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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

COMMUNITIES FOR A BETTER ENVIRONMENT, ASIAN PACIFIC ENVIRONMENTAL NETWORK, SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, Non-Profit Corporations,

Petitioners and Plaintiffs,

v.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT

Respondents and Defendants.

KINDER MORGAN MATERIAL SERVICES, LLC, KINDER MORGAN ENERGY PARTNERS, L.P.; DOES 1 through 20, inclusive

Real Parties in Interest and Defendants.

Case No.

MEMORANUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLANITIFF'S MOTION FOR PRELIMINARY INJUNCTION

[California Code of Civil Procedure § 527]

Date: April 28, 2014
Time: 11:00 a.m.
Dept.: 302
Judge: Judge Ernest Goldsmith

Action Filed: March 27, 2014
Trial Date: None Set

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INTRODUCTION

The recent domestic oil boom in the middle of the country has sparked another boom of mile-long trains of tank cars loaded with crude oil chugging along rivers, traveling through towns, and blocking intersections in cities. Many of these crude-by-rail trains are bound for California refineries or the California coast, where the crude can be shipped overseas. This new phenomenon, and the now recurring horror of crude-by-rail accidents, has many communities and citizens rightly concerned. Citizens of Richmond, then, were shocked to see a television news report last week exposing crude-by-rail trains rolling through their town without any public notice, review, or debate.

This is precisely the type of scenario that the California Environmental Quality Act ("CEQA") was designed to prevent. Instead of engaging in the open and thorough environmental review required by CEQA, the Air District illegally labeled Kinder Morgan's requested permit "ministerial." Yet, this was no check-the-box exercise, nor was it limited to mechanical application of fixed standards. Instead, the permitting action relied on the evaluation of an engineer who used his independent judgment to impose individualized permit conditions. These are exactly the kind of discretionary actions to which CEQA applies.

Not only is it crystal clear that the issuance of this Operating Permit was discretionary, it is equally clear that the project carries significant, adverse environmental impacts. As described below and in the attached declaration from Dr. Phyllis Fox, a licensed professional engineer, such impacts include risks of derailment and accidents, risks of explosions, increased release of toxic air pollutants, increased greenhouse gases from further train travel, and increased noxious odors. These are all impacts from the issuance of the Operating Permit should have been, but were not disclosed, analyzed, and mitigated in an Environmental Impact Review ("EIR"). It is even more confounding that the Air District would attempt to avoid public review for a proposed project of such controversy in a city that already bears more than its share of harm from oil transport and oil refining.

Richmond is home to schools, soccer fields, churches, and the daily lives of more than a 100,000 people. Allowing explosive and toxic crude oil to be transported through Richmond with no public notice or environmental review violates the very heart of CEQA. Because Plaintiffs Communities for a Better Environment, Asian Pacific Environmental Network, Sierra Club, and

Natural Resources Defense Council are likely to prevail on the merits, and because the Operating Permit is causing irreparable harm as it allows crude-by-rail to continue at the Kinder Morgan site, plaintiffs ask the Court to enjoin the Kinder Morgan Operating Permit and the crude-by-rail operations authorized by that permit until the Air District complies with the mandates of CEQA, including a full environmental review that is subject to public scrutiny and an open vote by the Air District's governing body.

BACKGROUND

Kinder Morgan's bulk rail terminal, located in the Burlington Northern/Santa Fe railyard, began operation as an ethanol rail-to-truck transloading facility in 2008 or 2009. Declaration of Adenike Adeyeye (March 27, 2014), Ex. A at 3. Kinder Morgan's Application No. 25180, dated January 29, 2013, proposed to alter its facility to introduce four additional pumps, four additional nozzles/loading arms, and switch as least some of its operations to the transloading of highly volatile and explosive Bakken crude oil from the midcontinent. *Id.*, Ex. B at 1, Ex. A at 3. Collectively, these alterations transformed Kinder Morgan's ethanol terminal into the Crude-By-Rail Project.

On July 10, 2013, the Bay Area Air Quality Management District ("Air District") conducted an initial engineering evaluation of Kinder Morgan's crude-by-rail proposal, including the project's air quality impacts. On the basis of that technical evaluation, the Air District suggested new permit conditions. *Id.*, Ex. B. That engineering evaluation specifically stated that the Air District "would impose more stringent source testing and monitoring conditions on [Kinder Morgan's transloading facility] to ensure compliance with current permit restrictions and well as all applicable rules and regulations." *Id*. at 3. Responding to Kinder Morgan's requested revision of some of the more stringent emissions monitoring requirements, the Air District conducted a second engineering evaluation, and issued an addendum, dated October 9, 2013 that modified the facility's permit conditions once more. *Id*. at Ex. C. And again, in December 2013, the Air District amended its engineering evaluation once more, in response to another Kinder Morgan request. *Id*., Ex. D at 1. Despite this detailed review and back and forth with the applicant, over a year later, the Air District issued the Operating Permit, with its particular conditions (*Id*. at Ex.E), claiming its permitting

action to be "ministerial." *Id*., Ex. B at 2. With that determination, the Air District exempted the Crude-By-Rail Project from any review under CEQA.

