IN THE SUPREME COURT OF CALIFORNIA
Case No. S177823

AMERICAN COATINGS ASSOCIATION,
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'S OPENING BRIEF ON THE MERITS

Matthew D. Zinn (SBN 214587)
Heather M. Minner (SBN 252676)
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
Phone (415) 552-7272
Fax (415) 552-5816

Daniel P. Selmi (SBN 67481)
919 Albany Street
Los Angeles, CA 90015
Phone (213) 736-1098
Fax (949) 675-9861

Attorneys for Defendant and Respondent South Coast Air Quality Management District

Kurt R. Wiese (SBN 127251)
Barbara B. Baird (SBN 81507)
William B. Wong (SBN 120354)
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765-0940
Phone (909) 396-3535
Fax (909) 396-2961

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ISSUES PRESENTED

1. [As stated in the Petition 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:

(a) 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

(b) 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?

2. [As stated in the Answer to Petition for Review] Where an emission limitation promulgated by an air pollution control district applies to a category of products, and where the record demonstrates that the limit is not achievable with available technology for all products within the category, has the district complied with the requirement to utilize BARCT?

INTRODUCTION

The South Coast Air Basin is home to approximately 17 million people in parts of four southern California counties. The Basin infamously experiences some of the worst air pollution in the nation, particularly ozone pollution, commonly known as smog. Ozone poses a severe risk to public health.

The federal Clean Air Act and California law mandate extensive regulatory efforts to improve air quality in the Basin. Both sets of laws establish "ambient air quality standards," which are maximum pollution levels designed to protect public health. (See 42 U.S.C. § 7510; Health & Saf. Code § 40001(a).) They also require Defendant and Respondent South Coast Air Quality Management District ("the District") to enact regulatory controls that will bring the Basin into attainment of those standards.

It is a daunting task. Although the District has made great progress in improving air quality in the Basin, some of the federal and state standards remain a distant goal, and the additional effort needed to attain them is immense. For example, to attain the federal air quality standard for ozone, the District must reduce emissions by 281 tons per day *after* implementing all

control technologies and techniques that have been identified as feasible.[1] Thus, achieving healthful air in the Basin will require both entirely new pollution control technologies and great improvements to existing technologies.

This case concerns the December 2002 amendments to District Rule 1113, which regulates emissions of volatile organic compounds ("VOCs"), a precursor of ozone, from paints and other architectural coatings ("Rule"). Plaintiff and Appellant American Coatings Association (formerly the National Paint & Coatings Association) sued to overturn the Rule, claiming it exceeds the bounds of the District's regulatory authority.

The Association's argument centers on one of the numerous statutes the Legislature has enacted to enable the District to meet the Basin's air pollution challenge, Health and Safety Code section 40440. It directs the District to "require ... the use of best available retrofit control technology for existing [air pollution]

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[1] Air Resources Board, *Proposed State Strategy for California's 2007 State Implementation Plan* (April 26, 2007), p. 66, *available at* <http://www.arb.ca.gov/planning/sip/2007sip/2007sip.htm#April26>.

sources."[2] Best available retrofit control technology, or "BARCT," is defined in section 40406 as "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." The Association contends that the Rule does not qualify as a BARCT standard because the administrative record allegedly does not show it to be "achievable."

After the trial court upheld the Rule, the court of appeal agreed with the Association as to part of the Rule, but on different grounds than those raised by the Association. It held that the District may require existing pollution sources to comply only with emission standards that are achievable with existing or "ready to be assembled" pollution control technology. (Slip Op. at 21.) On that basis, it invalidated the provisions of the Rule governing two regulated categories of coatings.

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[2] All unattributed statutory references are to the Health and Safety Code.

The court's interpretation flatly contradicts the BARCT statute. The word "achievable" in the BARCT definition implies no temporal limitation: an action may be achievable immediately, in three months, or in three years. Although an emission standard may not be currently achievable, if the evidence indicates that sources can achieve it in the future, it is nonetheless "achievable." Under the court of appeal's opinion, however, the District cannot require the implementation of technology unless it can be achieved at or very near the time of the regulation's adoption.

The court further limited the District's authority by finding that the BARCT statute impliedly establishes the most stringent standard that the District can adopt. (Slip Op. at 29.) Even though federal and state law mandates that the District adopt whatever measures are needed to attain the air quality standards, the court interpreted the BARCT statute to prevent the District from taking that necessary action.

Once again, the court of appeal was incorrect. The text of the BARCT provisions, related air pollution statutes, and their legislative history demonstrate that the Legislature did not adopt the BARCT provisions to limit the stringency of the District's

regulations, but intended instead to prompt greater District efforts to control air pollution. Indeed, in a related statute, the Legislature emphasized that it intended the BARCT standard to "establish *minimum requirements* ... for air quality management districts," and that it was not "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 [emphasis added].)

If adopted by this Court, the court of appeal's holdings would seriously impair the District's ability to protect public health and would generate results squarely inconsistent with the Legislature's purpose.

First, the BARCT statutes apply only to the District and other air districts with the most polluted air. Thus, the court's holding would leave those districts that face the greatest air quality problems with *less* regulatory authority than those with cleaner air.

Second, by allowing only rules that can be achieved with existing technology, the court of appeal effectively allowed industry to establish its own regulatory standards. If efforts to

improve pollution control technology lagged in an individual industry, the District would be powerless to require more stringent controls.

Finally, the court's ruling creates a conflict with the state's obligations under the federal Clean Air Act to attain the air quality standards. (See 42 U.S.C. § 7502(c).) As the United States Supreme Court has recognized, fulfilling these obligations may require states to "force" the development of new pollution control technology. (*Union Electric Co. v. EPA* (1976) 427 U.S. 246, 258.) By relegating the District to adopting standards achievable with existing technology, the court's ruling substantially undercuts the District's ability to comply with federal law.

Because BARCT is not the most stringent standard the District may adopt, the court of appeal erred in requiring the District to show that the challenged rule is achievable. But even if BARCT is a maximum standard, when "achievability" is properly construed to allow consideration of evidence of future achievability, the challenged Rule passes muster. The District went to great lengths to ensure that coatings manufacturers could achieve the Rule's limits on VOCs by the compliance

deadline. It relied on product data sheets developed by manufacturers—the Association's own members—for their products; surveys of those manufacturers; laboratory and field studies testing the performance of low-emission coatings; and surveys of end users. It also built flexibility into the Rule to ease compliance. This evidence supports the Rule for *all* of the regulated categories of coatings, including the two categories invalidated by the court of appeal.

Finally, in its Answer to the Petition for Review, the Association resurrected another argument that the court of appeal, and two other courts, properly rejected. The Association would force the District to prove that a coating that complies with the Rule's VOC limits is available for every coating use in the Basin.

That argument finds no support in the definition of BARCT, which contemplates a standard established for a "class or category of source." An individual coating is not a "class or category of source." Furthermore, as even the court of appeal recognized, the Association's reading of achievability would stymie the District's regulatory efforts by forcing it to rebut industry's arguments of infeasibility for every idiosyncratic

coating use in the Basin. The Legislature could not have intended to so paralyze the District when it adopted the BARCT requirement.

The District's statutory duty to bring the Basin into compliance with state and federal air quality standards presents an imposing challenge. If this Court upholds the court of appeal's decision, it will erect an impassable roadblock in the District's way. Accordingly, the District respectfully requests that this Court reverse the court of appeal's decision and remand with direction to enter judgment for the District.

STATUTORY BACKGROUND

A. The Federal and State Ambient Air Quality Standards

The statutory provisions at issue in this appeal implement the dictates of federal and state law mandating the attainment of air quality standards designed to protect public health. The federal Clean Air Act (42 U.S.C. § 7401 *et seq.*) directs the Environmental Protection Agency ("EPA") to promulgate ambient air quality standards for air pollutants that may "endanger public health or welfare." (*Id.* § 7408(a); *id.* § 7409(a), (b).) The standards must be set at levels "requisite to protect the public

health" with an "adequate margin of safety." (*Id.* § 7409(b)(1).) Each state must then adopt an implementation plan with enforceable emissions limitations and control measures (i.e., proposals for regulation) that will maintain the federal standards in each of the state's air basins. (*Id.* § 7410(a)(2)(A).) If pollution within an air basin already exceeds the federal standards, the state plan must include additional control measures to attain those standards. (*Id.* §§ 7410(a)(2)(I), 7502.)

EPA must approve a state's implementation plan. (*Id.* § 7410(k).) If EPA determines that the state plan is inadequate to meet the federal air quality standards, or that the requirements of an approved plan are not being met, EPA may adopt a federal implementation plan instead and impose sanctions on the state. (*Id.* §§ 7410(m), 7509.)

Under California law, the State Air Resources Board ("State Board") also establishes ambient air quality standards to protect public health for each air basin in the state. (§ 39606(a)(2).) The District must adopt an air quality management plan to achieve and maintain the state and federal air quality standards. (§§ 40460, 40911.) The plan constitutes the Basin's portion of the state implementation plan under the

federal Clean Air Act. (§ 40460(d).) The plan must include control measures that, if fully implemented, would cause the Basin to attain the state and federal air quality standards. (§§ 40460(a), 40913(a)(6).)

