Case No. S177823

In the Supreme Court of the State of California

AMERICAN COATINGS ASSOCIATION, INC.,

Petitioner and Appellant,

vs.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

Defendant and Respondent.

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

Appeal From the Superior Court of the State of California
Orange County Superior Court Case No. 03CC00007
Honorable Ronald L. Bauer

APPELLANT'S ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Does Health and Safety Code section 40440, which requires an air quality district to adopt rules requiring use of the "best available retrofit control technology" for air pollution, authorize the district to require technology that does not yet exist?

2. Is technology "available" if it exists and is being used for some, but not all, applications within a particular product category?

INTRODUCTION

In 1987, the Legislature amended various provisions of the Health and Safety Code relating to the structure and authority of the South Coast Air Quality Management District (hereinafter "District"). Pertinent to this case, the legislation amended Health and Safety Code section 40440[1] to revise the District's authority when it adopts rules or regulations to implement its plan to meet requirements of the federal Clean Air Act and the California Clean Air Act. As amended, section 40440 provides that such rules and regulations must require the use of "best available control technology" for new and modified sources and "best available retrofit control technology" for existing sources,[2] defining those technologies as "achievable" within specified conditions in sections 40405 and 40406.

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[1] Statutory citations are to the Health and Safety Code, unless otherwise stated.

[2] These two similarly-worded terms are referred to collectively in this brief as "best available technologies." In the briefs in the trial and appellate courts, these standards have been referred to as "BACT" (best available control technology) and "BARCT" (best available retrofit control technology). Mindful of the Court of Appeal's understandable frustration with the maze of acronyms that plagues this area of law and can render briefs difficult to read (see footnote 1 of the opinion below), we will avoid such acronyms to the extent possible.

This case presents the question of what the Legislature meant by the term "best available retrofit control technology" and how that term is to be applied to a category of products that the District seeks to regulate.

The rulemaking at issue is the 2002 amendment of District Rule 1113, intended to reduce emissions of volatile organic compounds from various categories of architectural and industrial maintenance coatings,[3] as part of the District's plan. The rulemaking was challenged by the American Coatings Association ("ACA"), in part based on the claim that the District failed to determine that the proposed emission reductions were based on available technology and were thus not achievable for all of the classes or categories of paints at issue.

The Court of Appeal concluded that a proposed best available retrofit control technology must in fact be "available" at the time it is adopted by the District in order for the emission reductions anticipated by that technology to be "achievable," as required under the statutory definition. This conclusion is undeniably correct, given the plain meaning of the terms used by the Legislature and their parallel use in the best available control technology standard, which the District agrees requires currently-available technology. It is also supported by the evolution of these terms as the 1987 legislation was amended before its passage, and within the context of subsequent legislation defining how air districts are to determine that a particular proposed best available technology could be required for new and modified or existing sources, as applicable.

According to the District, however, the Court should eschew the plain meaning of such critical statutory terms as "available" and "achievable," and instead conclude that the Legislature intended to give it

[3] Not all "paints" are "coatings," but for purposes of this brief, the terms are used interchangeably.

authority to require the use of technology that is not available and has never been proven to achieve the anticipated emission reductions. The District's interpretation of the statute devolves to the argument, that, because that the air quality in Southern California is so dire, the Legislature must have intended to provide more authority to the District than the plain meaning of the statute indicates. In an effort to prove this point, the District's brief is strewn with a variety of conflicts, supposed calamitous consequences, and other absurd results that it claims would occur from applying the plain meaning of the statutory language. As we shall demonstrate, these conflicts are false, and the consequences the District claims will occur are but straw man fallacies.

When it actually applied the availability requirement, the Court of Appeal erred by holding that one complaint coating in a category was sufficient. The court ignored the tact that the regulatory categories included in the District's 2002 rule were largely generic and heterogeneous. The availability of best available retrofit control technology to achieve emission reductions must be determined by "class or category of source." Accordingly, when a district seeks to impose best available retrofit control technology on broad categories of products, it must respond to claims that technology is not available for identifiable subcategories of products within those broad, heterogeneous categories.

This is particularly true of the categories of paint at issue in this litigation, as illustrated by the broad industrial maintenance coatings category, a regulatory category that subsumes a wide variety of distinct subcategories with radically differing resin and accompanying solvent technologies that depend on application conditions, substrates, and exposure environments. While technology that complied with the proposed rules existed at the time the rule was adopted for some of the uses for

industrial maintenance coatings, it was not available for other coatings within this category.

Where there is available technology, a district can and should require it for those categories where the technology will work. However, a finding that one type of product within a broad regulatory category has available technology is not sufficient to establish best available retrofit control technology for all classes or categories of products within the regulatory category. Simply put, the categories cannot be arbitrarily drawn in light of the availability of technology to achieve the anticipated emission reductions.

Because the District did not determine best available retrofit control technology as required by the statutory terms when it adopted the amendments to its Rule 1113 in 2002, the final limits in that rulemaking should be vacated.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Statutory Background

Control of air pollution in California is governed by Division 26 of the Health and Safety Code. To comply with the federal Clean Air Act (hereinafter "federal Act"), and to attain state air quality standards under the California Clean Air Act, the California Legislature has delegated authority to the California Air Resource Board (for vehicular sources) and to local and regional air pollution control districts (for non-vehicular sources). Health and Safety Code sections 39500, 40000, 40910. The District is charged with adopting an air quality management plan ("plan") for compliance with the federal and state Acts. Section 40460. It must adopt rules and regulations to carry out the plan, so long as those rules and regulations do not conflict with state and federal law. Sections 40460, 40440(a).

The District is required to adopt rules and regulations "that will assure that all of its administrative practices and the carrying out of its programs are efficient and cost-effective, consistent with the goals of achieving and maintaining federal and state ambient air quality standards and achieving the purposes of this chapter." Section 40440(c). In adopting a specific emission control measure, the District must consider the "relative cost effectiveness" of the measure, as well as other factors including, but not limited to, "technological feasibility, total emission reduction potential, the rate of reduction, public acceptability, and enforceability." Section 40922(b).

When the District adopts rules to carry out the plan, those rules must "require the use of best available control technology for new and modified sources and the use of best available retrofit control technology for existing sources." Section 40440(b)(1). "Best available control technology" is "an emission limitation that will achieve the lowest achievable emission rate for the source to which it is applied." Section 40405(a). "Best available retrofit control technology" is "an emission limitation that is based on the maximum degree of reduction achievable, taking into account environmental, energy, and economic impacts." Section 40406. These requirements apply to air districts that are not in attainment with state air quality standards. Sections 40918, 40919, 40920, and 40920.5.

Section 40920.6 provides a procedure that a district must follow in determining best available retrofit control technology. The district must identify potential control options that achieve the emission reduction objectives, and compare the cost-effectiveness of each potential control option.

B. The District's Adoption of Emission Limitations for the Affected Coatings

The District's Rule 1113 regulates the amount of volatile organic compounds ("VOC") in architectural and industrial maintenance coatings. This rule covers many categories of products uniquely formulated to fulfill the various requirements for numerous paint uses, or applications. The coatings regulated by Rule 1113 range from latex flat and gloss paints that consumers use in their homes, to the chemically complex, multi-component finishes that protect industrial structures exposed to harsh environmental conditions. *See generally*, administrative record, volume 1, pp 1-2.[4]

Because of the wide variety of uses and differences in resin technologies needed for differing environmental conditions of application and exposure, as well as differing substrates, a variety of solvents are needed for coatings to perform as expected. Many of these solvents are VOC. Many VOC are believed to react with oxides of nitrogen in the atmosphere to form ground level ozone, a component of smog. Even current water-borne coatings contain a limited amount of VOC solvent necessary for acceptable performance. 1 Appellant's Appendix ("AA") 2. By limiting the VOC content of various architectural and industrial maintenance coatings, Rule 1113 is intended to help meet the federal Act's standard for ozone. 44 AR 12542-43.

1. The 1999 Amendments to Rule 1113

The 2002 amendments to Rule 1113 that are at issue in this proceeding were originally adopted in May, 1999. These new provisions sought to reduce emissions by lowering the VOC limits of many of the categories of coatings in Rule 1113. The major coatings categories subject to the new VOC limits were: (1) industrial maintenance; (2) nonflats; (3)

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[4] The administrative record shall be cited hereinafter as [vol.] AR [pp.].

quick-dry enamels; (4) primers, sealers, and undercoaters; (5) quick-dry primers, sealers, and undercoater's, (6) rust preventative; (7) stains; and (8) waterproofing wood sealers (the "affected coatings"). 1 AR 112-15.

