NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

COMMUNITIES FOR A BETTER ENVIRONMENT et al., Plaintiffs and Appellants, v. SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT, Defendant and Respondent; BAKERSFIELD CRUDE TERMINAL LLC et al., Real Parties in Interest and Respondents.	F073517 (Super. Ct. No. 284013) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. William D. Palmer, Judge.

Earthjustice, Elizabeth B. Forsyth, Paul R. Cort, A. Yana Garcia; Communities for a Better Environment and Roger Lin for Plaintiffs and Appellants.

Annette A. Ballatore-Williamson, Jessica E. Hafer; Kahn, Soares & Conway and Philip M. Jay for Defendant and Respondent.

Susan Yu Law Group, Susan C. Yu, Eric M. Lode; Downey Brand, Steven H. Goldberg, Christian L. Marsh, Sophia B. Belloli; Clifford & Brown and Richard G. Zimmer for Real Parties in Interest and Respondents.

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Plaintiffs challenge San Joaquin Valley Air Pollution Control District's (Air District) 2014 approval of permits authorizing the construction of an oily water sewer system (sewer system) for a rail-to-pipeline transfer terminal in Kern County. Plaintiffs contend Air District violated the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.[1]) by concluding the proposed sewer system involved only ministerial actions, and was therefore exempt from environmental review. Plaintiffs argue approval of the permits was discretionary, not ministerial and, therefore, the CEQA exemption determination was wrong.

The trial court concluded Air District exercised no discretion when it approved the authority to construct permits for the sewer system. As a result, the trial court denied plaintiffs' petition for writ of mandate.

We conclude that the issuance of the authority to construct permits for the sewer system was a discretionary act. Air District exercised its judgment when it conditionally approved the permits and imposed specific requirements that were not explicitly mandated by the applicable rules and statutes. For example, imposing the condition requiring the measurement and recording of certain concentrations of volatile organic compounds (VOC)[2] at least once each week involved the exercise of discretion, because there is no rule or statute addressing the frequency of such measurements.

We therefore reverse the judgment and remand for further proceedings.

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1 All unlabeled statutory references are to the Public Resources Code.

2 Many reading this opinion will lack the parties' familiarity with the acronyms (e.g., ATC, APCO, BACT, BE, EE, ERC, PE, PE2, PTO, SIP, SSIPE, SSPE1, SSPE2) often used by veterans of the administrative scheme overseen by Air District. Therefore, we have limited the use of acronyms to "VOC," which appears throughout the opinion, and the relatively common "CEQA" and "EPA." (See Herrmann, The Curmudgeon's Guide to Practicing Law (ABA 2006) 6 ["avoid alphabet soup" where the goal is to be easily understood]; *National Association of Regulatory Utility Commissioners v. Dept. of Energy* (D.C.Cir. 2012) 680 F.3d 819, 820, fn. 1.)

FACTS

Plaintiffs

Five California nonprofit corporations filed this lawsuit. Communities for a Better Environment has offices in Oakland and Huntington Park and alleges its mission includes achieving environmental health and justice in low-income communities. Association of Irritated Residents is based in Kern County and alleges it was formed in 2001 to advocate for clean air and environmental justice in San Joaquin Valley communities. Center for Biological Diversity alleges it has offices throughout California and the United States, has members in Kern County, and is involved in environmental protection issues in California and North America. Sierra Club alleges it has a national membership exceeding half a million with about 600 members in Kern County. STAND, formerly known as ForestEthics, alleges it is committed to protecting North America's forests and wild places, has opposed crude-by-rail terminals, and had raised awareness of the risks of transporting crude oil in outdated rail cars. All five corporations have appeared in this matter as appellants. They are referred to in this opinion collectively as "plaintiffs."

Air District

Air District is the only defendant named in this lawsuit. Air District is a public agency formed by eight counties and has jurisdiction over the San Joaquin Valley Air Basin, where it "ensures that proposed pollution sources comply with state [and federal] air quality regulations." (*Elk Hills Power, LLC v. Board of Equalization* (2013) 57 Cal.4th 593, 603; Health & Saf. Code, § 40600, subds. (a), (b).) As a local air quality district, it is charged by the California Clean Air Act of 1988 (Stats. 1988, ch. 1568, § 1, p. 5634) (California Clean Air Act) to "adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards ... and ... enforce all applicable provisions of state and federal law." (Health & Saf. Code, § 40001, subd. (a).)

A federal law addressing air quality is the federal Clean Air Act (42 U.S.C. § 7401 et seq.). Each state must adopt a plan to implement, maintain and enforce national air

quality standards. (42 U.S.C. § 7410(a)(1).) For state regions that fail to attain the national standards, the state must prepare a state implementation plan that provides for implementation, maintenance and enforcement of air quality standards. (42 U.S.C. §§ 7410(a)(2)(I), 7501-7515 [plan requirements for nonattainment areas].) The San Joaquin Valley has been designated a nonattainment area for ozone. (40 C.F.R. § 81.305.) As a result, its state implementation plan must "require permits for the construction and operation of new or modified major stationary sources [of designated pollutants]" in the area. (42 U.S.C. §§ 7502(c)(5), 7503 [permit requirements].)

Pursuant to state and federal law, Air District adopted a rule that applies to "all new stationary sources and all modifications to existing stationary sources which are subject to the District permit requirements and after construction emit or may emit one or more affected pollutant." (Rules & Regs. of the San Joaquin Valley Unified Air Pollution Control Dist., rule 2201, § 2.0.)[3] The term "[a]ffected [p]ollutant" includes VOC, which are a precursor to ozone. (Rule 2201, § 3.4.) The interpretation and application of Rule 2201 lies at the center of this appeal.

Real Parties in Interest

Plaintiffs' petition named four real parties in interest, which are described here from top to bottom of the enterprise's organizational chart. The real parties in interest are referred to collectively as the "Owner-Operator."

Plains All American Pipeline, L.P., a Delaware limited partnership named as a real party in interest, sits at the top of the organizational chart. It (1) owns a 99.999 limited partner interest in Plains Marketing, L.P., (2) is listed with the United States Securities and Exchange Commission, and (3) is traded on the New York Stock Exchange.

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3 All further references to "Rules" refer to the Rules and Regulations of the San Joaquin Valley Unified Air Pollution Control District.

The second tier in the organizational chart is occupied by Plains Marketing, L.P., a Texas limited partnership named as a real party in interest. Plains Marketing, L.P. is the sole member of Plains Rail Holdings LLC and also owns a 99.999 percent limited partner interest in Plains LPG Services, L.P.

The third tier level of the organizational chart is occupied by (1) Plains Rail Holdings LLC, a Delaware limited liability company, and (2) Plains LPG Services, L.P., a Texas limited partnership. Plains LPG Services, L.P. was named as a real party in interest because its letterhead was used to apply for permits authorizing the construction of the sewer system. Plains Rail Holdings LLC was not named by plaintiffs as a real party in interest, but it is the sole member (i.e., owner) of the company, owns the transfer terminal and applied for the permits for the sewer system.

Bakersfield Crude Terminal LLC sits at the bottom of the organization chart and is the entity that owns and operates the transfer terminal. It is a Delaware limited liability company with offices in Houston, Texas. Plaintiffs named it as a real party in interest.

Rail-to-Pipeline Terminal

In April 2012, the County of Kern, as the lead agency, filed a notice of exemption from CEQA for a project (1) titled "Ministerial Permit No. 2, Map No. 158"; (2) described as "Site Plan Review"; and (3) located at "Santiago Road" in the "South Kern Industrial Complex." The only information in the notice possibly alerting the public that the proposed project involved the construction of a rail-to-pipeline transfer terminal handling crude oil was the name listed for the person carrying out the project, Bakersfield Crude Terminal LLC. The notice also listed Guidelines[4] section 15300.1 (ministerial project) as the reason the project was exempt. This notice of exemption was never challenged, despite (and perhaps due to) its multiple flaws. Those flaws include the

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4 "Guidelines" refers to the regulations promulgated to implement CEQA and set forth in the California Code of Regulations, title 14, section 15000 et seq. (§ 21083.)

failure to provide a "brief description of the project" as that phrase is used in Guidelines section 15062, subdivision (a)(1) and the failure to identify the location of the project either by map or "by street address and cross street" in accordance with Guidelines section 15062, subdivision (a)(2).

2012 Application for Permits

In May 2012, Bakersfield Crude Terminal LLC submitted an "Authority to Construct Application Package" to Air District for a rail-to-pipeline transfer terminal where crude oil would be transferred from incoming railcars into outbound pipelines, either directly or through storage tanks. The proposed facility included pumps, valves, piping, connectors and two 150,000-barrel storage tanks with internal floating roofs. The maximum capacity was stated as two unit trains per day, which was equated to 168,000 barrels per day or 61,320,000 barrels per year.[5] This daily offloading volume would be achieved by operating two pumps with a flow rate of approximately 6,000 barrels per hour for 14 hours per day. The facility's location is a parcel containing 110 acres at the corner of South Lake Road and Santiago Road in Taft, California.

Attachment F to the application package contained six laboratory reports of analysis, which appear to address types of crude oil that might be handled at the facility. One report was for a sample designated as "Crude BAKKEN." Two reports were for samples designated as "Bakken." Three reports were for sample designated as "Niobrara Crude." Plaintiffs contend crude oil from the Bakken region of North Dakota and from Canada is more volatile and explosive than heavy crude, which can be deadly in cases of derailment and major spills.

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[5] These daily and yearly figures indicate that the terminal would operate 365 days per year. A "unit train" usually consists of between 104 and 120 railcars, but the application's reference to two unit trains per day and 208 disconnects per day suggests a unit train arriving at the terminal will contain 104 railcars of crude oil.

Review of 2012 Application

On June 11, 2012, Air District deemed the application complete. Air District reviewed the application and calculated the potential emissions that would be result from the operation of the facility. One purpose of the review was to determine whether the proposed facility would be a major source[6] of air pollutants and, thus, subject to a more intensive review. A stationary source with a potential to emit 20,000 pounds or more of VOC per year qualifies as major source of that pollutant under Rule 2201.[7]

Emissions of VOC from the railcar unloading rack portion of the facility (i.e., the crude oil transfer operations, which excludes emissions associated with the two storage tanks) were described as having two sources: (1) disconnect losses (i.e., leaks and drips) and (2) fugitive emissions from components (i.e., valves, pump seals and connectors) in service from the railcars to the storage tanks or the pipeline. A June 26, 2012, email, from an Air District engineer to the project manager shows the engineer calculated the disconnect losses based on 208 disconnects per day times 8 milliliters per disconnect, with the crude oil weighing 7.1 pounds per gallon. These calculations attributed

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6 Federal statute defines "major source" as "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." (42 U.S.C. § 7412, subd. (a)(1); 40 C.F.R § 63.2 [definition tracks the federal statute].)

7 The threshold of 20,000 pounds of VOC emissions per year plays a dual role. First, under the federal Clean Air Act and related rules, it divides major sources of emissions from non-major sources. Second, for purposes of CEQA, 20,000 pounds per year is the threshold of significance adopted by Air District for VOC emissions. (See Guidelines, § 15064.7 [public agencies encourage to publish thresholds of significance].) When a project's potential impact exceeds such a threshold, its environmental effect normally will be deemed significant for purposes of CEQA. (*Id.*, subd. (a).) If such a significance determination is made during a preliminary review and the project is not exempt, it would trigger the need for an initial study or an environmental impact report. (See Guidelines, §§ 15002, subd. (k), 15063, subd. (a).)

approximately 3.1 pounds of VOC emissions per day or 1,138 pounds per year to disconnects. As to fugitive emissions of VOC from the transfer operations, the engineer calculated them at 1.3 pounds per day or 460 pounds per year. These preliminary calculations of disconnect losses and fugitive emissions estimated the facility's transfer operations would be the source of 1,598 pounds of VOC emissions per year, a figure modified in later calculations.

