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SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA - MARTINEZ
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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF CONTRA COSTA**

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. N16-0095

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

(Code Civ. Proc §§ 1085, 1094.5)

CEQA CASE

APPENDIX C

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1 **I. INTRODUCTION**

2 In 2014, the Board of Directors of the Bay Area Air Quality Management District (the
3 “District”) adopted a Resolution to better track and control refinery emissions, targeting a “20%
4 reduction in refinery emissions, or as much emissions as are feasible . . . as expeditiously as possible.”
5 (Admin. Record Doc. (“AR Doc.”) 150, at 002763-002764.) In response, District staff created the
6 “Refinery Emission Reduction Strategy”: a series of rules, issued in phases, collectively designed to
7 achieve this goal within five years (the “Refinery Project”). (AR Doc. 117, at 002438.)

8 As the first component of the Refinery Project, the District put together a single package of new
9 or revised rules, which it later segmented into three separate rulemaking packages. Petitioners now
10 challenge the three rules adopted in the first rulemaking package, which represent the first step of the
11 District’s Refinery Project. These rules (the “Challenged Rules”) are:

- 12 • Regulation 6, Rule 5: *Particulate Emissions from Refinery Fluidized Catalytic Cracking*
13 *Units* (“Rule 6-5”);
- 14 • Regulation 8, Rule 18: *Equipment Leaks* (“Rule 8-18”); and
- 15 • Regulation 11, Rule 10: *Hexavalent Chromium Emissions from All Cooling Towers and*
16 *Total Hydrocarbon Emissions from Petroleum Refinery Cooling Towers* (“Rule 11-10”).

16 (See AR Doc. 24 (Notice of Determination describing adoption of the Challenged Rules).)

17 The District’s adoption of the Challenged Rules violates both the legislative intent and statutory
18 requirements of the California Environmental Quality Act, Public Resources Code, § 21000 et seq.
19 (“CEQA”). Agencies must consider and evaluate “the whole of an action” when they adopt new rules
20 and cannot chop up actions into smaller components to minimize impacts or evade review. (Cal. Code
21 Regs. tit. 14, § 15378(a).)¹ But the District did just that: it repeatedly and artificially limited its CEQA
22 review to individual regulations, even while it continued to develop and discuss the Refinery Project as
23 a whole. That piecemeal review subverts CEQA’s core purpose of assuring a comprehensive
24 assessment of “the whole of the action.”

25 The District further violated California law when it adopted the Challenged Rules without
26

27 ¹ CEQA is implemented through the “Guidelines for Implementation of the California Environmental
28 Quality Act,” which are contained in California Code of Regulations, Title 14, Chapter 3, hereinafter
 referred to simply as the “CEQA Guidelines.”

1 complying with requirements imposed by the California Health & Safety Code (“H&S Code”),
2 including the District’s obligation to make findings of necessity, consistency, and non-duplication
3 under H&S Code § 40727, and to assess the cost-effectiveness of each rule under H&S Code § 40703.
4 The record demonstrates that the District had determined to proceed with the Challenged Rules as a
5 political matter before it even issued these rules for public comment. The District then proceeded to
6 cherry-pick data to support its pre-ordained outcome while ignoring a wealth of data to the contrary.
7 These arbitrary and capricious actions fail to demonstrate the necessity, consistency, and cost-
8 effectiveness of the Challenged Rules and render them fatally flawed.

9 Petitioners are three refineries that will be significantly affected both by the Challenged Rules
10 and by future Refinery Project rules that the District has identified as integral to achieving its
11 objectives. Petitioners seek a writ of mandate from this Court ordering the District to (i) vacate the
12 three Challenged Rules and (ii) comply with CEQA and the H&S Code in any future rulemaking to
13 achieve the Board’s Resolution.

14 **II. REGULATORY HISTORY & STATEMENT OF FACTS**

15 The Refinery Project originated in an October, 2012 “Work Plan,” in which the District
16 identified its desire to better track refinery emissions. (AR Doc. 122, at 002502.)² As the District
17 began developing an emissions tracking rule, its focus expanded to include both tracking and reducing
18 refinery emissions. (See AR Doc. 122, at 002502-002503; see also AR Doc. 124.) These efforts
19 culminated with the District’s adoption of Resolution 2014-07, unifying the District’s efforts and
20 expanding its goals. (See AR Doc. 150.)³ Resolution 2014-07 directed District staff to continue efforts
21 to track refinery emissions and to develop an integrated, broader strategy to reduce emissions from
22 petroleum refineries by 20%, “or as much emissions reductions as are feasible.” (AR Doc. 150, at
23 002763-002764.)

25 ² BAAQMD, Work Plan for Action Items Related to Accidental Releases from Industrial Facilities, at
26 2 (Oct. 11, 2012) (Action Item #4), at
27 http://www.baaqmd.gov/~media/Files/Technical%20Services/IncidentWorkPlan_Approved_10172012.ashx?la=en.

28 ³ At times, documents in the Administrative Record refer to Resolution 2014-07 as Resolution 2014-17.
(See, e.g., AR Doc. 3, employing both terms.) Petitioners believe this is a typographical error. To
avoid confusion, and for consistency, this brief will use the term Resolution 2014-07.

1 In response to this directive, District staff designed its comprehensive Refinery Project to
2 achieve a 20% reduction in emissions of certain criteria pollutants⁴ and a 20% reduction in health risks
3 over a five-year period (2015-2020). (AR Doc. 117, at 002438; AR Doc. 46). The Project incorporated
4 four main goals: (1) reducing criteria pollutants and precursors; (2) reducing health risks from air
5 toxics; (3) tracking GHG emissions; and (4) improving control technology and practices. (AR Doc.
6 117, at 002438-002439.)

7 The District planned to implement its Refinery Project through a “suite” of coordinated
8 rulemaking actions in 2015 and 2016. (*Id.*; see also AR Doc. 103, at 002278 (identifying Refinery
9 Project phases and related rules).) As the first phase, the District planned to develop and adopt in 2015
10 a single package of rules to address criteria pollutants, focusing on sulfur dioxide (“SO₂”) controls on
11 refinery coke calciners, reductions in particulate matter (“PM”) and PM precursors from Fluid Catalytic
12 Cracking Units, and tightening requirements for equipment leaks. (AR Doc. 119, at 002469; AR Doc.
13 117, at 002438.) The District planned to follow this package with a second suite of rules to address the
14 Refinery Project’s second objective, reducing risk from air toxics. (AR Doc. 119, at 002469.) Two
15 months after the Board passed Resolution 2014-07, it approved the District’s “Strategy” to achieve the
16 Resolution’s goals. (AR Doc. 118, at 002448-002449.)

17 By January 2015, the District developed a suite of ten new or revised rules for study,
18 development, and potential inclusion in the Refinery Project to complement the tracking and reduction
19 rules already under development, which included Regulation 12, Rule 15: *Petroleum Refining*
20 *Emissions Tracking* (“Rule 12-15”) and Regulation 12, Rule 16: *Petroleum Refining Emissions*
21 *Analysis, Thresholds, and Mitigation* (“Rule 12-16”). (AR Doc. 245, at 003770-003771.) The District
22 targeted seven of those rules (including the three Challenged Rules) for adoption by late 2015 and
23 indicated that these seven rules may collectively require an Environmental Impact Report (“EIR”)
24 under CEQA. (See AR Doc. 245-A, at 003770-003771, 003777-A.)

25 In May, the District decided to proceed with six rules instead of seven, and broke up this single
26 suite of rules into three distinct rulemaking phases, as follows:

27
28 ⁴ “Criteria pollutants” is a term of art under both the federal Clean Air Act and California regulations
that refers to six common air pollutants.

- Phase 1: development of Regulation 9, Rule 14 (“Rule 9-14”), which the District asserted would “address emissions of SO₂ and the formation of PM”;
- Phase 2: developing or amending the Challenged Rules, along with Rule 9-1, which the District asserted would further reduce SO₂ emissions and PM formation; and
- Phase 3: further amendments to Rules 6-5 and 9-1 and the addition of Rule 9-9 to address emissions from Stationary Gas Turbines at refineries.

(AR Doc. 46 at 001118-19.) These six rules were designed to “complement” and work in tandem with Rule 12-15 (the emissions tracking rule) and Rule 12-16 (which imposed emissions “caps” on refinery operations). (AR Doc. 46, at 001116.)

In October 2015, the District proposed a suite of six Refinery Project rules: Rule 9-14 (May’s “Phase 1”); the three Challenged Rules (May’s “Phase 2,” without Rule 9-1); and Rules 12-15, and 12-16 (May’s “Complementary” rules). (AR Doc. 9 (public hearing notice for Rules 6-5, 9-14, 8-18, 11-10); AR Doc. 53 (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 rules. (AR Doc. 55.) The basis of the District’s decision to prepare an EIR for only a portion of the Refinery Project—and, indeed, the District’s entire treatment of this issue—is ever-changing, confused, and inconsistent. The District first characterized the remaining four rules (the Challenged Rules and Rule 9-14) as a separate individual “project,” acknowledging that all four rules were “part of a concerted effort to reduce refinery emissions,” and prepared a single draft Negative Declaration covering all four rules. (AR Doc. 12, at 000557; AR Doc. 13.) But 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 new “project.” (AR Doc. 12, at 000557; see also AR Doc. 9, at 000552; AR Doc. 12.)

On November 23 and November 30, 2014, Petitioners, both individually and as members of the Western States Petroleum Association (“WSPA”), provided several hundred pages of substantive and technical comments on the six proposed rules, identifying both technical inaccuracies and the common objective of each rule as interrelated components of the Refinery Project. (AR Docs. 32-36; AR Doc. 102, at 002270-74 (November 30, 2015 meeting minutes describing public comments on proposed Refinery Project Rules).)

1 By the December 16, 2015 public hearing on these rules, the District changed course yet again,
2 chopping up these six rules into multiple Refinery Project rulemaking actions. At the public hearing,
3 the District announced that it would consider adoption of only three of the six originally-proposed
4 rules: Rules 6-5, 8-18, and 11-10 (*i.e.*, the Challenged Rules). (AR Doc. 3, at 000182-000183.) The
5 remaining rules were delayed until 2016, although the District reiterated its intent to proceed with them,
6 as they remained “important to meeting the Air District goals set forth in Resolution 2014-[0]7.” (AR
7 Doc. 3, at 000269.) Petitioners again provided oral comments at the December 16 public hearing. The
8 District subsequently adopted the Challenged Rules and approved the accompanying Initial
9 Study/Negative Declaration (“IS/ND”). (AR Doc. 8, at 000550; AR Doc. 5; AR Doc. 6; AR Doc. 7.)
10 On January 22, 2016, Petitioners filed a Petition and Complaint alleging that the District violated
11 CEQA, failed to comply with the H&S Code, and acted in an arbitrary and capricious manner when it
12 adopted the Challenged Rules.