The VOC limits were to be implemented in two phases. The first phase required VOC reductions in 2002 (the "interim limits"), and the second phase required additional reductions in 2006 (the "final limits"). *Id.* The interim limits required manufacturers to reformulate many coatings and effectively eliminated many high-performance coatings in virtually all categories. The final limits eliminated 87% of all industrial maintenance coatings and 97% of all non-flat coatings then on the market, requiring manufacturers to resort to unproven and potentially dangerous technologies, and to develop completely new coatings. 48 AR 13426, 52 AR 14835.

Numerous comments to a preliminary proposed regulation advised the District that the proposed amendments were not technologically feasible.[5] These included comments from ACA (17 AR 4698), Sherwin-Williams (17 AR 4818), the Metropolitan Water District of Southern California (addressing concerns over the impact of poorly performing coatings on industrial structures, such as water tanks, bridges, pipelines and water filtration plants) (17 AR 4840-42), the Los Angeles Department of Water and Power (16 AR 4591-94), and the Southern California Alliance of Publicly Owned Treatment Works (expressing concern over the need for public industrial maintenance coatings with higher VOC limits). 14 AR 3779-80. ACA requested additional industrial maintenance categories and sub-categories, by breaking certain applications out of the general industrial maintenance coatings category including extreme high durability industrial maintenance and tank lining coatings. 17 AR 4693-4700. .This approach

[5] *See generally*, Volumes 16-18 of the administrative record.

would have allowed the lower VOC limits identified by the District to be applicable to the majority of coatings within the industrial maintenance category, but allowed the higher VOC content required for a limited number of coatings with special application, substrate, and exposure performance requirements where technology was not available to make products that complied with the proposed rule.

After the District published a revised draft staff report and environmental assessment, manufacturers and sophisticated users of coatings with long experience with the coatings continued to point out that the District's proposed limits were not available for certain key applications. CalTrans noted its extensive efforts to utilize low-VOC coatings, stating that "despite our best efforts, we still need to use coatings with higher VOC levels for isolated areas on most structures and for a few structures located adjacent to the coast." 8 AR 2152. The Los Angeles Department of Water and Power comments addressed potential failure of electrical equipment, noting that "there are no known reduced VOC coatings (i.e., <420 grams/liter) that are proven to adequately protect its electrical equipment." 8 AR 2107; *see also* 7 AR 2023 (City of Pasadena Power Supply Business Unit). Commenters also expressed concern that product data sheets from purportedly low-VOC products served only as marketing tools, and that claimed performance characteristics were frequently not achievable in laboratory testing or under actual usage conditions. *See* 8 AR 2077, 8 AR 2131-32, 3 AR 565.

The proposed rule was released on May 4, 1999. The Staff Report claimed that "a wide range" of coatings complied with the proposed interim limits, and that these coatings had "comparable . . . durability characteristics compared to existing high VOC coatings." 3 AR 578. As to the final limits, staff acknowledged, "there are a limited number of currently available compliant coatings" (*id).*, and that it had not asserted

"that there are compliant coatings available for every coatings application." 3 AR 573.

Acknowledging the unavailability of compliant coatings for discrete coatings applications, staff asserted that manufacturers should utilize a proposed averaging program, despite having been told that such an option was not practical for many companies with limited product lines. 1 AR 217; 47 AR 13424. In response to comments from public agencies that had questioned the availability of "coatings needed for usage on critical structures," the District responded that it would "encourage end-users to approach coating manufacturers to ensure that they have available, for any highly specialized uses, coatings that do not comply . . . ." 3 AR 700-01, 710, 719, 725. Despite these and additional critical comments at its May 14, 1999 hearing, the District's governing board adopted the proposed amendments. 1 AR 1-94.

ACA and other parties challenged the 1999 amendments. On June 24, 2002, the Court of Appeal issued its unpublished opinion in *NPCA, Inc. v. SCAQMD*, Fourth Civil No. G029462. 56 AR 16221. The court held that last-minute exemptions for public agencies and small paint manufacturers "served to 'sandbag' the decisionmaking process of the board from public input" (56 AR 16227), and directed the trial court to issue a writ of mandate commanding the District to vacate its adoption of the 1999 amendments. 56 AR 16229.

2. The 2002 Amendments to Rule 1113

While the District pursued a petition for review of the Court of Appeal's decision (S109039), it simultaneously began the process to readopt the 1999 amendments, circulating a draft environmental assessment on August 6, 2002. 44 AR 12486, 12490. On December 6, 2002, before the trial court had issued the writ that had been directed by the Court of Appeal, the District's governing board considered the staff's proposal to

readopt the 1999 amendments, with only minor revisions. 44 AR 12486, 12543.

As was the case in 1999, the 2002 amendments eliminated many established coatings technologies and required manufacturers to engage in significant research and development efforts to develop and apply new technologies. In a number of instances, coatings based on those new technologies were in fact achievable with existing technology. In other instances, they were not. ACA and other members of industry again filed comments during the rulemaking process and testified at the hearing that the final limits, and some of the interim limits, were not achievable, because the technology required to reduce the VOCs in the affected coatings was not available for all of the uses of those coatings. 46 AR 13264-307, 47 AR 13397-414, 13417, 13419-27, 49 AR 14099-117, 51 AR 14644-646, 14769-80, 14787-88, 14791-52 AR 14822, 14826-864, 14866-864, 14866-898, 14901-957.

The District's staff determined that the limits were feasible, in large part because some products were available within the broad heterogeneous categories, but did not adjust the rule where existing technology could not be applied for certain discrete coatings. The District staff repeated its product availability argument and represented to the governing board at the December 6, 2002 hearing that the District was required by a settlement in federal citizen suit litigation to readopt the 1999 amendments, notwithstanding the unavailability of compliant technology. 44 AR 12442-43. The board approved the rule amendments. 44 AR 12482.

C. Procedural History

1. The Proceedings in the Trial Court

ACA filed a petition for writ of mandate on January 6, 2003, seeking to invalidate the 2002 amendments. 1 AA 1. ACA's petition included

three causes of action. The first cause of action, at issue here, alleges that the final limits, and certain of the interim limits, were not achievable for all of the coatings applications within each of the specified categories of products, and the District's determination that compliant coatings were available within each category was arbitrary and capricious. 1 AA 7-10.

On September 27 through September 29, 2004, the trial court heard arguments on ACA's first cause of action and related claims brought by the other petitioners. Reporter's Transcript ("RT") 1-162. On April 17, 2006, the court orally announced its decision in favor of the District. RT 165-68.

On October 5, 2007, ACA dismissed the second and third causes of action with prejudice. 3 AA 580. On January 2, 2008, the trial court filed its statement of decision. 3 AA 581. Final judgment on ACA's petition was entered in favor of the District on January 25, 2008. 3 AA 589. On March 25, 2008, ACA timely filed its notice of appeal from the judgment. 3 AA 592.

2. The Court of Appeal's Opinion and the Petition for Review

On September 29, 2009, the Court of Appeal issued its opinion. The court concluded that the question of the District's authority pursuant to section 40440(b) presented an independent question of law requiring de novo review. Opinion at 11. Referring to the plain meaning of "best," "available," and "achievable," and the legislative definition of achievable in the context of best available control technology, the court concluded that best available retrofit control technology is technology that currently exists or can be readily assembled from things that do exist. Opinion at 20-21. The court also determined that the District need only assess whether technology was available in each regulatory category, without assessing whether technology exists for subcategories within a heterogeneous category. Opinion at 16-17.

The court therefore affirmed the 2002 rulemaking for categories in which there was at least one compliant coating, and remanded the case to the trial court for an evidentiary determination of whether current technology existed in the two categories that were not supported by the administrative record. Opinion at 4, 30.