B. The Evolution of Air Pollution Control in California to Attain the Federal- and State-Mandated Air Quality Standards

As it began in the 1930s and 1940s, air pollution control in California was purely local, an application of local governments' plenary police power.[3] However, the experience of the County of Los Angeles soon demonstrated that municipal regulation was inadequate to the task.[4] In response, the Legislature authorized establishment of county and regional air pollution control districts to regulate activities in both the cities and counties.[5]

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[3] See Krier & Ursin, *Pollution and Policy* (1977) pp. 54-55; see also *Huron Portland Cement Co. v. City of Detroit, Mich.* (1960) 362 U.S. 440, 442 [police power includes regulation of air pollution].

[4] See Krier & Ursin, *supra,* pp. 54-55; Simmons & Cutting, *A Many Layered Wonder: Nonvehicular Air Pollution Control In California* (1974) 26 Hastings L.J. 109, 115; see also Stats. 1947, ch. 632, § 1, p. 1640 [former § 24199(b)].

[5] Stats. 1947, ch. 632, § 1; see *Western Oil & Gas Assn. v. Air Resources Bd.* (1984) 37 Cal.3d 502, 520-21 ["*Western Oil v. State*

The Legislature recognized that "[l]ocal and regional authorities have the *primary responsibility* for control of air pollution from all sources other than vehicular sources."[6] Because air districts lack inherent police power, the Legislature delegated them broad power—and a duty—to adopt regulations to control pollution. The original 1947 legislation provided that the districts "may make and enforce all needful orders, rules, and regulations necessary or proper to accomplish the purposes of this chapter."[7] Reflecting the enactment of the state and federal air quality standards, the successor to the 1947 legislation provided that "the districts shall adopt and enforce rules and

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Bd."]; Krier & Ursin, *supra*, pp. 55, 60-61; Simmons & Cutting, *supra*, p. 115.

[6] § 39002 [emphasis added] [enacted by Stats. 1975, ch. 957, § 12, p. 2142]; see also § 40000 [enacted by Stats. 1975, ch. 957, § 12, p. 2153] [same]; *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 418 ["*Western Oil v. Monterey Bay Dist.*"] [emphasizing "[t]he Districts' primary authority"].

[7] Stats. 1947, ch. 632, § 1, p. 1645 [former § 24260].

regulations to achieve and maintain the state and federal ambient air quality standards."[8]

Consistent with this local primacy, the Legislature provided that "local and regional authorities may establish stricter standards than those set by law or by the state board for nonvehicular sources."[9] It thus gave the districts "wide latitude to conduct their affairs as they see fit, so long as they maintain standards at least as stringent as those adopted by the State."[10] And it allowed cities and counties to adopt pollution control regulations even more stringent than those of the relevant district.[11]

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[8] § 40001(a) [enacted by Stats. 1975, ch. 957, § 12, p. 2153]; see also § 40702 [enacted by Stats. 1975, ch. 957, § 12, p. 2166]; *Western Oil v State Bd., supra,* 37 Cal.3d at 509 [districts have duty to "promulgate and implement rules and regulations reasonably assuring achievement and maintenance of the state [ambient air quality] standards"].

[9] § 39002 [enacted by Stats. 1975, ch. 957, § 12, p. 2142]; see also § 41508 [enacted by Stats. 1975, ch. 957, § 12, p. 2173] [same].

[10] *Beentjes v. Placer County Air Pollution Control Dist.* (9th Cir. 2005) 397 F.3d 775, 783.

[11] § 40449(a) [enacted by Stats. 1976, ch. 324, § 5, p. 898]; see also Stats. 1947, ch. 632, § 1, p. 1645 [former § 24247] [disclaiming "inten[t] to occupy the field"].

By 1976, however, the Legislature recognized that additional effort and a new regional district were necessary to meet the federal and state air quality standards in Southern California. That year the Legislature adopted the Lewis Air Quality Management Act to create the South Coast Air Quality Management District.[12] It found that the Basin "is acknowledged to have the most critical air pollution problem in the nation."[13] It further found that, to attain the state and federal air quality standards, "local governments in the South Coast 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."[14] In section 40440(a), the Act provided, "Not later than December 31, 1977, the south coast district board shall adopt rules and regulations that are not in conflict with federal and state laws

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[12] Stats. 1976, ch. 324 [codified at § 40400 *et seq.*]; see also Krier & Ursin, *supra*, at 254 & fn. a. The statute was later renamed the "Lewis-Presley Air Quality Management Act" ("Lewis-Presley Act" or the "Act"). Stats. 1988, ch. 1568, § 8.

[13] Stats. 1976, ch. 324, § 5, p. 893 [codified at § 40402(b)].

[14] Stats. 1976, ch. 324, § 5, p. 894 [codified at § 40402(e)].

and rules and regulations and reflect the best available technological and administrative practices."[15]

To further strengthen the District's authority and to press the District to do more with its existing authority, the Legislature amended the Lewis-Presley Act in 1987.[16] In doing so, it enacted the language of section 40440 at issue in this action. The Legislature amended section 40440(a) to read, "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."[17]

The amendments also enumerated several tasks that the District's regulations *must* accomplish.[18] First among these is a mandate that the district "[r]equire the use of best available control technology" ("BACT") for new pollution sources and

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[15] Stats. 1976, ch. 324, § 5, p. 897.

[16] Stats. 1987, ch. 1301 ["1987 Amendments"].

[17] § 40440(a); 1987 Amendments, § 9, p. 4653.

[18] § 40440(b) ["The rules and regulations adopted pursuant to subdivision (a) shall do all of the following:"]; 1987 Amendments, § 9, p. 4653.

BARCT for existing sources.[19] The 1987 legislation also defined both BACT and BARCT.[20] The meaning of BARCT is at the center of this case.

STATEMENT OF THE CASE

A. Ozone Pollution in the South Coast Air Basin and Coatings' Contribution Thereto

The Basin is well-known for its ground-level ozone. Ozone forms when VOCs react with oxides of nitrogen in the presence of the Basin's abundant sunlight. (Administrative Record ("AR") 44:12542.) The Basin has historically suffered and continues to suffer the worst ozone pollution in the United States. (EPA, *Latest Findings on National Air Quality: Status and Trends Through 2006* at 8-10 (2008), *available at* <http://www.epa.gov/airtrends/2007/>.) As a result, the Basin is in "extreme" nonattainment with the state air quality standards for ozone and in "severe" nonattainment with the 1997 federal ozone standard. (AR 64:18606; 69 Fed. Reg. 23,858, 23,881-90 (April 30, 2004).)

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[19] § 40440(b)(1); 1987 Amendments, § 9, p. 4653.

[20] §§ 40405, 40406; 1987 Amendments, §§ 1, 1.5, p. 4648-49.

Ozone irritates the respiratory system, aggravates asthma, and leads to irreversible reductions in lung function. (See 69 Fed. Reg. 23,858, 23,859 (April 30, 2004); see also *Allied Local & Regional Manufacturers Caucus v. EPA* (D.C. Cir. 2000) 215 F.3d 61, 66, fn. 1; AR 65:18679.) Its respiratory effects are particularly severe in children and the elderly. (See 69 Fed. Reg. at 23,859; see also *Dunn-Edwards Corp. v. South Coast Air Quality Management Dist.* (1993) 19 Cal.App.4th 519, 522, fn. 2 [*"Dunn-Edwards I"*].) A recent study estimated that the economic cost of these health impacts exceeds $480 million annually in the Basin alone. (Hall et al., *The Benefits of Meeting Federal Clean Air Standards in the South Coast and San Joaquin Valley Air Basins* at 80 (Nov. 2008), *available at* <http://business.fullerton.edu/centers/iees/reports/Benefits%20of%20Meeting%20Clean%20Air%20Standards.pdf>.)

VOCs come from many sources. However, "emissions from architectural coatings are greater than the emissions from the entire refinery community, the furniture manufacturing industry, printing industry[,] and aerospace industry combined, multiplied by a factor of two." (AR 44:12438.) Coatings are the single largest source of VOCs that the District can regulate. (*Ibid.*)

B. The District's Regulation of Coatings

1. The History of Rule 1113

In 1977, the District first enacted Rule 1113 to limit concentrations of VOCs in architectural coatings. (AR 44:12484-85.) Rule 1113 establishes VOC limits for coatings in 42 coating categories and prohibits the manufacture and use of noncompliant coatings. (AR 44:12515-16.) The District has amended Rule 1113 on 25 occasions since its adoption, most recently in 2007. (See Rule 1113 (2007), p. 1, *available at* <http://www.aqmd.gov/rules/reg/reg11/r1113.pdf>.)

2. The District's Adoption of the Challenged Amendments

The District's 1997 air quality management plan was in effect when the District adopted the amendments to Rule 1113 at issue here. (AR 44:12426-28.) The 1997 plan includes a control measure, known as "CTS 07," that calls for reductions in VOC emissions from coatings of 59.5 tons per day by 2010. (AR 44:12487.) After the Plan's adoption, both the State Board and EPA approved it. (See 65 Fed. Reg. 18,903 (April 10, 2000).)