13 Less than two months after adopting the Challenged Rules, the District further segmented the
14 Refinery Project by re-proposing Rules 9-14 and 12-15.⁵ This time, instead of preparing an EIR for
15 Rule 12-15, the District prepared individual Negative Declarations for both Rule 9-14⁶ and 12-15.⁷ The
16 District adopted these two rules in April, 2016, and on May 25, 2016, Petitioners and WSPA filed a
17 Complaint and Petition in this Court separately challenging the District’s adoption of Rules 9-14 and
18 12-15, currently pending as Case No. N16-0963. The District stated that it continues to reassess Rule
19 12-16, and intends to develop still more rules under its Refinery Project. (AR Doc. 111, at 002376
20 (additional rules are “planned for 2016”).)

21 **III. STANDARD OF REVIEW**

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

23 CEQA requires all public agencies to conduct an environmental review of any “project” they
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25 ⁵ Rulemaking materials for Rules 12-15 and 9-14 are posted on the District’s website, at
26 <http://www.baaqmd.gov/rules-and-compliance/rule-development/public-hearings>.

27 ⁶ Negative Declaration for Rule 9-14, at <http://www.baaqmd.gov/~media/files/planning-and-research/public-hearings/2016/9-14-and-12-15/042016-hearing/0914-ceqa-042016-pdf.pdf?la=en>.

28 ⁷ Negative Declaration for Rule 12-15, at <http://www.baaqmd.gov/~media/files/planning-and-research/public-hearings/2016/9-14-and-12-15/042016-hearing/1215-ceqa-042016-pdf.pdf?la=en>.

1 carry out. (Pub. Res. Code § 21080.) A “project” is an “activity which may cause either a direct
2 physical change in the environment, or a reasonably foreseeable indirect physical change in the
3 environment.” (Pub. Res. Code, § 21065.) CEQA “projects” include an agency’s adoption of a rule or
4 regulation, including those aimed at environmental protection. (*Cal. Unions for Reliable Energy v.*
5 *Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 Cal.App.4th 1225, 1240 (citing *Wildlife Alive v.*
6 *Chickering* (1976) 18 Cal.3d 190, 206; *Plastic Pipe & Fittings Ass’n v. Cal. Bldg. Standards Com.*
7 (2004) 124 Cal.App.4th 1390, 1412).)

8 When reviewing a project under CEQA, the lead agency must consider the “whole of an
9 action.” (Cal. Code Regs. tit. 14 § 15378(a).) CEQA forbids an agency from “chopping a large
10 project into many little ones” to evade a full environmental review. (*Laurel Heights Improvement*
11 *Ass’n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 396 (quoting *Bozung v. LAFCO* (1975) 13
12 Cal.3d 263, 283-84).) A series of actions undertaken to attain the same objective comprises a single
13 project. (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155
14 Cal.App.4th 1214, 1226-27) (hereinafter “*Tuolumne County*”).)

15 The scope of a CEQA “project” is a question of law; courts afford no deference to an agency
16 when determining what constitutes a project under CEQA. (*Tuolumne County*, 155 Cal.App.4th at
17 1224.) Upon finding that an agency has violated CEQA, a court may issue a writ of mandate voiding
18 an action and requiring compliance with CEQA. (Cal. Pub. Res. Code § 21168.9(a).) “Directing an
19 agency to void its approval of the project is a typical remedy [] for a CEQA violation.” (*POET, LLC v.*
20 *Cal. Air Res. Bd.* (2013) 218 Cal.App.4th 681, 759) (citation omitted).)

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

23 The H&S Code imposes several substantive requirements on the District when it engages in
24 rulemaking. Among other things, the District “*shall*” make findings and assure that rules meet the
25 following criteria: “necessity, authority, clarity, consistency, nonduplication, and reference.” (H&S
26 Code § 40727 (*italics added*)). The District also “*shall* consider . . . the cost effectiveness of a control
27 measure.” (*Id.* § 40703.) These are mandatory requirements that the District must comply with when
28 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 Ass’n*, 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 Ass’n v. S. Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 460.) The terms arbitrary and capricious are often bandied about but, in essence, these terms require an agency’s decision to be soundly based on the facts before it. (See Black’s Law Dict. (10th ed., 2014) (“arbitrary” means “a determination made without consideration of or regard for facts”; “capricious” means “contrary to the evidence”).) 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.’” (*Am. Coatings Ass’n*, 54 Cal.4th 446, 460 (quoting *Golden Drugs Co., Inc. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, 1466).)

IV. ARGUMENT

A. The District Violated CEQA by Illegally Segmenting the Refinery Project and Failing to Review the Whole of the Action.

In late 2014, the District declared its intent to track and control refinery emissions, seeking a 20% reduction in refinery emissions and health risks to the extent that such reductions are “feasible.” (AR Doc. 150, at 002763-002764.) To achieve these objectives, the District created the Refinery Project, an integrated set of regulatory actions taking place in several phases. (AR Doc. 117, at 002438-002439; AR Doc. 103, at 002278 (identifying Refinery Project phases and related rules).) No single phase or regulation is sufficient on its own to achieve the Refinery Project’s overarching goal. As the District acknowledged, the Challenged Rules are each “part of a concerted effort to reduce refinery emissions.” (AR Doc. 12, at 000557.)

Even though the District admitted that the Challenged Rules share the common objective “to reduce refinery emissions” (as required under the Board’s directive) the District improperly segmented

1 the Refinery Project into multiple CEQA analyses, evaluating each rule in isolation. This approach
2 enabled the District to artificially minimize the total environmental impact of the Project as a whole,
3 which in turn allowed the District to avoid preparing an EIR assessing *all* environmental impacts of the
4 Refinery Project. These actions violate CEQA and frustrate its core purpose of informing the public
5 and assuring a comprehensive review of “the whole of the action.”

6 **1. CEQA Requires Agencies to Analyze “The Whole of the Action” and**
7 **Agencies May Not Evaluate Projects In a “Piecemeal” Manner.**

8 It is black-letter law that an agency must evaluate “the whole of an action” under CEQA and
9 cannot “chop up” projects into smaller components to avoid review. (Cal. Code Regs. tit. 14 §
10 15378(a); *Bozung*, 13 Cal.3d at 283-84.) Because the scope of review under CEQA must include the
11 entire project, “a correct determination of the nature and scope of the project is a critical step in
12 complying with the mandates of CEQA.” (*Nelson v. Cnty. of Kern* (2010) 190 Cal.App.4th 252, 267
13 (citations and quotations omitted).) When a set of actions is aimed at a common objective—such as
14 reducing refinery emissions by 20%—CEQA requires an agency to evaluate those actions *together*:

15 One way to evaluate which acts are part of a project is to examine how closely related
16 the acts are to the overall objective of the project. The relationship between the
17 particular act and the remainder of the project is sufficiently close when the proposed
18 physical act is among the “various steps which taken together obtain an objective.
19 (*Tuolumne County*, 155 Cal.App.4th at 1226-27 (quoting *Robie et al.*, Cal. Civil Prac. Env’tl Litig.
(2005) § 8.7).)

20 Given CEQA’s core “purpose of informing the public about potential environmental
21 consequences, it is quite clear that an EIR is required even if the project’s ultimate effect on the
22 environment is far from certain.” (*Cal. Bldg. Indus. Ass’n v. Bay Area Air Quality Mgmt. Dist.* (2015)
23 62 Cal.4th 369, 382.) This requirement is designed to assure that all of a project’s impacts are
24 considered at the same time, since a set of smaller actions often may result in a significant cumulative
25 effect on the environment. (*Laurel Heights Improvement Ass’n*, 47 Cal.3d at 396.)

26 The fact that a specific project may occur through multiple components or phases does not
27 excuse an agency from CEQA’s mandate to evaluate “the whole of the action.” (*Cal. Union for*
28 *Reliable Energy*, 178 Cal.App.4th at 1242) (citing 1 Kostka Zischke, Prac. Under the Cal. Env’tl

1 Quality Act, § 6.31, 329-330).) “This prevents agencies from chopping a large project into little ones,
2 each with a minimal impact on the environment, to avoid full environmental disclosure. . . . Piecemeal
3 environmental review that ignores the environmental impacts of the end result is not permitted.” (*Id.*)
4 Yet this type of “piecemeal environmental review” is exactly what the District has done here.

5 **2. The District Improperly Segmented the Refinery Project to Evade CEQA**
6 **Review.**

7 The District did not prepare an EIR for the Refinery Project as a whole; nor did it even prepare
8 an EIR for the three Challenged Rules. Instead, the District reviewed these three rules independently,
9 concluded that each rule had no significant environmental impact, and adopted a single Negative
10 Declaration. (AR Doc. 24.) The District claims that its Negative Declaration should not create an
11 inference of interdependence between the Challenged Rules, and that its grouping of these three rules
12 was performed solely “[f]or administrative convenience.” (AR Doc. 12, at 000557.) But this Court,
13 not the District, is the arbiter of a CEQA project’s scope. (*Nelson*, 190 Cal.App.4th at 271). Its recent
14 self-serving statements notwithstanding, the District’s past actions and statements amply demonstrate
15 that the Challenged Rules are not merely interrelated, they are part of a single Project.

16 From the moment the Board issued Resolution 2014-07, the District began to develop a unified
17 approach and holistic plan to achieve the Resolution’s goals. Within two months, the District had
18 developed a multi-phased “Refinery Emission Reduction Strategy,” which it intended to implement
19 over the following two years. (AR Doc. 117, at 002438.) Within three months, the District held a
20 “Refinery Emissions Reduction Strategy Kick Off Meeting” to discuss its “rule development efforts”
21 and a unified approach to developing up to twenty individual rules under the Refinery Project—
22 including the Challenged Rules and Rules 12-15, 12-16, and 9-14, among others. (AR Doc. 245, at
23 003768-74.) To manage this significant and coordinated undertaking, the District created a project
24 workflow and organization chart assigning roles and responsibilities to twenty-two District staff
25 members tasked with handling specific aspects of the District’s Refinery Project rulemaking effort. (*Id.*
26 at 003776.)