Plaintiffs do not precisely know when Kinder Morgan began accepting Bakken crude oil, but unit trains of crude have been observed in the City of Richmond since at least mid-March. Because the Air District ignored its CEQA obligations, there has been no public notice or opportunity to comment on the operating permit whatsoever.

LEGAL STANDARDS

I. THE California Environmental Quality Act

The California Legislature enacted CEQA to "protect, rehabilitate and enhance the environmental quality of the state." Pub. Res. Code § 21001(a). CEQA must be interpreted "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*CBE. v. Calif. Res. Agency*, 103 Cal. App. 4th 98, 109 (2002) ("*CBE v. CRA*")). CEQA has substantive, procedural, and informational mandates. CEQA's substantive mandates include a prohibition on approving projects with significant adverse environmental impacts when feasible mitigation measures can reduce, eliminate, or lessen such impacts. Pub. Res. Code § 21002; Pub. Res. Code § 21081(a); 14 Cal. Code Regs ("CEQA Guidelines") §15370. Review of a disputed statutory exemption is governed by Pub. Res. Code § 21168.5, which provides for review of whether there was a "prejudicial abuse of discretion" because the agency has not proceeded in a manner required by law or [because] the determination or decision is not supported by substantial evidence.").

A. Discretionary vs. Ministerial Projects

CEQA applies to "discretionary" as opposed to "ministerial" projects. (Pub. Res. Code § 21080(a).) Whether an activity is ministerial or discretionary is a question of law and subject to *de novo* review. (*Great Oaks Water Co. v. Santa Clara Valley Water Dist.*, (2009) 170 Cal. App. 4th 956, 967.) "[F] ailure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decisionmaking and informed public participation. Case law is clear that, in such cases, the error is prejudicial." (*Cnty. of Amador v. El Dorado Cnty. Water Agency*, (1999)76 Cal. App. 4th 931, 946.

CEQA Guidelines define discretionary projects as actions requiring "the exercise of judgment, deliberation or decision" (Guidelines §15357) and further provide, in part:

> Discretionary Action. CEQA applies in situations where a governmental agency can use its judgment in deciding whether and how to carry out or approve a project. A project subject to such judgmental controls is called a "discretionary project."

Guidelines §15002(i). In a ministerial decision, the agency official uses only "fixed standards" or "objective measurements" and "cannot use personal, subjective judgment in deciding whether or how the project should be carried out." (Guidelines §15369.) In *Friends of Westwood, Inc. v. City of Los Angeles*, (1987) 191 Cal. App. 3d 259, 269), the court stated, "legislative history makes it abundantly clear the term 'ministerial' is limited to those approvals which can be legally compelled without substantial modification or change." Typical examples of ministerial permits include automobile registration, dog licenses, and marriage licenses. (*See Adams Point Preservation Society v. City of Oakland,* (1987) 192 Cal.App.3d 203, 206.) Projects that possess both ministerial and discretionary attributes are deemed to be discretionary. (Pub. Res. Code § 21080; Guidelines §15268(d)). Any doubt about whether a project is ministerial or discretionary should be resolved in favor of the latter characterization. (*Friends of Westwood*, 191 Cal.App.3d at 271; *NRDC v. Arcata Nat'l Corp.*, (1976) 59 Cal.App.3d 959, 970).

B. CEQA's EIR Requirement

Once CEQA applies to a project, a lead agency must determine whether the project is eligible for a negative declaration or a full EIR. A negative declaration is appropriate only when agency claims no significant impacts (Pub. Res. Code § 21064) and is subject to public notice, comment, and a vote by the lead agency's highest elected decisionmaking body. (*Id* at §§ 21092; 21151(c); Guidelines §15073). By contrast, CEQA requires an EIR whenever a public agency proposes to approve a project which may have a significant effect on the environment. (*Laurel Heights Impr. Ass'n v. Regents of Univ. of Cal*., (1988) 47 Cal.3d 376, 390; Guidelines § 15370.) An EIR fulfills CEQA's objectives by requiring agencies "to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided," Pub. Res. Code § 21002.1(a); *see also* Pub. Res. Code § 21002.1(b). The EIR is "the heart of CEQA," and an "environmental 'alarm bell' whose purpose is

to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return." (*Laurel Heights*, 47 Cal.3d at 392.) The EIR also functions as a "document of accountability," intended to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (*Id.*) The EIR process protects not only the environment but also informed self-government. (*CBE v. CRA*, 103 Cal.App.4th at 107.)