Upon EPA's approval, the Clean Air Act compelled the District to implement the control measure. (See Appellant's

Appendix ("AA") 1:101-02; § 40440(a) [requiring the District to "adopt rules and regulations that carry out the plan"].) The District adopted the Rule to partially implement that EPA-approved coatings control measure. (AR 44:12487.) The District was also under a court order mandating that it implement the control measure. (AR 64:18246.)

a. The District's Investigation of the Availability of Low-Emission Coatings

Since the original enactment of Rule 1113, the District has continuously evaluated the evolving state of the art in low-emission coatings. (AR 44:12484-85.) When the District adopted the 2002 amendments to Rule 1113, ample and growing evidence indicated that the limits imposed in the amendments were achievable and had already been achieved in practice. The District relied on product data sheets for low-emission coatings prepared by coatings manufacturers themselves. These showed that compliant coatings were available in each of the regulated categories and exhibited performance characteristics comparable to coatings with higher VOC contents. (AR 44:12717-24; 45:12725-42, 59:17018-61:17619.) The District also relied on the results of several studies evaluating the performance of low-

emission coatings performed by outside consultants. (AR 1:164; 3:823-31; 44:12560-62.) The District involved the Association and its members in the development of several of these tests. (AR 3:824-31; 44:12561.) Finally, District staff found evidence of significant sales of low-emission coatings in all of the regulated categories. (AR 1:178-79, 183-84, 191, 195, 206, 210; 44:12562-90, 57:16289-326.)

b. Adoption of the Rule

In 1999, the District adopted amendments to Rule 1113 that later formed the basis for the Rule challenged here. (AR 1:241-70.) They established interim VOC limits for 11 categories of coatings, effective in July 2002, and final limits, effective in July 2006. (AR 1:252-53.) The amendments were the culmination of an extensive public process that gathered industry suggestions from eight working group meetings and three public workshops. (AR 1:123.) The District also circulated and received public comment on an environmental assessment for the amendments. (AR 1:161, 1:167, 2:285, 3:562-681.)

After the adoption of the 1999 amendments, the court of appeal invalidated them because of a procedural error. (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.) Thereafter, the District undertook a new rulemaking proceeding during which it held additional public meetings, responded to industry comments on another environmental assessment, and considered new evidence of available compliant coatings. (AR 44:12425-30, 12490, 12505-33, 46:13263-13320.)

In December 2002, it adopted the Rule challenged here. For each coating category, the Rule establishes an interim VOC 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.) The Rule also incorporates several measures designed to give manufacturers and users flexibility in achieving the Rule's VOC limits.

c. Current Status of the Challenged Amendments

The Association never sought a provisional stay or injunction of the Rule. Accordingly, the interim limits were effective from January 1, 2003 to July 1, 2006, and the final limits have been effective since then. During the four year period since 2006, a variance procedure has been available for

manufacturers and users, but none have ever sought such a variance.

C. The Proceedings in the Trial Court

In January 2003, the Association filed suit. It asserted, among other claims, that section 40440(b)(1) limited the District to adopting BARCT standards, and that because the Rule's emission limits allegedly were not "achievable," they were not BARCT standards.

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. (AA 3:589.) At the Phase I trial, the court held that the Rule was within the District's authority. (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 in Phase III.

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. It concluded that the administrative record includes ample evidence that the Rule is in fact achievable. (AA 3:584-88.)

The court entered judgment for the District (AA 3:589-90), and the Association appealed.

D. The Court of Appeal's Decision

The court of appeal filed its opinion on September 29, 2009, affirming in part, reversing in part, and remanding. (*Nat. Paint & Coatings Assn. v. South Coast Air Quality Management Dist.* (2009) No. G040122, review granted January 21, 2010, S177823.) The court concluded that an emission standard must be immediately "achievable" to qualify as a BARCT standard. It 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.) It explained that emission limits either must have already been achieved or must be achievable "almost immediately" (*ibid.*); the District could not rely on evidence that a standard is achievable in the future. (*Id.* at 22.) The parties, however, had never argued this issue, because the Association had repeatedly conceded that the District need only show that its rules are achievable by their deadlines for compliance. (See *infra* Section I.A.3.)

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 concession that "some compliant coatings are available in each [coating] category" (Appellant's Opening Brief ["AOB Below"] at 31), the court found no existing compliant coatings in either category. It also found no other evidence that the Rule's limits in those categories are achievable. (Slip Op. at 3-4.)

Finally, the court held that BARCT is the most stringent regulatory standard that the District may adopt. The court focused on statutory provisions that neither the District nor the Association had argued and that the court acknowledged were not directly applicable. (Slip Op. at 23-26.) According to the holding, because the District may not adopt standards more stringent than BARCT, the District must show that its emission standards for existing sources are achievable. (*Id.* at 29.)

The court upheld the Rule, except for the rust preventative and quick-dry enamel categories. (Slip Op. at 30.) 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 VOCs" for those two categories. (*Ibid.*)

The District filed its Petition for Review on November 9, 2009, and this Court granted review on January 21, 2010.

STANDARD OF REVIEW

The District's adoption of the Rule was a quasi-legislative action. (See *Sherwin-Williams Co. v. South Coast Air Quality Management Dist.* (2001) 86 Cal.App.4th 1258, 1267.) Such action brings to the court a "strong presumption of validity." (*Western States Petroleum Assn. v. State Dept. of Health Services* (2002) 99 Cal.App.4th 999, 1007.) A court's review "is limited to determining whether the decision of the agency was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair." (*Western States Petroleum Assn. v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012, 1018 ["*Western States v. South Coast*"].)

Courts give an agency particularly wide latitude where, as here, the agency has applied technical expertise to a complex social problem. "In technical matters requiring the assistance of experts and the study of marshalled scientific data as reflected herein, courts will permit administrative agencies to work out their problems with as little judicial interference as possible." (*Stauffer Chemical Co. v. Air Resources Bd.* (1982) 128

Cal.App.3d 789, 794-95.) "Courts may not substitute their judgment for that of the experts as to the import of the available information. The choice between conflicting expert analyses is for the [agency], not the courts." (*Western Oil v. State Board, supra,* 37 Cal.3d at 515.) This "limited review" is based on "deference to the separation of powers ... and to the presumed expertise of the agency within the scope of its authority." (*Id.* at 509.)

ARGUMENT

I. The District May Anticipate and Encourage Innovation in Pollution Control Technology When It Regulates Existing Pollution Sources.

The court of appeal concluded that sections 40406 and 40440(b)(1) prohibit the District from adopting regulations that cannot be immediately achieved with existing technology. To the contrary, both the ordinary meaning of the word "achievable" in the BARCT definition found in section 40406 and its statutory context indicate that an emission reduction is "achievable" if it is "capable of being achieved" by the time the source must achieve it.

In any event, the Lewis-Presley Act allows the District to adopt standards more stringent than BARCT. The text of the statute and the legislative history make clear that the

Legislature sought to require the District to impose standards that are, at a minimum, at least as stringent as BARCT, not to limit the District's broad regulatory authority.

A. An Emission Standard Need Not Be Achievable with Currently Existing Pollution Control Technology.

The court of appeal narrowly interpreted the word "achievable" in the BARCT definition 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 court therefore required the District to show that existing sources can achieve an emission limit at the time the District *adopts* it, even if the rule does not require compliance for years to come.

The court misconstrued the word "achievable." That word implies no temporal limitation. A goal can be achievable immediately, a month from now, or a year from now. Accordingly, if an air pollution standard can be achieved by the deadline for compliance, that standard is "achievable."

1. The Plain Meaning of "Achievable" Does Not Demand that Emission Control Technology Be Presently Existing.

The court of appeal's interpretation damages the plain meaning of "achievable." The court began by citing a dictionary

definition of achievable as "capable of being achieved." (Slip Op. at 20 [quoting 1 *Oxford English Dictionary* (2d ed 1989), p. 102].) That definition is correct. (See also *Webster's Third New International Dictionary* (2002), p. 16 ["capable of being achieved: attainable"]). But it does not support the court's interpretation.

The court focused on the single word "achieved" in the dictionary definition, which it found to mean "completed; accomplished; attained, won." (Slip Op. at 20.) 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.) Then, without further analysis, the court abruptly 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" (*ibid.*).

The court's focus on the single word "achieved" was clearly erroneous. It ignores the words "capable of" in the definition of "achievable." Those words do not suggest completed acts; rather

they plainly encompass the *potential* to complete acts. In short, the court grafted onto the word "achievable" a nonexistent temporal limitation requiring that the technology to achieve a standard must exist either presently or "almost immediately."

Depending on context, an emission limit might be "capable of being achieved" today, next year, or five years from today. Use of "achievable" in the present tense supports all of these meanings; one need not use the word in the future ("will be achievable") or future conditional tenses ("would be achievable") to refer to something achievable in the future. 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>.) He did not appear to believe that success would be achieved "immediately."

Moreover, the Legislature has demonstrated that when it wishes to refer to a standard that has already been achieved, it uses different language. Section 40723, which applies to standards for new pollution sources, requires that, on request,

"the district shall review whether the applicable requirements *have been achieved.*" (§ 40723(b) [emphasis added]; see also § 40405(a)(2) ["that is achieved in practice"].) The Legislature's use of these phrases for new source standards strongly suggests that its exclusion of similar language for existing sources was intentional. (See *Parsley v. Superior Court* (1973) 9 Cal.3d 934, 939.)