As to the VOC emissions attributed to the facility's storage tanks, the engineer calculated the emissions at 9,611 pounds per tank per year.[8] Adding both storage tanks' VOC emissions to the transfer operations' emissions resulted in total facility emissions of 20,820 pounds per year. This figure narrowly exceeded Rule 2201's 20,000-pound threshold, which would make the facility a major source of VOC emissions. The engineer's email asked the project manager if he saw any discrepancies in the figures and suggested ways to keep the proposal under the 20,000-pound per year threshold. Suggestions included reducing the disconnect losses to less than 8 milliliters per disconnect and reducing the throughput of each tank to about 11 million barrels per year.

The project manager's responding email made two points. First, the project manager suggested that the estimates generated by the program used to analyze the storage tanks may have been based on the engineer's selection of "poor" for the shell condition. The project manager believed "good" should have been entered. Second, the project manager stated, "our project specifications call for disconnects with a 3.02 ml per disconnect average leak rate. I think we would be fine with a permit condition specifying

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[8] This figure included 9,533 pounds from the internal floating roof tank and 78 pounds of total fugitive emissions from components associated with each tank. Those components included 50 valves, two pump seals, and 100 connectors. Their fugitive VOC emissions were rounded to 42, 21 and 16 pounds, respectively, and totaled 78 pounds.

that." The next paragraph of the email, which plaintiffs quote in their opening brief, stated:

> "Please rerun [] your numbers and let me know if those two things get us under the 20,000 lb threshold. We are trying to avoid Title V [major source permitting] at this time because [Bakersfield Crude Terminal LLC] feels the need to get the terminal built and establish themselves in the market ASAP. They asked me to give them the maximum throughput that would keep them under the threshold. They are fine with going Title V in the future if they have the need to expand things, but would rather not right now."[9]

Later that day, the engineer responded by stating, "You're right, that tank [shell] condition description was the problem." Changing that description from "poor" to good" reduced each storage tank's total potential annual VOC emissions from 9,611 pounds per year to 9,460 pounds per year. The engineer took this reduction into account and stated, "we would need to limit the disconnects to 3.2 [milliliters per] disconnect to keep the potential facility emissions below 20,000 lb/year."

2012 Authority to Construct Permits

Air District adopted these adjustments and determined pursuant to Rule 2201 that the facility's potential to emit VOC was 19,992 pounds per year. This figure was below the threshold of 20,000 pounds of VOC per year used to identify a "major source" of emissions under Rule 2201. Applying the threshold, Air District determined "the facility is not an existing Major Source and is not becoming a Major Source as a result of this project."

As to CEQA compliance, Air District's written engineering evaluation of the proposed facility stated Air District was "a Responsible Agency for the project because

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[9] The timing concerns were expressed initially by Bakersfield Crude Terminal LLC in the application where it requested expedited processing on an extra-hours basis and agreed to pay for overtime incurred in processing the application. The application stated, "Expedited processing is being requested because each day of non-operation results in the loss of $50,000 of revenue."

of its discretionary approval power over the project via its Permits Rule (Rule 2010) and New Source Review Rule (Rule 2201)." As to the proposed facility's emission of air pollutants, the engineering evaluation stated compliance with its rules and permit conditions would reduce emissions to levels below the Air District's significance thresholds. Air District determined no additional findings were required by CEQA, thus concluding its CEQA analysis.

On July 31, 2012, Air District approved the application and issued three authority to construct permits. Each of the two storage tanks was issued a permit listing 36 conditions. The third permit covered the transfer operations, including the railcar unloading rack and associated offloading, transfer and booster pumps. The permit for the transfer operations listed 17 conditions. Each condition in the permits was followed by a citation to the Rule or federal regulation that was the source of the condition.

In August 2013, construction began on the terminal. Owner-Operator states it invested more than $135 million on the construction and paid more than $1.2 million in local and state sales taxes during the construction.

This litigation does not challenge the issuance of the permits in 2012 for the construction of the terminal. The terminal and the permitting process was included as background for our discussion of this litigation's challenge to the issuance of the 2014 permits authorizing the modification of the transfer facility by adding the sewer system.

First Application for Sewer System

In January 2014, Bakersfield Crude Terminal LLC submitted an application for permits authorizing the construction of the sewer system at the terminal facility. The two requested permits covered (1) four 24-barrel sump tanks to be used as lift stationS for oil and surface water collected from equipment drains and equipment pad surface drainage and (2) one 20,000 gallon oil-water separator with pumps and connections equipped with a carbon vapor control system. The oil collected in the separator was to be removed by a vacuum truck and the water was to be discharged to an onsite retention basin. Owner-

Operator asserts the system "efficiently minimized stormwater runoff by separating oil residue from water (during rains) and collecting oil drips on site (if any) before weekly vacuum/sanitation trucks picked up the collected oil residue." In response to this court's request for supplemental letter briefs, Air District and Owner-Operator stated that storm water is the only source of water collected by the sewer system.

On February 5, 2014, an Air District engineer completed a preliminary review checklist for the proposed sewer system. The section of the checklist labeled "Preliminary CEQA Significance Determination" asked whether the application indicated that the proposed equipment was allowed by the current conditional use permit, other land use permit, or by right. These types of permits would have been issued by Kern County. The engineer checked "yes," effectively stating a further approval from Kern County was not needed. The checklist stated a "yes" answer meant Air District was likely the lead agency for purposes of CEQA.[10] The engineer checked "no" to the questions (1) whether it was obvious the "Stationary Source Project Increase in Permitted Emissions" would exceed the CEQA significance thresholds for VOC and other criteria pollutants and (2) whether the applicant had completed the CEQA information form.

After completing the checklist, the engineer sent an internal email about CEQA stating: "The facility thinks their original proposal to Kern County that resulted in the [2012] CEQA [exemption] covers the entire facility which is the last project and this one. And of course we have total VOC emissions [greater than] 10 tons/year [(20,000 pounds)] between the two projects."

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10 If Kern County had been required to issue a permit for the sewer system, then the county probably would have been the "lead agency" for purposes of CEQA and Air District's approval of the authority to construct permit would have made it a "responsible agency." (See Guidelines, §§ 15367 [lead agency is the public agency with "the principal responsibility for ... approving a project" and decides whether to prepare a negative declaration or an environmental impact report]; 15381 [responsible agency is a public agency, other than the lead agency, with discretionary approval power over the project].)

Air District's April 2014 engineering evaluation addressed the issuance of five permits authorizing construction, instead of the two referenced in the application. This increase occurred because the engineering evaluation assigned a permit number to each of the four sump tanks, instead of treating the tanks as part of a single collection system. The engineering evaluation described the system by stating the sump tanks would be "used as lift stations for crude oil and water collected from equipment drains and surface water equipment pads"; fluid collected in the sump tanks would be sent to the oil-water separator; separated water would be pumped to a retention basin; and the separated oil would be removed by vacuum trucks.

The engineering evaluation estimated potential VOC emissions at 1,997 pounds per year for each sump and 109 pounds per year for the separator, which was to be served by a vapor control system consisting of a 200-pound carbon canister. Thus, the total VOC emissions of the sewer system were estimated at over 8,000 pounds per year. Next, the engineering evaluation added this figure to the terminal's potential to emit 19,992 pounds of VOC per year and determined the stationary source's total potential to emit was 28,089 pounds per year, which exceeded the threshold of 20,000 pounds per year and qualified the terminal with a sewer system as a major source of VOC emissions under Rule 2201. The engineering evaluation concluded Best Available Control Technology requirements were triggered for the four sump tanks and public notification was required for the project.[11]

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11 Rule 2201 requires the use of Best Available Control Technology when proposed modifications to an existing emissions unit trigger will increase emissions by more than 2.0 pounds per day. (Rule 2201, § 4.1.2.)

Rule 2201 requires public notification and publication for applications relating to (1) new major sources and major modifications and (2) any permitting action resulting in a Stationary Source Project Increase in Permitted Emissions exceeding 20,000 pounds per year for any one pollutant. (Rule 2201, §§ 5.4.1, 5.4.5.)

CEQA compliance was addressed by the engineering evaluation's statement that the County of Kern was the lead agency on the project and had prepared and adopted a notice of exemption, a reference to Kern County's 2012 notice of exemption described earlier. The engineering evaluation stated Air District "is a Responsible Agency for the project because of its discretionary approval power over the project via its Permits Rule (Rule 2010) and New Source Review Rule (Rule 2201)." As to environmental impacts, it concluded "that through a combination of project design elements and permit conditions, project specific stationary source emissions will be reduced and mitigated to less than significant levels" and no additional findings were required by CEQA.

In May 2014, Air District issued a public notice soliciting comments on the proposed issuance of authority to construct permits to Bakersfield Crude Terminal LLC for the sewer system. Comments from plaintiffs asserted Air District was required to prepare an environmental impact report on the terminal before permitting the sewer system because no prior CEQA review had been conducted.

On August 15, 2014, Owner-Operator sent Air District a letter stating "Bakersfield Crude Terminal, LLC would like to withdraw the [sewer system] application and cancel the project."

Second Application for Sewer System

Owner-Operator asserts the public comments to the first application helped it realize a simple solution for reducing VOC emissions. Owner-Operator claims that if carbon canister filters were added to the four sump tanks, the sumps tanks "would have virtually 0% emissions" based on Air District's policy for rounding down certain emissions to zero.

On September 8, 2014, Owner-Operator reapplied for authority to construct permits "for installation of a four fixed roof [sump] tanks and an oil/water separator." The revised proposal described in the second application stated each sump tank would be

served by a 200-pound carbon canister for vapor control. Like the first application, the second application stated the separator would be served by such a canister.

An Air District engineer examined the application and completed a preliminary review checklist on September 12, 2014. In the section of the checklist addressing Air District requirements relating to "Best Available Control Technology (BACT)," the engineer checked "yes" to the question: "Is it obvious that BACT is not triggered?" (See fn. 11, *ante* [modification that increases emissions by more than 2.0 pounds per day trigger Best Available Control Technology].) The first question under the heading "Preliminary CEQA Significance Determination" asked, "Does this project trigger BACT?" The engineer checked "no," which generated the conclusion "CEQA-Exempt" with directions to skip the remaining 25 questions about CEQA.

On September 15, 2014, Air District determined the application was complete and initiated a health risk assessment and risk management review. The report generated stated a health risk assessment "using the Toxic Fugitive Emissions from Oilfield Equipment" was performed. It also stated modeling was conducted using "the AERMOD model" and meterological data from 2004-2008 to determine dispersion factors. The report concluded: "The acute and chronic indices are below 1.0 and the cancer risk associated with the project is less than 1.0 in a million." Based on an Air District policy, it concluded the project could be approved without "Toxic Best Available Control Technology."

On September 20, 2014, Air District's engineering evaluation of the applications was completed. It calculated the post project potential to emit VOC (i.e., the sewer system's potential emissions) and the pre-project stationary source potential to emit (i.e., the terminal's potential emissions without the sewer system). These two calculations were added together to give the post project stationary source potential to emit (i.e., the potential emissions of the terminal and sewer system). These emission calculations were based on information provided by Owner-Operator and standard tank emission

calculation formulas contained in the United States Environmental Protection Agency's (EPA) document AP-42, "Compilation of Emission Factors."[12] Also, the potential of each sump tank to emit VOC was based on the canisters controlling 95 percent of the captured VOC. The potential emissions for each sump tank were determined by multiplying 5.5 pounds per day by 5 percent and multiplying that figure by 365 days. With rounding, the total was 100 pounds of uncaptured VOC per sump tank per year. The potential emissions for the oil-water separator was calculated at 109 pounds per year. As a result, the total potential VOC emissions were calculated to be 509 pounds per year. The terminal's stationary source potential to emit, without the addition of the sewer system, was estimated at 19,992 pounds per year based on the analysis done when Air District approved the construction of the terminal facility in 2012. The post project stationary source potential to emit was estimated at 20,501 pounds per year (i.e., 19,992 plus 509). In less technical terms, the 20,501 pounds is the estimate of the annual VOC emissions from the terminal facility *with* the sewer system operating.