II. Standard for a Preliminary Injunction

Courts evaluate two interrelated questions when deciding whether to issue a preliminary injunction: (1) will plaintiffs suffer greater injury from denial of the injunction than defendants will from its granting; and (2) is there a reasonable probability that plaintiffs will prevail on the merits. (*Robbins v. Superior Court* (1985) 38 Cal. 3d 199, 206 (citations omitted)). In striking this balance, the court should consider the advancement of the public interest. (*County of Inyo v. City of Los Angeles* (1976) 61 Cal.App.3d 91, 100; *Cosney v. California* (1970) 10 Cal.App.3d 921, 924.) "We believe no one would contend that the law has lesser concern for the overall public welfare than for individual private rights." (*Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 14.) Moreover, a court's decision to issue a preliminary injunction "must be guided by a mix of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support the injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.) Where the showing of the likelihood of success is sufficient, plaintiff need not show that the balance of harms tips in her favor at all. (*Common Cause of California v. Board of Supervisors* (1989) 49 Cal.3d 432, 447; *Pleasant Hill Bayshore Disposal v. Chip-It Recycling* (2001) 91 Cal.App.4th 678, 696.)

ARGUMENT

I. Petitioners are likely to succeed on the merits.

The Air District violated CEQA by incorrectly labeling Kinder Morgan's Crude-By-Rail Project as "ministerial." The disputed operating permit, which includes tailored conditions based on the Air District's independent judgment, is precisely the type of discretionary action CEQA was designed to cover. A finding that this permit was discretionary, rather than ministerial, justifies an

injunction and remand to the Air District to begin the CEQA process. Additionally, because the Crude-By-Rail Project carries significant adverse environmental impacts, it is ineligible for a negative declaration and instead triggers CEQA's full EIR requirement. The Court can and should directly order the Air District to begin that process.

A. Approval of Kinder Morgan's Operating Permit Was Discretionary.

This case challenges the Air District's "ministerial" designation of Kinder Morgan's crude-by-rail operation. In *Arcata Nat'l Corp.*, the court summarized the distinction between discretionary and ministerial: "a discretionary act is one which requires personal deliberation, decision and judgment, while a ministerial act amounts only to the performance of a duty in which the officer is left no choice of his own." 59 Cal.App.3d at 969. Discretion exists when the approving agency can impose "reasonable conditions" based on "professional judgment." (*Id.* at 971; *see also People v. Dep't of Housing & Cmty. Dev.* (1975) 45 Cal.App.3d 185, 193-94) (issuance of a conditional permit held to be discretionary in view of its containing both fixed design and construction specifications and generalized standards requiring the use of judgment.) Ministerial projects, by contrast, are those where the responsible agency official "is required to perform *in a prescribed manner in obedience to the mandate* of legal authority and *without regard to his own judgment or opinion concerning such act's propriety or impropriety*, when a given state of facts exists." (*Carrancho v. California Air Res. Bd.*, (2003) 111 Cal. App. 4th 1255, 1267) (emphasis in original.).

The disputed permit at issue in this case, which took more than a year to issue, was preceded by three separate engineering evaluation reports. Adeyeye Decl., Exs. B, C, D. The basic purpose of those evaluations was to develop specifically tailored conditions that ultimately formed Kinder Morgan's operating permit and to *recommend* action based on those new conditions.[1] *Id.*, Ex. B at 5 ("I recommend the proposed alteration … be approved."). The first addendum, which responded to Kinder's Morgan's claim of onerousness, weakened the monitoring requirements contained in the

[1] In its initial engineering evaluation report, the Air District deemed the application to be ministerial under the District's Regulation 2-1-311. Adeyeye Decl., Ex. B at 2. The Air District's reliance on its regulation is irrelevant for two reasons. First, no agency regulation can ordain all similar activities ministerial; the agency instead must look at the actual impacts of each specific project. (*Day v. City of Glendale*, (1975) 51 Cal. App. 3d 817, 124 Cal. Rptr. 569) (city guidelines not conclusive of ministerial nature of particular project; exercise of discretion by city engineer controlled CEQA applicability)). Second, even under the regulation on which the Air District purports to rely, the district engineer here did more than simply apply cookie-cutter standards.