The court of appeal also erred by emphasizing the word "available" in "best *available* retrofit control technology," finding that it requires emission limits to be currently or immediately achievable. (Slip Op. at 1, fn. 1, 3, 15-16, 20-21, 23.) Because BARCT is a statutorily defined phrase, the court should have construed the phrase as the Legislature defined it. (See *Rideaux v. Torgrimson* (1939) 12 Cal.2d 633, 636 ["When a legislative body enacts a statute which prescribes the meaning to be given to particular terms used by it, that meaning is binding upon the courts."]; *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543, 559 ["Internal definitions are controlling."].)

That the Legislature explicitly defined "BARCT" demonstrates that it intended a meaning other than the ordinary meaning of a single word in that phrase. Nothing in that

definition—"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"—suggests that the necessary pollution control technology must be currently "available." (§ 40406.)

2. If Supported by Substantial Evidence, the District May Conclude that a Regulation Is Achievable with Anticipated Technology.

An "achievable" regulatory standard must be one that is "capable of being achieved" when compliance is required. Where, as here, pollution sources have several years to reach compliance, the District may mandate a standard that, though not achievable immediately, is achievable by the compliance deadline.

To the extent the Legislature contemplated that the District would adopt only achievable rules (but see *infra* Section I.B), its purpose must have been to ensure that regulated entities can comply with them. It must also have intended, then, that such rules be achievable by the time the rules require a source to achieve them. Indeed, the court in *Sherwin-Williams, supra,* accepted this 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].)

Like most District rules, the Rule here did not require immediate compliance. (AR 44:12515-16; see also, e.g., *Western States v. South Coast, supra,* 136 Cal.App.4th at 1015 [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]; *Alliance of Small Emitters / Metal Industry v. South Coast Air Quality Management Dist.* (1997) 60 Cal.App.4th 55, 59 ["*Small Emitters*"] [emission cap would decline gradually over 10 years].)

This broader view of "achievable" also best comports with the legislative history of the BARCT provisions, sections 40440(b)(1) and 40406. In the 1987 amendments that added those sections, the Legislature acted against the backdrop of unrestricted grants of authority to districts and the plenary police power possessed by cities and counties. In other words, when the Legislature drafted the 1987 amendments, the District

already had broad authority to regulate nonvehicular pollution sources as necessary to achieve the air quality standards.

The Legislature clearly intended the 1987 amendments to push the District to use that authority more aggressively, not to constrain it. The legislation 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), p. 1.)[21] Witnesses emphasized that "while much progress in air quality has been achieved, much work remains to be done." (*Ibid.*) The 1987 legislation 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.

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[21] The court of appeal granted the District's request for judicial notice of several committee reports for the 1987 legislation. (See Slip Op. at 29, fn. 24.)

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

Given this clear legislative intent to *expand* the District's regulatory authority and encourage its more aggressive use, the BARCT provisions cannot be read to greatly *restrict* that authority. 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]; see also *Western Oil v. Monterey Bay Dist., supra,* 49 Cal.3d at 425 [" A court should not adopt a statutory construction that will lead to results contrary to the Legislature's apparent purpose."].)

Finally, the BARCT definition must be read expansively to effectuate the Lewis-Presley Act's remedial purpose. This Court has emphasized that "[t]he statutes that provide the districts with regulatory authority serve a public purpose of the highest order—protection of the public health." (*Western Oil v. Monterey*

Bay Dist., *supra*, 49 Cal.3d at 419.) Such "civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose." (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 313-15 [collecting cases]; accord *Smith v. Superior Court* (2006) 39 Cal.4th 77, 92 [quoting *Lungren*].) The court of appeal ignored that admonition and read BARCT to *constrain* the District's ability to protect public health.

Accordingly, if substantial evidence in the record supports the conclusion that a rule is achievable by the time the rule becomes effective, then it is "achievable" for purposes of BARCT.

3. The Association Has Repeatedly Conceded that "Achievable" Does Not Mean Immediately Achievable.

Even the Association conceded that a rule is "achievable" if it can be achieved by the deadline for compliance. It 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*." (AOB Below at 25 [emphasis added].) The Association has frequently repeated this concession. (See *id.* 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 ["the proposed limits are [not] technically feasible by the proposed deadlines on the basis of reasonably foreseeable coatings technology developments"]; *id.* at 23-24 ["BARCT Requires Emissions Reductions to be Achievable with Anticipated Technology Developments"]; Appellant's Reply Brief ("ARB Below") at 14 ["[W]e agree that BARCT is an authorization to adopt technology-forcing emissions reductions."]; Reporter's Transcript ("RT") 21-22 ["The Court: Not achievable today. [Association counsel]: Not achievable when they are to come into effect."], 42 [describing "technological and commercial feasibility" as "assuring that reformulation technologies will be available by the effective date"].)

The court of appeal ignored these concessions when it decided, sua sponte, that "achievable" means "immediately achievable."

4. The Court of Appeal's Interpretation of "Achievable" Would Give Broader Regulatory Authority to Jurisdictions with Cleaner Air.

The court of appeal's interpretation of "achievable" is wrong for another reason: it would tie the hands of districts with the most polluted air while leaving districts—and other local

governments—with cleaner air a free hand to require improvements in pollution control.

The Legislature has mandated BARCT standards only for districts in "serious," "severe," or "extreme" nonattainment of the state air quality standards. 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.)

Reading BARCT as limiting districts with impaired air quality to adopting only immediately achievable rules turns the statutory scheme on its head. Because districts with cleaner air have open-ended authority not subject to BARCT (see §§ 40001, 40702), they can adopt more aggressive air quality rules without regard to their achievability. And all 458 cities and 58 counties, regardless of their air quality, can adopt any standards they wish. (See §§ 40449(a), 41509; see also *supra* fn. 11.) By contrast, the District—with the most polluted air in the country—could only require sources to employ pollution controls that happen to be presently available. The Legislature could not have intended that illogical result.

5. The Court of Appeal's Interpretation of "Achievable" Would Allow Industry to Decide for Itself How Much Pollution to Emit.

There is yet another pernicious aspect of the court of appeal's conclusion that the District may only require immediately achievable emission reductions. If the District were limited to the status quo, it could require improved emission controls only if the regulated industry had voluntarily developed them. The District would thus be constrained by the voluntary pollution control decisions made by the very industry the District is regulating.

It would be naïve to expect industry to voluntarily develop controls at the advanced level needed to attain the air quality standards. In *Sherwin-Williams, supra,* the court declared that "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." (86 Cal.App.4th at 1280.) And the paint industry's litigiousness and recalcitrance proves the court's point. The industry has, at every turn, challenged efforts to require greater emission reductions from coatings. (*Id.* at 1263-64 ["[T]he paint industry has

extensively litigated attempts by the SCAQMD and other agencies to regulate harmful effects of paints on the environment . . . ."]; see also, e.g., *Nat. Paint & Coatings Assn. v. State* (1997) 58 Cal.App.4th 753; *Dunn-Edwards Corp. v. South Coast Air Quality Management Dist.* (1993) 19 Cal.App.4th 536; *Dunn-Edwards I, supra,* 19 Cal.App.4th 519; *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644; *Nat. Paint & Coatings Assn. v. South Coast Air Quality Management Dist.* (C.D.Cal. 2007) 485 F.Supp.2d 1153 ["*Nat. Paint*"].)

When it enacted BARCT, the Legislature did not intend to leave decisions about the level of pollution control in the hands of industry. Yet the court of appeal's holding would have just that effect.

B. The District May Stimulate Innovation in Pollution Control Technology by Adopting Rules More Stringent than BARCT.

The District strives to adopt rules that it can show to be achievable, as it did here. The law does not require it to make that showing, however. Though a BARCT standard, by definition, must be "achievable," the Legislature intended that, if necessary to attain the air quality standards, the District be able

to adopt standards more stringent than BARCT. By adding the BARCT provisions to the Lewis-Presley Act, it intended to push the District to use its regulatory authority more assertively, to make faster progress in improving air quality. Accordingly, it left intact the District's preexisting authority to adopt rules that prompt technological innovation in pollution control beyond the current state of the art. The court of appeal thus erred in holding that the District may not adopt emission standards more stringent than BARCT and invalidating the Rule's limits for two categories of coatings on the ground that the District had not shown the limits to be BARCT standards. (Slip Op. at 29.)

1. The Statutory Text and Structure Demonstrate that the Legislature Did Not Intend BARCT to Be the Most Stringent Standard the District May Adopt.

a. The Language of Section 40440 Demonstrates that BARCT Is Not the Most Stringent Standard the District May Adopt.

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. One 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. To the contrary, the language of subdivision (b) mandates the adoption of the enumerated regulations. It does not prohibit the adoption of 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.) By contrast, the court of appeal read the statute to say that District rules "shall do *only* the following."

The other parts of subdivision (b), subdivisions (b)(2) to (b)(4), confirm 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.) None of the other subdivisions in section 40440(b) limit the District's regulatory authority. Subdivision (b)(2) requires the District to "[p]romote cleaner burning alternative fuels,"

subdivision (b)(3) states that District rules shall "provide for indirect source controls" in specified areas in the Basin, and subdivision (b)(4) declares that the District shall "[p]rovide for transportation control measures." This language is mandatory, not restrictive.

b. The Legislature Has Repeatedly and Expressly Authorized Districts to Adopt Standards More Stringent than Those Required by State Law.

The Legislature has consistently protected the power of districts and local governments to adopt emission standards more stringent than required by state law. These provisions, including one that specifically addresses BARCT standards, show that BARCT is not a maximum standard.