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

THE STANDARD OF REVIEW

The issues before this court involve interpreting the meaning of section 40440(b) to determine whether the Legislature authorized the District to require the use of technology that does not exist, and if not, whether technology is "available" in a category of products if it is available for some products within the category but not others. Interpretation of the meaning of a statute presents a pure question of law to the court, which requires de novo review. *People ex rel. Lockyer v Shamrock Foods Co.*, 24 Cal.4th 415, 432 (2000). This Court must therefore undertake an independent determination; the District's application and construction of the statute is not given the deference given to quasi-legislative enactments, as asserted in the District's Opening Brief. See *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal.4th 1, 12 (1998).

To the extent the District asks this Court to determine that the VOC limits in the 2002 amendments met the best available retrofit technology standard as to each of the affected coatings, deferential review is not applicable, because the District failed to apply the appropriate standard during the rulemaking. If "administrative action transgresses the agency's statutory authority," the court does not "review the action for abuse of discretion; in such a case, there is simply no discretion to abuse." *Ass'n for Retarded Citizens v. Department of Developmental Services*, 38 Cal.3d 384, 391 (1985).

ARGUMENT

I. THE LEGISLATURE DID NOT AUTHORIZE THE DISTRICT TO REQUIRE EXISTING SOURCES TO BE "RETROFITTED" WITH EMISSION REDUCTION TECHNOLOGY THAT IS NOT AVAILABLE.

A. The Plain Language and Legislative History of the Controlling Provisions of the Health and Safety Code Require that All Emission Control Technology Must Be "Available."

In section 40440(b), the Legislature directed the District to adopt rules that "require the use of best available control technology for new and modified sources and the use of best available retrofit control technology for existing sources" to carry out the District's plan to comply with the federal and state clean Air Act. It defined best available control technology as "an emission limitation that will achieve the lowest achievable emission rate for the source to which it is applied" (section 40405 (a)) and best available retrofit control technology as "an emission limitation that is based on the maximum degree of reduction achievable, taking into account environmental, energy, and economic impacts" (section 40406).

The terms best available control technology and best available retrofit control technology, and their respective definitions, are remarkably parallel. They both speak of "control technology" that is the "best available," although existing sources require "retrofit" control technology. Both requirements are "emission limitations" that differ only in whether they "will achieve the lowest achievable emission rate" (for new or modified sources) or are "based on the maximum degree of reduction achievable," taking the defined factors into account (for existing sources). The issue before the Court is whether a district rule requiring future emission reductions from existing sources must be based on currently-available technology in order to be achievable.

"The first principle of statutory construction requires us to interpret the words of the statute themselves, giving them their ordinary meaning, and reading them in context of the statute . . . as a whole." *In re Tobacco II Cases*, 46 Cal.4th 298, 315 (2009). In understanding the everyday meaning of words, this Court has often turned to their dictionary definitions. *See, e.g., People ex rel. Lungren v. Superior Court*, 14 Cal.4th 294, 302-03 (1996). Here, the plain meaning of the words "available," "retrofit," and "achievable" deny the interpretation suggested by the District.

The word "available" means "[c]apable of being employed with advantage or turned to account; *hence*, capable of being made use of, at one's disposal, within one's reach." *The Oxford English Dictionary* (www.oed.com). "Retrofit" means "[a] modification made to a product or structure to incorporate changes and developments introduced since manufacture." *Id.* "Achievable," means "capable of being achieved," and "achieved" means "that is or has been achieved; accomplished; attained, won; realized, actual." *Id.*

These definitions lead ineluctably to the conclusion that, in order to be considered as a potential best available technology, the technology must be "capable of being employed" (available) and must be capable of reducing emissions (achievable). If it is intended as a "retrofit" for existing sources, the technology must additionally be "a modification to a product or structure to incorporate changes and developments introduced since manufacture." Technology that does not exist is neither capable of being employed nor capable of reducing emmissions.

These definitions are consistent with how the Legislature has itself defined "achievable." Section 40723(a) states the Legislature's intent that best available control technology must be "achievable." In order for a district to determine that the technology is achievable, a district must determine that "the applicable requirements *have been achieved*." Section

40723(b) (emphasis added). If the proposed technology has not been "achieved" as required by subdivision (b), "the district shall revise those requirements to a level achievable by the source." Section 40723(c)(1), (2).

As it must in the face of such unambiguous Legislative intent, the District concedes that best available control technology must be currently available, but it posits the reason for this result is: "Because such sources will be immediately built, the standard for that source must be immediately achievable." Opening Brief on the Merits ("Opening Brief") at 48. In light of the legislative direction to limit best available control technology to that which has been achieved, this argument proves nothing. A "retrofit" must also be achievable when it must be employed. Yet, the notion that there is a different definition of "achievable" to determine whether "retrofit" control technology is "available" is nowhere to be found in the terms used by the Legislature to describe, or define, that technology. The District points to no statutory language or direct statement of Legislative intent that supports its contention that the Legislature intended different definitions for the words "available " and "achievable" in the same series of statutes.

Indeed, longstanding principles caution against reaching such a conclusion. "[W]ords or phrases given a particular meaning in one part of a statute must be given the same meaning in other parts of the statute." *Wilcox v. Birtwhistle*, 21 Cal.4th 973, 979 (1999); *Californians for an Open Primary v. McPherson*, 38 Cal.4th 735, 744 (2006) (rejecting an assertion that the word "amendment" in the second sentence of a section of a statute had a different meaning than the same word "amendment" in the first sentence when there was no evidence of any such intention). The District fails to acknowledge, much less offer any credible reason for departing from, this commonsense rule.

Moreover, the District's rationale for distinguishing existing sources from new and modified sources has no logical basis, and leads to absurd

results. Although a new source may only be required to use available technology, is the District free to require non-existent technology the day after construction is completed? The Court should reject the District's argument that the Legislature had two different meanings of available and achievable – one stated and one hidden – as well as its implicit invitation to rewrite sections 40440(b) and 40406 to require and define the best "imaginable" control technology for existing sources.

Reviewing these statutory terms, the Court of Appeal noted that they do not allow the District to require the use of non-existent technology solely because it could "predict" that such technology could be developed in the future. Opinion at 21. As the court noted:

> "Science fiction is not substantial evidence. A trend line does not achievability make. There is a logical fallacy of extrapolation, which assumes that the future will be like the past, only more so. [Citation.] It is a fallacy which, in other contexts, California courts have squarely rejected. [Citation.]" Opinion at 22.

It is enough that the plain language of the statutes compels the conclusion that the Legislature did not intend to allow the District to require existing sources to use non-existing technology. "If the language is unambiguous, there is no need for further construction." *In re Tobacco II Cases*, 46 Cal.4th at 315. However, the conclusion that technology must be available is also consistent with the development of SB 151, the 1987 legislation that enacted the requirement for best available technologies in section 40440(b), and the definitions in sections 40405 and 40406, as they were introduced and modified during the legislative process. *See Shamrock Foods*, 24 Cal.4th at 429-30 (interpreting statute by reference to development of bill within which it was contained).

The Legislature first enacted section 40440 in 1976. Stats. 1976, ch. 324, section 5. Originally, section 40440 required District rules to "reflect the best available technological and administrative practices." *Id.* In 1987, section 40440 was amended to require the use of best available control technology and best available retrofit control technology. Stats. 1987, ch. 1301 (SB 151). This amendment was intended to revise the district's authority to regulate emissions from existing sources. Assem. Nat. Resources Com., Analysis of Sen. Bill No. 444 (1987-1988 Reg. Sess.). The forms in which the requirements were proposed, modified, and ultimately adopted in the language now present in sections 40440, 40405, and 40406, demonstrate that the Legislature was concerned with minimizing the burden that could be imposed by the District on existing sources, while allowing for more stringent emissions controls on new and modified sources.

When it was first introduced, SB 151 proposed to amend section 40440 to require that the District adopt rules and regulations that "promote the use of the best available control technology." SB 151, section 9, introduced Jan. 8, 1987. The initial version of the bill also proposed to add section 40405, which would have stated that "'best available control technology' has the same meaning as that term under the Clean Air Act." *Id.*, section 1. In the March 19 amendment, section 40405 was amended to read "'best available control technology' means an emission limitation that will achieve the lowest achievable emission rate for the source to which it is applied," the language that was ultimately adopted by the Legislature. SB 151, section 1, amended March 19, 1987.