27 While the timing and details of the Refinery Project changed over the following months, this
28 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 Board's Resolution—did not. In March, the District reported that its staff had “developed a Refinery Emission Reduction Strategy in response to Resolution 2014-7, identifying specific rulemaking efforts to meet the goal of reducing refinery emissions by 20%,” which included “a five-point action plan to provide a path forward to quickly and effectively address [refinery emissions].” (AR Doc. 112, at 002397). In June, 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. (AR Doc. 111, at 002376). The District's presentation explains this link quite clearly:

Refinery Emissions Reduction Strategy Rulemaking

- **20% criteria pollutant reductions by 2020**
 - Includes five specific refinery emission reduction regulations
 - Additional rulemaking is being investigated
- **20% reduction in risk by 2020**
 - 12-16 sets total risk at 25 in 1 million
 - 12-15 HRA and additional monitoring requirements will identify sources for further reductions

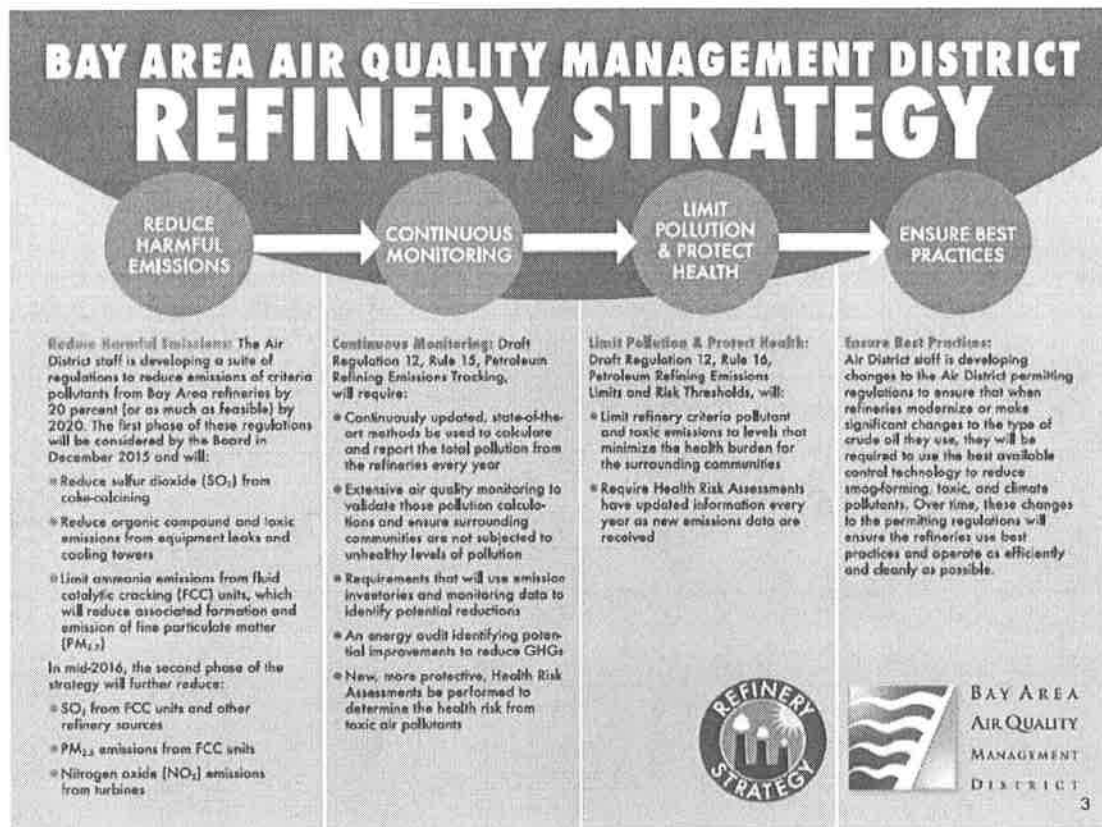


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002375

(AR Doc. 111, at 002375).

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 Challenged Rules, the District explained its Refinery Project using a straightforward chart:



002278

(AR Doc. 103, at 002278.)

This chart bears a striking resemblance to the District’s initial description of its “Strategy”: multiple components, each relying on several regulatory steps that collectively build upon each other to achieve the District’s objectives. In particular, the first component (“Reduce Harmful Emissions”) consists of two phases: the Challenged Rules in 2015, followed by a second suite of rules in 2016. (*Id.*) The final component (“Ensure Best Practices”), in turn, will depend heavily on data collected through rules adopted under the second component (“Continuous Monitoring”). (*Id.*; see also AR Doc. 50 (District Staff Report explaining purpose of Rules 12-15 and 12-16).)

As the District’s own documents demonstrate, the District’s Refinery Project regulatory actions, including the Challenged Rules, are all aimed squarely at achieving its unified objective: track and reduce refinery emissions and health risks by 20%, or as much as feasible. (*Id.*) The District intended its suite of rules—the entire Refinery Project—to work together towards this common purpose. (*Id.*; see also AR Doc. 103, at 002280 (explaining that the Challenged Rules, plus Rule 9-14, may collectively amount to a 16% reduction in emissions, while additional regulations adopted in a “Phase

1 II rulemaking planned for 2016” may additively attain the 20% reduction goal).) The Board understood
2 the interrelated nature of these efforts and adopted the Challenged Rules on that basis. (AR Doc. 8 at
3 000549 (noting that the Board had discussed “the Refinery Strategy and the proposed regulations the
4 staff has presented, *including* the three regulations up for a vote today.”) (italics added).) Given the
5 interdependence of the District’s regulatory actions and their common underlying purpose, it is plain
6 that they are “various steps which taken together obtain an objective” and comprise a single “project”
7 for purposes of CEQA. (*Tuolumne County*, 155 Cal.App.4th at 1226-27.)

8 While the District plainly understood the integrated nature of its Refinery Project rulemaking
9 efforts, it took a cavalier and inconsistent view of its CEQA obligations throughout the rulemaking
10 process. In early 2015, District staff recognized that “it would be good to consider the cumulative
11 impacts of the whole suite of regulatory efforts” under CEQA. (AR Doc. 381, at 004850.) And when
12 the District first outlined its initial Refinery Project rules, it recognized that its initial suite of rules may
13 require an EIR. (AR Doc. 245-A, at 003770-003771, 003777-A (creating a “Task Schedule” for
14 unified rule development and preparation of an EIR.) But by the time the District began to propose
15 individual rules for adoption, its view of its CEQA obligations began to change. The District
16 reformulated its approach on at least three different occasions:

- 17 • October, 2015: District proposes the Challenged Rules, 9-14, 12-15, and 12-16,
18 concluding that (i) Rules 12-15 and 12-16 are a single “project” requiring an EIR and
19 (ii) the remaining four rules are a separate individual CEQA “project.” (AR Doc. 54;
AR Doc. 12, at 000557.)
- 20 • December, 2015: the District severs the three Challenged Rules and adopts them with a
21 single Negative Declaration prepared for “administrative convenience.” (AR Doc. 24;
see also AR Doc. 3, at 000357-000449.)
- 22 • January, 2016: District re-proposes Rules 9-14 and 12-15, ignoring its prior EIR for
23 Rule 12-15 and grouping of Rule 9-14 with the Challenged Rules as a single “project,”
24 concluding instead that each of these two rules requires only a stand-alone Negative
Declaration. (*Supra*, at 5, fn. 4-5.)

25 In short, the District appears to have redefined its CEQA obligations based on haste and
26 expediency, resulting in an artificial compartmentalization of various Refinery Project rules and CEQA
27 reviews structured for “administrative convenience.” (AR Doc. 24, at 000675.) But CEQA
28 requirements are driven by substance, not logistics. Because the Challenged Rules and numerous other

1 rules (including but not limited to the subsequently-adopted Rules 9-14 and 12-15) were collectively
2 designed to achieve a single purpose—the goals set forth in Resolution 2014-07—they are part of a
3 single CEQA project. By analyzing the three Challenged Rules in isolation, the District addressed only
4 a fraction of the entire Refinery Project. That action is not only misleading, it violates CEQA and
5 subverts its purpose of assuring a comprehensive environmental review of “the whole of an action.”
6 (Cal. Code Regs. tit. 14 § 15378(a); *Bozung*, 13 Cal.3d at 283-84; *Nelson*, 190 Cal.App.4th at 271.)

7 **3. The District Ignored Concerns Suggesting that an EIR Was Required to**
8 **Fully Assess the Impacts of the Refinery Project.**

9 District Staff is well aware that some of its Refinery Project rules are likely to cause significant
10 environmental impacts, even when considered by themselves. In an early “Scoping Paper” for Rule 6-
11 5, one of the Challenged Rules, District staff noted “Significant CEQA Issues” that include negative
12 environmental impacts resulting from construction activities, GHG emissions, water use, and up to
13 30,000 gallons of wastewater per day resulting from each scrubber that the rule may require to reduce
14 emissions. (AR Doc. 229, at 003402.) Because of these significant environmental impacts, District
15 engineering staff cautioned in 2014 that “BAAQMD should expect to prepare an EIR for Reg 6-5 and
16 should begin this process as early as possible in the process because of the likelihood of significant
17 impacts.” (AR Doc. 229, at 003403.) These concerns continued to appear in scoping paper drafts
18 through early 2015. (AR Doc. 308, at 004138 (“One key issue that will almost certainly carry over
19 from the South Coast experience is the need to perform an EIR.”).) While the final, adopted version of
20 Rule 6-5 differs from its draft form, the final Negative Declaration continued to note potential
21 environmental impacts related to Rule 6-5. (AR Doc. 3, at 000383 (noting and evaluating “potential
22 secondary adverse environmental impacts” stemming from compliance with Rule 6-5).)

23 Similarly, the District initially recognized that Rules 12-15 and 12-16 would require preparation
24 of an EIR and even prepared a draft EIR for these two rules. (AR Doc. 55, at 001229.) As discussed
25 above, however, the District subsequently severed Rule 12-15 from Rule 12-16, combined it instead
26 with Rule 9-14, and declared that those two rules independently each required nothing beyond a
27 Negative Declaration.

28 The District’s actions highlight the problem CEQA seeks to avoid: by failing to consider Rule

1 6-5 and the other Challenged Rules alongside the rest of the Refinery Project, the District has
2 artificially minimized the impacts of its actions and skirted CEQA's mandate to review *all*
3 environmental impacts associated with a project, not just a few. (See *Laurel Heights Improvement*
4 *Ass'n*, 47 Cal.3d at 396 (CEQA requires an agency to analyze all project components).)

5 This Court, not the District, is tasked with determining the scope of the District's Refinery
6 Project. (*Tuolumne County*, 155 Cal.App.4th at 1224.) To further CEQA's dual purpose of informing
7 the public and assuring review of "the whole of the action," this Court should issue a writ of mandate
8 requiring the District to (i) vacate the NOD and Negative Declaration, (ii) vacate Rules 6-5, 11-10, and
9 8-18, and (iii) undertake a proper review under CEQA that considers "the whole of the action" when
10 undertaking any future regulatory actions as part of the Refinery Project. (See Cal. Pub. Res. Code §
11 21168.9(a); *POET, LLC*, 218 Cal.App.4th at 759.)

