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14 Attorneys for Petitioners and Plaintiffs COMMUNITIES FOR
15 A BETTER ENVIRONMENT; ASIAN PACIFIC
16 ENVIRONMENTAL NETWORK; SIERRA CLUB;
17 NATURAL RESOURCES DEFENSE COUNCIL

18 SUPERIOR COURT OF THE STATE OF CALIFORNIA
19 COUNTY OF SAN FRANCISCO

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

25 Petitioners and Plaintiffs,

26 v.

27 BAY AREA AIR QUALITY MANAGEMENT
28 DISTRICT

Respondents and Defendants.

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

Real Parties in Interest and Defendants.

Case No.

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

**[California Code of Civil Procedure § 1085;
California Public Resources Code § 21168.5]**

1 have been, and continue to be, threatened by the Air District’s failure to apply CEQA to the Kinder
2 Morgan Project.

3 8. By this action, CBE seeks to protect the health, welfare, and economic interests of its
4 members and the general public and to enforce a public duty owed to them by the Air District.

5 9. Petitioner and Plaintiff ASIAN PACIFIC ENVIRONMENTAL NETWORK
6 (“APEN”) is a non-profit organization incorporated in California that works to create a world where
7 all people have a right to a clean and healthy environment. With offices in Richmond and Oakland,
8 APEN organizes and develops the leadership of low-income Asian immigrants and refugees to
9 achieve environmental and social justice. It has a membership base of over 350 families in the Bay
10 Area. One of the central focuses of APEN has been organizing the Laotian refugee community. The
11 Laotian community, resettled to Contra Costa County in the aftermath of the Vietnam War, has
12 grown to a population of close to 10,000. APEN’s Richmond organizing is an intergenerational,
13 interethnic, community-led effort that helps Laotian families to come together to transform their
14 community into a place that is safe and healthy to live, work, and play. APEN has a membership
15 base of over 150 families in West Contra Costa County, most of whom live in Richmond. APEN’s
16 members have an interest in their health, well-being, and enjoyment, as well as conservation,
17 environmental, aesthetic, and economic interests in Richmond, Contra Costa County, and the greater
18 Bay Area. APEN’s members who live and work in or near the rail terminal have a right to, and a
19 beneficial interest in the Air District’s compliance with CEQA. These interests have been, and
20 continue to be, threatened by the Air District’s decision to issue Kinder Morgan a permit to operate
21 without any CEQA review.

22 10. By this action, APEN seeks to protect the health, welfare, and economic interests of
23 its members and the general public and to enforce a public duty owed to them by the Air District.

24 11. Petitioner and Plaintiff the SIERRA CLUB (“Sierra Club”) is a national nonprofit
25 organization of approximately 600,000 members. The Sierra Club is dedicated to exploring,
26 enjoying, and protecting the wild places of the earth; practicing and promoting the responsible use of
27 the earth’s ecosystems and resources; educating and encouraging humanity to protect and restore the
28 quality of the natural and human environment; and to using all lawful means to carry out these

1 objectives. The Club’s particular interest in this case and the issues which the case concerns stem
2 from the Club’s interests in reducing reliance on fossil fuels and protecting the health of vulnerable
3 communities. It has chapters throughout the San Francisco Bay Area, including its San Francisco
4 Bay, Redwood, and Loma Prieta chapters.

5 12. Sierra Club has over 52,000 members in the Bay Area. These members live, work,
6 and recreate in the nine counties that comprise the greater San Francisco Bay Area. They are
7 affected by the environmental quality of the area. They have an interest in their health and well-
8 being, and have conservation, aesthetic, and economic interests in the Bay Area environment. Sierra
9 Club’s members who live and work in or near the rail terminal have a right to, and a beneficial
10 interest in the Air District’s compliance with CEQA. These interests have been, and continue to be,
11 threatened by the Air District’s decision to issue Kinder Morgan a permit to operate without any
12 CEQA review.

13 13. By this action, the Sierra Club seeks to protect the health, welfare, and economic
14 interests of its members and the general public and to enforce a public duty owed to them by the Air
15 District.

