series of actions undertaken to attain the same objective constitutes a single CEQA project. (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1226-27) (hereinafter *Tuolumne County*).) The District admits that it conceived, developed, and adopted the Phase 2 Rules[1] as part of a broader, unified effort that encompasses at least seven separate rules[2] that are collectively designed to achieve a concrete, common objective: tracking and reducing refinery emissions by 20%. (Compl. at 4:24-27, Answer at 3:21.) Under *Tuolumne County* and core CEQA precepts, the District violated CEQA when it segmented its analysis of the Phase 2 Rules and adopted them in isolation, without any consideration of other actions taken by the District to achieve the same unified objective. (*Tuolumne County*, 155 Cal.App.4th at1226-27; see also Answer at 6:15-18, District admitting that relevant rules "have been analyzed separately under CEQA".)

Rather than address Petitioners' segmentation argument head-on, the District attempts to avoid the implications of *Tuolumne County* by arguing that Petitioners' claims "lack[] a predicate project" (Resp. at 10)—in essence, arguing that Petitioners' complaint is with the District's larger policy objectives, rather than a concrete CEQA project. The District misstates Petitioners' complaint. Petitioners have not challenged any generalized public policy, or even the specific objective that the Refinery Project attempts to achieve; rather, Petitioners object to the District's *implementation* of a specific objective (a 20% reduction in refinery emissions) in a manner that circumvents CEQA. The

---

[1] Regulation 12, Rule 15 ("Rule 12-15") and Regulation 9, Rule 14 ("Rule 9-14"). The District refers to these rules as the "Challenged Rules."

[2] The rules challenged here represent the second phase of rulemaking. The first phase included three rules: Regulation 6, Rule 5 ("Rule 6-5"), Regulation 8, Rule 18 ("Rule 8-18"), and Regulation 11, Rule 10 ("Rule 11-10"). This first phase also was challenged by certain petitioners in this case. (*See* Valero et al. v. BAAQMD, Case No. N16-0095). In addition to the five rules adopted during the first two phases, the District has proposed at least two additional rules as part of the Refinery Project and is considering several more.

District has expressly conceded that the Phase 2 Rules "are among several that have been publicly discussed as steps towards achieving the 20% goal of the Refinery Strategy." (Resp. at 1.) And yet nowhere has the District collectively evaluated the impacts of each step *as a whole*. Instead, the District elected to develop and adopt these rules serially, and then claim that its serial adoption justifies treating each such rule as a separate CEQA "project."

The District also asserts that the alleged "independent utility" of the Phase 2 Rules should insulate them from CEQA's requirement to review the "whole of the action." But "[t]heoretical independence is not a good reason for segmenting the environmental analysis of the two matters." (*Tuolumne County*, 155 Cal.App.4th at 1230.) No amount of Monday morning quarterbacking can alter the basic fact that the Phase 2 Rules—along with the rest of the District's "suite of regulations"—were conceived and adopted to achieve a common, specific, and targeted objective.

In addition to violating CEQA, the District exceeded its authority when it attempted to compel refineries to report (i) their confidential "crude slate" composition, and (ii) cargo carrier emissions. It is black-letter law that "administrative agencies have only the powers conferred on them" and "may not act in excess of those powers." (*Am. Fed'n of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1042, n.9, citing *Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103-04.) Here, the District lacks *any* express authority to collect crude slate data or regulate cargo carriers, and existing state and federal laws preempt the District's attempts to regulate in these fields.

The District attempts to avoid preemption by misconstruing the scope of its authority and the law of preemption. For example, the District argues that its crude slate requirements are authorized because the District's procedures provide similar protections as the state law that already regulates crude slate reporting—which also happens to grant exclusive authority over crude slate data to another agency. But even if this characterization were correct (which it is not), preemption means that the District cannot regulate in this area *at all*—not that it may regulate as long as it hews closely enough to the statutory powers granted to another agency. (See *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 (agency action preempted when it "enters an area fully occupied by general law").) Similarly, the District argues that preemption does not bar its cargo carrier requirements by asserting that it is not regulating cargo carriers at all—it is merely holding refineries responsible for

cargo carrier emissions. But the District cannot do indirectly what it lacks authority to do directly: it cannot compel refineries to "regulate" cargo carriers when it cannot do so itself.

The District has failed to demonstrate its compliance with California law and its authority to adopt core provisions of Rule 12-15. Petitioners respectfully ask this Court to enforce CEQA, find crude slate and cargo carrier provisions preempted, and order the District to vacate Rule 12-15.

II. THE DISTRICT HAS FAILED TO JUSTIFY ITS ILLEGAL SEGMENTATION OF THE REFINERY PROJECT UNDER CEQA

A. The Phase 2 Rules Are Part of a Larger CEQA Project Requiring Unified Review.

The critical facts here are simple. In late 2014, the District adopted Resolution 2014-07, which established the specific, defined objective of tracking refinery emissions (in part through Rule 12-15) and reducing those emissions by 20%. (AR Doc. 194, at 004394-95.) To implement the Resolution's objective, District staff developed a unified, multi-phase approach that it labeled as its "Refinery Emission Reduction Strategy." (AR Doc. 161, at 004069-70; see also AR Doc. 694, at 011575-83 (agenda for "Refinery Emissions Reduction Strategy Kick Off Meeting").) As the concrete regulatory actions flowing from this strategy, the District developed a coordinated set of refinery-focused rules, to be adopted in several phases, that *together* would achieve the Resolution's objective. (AR Doc. 161, at 004066-70 (describing approach); AR Doc. 147, at 003909-12 (identifying "phases" of Refinery Project).) These rules—including the Phase 1 Rules, the Phase 2 Rules, and other pending rules—collectively constitute the District's Refinery Project as "various steps which taken together obtain an objective." (*Tuolumne County*, 155 Cal.App.4th at 1226-27.) The District violated CEQA when it segmented its analysis by evaluating each rule separately and expressly disclaiming any obligation to consider the impacts of the Refinery Project as a whole. (See generally AR Docs. 15, 16.)