In the Assembly, section 40440 was amended to remove the requirement to "promote" best available control technology, to now "require" best available control technology for new and modified sources." SB 151, section 9, amended June 22, 1987. Section 40440 was amended

once again, to now require the District to require the use of best available retrofit control technology for existing sources, with the language currently in the statute. SB 151, section 9, amended July 7, 1987. The July 7 amendments also added section 40406, requiring that a determination of best available retrofit control technology include consideration of environmental, energy, and economic impacts. *Id.*, section 1.5.

The logical conclusion to be drawn from the development of the language in sections 40440, 40405, and 40406 is that the Legislature intended to impose the most stringent emission reduction requirements on new and modified sources, but did not intend to apply equally stringent requirements on existing sources. Indeed, this basic approach to emissions limitations on stationary sources is found in the new source review provisions of the federal Act, under which Congress required that permits be obtained before construction may be commenced on a new source of emissions or on any modifications to an existing source of emissions. 42 U.S.C. section 7475; 42 U.S.C. section 7502(c)(5); 42 U.S.C. section 7503; 40 C.F.R. section 51.160-66. Congress made the policy choice to exempt existing sources from these requirements because of the expense of completely overhauling existing sources and the perceived economic unfairness that would result from requiring retrofit. *See, e.g.*, H.R. Rep. No. 95-294, at 185 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1264.

The District's argument that availability and achievability should be defined in one manner for existing sources and in a different manner for new and modified sources is contrary to the two primary determinants of statutory construction: the meaning of the terms used by, and the intent of, the Legislature. Beyond failing to honor the words written by, and the intent of, the Legislature, as we discuss below, the District's construction of best available retrofit control technology further conflicts with subsequent statutes that address best available control technologies.

B. Construing Best Available Retrofit Control Technology to Allow the District to Require Existing Sources to Use Non-Available Technology Conflicts with Legislative Requirements Relating to the Adoption of Best Available Technologies.

Sections 40405 and 40406 require a district to undergo a process to determine whether a proposed technology meets the applicable legislative definitions of best available technologies. That process has been refined in subsequent legislative enactments, and those refinements do not support the District's argument.

First, the year after it adopted SB 151 in 1987, the Legislature required other districts in California to implement best available technologies to by adding sections 40918, 40919, and 40920. Stats. 1988, ch. 1568 (AB 1568). That legislation also added section 40922, which requires a district to assess the cost-effectiveness of all the measures proposed in its air quality attainment plan. The requirements were amended in 1992, in AB 2783, which added new section 40920.5. Stats. 1992, ch. 945.

Second, in 1995, the Legislature enacted new statutes, including sections 40440.11 and 40920.6, which specifically delineate how districts must determine whether a technology could be established as either best available control technology or best available retrofit control technology. Stats. 1995, ch. 837, sections 1-3 (SB 456).

Section 40440.11(c) establishes criteria that the District must evaluate before revising best available control technology for new or modified sources to be more stringent. The District must determine that the proposed emission limitation "has been met" by equipment or a process "that is commercially available for sale, and has achieved the best available control technology in practice on a comparable commercial operation for at least one year." Section 40440.11(c)(2). Moreover, the District must

undertake a cost-effectiveness analysis, including identifying multiple technologies, determining the cost-effectiveness (dollar cost per amount of emission reduction) for each, and ranking them based on their incremental cost-effectiveness.

Section 40920.6 requires a similar process, applicable to all districts, for best available retrofit control technology. A district must "Identify one or more potential control options which *achieves* the emission reduction objectives for the regulation," "Review the information developed to assess the cost-effectiveness of the potential control option," and "Calculate the incremental cost-effectiveness for the potential control options." Section 40920.6(a)(1)-(3) (emphasis added).

The Legislature adopted these requirements to address concerns from the regulated community about the processes by which districts established best available technologies. The Senate Third Reading Analysis for SB 456 (August 31, 1995) noted that the amendments responded to the high cost of compliance with the best available technologies. "Businesses want more input, information and certainty about the ... requirements. This measure is intended to impose limitations on ... [these] regulations to ensure their cost-effectiveness and workability for affected sources of air pollution. *Id.*

Third, section 40723, adopted in 2000 (Stats. 2000, ch. 501, section 1 (AB 1877)) and discussed above, requires that technology proposed by a vendor as best available control technology must have in fact been "achieved" before that technology can be considered "achievable."

Fourth, in 2001, the Legislature adopted section 40916(d). Stats. 2001, ch. 456, section 1 (AB 451). This section provides that the state Air Resources Board may recommend a suggested control measure for architectural paints or coatings to a district for inclusion in a district's plan *only* if the Board determines that "adequate data" show the measure is both

"necessary," and "commercially and technologically feasible." Again, the Legislature chose a definition for "feasible" that is strikingly similar to section 40406: "For purposes of this paragraph, 'feasible reduction in volatile organic compounds emitted' means an emission limitation that is achievable, taking into account environmental, energy, and economic impacts.'" Section 40916(d)(1)(A).

"[C]ode sections in pari materia must be harmonized with each other to the extent possible; a section should be construed in light of the whole system of law of which it is a part." *Pacific Southwest Realty*, *Pacific Southwest Realty Co. v. County of Los Angeles*, 1 Cal.4th 155, 169 (1991); see also *DeVita v. County of Napa*, 9 Cal.4th 763, 778 (1995) ("When . . . statutes touch upon a common subject, they are to be construed in reference to each other."). The clear import of the later-enacted statutes regarding best available technologies, requiring that they be achieved and that their costs be analyzed, is that the Legislature did not share the District's view that forcing industry to use unavailable technology was an appropriate means to reduce emissions. These statutes must be read in harmony with the provisions to which they relate and modify, and in a manner that honors the Legislature's policy decisions.

Indeed, it seems difficult, if not outright impossible, for the District to be able to determine the cost-effectiveness of unavailable technology, and to compare the cost-effectiveness of such unavailable technology with other proposed control technologies, in order to meet the legislative goals of providing more "certainty" and "workability" to the regulated community. This dilemma was noted by the Court of Appeal, which stated that "best . . . implies a choice of things existing. Competing *speculative* technologies or what is merely 'conceivable' do not lend themselves to easy comparison." Opinion at 20 (emphasis in original). No such difficulty

exists, however, if the statutes are construed as the Legislature intended them to be construed, to require that technology be currently available.

Relying on *Sherwin-Williams Co. v. SCAQMD*, 86 Cal.App.4th 1258 (2001), and *Alliance of Small Emitters/Metal Indus. v. SCAQMD*, 60 Cal.App.4th 55 (1997), the District dismisses the Court of Appeal's reliance upon the cost-effectiveness requirements, claiming that it is only required to analyze costs if data is available. Opening Brief at 49. Beyond the obvious irony in the District's reliance upon the term "available" to attempt to diminish the import of these statutes, in both of the cases cited by the District, the crucial issue was whether the District had complied with the requirement to conduct a socioeconomic impact analyses under section 40440.8. This section requires the District to assess the impact of a proposed rule or amendment on businesses, employment in the regional economy, and the range of probable costs to industry, among others, "to the extent data are available."

Neither section 40440.8, nor the companion section 40728.5 applicable to all districts, apply to section 40440(b) or the definitions in sections 40405 and 40406.[6] Importantly, they do not excuse the District from the cost-effectiveness analyses required by sections 40440.11 and 40920.6, which require evaluating the actual costs imposed in order to obtain emission reductions achievable by proposed control technologies. Indeed, the District's interpretation leads to the absurd result that the less it knows about a proposed control technology, the less it has to study the

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[6] *Small Emitters* is further inapposite because the RECLAIM program at issue there is a market incentive (or "cap-and-trade") program, not a "command-and-control" method, such as Rule 1113. 60 Cal.App.4th at 57-58. The RECLAIM program is governed by section 39616, which requires it to achieve emission reductions comparable to command-and-control schemes.

costs of that technology to businesses that must implement it to comply with a rule.

But that is not the only incongruity that flows from the District's interpretation available and achievable. Allowing the District to surmise that technology will appear, and impose rules based on technology that fails to actually materialize by the future effective date, creates the substantial risk that, once the requirement is included in the state implementation plan, and is approved by the US Environmental Protection Agency ("EPA"), it cannot be revised without EPA approval. 42 U.S.C. section 7410(l). A state may not ignore the commitments it makes in a state implementation plan if it later determines that those commitments are not really feasible. *U.S. v. Ford Motor Co.*, 814 F.2d 1099, 1103 (1987) (holding that a later determination of technological infeasibility for an approved state emissions limit does not render the limit unenforceable absent approval by EPA).