16 14. Petitioner and Plaintiff the NATURAL RESOURCES DEFENSE COUNCIL
17 (“NRDC”) is a non-profit environmental organization with more than 363,000 members nationwide.
18 Its mission is to safeguard the Earth, and its people, flora, fauna and natural ecosystems; to foster the
19 fundamental right of all people to have a voice in decisions that affect their environment; and to help
20 break down the pattern of disproportionate environmental burdens borne by people of color and
21 others who face social or economic inequities. NRDC’s membership and staff of lawyers, scientists,
22 and other environmental specialists have a long-standing interest in reducing reliance on fossil fuels
23 and protecting public health. NRDC maintains offices in San Francisco and Santa Monica,
24 California, as well as in other states and abroad, and has over 60,000 members in California,
25 including 281 members in Richmond. NRDC’s members have an interest in their health and well-
26 being, as well as conservation, environmental, aesthetic, and economic interests in Richmond,
27 Contra Costa County, and the greater Bay Area. NRDC’s members who live and work in or near the
28 rail terminal have a right to, and a beneficial interest in the Air District’s compliance with CEQA.

1 These interests have been, and continue to be, threatened by the Air District’s decision to issue
2 Kinder Morgan a permit to operate without any CEQA review.

3 15. By this action, NRDC seeks to protect the health, welfare, and economic interests of
4 its members and the general public and to enforce a public duty owed to them by the Air District..

5 16. Respondent and Defendant BAY AREA AIR QUALITY MANAGEMENT
6 DISTRICT is the local agency that issued the Permit to Operate that is the subject of this litigation.

7 17. Real Party in Interest and Defendant KINDER MORGAN MATERIALS SERVICES,
8 LLC engages in designing, building, and operating multimodal transloading facilities in the United
9 States. Its transloading facilities provide services in the areas of rail to truck, truck to rail, container
10 to railcar, railcar to container, truck to barge, and barge to truck services for food grade
11 commodities, steel, lumber, and paper, as well as flammable commodities and hazardous products.
12 Kinder Morgan Material Services also provides in-plant services at customer specific locations. The
13 company is based in Moon Township, Pennsylvania. Kinder Morgan Materials Services, LLC
14 operates as a subsidiary of Kinder Morgan Energy Partners, L.P.

15 18. Real Party in Interest and Defendant KINDER MORGAN ENERGY PARTNERS,
16 L.P. (“KMP”) holds stakes in 80,000 miles of natural gas and petroleum product pipelines and owns
17 180 bulk terminals and rail transloading facilities with 200 million barrels of storage capacity that
18 handle 100 million tons of coal, petroleum coke, and bulk products annually. KMP transports refined
19 petroleum products (gasoline, diesel, and jet fuel) through its pipelines and stores the products in 60
20 terminals in the US.

21 19. Petitioners do not know the true names or capacities of the persons or entities sued as
22 DOES 1 through 20, inclusive, and therefore sues these real parties by their fictitious names.
23 Petitioners will amend the Petition and Complaint to set forth the names and capacities of the DOE
24 defendants along with any additional appropriate allegations when such information is ascertained.

25 **JURISDICTION AND VENUE**

26 20. This Court has jurisdiction over this action pursuant to California Code of Civil
27 Procedure (“CCP”) § 1085.

1 32. Asthma and other respiratory illness rates are already at dangerously high levels in
2 these neighborhoods. People living downwind of the industrial area frequently experience severe
3 asthma attacks, dizziness, headaches, and rashes. Indeed, experts have confirmed high levels of
4 indoor pollutants, including metals closely associated with oil refineries, inside neighboring
5 households. This “toxic soup” has forced Richmond residents to live with high levels of air
6 pollution and the resulting health risks. The noxious odors reported by residents are released by the
7 production of hydrogen sulfide and other sulfur-based compounds that are present in crude oil and
8 emitted during the process of refining that crude.

9 **The Deplorable State of California’s Railway Infrastructure**

10 33. The California Public Utilities Commission’s (“CPUC”) Office of Rail Safety
11 publishes annual reports on the conditions and public safety risks of California’s railroads pursuant
12 to Cal. Pub. Util. Code §§ 309.7 and 765.6.

13 34. On November 30, 2013, the Office of Rail Safety published its most recent annual
14 railroad safety report, which listed a number of alarming railway safety concerns associated with the
15 increased movement of crude oil by rail through California. The report specifically identifies
16 California’s railroad bridges as a significant rail safety risk. According to the report, most of
17 California’s railroad bridges are old steel and timber structures, *some over a hundred years old*. As
18 the report goes on to explain:

19 [o]ften, these bridges now reside on properties owned by smaller short line railroads
20 that may not be willing or able to acquire the amount of capital needed to repair or
21 replace degrading bridges. [I]t is unclear if the railroads are able to adequately
22 identify, with a high degree of certainty, the year, model, construction materials, and
23 maximum weight the bridge can carry, as well as maintenance programs and
practices. Also, like most transportation infrastructure, the more the bridge is used
with greater frequency and with heavier loads, the more the bridge integrity is
potentially compromised. There are many unknown questions regarding bridge
integrity that need to be answered to ensure the public safety.