The District attempts to avoid this conclusion by arguing that the Refinery Project is not actually a single "project" under CEQA. The District acknowledges that the adoption of the Phase 2 Rules was an "activity" that qualified as a "project" under CEQA,[3] but then argues that these rules

[3] Compl. 17:13-16, Answer 8:26. Indeed, the District could not argue otherwise, as the adoption of environmental rules has long been acknowledged to trigger CEQA. *See, e.g., Cal. Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 Cal.App.4th 1225, 1240, citing *Wildlife*

cannot be considered the same CEQA project, because while they were each designed to achieve a common purpose, this purpose was simply a "policy goal," and not a CEQA project in and of itself. (Resp. at 6:23-25 ("What unifies the Challenged Rules is not anything that arguably meets the definition of a CEQA 'project,' but rather only the statement of a policy goal.").)

The District's argument is essentially this: in order for the Refinery Project rules to qualify as the same CEQA "project," they would themselves have to implement another, larger CEQA "project." This assertion goes far beyond what CEQA demands. All actions "taken together" to achieve a single "objective" are considered a single CEQA project—regardless of the nature of that objective, or whether the objective itself is an independent CEQA "project." A "policy goal" is, as the District asserts, inchoate and amorphous: it is not an "activity" with direct and foreseeable impacts, and so a policy goal or objective—standing alone—is not subject to CEQA. Petitioners did not challenge the Board's 2014 Resolution for precisely this reason. A CEQA "project," on the other hand, is the specific activity or set of activities that *implement* a given objective.

The 2014 Resolution established a well-defined and measurable objective (or "policy goal," as the District puts it): to track and reduce refinery emissions by 20%. Petitioners agree that the 2014 Resolution itself is not an "activity" challengeable under CEQA, because it merely established an objective and it did not "commit the agency to a definite course of action." (See Pub. Res. Code § 21080(a); CEQA Guidelines § 15352(a).) But when the District promulgated the Phase 1 and Phase 2 Rules, it transitioned from setting an objective to *implementing* that objective by adopting a set of rules—which *is* an "activity" subject to CEQA. (*Id.*) And because those rules are each "various steps taken together" to *achieve the same policy goal*—the same "objective"—they constitute a single CEQA project. (*Tuolumne County*, 155 Cal.App.4th at 1226-27; Cal. Code Regs., tit. 14, § 15378(a); *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283-84.) As the Court of Appeal has observed:

> CEQA's conception of a project is broad, and the term is broadly construed and applied in order to maximize protection of the environment. This big picture approach to the definition of a project (*i.e.*, including "'the whole of an action'") prevents a proponent or a public agency from avoiding CEQA requirements by dividing a project into smaller

---

Alive v. Chickering (1976) 18 Cal.3d 190, 206; *Plastic Pipe & Fittings Assn. v. Cal. Bldg. Standards Com.* (2004) 124 Cal.App.4th 1390.)

> components which, when considered separately, may not have a significant environmental effect. That is, the broad scope of the term "project" prevents "the fallacy of division," which is the "overlooking [of a project's] cumulative impact by separately focusing on isolated parts of the whole." Environmental considerations may not be submerged by chopping a single CEQA project into smaller parts for piecemeal assessment.

(*Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 271 (citations omitted).)

The District's approval of multiple refinery regulations to achieve the common, specific, and targeted objectives of the 2014 Resolution is "an activity" that will cause a physical change in the environment and is subject to CEQA. (Pub. Res. Code § 21065.) The core issue is whether the scope of that CEQA project is limited to individual regulations, as the District alleges, or whether it includes the entire multi-phase "Refinery Project", as Petitioners assert. *Tuolumne County* and its progeny establish that the correct answer is the latter: under CEQA, a project must include ***all*** of the "various steps which taken together obtain an objective." (*Tuolumne County*, 155 Cal.App.4th at 1226-27 (quotation omitted).) The District violated this core principle when it segmented its review of the individual Refinery Project rules.

B. The Alleged "Independent Utility" of the Phase 2 Rules Does Not Justify the District's Piecemeal Review of the Refinery Project.

The District does not contest the integrated nature of the rules it has conceived and adopted as part of its Refinery Strategy; nor does it contest the holding of *Tuolumne County*. Instead, the District argues that the alleged "independent utility" of the Phase 2 Rules somehow insulates them from CEQA review. (Resp. at 7:9-8:3.) Specifically, the District asserts that each of the Phase 2 Rules has some degree of "independent utility" that, in the District's words, "has been articulated as an indication that separate CEQA review of separate actions is appropriate." (Resp. at 7:16-18). In support of this proposition, the District cites two cases: *Del Mar Terrace Conservancy Inc. v. City Council of San Diego* (1992) 10 Cal.App.4th 712 (hereinafter *Del Mar Terrace*)[4] and *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal. App. 4th 1209. Neither case supports the District's argument.