Given these stakes, it is logical that the Legislature would require the District to adopt rules that require existing technology. The District's argument that best available retrofit control technology may be based on a surmise that technology may exist in the future leads to the intolerable result that, if the District's assumption is wrong, it may not be able to revise the rule. EPA may not allow future changes to the SIP if alternative emission reductions cannot be found, and has in the past disapproved the District's attempt to revise Rule 1113 limits that turned out to be unachievable. *See* 40 C.F.R. section 52.229(b)(2)(iii).

The District's interpretation of the best available retrofit control technology standard simply finds no support in the traditional indicia of statutory construction: the words of the statute, the legislative history, and the interaction of statutes relating to the same object. Consequently, most of the arguments raised in the Opening Brief are false conflicts and red

herrings, designed to draw the Court's attention away from the primary inquiry.

C. The District Does Not Offer Any Valid Rationale for Concluding that Best Available Retrofit Control Technology Is a "Minimum" Standard.

Although ACA responds to many of the District's arguments below, the fact that one or more of the purported justifications for the District's argument are not addressed herein should not be construed as tacit admission of their validity. In light of the foregoing analysis it is improbable that the isolated axioms of statutory construction and stray statutory references cited by the District create conflicts sufficient to justify refusing to follow the plain meaning of available and achievable, and intent of the Legislature.

1. The Legislature Has Not "Expressly Authorized" Air Districts to Ignore the Language of Best Available Retrofit Control Technology.

The District makes a bald assertion that the Legislature "unequivocally stated that District regulations could exceed [best available retrofit control technology] if necessary to achieve the air quality standards." Opening Brief at 42. For support, the District cites Section 18 of AB 2783, which amended the California Clean Air Act in 1992. Stats. 1992, ch. 945. AB 2783 substantially overhauled the Clean Air Act, including adding the provisions in sections 40918, 40919, 40920, and 40920.5 that require districts with moderate or worse air pollution to adopt best available technologies.

Although the District represents that section 18 "unequivocally" permits the District to ignore the best available retrofit control standard, in truth, it is a non-specific and uncodified savings clause tacked on at the end of the amendments: "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 state ambient air quality standards at the earliest practicable date." Reading this clause as the District proposes would render the process for determining best available technologies completely superfluous. Rather than engaging in a meaningful evaluation of potential control technologies, the District could just ignore the process and set some other emissions limit that it predicted could be achieved.

"Well-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative." *Mfrs. Life Ins. Co. v. Superior Court*, 10 Cal.4th 257, 274 (1995). The Court of Appeal recognized the sophistry in the District's approach, stating that "there is nothing in the text or legislative history of the statutes that sets up any sort of dichotomy on the lines of: 'Make rules requiring the best technology available, and feel free to also make rules requiring technology that is not available as well.'" Opinion at 29 (footnote omitted).

The District's interpretation is also inconsistent with Section 40920.6, enacted three years after the savings clause in SB 2738. As discussed above, the Legislature enacted Section 40920.6 to limit the best available retrofit control technology standard to ensure "cost-effectiveness," "certainty," and "workability," in light of high costs of compliance. It seems incongruous that the Legislature would adopt this requirement and intend that the savings clause from the prior legislation would render it moot. To the extent there is a conflict, a more specific provision controls over a more general provision. Code of Civil Procedure section 1859; Civil Code section 3534; *Fuentes v. Workers' Comp. Appeals Bd.*, 16 Cal.3d 1, 7-8 (1976) (construing a more specific statutory section as a limitation to a general section and rejecting the argument that the more general section be read liberally); *Brodie v. Workers' Comp. Appeals Bd.*, 40 Cal.4th 1313, 1323 (2007). The Legislature specifically addressed the

process for best available retrofit control technology in section 40920.6, while the savings clause contains no similar specific statement.

Accepting the conclusion that the District can require more than best available retrofit control technology requires one to rewrite yet more terms in the statute; the "maximum" achievable reduction is in actuality the "minimum" that the District may require. The Court should reject this invitation to mischief masquerading as statutory interpretation.

2. Cleaner Air Districts Do Not Have Open-Ended Regulatory Authority.

The District argues that the Legislature cannot have intended the best available retrofit control technology requirement to limit its authority, because that would mean districts with clean air would have "open-ended regulatory authority," while more polluted districts are constrained. Opening Brief at 36. However, as the District knows, a proposed clean air regulation must be based on separate findings of "authority" and "necessity." Section 40727(a). "'Authority' means that a provision of law or of a state or federal regulation permits or requires the regional agency to adopt, amend, or repeal the regulation." Section 40727(b)(2). "(Necessity) means that a need exists for the regulation..." Section 40727(b)(1). The District does not explain how a district with clean air could establish either the authority or the necessity to require the use of technology that does not exist in order to eliminate air pollution that does not exist.

3. The Scope of Authority Retained by Local Government Is Irrelevant.

The District argues that "all 458 cities and 58 counties, regardless of their air quality, can adopt any standards they wish," which "turns the statutory scheme on its head." Opening Brief at 37. This argument proves nothing.

As with other agencies created by the Legislature, "[a]n air pollution control district, as a special district, 'has only such powers as are given to it by statute and it is an entity, the powers and functions of which are derived entirely from the Legislature.'" 74 Ops.Cal.Atty.Gen. 196 (1991) (citations omitted). The Legislature has specified, before adopting or revising a rule, that an air pollution district must determine and specify the "authority" upon which it relies. Section 40727(a).

A local government, on the other hand, possesses police power to regulate on behalf of its citizens. Cal. Constitution, art. XI, section 7; *McCarthy v. Manhattan Beach*, 41 Cal.2d 879, 890 (1953). Thus, whether the Legislature intended to preserve the authority of local governments to regulate emissions has no bearing on the interpretation of the Legislature's grant of authority to the District and provides no basis for disregarding the plain meaning of Section 40440(a).

4. There Is No Basis to Conclude that Industries Will Not Innovate Unless the District Has Authority to Require the Use of Non-Existent Technology.

The District asserts that the Legislature must have intended to allow the District to require non-existent technology, because it would be "naïve" to think the coatings industry will innovate if the District cannot force industry to use unavailable technology. Opening Brief at 38. The alleged support for the District's position is a quotation from *Sherwin-Williams Co.*, 86 Cal.App.4th at 1280, and an unfounded claim positing a direct relationship between litigation and innovation.

In *Sherwin-Williams*, the court did not state that industry would not innovate without regulation, but was responding to a claim by the petitioners in that case "that market forces should be left to drive the trend toward increasing the percentage of architectural coatings that are water-borne, and that government should not have a hand in regulating the

content of paint." 86 Cal.App.4th at 1279. It is fallacious logic to use this statement to support the argument that the absence of government regulation will result in no innovation.[7]

The District's argument also ignores the fact that the best available retrofit control technology requirement still permits the District to adopt technology-forcing rules. On its face, the standard requires the District to find the best of what is available, considering environmental, energy, and economic impacts, and then require all companies to implement that technology.

Moreover, the District's complaint that paint manufacturers will not develop lower-emitting technology is factually unsupported. In fact, the District's staff report contains numerous statements of industry innovation in the absence of District regulation. 1 AR 164-75. The District's real complaint is that manufacturers will not innovate "enough." This claim is not only wrong, but it is also irrelevant to the question of what the Legislature intended in enacting the best available retrofit control technology standard.

5. The District's Claim that Requiring Best Available Retrofit Control Technology to Be Available Will Imperil the State's Compliance with the Clean Air Act Is Unsupported.

The District asserts that requiring only available technology under section 40406 jeopardizes the state's compliance with the federal Act, because it "undermine[s] the District's ability to fulfill its statutory mandate to achieve the federal and state air quality standards." Opening Brief at 58. The District's brief is devoid of any factual basis to support this claim. Even if there were some basis in the record to support the District's

[7] The false syllogism in the District's logic is easily divined: If A (the presence of innovation) does not equal B (preclusion of government regulation), one cannot deduct that if B, then not A.

argument, it is the Legislature's responsibility to make policy decisions about how to comply with the federal Act. The District asks this Court to endorse the extraordinary view that an agency created by the Legislature may exceed its statutory authority if the agency believes that the authority is not sufficient to meet the Legislature's policy goal. Even assuming that competent evidence substantiated the District's extreme claim, the Court should reject such a drastic conclusion for obvious separation of power reasons.