12 **B. The District Arbitrarily Ignored Information In the Record to Justify the**
13 **Challenged Rules in Violation of H&S Code Requirements.**

14 Before adopting new regulations, the District must evaluate several important H&S Code
15 requirements: it must make findings that demonstrate the necessity, authority, clarity, consistency, non-
16 duplication, and reference of the new or modified regulations, based on information in the rulemaking
17 record. (H&S Code § 40727.) It also must make findings as to the cost-effectiveness of the
18 regulations, including assessing the direct costs to be incurred by the regulated industry. (*Id.* § 40703.)
19 The District's findings must be based on substantial evidence that is "reasonable, credible, and of solid
20 value." (*Plastic Pipe and Fittings Ass'n*, 124 Cal.App.4th at 1407.) The District's evaluation also must
21 "demonstrate[] a rational connection between those factors [and] the choice made." (*Am. Coatings*
22 *Ass'n*, 54 Cal.4th 446, 460 (citation omitted).) An analysis failing this test is "arbitrary, capricious, or
23 lacking in evidentiary support." (*Id.*)

24 In this case, the District failed to undertake the type of reasoned decision making required by
25 the H&S Code and California law. As soon as the Board issued its resolution, District Staff developed
26 a comprehensive plan to achieve a 20% emissions reduction as quickly as possible. The District's
27 single-minded focus on achieving this goal, however, gave short shrift to these important H&S Code
28 requirements: rather than viewing its statutory obligations as core analyses on which to build its rules,

1 the District viewed them as little more than inconvenient hurdles for its Refinery Project to clear—as
2 boxes to check on the path to its pre-determined result.

3 **1. In adopting Rule 8-18 the District relied on outdated data, ignored existing**
4 **federal requirements, and overestimated benefits.**

5 Rule 8-18 requires refineries to perform periodic inspections for leaks from refinery equipment
6 and to repair any leaks within a specific period of time. Most leak inspection programs reserve the
7 most burdensome inspection and repair requirements (such as routine instrument monitoring) for
8 equipment containing gases and light liquids; because heavy liquids do not have the same propensity to
9 create airborne emissions, equipment containing these materials are inspected manually (*i.e.*, use of
10 sight, smell, and sound to detect leaks). (See e.g., 40 C.F.R. § 60.482-8; *id.* § 60.482-8a (federal
11 standards for heavy liquid service components providing for visual, audible, and olfactory detection
12 methods).)

13 As part of the Refinery Project, however, the District amended Rule 8-18 to require refineries to
14 extend the more burdensome inspection requirements to equipment containing heavy liquids. (See
15 Dist. reg. 8, rules 8-18-113, 8-18-400; AR Doc. 3, at 000193-000203.) The District also narrowed the
16 already-limited exemptions from the immediate repair obligations. (See Dist. reg. 8, rule 8-18-306; AR
17 Doc. 3, at 000193-000203.) The District’s stated purpose of these amendments is to achieve further
18 reductions in fugitive emissions of organic gases and toxic compounds from certain refinery equipment.
19 (AR Doc. 3, at 000241.)

20 The District’s adoption of its Rule 8-18 amendments violated the H&S Code in three distinct
21 ways. First, to demonstrate the necessity of Rule 8-18, the District relied exclusively on data from
22 uncontrolled facilities during the 1970s and 1980s, while completely ignoring actual recent monitoring
23 data from the very refineries regulated by the rule that demonstrate that emissions from heavy liquids
24 are orders of magnitude lower. Second, based on these inflated emissions estimates, and ignoring
25 significant compliance cost data, the District significantly overstated the emissions reductions the rule
26 would achieve and understated the costs of compliance, leading to an inflated cost-effectiveness
27 analysis. Third, the District failed to harmonize Rule 8-18 with existing federal regulations—
28 regulations that *already require* monitoring of heavy liquid service equipment. Individually, any one of

1 these flaws renders Rule 8-18 illegal, arbitrary, and capricious. Together, they highlight the District's
2 "check-the-box" approach to rulemaking and its focus on predetermined outcomes, rather than on
3 reasoned decision making and hard facts.

4 **a. The District relied on incorrect and inflated emissions data to**
5 **demonstrate the necessity of Rule 8-18.**

6 The District justified the "necessity" of the revisions to Rule 8-18 based on its projection that
7 leaks from equipment in heavy liquid service currently generate 1,476 tons per year ("tpy") of fugitive
8 emissions. (AR Doc. 3, at 000243.) This estimate, however, is based on 40-year-old emissions factors
9 that are indisputably outdated, and the District ignored substantial evidence in the record demonstrating
10 that actual emissions from the refineries subject to Rule 8-18 are orders of magnitude lower. The
11 District's exclusive reliance on outdated data and refusal to consider more reliable estimates epitomize
12 arbitrary and capricious rulemaking.

13 The District developed its 1,476 tpy estimate by multiplying the total number of components in
14 heavy liquid service by the emissions factors (emissions rate estimates) for each component type set
15 forth in the U.S. Environmental Protection Agency's ("EPA") 1995 Protocol for Equipment Leak
16 Emissions Estimates. (See AR Doc. 35, at 000953 (citing U.S. EPA, *Protocol for Equipment Leak*
17 *Emissions Estimates*, EPA-453/R-95-017 (Nov. 1995), (hereinafter the "1995 Protocol").)⁸ These
18 emission factors were developed using data collected during the late 1970s from uncontrolled
19 refineries. (1995 Protocol at 2-13 (Table 2-2, Footnote a, Reference 2), C-1 to C-2 (describing 1980
20 study); see also *id.* at 2-8 (describing that refinery average emission factors remain unchanged in the
21 1995 version of the Protocol).) Since these emissions factors were initially developed, however,
22 fugitive emissions from refineries have been significantly reduced through multiple layers of leak
23 detection programs. (See e.g., 40 C.F.R. § 60.482-8; *id.* § 60.482-8a.) These outdated emissions factors
24 do not represent actual emissions from modern *controlled* facilities. (See AR Doc. 35, at 000953.)

25 Given the limitations of the emissions factors in the 1995 Protocol, California Air Resources
26

27 ⁸ U.S. EPA, Protocol for Equipment Leak Emissions Estimates, EPA-453/R-95-017 (Nov. 1995), at
28 <https://www3.epa.gov/ttnchie1/efdocs/equiplks.pdf>. 1995 Protocol emissions factors also are
incorporated by reference in CARB's CAPCOA Guidance. (See *infra*, p. 18.)

1 Board (“CARB”) guidance specifically limits their use: “[t]he Average Emission Factor Method [the
2 method used by the District] may be used . . . to estimate overall emissions only when reliable site-
3 specific screen data are not available.” (See AR Doc. 3, at 000338; AR Doc 892, at 009628, 009636-37;
4 AR Doc. 32 (citing CAPCOA/CARB, California Implementation Guidelines for Estimating Mass
5 Emissions of Fugitive Hydrocarbon Leaks at Petroleum Facilities, (Feb. 1999) p. 7, at
6 https://www.arb.ca.gov/fugitive/impl_doc.pdf (hereinafter “CAPCOA Guidance”)).)

7 During rulemaking, Petitioners submitted reliable site-specific data—data *from the actual*
8 *equipment subject to the rule*. The data demonstrates that actual fugitive emissions from equipment in
9 heavy liquid service are far below the District’s estimated 1,476 tpy. Specifically:

- 10 • Petitioner Phillips 66 provided the District with actual heavy liquid component
11 monitoring data demonstrating that emissions from components in heavy liquid service
12 are lower than the District’s emissions estimates *by orders of magnitude*. (AR Doc. 33,
at 000868; see also AR Docs. 160 & 161.)
- 13 • Petitioner Tesoro submitted actual monitoring data showing negligible emissions from
14 components in heavy liquid service. (AR Doc. 35, at 000952-000954; AR Doc. 37, at
001020.)
- 15 • Petitioner Valero provided actual monitoring data confirming the low leak frequency of
16 heavy liquid components. (AR Doc. 162, at 002826.)

17 The District refused to consider any of this data. The District did not actually identify any
18 problems or errors in the data; rather, it summarily dismissed the data as “inadequate” solely because it
19 “was not collected in such a way that the Air District could verify that it accurately represented the
20 emissions from components in heavy liquid service”—even though all of the data was collected using
21 EPA-approved sampling methodologies and test methods. (AR Doc. 3, at 000244; see also, e.g., AR
22 Doc. 33, at 000868, 000874 (Phillips 66 Company providing EPA-approved Method 21 monitoring
23 results to District staff).)

24 The District’s findings must be based on substantial evidence that is “reasonable, credible, and
25 of solid value” (*Plastic Pipe and Fittings Ass’n*, 124 Cal.App.4th at 1407), and that bears a “rational
26 connection” to the District’s ultimate determination (*Am. Coatings Ass’n*, 54 Cal.4th 446, 460). By
27 arbitrarily choosing to rely on 40-year-old emissions factors that even CARB and EPA suggest are
28 unreliable—especially when provided with recent, actual data from the very sources at issue—the

1 District has failed to satisfy even this most basic rulemaking requirement.

2 Even the District admits that it needs more data to evaluate the utility of Rule 8-18, and since
3 2014 the refineries have repeatedly offered to collect data and study emissions from heavy liquid
4 components. When it adopted Rule 8-18, the District noted that it has finally accepted this offer (AR
5 Doc. 3, at 000244) and that once the study is completed, the District will “determine if the proposed
6 regulatory requirements for equipment in heavy liquid service continue to be cost effective.” (AR Doc.
7 3, at 000279.) The District has it backwards: it must demonstrate the necessity of a regulation *before*
8 choosing to regulate—not after the fact.

9 This “regulate first, ask questions later” approach entirely subverts the “necessity” requirement
10 and epitomizes arbitrary and capricious rulemaking. The H&S Code requires the District to show that
11 “a need exists for the regulation . . . *as demonstrated by the record of the rulemaking authority.*” (H&S
12 Code § 40727(b)(1).) Petitioners submitted extensive, real-world monitoring data from the very
13 refineries that will be subject to the rule. (AR Doc. 33, at 000868; AR Doc. 35, at 000952-000954; AR
14 Doc. 37, at 001020; AR Doc. 162, at 002826.) These data points—from not just one refinery, but from
15 three separate refineries—demonstrate that the emissions from heavy liquid components are orders of
16 magnitude lower than the District’s assumptions. (*Id.*) And yet the District flatly ignored all of this
17 real-world data, instead choosing to proceed based solely on 40-year-old data from unrelated,
18 uncontrolled facilities—data that even CARB agrees is so unreliable that it should not be used when
19 site-specific data is available. The District has failed to meet its burden of demonstrating that its
20 revisions to Rule 8-18 are “necessary” based on information that is “reasonable, credible, and of solid
21 value.” (*Plastic Pipe and Fittings Ass’n*, 124 Cal.App.4th at 1407.)