[4] *Del Mar Terrace* also is not directly controlling here because it addressed the required environmental review for highway projects. (*Del Mar Terrace*, 10 Cal.App.4th at 732.) As the court made clear, the version of the "independent utility" test it applied was derived from federal case law and "is specific to

Del Mar Terrace is inapposite to the facts presented in this case. *Del Mar Terrace* involved the sufficiency of an Environmental Impact Report ("EIR") related to a roadway project in Carmel, California known as the "56 West" project. (*Del Mar Terrace*, 10 Cal.App.4th at 719.) The 56 West project was one of five roadway projects that the local government sought to implement in phases; future anticipated projects included the 56 East project, followed by a possible four-mile Future Urbanizing Area ("FUA") project to link the 56 East and 56 West projects. (*Id.* at 731.) The EIR for the 56 West project evaluated the "worst-case" environmental impacts that might occur if the FUA were developed, but did not comprehensively analyze all aspects of the FUA, since its development was highly speculative. (*Id.* at 721-23, 731.) The petitioners nevertheless argued that the EIR for the 56 West project was insufficient because it did not include a complete analysis of the *potential* FUA project. (*Id.*) The court rejected this challenge, finding the EIR sufficient because the 56 West project was designed to independently relieve congestion in a certain area, because there was not yet any "defined project to [expand] SR 56 through the . . . FUA," and because the EIR did, in fact, evaluate the worst-case impacts associated with the potential future development of the FUA. (*Id.* at 732-37.)

None of the considerations of *Del Mar Terrace* apply here. The Refinery Project rules—including the Phase 2 Rules—were not developed in isolation to achieve independent objectives. As the District admits, they were developed as part of the District's unified strategy to achieve the mandates set out in Board Resolution 2014-07.[5] Nor are the Refinery Project rules highly speculative, uncertain, or contingent on future events: the District's Board has already approved the scope and goals of the Refinery Strategy, and the District has already promulgated five rules (including the Phase 2 Rules) as the first phases of its Refinery Project (while improperly evaluating each of those rules in isolation). Perhaps most importantly, the District has made *no* attempt to evaluate the "worst-case"

---

roads." (*Del Mar Terrace*, 10 Cal.App.4th at 732 (citing and discussing *Daly v. Volpe* (9th Cir. 1975) 514 F.2d 1106).) There is no roadway project at issue in this case.

[5] The connectivity of these rules is further reinforced by the District's stated intention to use data collected through Rule 12-15 to implement proposed Rule 12-16 and proposed Rule 13-1 (which is effectively a substitution for, or an extension of, the previously-proposed Rule 12-16). In fact, the District concedes that Rule 12-16, as previously proposed, was "functionally dependent on the version of Rule 12-15 proposed at the same time." (Resp. at 7:25-28.)

impacts associated with future Refinery Project actions. Unlike the EIR prepared in *Del Mar Terrace*, the Negative Declarations issued in conjunction with the Phase 2 Rules expressly limit their analysis to each individual rule and disclaim *any* obligation to consider the cumulative impacts arising from its Refinery Project as a whole or any other related rule or action. (AR Doc. 15 (negative declaration for Rule 9-14); AR Doc. 16 (negative declaration for Rule 12-15).)

In relying on *Del Mar Terrace*, the District conflates the "independent utility" test with CEQA's requirement to evaluate "integral" activities as part of the same CEQA project. (See *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223; *Sierra Club v. West Side Irrigation Dist.* (2005) 128 Cal.App.4th 690, 698.) But any argument that the Challenged Rules can "stand alone" does not remove them from CEQA's requirement to evaluate the "whole of the action" because:

> when one activity is an integral part of another activity, the combined activities are within the scope of the same CEQA project. [Parties go] astray, however, by inverting this principle. The idea that all integral activities are part of the same CEQA project does not establish that *only* integral activities are part of the same CEQA project.

(*Tuolumne County*, 155 Cal.App.4th at 1229 (emphasis added).) In other words, the "integral activities" concept does not contract the scope of CEQA—it expands it—and the "independent existence of the two actions cease[s] for purposes of CEQA" when both actions are steps towards a well-defined common objective. (*Id.* at 1231.)

The District fares no better with *Banning Ranch*. In that case, petitioners challenged an EIR adopted for the development of Sunset Ridge Park, in the City of Newport Beach, alleging that it wrongfully excluded consideration of "the pending residential and commercial development on an adjacent property, Banning Ranch." (*Banning Ranch Conservancy*, 211 Cal. App. 4th at 1214.) The court rejected petitioners' claims, holding that the Banning Ranch development was not a "reasonably foreseeable consequence of the park." (*Id.*) In doing so, the court noted that "piecemealing case law defies easy harmonization" and grouped impermissible piecemealing cases into two general categories. (*Id.* at 1223.) According to the court, there may be improper piecemealing when:

- "the purpose of the reviewed project is to be the first step toward future development" (*Id.*, citing *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, and its line of cases); and also when

- "the reviewed project legally compels or practically presumes completion of another action." (*Banning Ranch Conservancy*, 211 Cal. App. 4th at 1214, citing *Nelson v. County of Kern*, 190 Cal.App.4th at 272, *Tuolumne County*, 155 Cal.App.4th at 1231, and related cases).

The *Banning Ranch* court went on to evaluate the petitioners' claims based only on the *first* type of piecemealing analysis (the "first step" doctrine of *Laurel Heights*), ultimately concluding that there was no piecemealing because Banning Ranch and the park had "different project proponents", "serve different purposes", and were not dependent on each other for the fulfillment of any larger goal. (*Banning Ranch,* 211 Cal. App. 4th at 1223.) None of those considerations apply here. In this case, the record amply demonstrates a series of coordinated actions, taken by the same project proponent (the District), to collectively achieve a common, larger goal (a 20% reduction in refinery emissions).

The *Banning Ranch* court did not even evaluate the second type of piecemealing, where one action "practically presumes completion of another action." (*Id.* at 1223.) That is the scenario presented by the Refinery Project: each of the Phase 1 and Phase 2 Rules were jointly developed and adopted by the District in a coordinated fashion that plainly "presumes completion" of other actions (*i.e.*, the contemporaneous or later adoption of the other rules) in order to achieve the District's overarching objective of reducing refinery emissions by 20%. The District made this quite clear in numerous internal documents and public presentations that specifically describe the Refinery Project as comprised of multiple phases, each with several individual rules, which build upon each other to achieve the 20% reduction objective. (See, e.g., AR Doc. 147, at 003909, 003911; AR Doc. 30, at 001090-91.) Contrary to the District's argument, *Banning Ranch* is entirely consistent with *Tuolumne County*, and both cases reject the idea that theoretical independence can justify the segmentation of related actions.