Next, the engineering evaluation made the "major source" determination under Rule 2201 that plaintiffs challenge in their appellate briefing. Air District began by stating: "Pursuant to District Rule 2201, a Major Source is a stationary source with a [post project stationary source potential to emit] equal to or exceeding one or more of the following threshold values." The threshold for VOC was stated as 20,000 pounds per year. The post project stationary source potential to emit was stated as 20,501 pounds per year. Thus, the post project stationary source potential to emit listed in engineering evaluation clearly exceeded the 20,000 pounds per year threshold. Despite this fact, Air

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12 In applying the EPA formulas, it appears that Air District made no attempt to estimate the amount of storm water that the sewer system actually would collect for a particular time period, such as a month. As a result, Air District's estimated emissions are largest in months of high temperatures but low rainfall. Air District states that the estimated emissions are hypothetical and based on a worst case scenario.

District determined there was no "major source" for purposes of Rule 2201. Air District explained the determination, which contradicted its earlier calculations, as follows:

> "Pursuant to District policy APR 1030 Increases in Maximum Daily Permitted Emissions of Less than or Equal to 0.5 lb/day, new units with emissions of 0.54 lb/day or less are not included in Major Source determination calculations. Each of the proposed units has emissions of less than 0.54 lb/day; therefore, the facility will remain a non-Major Source."

Air District also used its rounding policy to conclude the 20,000 pound per year threshold for triggering offset requirements had not been met.[13] In effect, Air District was able to ignore the 509 pounds of annual VOC emission (i.e., not include them in its major source determination) by first spreading those 509 pounds among the five components of the sewer system and then calculating each component's daily VOC emissions in a way that caused those daily emissions to be under the threshold of 0.54 pounds per day stated in the rounding policy.[14] Then Air District applied the rounding policy to those daily figures, which rounded them down to zero and thereby treated the 509 pounds of annual VOC emissions as though it did not exist. With the proposed units' emissions at zero, Air District was able to conclude (1) the facility's total VOC emissions would remain at 19,992 pounds per year and, therefore, the facility would remain a non-major source of VOC emissions; (2) there were no modified emissions associated with the proposal, which was below the 2.0 pounds per day that triggered Best Available

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13 "Offsets" are emissions reductions recognized by the permitting officer in the form of "Emission Reduction Credits" issued under Rule 2301 or other "Actual Emissions Reductions" as defined in section 3.2 of Rule 2201. (Rule 2201, § 3.26.)

14 Breaking the proposed sewer system into five components appears to have resulted from the application of the term "Emissions Unit," which is defined as "an identifiable process or piece of process equipment such as a source operation which emits, may emit, or results in the emissions of any affected pollutant directly or as fugitive emissions." (Rule 2201, § 3.17.)

Control Technology requirements;[15] and (3) the public notification requirements were not triggered.

The CEQA section of the engineering evaluation concluded "that this project is exempt from the provisions of CEQA" because its "permitting action constitutes a ministerial approval." Air District's stated grounds for reaching this conclusion were that (1) the issuance of the permits were not subject to Best Available Control Technology requirements and (2) it had determined the potential emission increases would have a less than significant health impact on sensitive receptors. As a result, Air District characterized issuance of the permits as "a matter of ensuring conformity with applicable District rules and regulations and does not require discretionary judgment or deliberation."

The foregoing CEQA exemption determination and analysis is challenged by plaintiffs in this litigation. An argument raised by Air District asserted that the emissions from the sewer system already have been accounted for when the terminal facility was approved. The facts relating to this theory about the double counting of emissions are set forth in part IV.B.3, *post*.

2014 Authority to Construct Permits

On September 23, 2014, shortly after completing its review, Air District issued the authority to construct permits for the four sump tanks and oil-water separator. No public notice about the proposed issuance of the permits was given.

Each of the four permits for the sump tanks included the same 14 conditions. The tanks were required to be equipped with (1) a vapor recovery system and (2) a VOC control device. The vapor recovery system was required to be (1) a closed vent system

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15 Owner-Operator points out that, even without rounding, the requirements for Best Available Control Technology were not triggered because 509 pounds per year divided by 365 days per year yields 1.39 pounds per day, which is below the threshold of 2.0 pounds per day. (Rule 2201, § 4.1.2.)

that collects all VOC's from the storage tank, (2) approved by the permitting officer, and (3) maintained in gas-tight condition. The VOC control device was required to be a carbon canister system that reduces the inlet VOC emissions by at least 95 percent (calculated by weight). The fifth condition in the sump tank permits stated: "VOC emission from the outlet of the carbon canister shall not exceed 0.3 lb/day." VOC concentrations at the outlet of the carbon canister were required to be measured and recorded at least once per week and, if the VOC concentration exceeded 10,000 parts per million, the canister was required to be replaced with a fresh canister.

In December 2014, the terminal began receiving crude oil from trains and transferring that crude from unloading racks through the storage tanks. An inspection form stated that as of February 3, 2015, one of the two 150,000 barrel storage tanks had not been used.

Federal Notice of Violation

On April 30, 2015, the EPA issued a "Finding and Notice of Violation" to Bakersfield Crude Terminal LLC for violations of the federal Clean Air Act at the terminal. The notice of violations included findings of 10 violations of Rules 2010 and 2201. Paragraph 48 of the notice stated that the VOC emission calculations for the four sump tanks and the oil-water separator covered by the 2014 authority to construct permits were improperly excluded from the facility's potential to emit. It also stated the VOC emissions from these five units were calculated to be 509 pounds per year collectively or 1.4 pounds per day, but the VOC emissions were rounded down to zero based on a policy that excludes new units with emissions of 0.54 pounds per day or less from a facility's potential to emit calculations. Paragraph 48 concluded that the exclusion of the VOC emissions of the four sump tanks and oil-water separator from the facility's potential to

emit calculations (1) was not approved under the state implementation plan, (2) was not legitimate under the federal Clean Air Act, and (3) was not an acceptable practice.[16]

PROCEEDINGS

In January 2015, plaintiffs filed a verified petition for writ of mandate alleging Air District's issuance of the September 2014 authority to construct permits for the sewer system violated CEQA because the Air District had approved a discretionary project without conducting any environmental review. The petition requested that Air District be directed to set aside its September 2014 approval of the authority to construct permits. In addition, the petition made two alternate requests for injunctive relief. The narrower request sought to prohibit Air District and Owner-Operator from implementing or acting in furtherance of the September 2014 authority to construct permits until Air District complied with CEQA. The broader request sought to prohibit the entire terminal facility from operating until after Air District conducted an environmental review in compliance with CEQA.

On February 2, 2015, plaintiffs filed a motion for preliminary injunction seeking to enjoin the permits for the installation of the four sump tanks and the oil-water separator and halt operation of the terminal pending CEQA review. In June 2015, the

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16 The trial court took judicial notice of the April 2015 notice of violation and of guidance documents issued by the EPA. As a result, those documents are included in the appellate record.

In supplemental letter briefs filed in late April 2017, the parties agreed that the EPA had yet to issue an administratively final decision in the proceeding initiated by the EPA's notice of violation. Also, plaintiffs' supplemental letter brief acknowledges that California's doctrine of administrative collateral estoppel does not apply because the EPA's enforcement action has not concluded. We agree with this assessment and do not regard the EPA's findings as conclusive. (See *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 168-169 [finality element of administrative collateral estoppel]; *Luminant Generation Co., L.L.C. v. Environmental Protection Agency* (5th Cir. 2014) 757 F.3d 439, 440, 444 [notice of violation issued by EPA under federal Clean Air Act was preliminary and nonbinding in nature].)

trial court denied the motion for preliminary injunction. Thus, it appears the terminal has remained in operation during the trial court proceedings and this appeal.

On January 15, 2016, the trial court held a full hearing on the merits of the petition for writ of mandate. In late January, the trial court issued a minute order denying the petition. In February 2016, the trial court entered judgment denying the petition for writ of mandate. Plaintiffs filed this appeal.

DISCUSSION

I. STANDARD OF REVIEW

Appellate review in CEQA lawsuits is governed by the abuse of discretion standard set forth in section 21168.5. Consequently, our "inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (§ 21168.5.)

This statutory text identifies two ways an abuse of discretion can occur, each of which has its own standard of review. Claims that the public agency committed legal error (i.e., did not proceed in the manner required by law) are subject to independent review by the appellate court. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426-427.) Claims that the public agency committed factual errors are subject to the substantial evidence standard of review. (*Id.* at p. 426.)

II. PROCEDURAL BARS TO THE CEQA CLAIMS

A. Statute of Limitations

First, we conclude plaintiffs timely filed their CEQA challenges to Air District's approval of the permits for the proposed sewer system. The challenged permits were issued on September 23, 2014. Plaintiffs filed this lawsuit in January 2015.

Consequently, the lawsuit was commenced well within the 180-day statute of limitations. (§ 21167, subd. (a); Guidelines, § 15112, subd. (c)(5)(A).)

Second, plaintiffs' reply brief states that they are challenging Air District's approval of the 2014 authority to construct permits and are not seeking to extend the statute of limitations or reopen the permitting decision made in 2012. Thus, the claims plaintiffs are pursuing in this appeal do not include CEQA challenges to Air District's approval of the 2012 authority to construct permits. Based on the way plaintiffs have framed the issues raised in this appeal, we need not address the statute of limitations further.

B. Section 21166 and Conclusive Effect of Prior Determinations

1. Air District's Contention

In an argument related to its statute of limitations arguments, Air District contends CEQA review for the "project" was completed in 2012 and can only be reopened if the criteria in section 21166 for supplemental and subsequent environmental impact reports are satisfied. Air District contends that "substantial changes" to the project or circumstance have not occurred and new information of substantial importance has not come to light. (§ 21166, subds. (a)-(c); Guidelines, § 15162, subd. (a).)

Air District's argument is based on the 2002 environmental impact report prepared by Kern County for the South Kern Industrial Center Specific Plan and the 2012 notice of exemption Kern County issued in connection with its site plan review of the proposed terminal. Although the 2012 notice of exemption refers to the exemption for ministerial projects, Air District interprets Kern County's issuance of the notice of exemption as including a "determination that the [terminal] project was not expected to cause significant environmental effects not examined in the program [environmental impact report]" for the South Kern Industrial Center Specific Plan. Next, Air District cites Guidelines section 15050, subdivision (c), which provides: "The determination of the

lead agency of whether to prepare an [environmental impact report] or a negative declaration shall be final and conclusive for all persons, including responsible agencies, unless [one of three listed conditions applies]." In Air District's view, this provision requires it to consider Kern County's program environmental impact report as adequate for the project, which includes the whole of the activity—that is, both the terminal and the sewer system. As the last step of its argument, Air District contends the earlier environmental impact report remains conclusive unless a supplemental or subsequent environmental impact report is required by section 21166 and Guidelines section 15162.