22 **b. The cost-effectiveness analysis for Rule 8-18 is fatally flawed because**
23 **it relies on inflated emissions estimates and understated costs.**

24 The District’s inflated baseline emissions estimate invalidates its cost-effectiveness analysis as
25 well. The District’s projected emissions reductions (1,227 tpy) derives directly from its assumption
26 that current actual emissions are 1,476 tpy. But these “projections” significantly overstate the true
27 emissions reductions that the rule might achieve: actual emissions data submitted by Petitioners
28 indicate that current emissions *are already an order of magnitude or more below* the assumed 1,227 tpy

1 future reduction. (AR Doc. 33, at 000868; AR Doc. 35, at 000952-000954; AR Doc. 37, at 001020;
2 AR Doc. 162, at 002826.)

3 The District's gross overstatement of Rule 8-18's benefits is compounded by its understatement
4 of the Rule's compliance costs. Refineries have hundreds of thousands of heavy liquid components in
5 service. Petitioners estimated the capital costs and staffing costs of tagging and inspecting each
6 individual component will run well into the millions of dollars. (AR Doc. 33, at 000869; AR Doc. 35,
7 at 000954). The District simply ignored these costs.

8 Longstanding District guidance indicates that its cost-effectiveness threshold for an emissions
9 reduction rule targeting the kinds of pollutants regulated by Rule 8-18 is \$17,500 per ton. (AR Doc.
10 189, at 002977) (BAAQMD, Best Available Control Technology and Best Available Technology
11 Workbook, Sec.1, Policy and Implementation Procedure, (2002) p. 5); see also AR Doc. 189, at
12 002969-70 (district staff discussing cost effectiveness thresholds).) The District's cost-effectiveness
13 evaluation for Rule 8-18 assumed 1,227 tpy of emissions reductions at a cost of \$6.8 million per year,
14 or \$5,542 per ton. (AR Doc. 3, at 000228.) Using the data the refineries supplied for both current
15 emissions and compliance costs, Petitioner Phillips 66 calculated an actual cost of \$231,000 per ton—
16 far beyond the District's \$17,500 threshold. (AR Doc. 33, at 000869.)

17 The District's cost-effectiveness analysis also failed to consider the costs (both economic and
18 environmental) associated with lowering the mass emissions limit for leaking equipment placed on a
19 facility's non-repairable list (often called a "delay of repair" or "DOR" list). All leak detection and
20 repair programs, including Rule 8-18, allow repairs to be delayed if the leak cannot be repaired without
21 shutting down a process unit.⁹ (See Dist. reg. 8, rules 8-18-226, 8-18-306.) This exemption, however,
22 is narrow: only equipment that cannot be repaired without a process unit shutdown is eligible to be
23 placed on the DOR list and the total mass emissions from components placed on the DOR list is
24 limited. The District's recent revisions to Rule 8-18 significantly reduce this mass emissions limit.

25 _____
26 ⁹ Forcing a refinery to shut down immediately if a leak cannot be repaired typically requires high
27 volumes of process gases to be sent to the flare for combustion, which generates far more emissions
28 than a leaking valve or flange. Accordingly, when a particular leak cannot be repaired or removed from
service without a process unit shutdown, both EPA and the District have long allowed refineries to
delay the required repair until the next planned process unit shutdown. (See, e.g., 40 C.F.R. § 60.482-9;
id. § 60.482-9a; AR Doc. 3, at 000193-000203 (showing District's changes to Rule 8-18).)

(AR Doc. 3, at 000193-000203 (showing District’s changes to Rule 8-18).) But in deciding to reduce this limit, the District has failed to consider the potential consequences. Equipment cannot be placed on the DOR list unless the only other alternative is an immediate process unit shutdown. And if the equipment already on the DOR list reaches the mass emissions limit, no more equipment may be placed on that list—meaning that the next unrepairable leak will require an immediate process unit shutdown in order to remain in compliance with Rule 8-18. The District failed to consider the likelihood that significantly reducing the total allowed emissions from components on the DOR list may in fact force unplanned refinery shutdowns—with their very significant additional emissions and costs—in order to comply with these new requirements. Nor did the District consider the quantity and environmental impact of these excess emissions or the scope of the economic costs associated with such an event. (AR Doc. 35, at 000956; AR Doc. 32, at 000734-000735.)

c. The District ignored the impact of existing regulations on fugitive emissions and failed to harmonize Rule 8-18 with federal requirements.

The District also failed to make the required findings of consistency and non-duplication for Rule 8-18. (H&S Code § 40727(4)-(5).) Refineries are subject to a panoply of federal and state regulation, including federal standards for equipment in heavy liquid service. (See 40 C.F.R. § 60.482-8.) The District was required to demonstrate that its revisions to Rule 8-18 are consistent with and do not duplicate these existing requirements to the extent possible. (H&S Code § 40727.) But the District violated this requirement by assuming away the impact of the federal requirements, merely because they “do not rely on instrument measurements.” (AR Doc. 3, at 000241.)

As discussed above, the District’s analyses and emissions estimates assume that equipment in heavy liquid service is unregulated. Yet the District is well aware that the refineries are in fact subject to federal rules that impose specific and detailed requirements for monitoring and repairing leaks using visual, audible, olfactory, and other detection methods. (See *id.*) The District justifies this omission by arbitrarily *assuming* that the federal standards are insufficient—*i.e.*, that instrument monitoring is the only effective way to detect leaks from heavy equipment. *There is no evidence in the record to support*

1 the District's incorrect assumption.¹⁰

2 The District also failed to consider the significant costs and difficulties the refineries would
3 incur in attempting to comply with these two overlapping and inconsistent programs. The District's
4 revisions to Rule 8-18 fundamentally require refineries to develop a dual monitoring program for heavy
5 liquids: facilities would still be subject to the visual, audible, and olfactory inspections under federal
6 rules, but also would be required to conduct instrument monitoring on those same components under
7 Rule 8-18. Nowhere has the District evaluated the costs of operating two parallel programs, or assessed
8 whether alternatives exist that would minimize the inconsistencies and overlap between these
9 conflicting standards, as required by the H&S Code.

10 **2. Rule 11-10 is not necessary, fails to consider compliance costs, creates**
11 **duplicative regulation, and is based on emissions data arbitrarily selected by**
the District to achieve a pre-determined end.

12 Rule 11-10 was first developed in the 1980s to reduce hexavalent chromium emissions from
13 cooling towers. The amendments to Rule 11-10 adopted by the District add stringent new leak
14 monitoring and repair requirements, which the District concluded are necessary based on a single heat
15 exchanger leak that occurred in 2010.¹¹ (AR Doc. 3, at 000251.) Once again, the District's analysis
16 violates the H&S Code in three ways: (i) it bases its necessity determination on cherry-picked data
17 while ignoring actual monitoring data, (ii) it overstates the benefits and understates the costs of the new
18 rule; and (iii) it ignores the significant cooling tower monitoring and repair requirements now required
19 under comparable federal rules. (See 40 C.F.R. Part 63, Subpart CC.)

20 **a. Rule 11-10 is not necessary because real-world emissions are already**
21 **at or below the emissions levels sought by the District.**

22 The District determined that Rule 11-10 is necessary to reduce emissions of total hydrocarbons
23 based on its calculation that current cooling tower emissions are 978 tpy, using refinery emissions

24 ¹⁰ As noted above, heavy liquids are less likely to create airborne emissions and are easier to detect—
25 dripping liquids and stains on the ground are much more obvious to the naked eye than invisible gases
26 volatilizing from a leaking valve. (See *supra* § IV.B.1; see also 40 C.F.R. § 60.482-8 (federal leak
detection requirements).)

27 ¹¹ This 2010 event occurred before federal monitoring and repair requirements became effective for
28 cooling towers, but federal regulations now govern the same refinery components reached by Rule 11-
10. (See 78 Fed. Reg. 37133 (June 20, 2013) (noting effective date of revised federal regulations of
June 20, 2013).)

1 factors from EPA’s “AP-42, Compilation of Air Pollutant Emission Factors” (“AP-42”). (AR Doc. 3,
2 at 000255; see also AR Doc. 42, at 1084 (citing U.S. EPA, Compilation of Air Pollution Emission
3 Factors, Table 5.1-2 (5th ed., 1995), at <https://www3.epa.gov/ttn/chief/ap42/c00s00.pdf> (hereinafter
4 “AP-42”).) AP-42 emissions factors are a generalized method of calculating emissions and used only
5 as a “last resort”—EPA specifically notes that “[d]ata from source-specific emissions tests or
6 continuous emissions monitors are usually preferred for estimating a source’s emissions because those
7 data provide the best representation of the tested source’s emissions.” (AP-42, Introduction, p. 3.)
8 Only when “representative source-specific data cannot be obtained” and “emissions information from
9 equipment vendors . . . or actual test data” also is not available, then “*use of emissions factors may be*
10 *necessary as a last resort.*” (*Id.*, at 3 (italics added)).¹²