The concept of "independent utility" was fully considered in *Tuolumne County*. There, Lowe's (the project proponent) argued that its construction of a store and a road realignment were independent actions and did not require unified CEQA analysis because "they could 'be implemented independently of each other.'" (*Tuolumne County*, 155 Cal.App.4th at 1229.) The court squarely rejected that argument, noting that "[Lowe's] places too much importance on theoretical possibilities at the expense of what actually is happening." (*Id.* at 1230.) The same is true here: while the District argues that the

Phase 2 Rules could "stand alone functionally" and are not "dependent" on other Refinery Project rules (Resp. at 7:11-12), that simplistic statement fails to reflect "what is actually happening" in this case—namely, the coordinated development, adoption, and implementation of a suite of rules all aimed at achieving a single objective. (*Tuolumne County,* 155 Cal.App.4th at 1230 ("Theoretical independence is not a good reason for segmenting the environmental analysis of the two matters").) The District cannot hide behind the theoretical independence of Rule 12-15 and Rule 9-14 to argue that they are exempt from CEQA's mandate to review "the whole of the action."

"[W]here distinct actions are closely related to same overall objective, or if success of the overall objective depends on the inclusion of certain action, the distinct actions are viewed as parts of a larger whole—the same [CEQA] project." (*Nelson*, 190 Cal.App.4th at 271, citing *Tuolumne County*, 155 Cal.App.4th at 1225–1231; see also *Tuolumne County*, 155 Cal.App.4th at 1226.) The District admits that its Refinery Project rules each represent a component of its unified strategy to track and reduce refinery emissions by 20%. (Compl. at 4:24-27, Answer at 3:21). Further, no single Refinery Project rule is sufficient on its own to achieve that objective. (See AR Doc. 2, at 000561 (discussing additive contributions of various rules towards the 20% reduction objective).) Notwithstanding the clear and well-documented relationship of each Refinery Project rule to the "same overall objective," the District failed to prepare an EIR for the Refinery Project *as a whole*.[6] Instead, the District reviewed each of the Phase 2 Rules independently, concluded that each rule had no significant environmental impact, and adopted individual negative declarations. (AR Docs. 15, 16.) In doing so, the District "chopped up" the Refinery Project and violated CEQA.

[6] The District's recent actions further underscore the integrated and ongoing nature of the Refinery Project. In March 2017, the District published a draft EIR for Rules 12-16 and 11-18. (http://www.baaqmd.gov/~/media/files/planning-and-research/rules-and-regs/workshops/2017/reg-12-deir-pdf.pdf?la=en.) Previously, the District had combined its CEQA analysis for Rule 12-16 with Rule 12-15, but then severed that analysis when it adopted Rule 12-15. The District's uncoupling of Rule 12-15 from Rule 12-16, and subsequent reattachment of Rule 12-16 to Rule 11-18, reinforces the integrated nature of the District's Refinery Project rulemaking actions.

C. The District Cannot Avoid Its CEQA Obligations By Claiming Administrative Inconvenience.

The District complains that conducting a unified CEQA review for the Refinery Project would be "as a practical matter . . . perplexing." (Resp. at 10:18-19.) The District raises the specter of an agency tied in knots, stuck in an endless loop of CEQA reviews each time it engages in a new regulatory initiative. The District's argument is a strawman. Petitioners never argued that CEQA requires justification for the District's planning activities; Petitioners seek only a unified review of the impacts arising from the suite of regulations that the District *itself* identified as the mechanism by which it intended to implement the Refinery Strategy.[7] (See, e.g., AR Doc. 694, at 011575-83; *id.* at 011577-78; AR Doc. 161, at 004066-70; AR Doc. 147, at 003909-12; AR Doc. 56, at 002194.)

Nor is the District's Refinery Project aimed at a generalized public policy, such as "improving air quality," as the District seems to suggest. To the contrary, the District developed the Refinery Project to achieve the specific, targeted objectives it identified in the 2014 Resolution. The Phase 2 Rules are one of the steps needed to implement and achieve those specific and targeted objectives (in conjunction with the Phase 1 Rules, and additional future rules). At a minimum, the District could easily have conducted a comprehensive review of the two Phase 2 Rules and incorporated into that analysis the cumulative impacts associated with its already-adopted Phase 1 Rules—yet the District failed to undertake even this minimal additional effort.

Projects often occur in multiple phases or components, but that does not excuse an agency from CEQA's mandate to evaluate "the whole of the action." (*Cal. Union for Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 Cal.App.4th 1225, 1242.) If the District were interested in finding "practical" solutions, CEQA provides clear paths to do so. For example, among other things the CEQA Guidelines provide that:

---

[7] All projects have their origins in an idea or mandate, whether it is the District's Board resolution to reduce refinery emissions by 20%, or a corporate board resolution to build a new shopping center. In each case, numerous planning stages ensue, during which the project's proponents plan a path towards achieving their ultimate goal. For CEQA purposes, the culmination of that planning process is the approvals necessary for the project to proceed—approvals that trigger CEQA's requirement to assess the environmental impacts of the entire project. (See CEQA § 21065 (defining a CEQA "project" to include agency actions that have a direct or foreseeable indirect effect on the environment).)