Most importantly, in a related statute, the Legislature unequivocally stated that District regulations could exceed BARCT if necessary to achieve the air quality standards. All districts with "serious," "severe," or "extreme" air pollution must require BARCT control measures in their air quality management plans. (See §§ 40919(a)(3), 40920, 40920.5.) In amending these sections to add the BARCT requirement in 1992, the Legislature emphasized 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, pp. 4512-13 [uncodified section; emphases added].) This language unambiguously demonstrates that the Legislature did not intend BARCT to be the most stringent standard a district may adopt.

Courts must read related statutes in pari materia, construing 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]; *Smith, supra,* 39 Cal.4th at 83.) Accordingly, like the BARCT requirements established in sections 40919(a)(3), 40920, and 40920.5 for all districts with degraded air, the BARCT requirement in section 40440(b)(1) must be a minimum standard.

Consistent interpretation of these statutes is especially critical here because *both* sets of BARCT requirements apply to the District. Because the District is in "extreme" nonattainment of the state ozone standard (AR 64:18606), sections 40919 and

40920.5 require the District to adopt control measures at least as stringent as BARCT in its air quality management plan. The court of appeal's reading of section 40440(b) would thus subject the District to conflicting mandates: one that ostensibly treats BARCT as a maximum standard (40440(b)), and another that expressly treats it as a minimum standard (40919 and 40920.5).

Moreover, sections 39002 and 41508 explicitly allow districts to adopt standards more stringent than state or federal standards. Section 41508 provides, in terms nearly identical to section 39002,

> 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.

(Emphasis added.) These sections allow 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 40440(b)(1) contains nothing like the unmistakably specific restrictions on district authority in the statutes listed as examples in sections 39002 and 41508. (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 . . . ."]; see also *Western Oil v. Monterey Bay Dist., supra*, 49 Cal.3d at 419, fn. 15 [emphasizing the "specifically provided" language in section 41508].)

Under the interpretive canon of *ejusdem generis,* courts must construe the general term in section 41508—"otherwise specifically provided"—to include only items similar to the examples. (See *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 141.) Section 40440(b) includes *no* limiting language, let alone language as specifically limiting as that used in the examples in sections 39002 and 41508.

c. Section 40440(b) Leaves Other Sources of Regulatory Authority Unaffected.

Multiple statutory provisions grant air districts, including the South Coast District, authority to adopt pollution control regulations. (See, e.g., §§ 40001, 40440(a), 40702.) Section

40440(b), however, affects the grant of authority in only one of those sections: section 40440(a). (See § 40440(b) ["The rules and regulations adopted *pursuant to subdivision (a)* shall do all of the following:" (emphasis added)].) Accordingly the BARCT provision in subdivision (b)(1) cannot be read beyond its language and context to cap the stringency of the District's regulatory authority in its entirety.

First, as explained above, reading BARCT as a maximum standard creates a paradox. The District, which suffers from the "most critical air pollution problem in the nation" (Stats. 1976, ch. 324, § 5, p. 893), would be significantly limited in a way that most other districts—and all cities and counties—are not. (See *supra* Section I.A.4.)

Second, that the Legislature applied subdivision (b) of section 40440 only to subdivision (a) of that section suggests that subdivision (b) lists minimum tasks that the District *must* accomplish with its rules, rather than limiting what District rules *may* accomplish. If the Legislature had intended to so broadly limit the rules the District may adopt, it would have applied subdivision (b) to *all* rules enacted by the District. If

BARCT is read as action-forcing rather than action-restricting, that anomaly disappears.

d. The Statutory Provisions Cited by the Court of Appeal Do Not Show BARCT to Be the Most Stringent Standard the District May Adopt.

Instead of parsing the text of section 40440, the court of appeal detoured to other, inapplicable provisions. (Slip Op. at 23-25.) They shed no light on whether the District may adopt standards more stringent than BARCT.

First, the court considered sections 40723(b) and 40440.11. (Slip Op. at 23, 26). But these govern the application of "best available control technology" ("BACT") to *new* pollution sources, not the application of BARCT to existing sources. Accordingly, neither applies here. (See *Nat. Paint, supra*, 485 F.Supp.2d at 1160, fn. 21 [finding section 40723 unhelpful in construing BARCT].)

Although it acknowledged this problem (Slip Op. at 23), the court of appeal concluded the sections were nonetheless instructive, because, it assumed, the Legislature would not allow the District to impose more stringent requirements on existing sources than on new sources. (Slip Op. at 24, 26.)

That assumption is unwarranted. The District identifies BACT on a case-by-case basis in imposing requirements on construction permits for new pollution sources. (See District Rule 1303, *available at* <http://www.aqmd.gov/rules/reg/reg13/r1303.pdf>.) Because such sources will be immediately built, the standard for that source must be immediately achievable. By contrast, the District requires emission reductions from existing sources by adopting generally applicable rules that normally give sources lead time to reach full compliance. That lead-in period here was four years (or seven years from the original 1999 adoption). (See also, e.g., *supra* Section I.A.2 [citing *Western States v. South Coast, Sherwin-Williams*, and *Small Emitters*].) Furthermore, the District can grant variances to existing sources on a case-by-case basis to moderate the effects of its general rules. (See *infra* Section III.B.)

Second, the court concluded that, if the District were to adopt rules that are not immediately achievable, it could not possibly estimate their "cost effectiveness" as required by sections 40703 and 40922. The court therefore found those sections suggested a legislative intent to limit the District to adopting achievable rules. (Slip Op. at 24-25.)

In fact, those sections require the District to estimate costs *only to the extent that cost data is available*. (*Sherwin-Williams, supra*, 86 Cal.App.4th at 1274-75; *Small Emitters, supra*, 60 Cal.App.4th at 64.) Indeed, in *Small Emitters,* the court upheld a regulation for which the future means of compliance were unknown when the rule was adopted. (60 Cal.App.4th at 59, 62, 66; see *infra* Section I.B.3.) That court nonetheless upheld both the rule and the District's cost analysis, which did not attempt to estimate those unknown future costs. (*Id.* at 64.)

Finally, the court of appeal misapplied section 40916, which directs the State Board to develop a "model" coatings rule that districts may choose to adopt. (Slip Op. at 25.) Although section 40916 does require that the model rule be achievable (§ 40916(d)(1)), section 40916(d)(2) includes a 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." Section 40916 thus does not support the court of appeal's position. (See also *Nat. Paint, supra*, 485 F.Supp.2d at 1161.)

2. The Legislative History Also Demonstrates that BARCT Was Not Intended to Narrow the District's Existing Regulatory Authority.

The text of section 40440 and related statutes demonstrate that the Legislature did not intend BARCT to limit the stringency of District regulations. If the statutory text left any ambiguity, the legislative history of section 40440 disposes of it. (See *Smith, supra,* 39 Cal.4th at 83.)

When the Legislature adopted the BARCT provisions in sections 40406 and 40440(b) in 1987, it was as part of legislation designed to goad the District into more aggressive regulation. The Legislature was reacting to arguments that the District's efforts to curtail pollution have been insufficient. (See *supra* Section I.A.2.)

Reading BARCT as a new limitation on the stringency of District regulation is flatly inconsistent with this history. Given the clear legislative purpose, one would expect to find *some* indicum of legislative intent to impose such an important new limit. But the legislative history provides none. BARCT should be interpreted to be consistent with the Legislature's clear purpose of demanding more, not less, stringent regulation from

the District. (See *Western Oil v. Monterey Bay Dist.*, *supra,* 49 Cal.3d at 426 [rejecting interpretation "inimical" to Legislature's general purpose of "improv[ing] and strengthen[ing] air pollution regulation"].)

3. The District Exceeds BARCT in Rare But Important Circumstances.

Although it has authority to adopt rules more stringent than BARCT, the District exercises that authority rarely and judiciously. It strives to ensure that regulated entities can comply with its regulations. (See, e.g., *Western States v. South Coast*, *supra*, 136 Cal.App.4th at 1019-21 [describing evidence of achievability developed by the District]; *Nat. Paint, supra,* 485 F.Supp.2d at 1163-70 [same].)

The instant Rule is but one example. The District went to great lengths to ensure that the Rule is achievable. The bulk of the 67-volume administrative record is devoted to evidence of achievability—of the existence of low-emission coatings and of the potential for improvement in those coatings. (See *infra* Section III.)

Nevertheless, the District remains under mandate to achieve the state and federal air quality standards. Accordingly,

in limited but important instances, the District can rely, and has relied, on its authority to exceed BARCT. For example, in 1994, the District implemented its groundbreaking Regional Clean Air Incentive Program ("RECLAIM") to reduce nitrogen oxide and sulfur dioxide pollution. This market incentive program did so by capping emission levels of these pollutants for stationary sources and then steadily reducing the annual caps. (See *Small Emitters, supra,* 60 Cal.App.4th at 57-58 [upholding the RECLAIM rule].) The program was designed to obtain significant pollution reductions while giving regulated entities flexibility in deciding how to make those reductions. (*Ibid.*)

RECLAIM is explicitly designed to encourage pollution control innovation. Reduction targets for the first period or "tier" of the program were based on what was achievable with existing technologies. However, reduction targets for the second and third tiers "anticipated significant improvements in existing technologies or completely new approaches" that were unknown when the District adopted the program. (*Id.* at 59.) RECLAIM has successfully reduced nitrogen oxide emissions from the largest stationary sources by approximately 65 percent. (See South Coast Air Quality Management Dist., *Annual RECLAIM*

Audit Report for 2007 Compliance Year (2009), p. 3-3 [nitrogen oxide and sulfur dioxide emissions reduced 21 percent and 13 percent below requirements, respectively], *available at* <http://www.aqmd.gov/hb/2009/March/090337a.htm>.)