First, the District's argument is not legally tenable. The federal Act created "a federal-state partnership for the control of air pollution," *Abramowitz v. EPA*, 832 F.2d 1071, 1073 (9th Cir. 1987), also referred to as "cooperative federalism." *See Friends of the Earth v. Carey*, 552 F.2d 25, 37-38 (2d Cir. 1977); *Union Elec. Co. v. EPA*, 427 U.S. 246, 266 (1976) ("[T]he State may select whatever mix of control devices it desires, and industries with particular economic or technological problems may seek special treatment in the plan itself.") (internal citations omitted).

Section 109 of the federal Act directs EPA to establish national ambient air quality standards for any air pollutants that might endanger public health or welfare. 42 U.S.C. section 7409. EPA issued standards for six pollutants in 1971, including ozone. Pursuant to Section 110 of the federal Act, responsibility for meeting these standards falls, in the first instance, to the states, which are required to submit state implementation plans that would provide for attainment of the standards. 42 U.S.C. section 7410(a)(1). A state implementation plan must provide "necessary assurances that the State" or "a regional agency designated by the state" such as the District has "authority under state . . . law to carry out such implementation plan . . . ." 42 U.S.C. section 7410(a)(2)(E)(i).

If a state does not submit a state implementation plan that complies with the federal Act, it cannot be required to adopt a particular control

measure, and the burden falls on the federal government. *See Maryland v. EPA*, 530 F.2d 215, 228 (4th Cir. 1975). Similarly, EPA has "no authority to question the wisdom of a State's choices of emissions limitations," so long as the plan satisfies section 110 of the federal Act. *Train v. NRDC*, 421 U.S. 60, 79 (1975). Here, in section 40440, the California Legislature delegated some of its authority to the District to adopt and implement the state implementation plan, but the state ultimately retains the responsibility for compliance with federal law. Accordingly, assuming that the Legislature did not grant the District sufficient authority, there remains ample authority at the state and federal level to address pollution in the District.

Even if noncompliance with federal law were relevant to interpreting the statutes at hand, the only fact offered by the District is that emissions from coatings are among the largest stationary sources it can regulate. The District states that "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." Opening Brief at 17. But comparing two numerators is misleading when they are minuscule in relation to the denominator; in this case, the denominator is the total VOC emissions within the District.

In 1997, total VOC emissions in the District were 996.6 tons per day. 45 AR 12862. The total VOC emissions attributable to all of the affected coatings were 28 tons per day, or less than 3% of the total emissions in the District. *Id.* Furthermore, the emission reductions from affected coatings that the District anticipated from the 2002 amendments were 10 tons per day for the interim limits (which ACA largely agreed met the best available retrofit control standard), and 12 tons per day, or approximately 1.2% of all emissions, for the final limits. 45 AR 12842-43.

The District makes no showing that foregoing these emissions will cause the state to violate the federal Act. Nor could it.

The dire air quality in the District, according to the data in the District's plan, is largely due to mobile sources, which dwarf the emissions from affected coatings and emission reductions addressed by the 2002 amendments. In the 1993 data cited by the District in 1997, mobile sources accounted for 790 tons per day, or 64% of all VOC emissions. See 1997 AQMP, Chapter 3, Base Year and Future Emissions, Table 3-3A (http://www.aqmd.gov/aqmp/97aqmp/chapters/m-chap3.html). The District has no jurisdiction over these mobile source emissions, and they are not subject to the best available retrofit control technology requirement of section 40440(b).

When one views these actual emissions within the District, the claim that requiring currently available technology for existing sources within its jurisdiction would derail California's compliance with the federal Act becomes baseless hyperbole. If the District cannot find sufficient emission reductions to meet the federal requirement by addressing sources within its authority with rules within its authority, the cure is certainly not for the Court to conclude that all is lost and grant it more authority than the Legislature did. Rather, the cure is to look to the Air Resources Board to control emissions from mobile sources, and, if necessary, to the Legislature if it needs to revisit the policy decisions it has made regarding the District's authority over existing sources.

II. THE DISTRICT MUST EVALUATE THE AVAILABILITY OF TECHNOLOGY FOR EACH DISCRETE CLASS OR CATEGORY OF PRODUCT.

A. An Emission Control Technology Is Not "Available" for a Regulatory Category if It Is Not Available for All Product Types Within the Category.

The Court of Appeal correctly construed the best available retrofit control technology standard to require the use of available technology, but its determination that the standard is satisfied if there is at least one compliant product in a heterogeneous or generic category of products grouped together for regulatory purposes is contrary to the language of section 40406. That statute requires best available retrofit control technology to be determined "by each class or category of source." The Court of Appeal dealt with the term "source" by stating that "if the district's rule directed at the paint or coating – as distinct from whatever the paint or coating is put on – is within the authority of the statute, that is enough to comply with the statute." Opinion at 17.

But this conclusion begs the question of how the District may or should properly categorize "sources" by type of paint or coating for purposes of determining best available retrofit control technology. The affected coatings include one category of coatings that is described by *the type of facility in which* the coatings are used (industrial maintenance coatings), one that is described by the *surface* on which the coatings are applied (floor coatings), three that are described by *what* the coatings did (quick-dry enamels; primers, sealers, and undercoaters; rust-preventative coatings), and one that is described by its *gloss level* (nonflat coatings). As ACA commented, "Some limits might be completely appropriate for some applications in a coatings category but completely inappropriate for others. This is the reason for our recommendations that major categories need to be

subcategorized and additional specialty categories need to be added to the rule." 8 AR 2083.

The categories themselves varied in their level of uniformity, with the industrial maintenance category being the most elusive of categorization for "availability" purposes.[8] As described by the District itself, this category "is a generic coating for a variety of high performance coatings used in areas with harsh environmental conditions such as extreme weather, corrosion, chemical, abrasion, and heat. Typical users include oil and gas production – onshore and offshore, refineries, petrochemical production and processing, marine, pulp and paper mills, bridges, manufacturing facilities, and water and waste treatment facilities." 1 AR 182.

A "class" is "a number of individuals (persons or things) possessing common attributes, and grouped together under a general or 'class' name; a kind, sort, division." *Oxford English Dictionary.* A "category" is "a class

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[8] As defined in the 2002 amendments:

> "INDUSTRIAL MAINTENANCE COATINGS are coatings, including primers, sealers, undercoaters, intermediate coatings and topcoats, formulated for or applied to substrates, including floors, that are exposed to one or more of the following extreme environmental conditions:
>
> "(A) immersion in water, wastewater, or chemical solutions (aqueous and non-aqueous solutions), or chronic exposure of interior surfaces to moisture condensation;
>
> "(B) acute or chronic exposure to corrosive, caustic or acidic agents, or similar chemicals, chemical fumes, chemical mixtures, or solutions;
>
> "(C) repeated exposure to temperatures in excess of 250 degrees Fahrenheit;
>
> "(D) repeated heavy abrasion, including mechanical wear and repeated scrubbing with industrial solvents, cleaners, or scouring agents; or
>
> "(E) exterior exposure of metal structures. . . ." 44 AR 12509-10.

or division, in any general scheme of classification." *Id.* Thus, each of the foregoing types of industrial maintenance coatings is itself a "class or category of source," and according to section 40406, should have been evaluated *independently* for availability of the proposed control technology.

The breadth of the regulatory categories in Rule 1113 results in the fact that technology for certain "classes" or "categories" of coatings may not be available to meet a proposed emissions standard, even though others within the regulatory category are available. For example, it may not be possible to develop a chemical storage tank coating that will perform acceptably at an emission level proposed for industrial maintenance coatings, but there is technology to develop a bridge coating at that level. In this case, section 40406 requires a finding that the technology is not available for the chemical storage tank coating subcategory, even though it is available for the bridge coating. These coatings should not be subject to the same standard simply because the District has placed the two coatings in the same "industrial maintenance" category for regulatory purposes. Clearly, chemical storage tank coatings and bridge coatings are not the same "class or category of source."