> Where individual projects are, or a phased project is, to be undertaken and where the total undertaking comprises a project with significant environmental effect, the lead agency shall prepare a single program EIR for the ultimate project as described in Section 15168. Where an individual project is a necessary precedent for action on a larger project, or commits the Lead Agency to a larger project, with significant environmental effect, an EIR must address itself to the scope of the larger project. Where one project is one of several similar projects of a public agency, but is not deemed a part of a larger undertaking or a larger project, the agency may prepare one EIR for all projects, or one for each project, but shall in either case comment upon the cumulative effect.

(CEQA Guidelines § 15165.) As the Guidelines make clear, the fact that a project may occur over time or in multiple phases does not excuse an agency from evaluating all project actions in a comprehensive manner. (*Id.*) Instead, CEQA expressly provides various mechanisms to facilitate evaluation of multi-phase projects, which discredit the District's concerns.

For example, the District could have prepared a program EIR. (CEQA Guidelines § 15168.) Among other things, a program EIR is appropriate for "actions that can be characterized as one large project" and are "logical parts in the chain of contemplated actions." (*Id.*) Other mechanisms to aid agencies in multi-component projects include "tiering" EIRs (CEQA Guidelines § 15152), "staging" EIRs (CEQA Guidelines § 15167), and creating a "master" EIR (CEQA Guidelines §§ 15175-15179.5.) The common thread running through each of these options is that agencies are not excused from evaluating cumulative impacts arising from "the whole of the action" merely because the project may occur in multiple stages or over an extended timeline.

The District is well aware of these options—its own CEQA Guidelines specifically contemplate the use of these procedures. Among other things, the District's Guidelines provide that:

> Lead agencies may analyze and mitigate the significant effects of greenhouse gas emissions at a programmatic level, such as in a general plan, a long range development plan, or a separate plan to reduce greenhouse gas emissions. Later project-specific environmental documents may tier from and/or incorporate by reference that existing programmatic review. Project-specific environmental documents may rely on an EIR containing a programmatic analysis of greenhouse gas emissions as provided in section 15152 (tiering), 15167 (staged EIRs) 15168 (program EIRs), 15175-15179.5 (Master EIRs), 15182 (EIRs Prepared for Specific Plans), and 15183 (EIRs Prepared for General Plans, Community Plans, or Zoning).

(BAAQMD, CEQA Guidelines at 4-7 (2012).)[8] Emphasizing this point, the District recently published on its website a draft program EIR for its 2017 Clean Air Plan, explaining that:

> A program EIR also plays an important role in establishing a structure within which CEQA reviews of future related actions can be effectively conducted. This concept of covering broad policies in a program EIR and incorporating the information contained therein by reference into subsequent EIRs for specific projects is known as "tiering" (CEQA Guidelines §15152). A program EIR will provide the basis for future environmental analyses and will allow project-specific CEQA documents to focus solely on the new effects or detailed environmental issues not previously considered.

(BAAQMD, Draft 2017 Clean Air Plan § 1.2.2 (Feb. 17, 2017).)[9]

The District's organization of its own regulations is a matter of administrative convenience—there is no necessity for the District to adopt regulatory requirements separately. In effect, the District argues that it should be able to package its regulatory efforts however it likes, and to evaluate each regulatory action or rule in complete isolation from all others. Taken to its logical conclusion, the District's argument would permit it to segment any regulatory effort into many smaller regulations, minimize the perceived impacts by reviewing each component in isolation, and avoid a cohesive review of the "whole of the action." This outcome would make the District the sole arbiter of whether and to what extent CEQA review is required for any rulemaking action, and is exactly what CEQA prohibits. (CEQA Guidelines § 15378(a); *Bozung*, 13 Cal.3d at 283-84; *Nelson*, 190 Cal.App.4th at 271; *Laurel Heights Improvement Ass'n,* 47 Cal.3d at 396.)

Because each rule adopted as part of the Refinery Project is part of a cohesive plan to achieve a single, defined objective, the Phase 2 Rules—along with the previously adopted Phase 1 Rules—collectively form a single CEQA project. (*Tuolumne County*, 155 Cal.App.4th at 1226.) The District violated CEQA when it adopted these rules without analyzing them in concert, and it continues to violate CEQA by adopting and proposing new Refinery Project rules in isolation. (*Id.*; *Laurel Heights Improvement Ass'n,* 47 Cal.3d at 396.)

---

[8] http://www.baaqmd.gov/~/media/files/planning-and-research/ceqa/baaqmd-ceqa-guidelines_final_may-2012.pdf?la=en.

[9] http://www.baaqmd.gov/~/media/files/planning-and-research/plans/2017-clean-air-plan/2017plandrafteirpdf-pdf.pdf?la=en.

III. THE DISTRICT HAS FAILED TO DEMONSTRATE THAT IT HAS AUTHORITY TO COLLECT CRUDE SLATE DATA OR REGULATE CARGO CARRIERS

Two core provisions of Rule 12-15 are preempted by state and federal law. First, California's Petroleum Industry Information Reporting Act ("PIIRA") occupies the field with respect to the collection of "crude slate" information, and grants *exclusive* authority to collect such information to the California Energy Commission ("CEC"). (Pub. Res. Code §§ 25350-25366; Cal. Code Regs., tit. 20 §§ 1361-1371.) Second, the District lacks any express authority to regulate cargo carriers (such as marine vessels and trains) and several state and federal laws preempt its efforts to do so. The District brushes these issues aside, asserting that Petitioners' concerns with respect to PIIRA preemption are based only on what it calls "minor procedural variations," and that the District is not actually regulating cargo carriers by requiring refineries to do so—an argument that both the D.C. Circuit and the U.S. Environmental Protection Agency ("EPA") have rejected.