2. Section 21166 Does Not Apply

We reject Air District arguments regarding the conclusive effect of earlier CEQA review and the role of section 21166 for the following reasons. First, we disagree with the assertion that the 2002 program environmental impact report examined all of the potentially significant environmental effects of the terminal and sewer system. It would have been impossible for the project-specific impacts of the terminal to be evaluated in a document prepared 10 years earlier and for Kern County to have found that none of those potential impacts would be "significant" for purposes of CEQA.

Second, we disagree with the contention that Kern County's issuance of the 2012 notice of exemption reflects a determination that the terminal was not expected to cause significant environmental effect not examined in the 2002 program environmental impact report. The notice of exemption did not list this rationale in its "brief statement of reasons to support the finding" that the project was exempt from CEQA review. (See Guidelines, § 15062, subd. (a)(4).) The Guidelines explicitly refer to "reasons," which is plural, which suggests that Kern County would have listed all grounds for its determination the project was exempt. Nonetheless, the only reason given in the notice was a citation to Guidelines section 15300.1, which addresses the exemption for ministerial projects. Furthermore, we will not infer Kern County determined no

significant environmental impacts were expected from the terminal where it does not appear that Kern County independently assessed air quality impacts of the terminal.

Third, the statutory and regulatory text leads us to conclude that the prohibition in section 21166 and Guidelines section 15162 does not apply to the circumstances of this case. Section 21166 prohibits subsequent or supplemental environmental impact reports only "[w]hen an environmental impact report has been prepared for a project." This condition has not been satisfied in the present case. No environmental impact report has been prepared for the terminal, which Air District contends is the "project" for purposes of applying section 21166. As to subdivision (a) of Guidelines section 15162, it expands the prohibition to include projects for which a negative declaration has been adopted. Here, no negative declaration has been prepared for the terminal or any activity related to the terminal. Therefore, we conclude the prohibition relating to subsequent or supplemental environmental impact reports does not apply in this case and the 2002 program environmental impact report is not conclusive as to the significance of any potential environmental effect of the terminal or its sewer system.

C. Exhaustion of Administrative Remedies

1. Contentions of the Parties

Air District contends that plaintiffs failed to exhaust their administrative remedies and, therefore, cannot collaterally attack Air District's emissions determinations. In Air District's view, plaintiff should have used the administrative hearing board process required by Health and Safety Code section 42302.1 to pursue the claim that Air District violated applicable air rules in calculating facility emissions.

Plaintiffs contend that their claims alleged CEQA violations and not violations of the California Clean Air Act that are subject to hearing requirements in the Health and Safety Code. Plaintiffs contend CEQA claims need not be presented to the administrative hearing board to be exhausted and, in any event, the text of Health and Safety Code

section 42302.1 plainly excludes them because, unlike Owner-Operator, they did not "participate[] in the action before the district."

2. CEQA's Exhaustion Doctrine

The exhaustion of administrative remedies is an explicit part of CEQA and includes both an issue exhaustion requirement and a party exhaustion requirement. Section 21177, subdivision (a) sets forth the requirement that an issue be exhausted by stating:

> "An action or proceeding shall not be brought ... unless the alleged grounds for noncompliance with [CEQA] were presented to the public agency orally or in writing by any person during the public comment period provided by [CEQA] or prior to the close of the public hearing on the project before the issuance of the notice of determination."

Party exhaustion, which can be conceptualized as a standing requirement, is addressed in section 21177, subdivision (b):

> "A person shall not maintain an action or proceeding unless that person objected to the approval of the project orally or in writing during the public comment period provided by this division or prior to the close of the public hearing on the project before the filing of notice of determination pursuant to Sections 21108 and 21152."

The foregoing provisions demonstrate that a public comment period and a public hearing are important components of the exhaustion requirements. Their importance is reiterated in section 21177, subdivision (e), which states:

> "This section does not apply to any alleged grounds for noncompliance with [CEQA] for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if the public agency failed to give the notice required by law."

Under these provisions, the exhaustion requirements often do not apply to a public agency finding that a project was exempt from CEQA. (*Hines v. California Coastal Com.* (2010) 186 Cal.App.4th 830, 854.) Where a public agency determines a project is exempt from CEQA and files a notice of exemption without holding a hearing or

otherwise giving members of the public an opportunity to comment, the exhaustion requirements do not apply. (*Ibid.*) For instance, in *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, the public agency determined the project was exempt from CEQA and, as a result, there was no public hearing or public comment period. (*Id.* at p. 1210.) The court determined the exhaustion requirements of section 21177 did not apply in those circumstances. (*Azusa Land, supra,* at p. 1210.)

3. Statutory Exhaustion Requirements Do Not Apply

Here, plaintiffs have alleged violations of CEQA. Accordingly, the provisions of section 21177 govern whether plaintiffs were required to exhaust administrative remedies before maintaining this lawsuit.

Air District reviewed Owner-Operator's September 8, 2014, application relating to the sewer system without holding a public hearing or implementing a public comment period. Air District approved the application 15 days after it was submitted. Based on these undisputed facts in the record, we conclude that the exhaustion requirements in section 21177 do not apply to plaintiffs' CEQA challenges to the authority to construct permits issued in September 2014. (§ 21177, subd. (e).) Health and Safety Code section 42302.1 is irrelevant to whether plaintiffs may bring a cause of action under CEQA.

III. MINISTERIAL VERSUS DISCRETIONARY PERMITS

A. Basic Principles

1. Projects and the Scope of CEQA

Section 21080, subdivision (a) states that CEQA "shall apply to *discretionary projects* proposed to be carried out or approved by public agencies." (Italics added.) Restated in the negative, CEQA "does not apply to … [¶] [m]inisterial projects proposed to be carried out or approved by public agencies." (§ 21080, subd. (b)(1).) Thus, the line between discretionary and ministerial projects is one of the boundaries that defines

CEQA's scope. The rationale for this line is that when approval of a project is purely ministerial, an environmental review under CEQA would be useless to the officials carrying out the ministerial task because they could not require modifications of the project or deny the approval to avoid adverse impacts identified in the environmental review. (See *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 117.)

As relevant to the distinction between discretionary and ministerial projects, CEQA defines "[p]roject" to mean "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" and which involves the issuance of a permit by a public agency to the person undertaking the activity. (§ 21065.) Thus, the "term 'project' refers to the *activity which is being approved* and which may be subject to several discretionary approvals by governmental agencies." (Guidelines, § 15378, subd. (c), italics added.)

2. Discretionary Versus Ministerial

CEQA does not define "discretionary" or "ministerial." The Guidelines, however, define the terms "discretionary project" and "ministerial." "Discretionary project" means a project that "requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations." (Guidelines, § 15357.) Thus, "where a governmental agency can use its judgment in deciding whether and how to carry out or approve a project," the project is discretionary. (Guidelines, § 15002, subd. (i).)

"Ministerial" is defined as follows:

> "[A] governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no

special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out." (Guidelines, § 15369.)

As an example, the Guidelines state the issuance of a building permit is ministerial if (1) the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, (2) the structure would meet the strength requirements of the Uniform Building Code, and (3) the applicant has paid the fees. (Guidelines, § 15369.) "Where the law requires a governmental agency to act on a project in a set way without allowing the agency to use its own judgment, the project is called 'ministerial,' and CEQA does not apply." (Guidelines, § 15002, subd. (i)(1).)

Accordingly, "[w]hether an agency has discretionary or ministerial controls over a project depends on the authority granted by the law providing the controls over the activity." (Guidelines, § 15002, subd. (i)(2).) Thus, similar projects may be subject to discretionary controls in one jurisdiction and only ministerial controls in another. (*Ibid.*)

The Guidelines' statement of the principles for determining whether a particular agency action is discretionary or ministerial are supplemented by case law. The often-cited *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259 (*Westwood*) discussed the discretionary-ministerial distinction in detail. (*Id.* at pp. 264-273.) The court stated an agency's approval is ministerial "[o]nly when a private party can *legally compel* approval without any changes in the design of its project which might alleviate adverse environmental consequences." (*Id.* at p. 267.)[17]

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[17] In California, a private party can compel a public official or agency to take action by obtaining a writ of ordinary mandate. Pursuant to Code of Civil Procedure section 1085, subdivision (a), a writ of ordinary mandate "may be issued by any court ... to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station ...." (See *Coachella Valley Unified School Dist. v. State of California* (2009) 176 Cal.App.4th 93, 113 [mandate will lie to compel the

In *Westwood*, the appellate court concluded that the permit approval process for the 26-floor office tower was discretionary and reversed the trial court. (*Westwood, supra*, 191 Cal.App.3d at p. 282.) The court determined city employees set, or had the opportunity to set, standards and conditions for various aspects of the proposed building. (*Id.* at p. 274.) For example, the municipal code authorized the city engineer to determine what dedications and modifications would be sufficient to provide "'adequate'" ingress from and egress to the public streets. (*Ibid.*) Also, city's building and safety department was authorized to require driveway modifications that it deemed necessary in its judgment to minimize interference with the flow of traffic. (*Ibid.*)

Similarly, in *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, the appellate court concluded "that certain aspects of the hotel building permit process indicate that discretion was exercised by City employees." (*Id.* at p. 1140.) The court reviewed a number of conditions imposed by city officials addressing the anticipated environmental impacts of traffic, storm water drainage, and soil settlement and concluded framing those conditions involved discretion. (*Id.* at p. 1141.) The trial court analyzed Miller's request for a preliminary injunction and concluded it was reasonably probable Miller would be able to prove the building permit was a discretionary project within the meaning of CEQA and an environmental impact report was required. (*Id.* at p. 1142.)

In the recent case of *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11 (*Sonoma*), the court cited *Westwood* for the proposition that CEQA does not automatically apply to an agency decision simply because the agency may exercise some discretion in approving the project. (*Id.* at p. 23.) Instead, the discretion must provide

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performance of a clear, present and ministerial duty].) The definition of "ministerial" is essential the same for purposes of CEQA and ordinary mandate. In an ordinary mandate proceeding, a "ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists." (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 501.)

the agency with the ability and authority *to mitigate environmental damage* to some degree. (*Ibid.*) Here, Air District relies on this limitation as to discretion to argue some of plaintiffs' claims about the exercise of discretion do not involve the kind of discretion that prevents Air District's approval of the sewer system from being classified as ministerial for purposes of CEQA.

3. Agency's Classification of Action as Ministerial

Guidelines section 15268, subdivision (a) states that the determination of what is "ministerial" can most appropriately be made by the agency taking the action, based on the agency's analysis of its own laws governing the action. The Guidelines encourage public agencies to "make such determination either as a part of its implementing regulations or on a case-by-case basis." (Guidelines, § 15268, subd. (a).) This first possibility is addressed further in subdivision (c) of Guidelines section 15268:

> "Each public agency should, in its implementing regulations or ordinances, provide an identification or itemization of its projects and actions which are deemed ministerial under the applicable laws and ordinances."

In *Day v. City of Glendale* (1975) 51 Cal.App.3d 817 (*Day*), the city adopted guidelines stating the issuance of grading, fill and excavation permits were ministerial projects that did not require the preparation of an environmental impact report. (*Id.* at p. 821.) In connection with a highway construction project, the city issued a grading permit authorizing over 1.5 million cubic yards of excavated material to be placed in adjacent canyons as fill. When a CEQA challenge was brought, the trial court concurred with the city's guidelines and determined the issuance of the grading permit was ministerial. (*Day, supra,* at p. 820.) As a result, the trial court concluded CEQA did not apply. (*Day, supra,* at p. 820.) The appellate court reversed. (*Id.* at p. 824.)

