S177823

IN THE SUPREME COURT OF CALIFORNIA
Case No. _____

NATIONAL PAINT & COATINGS ASSOCIATION, INC.
Plaintiff and Appellant,
v.
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,
Defendant and Respondent.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three
Case No. G040122

Appeal from the Orange County Superior Court, Case No. 03CC00007
The Honorable Ronald L. Bauer, Judge Presiding

DEFENDANT AND RESPONDENT'S PETITION FOR REVIEW

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To the Honorable Ronald M. George, Chief Justice, and the Honorable Associate Justices of the Supreme Court of California:

Defendant and Respondent South Coast Air Quality Management District petitions for review of the decision of the Court of Appeal, Fourth Appellate District, Division Three (Sills, P.J., and Bedsworth and Moore, J.J.), filed on September 29, 2009, affirming the judgment in part, reversing in part, and remanding for further proceedings. This petition is timely filed pursuant to California Rule of Court 8.500(e)(1). A copy of the Court of Appeal's published opinion reflecting its date of filing is attached hereto.

ISSUES PRESENTED FOR REVIEW

Does Health and Safety Code section 40440, which requires that the District mandate use of "best available retrofit control technology" ("BARCT") for existing sources of air pollution, both:

(1) Prohibit the District from mandating emission standards unless they reflect pollution control technology that either already exists or could be "readily assembled" at the time the District adopts the standards; and

(2) Prohibit the District from ever requiring emission standards more stringent than BARCT even if such standards

are needed to attain federal- and state-mandated air quality standards?

GROUNDS FOR REVIEW

Southern California's South Coast Air Basin, which is home to approximately 17 million people in Los Angeles, Orange, Riverside, and San Bernardino Counties, suffers from infamously severe air pollution. Both California law and the federal Clean Air Act mandate that the South Coast Air Quality Management District bring the Basin into compliance with "ambient air quality standards"—pollution levels designed to protect public health. (See 42 U.S.C. § 7510; Health & Saf. Code, § 40001(a).) Despite forty years of intensive effort and considerable progress, the Basin has not attained the standards for several pollutants, and a wide gap remains between those standards and the Basin's poor air quality.

The District cannot close that gap by relying solely on existing pollution control technology. For example, to attain the federal standard for ozone, or "smog," the Basin will need 281 tons per day of emission reductions *after* implementation of *all* control technologies and techniques that the District and the California Air Resources Board have identified as presently

feasible.[1] Eliminating this enormous quantity of pollution will therefore require both new and improved technologies.

This petition presents the question whether state law gives the District the regulatory authority needed to reduce emissions by demanding improvements in pollution control, or instead limits the District to adopting only emission standards achievable with existing technology. The National Paint and Coatings Association challenged amendments to a District rule that limited levels of volatile organic compounds, a precursor of ozone, in various paints and architectural coatings ("Rule"). The trial court upheld the Rule in full, but the Court of Appeal reversed in part. The court's opinion ("Opinion") centers on Health and Safety Code section 40440, which directs the District to require existing pollution sources to use the "best available retrofit

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[1] California Air Resources Board, *Proposed State Strategy for California's 2007 State Implementation Plan* (April 26, 2007), p. 66, *available at* <http://arb.ca.gov/planning/sip/2007sip/apr07draft/sipback.pdf> [as of Nov. 8, 2009].

control technology" ("BARCT").[2] In turn, section 40406 defines BARCT to mean an emission standard that obtains the "maximum degree of [pollution] reduction achievable."

The Court of Appeal first held that, under these statutes, the District may require existing sources to comply only with standards "achievable" with existing or "ready to be assembled" technology. The court reasoned that the words "best," "available," and "achievable" all "demand something currently existing." (Slip Op. at 22.) Thus, the court concluded, the District can require only the "best of what exists," which the court then defined as limits that "have already been achieved" or can be achieved "almost immediately." (*Id.* at 21.)

The court's interpretation of "achievable" in the definition of BARCT contradicts its plain meaning. That definition does not imply any temporal limitation: something may be achievable immediately, in three months, or in three years. Read in context, the term requires an emission standard to be achievable by the

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[2] All further statutory references are to the Health and Safety Code unless otherwise indicated.

time the relevant regulation requires compliance with it—a deadline that may be months or years after the regulation's adoption. Indeed, the Second District Court of Appeal gave the word "achievable" precisely this meaning in rejecting a challenge to an earlier District paint regulation. (See *Sherwin-Williams Co. v. South Coast Air Quality Management Dist.* (2001) 86 Cal.App.4th 1258, 1278.)

The Court of Appeal also concluded that the District may not adopt emission standards more stringent than what could be achieved by applying BARCT. (Slip Op. at 29.) In other words, the court held that BARCT operates as a "ceiling" for the District's regulatory authority. That holding, however, is inconsistent with the text, structure, and legislative history of the statutory scheme, all of which demonstrate that the Legislature intended BARCT to be the *minimum* standard that the District may impose on existing sources, not the *maximum*. Indeed, in one instance, the Legislature expressly stated as much. (See Stats. 1992, ch. 945, § 18.)

The Opinion would also produce a host of anomalous results that would greatly impair air quality regulation in the Basin and beyond. First, under the court's interpretation, air

quality management districts in the state's most polluted regions would have narrower regulatory authority than districts in regions with relatively clean air. The Legislature has mandated BARCT standards only for districts with "serious," "severe," or "extreme" air quality problems, such as the South Coast District, the Sacramento Metropolitan Air Quality Management District, and the San Joaquin Valley Air Pollution Control District. (See §§ 40440(b)(1), 40601(a), 41010(b), 40919(a)(3), 40920, 40920.5.) By contrast, districts in less-polluted areas operate under open-ended grants of regulatory authority. (See §§ 40001, 40702.) Under the court's interpretation of BARCT, those districts with the dirtiest air would have the least authority to do anything about it. The Legislature could not have intended that paradoxical result.

Second, the Opinion would allow the very industries that the District regulates, in essence, to set their own regulatory standards. If existing technology in a particular industry achieves little emission reduction, the District could not require the industry to develop more stringent controls. The fundamental purpose of the District's regulatory authority, however, is to require greater reductions than regulated entities

will voluntarily provide. As the Second District emphasized in *Sherwin-Williams*, "Appellants cannot convince us that, left to itself, industry will take steps to safeguard the public health and public welfare by using less polluting but possibly more expensive technology." (*Sherwin-Williams, supra,* 86 Cal.App.4th at 1280.) For the same reason, industry is unlikely to voluntarily dedicate resources to research and development of new pollution control technologies.

Indeed, the Opinion's reading of "achievable" was far narrower even than that proposed by the Association in this case. It repeatedly conceded that the District may adopt "technology-forcing" regulations that were not achievable when adopted, so long as the technology necessary to comply would be available when the regulation took effect. (See, e.g., Appellant's Opening Brief at 25; Appellant's Reply Brief at 14.) By limiting the District to adopting only regulations that are immediately achievable, the Opinion deprives the District of even that power.

Third, the Opinion casts doubt on important regulations previously adopted by the District (and upheld by courts)—most importantly, the District's groundbreaking "Regional Clean Air Incentives" program, or "RECLAIM." RECLAIM employs market

incentives to reduce emissions from covered sources in annual increments over a period of 10 years. (See *Alliance of Small Emitters / Metals Industry v. South Coast Air Quality Management Dist.* (1997) 60 Cal.App.4th 55 ("*Small Emitters*").) The program "anticipated significant improvements in existing technologies or completely new approaches" that were entirely unknown when the District adopted the program. (*Id.* at 59.) The court upheld RECLAIM without expressing any doubt about the District's authority to adopt it. The Opinion here, however, could jeopardize the District's implementation of similar innovative programs in the future.

Finally, the Opinion creates a conflict with the state's obligations under the federal Clean Air Act. (42 U.S.C. § 7401 *et seq.*) The Act requires California to adopt a "state implementation plan" that includes control measures (i.e., proposals for regulation) that, when fully implemented, would cause the state to attain the federal air quality standards. (*Id.* § 7502(c).) The United States Environmental Protection Agency must approve the plan. (*Id.* § 7410(a).) In a seminal decision under the Act, *Union Electric Co. v. EPA* (1976) 427 U.S. 246, the Supreme Court explicitly held that such plans may require

emission reductions beyond the capacity of existing pollution control technology:

> [The Act] was intended to foreclose the claims of emission sources that it would be economically or technologically infeasible for them to achieve emission limitations sufficient to protect the public health within the specified time.

(*Id.* at 258.)

Indeed, the Basin's portion of the California plan includes long-term control measures designed to encourage improvements in control technology. As explained in the 1997 plan, which was in effect when the District adopted the rule challenged here:

> Long-term measures rely on the advancement of technologies and control methods that can reasonably be expected to occur between 2000 and 2010. These long-term measures rely on further development and refinement of known low- and zero-emission control technologies in addition to technological breakthroughs.

(Administrative Record, Volume 65, Page 18714 (hereinafter, "AR 65:18714").)

The Opinion could imperil EPA's approval of the California plan by depriving the District of adequate authority to implement such long term measures. (See 42 U.S.C. § 7410(a)(2)(E)(i) [plan must demonstrate "adequate personnel, funding, and authority

under State (and, as appropriate, local) law to carry out such implementation plan"].) Furthermore, if EPA disapproves the plan, it must impose sanctions on the region. (*Id.* §§ 7410(m), 7509.) Those sanctions would make it more difficult for the District to permit new and modified sources, and would potentially cut off billions of dollars of federal transportation funds allocated to California.

In sum, the Court of Appeal's decision involves significant errors of law that threaten to hamstring efforts to control harmful air pollution in the state's most populous region. This case therefore presents important questions of law that this Court should resolve. (Cal. Rules of Court, Rule 8.500(e)(1).) The District respectfully requests that the Court grant the petition.

STATEMENT OF THE CASE

I. The Challenged Rule: Rule 1113

In 1977, the District first enacted Rule 1113 to limit concentrations of volatile organic compounds in architectural coatings. (AR 44:12484-85; *Sherwin-Williams, supra,* 86 Cal.App.4th at 1264.) Since then, Rule 1113 has established volatile organic compound limits for coatings in a variety of use categories and prohibited the manufacture and use of

noncompliant coatings. Between 1977 and 1996, the District amended Rule 1113 thirteen times.[3] (See *Dunn-Edwards Corp. v. South Coast Air Quality Management Dist.* (1993) 19 Cal.App.4th 519, 523.)

In 1999, the District adopted amendments that later formed the basis for the Rule challenged here. (AR 1:241-70.) Those amendments established interim volatile organic compound limits for 11 categories of coatings, effective in July 2002, and final limits for those categories, effective in July 2006. (AR 1:252-53.) In June 2002, the Court of Appeal invalidated the 1999 amendments on procedural grounds in a challenge brought by the Association. (See *Nat. Paint & Coatings Assn. v. South Coast Air Quality Management Dist.* (Cal.Ct.App. June 24, 2002) No. G029462, 2002 WL 1365641, at *4-5.) The District immediately corrected the procedural error and in December

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[3] Since the 2002 amendments challenged here, the District has amended Rule 1113 several more times, including amendments in 2003 that the Association also challenged. (See *Nat. Paint & Coatings Assn. v. South Coast Air Quality Management Dist.* (C.D.Cal. 2007) 485 F.Supp.2d 1153 ["*National Paint*"].)

2002 adopted the Rule challenged here. (AR 44:12425-30, 12505-33.)

The Rule largely regulates the same coatings covered by the 1999 rule. For each coating category, the Rule establishes an interim volatile organic compound limit, effective on January 1, 2003 (July 1, 2004 for the Industrial Maintenance Coatings category), and a final limit, effective on July 1, 2006. (AR 44:12515-16.) Because the Association never sought provisional relief in the trial court, the Rule's final limits have been in effect continuously since 2006.

II. The Proceedings in the Trial Court

In January 2003, the Association filed suit, along with the California Paint Alliance (which did not appeal). The Superior Court trifurcated the case into a first phase on the District's authority to adopt the Rule, a second phase on other claims, and a third phase on the District's affirmative defenses. (Appellant's Appendix ("AA") 3:589.) At the Phase I trial, the court ruled that the District acted within its authority in adopting the Rule. (AA 3:583.) Before the trial court rendered a decision on Phase II, the Association voluntarily dismissed the remainder of its claims.

(AA 3:589.) Consequently, the court never ruled on the District's affirmative defenses.

On January 2, 2008, the court entered a statement of decision on the Phase I claims. (AA 3:588.) The court upheld the Rule in toto, concluding that, regardless of whether state law required the District to demonstrate that the Rule constitutes a BARCT standard and is therefore achievable, the administrative record included ample evidence that the Rule is in fact achievable. (AA 3:584-88.)

On January 25, 2008, the Superior Court entered judgment for the District denying the requested writ of mandate. (AA 3:589-90.) The Association appealed.

III. The Court of Appeal's Proceedings and Decision

The Court of Appeal heard oral argument on June 16, 2009. It filed the Opinion, certified for publication, on September 29, 2009.