Under the Court of Appeal's conclusion, however the District would be allowed to avoid determining whether the proposed limits for industrial maintenance coatings were achievable for discrete classes such as oil and gas production, refineries, marine, pulp and paper mills, etc. According to the court's reasoning, so long as one coating is "available" within the heterogeneous regulatory category of products, the inquiry is concluded, even if the category is arbitrary in light of the availability of technology for the uses it covers.

The Court of Appeal's interpretation of how the best available standard is actually applied to a "class or category of source" is contrary to the meaning of those terms, and opens the door to results inconsistent with

legislative intent. The logical consequence of the Opinion is that, if a district determines that technology is available to meet a proposed emission reduction limit for *any* one subcategory within a broad category of products, that finding justifies the conclusion that the technology is available for all other subcategories, regardless of how those subcategories may differ from the one for which technology is available. Surely, this cannot be the result that the Legislature intended when it required evaluation of achievability by class or category of source.

Requiring the District to engage in a specific evaluation of achievability and availability for discrete classes or categories of products within a heterogeneous category does not create an impossible standard. Indeed, it complies with the legislative mandate in sections 40440(b) and 40406 to assess technology "by each class or category of source." If the District may only require available technology, then the technology must be available for the entire class or category of products being regulated.

This conclusion is far from revolutionary. Other courts construing air pollution control rules and other environmental standards have vacated agency rulemaking where the record did not support the conclusion that technology was available for the entire regulated category. For example, in *Commonwealth Edison Co. v. Pollution Control Bd.*, 25 Ill.App.3d 271, 282, 287-88, 323 N.E.2d 84 (1974), *aff'd in part and rev'd in part on other grounds*, 62 Ill.2d 494, 343 N.E.2d 459 (1976), the court held that the record must demonstrate technical feasibility "for a substantial number of the individual emission sources in this State to comply by the specified deadline," and that "[w]ithout any evidence that the needed systems are beyond the conceptually workable stage of development," the proposed rule was invalid.

In *National Lime Ass'n v. EPA*, 627 F.2d 416 (D.C.Cir. 1980), the court vacated a rulemaking in which EPA failed to demonstrate

achievability for emission limitations in an entire industry. The court noted that "[p]romulgation of standards based upon inadequate proof of achievability would defy the Administrative Procedure Act's mandate against action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" 627 F.2d at 430. According to the court, "an initial burden of promulgating and explaining a non-arbitrary, non-capricious rule rests with the Agency and we think that by failing to explain how the standard proposed is achievable under the range of relevant conditions which may affect the emissions to be regulated, the Agency has not satisfied this initial burden." *Id.* at 433.

The federal Occupational Safety and Health Act ("OSHA") "requires that an OSHA standard be both technologically and economically feasible." *Asarco, Inc. v. OSHA.*, 746 F.2d 483, 495 (9th Cir. 1984) (citation omitted). This standard does not restrict OSHA "to the state of the art in the regulated industry" but requires it to develop "evidence that companies acting vigorously and in good faith can develop the technology," before requiring that industry comply with standards "never attained anywhere." 746 F.2d at 495 (citations and internal quotation marks omitted). Courts construing this act, and its aggressive technology-forcing character, have rejected rulemakings in which OSHA determined in a generic fashion that a proposed rule was feasible within heterogeneous categories. In *AFL-CIO v. OSHA*, 965 F.2d 962, 981-82 (11th Cir. 1992), the court vacated a rulemaking in which the agency "made no attempt to show the ability of technology to meet specific exposure standards in specific industries . . . [and] merely presented general conclusions as to the availability of these controls in a particular industry." The court held that OSHA does not have "a license to make overbroad generalities as to feasibility" and cannot "group large categories of industries together" without evidence to support

the conclusion that "findings for the group adequately represent the different industries in that group." *Id.*

In *Color Pigments Mfrs. Assn., Inc. v. OSHA*, 16 F.3d 1157, 1161 (11th Cir. 1994), the court vacated a rulemaking in which OSHA grouped the color formulators industry together with other users of cadmium pigments, "and its failure to study any particular dry color formulators whatsoever show[s] that OSHA proceeded generically rather than making the requisite specific findings for this identifiable industry segment." And, in *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1266 (D.C.Cir. 1980), *cert. denied sub nom Lead Indus. Assn. v. Donovan*, 453 U.S. 913, 101 S. Ct. 3148, 69 L.Ed.2d 997, 1293-94, 1297 (1981), the court vacated the lead standard in several industries for failure to "examine individual operations to show that the standard can be met in most of them." 647 F.2d at 1297.

These cases starkly contrast with the Court of Appeal's conclusion that one compliant product within a heterogeneous category at the time of a rulemaking is sufficient under the best available retrofit control technology standard. By determining that it was unreasonable to expect the District to contemplate every possible object that can painted and then determine if an available technology exists (Opinion at 17) the Court of Appeal responded to an argument that ACA never made, and importantly avoided confronting the fact that the limits were not uniformly "achievable" within each of the regulatory categories in the 2002 amendments.

ACA never suggested the burden is on the District to define every possible subcategory of coatings subject to the proposed rule based on every conceivable object to which the coatings might be applied. ACA's position has been, and remains, that when a district proposes a rule that requires the use of technology across a broad and heterogeneous category of products and substantial evidence shows that the technology is not

available for discrete classes or categories within the regulatory category, the district needs to adjust the technology requirement for those subcategories in which the technology is available and the standard is achievable. The district need not scour the earth for every possible subcategory of sources to determine that proposed technology is available for it. At a minimum, however, the district must ensure that technology is available for discrete subcategories of products identified by interested parties during the rulemaking process.[9]

B. The District Did Not Determine that Technology Was Available for Each Category of Affected Product.

Beyond the two categories for which the Court of Appeal found that no "available" coatings existed, the administrative record does not establish that the proposed emission limits were achievable based on existing technology for each identified class and category of coatings in the remaining categories. The range of compliant coatings in these categories varied widely. 2 AR 314-15. Thirty-five percent of existing nonflat coatings and 27% of existing industrial maintenance coatings complied with the interim limits but only 3% and 11%, respectively, complied with the final limits. On the other hand, 89% of the high temperature industrial maintenance coatings met the interim limits, and 81% complied with the final limits. *Id.* The District's feasibility analysis was not a determination of best available retrofit control technology, as directed by the statute. The District claimed that the rule was feasible for all categories, but never expressed what "feasible" meant, other than to say that *some* products were available in each category. It did not attempt to establish, for example, that

[9] Thus, ACA suggests a construction that is similar to the familiar standard in the California Environmental Quality Act, which requires an environmental impact report to be prepared if there is a "fair argument" in the record of adverse environmental impacts from a project.

the technology used for the 3% of compliant nonflat coatings or 11% of the industrial maintenance coatings would actually work for the applications within those categories once the final limits became effective.

Although the District's own consultant said it was "imperative" that compliant coatings be "economical, user-friendly, architecturally and aesthetically sound, and provide functional and environmental durability" (22 AR 6071), the District failed to consider these important factors. Instead, the District relied primarily upon a survey of available coatings, a review of product data sheets and marketing information, and limited laboratory (but not field) testing. Comments stated that low-VOC coatings did not perform acceptably for applications in many of the categories, especially for the final limits.[10] In response to a comment that no adequate technology was available for the final limits (44 AR 12601), the District responded that its analysis showed that there were "some coatings with VOC levels that would comply with the second-tier perform equally or superior to their higher-VOC counterparts. It is expected that by 2006, additional high-performing industrial maintenance coatings will be available." 44 AR 12648.

ACA posed the "key issue" as "*not* whether low VOC coatings currently exist that are below currently applicable VOC limits," but whether those coatings "are adequate to meet all the performance needs for all of the coatings in their category, and whether *reasonable inferences* for

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[10] See, e.g., 8 AR 2060 (proposed limits "will require multiple significant technological breakthroughs"); 17 AR 4818 ("severe limitations in the availability of product to meet all performance data"); 47 AR 13282 (the final limits "as a practical matter are technologically impossible to meet except with the most exotic coatings that are completely ill-suited for many applications"); 50 AR 14229 ("There are not adequate replacements to match the current performance for any of the categories with VOC reductions scheduled for 2006 and 2008.").

even lower VOC levels can be made based upon current coating technologies and performance characteristics. . . . In general there is no substitute for field testing application, performance and durability characteristics of coatings and this is especially true in the case of the radical reformulations being recommended by staff." 3 AR 604 (emphasis in original).