24 2013 Rail Safety Report at 8.

25
26 35. The report further warns that “[r]ailroad bridges are not inspected by any entity in the
27 California state government, even though they carry thousands of rail cars containing hazardous
28 materials and thousands of passengers daily,” and that only “[o]ne federal inspector is currently

1 assigned to cover California, along with 10 other states in the West, and cannot possibly provide
2 adequate oversight for the approximate 5,000-7,000 bridges in California.” 2013 Rail Safety Report
3 at 8-9. The reports lists criteria that may affect a ranking of the risk of a bridge, including “whether
4 the bridge exists in high-population areas and/or over major waterways, and the frequency that the
5 bridges support trains that that transport passengers, *volatile hazardous materials and petroleum*
6 *products.*” *Id.* at 9 (emphasis added).

7 36. Another critical piece of any railway safety assessment includes securing stationary
8 trains. The rail safety report provides context for this issue as it relates to crude-by-rail operations:

9 One example of failure to secure a train is the July 2013 runaway and derailment of a
10 parked but inadequately secured train in Canada. The unattended train and the
11 accompanying crude oil shipment rolled away at very high speed toward the town of
12 Lac-Mégantic, Quebec, Canada, where it derailed, exploded in fire, and resulted in
13 approximately 47 deaths. The Risk Assessment Section uses such worldwide rail
14 incidents in order to gauge the adequacy and effectiveness of California’s rail safety
15 program and identify any previously unknown risks in California’s rail system. For
16 example, the catastrophe in Canada also highlights concerns over recent increased
17 crude oil rail traffic through California’s, refineries, coast, and mountains. These
18 shipments occur over some of California’s steepest rail grades—making train
19 securement a timely issue.

20 2013 Rail Safety Report at 11.

21 37. The report advises “consideration of stationary and dynamic braking, structural
22 integrity of cars, train consist, track incline, track curvature, and speed limits,” in ensuring adequate
23 train securement. *Id.*

24 38. On the subject of earthquake risk, the report explains that California’s “railroad tracks
25 and bridges cross active faults in the state, and the *potential for earthquake-induced damage to the*
26 *railroad system infrastructure and other rail facilities is high*, with consequent risks to public safety
27 and the environment.” *Id.* (emphasis added).

28 39. In the wake of a 2008 head-on collision between a freight train and commuter train
that killed twenty-five people and seriously injured 130 more in Chatsworth, California, the CPUC
has elevated its efforts to draw attention to the dangers of California’s railway system and the need
for improved safety measures. For example, the agency reports that the state laws mandating annual
railway track safety inspections have not been fulfilled since 2005-2006.

1 more stringent source testing and monitoring conditions on [Kinder Morgan’s transloading facility]
2 to ensure compliance with current permit restrictions and well as all applicable rules and
3 regulations.”

4 45. Responding to Kinder Morgan’s requested revision of some of those more stringent
5 emissions monitoring requirements, the Air District conducted a second engineering evaluation, and
6 on that basis, issued an addendum, dated October 9, 2013 that modified the facility’s permit
7 conditions once more to weaken monitoring requirements.

8 46. The Air District amended its engineering evaluation yet once more on December 2,
9 2013 in response to rail shipments of “higher than expected” vapor pressure crude oil that forced
10 Kinder Morgan to curtail operations or risk violation of its permit conditions. This prompted the Air
11 District to modify Kinder Morgan’s permit conditions yet again—this time to require the use of
12 DOT 407 tanker trucks, which are not certified by the California Air Resources Board.

13 47. Two months after its second amendment to its engineering evaluation, on February 3,
14 2014, the Air District issued Kinder Morgan a permit to operate its Crude-By-Rail Project subject to
15 the new conditions resulting from the Air District’s engineering evaluation and two addendums. The
16 permit conditions that ultimately formed Kinder Morgan’s permit to operate required the
17 interpretation, analysis, and independent judgment of an Air District engineer.

18 48. Despite its engineering analysis and resulting permit modifications, and despite the
19 growing public concern over increased crude-by-rail operations and the risks and dangers they pose,
20 the Air District characterized the above-described permitting process to be “ministerial.” On that
21 basis, the Air District concluded that the California Environmental Quality Act lacked any
22 application to Kinder Morgan’s crude-by-rail project.