original evaluation and underwent separate review by two additional Air District staff, who concurred with the recommendation contained therein. *Id*., Ex. C at 3. The Air District amended its engineering evaluation once more, on December 2, 2013, in response to rail shipments of "higher than expected" vapor pressure crude oil that forced Kinder Morgan to curtail operations or risk violation of its permit conditions. *Id*., Ex. D at 1. The Air District modified Kinder Morgan's permit conditions to require the use of DOT 407 tanker trucks, which are able to withstand higher vapor pressure, but are not certified by the California Air Resources Board. *Id.*, Ex. D at 1-2. Replete with such "independent judgment, deliberation, and decision," those evaluations form indisputable evidence of discretion. (*Day v. City of Glendale*, (1975) 51 Cal.App.3d 817, 822-24; *also see, Arcata Nat'l*, 59 Cal.App.3d at 969; Guidelines §§ 15357; 15002(i)).

The Air District's own rules demonstrate that this operating permit is the result of discretionary decisionmaking, not rote application of a known formula. For example, Air District Rule 8-6-307 states that "[a]ny organic liquid subject to this Rule shall not be spilled, discarded in sewers, stored in open containers, or handled in any other manner that would result in evaporation to the atmosphere." In an attempt to ensure compliance with this regulation, the Air District permitting engineer used his independent judgment to craft and impose Condition #24160 (Part 9), which states, "[u]nder normal operations, the owner/operator shall not open the railcar dome. Under each circumstance when opening the railcar domes becomes necessary, the owner/operator shall record in a log book or electronic equipment the following information…" Adeyeye Decl., Ex. B at 4.

Similarly, Air District Rule 8-6-306 does not prescribe a fixed objective standard but instead subjectively states that "[a]ll equipment associated with organic liquid delivery and loading operations shall be maintained to be vapor tight, leak free and in good working order." In an attempt to ensure compliance with this subjective standard, the air district engineer used his independent judgment to craft and impose Condition # 24160 (Part 6), which states, among other things, that "[d]isconnect losses shall be collected and stored in a closed container for disposal." Adeyeye Decl., Ex. B at 4. The Air District was in no way compelled to rubberstamp its approval. To the contrary, the very purpose of the Air District's evaluation was to develop an individualized permit for the project. (*Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal. App. 3d at 278 (discretion

where the agency's "employees … are empowered … to use largely subjective criteria to create individualized standards as to a vast array of important issues.") Or, in fact, to deny the permit altogether. Air District Rule 2-1-304 ("The APCO shall deny … a permit to operate if the APCO finds that the subject of the application would not or does not comply with the emission limitations of the District, or with applicable permit conditions, federal or California laws or regulations.").

The Air District exercised wide discretion by conditioning Kinder Morgan's permit and by eventually approving that permit. This wide discretion fatally undermines any claim to a "ministerial" exemption and triggers CEQA's public notice and disclosure mandate. This illegal CEQA exemption is a violation of law that, by itself, entitles Petitioners to injunctive relief.

B. The Air District Violated CEQA By Failing to Study and Mitigate the Project's Significant Impacts in an Environmental Impact Report.

The Air District's incorrect "ministerial" classification raises far more than a theoretical concern and leads to a second legal violation. This fundamental error allowed the agency to mask the project's significant impacts, avoid public notice and inquiry, and forego mitigating impacts. Given that the Air District's sole mission is to protect air quality, the project's increased air pollution, which the agency disclaims, may well be the most egregious misinformation at issue. Simply put, an EIR is required to address the many significant impacts of the Crude-By-Rail Project.

1. Expert opinion supports a "fair argument" that the Project has significant environmental impacts.

An EIR is required, whenever substantial evidence in the record supports a "fair argument" that a project "may have any significant environmental impact." Pub. Res. Code § 21080(c); (*Citizens Action v. Thornley*, (1990) 222 Cal.App.3d 748, 754.) The fair argument standard creates a "low threshold" favoring preparation of an EIR. *Id.* If substantial evidence supports a fair argument that a project may have a significant environmental effect, the lead agency must prepare an EIR even if it is also presented with other substantial evidence indicating the project will have no significant effect. (*Stanislaus Audubon v. Stanislaus*, (1995), 33 Cal.App.4th 144, 150-151.) The "fair argument" standard is virtually the opposite of the typical deferential standard afforded to agencies. Whereas agency decisions are usually upheld if any substantial evidence supports its decision, under the "fair argument" standard, an agency's decision to avoid preparation of an EIR must be reversed

if any evidence contradicts the agency's decision. (*Quail Botanical Gardens v. City of Encinitas*, (1994), 29 Cal.App.4th 1597, 1602) (EIR required for 40-home residential development).