After deciding several issues not addressed in this petition, the court considered the question of when an emission standard must be "achievable" to qualify as a BARCT standard. The court held that "[t]he district has authority to require the *best* of what [control technology] exists, not what might conceivably come on

the market." (Slip Op. at 21.) Although the court stopped just short of holding that the District may rely only on already existing control technology, it held that emission limits either must have already been achieved or can be achieved "almost immediately." (*Ibid.*) It rejected the notion that the District could rely on evidence of future achievability. (*Id.* at 22.)

The court thus appeared to require the District to demonstrate that a rule is achievable at the time of its adoption, rather than when it becomes effective. (In this case, that amounts to a difference of four years from the 2002 adoption and seven years from the previous 1999 adoption.) The parties had never addressed this question, because the Association had conceded that the District need only show that its rules would be achievable by their deadlines for compliance. (See, e.g., Appellant's Opening Brief at 25; Appellant's Reply Brief at 14.)

The court then found that the District had not shown the Rule to be immediately achievable for two regulated categories of coatings: Rust Preventatives and Quick-dry Enamels. (Slip Op. at 3-4, 17.) Despite the Association's further concession that "some compliant coatings are available in *each* [coating] category" (Appellant's Opening Brief at 31 [emphasis added]), the court

found that no compliant coatings were available in either category. It also found no other substantial evidence in the record that the Rule's limits are achievable for coatings in those categories. (Slip Op. at 3-4.)

Finally, with little or no discussion of the District's statutory interpretation arguments, the court rejected the District's contention that BARCT establishes a minimum, not maximum, standard. Instead, the court focused on statutory provisions that neither the District nor the Association had addressed and that the court acknowledged were not directly applicable. (Slip Op. at 23-26.) As a result, the court held that BARCT requires the District to show that its emission standards for existing sources are presently achievable. (*Id.* at 29.)

The Court of Appeal affirmed the trial court's judgment in part, reversed in part, and remanded for further proceedings. (Slip Op. at 30.) It upheld the Rule except for the two categories of coatings for which it found insufficient evidence of achievability. (*Ibid.*) It remanded the case to the trial court "for a hearing to determine whether there is any current (2009) state of the art technology available to comply with the district's 2006 limits on volatile organic compounds" for the two coating

categories. (*Ibid.*) Neither party sought rehearing, and the Opinion became final on October 29, 2009. (Cal. Rules of Court, Rule 8.264(b)(1).)

ARGUMENT

The Health and Safety Code directs the District to mandate the use of "best available retrofit control technology" by existing pollution sources. (§ 40440(b)(1).) The District challenges two related holdings by the Court of Appeal about the meaning of BARCT. First, the court erred in holding that the District's regulations applicable to existing sources can only impose emission standards that are achievable with technology that is existing or immediately available. At a minimum, the District can require emission reductions achievable on the regulation's compliance deadline regardless of whether they are achievable when adopted. Second, contrary to the court's holding, the District can adopt regulations that are more stringent than a BARCT standard if needed to meet the District's statutory obligation to attain federal and state ambient air quality standards. BARCT represents the minimum standard that the District may impose on existing sources, not the maximum.

I. The Court of Appeal Erred by Narrowly Construing the Word "Achievable" to Mean Already Achieved or Immediately Achievable.

The Court of Appeal narrowly interpreted the word "achievable" in the BARCT definition in section 40406 to include only emission reductions attainable with technology that is "currently existing" or that is "ready-to-be-assembled." (Slip Op. at 21, 22.) The Opinion therefore would require the District to show that existing sources could achieve an emission limit when the District adopts the limit, even if it, like the Rule 1113 limits, would not require compliance for years to come. This result would substantially impair the District's efforts to obtain further emission reductions in the Basin.

A. The District Has Broad Authority to Adopt Regulations Needed to Attain the Federal and State Air Quality Standards.

"[L]ocal and regional authorities have the primary responsibility for control of air pollution from all sources, other than emissions from motor vehicles." (§ 40000; accord, § 39002; *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 417-18 [collecting cases] ("*Western Oil & Gas*").) The Legislature has accordingly delegated to districts broad authority to "adopt and enforce rules

and regulations to achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction." (§ 40001(a); see also § 40702.) Legislation specific to the District further provides,

> The south coast district board shall adopt rules and regulations that carry out the [air quality management plan] and are not in conflict with state law and federal laws and rules and regulations.

(§ 40440(a).) In promulgating the Rule, the District relied on its authority under sections 40001, 40440(a), and 40702. (AR 44:12427.)

B. The Court of Appeal Erroneously Held that "Achievable" Means Only Currently or Immediately Achievable.

Section 40440(b)(1) provides that the District's rules must "[r]equire the use of . . . best available retrofit control technology for existing sources." In turn, section 40406 defines BARCT as meaning "an emission limitation that is based on *the maximum degree of reduction achievable,* taking into account environmental, energy, and economic impacts." (§ 40406 [emphasis added].) The Court of Appeal held that for an emission limit to be "achievable" within the meaning of section 40406, it

must be already achieved or immediately achievable. (Slip Op. at 21.)

The court began by citing a dictionary definition of achievable as "capable of being achieved." (Slip Op. at 20 [quoting 1 Oxford Eng. Dict. (2d ed 1989), p. 102].) Then, however, it focused on the dictionary definition of "achieved," finding it to mean "completed; accomplished; attained, won." (*Ibid.*) Based on this latter definition, the court concluded that "[t]he past tense in the variations on the word 'achievable' indicates that it refers to a thing or process that currently exists, as distinct from what is speculative or merely theoretical." (*Id.* at 21.)

The court did acknowledge that the use of the word "achievable," rather than "achieved," suggests technology beyond what already exists. (Slip Op. at 21.) Yet the court narrowed the time in which that technology must come into existence. Without further analysis, the court concluded that something "achievable" is something that (1) is either already "achieved" (*ibid.*); (2) "can be readily put together" (*ibid.*); (3) can be "put . . . together on a moment's notice" (*ibid.*); (4) can be "readily assembled out of

things that currently do exist" (*ibid.*); or (5) may be achieved "almost immediately thereafter" (*ibid.*).

In short, the court grafted onto the word "achievable" a temporal limitation requiring that the technology to achieve a standard must exist either presently or in the immediate future. No basis, however, exists for this limitation. The ordinary meaning of the word "achievable," including the court's dictionary definition, includes no temporal component. Depending on the context, a technology might be "capable of being achieved" today, next month, or ten years from today. For example, the Secretary General of NATO recently said, "I'm convinced that success in Afghanistan is achievable and will be achieved. . . . [W]e will stay in Afghanistan as long as it takes to finish our job." (Mark Murray, *NATO Chief Says Success 'Achievable,'* (Sept. 29, 2009) MSNBC.com <http://firstread.msnbc.msn.com/archive/2009/09/29/2082947.aspx> [as of Nov. 8, 2009].) It does not appear that the Secretary General thought that success would be achieved "immediately" or that such success could be "readily assembled."

In reaching its conclusion, the court also repeatedly emphasized the use of the word "available" in best *available*

retrofit control technology, which it concluded showed that emission limits must be existing or immediately achievable. (Slip Op. at 1, fn. 1, 3, 15-16, 20-21, 23.) Because BARCT is a statutorily defined term, however, the court should have focused on the term's meaning *as defined*, not as ordinarily used. (See *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238-39 ["courts should give to the words of the statute their ordinary, everyday meaning *unless, of course, the statute itself specifically defines those words to give them a special meaning*"] [emphasis added; citations omitted]; see also *Scott v. Continental Insurance Co.* (1996) 44 Cal.App.4th 24, 30 (Sills, P.J.) ["Sometimes the 'ordinary dictionary' meaning of a word coincides with its statutory definition. [¶] Then again, sometimes it does not."].)

The court's narrow reading of "achievable" also makes no sense in the statutory context. A court should not "not adopt '[a] narrow or restricted meaning' of statutory language 'if it would result in an evasion of the evident purpose of [a statute], when a permissible, but broader, meaning would prevent the evasion and carry out that purpose.'" (*Copley Press, Inc. v. Superior*

Court (2006) 39 Cal.4th 1272, 1291-92 [quoting *In re Reineger* (1920) 184 Cal. 97, 103] [alterations in original].)

To the extent the Legislature contemplated that the District would adopt only achievable rules (but see *infra* Section II), it must have intended that they be achievable when they are required to be achieved. Like the Rule here, most District rules—and air pollution rules generally—allow considerable "lead time" before the rule takes effect. (See, e.g., *Western States Petroleum Assn. v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012, 1015 (*"Western States"*) [rule provided three years for refineries to comply]; *Sherwin-Williams, supra,* 86 Cal.App.4th at 1264, 1278 [District provided "extended compliance times" for paint limits in previous amendment to Rule 1113]; *Small Emitters, supra*, 60 Cal.App.4th at 59 [emission cap would decline gradually over 10 years].) It would be pointless to require a regulation to be achievable when adopted if it would not take effect for several years. (Cf. Civ. Code, § 3532 ["The law neither does nor requires idle acts."].)

Indeed, the court in *Sherwin-Williams, supra*, adopted just such a common-sense reading of the word "achievable." It concluded that "[t]he record is replete with other evidence that

low- and zero-VOC flats are achievable *during the time frame proposed in the amendments*." (86 Cal.App.4th at 1278 [emphasis added].) The *Sherwin-Williams* court's view of "achievable" differs fundamentally from the Court of Appeal's cramped interpretation in the instant case.

This broader view of "achievable" fits best with the statutory definition of BARCT as "an emission limitation that is based on the *maximum* degree of reduction achievable." (§ 40406 [emphasis added].) As is evident from its language, the legislative purpose of this provision is to obtain the maximum emission reductions achievable. That purpose corresponds to the overall goal of air pollution regulation, namely, to reduce emissions and thereby the risk to public health. (See *Western Oil & Gas, supra*, 49 Cal.3d at 419.)

When the District considers whether to regulate emissions from a category of existing sources, it may determine that current technology can attain reductions of X amount, but that reductions of X+20 are achievable within five years. Those improvements may be due, for example, to technology transfer from other industries, or applications or recent improvements in technology demonstrated in experimental settings. In that case, the District

might better serve the legislative purpose by adopting a rule with a compliance deadline five years hence that requires greater than *X* reductions, rather than merely accepting the more limited reductions currently or immediately achievable.

Even the Association conceded that the District's interpretation here is correct. The Association admitted that "BARCT may be considered 'technology-forcing' in the sense that [the District] may force companies to implement technology if there is a showing that implementation is achievable by the effective date." (Appellant's Opening Brief at 25; see also *infra* Section I.E [discussing the concept of "technology-forcing" regulation].) Indeed, the Association repeated this concession numerous times. (See Appellant's Opening Brief at 1 [complaining that the Rule could not be achieved with technology "either available, or likely to become available . . . by the compliance dates"); *id.* at 7 [quoting prior Association comments that "the proposed limits are [not] technically feasible by the proposed deadlines on the basis of reasonably foreseeable coatings technology developments"]; Appellant's Reply Brief at 14 ["[W]e agree that BARCT is an authorization to adopt technology-

forcing emissions reductions."].) The Opinion, however, ignored these concessions.

Finally, the Court of Appeal should have read section 40406 broadly to effectuate its remedial purpose. As this Court emphasized in *Western Oil & Gas*, *supra*, "The statutes that provide the districts with regulatory authority serve a public purpose of the highest order—protection of the public health." (49 Cal.3d at 419.) Courts "are required to construe [such] statutes broadly to accomplish their protective purposes." (*Western States Petroleum Assn. v. State Dept. of Health Services* (2002) 99 Cal.App.4th 999, 1008.)

By contrast, the Court of Appeal read any ambiguity in the meaning of BARCT to *constrain* the District's ability to protect public health. In doing so, the court violated this well-accepted canon of statutory construction.

C. Under the Court of Appeal's Interpretation of BARCT, Districts With Clean Air Would Have Broader Regulatory Authority than the Districts With the Dirtiest Air.

The court's interpretation of "achievable" would also produce a result manifestly contrary to the Legislature's intent in enacting the BARCT provisions. It would tie the hands of

districts with dirty air while leaving districts with clean air a free hand to regulate.

As noted above, the Legislature mandated BARCT standards only for districts with "serious," "severe," or "extreme" air quality problems. These include the South Coast District, the Sacramento Metropolitan Air Quality Management District, and the San Joaquin Valley Air Pollution Control District. (See §§ 40440(b)(1), 40601(a), 41010(b), 40919(a)(3), 40920, 40920.5.) By contrast, districts in less-polluted areas have open-ended regulatory authority; they are not subject to BARCT. (See §§ 40001, 40702.)

Reading BARCT as limiting the District—and other districts with impaired air quality—to adopting rules that are immediately achievable turns the statutory scheme on its head. Because districts with clean air are not subject to BARCT, they could adopt aggressive technology-forcing rules without regard to their achievability. By contrast, the District could ask for nothing more than pollution controls that happen to be already available. The Legislature could not have intended such a result.