The Supremacy Clause of the United States Constitution requires state and local laws to yield to federal law. (U.S. Const., art. VI, cl. 2; *Gibbons v. Ogden* (1824) 22 U.S. 1, 2 (federal laws "are supreme, and the State laws must yield to that supremacy").) The Supremacy Clause gives rise to "well-known principles of pre-emption." (*Douglas v. Seacoast Products, Inc.* (1977) 431 U.S. 265, 272.) And "when Congress has unmistakably ordained that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall." (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525 (internal quotations and annotations omitted).) The California Supreme Court has set forth similar preemption principles, holding that local law is preempted when it (i) conflicts with a state law, (ii) duplicates state law, (iii) contradicts state law, or (iv) "enters an area fully occupied by general law, either expressly or by legislative implication." (*Sherwin-Williams Co.*, 4 Cal.4th at 897-98.) The District's adoption of crude slate and cargo carrier provisions in Rule 12-15 falls squarely within these bedrock principles, and is void. (See generally *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501 (agency action is void if preempted by an act of the Legislature).)

A. PIIRA Preempts Rule 12-15's Crude Slate Reporting Requirements for Two Distinct Reasons.

The crude slate reporting provisions of Rule 12-15 are preempted for two distinct reasons. First, when it enacted PIIRA the California Legislature fully occupied the field of reporting petroleum and crude oil information. Second, and independently, Rule 12-15 conflicts with and undermines core protections of PIIRA enacted by the Legislature to protect highly sensitive information. In its Response, the District asserts that Petitioners' arguments are based only on "minor procedural variations" between PIIRA and Rule 12-15 with respect to the treatment of confidential data. (Resp. 21:26-22:1). That statement entirely ignores basic preemption principles, the breadth and scope of PIIRA, the plain intent of the Legislature, and the cavalier approach the District has taken with respect to highly sensitive information protected by PIIRA.

1. PIIRA Occupies the Field of Crude Oil Reporting and Rule 12-15's Intrusion Into That Field is Unauthorized and Illegal.

PIIRA was intended by the Legislature as the exclusive mechanism for collecting crude oil data in California. The name alone—the "Petroleum Industry Information Reporting Act"—plainly indicates the content of the law and its scope, and PIIRA expressly provides that it was established for the purpose of collecting "information and data concerning ***all aspects*** of the petroleum industry." (Pub. Res. Code § 25350(c).) Notably, PIIRA grants authority to collect such data to a single state agency—the CEC. The Legislature granted no other agency co-extensive authority. The *only* agency to which the CEC may even disclose crude slate data is the California Air Resources Board ("ARB") and then only "if [ARB] agrees to keep the information confidential." (Pub. Res. Code § 25364(g).) There is no mention of the District (or any other air district) in PIIRA—an exclusion that, by its terms, prohibits transmission of crude slate data by the CEC to the District.

PIIRA is comprehensive, covering a wide range of entities (including refineries), feedstocks, blendstocks, petroleum products, and other related data. (See generally Pub. Res. Code § 25354.) Under PIIRA, refineries submit weekly, monthly, and annual data on a wide range of parameters specified in CEC's implementing regulations. (Cal. Code Regs. tit. 20 §§ 1361-1371, App. A.) The Legislature tasked CEC with analyzing and interpreting this data for, among other things, "economic

and environmental impacts" related to petroleum supply and "efforts of the petroleum industry to expand refinery capacity and to make acquisitions of additional supplies of petroleum and petroleum products." (Pub. Res. Code § 25356(a)(2),(7).) In short, PIIRA establishes an extensive state-wide scheme for collecting and analyzing all manner of data related to crude oil, petroleum products, blendstocks, and other related substances.

"If the subject matter or field of the legislation has been fully occupied by the state, there is no room for supplementary or complementary local legislation." (*Cal. Water & Tel. Co. v. Los Angeles County* (1967) 253 Cal.App.2d 16, 27.) Had the Legislature intended to grant the District authority to collect crude slate data, it could easily have done so when it amended PIIRA over the years, but it chose not to. Indeed, the Legislature has considered—*and expressly rejected*—amendments to PIIRA that would have allowed the CEC to disclose information it collects under PIIRA to "other governmental agencies which have a need for that information related to their official functions." (See Assem. Bill No. 3777 (1991-1992 Reg. Sess.), amended by the Senate on June 3, 1992.) The Legislature did *not* enact this provision, and PIIRA continues to prohibit disclosure to the District. PIIRA occupies the field of petroleum and crude slate reporting in California—to the exclusion of any regulations adopted by the District—and preempts the crude slate requirements of Rule 12-15.

2. Rule 12-15 Conflicts With and Undermines PIIRA.

Even if PIIRA did not entirely occupy the field of crude slate reporting, the District's efforts to regulate in this area directly conflict with and undermine vital provisions of PIIRA intended to protect sensitive information and California consumers. As Petitioners have explained, PIIRA contains extensive provisions aimed at preventing the disclosure and improper use of petroleum data. (See Pet'rs' Br. 23:5-26:2.) The District attempts to minimize these concerns, pointing to what it calls are mere "minor procedural variations" between Rule 12-15 and PIIRA. (Resp. 21:28.) But at the same time, the District concedes that, with respect to confidentiality:

> The most substantial difference between PIIRA and the Air District's procedures appears to be that, under PIIRA, the CEC can decide not to release information it deems confidential (which decision presumably can be challenged in court). The Air District's procedures, by contrast, require it to release requested information unless a court injunction is obtained. . . *Under Air District procedures, the Refineries must be proactive in seeking judicial relief. Under PIIRA, the Refineries may be reactive.*

(Resp. 24:20-27 (emphasis added).) Notwithstanding its attempts to minimize this issue, the District seems to *agree* with Petitioners that Rule 12-15 completely inverts the confidentiality and disclosure requirements carefully considered by the Legislature and included in PIIRA.

