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February 16, 2023

By Electronic Filing

Honorable Chief Justice Patricia Guerrero
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

Re: Letter of Amicus Curiae Supporting Petition for Review in *American Chemistry Council, et al. v. Department of Toxic Substances Control, et al.*
California Supreme Court Case No. S278221

Dear Honorable Chief Justice Guerrero and Associate Justices of the Court:

The National Association of Manufacturers ("NAM") submits this letter in support of the Petition for Review filed by the American Chemistry Council in the above-referenced matter.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, including more than 1.3 million people in California, contributes over $2.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community, and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

All entities involved in California Environmental Quality Act ("CEQA") litigation—litigants, agencies, and courts—benefit from clear rules regarding what steps are required before litigation can be initiated. A black letter requirement to exhaust administrative remedies before initiating such litigation has guided parties for decades. But the Court of Appeal's decision below injects ambiguity in this process, creating confusion as to when a litigant needs to exhaust the administrative remedies identified in an agency's administrative review process before initiating CEQA litigation.

CEQA issues arise in numerous contexts, ranging from project development and land use decisions to the adoption of new regulations. Manufacturers are subject to a diverse array of

state laws and regulations, but because of CEQA's expansive reach, manufacturers—and everyone else needing discretionary government approvals to conduct business—will be impacted by the Court of Appeal's decision. The NAM's members need clarity to continue fulfilling their essential role as the backbone of the U.S. economy. The NAM urges this Court to clarify the confusion created by the Court of Appeal on the issue of when administrative exhaustion is required before initiating a CEQA claim in court.

The Court of Appeal's Decision Creates Uncertainty as to When a Litigant Must Exhaust Administrative Remedies Before Initiating CEQA Litigation

The Court of Appeal concluded that litigants do not need to exhaust administrative remedies before initiating CEQA claims unless the underlying administrative review process "specifically" references CEQA. But this holding conflicts with numerous other published decisions requiring just the opposite—that litigants *must* exhaust administrative remedies before seeking judicial review for CEQA claims, regardless of whether CEQA is referenced in the underlying procedures. (See [Jan. 20, 2023] American Chemistry Council's Petition for Review at p. 23-32.) Indeed, it is hornbook law that agency action generally cannot be challenged in court until administrative review proceedings have been completed. (See, e.g., Kosta & Zischke, Practice Under the California Environmental Quality Act (Cont. Ed. Bar 2d ed. 2022 update), § 23.110 ["agency action is ordinarily not sufficiently ripe for judicial review until all administrative proceedings have been completed, and the agency has reached a final decision in the matter" (internal citations removed)].). Failing to include CEQA-related challenges in the administrative appeal process robs the agency of the ability to correct any purported error before litigation is initiated.

Obtaining clarity for how to initiate CEQA litigation is particularly important because CEQA has notoriously short statutes of limitations. (See, e.g., Pub. Res. Code § 21167(c) [30-day statute of limitations for CEQA-based challenges begins upon filing the Notice of Determination]). If a litigant pursues administrative exhaustion that was ultimately not required, then its subsequent challenge filed in superior court will almost certainly be time-barred because pursuing an administrative remedy would not toll the limitations period, forcing a litigant to both initiate legal proceedings and administrative proceedings simultaneously. Quite simply, with CEQA's short limitations period, there is no time for a litigant to choose incorrectly as to whether exhaustion is required.

The underlying case illustrates this point. Here, the American Chemistry Council ("ACC") initiated the agency dispute resolution process in May 2018 and that process concluded in February 2019, approximately nine months later. Op. 22. Neither the ACC nor the Department of Toxic Substances Control disputed that the relevant limitations period was 180 days. (See Pub. Res. Code § 21167(d); see also Op. 46-47). ACC initiated administrative proceedings well within the limitations period by doing so approximately one month after the Office of Administrative Law approved the Department's listing regulation for spray foam. Op.

22. The Court of Appeal concluded that, despite the fact that ACC sought to exhaust its administrative remedies, ACC should have instead filed a lawsuit in superior court; therefore, ACC's CEQA claim was time-barred.[1] Here, the administrative exhaustion process took longer than 180 days, so by pursuing administrative remedies, judicial review of the CEQA claim was precluded. This confounding result, standing in contrast to the great weight of case law requiring administrative exhaustion, is in desperate need of clarification by this Court.

Litigants and Courts Will Struggle to Determine When an Agency's Administrative Procedures "Specifically" Incorporate CEQA

The Court of Appeal decision concludes that a litigant must exhaust administrative remedies for CEQA claims *only* if the underlying agency's administrative review process "specifically" references CEQA. In addition to being contrary to precedent, such a scheme is unworkable, creating a risk of inconsistent outcomes and possibly turning routine CEQA claims into complex determinations of what various administrative review procedures require.