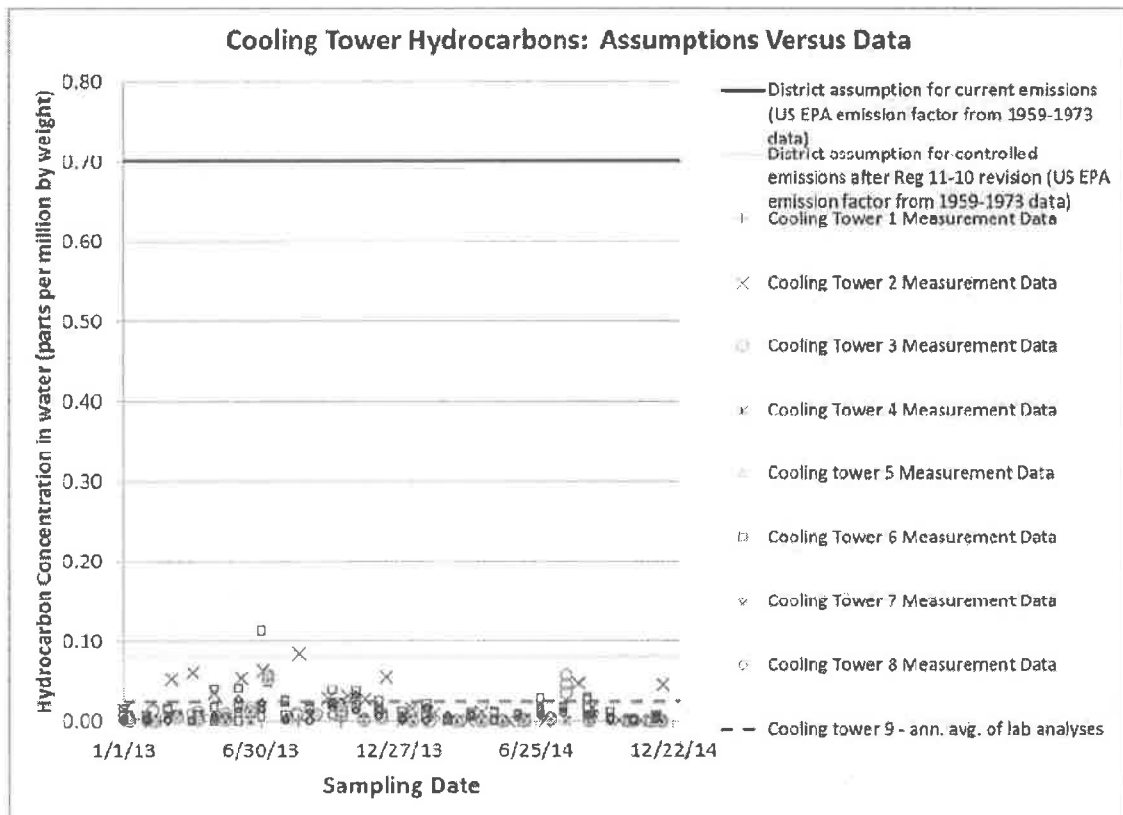
11 In addition to these general concerns with the accuracy of AP-42 emissions factors, some
12 emissions factors are more reliable than others. EPA has rated each emissions factor from A to E, with
13 “A” being the most reliable. (*Id.* at 8.) The emission factor for petroleum refinery cooling towers is
14 rated a “D”—*i.e.*, below average, signifying that the emission factor was developed from “a small
15 number of facilities, and there may be reason to suspect that these facilities do not represent a random
16 sample of the industry.” (*Id.*, Introduction, at 10; Chapter 5, Table 5.1-3, at 5-1.16).

17 The District also used the wrong emissions factor. AP-42 lists separate emissions factors for
18 “controlled” and “uncontrolled” cooling towers. (*Id.* Chapter 5, Table 5.1-3, at 5-1.16.) The District’s
19 calculation is based on the EPA emission factor for *uncontrolled* cooling towers. (AR Doc. 3, at
20 000255 (italics added).) However, the majority of the refinery cooling towers in the Bay Area are
21 *controlled* facilities, because they are subject to existing EPA federal rules. (AR Doc. 32, at 00076)
22 (explaining that 24 of 32 cooling towers are already subject to federal requirements).¹³ By assuming
23 away the existence of these federal requirements, the District further overstated the current emissions
24 from Bay Area cooling towers.

25
26 ¹² CARB guidance is consistent with this approach. (See generally CAPCOA Guidance).

27 ¹³ The AP-42 document considers “controlled” cooling towers to be those in which cooling water
28 contamination is reduced “through the proper maintenance of heat exchangers and condensers.” (AP-
42, Chapter 5, § 5.1.3.5 at 5.1-18.) These are the same types of requirements imposed under Subpart
CC. (See, e.g., 40 C.F.R. § 63.654 (heat exchange systems).)

Given these many concerns with the District's emissions estimates, Petitioners and WSPA submitted real-world data—actual monitoring data from the very cooling towers regulated under Rule 11-10—demonstrating that current emissions were orders of magnitude below the District's assumptions. For example, Petitioner Phillips 66 submitted actual monitoring data showing that average emissions from the refinery's cooling towers were *already* at or below the level of total hydrocarbons that the District sought to attain under the new provisions of Rule 11-10. (AR Doc. 33, at 00870.) In addition, WSPA submitted the following chart comparing the District's emissions assumptions with actual measurements from Bay Area refineries:



(AR Doc. 32, at 000761.)

The District refused to consider any of these data. Instead, the District cited unspecified “concerns” with the method by which the data were collected (the “modified El Paso method” or “MEPM”)—a test method specifically approved by EPA. (AR Doc. 3, at 000254.) Petitioners submitted comments explaining why MEPM is the most accurate method of measuring cooling tower emissions. (AR Doc. 34, at 000934; AR Doc. 35, at 000959). Again, the District refused even to

1 consider this data based on its as-yet unpublicized “concerns”—and after excluding data that AP-42
2 itself ranks as more reliable than AP-42 emissions factors—the District then based its evaluation of the
3 necessity of the rule solely on the AP-42 emissions factors. (AR Doc. 3, at 000254.) The District’s
4 conclusion that relying on “last-resort” emissions factors is more “reasonable, credible, and of [more]
5 solid value” than recent test data obtained using the federally-approved test method defies belief and
6 represents an entirely arbitrary and capricious choice. (*Plastic Pipe and Fittings Ass’n*, 124 Cal.App.4th
7 at 1407.)

8 **b. Rule 11-10 employs inflated emissions estimates to justify regulatory**
9 **requirements that would not otherwise be cost-effective.**

10 The District estimated that current VOC emissions from cooling towers are 978 tpy, based on
11 AP-42 emissions factors for uncontrolled facilities. (AR Doc. 3, at 000256.) The District then
12 estimated Rule 11-10 would reduce this figure by 88% (861 tpy reduction), which it then used to
13 support its conclusion that the rule was cost-effective. (AR Doc. 3, at 000256-000258.) As with the
14 heavy liquids data, the District’s artificially elevated calculation of “current” emissions leads to an
15 artificially elevated projection of future emissions reductions.

16 The District compounds this error by ignoring the emissions reductions already achieved under
17 applicable federal regulations. As discussed above, the District based its emissions estimates on the
18 assumption that all cooling towers in the District are “uncontrolled” (as that term is used in AP-42).
19 (AR Doc. 3, at 000255.) However, as also discussed above, many of these cooling towers are in fact
20 already controlled under 40 C.F.R. Part 63, Subpart CC. As a result, the District credits Rule 11-10
21 with emissions reductions that *have already been achieved* by the pre-existing federal rules. Again,
22 this erroneous attribution allows the District to conclude that the amendments to Rule 11-10 are cost-
23 effective.

24 The District cannot rely on emissions reductions already achieved by federal rules to justify its
25 own overlapping rules. To properly calculate the *actual* benefits of Rule 11-10, the District would need
26 to calculate (i) the emissions reductions associated with applying cooling tower monitoring to those
27 cooling towers not already covered by federal regulations; and (ii) any incremental emissions
28 reductions achieved by requiring cooling towers already regulated under Subpart CC to perform more

1 frequent monitoring under Rule 11-10. By failing to undertake that basic analysis, the District has
2 failed to demonstrate the cost effectiveness of Rule 11-10.

3 **c. Rule 11-10 is duplicative of federal regulations requiring monitoring**
4 **of heat exchangers and inconsistent with those requirements.**

5 Many of the refinery cooling towers in the Bay Area are already required, pursuant to EPA
6 regulations, to implement a cooling tower monitoring program and to correct any leaks detected. (See
7 40 C.F.R. § 63.654.) Rule 11-10 requires these same cooling towers to implement a second monitoring
8 program on top of existing federal requirements. The District is well aware of the overlap, with staff
9 noting early in the rulemaking process that they were “still a bit surprised by the cooling tower
10 emissions” rule given that federal requirements under 40 C.F.R. section 63.654 were “already
11 applicable” to refinery cooling towers and heat exchangers. (AR Doc. 228, at 003398.) Despite this
12 awareness, the District never appropriately evaluated the consistency of these programs or assessed
13 whether the programs would require unnecessarily duplicative compliance efforts.

14 The District prepared a cursory chart comparing applicable requirements under Subpart CC and
15 Rule 11-10. (AR Doc. 3, at 000261-000263.) However, the District did not evaluate the significant
16 differences in these programs, nor did the District analyze the extent to which the specific requirements
17 of Rule 11-10 conflict with the refineries’ obligations under Subpart CC. For example, Subpart CC
18 requires refineries to conduct monthly monitoring to detect heat exchanger leaks; EPA has approved
19 the use of the MEPM sampling methodology for these purposes. (See U.S. EPA, “Emissions Estimation
20 Protocol for Petroleum Refineries”, Version 3, Apr. 2015, at 8-2.) Rule 11-10, in turn, requires these
21 same refineries to implement a daily monitoring program at these same cooling towers. However, the
22 District does not allow the use of MEPM as approved by EPA; rather, the refineries may use MEPM
23 only if they make changes to the sampling methodology. (AR Doc. 3, at 000253; AR Doc. 3, at
24 000519.) Yet EPA has never approved the District’s changes for compliance with the federal rules. As
25 a result, refineries will be forced to conduct two parallel monitoring programs—one following the
26 federal requirements, one following the District’s requirements—for the same equipment, to achieve
27 the same outcome. The District simply ignored the problem presented by these inconsistent and
28 duplicative requirements, violating the H&S Code’s mandate to assess the consistency and non-

1 duplication and avoid conflicting obligations.¹⁴ (H&S Code § 40727.)

2 **3. Rule 6-5 is based on guesswork and assumptions that contradict the**
3 **District's own prior analysis.**

4 Rule 6-5 establishes new, stringent ammonia emissions limits on refinery fluidized catalytic
5 cracking units ("FCCUs") because it asserts that ammonia is a significant "precursor" to the formation
6 of fine particulate matter ("PM_{2.5}") in the atmosphere¹⁵ (*i.e.*, ammonia, together with other materials in
7 the atmosphere, contributes to the formation of PM_{2.5}).¹⁶ (AR Doc. 3, at 000234.) Because the District
8 asserts that ammonia emissions may lead to the formation of PM_{2.5} in the atmosphere, the District
9 maintains that these first-ever ammonia limits are "necessary to ensure the attainment and
10 maintenance" of the National Ambient Air Quality Standards ("NAAQS") and California Ambient Air
11 Quality Standards ("CAAQS") for PM_{2.5}. (AR Doc. 3, at 000232.)