D. The Legislative History Confirms that, in Enacting the BARCT Provisions, the Legislature Intended to Spur Stronger Action by the District, Not to Restrict the District to Regulations Based on Existing Technology.

Even if the statutory text were ambiguous, the legislative history of the BARCT provision would support the District's reading.[4] (See *Smith v. Superior Court* (2006) 39 Cal.4th 77, 83 ["If the statutory terms are ambiguous, we may examine extrinsic sources, including the ostensible objects to be achieved and the legislative history."].) As the Court of Appeal briefly acknowledged (Slip Op. at 29, fn. 24), the Legislature in 1987 enacted section 40440(b) in its current form and added section 40406 to prompt stronger regulatory action by the District, not to limit its preexisting authority.

The court's interpretation of these statutes conflicts with that purpose. The court would have the Legislature placing a substantial new *limitation* on the District's preexisting

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[4] The Court of Appeal granted the District's request for judicial notice of several committee reports for the 1987 legislation that amended section 40440(b) and added section 40406. (See Slip Op. at 29, fn. 24.)

regulatory authority as part of a bill plainly designed to *expand* the District's authority and prompt more aggressive control of air pollution. The legislative history does not support reading such a limitation into the statute.

The 1987 legislation (Stats. 1987, ch. 1301) was introduced after "the Senate Subcommittee on Budget and Fiscal Review held two special hearings to investigate the District's performance and to determine whether it lack[ed] the authority it needs to take corrective action." (SB 151, Senate Local Government Committee Report, "South Coast Air District Reorganization" (April 20, 1987), at 1.)

At the hearings, witnesses emphasized that "while much progress in air quality has been achieved, much work remains to be done." (*Id.*) In enacting the 1987 legislation, the Legislature responded directly to this criticism:

> In recent months, SCAQMD has come under severe criticism from federal, state and local officials for not taking sufficient actions to control and reduce air pollution. *This bill is intended to encourage more aggressive improvements in air quality* and to give the district new authority to implement such improvements.

(SB 151, 1987-1988, Senate Third Reading Analysis (Aug. 24, 1987), at 4 [emphasis added]; *accord* SB 151, Assembly Natural Resources Committee Report (June 29, 1987), at 4 [same].)

Courts must interpret statutory language consistent with the Legislature's general purpose in enacting that language. (See *Copley Press*, *supra,* 39 Cal.4th at 1291 [court's "task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose"]; *Smith, supra,* 39 Cal.4th at 83 [same].)

The broad grant of authority to the District found in section 40440(a) and other sections (see *supra* Section I.A) predates the 1987 enactment of the current subdivision (b) and the definition of BARCT in section 40406. (See Stats. 1976, ch. 324, pp. 891, 897 [adding section 40440]; Stats. 1987, ch. 1301, § 9, p. 4653 [replacing section 40440(b); see also, Stats. 1987, ch. 1301, § 1.5, p. 4649 [adding section 40406].) Accordingly, if sections 40440(b) and 40406 limited the District to adopting standards achievable with existing technology, as the Court of Appeal found, that limitation was newly enacted by the 1987 legislation.

Given the clear legislative purpose underlying that legislation, it would have been anomalous, at the least, for the Legislature to have imposed a major new restriction on the District's authority in legislation designed to impel the District to stronger action. The Court of Appeal's reading, however, produces just that illogical result.

E. Technology-Forcing Regulation Is a Well-Established Tool in Air Pollution Control.

Finally, there is nothing radical or irrational about the District's argument that it need not demonstrate that its regulations are immediately achievable. Congress and the courts have long approved of "technology-forcing" regulation that pushes emission sources to reach beyond the limits of currently available pollution control technology.

In a landmark case under the federal Clean Air Act, *Union Electric Co. v. EPA, supra,* the Supreme Court held that Congress intended to impose stringent requirements for the improvement of air quality, regardless of their technological or economic feasibility. (427 U.S. at 258; see also D. Bruce La Pierre, *Technology-Forcing and Federal Environmental Protection Statutes* (1977) 62 Iowa L. Rev. 771, 779 ["[I]t is clear that

Congress did believe that technological feasibility should not be a consideration in achieving primary ambient air quality standards."].) Congress contemplated that the Act's rigid requirements would force emission sources to develop or adapt new pollution control technologies. (See *Union Electric, supra,* 427 U.S. at 256-57 [the Act's requirements "are of a 'technology-forcing character,' and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible"].)

In the *Small Emitters* case, *supra,* the court upheld the District's RECLAIM program, which is explicitly technology-forcing. As the court noted, without apparent concern, the program included three phases or "tiers." The first was based on existing technology, but the second and third "anticipated significant improvements in existing technologies or completely new approaches" that were unknown when the District adopted the program. (60 Cal.App.4th at 59; accord, *id.* at 62 ["the tier II technology was not yet known when [the District] performed its studies"]; *id.* at 66 ["the pollution control technologies and costs which will be used for the post-2000 period are simply unknown"]; *id.* at 68 ["unknown tier II technologies in the years

beyond 2000"].) If the Court of Appeal's holding here had been applied to the RECLAIM program—one of the District's most significant pollution control programs[5]—the District likely could not have adopted it.

II. The Court of Appeal Erred in Concluding that the District May Never Adopt Emission Standards More Stringent than BARCT for Existing Pollution Sources.

The Court of Appeal also adopted a second holding on the meaning of BARCT. It held that the District may not require greater emission reductions from existing pollution sources than what could be attained through the application of BARCT. In other words, the court concluded that BARCT establishes a ceiling for the District's authority to regulate existing sources, rather than a floor, as the District has consistently interpreted the statutory scheme. (Slip Op. at 29.) The court ostensibly

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[5] RECLAIM has reduced nitrogen oxide emissions from the largest stationary sources by approximately 65 percent since 1994. (See South Coast Air Quality Management Dist., *Annual RECLAIM Audit Report for 2007 Compliance Year* (2009), p. 3-3 [emissions reduced 21 percent below requirements], *available at* <http://www.aqmd.gov/hb/2009/March/090337a.htm> [as of Nov. 8, 2009].)

found nothing in the statutory text or legislative history to support the District's position. (*Ibid.*) But the statutory text and legislative history strongly support the District's position that, if necessary, it can adopt technology-forcing regulations that are more stringent than BARCT.

A. The Statutory Text and Structure Demonstrate that the Legislature Did Not Intend to Limit the District's Regulatory Authority When It Mandated BARCT.

The text of the statutes that establish and control the District's regulatory authority demonstrate that the Legislature did not intend to preclude the District from adopting regulations more stringent than BARCT. Nothing in the statutes imposes on the District a burden to prove that its existing-source regulations are achievable.

The critical provision here is section 40440(b), which requires that the District's regulations adopted under its section 40440(a) authority "shall do all of the following" four enumerated

tasks.[6] (Subdivision (b) is set out in full in the margin.)[7] The first of those tasks directs the District to "[r]equire the use of best available control technology for new and modified sources and the use of best available retrofit control technology for existing sources." (§ 40440(b)(1).) On its face, subdivision (b)(1) does not bar the District from adopting standards more stringent than BARCT for existing sources. To the contrary, for several reasons,

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[6] The court misconstrued subdivision (b) as a "grant of rule-making authority to the district" rather than establishing criteria for the authority previously granted in subdivision (a). (Slip Op. at 20.) The District's regulatory authority is far broader than the requirements in subdivision (b).

[7]

> (b) The rules and regulations adopted pursuant to subdivision (a) shall do all of the following:
>
> (1) Require the use of best available control technology for new and modified sources and the use of best available retrofit control technology for existing sources.
>
> (2) Promote cleaner burning alternative fuels.
>
> (3) Consistent with Section 40414, provide for indirect source controls in those areas of the south coast district in which there are high-level, localized concentrations of pollutants or with respect to any new source that will have a significant effect on air quality in the South Coast Air Basin.
>
> (4) Provide for transportation control measures, as listed in the plan.

(§ 40440(b).)

the statute demonstrates that the Legislature intended to establish a regulatory minimum, not a maximum. (See *Smith, supra,* 39 Cal.4th at 83 [statutory language "must be construed in the context of the statute as a whole and the overall statutory scheme"].)

First, subdivision (b) is phrased as a mandate to adopt the enumerated regulations, not as a prohibition against adopting other, unenumerated regulations—such as those more stringent than BARCT. Subdivision (b) states that "[t]he rules and regulations adopted pursuant to subdivision (a) *shall do all* of the following." (Emphasis added.) The Court of Appeal read the statute as if it said that they "shall do *only* the following." The statute's affirmative, expansive language contradicts this interpretation, which would read an unwritten restriction into the statute.

Second, subdivisions (b)(2) to (b)(4) make clear that subdivision (b) is a list of minima, not maxima. "[T]he Legislature would not intend one subsection of a subdivision of a statute to operate in a manner 'markedly dissimilar' from other provisions in the same list or subdivision." (*Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944, 960.) No other

subdivision in section 40440(b) even remotely limits the District's regulatory authority. For example, subdivision (b)(2)'s direction to "[p]romote cleaner burning alternative fuels" has no conceivable restrictive effect; rather, it is a minimum requirement for the District's exercise of its regulatory authority. The other subdivisions likewise establish minimum requirements. (See § 40440(b)(3) [District rules shall "provide for indirect source controls" in specified areas in the District]; § 40440(b)(4) (District shall "provide for transportation control measures"). Subdivision (b)(1) must be read to be consistent with the remainder of subdivision (b), namely, as requiring—at least—the use of BARCT.

Third, section 41508 explicitly allows districts to adopt standards more stringent than state or federal standards:

> Except as otherwise specifically provided in this division, including, but not limited to, Sections 41809, 41810, and 41904, any local or regional authority may establish additional, stricter standards than those set forth by law or by the state board for nonvehicular sources.

(§ 41508; see *Western Oil & Gas*, *supra*, 49 Cal.3d at 419, fn. 15.)

This provision allows the District to adopt a "stricter standard" than BARCT because section 40440(b)(1) does not

"specifically provide" that it may not do so. Section 41508's examples of statutes that specifically restrict a district's authority uniformly include *very* explicit restrictions on district authority. (See § 41809 ["Notwithstanding Sections 41508 and 41800, open outdoor fires may be used to dispose of Russian thistle . . . ."]; § 41810(b) ["No district shall adopt any rule or regulation stricter than those provided by law with respect to open outdoor fires."]; § 41904 ["[N]o rule or regulation of any district that is applicable to sandblasting operations shall be stricter or less strict than the standards adopted by the state board . . . ."].) Applying the interpretive canon of *ejusdem generis* to section 41508, the general term ("otherwise specifically provided") must be construed to include only items similar to the examples used. (See *Kraus v. Trinity Mgmt. Services, Inc.* (2000) 23 Cal.4th 116, 141.) Section 40440(b) includes no limiting language, let alone specific language like the examples in section 41508.

Furthermore, in another air pollution statute, the Legislature stated expressly that BARCT is intended to be a minimum standard, not a maximum. All districts with "serious," "severe," or "extreme" air pollution problems must require

BARCT. (See §§ 40919(a)(3), 40920, 40920.5; see also Stats. 1992, ch. 945 [amending those sections].) In amending these sections to add this BARCT requirement, the Legislature expressly found that the amendments were

> intended to establish *minimum requirements* for air pollution control districts and air quality management districts. Nothing in this act is intended to limit or otherwise discourage those districts from adopting rules and regulations which exceed these requirements and which are designed to achieve ambient air quality standards at the earliest practicable date.

(Stats. 1992, ch. 945, § 18 [uncodified section; emphasis added].)

Courts must read related statutes in pari materia and thus must construe terminology consistently across a statutory scheme. (See *Copley Press, supra,* 39 Cal.4th at 1288-89 [citing *Walker v. Superior Court* (1988) 47 Cal.3d 112, 132].) By contrast, the Opinion creates a particularly jarring inconsistency in the meaning of BARCT. Because the District is an "extreme" nonattainment area (AR 64:18606), section 40919, in addition to section 40440, requires it to adopt BARCT standards. Given the expression of legislative intent for section 40919 just quoted, the District would not be limited to adopting BARCT standards under that section. According to the Opinion, however, section

40440 would simultaneously limit the District to adopting that same BARCT standard. This result is absurd. The BARCT provisions must be read consistently as minima, not maxima.

Finally, as discussed above in Section I.C, the court's view of BARCT creates the illogical result that districts with clean air would have broader regulatory authority than those, like the South Coast District, with dirtier air, because BARCT applies only to the districts with the dirtiest air. This result is inconsistent with the Legislature's finding that the South Coast District faces unique air quality challenges. (See § 40402).

B. The Legislative History Supports the District's View of BARCT as a Regulatory Floor.

As described above in Section I.D, when the Legislature in 1987 adopted the BARCT provisions in section 40406 and 40440(b), it was as part of legislation designed to goad the District into *more aggressive* regulation. The Legislature was reacting to arguments that the District had not gone far enough to curtail pollution.