The District's statement also understates the significant differences between PIIRA and Rule 12-15. PIIRA expressly prohibits the CEC from utilizing non-aggregated data for ***any*** purpose other than the statistical analysis, and from disclosing that information ***to anyone other than CEC members and staff.*** (Pub. Res. Code § 25364(f); see also Cal. Code Regs. tit. 20 § 1370(a).) Rule 12-15 contains no such protections; indeed, the District admits that the *only* protections afforded to crude slate data collected under Rule 12-15 derive from California's generalized Public Records Act, which does not—in the District's own words—"address procedures for determining what qualifies as trade secret." (Resp. 23:5-10.)

It is readily apparent that by adopting Rule 12-15, the District intends to collect crude slate data similar or identical to that collected under PIIRA, while affording it none of the protections ensured by PIIRA. When "'local legislation conflicts with state law, it is preempted by such law and is void.'" (*Sherwin-Williams Co.* 4 Cal.4th 893, 897, quoting *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885; accord, *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 90; *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484; *Lancaster v. Municipal Court* (1972) 6 Cal.3d 805, 807.) A local air district cannot subvert the will of the Legislature by adopting regulations that entirely circumvent the protections granted by the Legislature. "If the preemption doctrine means anything, it means that a local entity may not pass an ordinance, the effect of which is to completely frustrate a broad, evolutional statutory regime enacted by the Legislature." (*Fiscal v. City and County of S.F.* (2008) 158 Cal.App.4th 895, 911.) Because the crude slate provisions of Rule 12-15 frustrate the goals and protections of PIIRA, they are preempted by PIIRA and void. (See *County of San Diego,* 166 Cal.App.4th 501.)

3. The District Has No Authority to Collect Crude Slate Data.

In a further effort to justify the crude slate provisions of Rule 12-15, the District points to two highly generalized provisions in the H&S Code, neither of which contain any express grant of authority to collect crude slate data, and neither of which operate to displace PIIRA.

The District cites H&S Code Sections 42303 and 41511 as its underlying grant of authority to collect crude slate data. But as the District concedes, its authority under these provisions is limited to "emissions" and "air contaminants." (See Resp. 16:7-25; H&S Code §§ 42303, 41511.) Rule 12-15, on the other hand, directly compels the disclosure of highly confidential raw material and feedstock composition. While the District now argues that collecting crude slate data is a "reasonable measure" for assessing air pollution (Resp. 16:5-20:11), this litigation position directly conflicts with the District's prior statements in the record that a refinery's crude slate has an "uncertain[]" relationship to "refinery air emissions" (AR Doc. 2, at 000291).[10] The District is entitled to no deference on whether its choice was "reasonable" because "[a] court does not . . . defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature." (*Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11, n. 4) (citation and quotation omitted).)

More importantly, the extremely generalized provisions of the H&S Code cited by the District do not allow the District to circumvent PIIRA. When it enacted PIIRA, the Legislature expressly granted exclusive authority to the CEC with respect to the collection of data related to crude oil, petroleum products, blendstocks, and related items. The Legislature has chosen ***not*** to grant the District any similar authority and "a specific statute will not be controlled or nullified by a general one." (*Morton v. Mancari* (1974) 417 U.S. 535, 550-51; see also *Sherwin-Williams Co.*, 4 Cal.4th at 897 ("If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.").)[11]

---

[10] The District also points to the New Source Review ("NSR") program as evidence of legislative intent to allow the District to collect crude slate data. (Resp. 17:11-21.) The District fails to note, however, that the federal definitions incorporated into the District's NSR program do *not* consider most changes in fuels and raw materials to be "modifications" that would trigger NSR. *See* 40 C.F.R. § 51.165(a)(1)(v)(C). Furthermore, most refineries are designed to handle a particular crude oil blend (within narrow parameters), and changes to that configuration would necessitate a physical redesign of certain refinery components, which is outside the scope of the NSR program. (See *Helping Hand Tools v. U.S. Environmental Protection Agency* (9th Cir. 2016) 848 F.3d 1185 (discussing NSR program and its scope).)

[11] Petitioners also have challenged other findings made by the District with respect to Rule 12-15, including findings that the rule is necessary and does not duplicate or interfere with requirements imposed by state or federal law. (See Pet'rs' Br. 17:1-21:2; see also H&S Code § 40727(b)(1),(4)-(5).) The District concedes that its findings are subject to judicial review based on an "arbitrary and

B. The District Concedes That it Has No Authority To Regulate Cargo Carriers.

The District has not even responded to Petitioners' preemption arguments related to the cargo carrier requirements of Rule 12-15. Instead, the District attempts to avoid preemption by arguing that Rule 12-15 does not actually regulate cargo carriers. In effect, the District's position is that even though it lacks authority to regulate or collect emissions data from cargo carriers directly, it may regulate them indirectly by compelling refineries to "estimate" cargo carrier emissions through "observations by refinery staff combined with assumptions regarding the type of equipment being used by cargo carriers." (Resp. 26:28-27:2.)