12 The District's current assertion directly contradicts the claims it made two years ago, when it
13 persuaded EPA that ammonia emissions do *not* contribute significantly to PM_{2.5} levels in the Bay Area.
14 Under the Clean Air Act, the District must ensure that its New Source Review program applies not just
15 to PM_{2.5} itself, but also to any precursors that contribute significantly to the exceedance of the NAAQS
16 for PM_{2.5}. (See 40 C.F.R. § 51.166(b)(49) (describing regulated NSR pollutants as including
17 precursors.) Two years ago, the District revised its New Source Review program to *exclude* ammonia
18 as a PM_{2.5} precursor because, as the District concluded at the time, *ammonia is "not a significant*
19 *contributor to secondary PM formation."* (AR Doc. 32, at 000730-31 (citing Letter from J. Karas,

20
21
22 ¹⁴ The District also failed to consider simple solutions to this problem, such as extending the federal
23 Subpart CC requirements to currently-exempt cooling towers rather than implement an entirely new
24 and unnecessary regulatory program. (See AR Doc. 32, at 000738.)

25 ¹⁵ Direct emissions of particulate matter are typically referred to as "primary" particulate matter.
26 Particulate matter that forms in the atmosphere from other gaseous pollutants, such as ammonia, is
27 referred to as "condensable" or "secondary" particulate matter. (See U.S. EPA, Report on the
28 Environment, Particulate Matter Emissions, at <https://cfpub.epa.gov/roe/indicator.cfm?i=19>.)

¹⁶ The District does not claim the authority to regulate ammonia directly, citing only its general
authority to regulate criteria pollutants such as PM_{2.5}. (H&S Code 63.654(a), (c); AR Doc. 3, at
000232.) Instead, the District has imposed these new emissions limits because it asserts that ammonia
is a significant "precursor" to the formation of fine particulate matter ("PM_{2.5}") in the atmosphere (*i.e.*,
ammonia, together with other materials in the atmosphere, contributes to the formation of PM_{2.5}). (AR
Doc. 3, at 000234.)

1 BAAQMD, to G. Rios, EPA Region 9 (Dec. 22, 2015)).) If, as the District concluded two years ago,
2 ammonia is “not a significant contributor to secondary PM formation,” then controlling ammonia
3 emissions cannot be “necessary” to ensure the attainment and maintenance of the PM_{2.5} NAAQS and
4 CAAQS.

5 To put it another way, two years ago, the District concluded that 686 tpy of ammonia emissions
6 from three industries did not significantly contribute to secondary PM formation. (See AR Doc. 32, at
7 000730-31 (citing Letter from J. Karas, BAAQMD, to G. Rios, EPA Region 9 (July 15, 2015).) The
8 District’s estimates suggest that the refineries regulated by Rule 6-5 collectively emit 444 tpy of *total*
9 condensable PM_{2.5} emissions from FCCUs (*i.e.*, ammonia and all other precursors *combined*). (AR
10 Doc. 3, at 000236). Yet there is no evidence in the record explaining why the District has now
11 concluded that less than 444 tpy of ammonia emissions significantly impacts PM_{2.5} formation, when
12 just two years ago the District concluded that 150% of that amount did not.

13 Nowhere does the District provide any reasoned basis for this about-face. The District has
14 performed no new evaluations, nor has it identified new scientific or technical data to support its
15 change of heart. Indeed, if anything, the record demonstrates that the District was fully aware that the
16 link between ammonia emissions and PM_{2.5} formation is highly tenuous at best. As early as the
17 District’s May 2015 Initial Report, the District noted that while “[t]here is reason to believe that this
18 [the reduction of ammonia emissions under Rule-6-5] would also reduce emissions of condensable PM
19 . . . *it is not possible to quantify that at this time.*” (AR Doc. 46, at 001123 (*italics added*).) The final
20 December 2015 Staff Report came no closer to defining the estimated emissions reductions based on
21 supporting data: the District characterized the factual basis for its figures as “based on a very small
22 number of *non-standard* tests on FCCUs” and identified both its emissions calculations and the impact
23 of the new ammonia controls on PM formation as “uncertain.” (AR Doc. 3, at 000228 (*italics added*).)

24 In other words, the District *assumes* that the ammonia emissions limits will reduce the
25 formation of PM_{2.5} formation, but admits that it does not know if that is actually true, or to what extent.
26 To remedy this knowledge gap, the District indicated that it is “currently working with refineries that
27 operate FCCUs to perform source testing of condensable PM_{2.5} emissions using the most recently
28 developed and accurate testing methods.” (AR Doc. 3, at 000234, 000274).

1 Again, the District's approach is backwards: it must establish the necessity for a particular rule
2 before promulgating it—not regulate in the hope that emissions will decrease and that subsequent
3 testing will justify its decision. The District has failed to demonstrate the necessity of Rule 6-5, in
4 violation of H&S Code § 40727.

5 **V. CONCLUSION**

6 For all of the foregoing reasons, this Court should grant the Petition and issue a writ of mandate
7 requiring the District to vacate the Challenged Rules and comply with the requirements of CEQA and
8 the H&S Code in this and any other rulemaking action related to the Refinery Project.

9
10
11 Dated: August 31, 2016

Respectfully submitted,

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1 **PROOF OF SERVICE**

2 I, the undersigned, declare that I am employed in the County of San Francisco; I am over the
3 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.

4 On August 31, 2016, I served the following document(s): **PETITIONERS' BRIEF IN**
5 **SUPPORT OF PETITION FOR WRIT OF MANDATE** on the interested party(ies) in this action.

6 Adan Schwartz
7 Senior Assistant Counsel
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10 The documents were served by the following means:

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

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

15 DATED: August 31, 2016

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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF CONTRA COSTA**

12
13 WESTERN STATES PETROLEUM
ASSOCIATION; VALERO REFINING
14 COMPANY—CALIFORNIA; TESORO REFINING
& MARKETING COMPANY, LLC; and PHILLIPS
15 66 COMPANY,

16 Petitioners/Plaintiffs,

17 v.
18

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

21 Respondents/Defendants.
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Case No. N16-0963

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

(Code Civ. Proc §§ 1085, 1094.5)

CEQA CASE

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1 **I. INTRODUCTION**

2 The Bay Area Air Quality Management District (the “District”) violated the California
3 Environmental Quality Act (“CEQA”) by segmenting its analysis of multiple actions that collectively
4 comprise the District’s Refinery Project. CEQA demands unified review of “the whole of the action,”
5 and a series of actions undertaken to attain the same objective constitutes a single CEQA project.
6 (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th
7 1214, 1226-27) (hereinafter *Tuolumne County*.) The District admits that it conceived, developed, and
8 adopted the Phase 2 Rules¹ as part of a broader, unified effort that encompasses at least seven separate
9 rules² that are collectively designed to achieve a concrete, common objective: tracking and reducing
10 refinery emissions by 20%. (Compl. at 4:24-27, Answer at 3:21.) Under *Tuolumne County* and core
11 CEQA precepts, the District violated CEQA when it segmented its analysis of the Phase 2 Rules and
12 adopted them in isolation, without any consideration of other actions taken by the District to achieve
13 the same unified objective. (*Tuolumne County*, 155 Cal.App.4th at 1226-27; see also Answer at 6:15-
14 18, District admitting that relevant rules “have been analyzed separately under CEQA”.)

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

22
23 ¹ Regulation 12, Rule 15 (“Rule 12-15”) and Regulation 9, Rule 14 (“Rule 9-14”). The District refers
24 to these rules as the “Challenged Rules.”

25 ² The rules challenged here represent the second phase of rulemaking. The first phase included three
26 rules: Regulation 6, Rule 5 (“Rule 6-5”), Regulation 8, Rule 18 (“Rule 8-18”), and Regulation 11, Rule
27 10 (“Rule 11-10”). This first phase also was challenged by certain petitioners in this case. (*See Valero*
28 *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.

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

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

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

19 The District attempts to avoid preemption by misconstruing the scope of its authority and the
20 law of preemption. For example, the District argues that its crude slate requirements are authorized
21 because the District’s procedures provide similar protections as the state law that already regulates
22 crude slate reporting—which also happens to grant exclusive authority over crude slate data to another
23 agency. But even if this characterization were correct (which it is not), preemption means that the
24 District cannot regulate in this area *at all*—not that it may regulate as long as it hews closely enough to
25 the statutory powers granted to another agency. (See *Sherwin-Williams Co. v. City of Los Angeles*
26 (1993) 4 Cal.4th 893, 897 (agency action preempted when it “enters an area fully occupied by general
27 law”).) Similarly, the District argues that preemption does not bar its cargo carrier requirements by
28 asserting that it is not regulating cargo carriers at all—it is merely holding refineries responsible for

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

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

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

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

9 The critical facts here are simple. In late 2014, the District adopted Resolution 2014-07, which
10 established the specific, defined objective of tracking refinery emissions (in part through Rule 12-15)
11 and reducing those emissions by 20%. (AR Doc. 194, at 004394-95.) To implement the Resolution’s
12 objective, District staff developed a unified, multi-phase approach that it labeled as its “Refinery
13 Emission Reduction Strategy.” (AR Doc. 161, at 004069-70; see also AR Doc. 694, at 011575-83
14 (agenda for “Refinery Emissions Reduction Strategy Kick Off Meeting”).) As the concrete regulatory
15 actions flowing from this strategy, the District developed a coordinated set of refinery-focused rules, to
16 be adopted in several phases, that *together* would achieve the Resolution’s objective. (AR Doc. 161, at
17 004066-70 (describing approach); AR Doc. 147, at 003909-12 (identifying “phases” of Refinery
18 Project).) These rules—including the Phase 1 Rules, the Phase 2 Rules, and other pending rules—
19 collectively constitute the District’s Refinery Project as “various steps which taken together obtain an
20 objective.” (*Tuolumne County*, 155 Cal.App.4th at 1226-27.) The District violated CEQA when it
21 segmented its analysis by evaluating each rule separately and expressly disclaiming any obligation to
22 consider the impacts of the Refinery Project as a whole. (See generally AR Docs. 15, 16.)