In *Small Emitters*, *supra*, the court upheld the RECLAIM program even though the District had not established that the emission reductions required by the second and third tiers of the program were achievable. Indeed, the court expressly recognized that "the pollution control technologies and costs which will be used for the post-2000 period are *simply unknown*." (60 Cal.App.4th at 66 [emphasis added].) The court noted that requiring the District to precisely predict future pollution control technologies would make it "impossible to devise a long-range air pollution control program." (*Id.* at 65.)

If the court of appeal's holding here had been applied to the RECLAIM program, the District likely would have lost one of its most significant pollution control programs.

C. Regulation Designed to Prompt Technological Innovation Is Common in Environmental Law.

There is nothing unusual about the Legislature's decision to allow the District to adopt regulations that are not

immediately achievable. In environmental law, "technology-forcing" regulation—regulation designed to prompt technological innovation—is common. Numerous federal statutes allow regulators to adopt standards that are not immediately achievable but that "press development of new, more efficient and effective technologies." (*Natural Resources Defense Council, Inc. v. EPA* (D.C. Cir. 1987) 822 F.2d 104, 124 [Clean Water Act]; see also, e.g., *American Iron & Steel Institute v. Occupational Safety & Health Admin.* (3d Cir. 1978) 577 F.2d 825, 834, 838 [Occupational Safety and Health Act]; *Edison Electric Institute v. EPA* (D.C. Cir. 1993) 996 F.2d 326, 335 [Resource Conservation and Recovery Act].) Other states have also embraced technology-forcing regulation. (See, e.g., *Nat. Steel Co. v. Illinois Pollution Control Bd.* (1993) 613 N.E.2d 719, 734 [holding Illinois statute authorizes "adopt[ion of] technology-forcing standards which are beyond the reach of existing technology"]; *Commonwealth v. Pennsylvania Power Co.* (1980) 416 A.2d 995, 997-1001 [holding Pennsylvania statute granted authority to "set air quality standards which are 'technologically impossible' at the time of the promulgation of the standard"].)

Technology-forcing regulations have been especially important in air pollution control. In a federal Clean Air Act case, *Union Electric Co. v. EPA, supra,* the United States Supreme Court held that Congress intended states to impose stringent requirements for the improvement of air quality, regardless of their technological feasibility. (427 U.S. at 258 [noting that 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"].) Congress intended the Act's requirements to force emission sources to develop new pollution control technologies. (*Id.* 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"].)

Given the widespread use of technology-forcing regulations in environmental law, it is understandable that the Legislature would not require the District to adopt regulations that are immediately achievable.

D. The Court of Appeal's Decision Would Jeopardize the District's Ability to Attain Air Quality Standards and Could Subject the State to Sanctions Under Federal Law.

The District must bring the Basin into compliance with both state and federal air quality standards. (§ 40001(a); 40402(d); 40440(a); 40910.) If the District may adopt only immediately achievable rules, it cannot satisfy its statutory mandate to attain those standards. Such a ruling could also lead EPA to impose sanctions on the State under the federal Clean Air Act.

The court of appeal's ruling created a conflict with the State's obligations under the federal Clean Air Act. As just described, in its seminal *Union Electric* decision, *supra*, the United States Supreme Court held that state implementation plans may require emission reductions beyond the capacity of existing pollution control technology. (See *supra* Section I.C [quoting 427 U.S. at 258].)

The Basin's portion of the California implementation plan includes long-term control measures designed to secure improvements in control technology. As explained in the 1997 plan in effect when the District adopted the Rule,

> 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.

(AR 65:18714.)

If this Court were to affirm the court of appeal, it could imperil EPA's approval of the California plan by depriving the District of adequate authority to implement such long term measures in the plan. (See 42 U.S.C. § 7410(a)(2)(E)(i) [plan must demonstrate "adequate ... authority under State (and, as appropriate, local) law to carry out such implementation plan"].) In turn, such a holding could require EPA to impose a "federal implementation plan" in the region (42 U.S.C. §§ 7410(c)(1), 7509). The imposition of a federal plan in the Basin could require "across-the-board, draconian measures [that would] devastat[e] the country's largest industrial area." (*Coalition for Clean Air v. Southern Cal. Edison Co.* (9th Cir. 1992) 971 F.2d 219, 223 [quoting former EPA administrator].)

Furthermore, if EPA disapproves the plan, it must impose sanctions on the region in addition to imposing a federal plan. (42 U.S.C. §§ 7410(m), 7509.) Those sanctions would make it

more difficult for the District to permit new pollution sources, thus impairing economic growth, and could potentially cut off billions of dollars of federal transportation funds allocated to California. (*Id.* § 7509(b)(1)(A); Southern California Assn. of Governments, *2008 Regional Transportation Plan, Transportation Finance Report*, p. 5, *available at* <http://www.scag.ca.gov/rtp2008/pdfs/finalrtp/reports/fFinance.pdf>.)

The Legislature could not have intended its 1987 amendments to the Lewis-Presley Act to undermine the District's ability to fulfill its statutory mandate to achieve the federal and state air quality standards. (See *Western Oil v. Monterey Bay Dist., supra,* 49 Cal.3d at 426; *Western Oil v. State Bd., supra*, 37 Cal.3d at 524.).) The court of appeal's interpretation would do just that.

II. The District Need Not Prove that Its Regulations Are Achievable by Every Source.

The Association argues that the District must show that its regulations are "achievable with available technology for all

products within the [regulated] category."[22] (Answer to Petition for Review at 9.) Because, the Association contends, the District did not show that the Rule's limits are achievable by *all* coatings in each category of regulated coatings, the District allegedly violated the BARCT requirement.

If the Court concludes the District may adopt regulations more stringent than BARCT, the Court need not reach this issue. But if the Court addresses this issue, it must reject the Association's cramped interpretation of "achievable." Each of the three courts that have considered it has roundly rejected it: (1) the superior court here (AA 3:585), (2) the court of appeal here (Slip Op. at 16-17), and (3) the United States district court in the Association's challenge to the 2003 amendments to Rule 1113 (*Nat. Paint, supra,* 485 F.Supp.2d at 1157-58). Each correctly found that the Association's reading clashes with the statutory text and would paralyze the District's pollution control efforts.

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[22] The Association phrases the issue presented in its Answer as though the record affirmatively established that the Rule's limits were *not* achievable for some coatings. This is patently untrue. When stripped of its argumentative phrasing, the Association's issue presented is as quoted here.

Moreover, the Association suggests that the District should have chosen different regulatory categories for coatings. The Association, however, has not shown the District's categorization to be arbitrary and capricious.

A. A BARCT Standard Need Not Be Shown to Be Achievable by Every Source.

The Association argues that the District must show the Rule is achievable for every regulated coating in the Basin. For example, it claims that the District should have demonstrated that the emission limit for "industrial maintenance" coatings is achievable by every individual coating that serves any use in that category. (Answer at 10.) In other words, the Association asserts that, before the District could adopt the Rule, it had to prove that *every* coating for *every* use in the Basin could be reformulated to meet the Rule's VOC limits.

The Association's position collides with the BARCT definition:

> 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*.

(§ 40406 [emphasis added].)

A "class or category" denotes a group of multiple items. (See *The Compact Oxford English Dictionary* (2d ed. 2002), p. 264 [defining class as "[a] number of individuals (persons or things) possessing common attributes, and grouped together under a general or 'class' name; a kind, sort, division"]; *id.* at 223 [defining category as "[a] term ... given to certain general classes of terms, things, or notions"].) BARCT thus contemplates that the District will aggregate multiple individual sources into a single regulated category and determine achievability for that category.

The Association would have the District establish regulations for each coating. However, individual coatings are individual sources, not "class[es] or categor[ies] of sources." (See Slip Op. at 17 ["the paint or coating *itself* is the regulated 'source'"]; *Nat. Paint*, *supra,* 485 F.Supp.2d at 1158, 1163 [referring to the achievability analysis as "predominately category specific"].) Accordingly, the Association's argument is inconsistent with the statutory commands.

The Association's view of achievability also cannot be correct because it would paralyze the District's pollution control efforts. Under the Association's theory, "no paint or coating could

ever be limited in emissions" (Slip Op. at 17), because the potential variety of different coatings for different uses is essentially "infinite." (*Ibid.*; accord *Nat. Paint, supra,* 485 F.Supp.2d at 1158.)

Indeed, the Association has repeatedly emphasized the numerous "unique" requirements that individual coatings serve. (See, e.g., RT at 34 ["specific applications and their unique performance characteristics"]; see also *id.* at 30 ["The floor at your house is not like the floor outside the courtroom. They all have unique characteristics."]; AOB Below at 36 ["users of coatings with unique requirements"]; *id.* at 37 ["[s]ophisticated users [of] coatings with unique requirements"].) The variety of potential individual coatings is virtually limitless. (E.g., AR 4:886-87 [coating manufacturer describing a coating for microwave antennas and "a swimming pool coating for use ... in animal enclosures"].)