As a matter of law, "expert opinion" constitutes "substantial evidence" within the meaning of CEQA. (Pub. Res. Code § 21080(e)(1); Guidelines § 15064(f)(5)). Expert testimony is sufficient to create a fair argument, even if other evidence contradicts the expert's conclusions. (Guidelines § 15064(g); *Brentwood Ass'n v. City of Los Angeles*, (1982) 134 Cal. App.3d 491, 504-05; *Sierra Club v. Sonoma*, (1992) 6 Cal.App.4th, 1307, 1317).

2. Expert opinion demonstrates the Project's significant impacts.

Dr. Phyllis Fox, whose expertise has been acknowledged in two published CEQA cases (*Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal. App. 4th 1344, 1365; *CBE v. South Coast Air Quality Management Dist*., (2010) 48 Cal.4th 310), explains that the Crude-By-Rail Project has a number of significant environmental impacts that must be disclosed, studied, and mitigated in an EIR.[2] As explained in her declaration, the project emits significant amounts of air pollution (including toxic air contaminants and greenhouse gases) and poses a significant accident-related risk to public health, public safety, and the environment. *See generally* Declaration of Dr. Phyllis J. Fox ("Fox Decl.") Dr. Fox's expert evaluation shows that an EIR is required here. First, Dr. Fox estimates (based on conservative assumptions and her review of the permit materials) that the project will emit 39 tons per year, or 216 pounds per day, of reactive organic gases. *Id*. at ¶ 48. This is nearly four times higher than the Air District's own CEQA significance thresholds of 10 tons per year and 54 pounds per day for this class of pollutants. *Id*. Second, Dr. Fox estimates that the project will emit 22,863 metric tons of greenhouse gases per year—more than *twenty times* higher than the Air District's CEQA significance threshold of 1,100 metric tons per year. *Id*. at ¶ 53. Third, on the issue of public health, Dr. Fox estimates that the project will emit 1,400 pounds per year of benzene, a known carcinogen. *Id*. at ¶ 58. This is more

[2] Dr. Fox has M.S. and Ph.D. degrees in environmental engineering from the University of California at Berkeley with minors in Hydrology and Mathematics. Fox. Decl. at ¶2. She is a licensed professional engineer (chemical, environmental) in five states, including California; a Board Certified Environmental Engineer, certified in Air Pollution Control by the American Academy of Environmental Engineers; and a Qualified Environmental Professional, certified by the Institute of Professional Environmental Practice. *Id*. She has over 40 years of experience in the field of environmental engineering and has prepared comments, responses to comments, and sections of Environmental Impact Reviews (EIRs) for well over 100 CEQA documents. *Id*. at ¶¶ 3-4.

than *three hundred and sixty-eight times* the Air District's 3.8 pound/year CEQA significance threshold for this toxic air contaminant. *Id*. As Dr. Fox explains, this vast increase in benzene poses a significant cancer risk to the neighboring community. *Id*. at ¶ 61. Fourth, Dr. Fox explains that the project's hydrogen sulfide emissions will cause significant odor impacts to the local community. *Id*. at ¶¶ 64-66. Fifth, Dr. Fox identifies a significant risk of catastrophic accident based on the explosive nature of Bakken crude and based on the potential contamination of California's waterways. *Id*. at ¶ 17-37. Any one of these five impacts would be sufficient to satisfy CEQA's "fair argument" standard and trigger an EIR.

CEQA is first and foremost designed to require governmental decisionmakers to consider the environmental impacts of their actions *before* proceeding with a proposed project. The courts have held that where, as here, the lead agency has failed to prepare an EIR for a project, it is appropriate the stay the project pending resolution of the litigation. (*NRDC v. Los Angeles*, (2002) 103 Cal. App. 4th 280-81, 285-86 (court stayed ongoing construction of Port of Los Angeles expansion pending completion of an EIR)). As the court held,

> A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding whether to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved. If post-approval environmental review were allowed, EIR's would likely become nothing more than post hoc rationalizations to support the action already taken. We have expressly condemned this use of EIR's.

(*Id.* at 284, *citing Laurel Heights*, 47 Cal.3d at 394*; San Joaquin Raptor v. Co. of Stanislaus*, (1994) 27 Cal.App.4th 713, 742 (court enjoined "all activities" in furtherance of the development project "pending full compliance with CEQA."); *Burbank-Glendale-Pasadena Airport v. Hensler*, (1991) 233 Cal.App.3d 577, 595-96 (all activities in furtherance of airport project enjoined pending CEQA review); *Ultramar v. SCAQMD*, (1993) 17 Cal.App.4th 698, 705 (refinery rule enjoined pending CEQA review*); Day v. City of Glendale*, (1975) 51 Cal.App.3d 817, 824 (EIR is required prior to significant site grading activities)).