The Court of Appeal opinion provides little guidance as to what level of detail is required to incorporate CEQA claims into administrative exhaustion procedures enumerated in other statutory schemes. In this case, the Court of Appeal found "no basis to conclude that the regulations [for California's Green Chemistry Program] are intended to or do include provisions for resolving disputes arising under CEQA." Op. 50. Instead, the regulations "provide a dispute resolution process for only a limited set of issues that can arise under the broader regulatory scheme[.]" Op. 51. But the Court did not go on to provide guidance for how to determine when a statutory scheme does specifically incorporate CEQA. Must CEQA be identified by name and statutory cite? Is a reference to environmental claims sufficient? What if a regulatory dispute resolution process was encompassed within a different environmental law—would that lend support that CEQA claims are to be included? Absent clear guidance, the Court of Appeal's holding requires litigants to be experts in parsing diverse and complex regimes to determine whether the agency intended its dispute resolution procedures to incorporate CEQA claims, and this will likely flood the courts with premature claims in order to ensure that they can receive judicial resolution.

The consequences of incorrectly determining whether administrative review is a necessary precursor to initiating litigation in court are severe. If a litigant chooses to first exhaust administrative remedies but that was not required, then it is likely that CEQA's limitations period will run during the process and judicial review will be foreclosed—just as the Court of Appeal concluded in this case. On the other hand, if a litigant sues immediately and foregoes exhausting administrative remedies, then a court could dismiss the claim for failure to

[1] Litigation was initiated in superior court in August 2019, less than 180-days after the administrative proceedings concluded. Op. 22. But the litigation was initiated significantly more than 180-days after the final listing regulation was submitted to the Office of Administrative Law. *Id.*

comply with the necessary administrative procedure before filing suit. This structure forces litigants to pursue both administrative and judicial review proceedings in parallel, stressing court and party resources, and inviting potentially warrantless litigation that could be resolved during the administrative process.

Lack of Clarity About how to Initiate Litigation Undermines Key Tenants of Our Judicial System

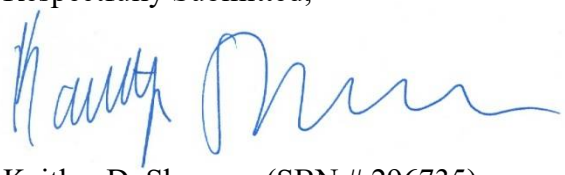
No one benefits from confusion regarding how to initiate litigation and the necessary precursors to doing so. The confusion unleashed by the Court of Appeal's decision undermines key concepts in our judicial system. First, requiring a potential litigant to exhaust administrative remedies serves important functions. These administrative processes allow agencies to correct CEQA mistakes without the time, cost, and potential delay of litigation. This promotes efficiency by conserving resources and preventing the possibility of inconsistent decisions.

Second, a lack of clarity about how to challenge CEQA decisions can shield agency decisionmaking from review. Agencies, counties, and cities can draft administrative appeal regimes that someone must follow before filing suit but that do not "specifically" reference CEQA. This creates needless tripwire for potential litigants who will understandably be uncertain as to whether administrative exhaustion is required. This confusion will enable the government to move to dismiss lawsuits on either timeliness grounds or exhaustion grounds. It also contravenes one of CEQA's primary aims to ensure that government decisionmaking is informed by the environmental consequences of its actions.

Finally, California Courts have expressed a preference for deciding issues on the merits and not on technicalities. (See, e.g. *Hamilton v. Orange County Sheriff's Dept.* (2017) 8 Cal.App.5th 759, 766 [overturning trial court's denial of continuance when denial resulted in manifest injustice because "the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency"] (internal citations removed)). The Court of Appeal's decision almost guarantees that more CEQA suits will be decided on procedural and timeliness grounds, thereby undermining the ability for these disputes to be adjudicated on the merits.

For all of these reasons, the NAM respectfully requests that the Court grant review to ensure that there is uniformity and clarity as to how, and whether, to exhaust administrative procedures before initiating CEQA claims.

Respectfully Submitted,



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PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed with the law firm of Beveridge & Diamond, P.C., whose address is 456 Montgomery Street, Suite 1800, San Francisco, CA 94104-1251. My electronic address is acruz@bdlaw.com. On February 16, 2023, I served the following document(s) by the method indicated below on the parties listed on the attached service list.

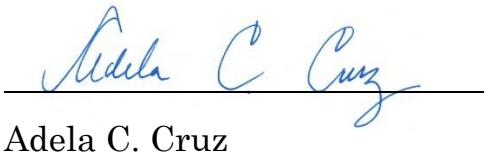
AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW

[X] (BY ELECTRONIC SERVICE VIA TRUEFILING). I electronically transmitted the document(s) listed above to TRUEFILING, an electronic filing service provided at www.truefiling.com. To my knowledge, the transmission was reported as complete and without error.

[X] (BY FIRST CLASS MAIL). I caused true copies thereof to be placed in sealed envelopes, addressed as shown in the service list, for collection and mailing pursuant to the ordinary business practice of this office which is that correspondence for mailing is collected and deposited with the United States Postal Service on the same day in the ordinary course of business.

[X] (VIA OVERNIGHT DELIVERY). I caused true copies thereof to be placed in a sealed envelope addressed to each interested party as shown below. I placed each such envelope, with FedEx fees thereon fully prepaid, for collection and delivery pursuant to the ordinary business practice of this office.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this proof of service was executed on February 16, 2023 at San Francisco, California.



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