Prior to 1987, the District's regulatory authority, in section 40440(a), 40001, and 40702, was open-ended: there was no section 40440(b) that provided a list of tasks that the District

must accomplish with its regulations. By the Court of Appeal's reasoning, when the Legislature enacted section 40440(b) in 1987 it adopted an entirely new restriction on the District's previously unconstrained regulatory authority. Given the tenor of the legislative history, one would expect at least some indicum of legislative intent explaining the decision to include such a significant new restriction as part of a bill otherwise designed to *expand* the District's authority. There is none; the history gives no hint of legislative intent to carve out new limits from the District's authority. Accordingly, the court's view of BARCT as a regulatory ceiling is plainly inconsistent with both the legislative history and the text.

By contrast, the District's view of BARCT as a minimum is fully consonant with the legislative history. The Legislature adopted BARCT to ensure that District would adopt emission standards for existing sources that are *at least as strict* as what application of BARCT could attain. Prior to 1987, the law included no such requirement, and thus the District could have adopted standards less stringent than BARCT.

C. The Court of Appeal's Interpretation Focused on Inapplicable Statutory Provisions.

In reaching its conclusion, the Court of Appeal undertook no exegesis of the relevant statutory language in section 40440. It limited its consideration of section 40440 to emphasizing language in that and other sections requiring that District rules must be "*not in conflict with state law* and federal laws and rules and regulations." (Slip Op. at 29 [citing sections 40440(a) and 40916].) The District acknowledges, of course, that it cannot adopt rules "in conflict with state law." The court's citation to this language adds nothing to the analysis; it merely begs the question whether the "state law" found in section 40440 (or elsewhere) limits the District to adopting BARCT standards. As described above, it does not do so.

Instead of focusing on the text of section 40440, the court detoured to other, inapplicable statutory provisions. (Slip Op. at 23-25.) Those provisions shed no light on whether the District may only adopt BARCT standards for existing pollution sources.

1. Section 40723 and 40440.11

First, the court considered sections 40723(b) and 40440.11, which govern the application of "best available control

technology" ("BACT") to new pollution sources. (Slip Op. at 23, 26.) Section 40723 provides that a new source may request a review of whether a BACT requirement in fact has been achieved. (§ 40723(b).) Section 40440.11 provides that, in establishing a BACT standard more stringent than the applicable federal standard, the District may consider only emission control options "existing" in the relevant source category. (§ 40440.11(a).)

Neither provision applies here, because both address the selection of BACT for new sources rather than the use of BARCT for existing sources. (See *Nat. Paint, supra*, 485 F.Supp.2d at 1160, fn. 21 [finding section 40723 to be inapplicable and unhelpful in construing BARCT].) The Court of Appeal acknowledged that section 40723 does not apply to existing-source regulations (Slip Op. at 23), but nonetheless found it instructive. Without supporting citation, the court concluded that the Legislature would not have required emission limitations for new sources to be based on existing technology, but allowed the District to go beyond existing technology in regulating existing sources. (Slip Op. at 24; see also *id.* at 26 [applying a similar construction to section 40440.11].)

Yet there is nothing paradoxical about that result; it is perfectly logical. The District identifies BACT for new sources on a case-by-case basis when a source applies for a *construction* permit. (See District Rule 1303.)[8] As a result, the source must be able to achieve the required emission standard immediately for the facility about to be built.

By contrast, the District imposes emission reductions on existing sources by adopting generally applicable regulations. Those rules can be drafted, as the Rule here is, in a prospective and staggered fashion allowing sources time to reach full compliance in the future. For instance, when the challenged Rule was first adopted in 1999, paint manufacturers had seven years of lead time to develop coatings that would comply with the Rule's volatile organic compound limits. (See also, e.g., *supra* Section I.B, at 22 [citing *Western Petroleum, Sherwin-Williams,* and *Small Emitters*].)

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[8] The District's rules are available on its website: http://www.aqmd.gov/rules/index.html

Beyond being inapplicable on their face, these BACT provisions in fact imply that the District is *not* limited to requiring technology that has already been "achieved." The Legislature's inclusion of these provisions for BACT and new sources implies that its exclusion of similar provisions for BARCT and existing sources was intentional. (See *Kaiser Foundation Hospital v. Workmen's Comp. Appeals Bd.* (1974) 13 Cal.3d 20, 27; *Parsley v. Superior Court* (1973) 9 Cal.3d 934, 939.)

2. Sections 40703 and 40922

Next, the court addressed several statutes that require the District to estimate the cost effectiveness of proposed regulations. The court asserted that the District could not possibly make the required findings for rules that had not been achieved. Thus, according to the court, the Legislature must have intended to limit the District to adopting achievable regulations. (Slip Op. at 24-25 [citing sections 40703 and 40922].)

This conclusion, however, squarely conflicts with the Second District's decisions in *Sherwin-Williams, supra,* and *Small Emitters, supra.* In those cases the court held that the District's obligation to estimate costs is limited to existing data. (*Sherwin-Williams, supra*, 86 Cal.App.4th at 1274-75; *Small*

Emitters, supra, 60 Cal.App.4th at 64.) Indeed, as noted above, the *Small Emitters* case involved a regulation for which the future means of compliance were unknown when the rule was adopted. (60 Cal.App.4th at 59, 62, 66.) The court nonetheless upheld both the rule and the District's cost analysis.

3. Section 40916

Finally, the court below relied on yet another inapplicable provision, section 40916. That statute directs the California Air Resources Board to adopt a model rule for coating emissions that districts may then choose to adopt themselves. (Slip Op. at 25.) The Court of Appeal correctly noted that section 40916 mandates that the Board adopt a rule that is achievable. (§ 40916(d)(1).) The court was incorrect, however, in holding that *district* rules are similarly constrained. Section 40916(d)(2) includes an express savings clause: "[n]othing in this subdivision shall limit or affect the ability of a district to adopt or enforce rules related to architectural paint or coatings." (See also *Nat. Paint, supra,* 485 F.Supp.2d at 1161 [rejecting the Association's reliance on section 40916 for this reason].)

In a footnote, the court acknowledges this savings clause but then attempts to avoid it. The court points to another

provision requiring that district rules "shall be adopted . . . in accordance with existing law." (Slip Op. at 26, fn. 21 [citing section 40916(d)(2)].) But, once again, this provision merely begs the question that the court set out to answer. It provides no response to the explicit savings clause for district-adopted regulations, and it adds nothing to the court's substantive analysis.

CONCLUSION

In sum, the Court of Appeal's Opinion will handcuff the District in its efforts to protect public health by reducing air pollution in the Basin. The Court should grant this petition to resolve the important questions of law presented by the Opinion concerning the scope of the District's regulatory authority. (Cal. Rules of Court, Rule 8.500(b)(1).)

DATED: Nov. 9, 2009

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CERTIFICATE OF WORD COUNT

I certify that this petition contains 8,335 words, exclusive of this certificate and the tables of contents and authorities, according to the word count function of the word processing program used to produce the petition. The number of words in this petition therefore complies with the requirements of Rule 8.504(d)(1) of the California Rules of Court.

DATED: Nov. 9, 2009

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PROOF OF SERVICE

National Paint & Coatings Association, Inc. v. South Coast Air Quality Management District; Supreme Court of California

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, California 94102.

On November 09, 2009, I served true copies of the following document(s) described as:

DEFENDANT AND RESPONDENT'S PETITION FOR REVIEW

on the parties in this action as follows:

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

Executed on November 09, 2009, at San Francisco, California.

Natalia Thurston

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NATIONAL PAINT & COATINGS ASSOCIATION, INC.,

Plaintiff and Appellant,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,

Defendant and Respondent.

G040122

(Super. Ct. No. 03CC00007)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed in part; reversed and remanded with directions in part.

Fulbright & Jaworski, Jeffrey B. Margulies and William L. Troutman for Plaintiff and Appellant.

Shute, Mihaly & Weinberger, Matthew D. Zinn; Daniel P. Selmi; Kurt R. Weise, Barbara B. Baird and William B. Wong for Defendant and Respondent.

I. INTRODUCTION

A trade group, the National Paint & Coatings Association, has brought this action against the South Coast Air Quality Management District, challenging the district's 2002 amendments to its rule limiting the amount of volatile organic compounds allowed in various kinds of paint and coatings in Southern California.[1]

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[1] It *is* possible to write an opinion in the area of air pollution control law without descending into an alphabet soup of jargon-based acronyms familiar only to practitioners who live and, er, breathe this area of the law. (E.g., *Sierra Club. v. U.S. E.P.A.* (7th Cir. 2007) 499 F.3d 653 (opn. by Posner, J).) This point is of some substantive importance because the use of acronyms tends to obscure, certainly in the reader's mind and sometimes even in the writer's, the underlying reality of a case, and the legal issues on which it must turn. For example, the case before us essentially revolves around two words widely used in federal and state air pollution control statutes, "available," and "achievable." But when the words are incorporated into the widely used acronyms "BACT" -- for "best available control technology" or "BARCT" -- for "best available retrofit control technology" -- their full significance is obscured. "BACT" and "BARCT" take on a life of their own, severed from the actual statutory language.

Besides which, the literature in this area tends to be more difficult to read (at least for a non-specialist) because of the heavy use of acronyms. Consider, for example, this sentence, committed on page 32 of the appellant's opening brief: "In June 22, 2000, CARB adopted an SCM for AIM coatings." Huh? Even if one can figure out that "CARB" means "California Air Resources Board" and "AIM" means "architectural and industrial maintenance coatings," one scurries around the brief looking for the first use of "SCM," which, one finds from a passage about 11 pages before, means "suggested control measure." (Well, the use of acronyms is at least one way to force judges to re-read passages from the brief.) It is all needlessly confusing. (See Scalia & Garner, Making Your Case: The Art of Persuading Judges (Thomson West 2008) p. 120 ["Acronyms are mainly for the convenience of the writer or speaker. Don't burden your reader or listener with many of them, especially unfamiliar ones."].)

We will therefore, in this opinion, in order to maintain a modicum of readability and register our small protest against the further uglification of the English language, avoid the further use of acronyms in this opinion.

Except for this footnote. It is also apparent that many specialists in this area are addicted to acronyms, and, more importantly, when researching computerized databases, are more likely to plug in "BACT" or "CARB" than their English equivalents, and may not find this case unless it contains those acronyms. (Cf. *Seibert Security Services, Inc. v. Superior Court* (1993) 18 Cal.App.4th 394, 404-405, fn. 3 [choosing to use non-gender neutral term "fireman's rule" in part because it is "more readily accessible to electronic researchers not enlightened enough to program 'firefighter's rule' into their search requests"].) We therefore now provide a list of common acronyms for this case and area of the law, so at least such researchers will be able to find this footnote:

NPCA -- National Paint & Coatings Association, the plaintiff in this case, which we will call "the paint association."

SCAQMD -- South Coast Air Quality Management District, a regional regulatory agency and the defendant in this case, which we will call "the district."

VOC -- volatile organic compounds, generally used to make paint and other "coatings" last and adhere to surfaces, and which also make paint stink and pollute the air (by helping form smog). Volatile organic compounds are what this case is all about.

CAA -- Clean Air Act, federal clean air legislation going back to the Kennedy Administration.

CCAA -- California Clean Air Act, enacted to bring California law into conformity with the federal Clean Air Act. (See Health & Saf. Code, § 39500 et seq.)

AIM -- architectural and industrial maintenance coatings. While "coatings" has the industry-promulgated euphemistic feel as a fancy word for paint, we will use "coatings" where appropriate instead of paint because it is more accurate. Something you put on something else to prevent it from rusting, or to protect it from the weather as distinct from making it look nicer, is, substantively, a "coating" as distinct from mere "paint."

SCM -- suggested control measure.

The challenged rule basically says: Here's a list of the maximum levels of volatile organic compounds that paint manufacturers may have in different kinds of paint and coatings, with the effective levels kicking in at various times.[2] The rule also has an averaging provision, similar to federal car mileage standards, which allows manufacturers to average the "actual cumulative emissions" of their paints and coatings so that the total emission can be under a hypothetical compliance limit, even if *some* of their paints and coatings are not.

The paint association's challenge is also conceptually simple enough: It asserts that the district has exceeded the authority given it by the statutes governing its authority to promulgate air pollution regulations, because the rule specifies limits that are not actually "available" and "achievable." (See Health & Saf. Code, § 40440, subd. (b)(1); 40406.[3])

As we explain below, the paint association's challenge fails as to all of the categories of paints and coatings governed by the rule, except for two. In a word, if it exists, it's both "available" and "achievable," even if there is not much of it by way of variety or market penetration. There is substantial evidence that there are floor coatings, industrial maintenance coatings, high temperature industrial maintenance coatings, nonflat coatings, primers, sealers and undercoaters and quick dry primers, sealers and undercoaters which both exist and comply with even the most recent limits (effective July 2006) required under the rule. That is, technology complying with the limits is both available and achievable.