Because CEQA applies to the Crude-By-Rail Project and because the project carries significant adverse environmental and public health impacts, the Air District must prepare an EIR.

II. Plaintiffs will be irreparably harmed without an injunction.

Plaintiffs, the environment, and human health are at risk of suffering irreparable harm should the Crude-By-Rail Project be allowed to continue without any, let alone adequate, environmental analysis and without feasible mitigation measures to protect the environment and public health. "It is undisputed that 'environmental injury, by its nature, can seldom be remedied by money damages and is often permanent or at least of long duration, i.e. irreparable.'" (*CBE v. Cenco*, 179 F. Supp. 2d 1128, 1148 (C.D. Cal. 2001), quoting *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 545 (1987); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 722 (9th Cir. 1988) ("when environmental injury is sufficiently likely, the balance of harms will usually favor issuance of an injunction to protect the environment")). CEQA, like its federal counterpart the National Environmental Policy Act ("NEPA"), has procedural requirements in place to provide the opportunity for public involvement and to facilitate sound environmental decision. Failure to comply with CEQA's requirements causes harm itself, specifically the risk that "real environmental harm will occur through inadequate foresight and deliberation." (*Sierra Club v. Marsh,* 872 F.2d 497, 504 (1st Cir. 1989)); *see also Sierra Club v. U.S. Army Corps of Eng'rs,* 446 F.3d 808, 816 (8th Cir. 2006) (injury under NEPA includes "failing to issue a required environmental impact statement")).

Operation of the Crude-By-Rail Project without properly investigating and mitigating environmental impacts creates irreparable harm to plaintiffs' members, workers,and other local residents. Operation of the project exposes the public to unsafe risks of harm from the change in product from ethanol to Bakken crude oil, potentially explosive rail accidents, increased volatile organic compound ("VOC") emissions, increased greenhouse gas emissions, toxic air contaminants like benzene, and increased noxious odors. *See generally* Fox Decl. at

The Air District's utter disregard for CEQA and public involvement also inflicts substantial and irreparable informational harm upon plaintiffs and the general public. CEQA confers a right to an informed decision-making process and an opportunity for meaningful public participation prior to project construction. *See e.g.*, Pub. Res. Code §21092; *Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1250 (9th Cir. 1984) (strong presumption of irreparable harm when "agency fails to evaluate thoroughly the environmental impact of a proposed action").

A. The Change From Ethanol To Crude Oil Harms People and the Environment.

1. Rail transport of crude oil inherently risks harm to human life, health, and the environment.

Crude oil has certain properties that make it uniquely dangerous. First, it is a liquid, meaning that it can migrate away from the site of an accident or other release and travel into communities, down waterways, or into groundwater. Second, unrefined Bakken crude oil contains a wide range of volatile organic compounds ("VOCs") and toxic air contaminants. Fox Decl. at ¶ 17-37, 55.

Domestic crude oil production is undergoing a major boom, and that boom has caused a corresponding increase in crude-by-rail. In May 2013, the American Association of Railroads profiled how crude production and crude-by-rail are undergoing twin booms:

> Small amounts of crude oil have long been transported by rail, but since 2009 the increase in rail crude oil movements has been enormous. As recently as 2008, U.S. Class I railroads (including the U.S. Class I subsidiaries of Canadian railroads) originated just 9,500 carloads of crude oil. By 2011, carloads originated were up to nearly 66,000, and in 2012 they surged to nearly 234,000. Continued large increases are expected in 2013. In the first quarter of 2013, Class I railroads originated a record 97,135 carloads of crude oil, 20 percent higher than the 81,122 carloads originated in the fourth quarter of 2012 and 166 percent higher than the 36,544 carloads originated in the first quarter of 2012.[3]

Predictably, the rise in crude transportation by rail has resulted in soaring numbers of crude oil releases to the environment in the form of both accidents and "non-accident" releases such as leaks. For the Richmond Kinder Morgan Project, the rail lines that will bring oil into the facility run through the city. An accident at or near the terminal could result in vast environmental damage, horrifying personal damage, including loss of life, and millions of dollars of economic harm. Unfortunately, the surge of incidents and releases has not been matched by an increase in the resources available to responders and regulators.

a. Lac-Mégantic

On July 5, 2013, a train hauling 72 tanker cars loaded with 2.0 million gallons of crude from the Bakken shale oil field in North Dakota slammed into Lac-Mégantic, a town of 6,000 located in Quebec. The brakes on the five-locomotive train malfunctioned, and it began a seven-mile roll toward the small town. Reaching a speed in excess of 60 mph, the train reached a bend in the tracks,

[3] American Association of Railroads, "Moving Crude Petroleum by Rail," May 2013, at 3-5, *available at* https://www.aar.org/keyissues/Documents/Background-Papers/Crude-oil-by-rail.pdf.

derailing and dumping 1.6 million gallons of its contents, which caught fire and incinerated dozens of buildings. Forty-seven people were killed. Fox Decl. at ¶31.