In *Western Oil v. State Board, supra,* this Court rejected an argument that the State Board was required to consider the economic consequences of its ambient air quality standards. In doing so, the Court emphasized,

> The enormity of such a task could well paralyze the Board indefinitely, effectively frustrating its most fundamental steps toward the improvement of air quality. Such a result is completely at odds with the urgency inherent in the declaration of policy which prefaced the [statute].

(*Western Oil v. State Bd., supra*, 37 Cal.3d at 524; see also *Western Oil v. Monterey Bay Dist., supra,* 49 Cal.3d at 426 [rejecting construction of air pollution statute that would "effectively preclude meaningful regulation for the indefinite future" where "the Legislature's obvious purpose in passing the act was to improve and strengthen air pollution regulation"].)

Here too, the "enormity of [the] task" that the Association proposes and the concomitant impact on the District's regulatory efforts "is completely at odds" with the clear legislative intent behind the BARCT requirement to facilitate stronger pollution control regulation. In enacting BARCT, the Legislature could not have meant to paralyze the District by requiring it to meet the impossible evidentiary burden of proving specifically that its coatings regulations are achievable for all uses, e.g., animal enclosure swimming pools. (See *Western Oil v. State Bd., supra*, 37 Cal.3d at 524.)

B. The Association Cannot Prevail on Its Argument that the District Should Have Defined the Regulated Coatings Categories Differently.

The Association also argues that the District should have defined its categories more narrowly so that the limit applicable to a category is achievable by every single coating in that category. (Answer at 9-10.) In doing so, the Association fights a steep uphill battle. To prevail, the Association must demonstrate that the District's categorization of coatings was arbitrary and capricious, as the Association appears to recognize. (*Id.* at 10-11.)

The Legislature did not define "class or category of source" or otherwise direct the District as to how it should categorize sources. Where the Legislature leaves a statutory gap to be filled by the administrative agency implementing the statute, the agency's legislative determination of how best to fill that gap is subject to deferential arbitrary and capricious review. (See *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 799-800 [citing *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999]; *Ralphs Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, 175-76; *Helene Curtis, Inc. v. Assessment Appeals Bd.* (1999) 76

Cal.App.4th 124, 129 [citing *Masonite Corp. v. Superior Court* (1994) 25 Cal.App.4th 1045, 1053].)

The undefined phrase "class or category of source" in the BARCT definition leaves to the District the determination of how sources may most sensibly be categorized. In delineating source categories, moreover, the District brings to bear its expertise as a highly specialized regulatory agency, which is entitled to deference. (See *Western Oil v. State Bd., supra,* 37 Cal.3d at 515; *Stauffer Chemical, supra,* 128 Cal.App.3d at 794-95.) As a result, the District's chosen categorization here can be improper only if it is manifestly irrational.

It is not. The Rule is divided into 42 coatings categories, 10 of which were amended or created by the 2002 amendments. (AR 44:12515-16.) The Association has not carried its burden of showing that any of these categories was arbitrarily delineated.

In fact, the categories are similar to those used by other agencies in regulating coatings emissions. The Rule uses categories like those used by the State Board in its model coatings rule (see *supra* Section I.B.1.d), which the Association has held up as the gold standard for the regulation of coatings. (See AA 3:521-22 (2000 control measure); AR 28:8035 [1990s

measure]; see also AOB Below at 21, 23, 33, 45; RT 41-43.) For example, the Association complains specifically about the District's category of industrial maintenance coatings (Answer at 10), but the State Board's model rule includes the same category. (See AA 3:521.)

Furthermore, in surveying coatings manufacturers about the characteristics of their coatings in 1998, the State Board referred to categories similar to those in the challenged Rule. (AR 23:6442, 6454-59; see also AR 14:3925-4021 [draft survey results report].) For each coating, it asked respondents to identify one of 58 category codes "which best represents the reported coatings' category." (AR 23:6448.) There too, the State Board used the broadly defined "industrial maintenance" category that the Association finds so objectionable. Moreover, that the State Board used these coatings categories in an industry survey suggests that industry is fully familiar with the categories.

The District also adjusted the regulated categories in response to input from the Association and others in the industry. (AR 5:1288 [comment letter from manufacturer Dunn-Edwards in support of the Rule].) The District created the rust

preventative, recycled, and specialty primers categories in response to industry concerns. (*Id.*; AR 8:2084-86 [specialty primers category created at the Association's request].) It is particularly ironic that the court of appeal invalidated the Rule's limit for rust preventative coatings, given that the District added it as an "accommodation ... to help this industry meet the measures called for in the Air Quality Management Plan." (AR 5:1288 [Dunn-Edwards letter] [emphasis added]; see also AR 8:2086 [Association letter].)

C. The Association Misplaces Reliance on Cases Decided Under Other Statutory Schemes.

Finally, the Association employs cases from other jurisdictions and far different regulatory contexts to argue that the District must show that the Rule is achievable for every coating. Those cases are entirely unconvincing.

The Association cites cases decided under the federal Occupational Safety and Health Act (29 U.S.C. § 651 *et seq.*) ("OSH Act"), which conclude that a regulator cannot impose a single regulation on disparate *industries*. (Answer at 12-13 [citing *AFL-CIO v. OSHA* (11th Cir. 1992) 965 F.2d 962, 981-82, and *Color Pigments Manufacturers Assn. v. OSHA* (11th Cir.

1994) 16 F.3d 1157, 1161].) The industry-by-industry approach of the OSH Act cases is irrelevant to the District's regulatory categories of paints and other coatings, which affect only a single industry. (See *Nat. Paint, supra*, 485 F.Supp.2d at 1162 [finding the OSHA cases uninstructive].)

Moreover, the OSH Act cases do not require the evidence of universal achievability that the Association demands. The seminal OSH Act case, *United Steelworkers of America, AFL-CIO-CLC v. Marshall* (D.C. Cir. 1980) 647 F.2d 1189, held that the feasibility standard "in no way ensures that all companies at all times and in all jobs can meet OSHA's demands." (*Id.* at 1272; see also *id.* at 1264 [OSH regulation may be feasible even if "only the most technologically advanced plants in an industry have been able to achieve [it—]even if only in some of their operations some of the time"].)[23]

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[23] If the OSH Act cases were relevant, they would also support the District's contention that its rules need *not* be immediately achievable:

> Congress meant the [OSH Act] to be 'technology-forcing.' ... OSHA can also force industry to develop and diffuse new technology. At least where the

In any event, cases from totally different federal regulatory schemes cannot support the Association's argument under California law. The Association itself put it well when it wrote that the reviewing court's focus must be on "the language of the District's enabling statutes" and that "[c]itation to cases not involving those statutes is particularly unhelpful." (ARB Below at 15.)

III. The Rule Is Well Within the District's Statutory Authority.

If the District may adopt standards more stringent than BARCT, then the District is not legally required to show that the Rule is "achievable." Nonetheless, as is its normal practice, the District took pains to ensure that the Rule is achievable, and the record clearly reflects that effort. Accordingly, even if the District may only adopt standards that are achievable by the deadline for

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> agency gives industry a reasonable time to develop new technology, OSHA is not bound to the technological status quo.

(*United Steelworkers, supra,* 647 F.2d at 1264 [citations omitted]; accord *American Iron & Steel, supra,* 577 F.2d at 838 [OSHA can "require[] an employer to implement technology 'looming on today's horizon,' and is not limited to ... technology that is fully developed today"].)

compliance, the Court must still uphold the Rule in full given the ample evidence of achievability.

A. The District Relied on a Variety of Evidence of Achievability Including, but Not Limited to, the Existence of Compliant Coatings.

First, a variety of manufacturers' data sheets generated independently of the District's rulemaking process show that, in 2002, manufacturers were already producing coatings that achieved the Rule's final limits, which would take effect in 2006. (AR 44:12717-24; 45:12725-42; 59:17018-61:17619.) District staff also analyzed data compiled by the State Board to estimate the volume of compliant coatings sold in California during 1996—ten years before the final limits would go into effect—in which manufacturers reported significant sales of compliant coatings.[24] Indeed, the Association has conceded that "some compliant

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[24] See, e.g., AR 1:178-79 (28 percent of floor coatings sold in 1996 comply with final limit); 1:183 (11 percent of industrial maintenance coatings sold comply with final limit); 1:191 (estimating 81 percent of high temperature industrial maintenance coatings comply with final limit); 1:195 (three percent of non-flat coatings sold comply with final limit); 1:206 (42 percent of primers, sealers, and undercoaters comply with final limit); 1:210 (12 percent of quick-dry primers, sealers, and undercoaters comply with final limit).

coatings are available in each category, and its members and others do in fact manufacture and sell some coatings that comply with the limits." (AOB Below at 31.)

Second, several studies demonstrate that low-emission coatings can perform as well as, and in some cases better than, more-polluting alternatives. A joint District-industry Technical Advisory Committee, which included Association representatives, commissioned National Technical Services ("NTS") to "do a side-by-side comparison of zero-, low-, and high-VOC coatings." (AR 1:164; 39:11251-84.) Using the same standardized methods that the paint manufacturers themselves use to test their coatings, (see, e.g., AR 41:11708-25), the test showed that, overall, available zero- and low-emission coatings performed comparably to high-emission coatings, though in some instances, low-emission coatings outperformed high-emission coatings, and in others the reverse was true. (AR 1:112; 39:11252-55.)