The appellate court in *Day* concluded that CEQA and the Guidelines did not give local agencies absolute power to determine which projects were ministerial. (*Day*, *supra*, 51 Cal.App.3d at p. 822.) Instead, the court concluded a categorical determination by a

local agency that certain permits are ministerial must agree with the formulation of the discretionary-ministerial distinction set forth in CEQA and the Guidelines. (*Day, supra,* at p. 820.) The court concluded the city's municipal code imposed many technical and clearly ministerial requirements for the issuance of grading permits, but also allowed for the imposition of requirements that were discretionary. (*Id.* at pp. 822-823.) As to the grading permit in question, the court concluded the city engineer exercised that discretionary authority by attaching numerous conditions to the grading permit. (*Id.* at p. 823.) Thus, the court concluded the city's classification of the approval process as ministerial was not conclusive and it could review applicable law to determine whether the classification was consistent with CEQA and the Guidelines. (*Id.* at p. 822; see *Westwood, supra*, 191 Cal.App.3d at p. 270 [city's issuance of building permit held to be discretionary].)

Day and *Westwood* establish the principles that (1) an agency's regulation or ordinance classifying the issuance of a particular type of permit as ministerial is not conclusive and (2) an agency's classification is tested by applying the Guideline's definitions for discretionary and ministerial to the particular law that governs the issuance of the permit. Here, we extend these principles to an agency's determination made "on a case-by-case basis." (Guidelines, § 15268, subd. (a).)

The application of definitions of discretionary and ministerial to the particular law governing the issuance of a permit cannot be accomplished without determining the meaning of that law. We recognize the general principle that "an agency's view of the meaning and scope of its own ordinance [or regulation] is entitled to great weight unless it is clearly erroneous or unauthorized." (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1015 (*Davis*.) This general principle does not require us to defer to a misinterpretation of Air District's rules.

B. Air District's Decisions Involving the Carbon Canisters

1. Plaintiffs' Contentions

Plaintiffs contend Air District exercised discretion when it negotiated the design and permit terms for the sewer system. Plaintiffs cite the section of the engineering evaluation that addressed emission control technology as follows:

> "The proposed tanks will each be equipped with a vapor control system consisting of a 200-lb. carbon canister. Typically, a carbon absorption system [is] required to operate with two carbon canisters in series in the event breakthrough occurs at the upstream canister. Owing to the [oil-water separator's] expected low actual emissions only one canister will be required. The passive control system will control 95% of captured VOCs."

In addition, plaintiffs refer to differences in the conditions in the draft authority to construct permits relating to the first application for the sewer system and the conditions imposed in the permits issued in September 2014. Condition No. 8 of the draft permit stated: "Carbon canister shall contain at least 200 pounds of carbon. [District Rule 2201]." This condition was not contained in the permits issued and, thus, plaintiffs argue that (1) Air District must have exercised some discretion when it decided not to include such a condition and (2) that discretion plainly relates to the equipment used to mitigate or control VOC emissions and thereby satisfies the limitation expressed in *Sonoma*.

2. Contentions of Air District and Owner-Operator

Air District's appellate briefing does not address whether it exercised discretion with respect to the number of canisters or with respect to the amount of carbon each canister was required to contain. Owner-Operator responded to the argument that Air District exercised discretion with respect to the canister specifications by stating:

> "It is well-settled that agency personnel are always free to offer suggestions, propose changes, and encourage applicants to make voluntary concessions to reduce or mitigate impacts. [Citations.] That process, however, does not render the 2014 [authority to construct] approval discretionary under CEQA or render it a product of 'negotiation.' [Owner-Operator] included the relatively inexpensive carbon canister filters in the

four sumps in response to public comments. Such voluntary measures are encouraged, not discouraged."

Owner-Operator's response does not address directly whether Air District exercised discretion when it did not require the canisters to contain at least 200 pounds of carbon, a condition it had included in the draft permit for the first sewer system application.

3. Air District Exercised Discretion

First, the use of carbon canisters as part of the sewer system is intended to control vapor emissions—specifically, the emissions of VOC. Consequently, if Air District exercised authority over the specification the carbon canisters were required to meet, that discretion satisfies the test for distinguishing discretionary projects from the ministerial project adopted in *Sonoma*. In short, Air District's authority to decide the specification the canisters must meet means Air District had the ability and authority to mitigate environmental damage to some degree. (*Sonoma*, *supra*, 11 Cal.App.5th at p. 23.)

Second, we conclude that Air District actually exercised authority over the specification of the mitigation measures adopted by Owner-Operator when it decided not to require the use of two canisters in series and not to require each canister to contain a minimum of 200 pounds of carbon. Air District and Owner-Operator had not identified a specific source of this authority, but the citation after the condition in the draft permit suggests that the authority came from Rule 2201. Since we have located no provisions in Rule 2201 addressing canister specifications, it appears Air District decided to include the canister specifications under section 5.6.3 of Rule 2201, which states a permit "shall include all those conditions the [permitting officer] deems necessary to assure construction and operation in the manner assumed in making the analysis to determine compliance with this rule." We interpret the phrase "deems necessary" as placing discretionary authority in the permitting officer and, in this case, that discretionary authority actually was exercised in determining the configuration and specifications of

the carbon canisters used to mitigate VOC emissions. This conclusion has not been negated by Air District or Owner-Operator by citing to statutory or regulatory requirements that could have been the basis for a court order directing Air District to approve the project without two canisters in series and without requiring a minimum amount of carbon in the canisters. Like the city employees who evaluated the proposed 26-floor office tower in *Westwood*, the Air District's personnel set, or had the opportunity to set, standards and conditions for various aspects of the proposed project—aspects relating directly to the project's environmental impact. (*Westwood, supra*, 191 Cal.App.3d at pp. 273-274.)

C. Permit Conditions

1. Contentions of the Parties

Plaintiffs contend Air District's exercise of discretion is confirmed by looking at the regulatory provisions and trying to find objective criteria for some of the conditions to be included in the sewer system permits. Plaintiffs contend the conditions were not based on "fixed standards" or "objective measurements," terms that appear in the definition of ministerial. (Guidelines, § 15369.) In plaintiffs' view, District exercised discretion in crafting the permit conditions related to the control of VOC emissions.

Air District contends the imposition of the conditions was not discretionary because they were taken out of the permit application itself or simply state standards from its Rules, federal regulations or applicable statutes. Owner-Operator contends the conditions specified in the permits did not render Air District approval discretionary. Owner-Operator supports this contention by citing cases that state the imposition of conditions does not necessarily render a project discretionary. (See *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 309.)

2. Conditions Included Discretionary Aspects

We agree with the principle that the imposition of a condition in a permit does not automatically mean the agency exercised discretion for purposes of CEQA. The particulars of the condition and the source of the authority for its imposition must be examined to determine whether the imposition of the condition was ministerial or discretionary.

Here, Plaintiff specifically refers to "Condition 12" imposed in the sump tank permit as an example of a permit condition that was not spit out by the mechanical application of a standard list of requirements. The permits for each of the four sump tanks included 14 numbered conditions, including the following: "12. Permittee shall measure and record the VOC concentration at the outlet of the carbon canister at least once each week. [District Rule 2201]." The same condition was numbered "13" in the permit for the oil-water separator. Plaintiffs contend Air District used its discretion in requiring measurements only once per week and in leaving it to Owner-Operator's judgment what sort of measuring device to use and how to report the measurement. Accordingly, we consider whether Air District exercised its discretion in setting the frequency of the measures and whether Air District could have required the measurements to be taken more frequently, such as every three or five days.

3. Textual Analysis of Rule 2201

The permits cited Rule 2201 as the source of the condition requiring weekly measurements. However, in reviewing the text of Rule 2201, we have located no use of the words "week" or "weekly." There is one reference to a period of "seven calendar days," but that specifies a time limit relating to routine replacements under section 8.1 of Rule 2201, which has no application to this case. Rule 2201 uses the word "measure" four times, but only as a noun modified by the adjective "control." (Rule 2201, §§ 3.2.2.2, 3.2.3, 3.23.2.) Rule 2201 does not combine the use of the verb "measure" with the verb "record" in any form of a measure-and-record requirement. It uses the word

"record" once in a provision addressing emergency standby electric generators: "Equipment exempted by this section shall maintain a written record of the hours of operation and shall have permit conditions limiting non-emergency operation." (Rule 2201, § 4.6.2.) Thus, our review of the text of Rule 2201, the purported source of the condition, located nothing that requires weekly measurements of any type, much less the type required in the permits.

General conditions for authority to construct permits are addressed in Section 5.6 of Rule 2201, which includes the following:

> "5.6.2 An [authority to construct permit] shall require that the new or modified source be built according to the specifications and plans contained in the application.
>
> "5.6.3 An [authority to construct permit] shall include all those conditions which the [permitting officer] deems necessary to assure construction and operation in the manner assumed in making the analysis to determine compliance with this rule."

It appears the conditions requiring recorded weekly measurements were imposed pursuant to section 5.6.3 of Rule 2201—that is, the permitting officer deemed the condition necessary to assure operation of the sump tanks and separator in the manner assumed by him when he analyzed compliance with Rule 2201. We have located no provision of any rule or statute that required measurements to be made weekly. Our search for such a provision was not aided by Air District and Owner-Operator. Neither has addressed the source of the requirement for weekly measurements, much less cited a statute or Rule containing such a timing requirement. That leaves section 5.6.3 of Rule 2201 as the source of the authority to impose the condition. If the conditions were imposed pursuant to that section, we conclude that the permitting officer exercised discretion when he deemed weekly measurement were necessary to assure the system operated in compliance with the Rules. (See pt. III.B.3, *ante*.)

D. Air District's Use of Rounding Down: Ministerial or Discretionary

We have determined Air District exercised discretion related to mitigation when it chose to (1) deviate from its typical approach of requiring two carbon canisters placed in series, (2) not include a condition requiring the canisters to contain at least 200 pounds of carbon, and (3) include a condition requiring Owner-Operator to measure and record the VOC concentration at the outlet of the carbon canister at least once each week. These determinations are sufficient to reverse and remand for issuance of a writ of mandate. Nonetheless, we will address Air District's rounding policy because disputes involving that policy may arise during the proceedings conducted on remand. Our most important conclusion for purposes of remand is that eliminating a consideration of emissions by rounding them down to zero is not appropriate when deciding issues under CEQA.

1. Contentions of the Parties

Plaintiffs contend Air District exercised discretion when it rounded the emissions from the sump tanks and separator down to zero during its review of the permit applications for the sewer system. The rounding down was done pursuant to guidance contained in Air District's Policy APR 1130, titled "Increases in Maximum Daily Permitted Emissions of Less than or Equal to 0.5 lb/day." As a consequence of rounding the VOC emissions from each of the five permit units (four sump tanks and one separator) to zero, (1) the terminal was able to retain its designation as a minor source of VOC emissions, (2) Air District did not require offsets, and (3) no public notice was given prior to the issuance of the September 2014 permits. In addition, plaintiffs contend rounding down allowed the sewer system to avoid environmental review under CEQA.

Air District contends its long-standing policy for handling de minimis, virtually undetectable emissions complies with the federal Clean Air Act. Air District notes plaintiffs did not raise any cause of action for violation of federal laws, as jurisdiction for such claims lies exclusively in federal court. (42 U.S.C. § 7604, subd. (a).) Air District also contends Policy APR 1130 incorporates Air District's scientific and engineering

judgments of what constitutes a trifling matter and neither CEQA nor this court should concern itself with trifles. (See Civ. Code, § 3533 [law disregards trifles].)

Owner-Operator contends the four sump tanks and separator have the potential to emit at most a negligible 509 pounds per year, which is a minute percentage (2.6%) of the 20,000 pounds per year threshold for major sources. Owner-Operator states: "With the charcoal canisters installed, those minute emissions are reduced to virtually 0%."[18] During oral argument, both Owner-Operator and Air District argued that any discretion involving rounding is not related to its authority to mitigate environmental damage and, therefore, it is not the kind of discretion that precludes Air District's approval from being ministerial. (See *Sonoma*, *supra*, 11 Cal.App.5th at p. 23.)