The Lac-Mégantic rail accident/spill will likely have costs on the order of $500 million to $1 billion excluding any civil or criminal damages. Costs/damages for a similar incident could have been substantially higher had it occurred in a more populated area. *Id.* Lac-Mégantic is also relevant in that it shows how an accident involving highly flammable light crude (such as the Bakken crude) can have devastating consequences even in a small town in terms of loss of human life and widespread explosion and fire damage to surrounding property.

b. Other accidents

Unfortunately, the tragic accident at Lac-Megantic turned out to be prelude. The regular occurrence of these accidents underscores the risks to pubic safety in a more populated location like Richmond. On October 19, 2013 in Edmonton, Canada, a fireball erupted as a Bakken unit train derailed, burning several homes to the ground. On November 8, 2013, a 90-car unit train carrying 2.7 million gallons of crude oil derailed and exploded in a rural wetland in western Alabama, spilling crude oil into the surrounding wetlands and igniting a fire that burned for several days. *See* e.g. Fox Decl. at ¶ 35. On December 30, 2013, a mushroom-shaped fireball erupted outside of Casselton, North Dakota, followed by heavy plumes of toxic smoke, when 21 cars of a Bakken train derailed and burned. Officials evacuated the town and urged evacuation for everyone in a five mile radius. On January 7, 2014, in New Brunswick, Canada, 150 people were evacuated when 17 cars derailed including 5 oil cars (likely Alberta tar sands). On January 20, 2014, seven cars of a 101-car train from Chicago derailed on the Schuylkill Arsenal Railroad Bridge over the Schuylkill River in Philadelphia, Pennsylvania. Six were carrying Bakken crude, and one was carrying sand. On February 13, 2014, Nustar's Norfolk Southern Train derailed, crashed, and spewed 7,000 gallons crude plus propane near homes.

In January 2014, the federal Pipeline and Hazardous Materials Safety Administration issued a safety alert "to notify the general public, emergency responders and shippers and carriers that recent derailments and resulting fires indicate that the type of crude oil being transported from the

Bakken region may be more flammable than traditional heavy crude oil."[4] As Dr. Fox explains, Bakken crude has a significantly lower flash point than ethanol, is less viscous than ethanol, and has a higher vapor pressure than ethanol, all chemical differences that increase the risk of harm to people and the environment from the shift to crude oil. Fox Decl. at ¶ 25.

c. California's concerns about crude-by-rail

The Air District should have been on notice that crude-by-rail operations pose significant hazards to communities and the environment. On November 30, 2013, California Public Utilities Commission's ("CPUC") Office of Rail Safety published its most recent annual railroad safety report, which listed a number of alarming railway safety concerns that are exacerbated by the increased movement of crude oil by rail through California. The report specifically identifies California's railroad bridges as a significant rail safety risk, warning that "[r]ailroad bridges are not inspected by any entity in the California state government, even though they carry thousands of rail cars containing hazardous materials and thousands of passengers daily," and that only "[o]ne federal inspector is currently assigned to cover California, along with 10 other states in the West, and cannot possibly provide adequate oversight for the approximate 5,000-7,000 bridges in California." Annual Railroad Safety Activity Report to California State Legislature (Nov. 30, 2013) at 8, attached to Fox Decl. at Attach. 2. The reports lists criteria that may affect a ranking of the risk of a bridge, including "whether the bridge exists in high-population areas and/or over major waterways, and the frequency that the bridges support trains that that transport passengers, volatile hazardous materials and petroleum products." *Id.* at 9.

On the subject of earthquake risk, the report explains that California's "railroad tracks and bridges cross active faults in the state, and the potential for earthquake-induced damage to the railroad system infrastructure and other rail facilities is high, with consequent risks to public safety and the environment." 2013 Rail Safety Report at 11; Fox Decl. at ¶ 20.

On the specific threat of crude-by-rail, the CPUC's report provided a dire warning:

> According to the California Energy Commission, more than 200,000 barrels of crude per month were imported into California this summer, a fourfold increase from early 2012. Hauling crude into California involves traversing some of the most challenging

[4] PHMSA, Jan. 2, 1014 Alert, *available at* http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/1_2_14%20Rail_Safety_Alert.pdf.

> mountain passes in the nation. A runaway train, although rare, could render significant consequences. In 2003, a 31-car train rolled downhill for about 30 miles and crashed into the City of Commerce with a load of lumber that damaged property and injured a dozen people. It if had been highly volatile Bakken crude, which can burn like gasoline, the damage would have assuredly been far greater.