NTS also conducted an accelerated outdoor exposure study and a two-year, real-time exposure study of exterior coatings and coating systems. This study "show[ed] that zero- and low-VOC coatings are similar in weathering and durability characteristics, and in many cases have outperformed their higher VOC based

counterparts." (AR 44:12560; see also AR 56:16263-57:16288 [two-year study results].) A further test comparing the performance of existing low- and higher-emission coatings in four categories also showed that currently available, low-emission coatings "work as well and in some cases better than high-VOC counterparts." (AR 44:12561; see also AR 52:14983-53:15129.)

After the 1999 rulemaking, the District documented the growing acceptability of low-emission coatings among users. Staff conducted surveys and field studies, including a case study involving the successful use of ultra-low and zero-emission coatings at an Orange County amusement park. (AR 44:12587-90; 57:16289-326.) Staff also compiled a list of numerous low-emission coatings that had entered the market between the 1999 and 2002 rulemakings. (AR 44:12716-45:12742.)

All of this evidence supported the Rule as ultimately adopted.

B. The District Gives Regulated Entities Flexibility to Ensure They Can Comply with the Rule.

Beyond this extensive evidence of achievability, the Rule and other District procedures provide flexibility to ensure that the Rule's limits are achievable. Such "escape routes" are

probative of a regulation's achievability. (See *Western States v. South Coast, supra,* 136 Cal.App.4th at 1021 & fn. 18 [refinery emission rule]; *Nat. Paint, supra,* 485 F.Supp.2d at 1166-67 [2003 amendments to Rule 1113].)

First, the Rule gave manufacturers four years from adoption to reformulate coatings to meet the final limits, and small manufacturers had two additional years. (AR 1:47; 44:12515-16; 44:12524-25 [Rule 1113(g)(8)].) Manufacturers and their suppliers had told the District that three to five years were needed to develop, test, and commercialize new products. (E.g., AR 4:884.)

Second, manufacturers may continue to sell non-compliant, high-emission coatings if they offset their excess emissions with sales of ultra-low-emission coatings. (AR 44:12517 [Rule 1113(c)(6)], 12526-33 [Rule 1113, App. A], 12562.) In *Western States v. South Coast, supra,* the court found that a similar offset provision in an oil refinery rule supported the rule's achievability. (136 Cal.App.4th at 1021 & fn. 18.)

Third, the Rule exempts coatings containers of one quart or less to allow the use of high-emission coatings in small

applications where necessary. (AR 44:12522-23 [Rule 1113(g)(1)(A)].)

Finally, statutory variance procedures give manufacturers and users an "escape route" of last resort if they cannot achieve the Rule's limits without jeopardizing their business or property rights. (See §§ 42350-42372.) The District's Hearing Board must grant a variance if it makes several statutorily-required findings after a hearing. (§§ 42352(a), 42368(a).) In *Western Oil v. State Board, supra,* this Court recognized that the variance provisions "vested in [the districts] a broad discretion to grant reasonable variances" to avoid the harsh consequences of stringent air pollution rules in individual cases. (37 Cal.3d at 523; see also § 42354 [hearing boards "shall exercise a wide discretion in weighing the equities involved"].) To date, no manufacturer or user has sought a variance from the Rule's requirements.

C. Contrary to the Court of Appeal's Conclusion, the Rule Is Achievable for Quick-Dry Enamel and Rust Preventative Coatings.

Relying on an unidentified table in the record that ostensibly shows no compliant coatings in the quick-dry enamels and rust preventatives categories, the court held the District had failed to show that the Rule was achievable for those categories.

(Slip Op. at 3-4, 17, 21-22, 30.) Although the absence of existing compliant coatings was not dispositive, it held, there was no additional evidence that the limits in those categories were immediately achievable. (*Id.* at 21.)

The court of appeal made two errors, which, when corrected, show that the limits in these categories are achievable. First, it erred in finding that, as of 2002, no existing coatings in those categories complied with the limits. (See Slip Op. at 3-4, 17.) The District believes that the court was referring to a table in the administrative record that showed only those compliant coatings that had been identified in a *1998* State Board survey of manufacturers based on sales in *1996*. (AR 45:12847-88.)

Moreover, the table's footnotes demonstrate that, even in 1996, compliant coatings were available in the two categories. Note "d" states that "[n]umerous nonflat coatings not included in this category also meet the definition of quick-dry enamel," and note "f" states that, for rust preventative coatings, "[o]ther coatings not included in this category were identified in the following coating categories: IM, nonflats, PSU, quick-dry PSU." (AR 45:12848.) In other words, low-emission coatings that meet the Rule's definitions for the two categories had been included in

other categories in the State Board survey. Accordingly, they did not appear under the rust preventatives and quick-dry enamel categories in the table.

In fact, many coatings in those categories comply with the Rule's limits.[25] As the District staff report stated,

> Over the past five years, several coating manufacturers have developed and marketed acrylic formulations that achieve the high gloss and dry time[] requirements to be classified [as] quick-dry enamel[s]. Several of these products are zero-VOC formulations and were discussed in the nonflat section of this report.

(AR 1:202.) Similarly,

> AQMD staff has conducted extensive searches for rust preventative primers and topcoats that meet the proposed VOC limits of 100 g/l. Staff has found numerous manufacturers that have direct-to-metal (DTM) finishes, as well as primers and topcoats. [¶] These technologies are discussed in [other] section[s] of this report.

(AR 1:212.) Moreover, additional low-emission coatings came onto the market between the 1999 and 2002 Rule proceedings

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[25] For rust preventatives, see AR 45:12742, 12892; 46:13099, 13129; 56:16253-54; 59:17111-12, 17125-26, 17129-33; 60:17355, 17407-08, 17411, 17414-15, 61:17493, 17528, 17607-14, 17603, 17151-52. For quick-dry enamels, see AR 38:10738-39, 45:12730; 46:13082-83; 59:17099-100, 17125-26, 17129-30, 17131-32, 17151-52; 60:17421; 61:17528.

(E.g., AR 44:12716-45:12742), several of which were quick dry enamels and rust preventatives compliant with the final limits in those categories. (AR 45:12742; 60:17407-08, 17411, 17414-15, 17528.)

Second, because of its narrow focus on immediate achievability, the court improperly ignored evidence that more compliant coatings were likely to become available by 2006. (Slip Op. at 22.) The record shows consistent improvement in the availability of compliant coatings across the regulated categories. For example, the experimental studies discussed above show that low-emission coatings can perform comparably to, and in some cases even better than, higher-emission coatings. The NTS study included both quick-dry enamels and rust preventatives. The court of appeal ignored these studies.

Given the proper construction of "achievable," substantial evidence shows that the Rule is achievable for quick-dry enamels and rust preventatives. The court of appeal therefore erred in remanding the Rule for further proceedings on those categories.

CONCLUSION

This Court should reverse the court of appeal and direct that judgment be entered for the District.

DATED: Mar. 13, 2010

SHUTE, MIHALY &
WEINBERGER LLP
DANIEL P. SELMI
KURT R. WIESE, GENERAL
COUNSEL

By: _____
MATTHEW D. ZINN

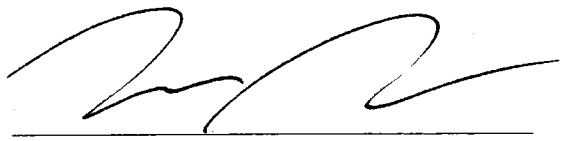
Attorneys for Defendant and
Respondent
SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT

CERTIFICATE OF WORD COUNT

I certify that this brief contains 13,983 words, exclusive of this certificate, the statement of issues presented, and the tables of contents and authorities, according to the word count function of the word processing program used to produce the brief. The number of words in this brief therefore complies with the requirements of Rule 8.520(c)(1) of the California Rules of Court.

DATED: Mar. 13, 2010

SHUTE, MIHALY &
WEINBERGER LLP
DANIEL P. SELMI
KURT R. WIESE, GENERAL
COUNSEL

By: 
MATTHEW D. ZINN

Attorneys for Defendant and
Respondent
SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT

PROOF OF SERVICE

American Coatings Association v.
South Coast Air Quality Management District

Supreme Court of California, Case No. S177823

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 March 15, 2010, I served true copies of the following document(s) described as:

DEFENDANT'S OPENING BRIEF ON THE MERITS

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on March 15, 2010 at San Francisco, California.

Natalia Thurston

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American Coatings Association v. South Coast Air Quality Management District
Supreme Court of California, Case No. S177823

Jeffrey B. Margulies
William L. Troutman
Fulbright & Jaworski, LLP
555 South Flower St., 41st Floor
Los Angeles, CA 90071
Tel: (213) 892-9200

Attorneys for Plaintiff and Appellant American Coatings Association (f/k/a National Paint & Coatings Association, Inc.)

Clerk of the Court
California Court of Appeal
Fourth Appellate District,
Division Three
601 W. Santa Ana Blvd.
Santa Ana, California 92701
Tel: (714) 571-2600
(1 copy)

Clerk of the Court
Superior Court of Orange County
Civil Complex Center
751 West Santa Ana Blvd.
Santa Ana, CA 92701
Tel: (714) 568-4700
(1 copy)