However, the administrative record shows there are zero -- count 'em, zero -- products that comply with the most recent limits in two categories: quick-dry enamels

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Rule 1113 -- the district's basic rule governing the amount of volatile organic compounds in paint and coatings, which we will call "the rule." Technically it is an amended rule, having first been enacted in 1977.

[2] For example, if we read the table of standards for grams per liter, minus water and exempt compounds, the limit for "quick dry enamels (effective July 2006) is 50 grams per liter, the level for clear wood finishes (effective January 2005) is 275 grams per liter, and the level for roof coatings (effective January 2003) is 250 grams per liter. Amateur and professional artists, on the other hand, may (or may not) be relieved to learn that the limit on graphic arts coatings has remained at the relatively high level of 500 grams per liter since at least 1998.

[3] All further undesignated statutory references in this opinion are to the Health and Safety Code.

and rust preventative coatings. We have no evidence that, in these categories, the technology is both "available" and "achievable" to comply with the district's amended limits; we have only speculation that one day in the *future* the technology will exist to comply with the limits.

We will therefore affirm the trial court in denying the paint association's requested writ of administrative mandate as to everything but these two categories. We will direct the writ to be granted as to quick-dry enamels and rust preventers, but with this proviso: Recognizing that, as we write in 2009 working with an administrative record largely based on information existing in late 2002 (and there's a reason for the long lag time, as will soon be apparent), instead of directing that the rule be vacated as to these two categories, the writ will conditionally give the district the opportunity to show, based on *current* technology, that quick-dry enamels and rust preventers can be made which comply with the most recent limits. Only if, after a hearing on remand, the district cannot show availability and achievability based on existing coatings in these two categories should a writ issue requiring the amended rule to be rolled back to earlier limits.[4]

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[4] For reader convenience, we now provide an outline of this opinion:

I. INTRODUCTION
II. THE HISTORY OF THE LITIGATION
  A. *National Paint Association I*
  B. *National Paint Association II*
  C. *National Paint Association III*
III. DISCUSSION
  A. *Collateral Estoppel: Public Interest Exception*
  B. *Standard of Review*
  C. *The Controlling Statutes*
    1. Overview and Relevant Statutory Text
    2. California Cases on the Controlling Statutes
  D. *Source versus Application*
  E. *State of the Art*
    1. The Analysis So Far
    2. Beyond State of the Art: "Strawless bricks" versus "Godot"
    3. When All Else Fails Read the Relevant Statutes
      a. *Plain Meaning*
      b. *Light Shed by Statutes Part of the Same Scheme*
    4. The Escape Valves
    5. Floors versus Ceilings
IV. CONCLUSION

II. THE HISTORY OF THE LITIGATION

A. *National Paint Association I*

As mentioned, the rule was first promulgated in 1977. The rule was amended in 1999. The amended rule put very restrictive limits on volatile organic compounds. Those amendments were quickly challenged, as exceeding the district's enabling statutes, by the paint association in the Orange County Superior Court, then later in this court.

The challenge resulted in an unpublished decision, *National Paint & Coatings Association, Inc. v. South Coast Air Quality Management District* (June 24, 2002, G029462) [unpub. opn] [2002 WL 1365641] ("*National Paint Association I*".) In *National Paint Association I*, this court reversed a judgment denying the requested writ of administrative mandamus on procedural grounds. We noted that, at the very last moment -- that is, within about 10 days before the hearing at which the district considered the amended rule -- the district announced two significant exceptions. One exempted essential public services from certain interim limits. The other allowed small manufacturers to average their emissions. (See *id.* at p. 3.)

Those last-minute exceptions contravened section 40725, requiring 30 days public notice of a new rule. As we explained, the timing of the exceptions served to "'sandbag'" the opposition to the amended rule in three ways: They effectively bought off opposition to the rule from public agencies like CalTrans and Metropolitan Water District (both of which have a need for coatings relatively high in volatile organic compounds because they last longer); they made it more difficult for opponents of the limits to rally opposition; and, they even precluded opponents of any exemptions from being heard. (*National Paint Association I,* 2002 WL 1365641 at p. 3.) We directed a writ of mandate to command the district to vacate its 1999 amendments, so as to allow the amended rule the required time to circulate before adoption. (*Id.* at p. 5.)

In our unpublished opinion, we stated that we did not reach the "merits" of the paint association's challenge to the 1999 rule. We did observe in that regard, though, that, for certain heavy duty public uses such as electrical transformers and water

pipelines, "there is a serious question as to whether there are now *any* low volatile organic paints available as substitutes." (*National Paint Association I, supra*, 2002 WL 1365641 at p. fn. 2.)[5]

B. *National Paint Association II*

By the end of December 2002, that is, within less than seven months of the filing date of *National Paint Association I*, the district promulgated an amended rule, this time avoiding the procedural mistake of inserting exemptions at the last minute. Quickly -- January 2003 -- the paint association filed suit in Orange County Superior Court, again asserting that the amended rule (let's call this the 2002 rule) violated the district's enabling statutes.

Not to put too fine a point on it, the district's lawyers quickly outmaneuvered the paint association's lawyers into what was no doubt perceived to be a more favorable forum for their side. They had the case removed to federal court.[6]

The details here are interesting: The district's notice of removal was based on the theory that there had been a consent judgment in an unrelated federal case going back to 1997 which gave the district a "colorable federal defense" to the paint association's lawsuit.[7] After the notice of removal to federal court, the paint association responded with a motion to remand back to state court. Federal trial court judges typically have enough federal work to do without having to unnecessarily kibitz matters of state law, and, in 2004, the federal court *granted* the paint association's motion to send the case back to state court.

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[5] The opinion also avoided acronyms. Judging by the briefing in the case before us now, nobody got the hint. Unfortunately, there are no rehab clinics for acronym addicts.

[6] While the district makes a collateral estoppel argument based on the federal district court's ensuing decision, its brief, otherwise a splendid document except for its reliance on acronyms, is very sparing with the procedural details of how the district court got the case in the first place and how it came to issue its decision. Actually it pretty much avoids the issue altogether. This is a rather telling omission.

While the proper term for a federal trial level court is "federal district court," to avoid confusion with the agency we refer to as the "district," we will refer to that court as either "the federal court" or "the federal trial court."

[7] The case was *Coalition for Clean Air, et al. v. South Coast Air Quality Management District, California Central District number* CV97-6916-HLH (SHx).

But the district appealed that order, and, if one reads the ensuing unpublished Ninth Circuit opinion, one finds that the federal judge's remand order was reversed because the paint association's counsel filed its remand request too late.[8]

In short, but for a procedural mishap by the paint association's counsel, the case would have gone back to state trial back in 2004, and then on to (presumably) this appellate court by 2005 or maybe 2006. Instead, the Ninth Circuit did not issue its decision reversing the remand order until summer 2006, requiring Federal District Court Judge Dean Pregerson to undertake the arduous task of deciding the merits of the paint association's challenge.

The task was accomplished in May 2007, resulting in a published decision, *National Paint & Coatings Association v. South Coast Air Quality Management District* (C.D. Cal. 2007) 485 F.Supp.2d 1153, or "*National Paint Association II.*" Significantly, the decision was decided as a matter of the federal court's *diversity* jurisdiction, looking solely to California precedent and statutes to best ascertain how our state's highest court would rule. (See *id.* at pp. 1155-1156.) When one reads the decision one discovers that, despite the supposedly federal basis for the original remand request, there is no federal law component in the *National Paint Association II* opinion. (So much for that "colorable federal defense.")

The federal trial court decided to deny the paint association's requested writ in *National Paint Association II.* We will discuss -- and *mostly* agree with -- the federal trial court's decision *National Paint Association II* below in parts III.D. and III.E.1. of this opinion. (Our sole disagreement is with *National Paint Association II's* decision not to consider one of the statutes in the scheme.) It should be noted here, though, that the point on which we agree with the paint association concerning the two categories of

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[8] See *National Paint & Coatings Association v. South Coast Air Quality Management District* (July 27, 2006, 9th Cir. No. 04-56241) 195 Fed.Appx. 557, 558 [2006 WL 2086823]: "Accordingly, the district court in the present case erred in remanding the case to state court because [the paint association] failed to move to remand the case within the 30-day time limit of [28 U.S.C.] § 1447(c)."

paints and coatings for which there is no evidence of availability or achievability was itself not specifically addressed in *National Paint Association II*.

C. *National Paint Association III*

However, the paint association's lawyers hadn't been completely outmaneuvered. During the case's sojourn in the federal courts, the state case continued in fits and starts. (Remember that the federal trial court had decided the case should be sent back to state court by early 2004, so, from the state trial court's point of view, for the period 2004 through 2006, it had in front of it a case where remand to federal court had been rejected).

The state court was going to try the paint association's suit in three phases: (1) the legal authority of the district to propound the 2002 rule; (2) other claims by the paint association (e.g., that the district had not engaged in an adequate socioeconomic impact assessment); and (3) the district's own affirmative defenses. Phase 1, dealing with the issue of the district's authority, was tried to the court in September 2004. After that, however, there appears to have been a hiatus in the state court of about a year, until April 2006, when the district proposed a statement of decision. The paint association objected to that proposed statement in June 2006. In July 2006, before the trial court decided the matter, the Ninth Circuit reversed the federal court's decision to reject the remand to federal court. In the period August 2006 through May 2007, *National Paint Association II* was being litigated in the federal trial court. After the May 2007 decision by the federal trial court, the paint association dismissed its claims not associated within the scope of the district's authority, that is, not otherwise covered by Phase 1. The dismissals left no causes of action in the state case for judgment, and finally, in January 2008, the trial court issued its statement of decision as to Phase 1 proposed back in April 2006.[9]

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[9] The district's adopted statement of decision recites that the trial judge carefully reviewed the "voluminous Administrative Record." To be sure, that is probably a bit of an exaggeration. The administrative record is over 65 binders of material, and we doubt that any one human being, not otherwise familiar with the record as it was compiled in real time, could "carefully" review it all. (Cf. *Hiser v. Bell Helicopter Textron Inc.* (2003) 111 Cal.App.4th 640, 656 ["We are not required to make an independent search of this voluminous record and may

The statement of decision noted the evidence in the administrative record that a number of compliant paints and coatings were present on the market, and further referenced a 1997 assessment by Eastern Michigan University on the state of technology for low volatile organic compound coatings. The assessment concluded that low volatile organic compound technology "'should witness major progress over the next 5 to 7 years.'" The assessment further "concluded that by the year 2005, there will be near-zero [volatile organic compound] coatings commercially available in a number of categories" (which, of course, also suggests that they would not be available in at least some others).

The statement of decision also pointed to four "'escape routes'" that "address" the paint association's "feasibility concerns." One was the averaging provision (discussed above). The second was an extension of compliance deadlines for small "niche" paint manufacturers "that may be unable to utilize averaging." The third were requirements that the district's staff "conduct technology assessments to evaluate industry's progress in meeting" the limits and report back to the board as to the '"appropriateness of maintaining'" future volatile organic compound limits. Finally, the statement of decision pointed to the statutory product variance process as set out in section 42365 et seq.

With the statement of decision, a judgment ensued denying the paint association's petition. A timely notice of appeal followed.

III. DISCUSSION

A. *Collateral Estoppel:*

Public Interest Exception

The paint association's appeal is not foreclosed by the federal trial court's decision in *National Paint Association II*. The reason is the public interest exception to the doctrine of collateral estoppel. (See *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 620-621 [refusing to apply public interest exception to collateral estoppel

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disregard any claims where no reference is furnished."].) That said, *this trial* judge most certainly reviewed the important parts: We found his tabs on various portions of it, which apparently were not removed as the boxes of binders made their trip over to this court.

and res judicata doctrines where Ninth Circuit had upheld federal trial court decision declaring parts of California campaign finance reform initiative unconstitutional]; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 64 [prior decision adversely affected taxpayers or, alternatively, affected receipt of federal funds; either way, public interest required definitive decision]; *Greenfield v. Mather* (1948) 32 Cal.2d 23, 35 [recognizing public interest exception to res judicata]; *Modesto City Schools v. Education Audits Appeal Panel* (2004) 123 Cal.App.4th 1365, 1379 ["courts recognize an exception to the rule of collateral estoppel where there is a prior ruling on a question of law and the issue concerns a matter of public interest"].)

As the California Supreme Court pointed out in *Kopp*, state courts are the "'principal expositors of state law'" (*Kopp, supra*, 11 Cal.4th at p. 620, quoting *Moore v. Sims* (1979) 442 U.S. 415, 429) and "'federal courts 'lack jurisdiction authoritatively to construe state legislation'" (*Kopp, supra*, 11 Cal.4th at p. 620, quoting *United States v. Thirty-Seven Photographs* (1971) 402 U.S. 363, 369).

The need for authoritative state construction of state legislation is illustrated in *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251 (*Arcadia*). There, a prior *state* appellate decision was unpublished and thus could not be cited as legal authority. (*Id.* at p. 257.) Because of the void, our high court thus applied the public interest exception.