Plaintiffs respond to the contentions of Air District and Owner-Operator by reiterating their argument that "Air District further exercised discretion in deciding to 'round' down the oily water sewer system's emissions under an informal District policy."

2. Policy APR 1130

Policy APR 1130 contains five sections—purpose, background, policy, procedures, and examples. The purpose of the policy is to detail how increases in permitted emissions of less than or equal to 0.5 pounds per day "are handled during the application review process." The background section states the policy will rectify confusion and inaccuracy associated with rounding errors and describes the 2003 version of the policy. It then describes the current version as follows:

> "In April 2009, the policy was revised to *allow* [increases in permitted emissions] less than or equal to 0.5 lb/day to be set to zero for purposes of providing emission offsets. This change *allows* an [increase in permitted

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18 This statement is misleading because the emissions of 509 pounds of VOC per year, even if properly characterized as "negligible" or "minute," are not reduced by the canisters. Rather, the 509 pounds are the emissions estimated to occur with the canisters operating. (See Bus. & Prof. Code, § 6068, subd. (d); Cal. Rules Prof. Conduct, rule 5-200-(B).)

emissions] that rounds to 0.5 lb/day, e.g. less than 0.54 lb/day, to be set to zero for purposes of providing emissions offsets." (Italics added.)

The policy section begins: "A daily increase in permitted emissions of any criteria pollutant of less than or equal to 0.5 lb/day per permit unit is rounded to zero (0) lb/day, only for purposes of determining whether New and Modified Source Review (NSR) rule requirements are triggered." Later, the policy section describes a situation to which rounding does not apply: "[E]mission increases that *average* less than or equal to 0.5 lb/day, where the maximum daily increase is not limited to less than or equal to 0.5 lb/day every day, are not roundable to zero for the purposes detailed in this policy." The procedures section of Policy APR 1130 addresses how calculated emissions should be reported in the written engineering evaluation.

3. Unauthorized Policy

The first question raised by the parties' contentions is whether the rounding policy violates the federal Clean Air Act. Plaintiffs argue, in effect, the rounding policy is an unauthorized interpretation of the federal statute and support that argument by citing the EPA's determination that the application of the rounding policy was not an acceptable practice in this case. Specifically, paragraph 48 of the EPA's notice of violation stated that using Policy APR 1130 to exclude VOC emissions of the sump tanks and oil-water separator from the calculation of the facility's potential to emit was neither approved under the state implementation plan nor legitimate under the federal Clean Air Act.

Stated in terms of the "clearly erroneous or unauthorized" test from *Davis*, *supra*, 83 Cal.App.4th at page 1015, plaintiffs argue, in effect, that Air District's approach to rounding down emissions is "unauthorized" by federal law. (See pt. III.A.3, *ante*.) We will not attempt to resolve the parties' dispute over whether the rounding policy—generally or as applied in this case—violates the federal Clean Air Act. First, we decline to decide this question of federal law because this appeal can be resolved on other grounds. Second, the EPA's April 2015 notice of violation is not a binding, final

administrative decision. The EPA might change or refine its conclusions about the application of the rounding policy to the terminal and the sewer system. Alternatively, if the EPA's review of the facility's permits is ongoing, the EPA's conclusion about rounding might change in the future. Thus, our resolution of the question could be inconsistent with the EPA's application of the federal Clean Air Act. To avoid inconsistent interpretations, we assume only for purposes of this appeal that the rounding policy is not "clearly erroneous or unauthorized" by federal statute. (*Davis*, *supra*, at p. 1015.)

4. Textual Analysis of Policy APR 1130

Our analysis of the language used in the policy has two parts. First, we consider some of the words that do not appear in the policy. Second, we consider the words used.

Policy APR 1130 does not use the following words typically associated with a clear, mandatory task: (1) "shall," (2) "must," (3) "mandatory" or any of its variants, (4) "obliged" or any of its variants, (5) "duty" or (6) "ministerial." As to words typically associated with the exercise of judgment, the policy does not use the words "may," "opinion," "judgment" or any variant of the word "discretion."

Policy APR 1130 uses the word "required" once, but it appears in the description of the 2003 version of the policy. All 13 uses of the word "requirements" refer to the "New and Modified Source Review (NSR) rule requirements" and do not refer to rounding down to zero as a requirement. Thus, the few mandatory terms used in the policy do not apply to rounding.

The procedures section of Policy APR 1130 uses the word "should" twice. "Should" is an intermediate term, neither entirely mandatory nor entirely permissive. (Guidelines, § 15005 [definitions of shall, should and may].) The procedures section's first use of "should" occurs in the following sentence: "Calculated emissions of less than or equal to 0.5 lb/day should not be identified as equal to, or 'set to', zero in calculations

or tables" in the written engineering evaluation. The second use occurs in the second paragraph of the procedures section: "However, if [new or modified source review] requirements are triggered solely due to increases in permitted emissions of less than or equal to 0.5 lb/day, the [engineering evaluation] should state that" the rounding policy prevented the triggering of those requirements. The use of "should" instead of "shall" or "must" suggests the use of rounding is advisory and not an unequivocal, binding directive.

The words "allowing," "allowed," "to allow" and "allows" appear in the background section of Policy APR 1130. The section states the new version of the policy will rectify confusion associated with rounding errors "by *allowing* all of the emissions calculations to be carried throughout the [engineering evaluation] and posted in the emissions profile." (Italics added.) In other words, the calculations and tables in the engineering evaluation are completed without the use of rounding down and the reduction in estimated emissions that results from rounding occurs after those calculations are made and the table completed. The background section also states the policy "was revised *to allow* [increases in permitted emissions] less than or equal to 0.5 lb/day to be set to zero for purposes of providing emission offsets. This change *allows* an [increase in permitted emissions] that rounds to 0.5 lb/day, e.g. less than 0.54 lb/day, to be set to zero for purposes of providing emission offsets." (Italics added.)

The word "allow" is synonymous with "permit." (*Markus v. Justice's Court* (1953) 117 Cal.App.2d 391, 398.) Consequently, the use of "allow" and its variants, like the use of "should," suggests that rounding down pursuant to Policy APR 1130 is permissive and not a uniform, binding directive.

5. Policy Guidance or a Clear Duty

In addition to the text, we consider the general nature of policies and where they sit in the legal hierarchy because ministerial acts are ones performed "in obedience to the

mandate of legal authority." (*Rodriguez v. Solis*, *supra*, 1 Cal.App.4th at p. 501.) Air District and Owner-Operator have cited, and we have located, no authority for the principle that the rounding policy, or any policy, adopted by Air District has the force of law and, as a result, can be enforced in court. As a result, there is no ground for concluding Owner-Operator could "*legally compel*" Air District to apply the rounding policy in a manner that would result in the approval of its September 2014 application without changes. (*Westwood*, *supra*, 191 Cal.App.3d at p. 267.) In other words, a mere policy of the Air District is not legal authority that prescribes the manner in which an act is to be performed. (See *County of Los Angeles v. City of Los Angeles* (2013) 214 Cal.App.4th 643, 653 [test for enforcing a ministerial duty using ordinary mandamus].) As a result, the fact Air District rounded VOC emissions to zero based on guidance in a policy and not a rule, regulation or statute suggests rounding is not a ministerial act, but a discretionary choice.

6. Performance in a Prescribed Manner

Assuming rounding emissions down to zero was set forth in binding legal authority that used mandatory language, another aspect of whether the application of rounding down was ministerial relates to whether the "prescribed manner" for rounding down can be obeyed or implemented without regarding to the official's judgment. (*Westwood*, *supra*, 191 Cal.App.3d at p. 267; *Rodriguez v. Solis*, *supra*, 1 Cal.App.4th at p. 501.) Accordingly, we consider the manner prescribed for rounding in the policy.

Policy APR 1130 refers to "[a] daily increase" in permitted emissions. It does not identify the manner for determining that daily increase. For example, is the increase estimated for each day or is it initially estimated for each minute, hour, week, month, quarter or year with a daily figure generated by applying the appropriate multiplication or division? This question has practical implications within the San Joaquin Valley because temperatures and, thus, evaporation rates vary widely during the course of a year.

Appendix C to the September 2014 engineering evaluation of the applications estimates the pounds of uncontrolled VOC emissions for each month and quarter of the year. The uncontrolled emissions of a sump tank, when reduced by 95 percent to account for the use of the canisters, exceeded the 0.54 pounds per day rounding threshold for the days in June, July and August.[19] Thus, for the daily increase in VOC emissions for these months to be ignored, they must be aggregated with the emissions from other months before the rounding down occurs, which is what Air District did.

Policy APR 1130 does not prescribe the manner in which a daily increase in permitted emissions is determined. For instance, the policy refers to emission increases that *average* less than or equal to 0.5 pounds per day per permit unit, but does identify the length of the period used to calculate the average. Therefore, we conclude the application of the rounding down policy requires an Air District official to exercise judgment in determining how an average daily increase is to be calculated before it is rounded to zero.

7. Conclusion: Rounding Down Involves Discretion

Based on the text of Policy APR 1130, the fact that it is a policy and not a regulation, and the absence of a clearly prescribed manner for its application, we conclude Air District's use of the policy in this case was not ministerial, but involved the exercise of discretion. More specifically, we conclude a private party such as Owner-Operator would not have been able to obtain a court order compelling Air District to apply the rounding policy to Air District's review of the September 2014 permit applications. Air District's assertion that it could be compelled to round down the VOC

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[19] For example, the pounds of uncontrolled VOC emissions for one sump tank for the month of July are estimated at 518.76 pounds. Dividing this figure by 31 days produces a daily average in July of 16.73 pounds of uncontrolled VOC emissions. If the canister controls 95 percent of these emissions, the average daily VOC emissions for July is reduced to 0.837 pounds, which exceeds the threshold for rounding down.

emissions from each unit comprising the sewer system is clearly erroneous. (See *Davis*, *supra*, 83 Cal.App.4th at p. 1015.)

8. Rounding Down Cannot Be Used During CEQA Review

On remand, Policy APR 1130 cannot be used in any analysis under CEQA, including any analysis of (1) the commonsense exemption that Air District might undertake on remand and (2) whether the activity authorized by the permits has "potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Guidelines, § 15378, subd. (a); see *Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 639-640 (*ACE*).)

First, neither CEQA nor the Guidelines authorize rounding down any type of physical change to the environment. Thus, there is no basis for us to decide categorically that rounding down is appropriate for purposes of CEQA. Rather, the regulatory text applicable to a preliminary review implies that rounding down is not appropriate. When conducting a preliminary review, the lead agency examines the activity's "potential" for causing a physical change in the environment and rounding impacts out of existence is not consistent with determining a project's potential for impacting the environment. In addition, CEQA requires a consideration of cumulative impacts that "can result from individually minor but collectively significant projects taking place over a period of time." (Guidelines, § 15355, subd. (b); see Guidelines, § 15130 [discussion of cumulative impacts].) Rounding down to zero is not consistent with considering whether an individually minor impact is part of a significant cumulative impact.

Second, the policy itself states rounding to zero is done "only for the purposes of determining whether New and Modified Source (NSR) rule requirements are triggered." The use of the word "only" demonstrates that rounding to zero is not done for other purposes, such as performing a preliminary review required by CEQA or, if necessary,

preparing an initial study or an environmental impact report. (See Guidelines, §§ 15060 [preliminary review], 15063 [initial study]; see also, Guidelines, § 15002, subd. (k) [CEQA's three-step process].)