2013 Rail Safety Report at 25. The report urged heightened safety measures to address the public safety risks of California's deteriorating railway system, especially in light of the uptick in crude-by-rail projects throughout the state.

2. Crude oil transport causes significant harm to air quality.

As explained by Dr. Fox, there are important differences between ethanol and Bakken crude oil that harm Richmond's people and environment, particularly with respect to volatile organic compounds. Fox Decl at ¶ 44. Using standard methods, Dr. Fox calculated that "replacing ethanol with Bakken crude oil will increase VOC emissions from the Terminal by about a factor of ten." *Id.* These emission levels exceed CEQA significance thresholds by a significant amount. In addition, Bakken crude contains toxic air contaminants "that may cause or contribute to an increase in mortality or in serious illness or that may pose a present or potential hazard to human health." Fox Decl. at ¶ 55. Dr. Fox stated that toxic air contaminants in Bakken crude "pose a significant public health risk, especially in the event of accidental releases, which would be more common and severe than for ethanol." *Id.* at ¶ 59.

The communities that will be most affected by the project's accidents, air emissions, noxious odors, and other environmental health impacts are overwhelmingly minority and low-income neighborhoods. The communities surrounding the project have minority population percentages of 92-95%.[5] Likewise, the poverty rate for many nearby neighborhoods is in the 40-100% bracket. Average per capita income for the immediately adjacent area is $11,418. These rates among Kinder Morgan's immediate neighbors are far in excess of the greater community's minority population percentage (53%) and the poverty rates (average per capita income $43,494). They also far exceed the rates for Contra Costa County as a whole (53% minority population and 10% below poverty

[5] This data comes from the U.S. Environmental Protection Agency's EJ View website, *available at* http://epamap14.epa.gov/ejmap/entry.html. Reports and Maps created using EPA's tool are attached to the Adeyeye Decl. at Ex. E.

level). Because of the Air District's violation of CEQA, the project's impacts on minority and low-income communities were entirely neglected.

B. The Air District's Violation of CEQA Meant That There Was No Public Information, No Community Engagement, No Public Comment, and No Environmental Review.

The failure to conduct any CEQA review process deprived plaintiffs, their members, and the public of their right to full disclosure, analysis, avoidance, minimization, and mitigation of the Project's environmental impacts. Declaration of Andrés Soto ¶ 7 (March 25, 2014) ("Given the heightened risks and community concern associated with crude by rail, CBE and its members would have provided significant public comment and input, had we or our community received notice of, or even that very opportunity to provide public comment on, Kinder Morgan's new transport of crude oil."). Plaintiffs will suffer irreparable harm if the project is allowed to continue without the required environmental review. Declaration of Lio Saeteurn ¶ 8 (March 27, 2014) ("As a mother of two, raising my family in Richmond, I am furious that I was not notified of this approval and change at Kinder Morgan. I live pretty close to this facility, and hear the trains go by day and night passing by my home. I'm concerned that if Kinder Morgan continues its crude by rail operations, we're all being exposed to an unnecessary risk of spills and explosions from train derailment. [I also worry about] increased pollution from the eventual refining of that crude.").

CEQA is designed to require governmental decisionmakers to consider the environmental impacts of their actions *before* proceeding with a proposed project. The informational and open government harms of the Air District's CEQA violations are by themselves enough to justify the requested preliminary injunction. Combined with the severe environmental risks and public health hazards outlined above and in Dr. Fox's declaration, preliminary injunctive relief is warranted to prevent additional irreparable harm. Plaintiffs ask the Court to enjoin the Operating Permit issued by the Air District and to ensure that this crude-by-rail operation ceases while this case progresses.

III. THE COURT SHOULD REQUIRE NO MORE THAN A NOMINAL BOND.

Plaintiffs ask that the Court waive the bond requirement or require no more than a nominal bond. (*Mangini v. J.G. Durand Int'l,* (1994) 31 Cal.App.4th 214, 217 (court has discretion to require a nominal bond if larger bond would "deny access to judicial review"). *South Pasadena v.*

Slater, 56 F. Supp. 2d 1106, 1148 (C.D. Cal. 1999) ("courts routinely impose either no bond or a minimal bond in public environmental cases")).

CONCLUSION

For the reasons stated above, plaintiffs respectfully ask the Court to issue a preliminary injunction suspending the Kinder Morgan Operating Permit, and the crude-by-rail operations authorized by that permit, issued February 3, 2014 to prevent further irreparable harm while the Court considers the Air District's violation of CEQA.

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Respectfully submitted,

EARTHJUSTICE

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