Arcadia is a template for the case before us. As otherwise persuasive or helpful as it might be, *National Paint Association II* is not binding on any California trial court. And of course the matter is of significant public interest. Everyone breathes. And everyone has some contact with paint or coating, even if only to rely on electric transformers and water lines that need rust proofing.

Ironically, the need for an authoritative *state* court interpretation of the district's "best available technology" statutes was itself underscored by the federal trial court in *National Paint Association II*. Judge Pregerson made a point of noting that "The California Courts have thus far declined to rule on the scope of [the district's] rule-making authority." (*National Paint Association II, supra*, 485 F.Supp.2d at p. 1157.)

This case also seems particularly appropriate for application of the public interest exception given that the removal to federal court was based on federal issues, yet federal issues did not play any role in the federal trial court's decision in *National Paint Association II.* In point of fact, the only reason the federal court was burdened with the job of interpreting state law in the first place was a procedural mishap (the lack of a timely filing) by the paint association.

B. *Standard of Review*

A word on the standard of review. The subject has already been well covered in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*), in both the majority and concurring opinions. As the *Yamaha* majority explained, when dealing with controlling statutes: "In one respect, our opinion in *Wallace Berrie* [*v. State Bd. of Equalization* (1985) 40 Cal.3d 60], may overstate the level of deference -- even quasi-legislative rules are reviewed independently for consistency with controlling law. A court does not, in other words, defer to an agency's view when deciding whether *a regulation lies within the scope of the authority delegated by the Legislature.* The court, not the agency, has 'final responsibility for the interpretation of the law' under which the regulation was issued." (*Yamaha, supra*, 19 Cal.4th at p. 11, fn 4, italics added.) Even so, the court still accords "great weight and respect to the administrative construction.'" (*Id.* at p. 12.)

And, as Justice Mosk wrote, concurring in *Yamaha*: "In the case of quasi-legislative regulations, the court has essentially two tasks. The first duty is 'to determine whether the [agency] exercised [its] quasi-legislative authority within the bounds of the statutory mandate.' . . . *[T]his is a matter for the independent judgment of the court.*" (*Yamaha, supra*, 19 Cal.4th at p. 16 (conc. opn. of Mosk, J.), italics added.)

As we read these rules, it is an independent question of law for this court whether the 2002 amendments exceeded the district's statutory authority. As Justice Mosk wrote for a unanimous court in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390-391: "The scope of judicial review of quasi-legislative administrative action is well settled. . . . *To be valid, such*

administrative action must be within the scope of authority conferred by the enabling statute. . . . We have long recognized, of course, that 'the construction of a statute by officials charged with its administration, including their interpretation of the authority invested in them to implement and carry out its provisions, is entitled to great weight . . . .' Nevertheless, '[w]hatever the force of administrative construction, . . . final responsibility for the interpretation of the law rests with the courts.'" (Italics added.)

C. *The Controlling Statutes*

1. Overview and Relevant

Statutory Text

In California, the regulatory agency with authority over *vehicular* air pollution is the California Air Resources Board. A series of regional regulatory districts have authority over *non*vehicular air pollution. (§ 40000 ["The Legislature finds and declares that local and regional authorities have the primary responsibility for control of air pollution from all sources, other than emissions from motor vehicles. The control of emissions from motor vehicles, except as otherwise provided in this division, shall be the responsibility of the state board."].) The most prominent of these regional districts, given Southern California's well-known smog problem, is of course the South Coast Air Quality Control District. (See § 40402.[10])

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[10] Section 40402 provides:

"The Legislature finds and declares all of the following:

"(a) That the South Coast Air Basin is a geographical entity not reflected by political boundaries.

"(b) That the basin is acknowledged to have critical air pollution problems caused by the operation of millions of motor vehicles in the basin, stationary sources of pollution, frequent atmospheric inversions that trap aerial contaminants, and the large amount of sunshine that transforms vehicular and nonvehicular emissions into a variety of deleterious chemicals.

"(c) That these critical air pollution problems are most acute in the foothill communities of the San Gabriel/Pomona Valleys and the Riverside/San Bernardino areas, where pollutants which originate in other parts of the basin are trapped by geographical and meteorological conditions characteristic of these areas.

"(d) That the state and federal governments have promulgated ambient air quality standards for the protection of public health, and it is in the public interest that those standards not be exceeded.

"(e) That, in order to achieve and maintain air quality within the ambient air quality standards, a comprehensive basinwide air quality management plan must be developed and implemented to provide for the rapid abatement of existing emission levels to levels which will result in the achievement and maintenance of the state and federal ambient air quality standards and to ensure that new sources of emissions are planned and operated so as to be consistent with the basin's air quality goals.

The district's rule making authority is delineated in section 40440. While we quote the entirety of the statute in the margin,[11] the critical text is in subdivisions (a) and (b), which we quote here:

"(a) The south coast district board shall adopt rules and regulations that carry out the plan and are not in conflict with state law and federal laws and rules and regulations. Upon adoption and approval of subsequent revisions of the plan, these rules and regulations shall be amended, if necessary, to conform to the plan.

"(b) The rules and regulations adopted pursuant to subdivision (a) shall do all of the following:

"(1) Require the use of best available control technology for new and modified sources and the use of best available retrofit control technology for existing sources."

"(f) That, in recognition of the fact that some regions within the basin face more critical air pollution problems than others, it is necessary for the basinwide air quality management plan to consider the specific air pollution problems of regions within the air basin in planning for facilities which create new sources of emissions.

"(g) That, in order to successfully develop and implement a meaningful strategy for achieving and maintaining ambient air quality standards, local governments in the South Coast Air Basin must be delegated additional authority from the state in the control of vehicular sources and must retain existing authority to set stringent emission standards for nonvehicular sources.

"(h) That, in order to successfully implement a comprehensive program for the achievement and maintenance of state and federal ambient air quality standards in the South Coast Air Basin, the responsibilities of local and regional authorities with respect to air pollution control and air quality management plan adoption must be fully integrated into an agency with basinwide authority, largely to be governed by representatives of county and city governments."

[11] The complete text of section 40440 is:

"(a) The south coast district board shall adopt rules and regulations that carry out the plan and are not in conflict with state law and federal laws and rules and regulations. Upon adoption and approval of subsequent revisions of the plan, these rules and regulations shall be amended, if necessary, to conform to the plan.

"(b) The rules and regulations adopted pursuant to subdivision (a) shall do all of the following:

"(1) Require the use of best available control technology for new and modified sources and the use of best available retrofit control technology for existing sources.

"(2) Promote cleaner burning alternative fuels.

"(3) Consistent with Section 40414, provide for indirect source controls in those areas of the south coast district in which there are high-level, localized concentrations of pollutants or with respect to any new source that will have a significant effect on air quality in the South Coast Air Basin.

"(4) Provide for transportation control measures, as listed in the plan.

"(c) The south coast district board shall adopt rules and regulations that will assure that all its administrative practices and the carrying out of its programs are efficient and cost-effective, consistent with the goals of achieving and maintaining federal and state ambient air quality standards and achieving the purposes of this chapter.

"(d) The south coast district board shall determine what is the best available retrofit control technology for existing electric plants, and shall adopt rules and regulations requiring the use of the best available retrofit control technology in existing electric plants, if the board finds and determines that to do so is necessary to carry out the plan.

"(e) In adopting any regulation, the south coast district board shall comply with Section 40703."

The phrases "best available control technology" and "best available retrofit control technology" have been specifically defined in sections 40405 and 40406 (the definitions part of the statutory scheme setting up the district) respectively. Section 40405 provides in its entirety:

"(a) As used in this chapter, 'best available control technology' means an emission limitation that will achieve the lowest achievable emission rate for the source to which it is applied. Subject to subdivision (b), 'lowest achievable emission rate,' as used in this section, means the more stringent of the following:

"(1) The most stringent emission limitation that is contained in the state implementation plan for the particular class or category of source, unless the owner or operator of the source demonstrates that the limitation is not achievable.

"(2) The most stringent emission limitation that is achieved in practice by that class or category or source.

"(b) 'Lowest achievable emission rate' shall not be construed to authorize the permitting of a proposed new source or a modified source that will emit any pollutant in excess of the amount allowable under the applicable new source standards of performance."

Section 40406 provides in its entirety: "As used in this chapter, 'best available retrofit control technology' means an emission limitation that is based on the maximum degree of reduction achievable, taking into account environmental, energy, and economic impacts by each class or category of source."

2. California Cases on
the Controlling Statutes

While a number of California appellate decisions have involved challenges to air pollution regulations promulgated by the district,[12] as we have noted above, the

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[12] Here is a quick bibliography of the published decisions in the area:
-- *Security Environmental Systems, Inc. v. South Coast Air Quality Management Dist.* (1991) 229 Cal.App.3d 110 (*Security Environmental*). This decision involved whether mitigation measures requiring best available technology were necessary to construct a hazardous waste incineration facility after a delay since permits had actually been issued.

federal trial court in *National Paint Association II* stated California courts had "thus far declined" to "rule on the scope of [the district's] authority." (*National Paint Association II, supra*, 485 F.Supp.2d at p. 1157.)

The federal trial court's statement, however, was not *quite* accurate. Two published appellate decisions have certainly dealt with the scope of the district's authority in the context of pondering just what the Legislature intended when it wrote the words, "best available" in the context of new or retrofit technology.

First, in upholding district regulations limiting the amount of small particulate matter that refineries may emit, the *Western Petroleum* case dealt with the problem of exactly what is meant by the word "achievable." (See *Western States, supra*, 136 Cal.App.4th at p. 1019.)[13] The *Western Petroleum* court took the common sense view that if something had already been done, it's achievable, and on that basis reasoned that if one out of six refineries had been able to meet the district's small particulate matter standard, that standard was achievable by the five others. (See *id.* at pp. 1019- 1020 [rejecting notion that a given refinery's "achievements" were not a "fair indication" that the other refineries could also meet the standard].)

Second, *Security Environmental, supra,* 229 Cal.App.3d 110, had occasion to comment on the meaning of "best available control technology" in the context of permits for a hazardous waste incineration facility based on what had been a negative

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-- *Dunn-Edwards Corp. v. South Coast Air Quality Management Dist.* (1993) 19 Cal.App.4th 536 (*Dunn-Edwards*). This case is essentially a process case, challenging what the plaintiff contended was an improper delegation of authority to a technical review group.

-- *Sherwin-Williams Co. v. South Coast Air Quality Management Dist.* (2001) 86 Cal.App.4th 1258 (*Sherwin-Williams*). This case is essentially an environmental-impact-report style challenge to the 1996 version of the rule, that is, arguing, just as an environmental activist group would argue that an environmental impact report does not consider various factors, neither did the district consider required factors (e.g., socioeconomic impacts) in promulgating the 1996 rule.

-- *Western States Petroleum Assn. v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012 (*Western States*). *Western States* involved regulations of small particulate matter from oil refineries.

[13] In *Western States*, the trade group alleged that the rule governing fine particulate matter was "neither feasible nor cost effective." (*Western States, supra*, 136 Cal.App.4th at p. 1018.) And in *National Paint Association II*, the paint association apparently seized on the word "feasible" as well. (See *National Paint Association II, supra*, 485 F.Supp.2d at p. 1158.) "Feasible," however, is not the word the Legislature chose, and the court in *National Paint Association II*, treated the paint association's feasibility challenge as an achievability challenge. (See *id.* at pp. 1158-1159 [court segues from discussing feasibility to achievability].) We follow suit. Our analysis must be based on the words chosen by the Legislature.

declaration as to environmental effects. In that case, the district wanted to condition construction of the incineration facility on its using the "best available control technology" at the time of construction, even though permits had already been granted more than two years previously. The *Security Environmental* court observed: "The [best available control technology] has progressed since the original permits and new information is available in the form of technology for controlling acid gases, particulates and their associated dioxins and furans. It has further been determined that a previously known [selective catalytic reduction nitrogen oxide] control system is cost effective *now* due to new information, thus qualifying its use on hazardous waste incinerators as technologically feasible [best available control technology]. [¶] Thus the new information raising the possibility of substantially increased health risk and the *availability of new emission control technology* which may lessen that risk require an [environmental impact report] to set forth the present significant environmental effects of the proposed project and any mitigating measures to minimize the significant environmental effects and alternatives to the proposed project." (*Security Environmental, supra*, 229 Cal.App.3d at pp. 124-125, italics added.)

The passage is significant. Like the *Western Petroleum* court, the *Security Environmental* court treated the phrase "best available control technology" in the common, ordinary sense of the words "best" and "available" as something that exists -- rather than something that *might* one day be expected *to* exist.

D. *Source Versus Application*

The core of the paint association's challenge to the 2002 rule may be summarized this way: While compliant paints and coatings may exist in various categories, there is no evidence in the administrative record that those compliant paints and coatings are suitable for all "applications" or *uses* of those paints. Thus, for example, there is nothing to show that any of the paints or coatings used for, say, heavy-duty hard-weather "applications" like electric transformers or street lights, are suitable for such a *use*.