23 The District attempts to avoid this conclusion by arguing that the Refinery Project is not
24 actually a single “project” under CEQA. The District acknowledges that the adoption of the Phase 2
25 Rules was an “activity” that qualified as a “project” under CEQA,³ but then argues that these rules
26

27 ³ Compl. 17:13-16, Answer 8:26. Indeed, the District could not argue otherwise, as the adoption of
28 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*

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

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

14 The 2014 Resolution established a well-defined and measurable objective (or “policy goal,” as
15 the District puts it): to track and reduce refinery emissions by 20%. Petitioners agree that the 2014
16 Resolution itself is not an “activity” challengeable under CEQA, because it merely established an
17 objective and it did not “commit the agency to a definite course of action.” (See Pub. Res. Code §
18 21080(a); CEQA Guidelines § 15352(a).) But when the District promulgated the Phase 1 and Phase 2
19 Rules, it transitioned from setting an objective to *implementing* that objective by adopting a set of
20 rules—which *is* an “activity” subject to CEQA. (*Id.*) And because those rules are each “various steps
21 taken together” to *achieve the same policy goal*—the same “objective”—they constitute a single CEQA
22 project. (*Tuolumne County*, 155 Cal.App.4th at 1226-27; Cal. Code Regs., tit. 14, § 15378(a); *Bozung*
23 *v. LAFCO* (1975) 13 Cal.3d 263, 283-84.) As the Court of Appeal has observed:

24 CEQA’s conception of a project is broad, and the term is broadly construed and applied
25 in order to maximize protection of the environment. This big picture approach to the
26 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

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

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

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

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

17 **B. The Alleged “Independent Utility” of the Phase 2 Rules Does Not Justify the**
18 **District’s Piecemeal Review of the Refinery Project.**

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

28 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

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

15 None of the considerations of *Del Mar Terrace* apply here. The Refinery Project rules—
16 including the Phase 2 Rules—were not developed in isolation to achieve independent objectives. As
17 the District admits, they were developed as part of the District’s unified strategy to achieve the
18 mandates set out in Board Resolution 2014-07.⁵ Nor are the Refinery Project rules highly speculative,
19 uncertain, or contingent on future events: the District’s Board has already approved the scope and goals
20 of the Refinery Strategy, and the District has already promulgated five rules (including the Phase 2
21 Rules) as the first phases of its Refinery Project (while improperly evaluating each of those rules in
22 isolation). Perhaps most importantly, the District has made *no* attempt to evaluate the “worst-case”

23
24 roads.” (*Del Mar Terrace*, 10 Cal.App.4th at 732 (citing and discussing *Daly v. Volpe* (9th Cir. 1975)
25 514 F.2d 1106).) There is no roadway project at issue in this case.

26 ⁵ The connectivity of these rules is further reinforced by the District’s stated intention to use data
27 collected through Rule 12-15 to implement proposed Rule 12-16 and proposed Rule 13-1 (which is
28 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.)

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

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

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

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

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

- 27 • “the purpose of the reviewed project is to be the first step toward future development”
28 (*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

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

8 “[W]here distinct actions are closely related to same overall objective, or if success of the
9 overall objective depends on the inclusion of certain action, the distinct actions are viewed as parts of a
10 larger whole—the same [CEQA] project.” (*Nelson*, 190 Cal.App.4th at 271, citing *Tuolumne County*,
11 155 Cal.App.4th at 1225–1231; see also *Tuolumne County*, 155 Cal.App.4th at 1226.) The District
12 admits that its Refinery Project rules each represent a component of its unified strategy to track and
13 reduce refinery emissions by 20%. (Compl. at 4:24-27, Answer at 3:21). Further, no single Refinery
14 Project rule is sufficient on its own to achieve that objective. (See AR Doc. 2, at 000561 (discussing
15 additive contributions of various rules towards the 20% reduction objective).) Notwithstanding the
16 clear and well-documented relationship of each Refinery Project rule to the “same overall objective,”
17 the District failed to prepare an EIR for the Refinery Project *as a whole*.⁶ Instead, the District
18 reviewed each of the Phase 2 Rules independently, concluded that each rule had no significant
19 environmental impact, and adopted individual negative declarations. (AR Docs. 15, 16.) In doing so,
20 the District “chopped up” the Refinery Project and violated CEQA.

21
22
23
24 ⁶ The District’s recent actions further underscore the integrated and ongoing nature of the Refinery
25 Project. In March 2017, the District published a draft EIR for Rules 12-16 and 11-18.
26 ([http://www.baaqmd.gov/~media/files/planning-and-research/rules-and-regs/workshops/2017/reg-12-](http://www.baaqmd.gov/~media/files/planning-and-research/rules-and-regs/workshops/2017/reg-12-deir-pdf.pdf?la=en)
27 [deir-pdf.pdf?la=en](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
28 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.

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

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

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

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

24 ⁷ All projects have their origins in an idea or mandate, whether it is the District’s Board resolution to
25 reduce refinery emissions by 20%, or a corporate board resolution to build a new shopping center. In
26 each case, numerous planning stages ensue, during which the project’s proponents plan a path towards
27 achieving their ultimate goal. For CEQA purposes, the culmination of that planning process is the
28 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).)

1 Where individual projects are, or a phased project is, to be undertaken and where the
2 total undertaking comprises a project with significant environmental effect, the lead
3 agency shall prepare a single program EIR for the ultimate project as described in
4 Section 15168. Where an individual project is a necessary precedent for action on a
5 larger project, or commits the Lead Agency to a larger project, with significant
6 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.

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

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

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

21 Lead agencies may analyze and mitigate the significant effects of greenhouse gas
22 emissions at a programmatic level, such as in a general plan, a long range development
23 plan, or a separate plan to reduce greenhouse gas emissions. Later project-specific
24 environmental documents may tier from and/or incorporate by reference that existing
25 programmatic review. Project-specific environmental documents may rely on an EIR
26 containing a programmatic analysis of greenhouse gas emissions as provided in section
27 15152 (tiering), 15167 (staged EIRs) 15168 (program EIRs), 15175-15179.5 (Master
28 EIRs), 15182 (EIRs Prepared for Specific Plans), and 15183 (EIRs Prepared for General
Plans, Community Plans, or Zoning).

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

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

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

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

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

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

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

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

3 Two core provisions of Rule 12-15 are preempted by state and federal law. First, California's
4 Petroleum Industry Information Reporting Act ("PIIRA") occupies the field with respect to the
5 collection of "crude slate" information, and grants *exclusive* authority to collect such information to the
6 California Energy Commission ("CEC"). (Pub. Res. Code §§ 25350-25366; Cal. Code Regs., tit. 20 §§
7 1361-1371.) Second, the District lacks any express authority to regulate cargo carriers (such as marine
8 vessels and trains) and several state and federal laws preempt its efforts to do so. The District brushes
9 these issues aside, asserting that Petitioners' concerns with respect to PIIRA preemption are based only
10 on what it calls "minor procedural variations," and that the District is not actually regulating cargo
11 carriers by requiring refineries to do so—an argument that both the D.C. Circuit and the U.S.
12 Environmental Protection Agency ("EPA") have rejected.

13 The Supremacy Clause of the United States Constitution requires state and local laws to yield to
14 federal law. (U.S. Const., art. VI, cl. 2; *Gibbons v. Ogden* (1824) 22 U.S. 1, 2 (federal laws "are
15 supreme, and the State laws must yield to that supremacy").) The Supremacy Clause gives rise to
16 "well-known principles of pre-emption." (*Douglas v. Seacoast Products, Inc.* (1977) 431 U.S. 265,
17 272.) And "when Congress has unmistakably ordained that its enactments alone are to regulate a part
18 of commerce, state laws regulating that aspect of commerce must fall." (*Jones v. Rath Packing Co.*
19 (1977) 430 U.S. 519, 525 (internal quotations and annotations omitted).) The California Supreme
20 Court has set forth similar preemption principles, holding that local law is preempted when it (i)
21 conflicts with a state law, (ii) duplicates state law, (iii) contradicts state law, or (iv) "enters an area fully
22 occupied by general law, either expressly or by legislative implication." (*Sherwin-Williams Co.*, 4
23 Cal.4th at 897-98.) The District's adoption of crude slate and cargo carrier provisions in Rule 12-15
24 falls squarely within these bedrock principles, and is void. (See generally *County of San Diego v.*
25 *Bowen* (2008) 166 Cal.App.4th 501 (agency action is void if preempted by an act of the Legislature).)

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

3 The crude slate reporting provisions of Rule 12-15 are preempted for two distinct reasons.
4 First, when it enacted PIIRA the California Legislature fully occupied the field of reporting petroleum
5 and crude oil information. Second, and independently, Rule 12-15 conflicts with and undermines core
6 protections of PIIRA enacted by the Legislature to protect highly sensitive information. In its
7 Response, the District asserts that Petitioners' arguments are based only on "minor procedural
8 variations" between PIIRA and Rule 12-15 with respect to the treatment of confidential data. (Resp.
9 21:26-22:1). That statement entirely ignores basic preemption principles, the breadth and scope of
10 PIIRA, the plain intent of the Legislature, and the cavalier approach the District has taken with respect
11 to highly sensitive information protected by PIIRA.

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

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

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

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

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

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

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

25 The most substantial difference between PIIRA and the Air District’s procedures
26 appears to be that, under PIIRA, the CEC can decide not to release information it deems
27 confidential (which decision presumably can be challenged in court). The Air District’s
28 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.

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

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

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

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

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

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

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

20
21 ¹⁰ The District also points to the New Source Review (“NSR”) program as evidence of legislative intent
22 to allow the District to collect crude slate data. (Resp. 17:11-21.) The District fails to note, however,
23 that the federal definitions incorporated into the District’s NSR program do *not* consider most changes
24 in fuels and raw materials to be “modifications” that would trigger NSR. See 40 C.F.R. §
25 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).)

26 ¹¹ Petitioners also have challenged other findings made by the District with respect to Rule 12-15,
27 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).)
28 The District concedes that its findings are subject to judicial review based on an “arbitrary and

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

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

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

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

21
22 capricious" standard. (Resp. 12:2-24.) To survive that standard, the District must support its findings
23 with substantial evidence in the record that is "reasonable, credible, and of solid value." (*Plastic Pipe*
24 *and Fittings Assn.*, 124 Cal. App. 4th at 1407.) In its Response, the District cites approximately 24
25 pages of two documents in the Administrative Record in support of its conclusions. (See Resp. 12:25-
26 21:19). Petitioners have previously argued that the Record contains little more than conclusory
27 assertions that do not support the District's mandatory findings under the H&S Code. (Pet'rs' Br. 17:1-
28 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.

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

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

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

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

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

3 The District does not contest that it lacks authority to regulate cargo carriers. While it may
4 prefer an emissions inventory containing cargo carrier data, the District cannot compel refineries to do
5 what it lacks authority to do itself, at the risk of enforcement for failing to provide sufficiently accurate
6 guesstimates. The cargo carrier provisions of Rule 12-15 are preempted and void. (*Am. Fed'n of*
7 *Labor v. Unemployment Insurance Appeals Bd.* (1996) 13 Cal.4th 1017, 1042; *County of San Diego*,
8 166 Cal.App.4th 501.)

9
10 **IV. CONCLUSION**

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

16 Dated: April 11, 2017

Respectfully submitted,

17
18 BEVERIDGE & DIAMOND, P.C.

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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
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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