This is a remarkable position. As the District concedes, the refineries cannot compel cargo carriers to provide them with emissions data, and "it is unknown at this point to what extent cargo carriers will cooperate with Refineries in providing emissions-related information to the air District." (Resp. at 25:18-20.) What the District seeks, then, is to have the refineries take a *guess* at cargo carrier emissions, report their guesses to the District, then be held legally accountable for the accuracy of those guesses.[12]

The District's approach to cargo carrier emissions is at best arbitrary and capricious. Given the complete lack of any mechanism by which the refineries can compel accurate data from unrelated third parties, there is simply no way to ensure that "guesstimates" provided by refineries will provide information that is sufficiently accurate to support any future emissions analysis or regulatory efforts by the District. Further, should the District pursue enforcement against the refineries for insufficiently accurate guesstimates, such a claim would raise significant due process concerns, given that the District

---

capricious" standard. (Resp. 12:2-24.) To survive that standard, the District must support its findings with substantial evidence in the record that is "reasonable, credible, and of solid value." (*Plastic Pipe and Fittings Assn.*, 124 Cal. App. 4th at 1407.) In its Response, the District cites approximately 24 pages of two documents in the Administrative Record in support of its conclusions. (See Resp. 12:25-21:19). Petitioners have previously argued that the Record contains little more than conclusory assertions that do not support the District's mandatory findings under the H&S Code. (Pet'rs' Br. 17:1-21:2) Petitioners assert that the record speaks for itself on these issues, and fails to satisfy the District's obligation to make H&S Code findings based on "substantial evidence."

[12] Tellingly, Petitioners are unaware of any District efforts to require other facilities or industries to gather and report emissions data related to cargo carriers visiting those facilities.

has provided no means by which refineries can compel the production of the information for which they are to be held accountable.

Of even greater concern, the District cannot compel a refinery to do what the District itself cannot. As the D.C. Circuit has held under the Clean Air Act, marine vessel emissions cannot be attributed to a stationary source like a refinery. (*NRDC v. EPA* (D.C. Cir. 1984) 725 F.2d 761, 764 ("it is entirely implausible that a vessel's 'to-and-fro' emissions could be attributed to a marine terminal owner under any approach that the [Clean Air Act] would tolerate."). Similarly, EPA has concluded that "[t]he 'to and fro' emissions and 'hotelling' emissions from the vessels are associated with the normal seagoing activities of the vessels and not with the industrial activities associated with the port[.]" (See AR Doc. 18, at 000871, citing Letter from C. Sheehan (EPA Region 6) to M. Cathey, El Paso Energy, and D. Dutton, Akin, Gump (Oct. 28, 2003).) And, in the absence of express EPA authorization, the Clean Air Act prohibits the District from regulating marine vessels. (*Pacific Merchant Shipping Assn. v. Goldstene*, (9th Cir. 2008) 517 F.3d 1108.)

The District's lack of authority in the context of trains is equally clear: the Interstate Commerce Commission Termination Act ("ICCTA") expressly preempts and prohibits the District from regulating rail carriers in any fashion. (49 U.S.C. § 10501(b).) That prohibition extends to the exact scenario presented here: the Ninth Circuit has previously rejected attempts by an air district to require a third-party entity to collect and report railroad emissions data. (*Assn. of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.* (9th Cir. 2010) 622 F.3d 1094, 1098.) Just like the air district rules considered in *Assn. of Am. Railroads*, Rule 12-15 seeks to compel a third party (refineries) to undertake an activity (collecting and reporting railroad emissions) that the District itself is expressly *prohibited* from undertaking. *Assn. of Am. Railroads* squarely blocks the District's attempt to conduct an end-run around the ICCTA.

The District cannot delegate to Petitioners an activity the District itself lacks authority to undertake. And even if the District did have authority to regulate cargo carriers, any attempt to delegate that authority to Petitioners would run afoul of due process and the non-delegation doctrine. (See, e.g., *Carter v. Carter Coal Co*, (1936) 298 U.S. 238 (invalidating qualified legislative delegation of authority to private parties); *Assn. of Am. Railroads v. Dept. of Transp.* (D.C. Cir. 2016) 821 F. 3d 19

(invalidating certain delegations of authority to Amtrak based on due process concerns related to allowing Amtrak to effectively regulate or oversee a competitor in the marketplace).)

The District does not contest that it lacks authority to regulate cargo carriers. While it may prefer an emissions inventory containing cargo carrier data, the District cannot compel refineries to do what it lacks authority to do itself, at the risk of enforcement for failing to provide sufficiently accurate guesstimates. The cargo carrier provisions of Rule 12-15 are preempted and void. (*Am. Fed'n of Labor v. Unemployment Insurance Appeals Bd.* (1996) 13 Cal.4th 1017, 1042; *County of San Diego*, 166 Cal.App.4th 501.)

IV. CONCLUSION

For all of the foregoing reasons, this Court should grant the Petition and issue a writ of mandate finding Rule 12-15 preempted by state and federal law and requiring the District to: (i) vacate and set aside the Initial Study/Negative Declarations for Rules 12-15 and 9-14; (ii) comply with CEQA and H&S Code requirements in any future Refinery Project rulemaking; and (iii) vacate and set aside Rule 12-15.

Dated: April 11, 2017

Respectfully submitted,

BEVERIDGE & DIAMOND, P.C.

By: /s/ David H. McCray

Gary J. Smith (SBN 141393)
David H. McCray (SBN 169113)
456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251
Telephone: (415) 262-4000
Facsimile: (415) 262-4040
gsmith@bdlaw.com
dmccray@bdlaw.com

Attorneys for Petitioners/Plaintiffs WESTERN STATES PETROLEUM ASSOCIATION; VALERO REFINING COMPANY—CALIFORNIA, TESORO REFINING & MARKETING COMPANY, LLC, AND PHILLIPS 66 COMPANY

PROOF OF SERVICE

I, the undersigned, declare that I am employed in the County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is Beveridge & Diamond, P.C., 456 Montgomery Street, Suite 1800, San Francisco, CA 94104-1251.

On April 11, 2017, I served the following document(s): **PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE** on the interested party(ies) in this action.

Adan Schwartz
Senior Assistant Counsel
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109
E-mail: aschwartz@baaqmd.gov

The documents were served by the following means:

☒ BY ELECTRONIC TRANSMISSION: Based on an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the person at the electronic notification address set forth above.

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

DATED: April 11, 2017

BY: Robin Onaka
ROBIN ONAKA