On this point, the district has the better part of the argument. The key word in the statute is *sources* -- as in "sources" of pollution -- not "applications." The cornerstone statute, section 40000, is framed in terms of the district's responsibility for "control of air pollution from *all sources*" (italics added) while the more detailed subdivision (b)(1) of section 40440 is similarly framed in terms *sources* of pollution: "Require the use of best available control technology for *new and modified sources* and the use of best available retrofit control technology for *existing sources*." (Italics added.)

As the federal trial court (we think correctly) divined in *National Paint Association II*, the number of possible "applications" is infinite. (*National Paint Association II, supra,* 485 F.Supp.2d at p. 1158 [reference to "every conceivable application"].)

Put another way: You can slap paint on anything. It is therefore unreasonable to believe that the Legislature intended to think of the object receiving the paint or coating as a regulated "source of pollution"; the natural reading of the word is that the paint or coating *itself* is the regulated "source," particularly when one realizes that it is paint or coating that is the "source" of any obnoxious fumes from an object that might escape into the air. It follows then that if the district's rule directed at the paint or coating -- as distinct from whatever the paint or coating is put on -- is within the authority of the statute, that is enough to comply with the statute. Any other conclusion would mean that no paint or coating could *ever* be limited in emissions, because one could always dream up a heavy duty application for which the limit would be, as the doctors say, counterindicated.

E. *State of the Art*

1. The Analysis So Far

Based on what we have noted so far, we uphold the 2002 rule as it applies to all but two categories of regulated paints and coatings. The administrative record contains a table of "currently available compliant coatings" that shows that there are at least *some* compliant coatings (compliant with the 2006 limits) in all categories except, as we have noted, quick-dry enamels and rust preventative coatings.

To be sure, in some categories the total percentages of coatings compliant with the 2006 limits are pretty low: Only eight percent of quick-dry primer sealer undercoaters are shown compliant with the 2006 limits, only 11 percent of industrial maintenance coatings are compliant, and only three percent of nonflat coatings are compliant.

Even so, in the ordinary sense of the words, it means that there are "best available" paints and coatings, in existence, that meet the 2002 rule. Obviously such coatings are "achievable" -- they have been, in fact, achieved. Applying the *Western Petroleum* rationale -- if it has been already been done, it's achievable -- it is clear that the rule is within the bounds of 40440 as regards these categories.

2. Beyond State of the Art:

"Strawless bricks" versus "Godot"

We now turn to the issue as to whether the limits on two categories, quick-dry enamels and rust preventative coatings -- categories for which there are no known compliant coatings in existence (at least in this record), are within the scope of the district's statutory authority.

The parties proffer two different models of the statute, basically dividing on whether the district's statutory authority is limited to requiring state of the art technology, or extends to requiring technology that is *beyond* current state of the art.

Which brings us to a topic that is generally referred to in the literature as "technology forcing." Unfortunately, the phrase "technology forcing" is not always clear. At its mildest, it appears to connote technology redirection, in which the law seeks to "shape" technology into existent low or zero emission approaches, even if, for example, those approaches are relatively expensive. At its most extreme, technology forcing connotes an attempt to decree a technological result by legal ukase.

Two competing literary tropes exemplify "technology forcing" in this extreme sense. On the positive side, we have the comment of the federal appellate court for the District of Columbia in a 1980 occupational safety case, suggesting that if the legislative goal is sufficiently important, that fact overrides what does, or does not, exist

as state of the art. The goal, as the court said, simply cannot wait for "the Godot of scientific certainty." (*United Steelworkers of America, AFL-CIO-CLC v. Marshall* (D.C. Cir. 1980) 647 F.2d 1189, 1266 (*United Steelworkers*).)

Godot was the subject of Samuel Beckett's absurdist play about two characters waiting for a compatriot who -- and here's the punch line -- never arrives.[14] (Perhaps a more popular trope for the technology forcing approach would be Captain Picard's line to his immediate subordinate in the second Star Trek series, "Make it so, Number One!"). In the "Godot" model, the regulatory agency need only show that "modern technology has at least *conceived* some industrial strategies or devices" that will be "*likely* to be capable of meeting" the regulatory requirement. (*United Steelworker, supra*, 647 F.2d at p. 1266, italics added.)

The other literary trope is of somewhat older origin that Beckett's play. It is Pharaoh's venting of his displeasure with the Israelite slaves by making them gather their own straw to make bricks, yet maintaining the same quota for brick production. Needless to say, that was a bit of a hardship.[15] It was not "feasible" to make bricks without straw, or at least, given the technology of the day, decent bricks of the sort that a ruler like Pharaoh would require for some building project like his tomb.[16] In the "brickless straw" model, the limits of the agency's authority do not extend beyond what currently exists.

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[14] Thus the metaphor is probably not the most propitious for those who believe that the law can decree a technological result and the result will follow.

[15] See generally Exodus, chapter 5.

[16] Perhaps in deference to the obvious possibilities of hardship in technology forcing rules, even those courts that have embraced the "Make it so, Number One" approach have articulated a need for escape valves. Such was the case in *United Steelworkers*, which, like Canute, recognizing that some things might not be amenable to mere decree, noted that variance provisions are integral to any technology forcing statute: "The ironic truth is that 'technology-forcing' makes the agency's standard of proof somewhat circular. Since the agency must hazard some predictions about experimental technology, it may not be able to determine the success of new means of compliance until industry implements them. . . . Conversely, OSHA or the courts may discover that a standard is infeasible only after industry has exerted all good faith efforts to comply. . . . Both the agency, in issuing, and the court, in upholding, a standard under this principle obviously *run the risk that an apparently feasible standard will prove technologically impossible in the future*. But, while we will address below the complexities of this issue, we note *the general agreement in the courts that such flexible devices as variance proceedings* can correct erroneous predictions about feasibility when the error manifests itself, and thus can reduce this risk." (*United Steelworkers, supra*, 647 F.2d at p. 1266, italics added.) In fact, the United States Supreme Court has actually required variance proceedings. (*E. I. du Pont de Nemours & Co. v. Train* (1977) 430 U.S. 112.)

3. When All Else Fails

Read the Relevant Statutes

These competing images, however, can only serve as images of competing legislative models, they cannot tell what our *Legislature* actually intended. To do that, we must actually examine *the words of the relevant statutes*.

a. *Plain Meaning*

We now parse the relevant statutes, sections 40405, 40406, and 40440.

The operative grant of rule-making authority to the district is found in section 40440, subdivision (b)(1) where the district is mandated to adopt rules that "Require the use of best available control technology for new and modified sources and the use of best available retrofit control technology for existing sources." Beyond that sections 40405 and 40406 define "best available control technology" and "best available retrofit control technology" respectively in terms of an "emission limitation" that "will achieve the lowest achievable emission rate for the source to which it is applied" (§ 40405) or "an emission limitation that is based on the maximum degree of reduction achievable" (§ 40406).

We first notice the obvious -- the first operative word in the operative phrase: "best." Best is a comparison word: good, better, best, and thus implies a choice of things existing. Competing *speculative* technologies or what is merely "conceivable" do not lend themselves to easy comparison.

We next notice the word "available." The word similarly indicates something that exists in a way that things that are merely "conceivable" do not. Cold fusion is conceivable. It is not, today, available.

What about "achievable"? The word "achievable" has the distinction of having one of the shortest definitions one is likely to encounter in the Oxford English Dictionary. It is literally one phrase: "Capable of being achieved." And the definition of "achieved" is similarly short, consisting of four synonyms, all in the past tense: "Completed; accomplished; attained, won." (1 Oxford Eng. Dict. (2d ed 1989) at p. 102.)

The past tense in the variations on the word "achievable" indicate that it refers to a thing or process that currently exists, as distinct from what is speculative or merely theoretical. When construed together with the words "best" and "available," the conclusion becomes inevitable: The district has authority to require the *best* of what exists, not what might conceivably come on the market.

What about the "able" in achievable? Surely the choice of the word "achievable" as distinct from "achiev*ed*" is some indication that the district may require at least something, even if it doesn't exist as such, can be readily put together?

Indeed; we agree. It is said, for example, while some nations do not possess atomic weapons as such, they can put them together on a moment's notice. The technology for them already exists -- it is simply a matter of the will to assemble the component parts.

So, the fact that there are no existing compliant coatings at, say "time one," does not necessarily mean such coatings could not be "achieved" at, say, "time one plus almost immediately thereafter." That is, even if something does not currently exist, it is "achievable" in the sense that it can be readily assembled out of things that currently do exist. Using lemon juice instead of pesticides in your kitchen to kill ants is certainly achievable, even if you don't have any lemon juice on hand.

This opinion should therefore not be read as restricting the district's authority to promulgate a rule requiring what is "achievable" when based on *existing* technology.

Thus, the fact that there are no compliant quick-dry enamels or rust preventers that are compliant with the 2006 limits is not absolutely dispositive. However, as shown by the trial court's own statement of decision referencing the Eastern Michigan University assessment of the state of technology for low volatile organic compound coatings, there was no evidence of any ready-to-be-assembled sort of achievability. That assessment simply prophesied that there would be "major progress over the next 5 to 7 years" and predicted, H.G. Wells style, that there would be compliant coatings by the year 2005.

Science fiction is not substantial evidence. A trend line does not achievability make. There is the logical fallacy of extrapolation, which assumes that the future will be like the past, only more so. (See Rahdert, *Of Impressionists and Rohrschach Blots* (1986) Col. L. Rev. 1283, 1288 ["Indeed, Professor Friedman warns us early on not to indulge in the 'extrapolation fallacy' -- the usually erroneous assumption that the future will be just like the present, only more so"[17]].) It is a fallacy which, in other contexts, California courts have squarely rejected. (E.g., *In re Marriage of Mosley* (2008) 165 Cal.App.4th 1375, 1386 ["We must be wary of 'the logical fallacy of extrapolation, in which some series of events in the past is necessarily assumed to continue in exactly the same way into the future.'"].)

There is thus a difference between existing technology and projected technology based on a trend line. Some of us are old enough to remember those bumptious predictions in the 1950's forecasting that we'd all be commuting to work in flying aerocars. And wasn't there a 1967 Star Trek episode that was premised on the exile of a tyrant who, *in 1996*, blasted off into deep space? The extrapolation of the space technology of 1967 into an interplanetary voyage in 1996 didn't seem *quite* so laughable at the time. The point is: The Legislature used the words "best," "available" and "achievable," and those words demand something currently existing, not mere projection.

b. *Light Shed by Statutes*
Part of the Same Scheme

Any doubt about our conclusion is dispelled by examining the statutory scheme of which sections 40405, 40406, and 40440 are a part.

The district's authority is part of a general legislative scheme to control air pollution from nonvehicular sources in Southern California, and this scheme envisions controls on both existing and new sources. (See 40440, subd. (b)(1) [reference to "new and modified sources" and "existing sources"].).

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[17] Reviewing Friedman, Total Justice (1985).

Statutes which are part of the same scheme should be construed together. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1289-1290 [giving term "employing agency" consistent meaning across statute]; *County of Placer v. Aetna Cas. etc. Co.* (1958) 50 Cal.2d 182, 188-189 ["statutes relating to the same subject matter are to be construed together and harmonized if possible"]; *Wertin v. Franchise Tax Bd.* (1998) 68 Cal.App.4th 961, 974 ["Statutes are to be construed together with other statutes forming part of the same scheme."].)

The point is important for the case before us because the Legislature in this case used exactly the same phrase -- "best available" -- to describe what it wanted the district to do for both new and existing (and only *existing* sources can be in need of *retro*fitting) "sources" of pollution.

We may thus learn things about "best available retrofit control technology" for *existing* sources of pollution from what the Legislature said about "best available control technology" for *new* sources.

And what we learn is: Best available means best *available*, not what is "conceivable."

First, section 40723, subdivision (b), which by its terms involves "best available control" technology as distinct from "best available retrofit control" technology, says that operators of equipment subject to "best available control technology" requirements have the right to request the district to "review whether the applicable requirements *have been achieved* and whether the requirements should be required for the source category." (Italics added.)[18]

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[18] Here is the complete text of section 40723:

"(a) It is the intent of the Legislature that, when an air district establishes best available control technology or lowest achievable emission rate requirements based in part on vendor representations, the requirements be achievable for the applicable source category.

"(b) Upon the request of any owner or operator of equipment that is subject to best available control technology or lowest achievable emission rate requirements, the district shall review whether the applicable requirements have been achieved and whether the requirements should be required for the source category or source if the owner or operator demonstrates that all of the following conditions are true:

It would be highly anomalous for the Legislature to build in a protection for the operators of equipment subject to rules governing new sources of pollution, namely that the operator could request review as to whether the requirements had been "achieved" -- past tense -- if the Legislature intended that rules governing *existing* sources of pollution could be based on technology *beyond* state of the art. If anything, one would expect the reverse: If the Legislature wanted to give the district authority to make rules requiring *something beyond* state of the art technology, it would presumably want to give that authority first as regards any *new* sources of pollution, where, after all, the most recent "conceivable" technologies would be more likely to be devised, then attempted.[19]

Second, section 40703 similarly points in the direction of existing, as distinct from conceivable, technology. The statute provides, in full that: "In adopting any regulation, the district shall consider, pursuant to Section 40922, and make available to the public, its findings related to the *cost effectiveness of a control measure*, as well as the basis for the findings and the considerations involved. A district shall make

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"(1) The owner or operator purchased equipment that was subject to or intended by the manufacturer or vendor to satisfy federal, state, or local air district rules or permitting requirements that impose best available control technology or lowest achievable emission rate requirements.