E. Conclusions

Air District committed an abuse of discretion for purposes of section 21168.5 because it did not proceed in a manner required by law when it determined the sewer system was exempt from CEQA. (§ 21168.5.) Air District's permitting officer did not perform a ministerial task when he chose to (1) deviate from its typical approach of requiring two carbon canister placed in series, (2) not include a condition requiring the canisters to contain at least 200 pounds of carbon, and (3) included a condition requiring Owner-Operator to measure and record the VOC concentration at the outlet of the carbon canister at least once each week. Therefore, we conclude the sewer system is a "discretionary project" for purposes of CEQA and Guidelines section 15357. Accordingly, the exemption for ministerial projects described in Guidelines section 15300.1 does not apply.

IV. OTHER EXEMPTIONS

Air District contends the exemption determination and the judgment should be affirmed on other grounds. Specifically, Air District argues the project qualifies for the categorical exemption for existing facilities set forth in Guidelines section 15301 or is exempt under the commonsense exemption set forth in Guidelines section 15061, subdivision (b)(3).

A. Existing Facilities

Categorical exemptions are not statutory in nature but are enumerated in the Guidelines to identify classes or categories of projects that ordinarily have no significant effect on the environment. (See § 21084, subd. (a); Guidelines, §§ 15300-15333.) A categorical exemption (numbered class 1) was created for "the operation, repair,

maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." (Guidelines, § 15301.) "The key consideration is whether the project involves negligible or no expansion of an existing use." (Guidelines, § 15301.)

Here, the existing facilities exemption does not apply because the terminal had not been completed and was not operating when Owner-Operator applied for approval of the permits for the sewer system. The regulatory phrase "existing use" refers to operations that have begun and are ongoing. For example, in *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, our Supreme Court summarized cases holding that "the continued operation of an existing facility without significant expansion of use … [is] exempt from CEQA review under CEQA Guidelines section 15301." This description demonstrates the importance of having continuing operations—that is, *operations that already are impacting the environment*. Where a facility has not been completed and is not operational, there is no existing use creating impacts.

An "agency's decision regarding the applicability of a categorical exemption is reviewed under the fair argument standard." (*Friends of the Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457, 465.) Thus, even if Air District actually had decided that the existing facilities exemption applied to the sewer system, that decision would not withstand review under the fair argument standard (or even the substantial evidence standard) because the record shows the September 2014 permits were issued before the terminal began operations in December 2014.

B. Commonsense Exemption

1. Rules Governing Application of the Exemption

The commonsense exemption is inherent in CEQA's text and explicitly set forth in Guidelines section 15061 as follows:

> "(b) A project is exempt from CEQA if: [¶] ... [¶] (3) The activity is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen *with certainty* that there is *no possibility* that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA." (Italics added.)

Generally, when a legitimate question is raised about the possible environmental impacts of a proposed activity, the public agency has "the burden to elucidate the facts that justified its invocation of CEQA's commonsense exemption." (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 387 (*Muzzy Ranch*).) The elucidation of facts is important because whether a particular activity qualifies for the commonsense exemption presents an issue of fact. (*Id.* at p. 386.) In short, the public agency invoking the exemption has the burden of demonstrating it applies. (*Ibid.*) Notwithstanding this allocation of the burden of presenting evidence and demonstrating the exemption applies, it is possible that the burden might be carried on appeal even though the commonsense exemption was not addressed in the agency's review. (See *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 175.)

2. Air District's Contentions

Air District argues the commonsense exemption applies based on its theory that the emissions from the sewer system "had already been accounted for as fugitive emissions associated with the transfer operations identified in" the permit for the construction of the unloading rack and other equipment involved in the transfer operations. Accordingly, we turn to the evidence in the record to determine if this theory of double counting allows us to determine *with certainty* that there is *no possibility* the

activity in question may have a significant effect on the environment. (Guidelines, § 15061, subd. (b)(3).)

3. Facts Established by the Record

Our review of the evidence relating to the double counting theory begins with the declaration of David Warner, a deputy air pollution control officer and deputy executive director who has been employed by Air District since it was formed in 1992. His November 2015 declaration was part of Air District's opposition to plaintiffs' petition for writ of mandate.

Warner's declaration asserted that the 509 pounds of VOC emissions per year attributed to the four sump tanks and the separator "are, for the most part, the *same* emissions already accounted for as fugitive emissions associated with the transfer operations identified in [the permit for the transfer operations]." Warner's explanation of the purported double counting is difficult to follow when viewed in the context of the transfer operation's VOC emission figures—the figures that purportedly reflect the first counting of the emissions. To avoid the possibility of mischaracterizing Warner's explanation, it is quoted here in its entirety:

> "As described in the September 2014 [Authority to Construct] Application Review, the proposed sump tanks were intended to 'be used as lift stations for crude oil and water collected from equipment drains and surface water equipment pads,' which is then 'sent to the proposed [oil-water separator] tank which will pump the separated water to retention basin(s),' with the remaining separated oil removed via vacuum trucks. The origin of the crude oil collected from equipment drains and equipment pads, however, is the transfer station of the facility receiving crude oil from offloading railcars—'fugitive VOC emissions from the components of the loading rack and VOC emissions from residual organic liquids lost in disconnecting the loading rack equipment from railcars.' In the absence of the sump tanks, residual surface oil would have been diverted to a septic and leach field during a storm water event. So the emissions associated with the sump tanks and [oil-water separator] are not truly new emissions, but are redundant emissions accounted for as part of the original permitting of the unloading terminal. However, because the sump tank emissions were so

small that the District found them to be insignificant, there was no reason to try to avoid double counting them."

We tested this story about the origin of the VOC captured and then potentially emitted by the sewer system by comparing the volume of those potential emissions (without canisters) from the sewer system's collection components to the total amount of VOC emitted by the alleged origin. The logic underlying this comparison has three steps. First, commonsense tells us that the sewer system should not have the potential to *emit* more VOC than it *captured* (i.e., collected). Second, if the origin story is true, the sewer system cannot *capture* more VOC than the alleged origin *emitted.* From these two statements, one can deduce that, if the origin story is true, the sewer system's potential emissions will not exceed the VOC emitted by the alleged origin.

Here, the alleged origin of VOC emissions is the terminal's transfer operations. The record identified two sources of emissions from the transfer operations—(1) fugitive VOC emissions and (2) the disconnect VOC emissions lost in unloading. The total emissions from the transfer operations were estimated at 1,072 pounds per year based on (1) annual VOC emissions from disconnect losses of 455 pounds[20] and (2) annual fugitive emissions of VOC from valves, pump seals and connectors of 617 pounds. This figure of 1,072 pounds also appears in the engineering evaluation of the applications submitted for the sewer system. To summarize, the first counting in Air District's double counting theory identified 1,072 pounds of VOC emissions from the terminal's transfer operations.

The next step of our analysis is to identify an amount of VOC the sewer system must have collected by identifying the system's potential to emit VOC. We will use the uncontrolled figure for emissions—that is, the amount of VOC the system would emit

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20 The annual total of 455 pounds of crude oil lost from disconnects was an estimate based on 208 disconnects per day with losses per disconnect averaging 3.2 milliliters of crude oil weighing 7.1 pounds per gallon. One milliliter was equated to 0.000264 gallons.

without the use of carbon canisters—because that figure will be closer to the amount collected. The September 2014 engineering evaluation of the applications for permits to construct the sewer system estimated each of the four sump tanks had the potential to emit 5.5 pounds of VOC emission per day or 1,997 pounds per year if canisters were not used to control those emissions. Multiplying this figure by four sump tanks produces a total of 7,988 pounds, which we conclude establishes the amount of VOC emissions that the sewer system has the potential to capture. We note that the estimated minimum collections of 7,988 pounds per year is a conservative because it does not include the potential emissions from the oil-water separator.

The final step in our analysis to test Air District's double counting theory is to compare the amount of VOC emissions from the alleged origin (the first counting) to the estimate of the amount collected by the sewer system (the second counting).[21] VOC emissions from the transfer operations are estimated at 1,072 pounds per year. In comparison, our estimate of the amount collected by the sewer system is 7,988 pounds per year. As the collections are nearly eight times greater than the original emissions, we determined the double counting theory was seriously flawed and inconsistent with the evidence in the record. Collections should not exceed the emissions that are the source of the VOC collected.[22]

4. Supplemental Briefing

After completing this basic arithmetic, we sent counsel a request for supplemental letter briefing that (1) described the foregoing calculations and reasoning and (2) asked them to address whether "the figures for the uncontrolled VOC emissions of the sump

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[21] This comparison is conservative because it assumes that all 1,072 pounds of emissions are available for capture—that is, none of the VOC emitted as evaporated and been carried from the site as air pollution.

[22] The idea that it is not logical for collections to exceed the original amount is used in the story about loaves and fishes to show a miracle occurred. (Matthew 14:13-21 [5 loaves and 2 fish fed 5,000 people and 12 full baskets of leftovers were collected].)

tanks and the figures for VOC emissions by the transfer operations are consistent with Air District's double counting theory."

Air District's supplemental letter brief asserts the figures provided are consistent with its double counting theory because 1,072 pounds per year of VOC emissions from disconnect and component losses are only part of the VOC that might be captured by the sewer system. Air District contends there are "incidental emissions" from the pump stations, pipeline booster pump and pig launcher areas that are typically associated with maintenance and repair activities that are exempt from permitting requirements and, therefore, VOC emissions from those areas "are not part of the 1,072 lbs/year total from the transfer operations." In other words, Air District identified another origin for the VOC potentially collected by the sewer system.

Air District's explanation seems to contradict the statement in Warner's declaration that "the emissions associated with the sump tanks and [oil-water separator] ... are redundant emissions *accounted for as part of the original permitting of the unloading terminal*." Under Air District's most recent explanation, only some of the sewer system's VOC potential emissions actually were *accounted for as part of the original permitting of the unloading terminal* and the remaining seven-eighths of the emissions were not accounted for as they were exempt from the original permitting. Furthermore, based on our review of the documents cited by Air District, the distinction between the disclosed source and the exempt source was poorly articulated. In other words, the documents in the record do not adequately explain that the sewer system would collect VOC from various sources, including (1) the 1,072 pounds per year of emissions from the transfer operations and (2) a much greater amount from the pump stations, booster pump and pig launch areas.

5. The Commonsense Exemption Cannot Be Applied

The question presented is whether this court can determine the commonsense exemption applies and affirm the judgment on that ground. Based on the state of the record before this court, there are serious doubts about the facts and the reasoning underlying Air District's double counting theory.

Basic arithmetic shows that only a portion of the VOC emissions were "accounted for" in the permit authorizing the construction of the terminal and a significant portion (perhaps seven-eighths) was not counted in the calculations disclosed during the approval process for that permit or during the approval process for the permits for the sewer system. Therefore, we conclude Air District has not carried its "burden to elucidate the facts that justified its invocation of CEQA's commonsense exemption." (*Muzzy Ranch, supra*, 41 Cal.4th at p. 387.) It follows that the theory of double counting does not allow us to determine *with certainty* that there is *no possibility* the activity in question may have a significant effect on the environment. (Guidelines, § 15061, subd. (b)(3).) As a result, the commonsense exemption cannot be applied at this stage of the proceedings.

C. Formulating Appellate Relief

1. Relief Requested by Plaintiffs

Plaintiffs' petition for writ of mandate requested the issuance of a writ directing Air District to set aside its approval of the 2014 authority to construct permits relating to the proposed sewer system. Similarly, plaintiffs' opening appellate brief requested a reversal and remand with directions for the superior court to issue a writ of mandate requiring Air District set aside its approval of the 2014 permits and conduct a further environmental review under CEQA.