23 49. As a result of the Air District’s “ministerial” designation, the crude-by-rail project
24 was approved without any public notification, comment period, process, or environmental review
25 under CEQA.

1 **FIRST CAUSE OF ACTION**

2 **(Violation of CEQA–Illegal CEQA Exemption; CCP §1085, Cal. Pub. Res. Code §21168.5)**

3 50. The primary goal of CEQA is to “[e]nsure that the long-term protection of the
4 environment shall be the guiding criterion in public decisions.” Pub. Res. Code § 21001(d).

5 51. The Air District’s issuance of Kinder Morgan’s permit to operate, which imposes
6 operational conditions designed to control air pollution, based on the independent judgment of a
7 qualified engineer, was “discretionary” and constituted a “project” that was subject to CEQA. Cal.
8 Pub. Res. Code § 21065; 14 Cal. Code of Regs. §15378.

9 52. The Air District’s failure to conduct any CEQA review before issuing Kinder Morgan
10 a permit to operate its crude-by-rail facility constituted a prejudicial abuse of discretion for failure to
11 proceed in a manner required by law. Cal. Pub. Res. Code §21168.5.

12 **SECOND CAUSE OF ACTION**

13 **(Violation of CEQA–Failure to Prepare an Environmental Impact Report; CCP §1085,**
14 **Cal. Pub. Res. Code §21168.5)**

15 53. Substantial evidence supports a “fair argument” that the Kinder Morgan crude-by-rail
16 project will cause potentially significant and significant impacts to the environment, including, but
17 not limited to a significant risk to the environment, including public health and safety, from risk of
18 explosion due to train derailments coupled with the high volatility and combustion potential of
19 Bakken crude oil; a significant increase in human exposure to volatile organic compounds including
20 benzene, a toxic air contaminant and known carcinogen; a significant increase in hydrogen sulfide
21 emissions; and, a significant increase in greenhouse gas emissions.

22 54. The Air District’s failure to prepare an EIR that discloses, analyzes, and mitigates the
23 environmental impacts of Kinder Morgan’s Crude-By-Rail Project constituted a prejudicial abuse of
24 discretion for failure to proceed in a manner required by law. Cal. Pub. Res. Code §21168.5.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, CBE, APEN, the SIERRA CLUB and NRDC pray for judgment as set forth
27 below:
28

1 A. For a writ of mandate or peremptory writ issued under the seal of this Court and
2 directing the Bay Area Air Quality Management District to:

3 1. Set aside and withdraw its approval of Kinder Morgan’s February 3, 2014 Permit To
4 Operate Altered Equipment (Air District Application No. 25180);

5 2. Refrain from granting any further approvals of the crude-by-rail Project unless and
6 until the Air District complies fully with the requirements of CEQA; and

7 3. Circulate a draft EIR studying Kinder Morgan’s bulk rail terminal operations for
8 public review and comment.

9 B. For entry of preliminary and/or permanent injunctive relief prohibiting the Air
10 District and Kinder Morgan from operating its bulk rail terminal in Richmond, California until a
11 lawful approval has been obtained from the Air District after the requirements of CEQA have been
12 fulfilled.

13 C. For a declaratory judgment stating that the Air District violated CEQA by approving
14 Kinder Morgan crude-by-rail project without complying with CEQA.

15 D. For a declaratory judgment stating that the Air District’s approval of Kinder
16 Morgan’s February 3, 2014 Permit to Operate Altered Equipment (Air District Application No.
17 25180) is void *ab initio* or otherwise invalid and of no legal effect.

18 E. For a declaratory judgment that the Air District’s failure to prepare, consider, and
19 approve or certify an adequate environmental analysis under CEQA was arbitrary and capricious and
20 constituted a prejudicial abuse of discretion for failure to proceed in a manner required by law.

21 F. For Petitioners’ fees and costs, including reasonable attorneys’ fees and expert
22 witness costs, as authorized by CCP § 1021.5, and any other applicable provisions of law on its
23 claims regarding the unlawful issuance of Kinder Morgan’s February 3, 2014 Permit to Operate
24 Altered Equipment (Air District Application No. 25180).

1 G. For such other legal and equitable relief as this Court deems appropriate and just.

2
3 DATED: March 27, 2014

Respectfully submitted,

4 EARTHJUSTICE

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