"(2) An express warranty was provided to the owner or operator by the manufacturer or vendor that the equipment would achieve the best available control technology or lowest achievable emission rate requirements, or any specified emission rate or standard intended to satisfy those requirements.

"(3) The owner or operator made a reasonable effort, for a reasonable period of time, to operate the equipment in accordance with the operating conditions specified by the equipment manufacturer or vendor.

"(4) The equipment failed to meet the best available control technology or lowest achievable emission rate requirements covered by the warranty provided by the equipment manufacturer or vendor.

"(5) The applicable best available control technology or lowest achievable emission rate requirements were established primarily on the basis of the representations and data provided by the equipment manufacturer or vendor.

"(c)(1) If, after conducting a review pursuant to subdivision (b), the district determines that the applicable best available control technology or lowest achievable emission rate requirements are not achievable by a source, the district shall revise those requirements to a level achievable by that source.

"(2) If, after conducting a review pursuant to subdivision (b), the district determines that the applicable best available control technology or lowest achievable emission rate requirements are not achievable by a source category, the district shall revise those requirements to a level achievable by that source category.

"(d) This section shall be implemented in a manner consistent with applicable federal and state statutes, regulations, and requirements for the establishment of best available control technology and lowest achievable emission rate requirements."

[19] This is a point on which we respectfully part company with the federal district court in *National Paint Association II*. That court dismissed out of hand any light that section 40723 might shed on the phrase "best available" because the statute was not directed at "best available *retrofit* control technology," only "best available control technology." (See *National Paint Association II, supra*, 485 F.Supp.2d at p. 1160, fn. 21.)

reasonable efforts, to the extent feasible within existing budget constraints, to make specific reference to the *direct costs* expected to be incurred by regulated parties, including businesses and individuals." (Italics added.) Cost effectiveness is a factor which necessarily demands the hard data ("direct costs") associated with existing technology. *Conceivable* technology that is only "likely" to meet a regulatory requirement given a hypothesized trend line is generally not amenable to clear-eyed cost accounting.

Third, section 40922 similarly follows section 40703 in mandating consideration of cost effectiveness, again suggesting that whatever "best available" technology that the agency may be considering requiring actually be available, and therefore amenable to cost calculation.[20]

Next, section 40916, though it ostensibly governs the powers of the state air resources board, addresses the problem of volatile organic compounds in paints in terms of state of the art, implying a regulatory regime aimed at the possible, not merely the conceivable. Subdivision (d) of the statute provides power to the state air resources board to "recommend a suggested control measure for adoption by a district to meet the requirements of the district's plan adopted pursuant to this chapter for any architectural paint or coating, if the state board determines all of the following: [¶] (A) The control measure will achieve a feasible reduction in volatile organic compounds emitted by the architectural paint or coating. For purposes of this paragraph, 'feasible reduction in volatile organic compounds emitted' means an emission limitation that is *achievable, taking into account environmental, energy, and economic impacts.* [¶] (B) *Adequate data exist to establish that the control measure is necessary to attain state and federal*

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[20] The statute provides in full:

"(a) Each plan prepared pursuant to this chapter shall include an assessment of the cost effectiveness of available and proposed control measures and shall contain a list which ranks the control measures from the least cost-effective to the most cost-effective.

"(b) In developing an adoption and implementation schedule for a specific control measure, the district shall consider the relative cost effectiveness of the measure, as determined under subdivision (a), as well as other factors including, but not limited to, technological feasibility, total emission reduction potential, the rate of reduction, public acceptability, and enforceability."

ambient air quality standards. [¶] (C) The control measure is commercially and *technologically feasible and necessary*." (Italics added.)[21] It is hard to have "adequate data" and gauge "environmental, energy, and economic impacts" when technology is still on the drawing board.

Finally, section 40440.11, which governs the situation where the district proposes best available control technology that is stricter than *federal* law requires, restricts the district's options to equipment that is "existing in that source category or a similar source category." Again, it would be highly anomalous for the Legislature to give the district authority to, in effect, order technology by decree in one statute, when it was confining the district's options to "equipment *existing* in that source category" (italics added) in another statute.[22]

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[21] While subdivision (c)(2) provides that "(2) Nothing in this subdivision shall limit or affect the ability of a district to adopt or enforce rules related to architectural paint or coatings," that doesn't mean that the statute is not available to shed light on the existing scope of a district's authority as delineated elsewhere. Subdivision (c)(2) in fact then goes on to say that "Every rule adopted by a district regarding architectural paint or coatings *shall be adopted by the governing board of the district in accordance with existing law*, and shall include at least one public workshop." (Italics added.)

[22] Here is the entirety of section 40440.11:

"(a) In establishing the best available control technology that is more stringent than the lowest achievable emission rate pursuant to federal law for a proposed new or modified source, the south coast district shall consider only control options or emission limits to be applied to the basic production or process equipment existing in that source category or a similar source category.

"(b) In establishing the best available control technology for a source category or determining the best available control technology for a particular new or modified source, when a particular control alternative for one pollutant will increase emissions of one or more other pollutants, the south coast district's cost-effectiveness calculation for that particular control alternative shall include the cost of eliminating or reducing the increases in emissions of the other pollutants as required by the south coast district.

"(c) Prior to revising the best available control technology guideline for a source category to establish an emission limit that is more stringent than the existing best available control technology guideline for that source category, the south coast district shall do all of the following:

"(1) Identify one or more potential control alternatives that may constitute the best available control technology, as defined in Section 40405.

"(2) Determine that the proposed emission limitation has been met by production equipment, control equipment, or a process that is commercially available for sale, and has achieved the best available control technology in practice on a comparable commercial operation for at least one year, or a period longer than one year if a longer period is reasonably necessary to demonstrate the operating and maintenance reliability, and costs, for an operating cycle of the production or control equipment or process.

"(3) Review the information developed to assess the cost-effectiveness of each potential control alternative. For purposes of this paragraph, 'cost-effectiveness' means the annual cost, in dollars, of the control alternative, divided by the annual emission reduction potential, in tons, of the control alternative.

"(4) Calculate the incremental cost-effectiveness for each potential control option. To determine the incremental cost-effectiveness under this paragraph, the district shall calculate the difference in the annual dollar costs, divided by the difference in the annual emission reduction between each progressively more stringent control alternative, as

4. The Escape Valves

An important part of the rationale of *National Paint Association II*, *Western Petroleum*, and the statement of decision by the trial judge here is the existence of escape valves. The main escape valves are (1) averaging, and (2) the possibility of individual variances under section 42365. The latter is a one-sentence statute that provides for individual relief: "Any person who manufactures a product may petition the hearing board for a product variance from a rule or regulation of the district pursuant to this article." (The other ones are extra time and the right to request a technology review.)

Because we have concluded that the district has authority to require state of the art technology (here, in paints and coatings), and because in most of the regulated categories compliant coatings exist -- meaning that the district's rule certainly does not exceed the state of the art as to those categories, we do not ground our upholding of the district's rule on the fact of these escape valves.

The significance of our refusal to ground the upholding of the rule on excape valves is that we must reject the paint association's argument about the hardship the rule has on small niche manufacturers. According the paint association, the fact of escape valves does nothing to help such manufacturers, because they lack the proprietary technology to duplicate the compliant coatings (to say nothing of their inability to

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compared either to the next less expensive control alternative, or to the current best available control technology, whichever is applicable.

"(5) Place the best available control technology revision for a source category proposed under this subdivision on the calendar of a regular meeting agenda of the south coast district board, for its acceptance or further action, as the board determines.

"(d) If the proposed control option is more stringent than the lowest achievable emission rate for a source category pursuant to federal law, the south coast district shall not establish an emission limit for best available control technology that is conditioned on the use of a particular control option unless the incremental cost-effectiveness value of that option is less than the district's established incremental cost-effectiveness value for each pollutant. Notwithstanding any other provision of law, the south coast district shall have the discretion to revise incremental cost-effectiveness value for each pollutant, provided it holds a public hearing pursuant to Section 40440.10 prior to revising the value.

"(e) After the south coast district determines what is the best available control technology for a source, it shall not change that determination for that application for a period of at least one year from the date that an application for authority to construct was determined to be complete by the district. For major capital projects in excess of ten million dollars ($10,000,000), after the applicant has met and conferred with the south coast district in a preapplication meeting, the south coast district executive officer may approve existing best available control technology for the project, for a longer time period as long as the final design is consistent with the initial, preliminary project design presented in the preapplication meeting."

duplicate such coatings economically), and their market is too small to take advantage of averaging.

The hardship to small manufacturers, however, does not show that the 2002 rule exceeded the scope of the district's statutory *authority*. The district's scope of authority is framed in terms of limiting pollution by *source*, not manufacturer. Averaging is simply a way for a given manufacturer to produce some *non*compliant coatings and still remain in business.[23] Variances, by contrast, do not go to the scope of the authority to make a rule, they go to whether that rule should be applied in a given instance. The upshot is: If niche manufacturers cannot take advantage of averaging, they must seek variances. The district's rule is still within its authority.

By the same token, however, the existence of the possibility of averaging or of a variance cannot create statutory authority that the Legislature never gave the district in the first place. Sections 40440, 40405, and 40406 do not say to the district: "Never mind if you require emission limits that are beyond state of the art and therefore outside of your authority to make a rule; feel free to do that because the possibility of averaging, or variances (or extra time or a staff technology review), allows you to command anything you want." No. The statutes are framed as a grant of authority, and there is an independent possibility for variances if the proper exercise of that authority is too onerous as regards a given manufacturer. Put another way: The possibility of a legitimate exception to a rule that strays beyond an agency's authority does not place the rule within that authority in the first place.

5. Floors versus Ceilings

From what we have just seen in the statutory language, the Legislature evidently did not contemplate regional air pollution rules that required technology

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[23] Another way to do that is by section 40440.1, which authorizes the district to institute a cap and trade program. Subdivision (a) of the section 40440.1 provides: "A market-based incentive program adopted pursuant to Section 39616 in the south coast district shall achieve emission reductions across a spectrum of sources by allowing for trading of emissions trading units for quantifiable reductions in emissions from a significant number of different sources, including mobile, area, and stationary, which are within the district's jurisdiction or which the district is authorized to include in a market-based emissions trading program."

beyond state of the art. The district counters with the assertion that these "best available technology" statutes do not, as a matter of fact, *limit* the district's authority to make rules, they simply require the district to make rules that require *at least* state of the art, but the district still has authority to make rules that go beyond state of the art.

There are two answers to this point. First, there is nothing in the text or legislative history[24] of the statutes that sets up any sort of dichotomy on the lines of: "Make rules requiring the best technology available, and feel free to also make rules requiring technology that is not available as well." That is, there is a paucity of statutory language for the idea that "best available technology" is merely a "floor," not a "ceiling."

Second, the statutory grant of authority to the district is one that specifically requires the district to remain within the bounds of the established statutes. Section 40440 subdivision (a) provides that "The south coast district board shall adopt rules and regulations that carry out the plan and are *not in conflict with state law* and federal laws and rules and regulations." (Italics added.) Section 40916, subdivision (d)(1)(C)(2) provides "Every rule adopted by a district regarding architectural paint or coatings shall be adopted by the governing board of the district in *accordance with existing law*, and shall include at least one public workshop." (Italics added.) Under the district's asserted scope of its authority, the words "best available" as used in sections 40440, 40405, and 40406 would be surplusage, with the Legislature having said, in effect: "You are to require the best available technology to reduce emissions, but don't worry about figuring out what the best available technology is, because you can always go beyond that."

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[24] We have granted the district's request to take judicial notice of certain parts of the legislative history of Senate Bill 151 in 1987. While those items (basically three Senate committee reports) *do* indicate that the purpose of the bill was to "encourage more aggressive improvements in air quality," there is nothing in the reports' discussion of best available control technology or best available control retrofit technology to indicate that Legislature intended to give the district the authority to require what does not yet exist. In fact, like the legislation itself, the committee reports still use the key words "available" and "achievable" and give no indication that the district could impose rules requiring projected technology.

IV. CONCLUSION

The judgment denying the requested writ of mandate sought by the paint association is affirmed, except in the following respects:

As to, and only as to, quick-dry enamels and rust preventative categories of coatings, the matter is remanded to the trial court for a hearing to determine whether there is any current (2009) state of the art technology available to comply with the district's 2006 limits on volatile organic compounds. If the trial court determines that there is not, the trial court shall grant the relief requested by the paint association as to those two categories of coatings only. If there is, the trial court shall deny the relief requested.

In the interest of justice each side shall bear its own costs on appeal.

SILLS, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.