In addition to these general objections, comments explicitly informed the District that the proposed limits were not achievable for specific coatings within in each of the categories, in particular industrial maintenance,[11] specialty primers,[12] nonflat coatings,[13] and floor coatings.[14]

Not only were the generalizations in the District's analysis inadequate, but the bases for those conclusions were also insufficient to establish that the limits were achievable. The District relied largely upon

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[11] *See, infra*, at 7-8. For example, the District relied upon the availability of exotic industrial maintenance technology (such as hot spray metal coatings) to gloss over the lack of technology that had been shown to work for all uses in the category. 51 AR 14769, 14826, 56 AR 16244.

[12] Higher VOC levels are required for specialty primers to be effective as cement substrate primers, anti-graffiti coatings and to deal with water stains and tannin bleed through. 52 AR 14833, 51 AR 14794, 56 AR 16231. An effective asphalt roof primer could not be developed at the proposed limit. 51 AR 14787-88. There were no adequate replacements for these coatings at the final limits. 50 AR 14229.

[13] The interim limits for nonflat coatings presented problems for high solid paints, particularly for exterior paints, and the final limits were especially problematic. 50 AR 14229, 14252. The technology reasonably anticipated to be available to meet the final limits would result in limitations including reduction in long-term durability and more frequent repainting. 44 AR 12601.

[14] The lower limits for floor coatings were not achievable for important requirements such as chemical resistance. 50 AR 14509-10, 51 AR 14832. The District's response to these comments did not identify any testing, but simply stated that compliant coatings advertised for chemical resistance. 50 AR 14286.

marketing materials, such as product data sheets, and very limited testing, to support the conclusion that compliant coatings were available to meet the proposed VOC limits throughout the coatings categories.[15] The District ignored undisputed comments that pointed out that these marketing tools "must be verified" by laboratory and field testing in order to determine that the limits were achievable. 3 AR 565, 8 AR 2077, 44 AR 12709-12. If compliant coatings had not been demonstrated to perform acceptably, they "may not adequately protect and possibly result in accelerated damage to our public infrastructures." 8 AR 2114. Performance characteristics represented in manufacturers' technical product data sheets are not obtainable under laboratory testing or actual usage conditions. 8 AR 2131-2132. Rather, achievability requires "field testing application, performance and durability characteristics of coatings." 3 AR 604. Instead of obtaining field data, the District "relied too heavily upon the unsubstantiated claims of a small number of manufacturers which may not represent the mainstream of industrial maintenance coatings technology." 3 AR 570.

In comparing the data sheets, the District sidestepped the fundamental question whether the available technology would perform acceptably for the discrete applications within the heterogeneous regulatory categories. This generic analysis was repeated consistently in response to issues raised by industry with regard to particular coatings applications for which generic conclusions were inappropriate. *See* 3 AR 732-36, 737-39, 752-63.

The District's determination that products were "available" within each category did not establish that the proposed limits were in fact "achievable" as required by section 40406.

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[15] This analysis was itself flawed, due to mistaken identification of certain coatings (and claims in the data sheets) with the wrong coating categories. 51 AR 14770.

C. Including "Escape Valves" Does Not Permit an Agency to Exceed the Authority Granted to It by the Legislature.

In response to comments regarding the harsh impacts of the rule, and the objections to the use of data sheets and limited testing to demonstrate the availability of compliant coatings, the District offered what the trial court called "escape routes." The District's brief goes to great lengths to explain how much "flexibility" it provided in its Rule, claiming that this demonstrates "achievability." Opening Brief at 72-73. These purported "escape routes" include: providing four years from adoption for compliance; permitting the averaging of non-compliant coatings with ultra-low-emission coatings; exempting coatings sold in one-quart containers from the Rule; and the availability of variances from the rule. While ACA is hard-pressed to disagree with flexibility, it is simply not a relevant factor to determining whether technology is available.

In developing new technologies for the marketplace, most coatings manufacturers need approximately 5 years *from the inception of the technology* to convert the technology into a useful product. 3 AR 605. Four years provides no relief to these manufacturers; it simply provides them the time that they need to "achieve" the proposed limit by implementing currently-available technology.

Similarly, averaging is limited to only certain categories of coatings and is only useful if a manufacturer makes products with both non-compliant and ultra-low emissions. And, even if every single coatings manufacturer could avail itself of the averaging provision, it does nothing to make non-existent technology available.

The one-quart exemption is equally counterintuitive, as the coatings categories with the biggest technology barriers are large, industrial uses. The image of a bridge or other large industrial facility being painted quart-by-quart is absurd. Not only that, but the District can also revoke the quart

exemption at any time, and has done so already for certain coatings. *See* SCAQMD Rule 1113(g)(1)(A) (amended July 13, 2007), *available at http://www.aqmd.gov/rules/reg/reg11/r1113.pdf.*

Finally, the District's cursory description of variances, the supposed "escape route" for sources that cannot attain compliance without "jeopardizing their business and property rights," fails to discuss the limited circumstances and brief timeframe for which one can obtain a variance. It also neglects to state the high burden placed on the moving party, and ignores the injustice of requiring "excess emissions" to be paid due to the unavailability of technology to comply with the rule. In effect, this variance procedure is no escape route at all.

Notwithstanding that, the District's discussion of flexibility is entirely irrelevant and misplaced. As the Court of Appeal rightly concluded, the inclusion of so-called "escape routes" in the District's rules "cannot create statutory authority that the Legislature never gave the [D]istrict in the first place." Opinion at 28.

D. It Would Be Inappropriate for the Court to Conclude that Rust Preventative and Quick-Dry Enamel Technology Was Available.

The District asserts that the rulemaking record supports a conclusion that compliant technology for quick-dry enamels and rust preventative coatings was available at the time the rule was adopted. See Opening Brief at 74-77. First, as discussed above, even assuming that the District's reconstruction of the staff report supported its claim, the fact remains that the District did not evaluate the achievability of the proposed limits for the discrete applications in these coating categories.

Second, and more fundamentally, the District cannot have its action affirmed, because it did not follow the process articulated by the Legislature in sections 40440(b) and 40406. See *East Peninsula Educ.*

Council v. Palos Verde Peninsula Unified School Dist., 210 Cal.App.3d 155, 174 (1989) (agency's failure to use correct standard constituted prejudicial error, barring court from any consideration of whether agency's decision was supported by substantial evidence); *Gentry v. City of Murrieta*, 36 Cal.App.4th 1359, 1407-08 (1995) (court lacked adequate record to evaluate agency's decision because agency failed to apply appropriate legal standard).

CONCLUSION

As in *Cooper v. Swoap*, 11 Cal.3d 856, 872 (1974), this Court should follow the words used by, and the intent of, the Legislature, not the District, to interpret the meaning of the statutes governing the adoption of best available retrofit control technology for emission reductions on existing sources. The plain language of those statutes, and the legislative context in which they were adopted, admit of but one reasonable interpretation: A proposed "best available" technology must be currently available, and the emissions reductions must be in fact achievable with that technology.

For the same reasons, when a district seeks to regulate a category of products, the statutes require that the technology is in fact available for all classes or categories of products within the regulatory category, particularly when credible assertions of unavailability are provided by interested parties.

The final limits in the District's 2002 amendments to Rule 1113 met neither standard, and cannot survive judicial scrutiny.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Jeffrey B. Margulies, declare as follows:

1. I am an attorney at law, duly licensed to practice before all the courts of the state of California, and am a partner in the law firm of Fulbright & Jaworski L.L.P., attorneys of record for petitioner and appellant American Coatings Association, Inc. I have personal knowledge of the following, and can and do testify thereto.

2. The foregoing APPELLANT'S ANSWER BRIEF ON THE MERITS is proportionately spaced, in 13 point Times Roman typeface. The brief contains 12,859 words, according to the word count provided Microsoft Word word-processing software.

I declare under penalty of perjury the foregoing is true and correct. Executed this 1st day of June, 2010 at Los Angeles, California.

Jeffrey B. Margulies

AMENDED PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, 41st Floor, Los Angeles, California 90071. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service.

On June 1, 2010, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s): **APPELLANT'S ANSWER BRIEF ON THE MERITS** as follows:

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

Executed on June 2, 2010, at Los Angeles, California.

William L. Troutman