2. Statutory Authority to Grant Relief

The relief that courts are authorized to implement once a violation of CEQA has been found is set forth in section 21168.9. In *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681 (*POET I*), this court discussed at length the judicial remedies

provided by CEQA and the application of the remedies to the facts of that case. (*Id.* at pp. 756-766.) Courts are required to issue a writ of mandate to remedy a failure to comply with CEQA. (*Id.* at pp. 756-757.) The writ of mandate shall include one or more of the types of relief identified in subparagraphs (1) through (3) of subdivision (a) of section 21168.9. The agency may be directed (1) to void, in whole or in part, a determination, finding or decision, (2) to "'suspend any or all specific project activity or activities'" if certain conditions are met, or (3) to take specific action necessary to bring the determination, finding or decision tainted by the CEQA violation into compliance with CEQA. (*POET I, supra*, at p. 757.)

Based on the foregoing statutory provisions, we must decide what type of relief is appropriate for our disposition. This decision includes determining which types of relief should be adopted or rejected by this court and which types of relief are best committed to the superior court for determination.

3. Voiding Determinations of Air District

Based on our conclusion that Air District violated CEQA in determining the proposed sewer system project was ministerial and exempt from further CEQA review, it follows that the ministerial exemption determination must be voided. Accordingly, plaintiffs are entitled to the issuance of a writ of mandate requiring Air District to void that determination. (See § 21168.9, subd. (a)(1).)

The writ issued on remand also could "mandate that [the project approval] be voided by the public agency, in whole or in part." (§ 21168.9, subd. (a)(1).) Typically, such a mandate would be included in the relief granted by this court. (*POET I, supra*, 218 Cal.App.4th at p. 759 [directing agency to void its approval of the project is a typical remedy for a CEQA violation].) "In most cases, when a court finds an agency has violated CEQA in approving a project, it issues a writ of mandate requiring the agency to set aside its CEQA determination, to set aside the project approvals, and to take specific

corrective action before it considers reapproving the project." (2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2017) § 23.124, p. 23-140 (rev. 3/15).)

In this appeal, Air District and Owner-Operator chose to focus on arguments supporting the affirmance of the judgment and did not address the specific provisions that should be included in or excluded from the writ of mandate. Consequently, the factors relevant to whether a project approval should be voided (and the consequences of voiding the project approval on the operation of the sewer system and the terminal) have not been developed in the arguments presented to this court. Many of those factors also are relevant to whether any project activity should be suspended pursuant to the authority granted in subdivision (a)(2) of section 21168.9. We note that the question of voiding a project approval and suspending project activities was addressed by this court in *POET I*, *supra*, 218 Cal.App.4th at pages 759 through 764 and *POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52 (*POET II*) at pages 91 through 99. Consistent with the analysis conducted in those cases, an important consideration to the questions of voiding the project approval and suspending project activity is the impact that granting such relief would have on the environment. In particular, would suspending the operation of the sewer system have an overall negative impact on the environment or, alternatively, is the sewer system's overall impact beneficial to the environment.

Another practical consideration makes us reluctant to decide whether to void the project approval and whether to suspend any project activity. The EPA proceedings are still pending and we lack information about the consequences such directions might have on the federal matter. For instance, the EPA might require Owner-Operator to operate the sewer system in a particular manner. A state court order that unknowingly interferes with federal requirements would create confusion and inefficiency for the regulators and the parties. Committing the decision to the superior court will allow the parties to inform

the court of the possible consequences that the terms of the writ may have on the federal proceeding.

Based on the foregoing, we will not adopt the typical approach and require the issuance of a writ of mandate directing, among other things, the agency to vacate is approval of the proposed project. Instead, we will direct the superior court to decide whether the writ of mandate is to include such a provision—a decision it can make in coordination with the determination whether plaintiffs are entitled to the suspension of any project activity pursuant to the requirements of section 21168.9, subdivision (a)(2).

4. Air District's Further Action to Comply with CEQA

Plaintiffs' appellate briefing contends the writ of mandate should require "Air District to issue public notice and prepare an environmental review document before approving the permits." This contention raises the question of whether Air District should be directed to complete a preliminary review (the first stage of CEQA review) or, alternatively, undertake an initial study (CEQA's second stage of review). We conclude the directions should be limited to directing Air District to complete the preliminary review.

We cannot, on the record before us, reach a final determination that no CEQA exemptions will apply to the proposed sewer system. As a result, it is unclear whether Air District must proceed to the second stage of CEQA review and complete an initial study. In other words, the undeveloped record before this court does not provide a basis for eliminating, as a matter of law, the double counting theory as a basis for invoking the commonsense exemption. A reasonable basis for the application of the exemption on remand might be possible if (1) the record is developed to include, among other things, a factually realistic assessment that adequately identifies and counts all sources of the VOC captured by the sewer system and (2) the potential emissions of the sewer system are estimated, using models that reflect what is actually happening or reasonably likely to

happen at the site. Consequently, the directions for the issuance of a writ of mandate will require the completion of a preliminary review in accordance with the requirements of CEQA. (See *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1074 [our disposition directed city to set aside its finding the proposed project was categorically exempt and to conduct a proper preliminary review]; cf. *ACE*, *supra*, 116 Cal.App.4th at pp. 641-642 [agency could not establish the project was exempt; our disposition directed agency to undertake an initial study].) A properly conducted preliminary review will determine whether further environmental review is required by CEQA.[23]

Accordingly, pursuant to the authority provided by subdivision (a)(3) of section 21168.9, we will direct the superior court to issue a writ of mandate that includes a provision directing Air District to conduct a preliminary review that complies with the requirements of CEQA. That preliminary review, and any further action required by the conclusions reached during the preliminary review, would constitute Air District's corrective action (assuming the preliminary review and subsequent actions are done properly under CEQA).

5. Contents of the Writ of Mandate to Be Resolved by the Trial Court

We have determined that Air District's decision that the proposed project is exempt from CEQA was wrong and must be vacated. (§ 21168.9, subd. (a)(1).) Air District's determination that the ministerial exemption applied is distinct (for purposes of CEQA remedies) from Air District's decision to approve the 2014 permits for the sewer system. As to this separate issue, we have determined the superior court shall determine whether to vacate Air District's decision to approve the permits and shall include an appropriate provision in the writ of mandate to reflect its determination.

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[23] The completion of the preliminary review might result in a determination that an initial study (i.e., the second stage of CEQA review) is required, or that an environmental impact report should be prepared. (See Guidelines, §§ 15002, subd. (k) [CEQA's three-step process], 15060 [preliminary review], 15063 [initial study].)

Related to the determination whether to vacate the project approval, the trial court also shall consider whether to "suspend any or all specific project activity or activities" pending compliance with the writ and CEQA. (§ 21168.9, subd. (a)(2).) Suspending the operation of the sewer system would be appropriate only if the two requirements set forth in section 21168.9, subdivision (a)(2) are satisfied. First, suspension requires a finding "that a specific project activity or activities will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project ...." (§ 21168.9, subd. (a)(2).) Second, the suspension appears to be limited to project activity "that could result in an adverse change or alteration to the physical environment ...." (§ 21168.9, subd. (a)(2); see *POET I, supra*, 218 Cal.App.4th 761.)

In *POET II, supra*, 12 Cal.App.5th at pages 95 through 99, this court determined suspension of a project activity—namely, the enforcement of provisions in a regulation—did not satisfy the second statutory requirement because suspending regulations would result in an actual increase in certain emissions while only potentially reducing other emissions. After weighing the actual increase versus the potential reduction, we concluded the operation and enforcement of the provisions should not be suspended. (*Id.* at p. 99; see *POET I, supra*, 218 Cal.App.4th at pp. 762-763.)

In addition, the trial court may, in an exercise of its discretionary equitable powers, require Air District to file an initial return explaining the corrective action it intends to take and the proposed timing of that action. (*POET I, supra*, 218 Cal.App.4th at p. 766; § 21168.9, subd. (c) [section does not limit equitable powers of the court].) We note the existence of this discretionary authority because its exercise might promote efficiency for the court, the state and federal regulators, and the parties. For example, if the trial court requires an initial return, it may lead to the resolution of objections before the attempted corrective action is completed and the court is asked to evaluate that action in the context of a motion to discharge the writ. (*POET I, supra,* at p. 766.) In addition,

the trial court may, in its discretion, include provisions in the writ that promote a diligent compliance with its terms. (See *id.* at pp. 767-768.)

V. ISSUES NOT RESOLVED

A. Major Source of Air Pollutants

Plaintiffs contend that Air District's determination that the terminal and sewer system are not a major source of air pollution under the federal Clean Air Act is relevant to the CEQA issues raised in this appeal. As previously explained, we will not address the questions of federal law because the ongoing EPA administrative proceeding may result in an interpretation and application of the federal Clean Air Act to the facility and that interpretation might be inconsistent with our interpretation of federal law.

B. Exercises of Discretion

We have not reached a number of plaintiffs' contentions about Air District exercising discretion in connection with the approval of the permits for the sewer system. The following list of unresolved issues relating the exercise of discretion is provided to clarify the scope of this decision.

(1) Did Air District exercise discretion when it processed the applications for authority to construct the sewer system rather than applying EPA guidance warning about the piecemealing of projects?

(2) Did Air District exercise discretionary rather than ministerial authority *for purposes of CEQA* when it applied the discretionary rounding policy to (a) avoid requiring emissions offsets or (b) avoid issuing a public notice relating to the applications for permits authorizing the construction of the sewer system? (See Rule 2201, §§ 4.5 [offsets], 5.4 [notification].)

(3) Did Air District exercise discretion in deciding not to conduct the additional CEQA scrutiny described in Air District's Policy APR 2010, which addresses CEQA implementation?[24]

(4) Did Air District exercise discretion in deciding to allow Owner-Operator to (a) select the measuring device and (b) decide how to report the measurements of the VOC concentration at the outlet of the carbon canister? (See pt. III.C.2, *ante*.)

DISPOSITION

The February 2016 judgment denying the petition for writ of mandate is reversed and the matter remanded for further proceedings. The superior court is directed to vacate its order denying the petition and to enter a new order granting the petition for writ of mandate.

The superior court shall issue a writ of mandate that compels Air District to void or set aside its determination that the ministerial exemption applied to the proposed project (§ 21168.9, subd. (a)(1)) and to undertake and complete a preliminary review that complies with the requirements of CEQA (§ 21168.9, subd. (a)(3)).

The superior court shall determine whether the writ of mandate includes provisions directing Air District (1) to void its decision to approve the permits authorizing the construction of the sewer system (§ 21168.9, subd. (a)(1)) and (2) to suspend any or all specific project activity or activities pending Air District's compliance with the writ of mandate and CEQA (§ 21168.9, subd. (a)(2)).

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[24] Under the heading "Facilities/Operations of Potential Public Concern," (boldface omitted) the policy states: "Because of potential public concern, some projects may be considered significant by the public regardless of the District's determination of the project impact on air quality. Projects receiving negative comments by local groups during public meetings, adverse media attention (newspapers or other periodicals), local news programs, or having environmental justice issues, etc. will require further District CEQA analysis. These projects will receive further analysis by the District for CEQA purposes."

The foregoing directions shall not limit the authority of the superior court to mandate Air District take other specific actions necessary to bring Air District's determinations, findings, or decisions into compliance with CEQA (§ 21168.9, subd. (a)(3)) or to include deadlines or other requirements (§ 21168.9, subd. (c)). The superior court shall retain jurisdiction over the proceedings by way of a return to the writ and may, in its discretion, require Air District to file an initial return explaining what action Air District intends to take to satisfy the writ's requirements and comply with CEQA.

Plaintiffs shall recover their costs on appeal.

FRANSON, J.

WE CONCUR:

LEVY, Acting P.J.

DETJEN, J.