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19 SUPERIOR COURT OF THE STATE OF CALIFORNIA

20 IN AND FOR THE COUNTY OF TEHAMA – CIVIL DIVISION

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22 INENTEC MEDICAL SERVICES CALIFORNIA)
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Case No. 56912

**REAL PARTIES IN
INTEREST'S OPPOSITION
TO PETITIONER'S
MEMORANDUM OF
POINTS AND
AUTHORITIES**

Date: September 8, 2006
Time: 10:30 am
Dept.:

The Honorable John Letton

1 Real Parties in Interest.)
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1 **I. INTRODUCTION**

2 This action concerns the decision of the Hearing Board of the Tehama County Air
3 Pollution Control District (the “Board”) to grant the appeal by Citizens for Review of
4 Medical and Infectious Waste Imports into Tehama County and Greenaction for Health and
5 Environmental Justice (collectively “Citizens”). InEnTec Medical Services California, LLC
6 (“InEnTec”) has filed its Opening Brief (“OB”), and Citizens here responds. As a
7 preliminary matter, InEnTec has failed to challenge the Board’s final action, and thus its
8 petition is improper under Code of Civil Procedure §1094.5. Even if this Court considers the
9 case on the merits, however, substantial evidence supports the Board’s decision and it must
10 be upheld.

11 Tehama County empaneled the Board to hear appeals of air permits issued by the
12 Tehama County Air Pollution Control District (“District”). Here, the Board heard an appeal
13 by two citizen groups of an air permit the District issued for a medical waste incineration
14 facility. The Board, after hearing dozens of hours of testimony in 10 days of hearings over a
15 three month period, issued a detailed series of findings overturning the permit. The findings,
16 based on substantial evidence before the Board in both documents and oral testimony,
17 outlined a variety of deficiencies with the District’s permit process, environmental review,
18 and actual permit. These include violations of District rules and regulations, specifically
19 Regulation II, Rule 2:1A (District erred in transferring permits without requiring information
20 on project location and design), Regulation II, Rule 2:1B (Air Pollution Control Officer
21 (“APCO”) failed to determine InEnTec had demonstrated it could comply with all applicable
22 state, federal and local regulations), and Regulation II, Rule 2:5A (APCO improperly granted
23 permits despite failure to show that proposed facility was designed, controlled or with such
24 air pollution control equipment that it may operate without causing to be emitted air
25 contaminants in violation of applicable law); violations of the California Environmental
26 Quality Act (“CEQA”) and its implementing regulations, specifically violation of CEQA

1 Guidelines § 15162(a)(1)¹ (failure to require a subsequent environmental impact report
2 (“EIR”) as a result of the substantial changes to the proposed facility), Guidelines §
3 15162(a)(3) (failure to require a subsequent EIR as a result of new and significant
4 information regarding the proposed facility), and Public Resources Code § 21151.1(a)² (the
5 proposed facility qualifies as an incinerator requiring an EIR); and the Board’s finding that
6 the APCO’s interpretation was not fair and reasonable.

7 To overturn the District’s permit, the Board made five findings comprised of 24
8 subfindings, each listing the evidence on which it was based. Under the highly deferential
9 standard of review applicable here, the Board’s decision must be upheld if even *one* of the 24
10 subfindings the Board made is supported by substantial evidence. Below, Citizens provides
11 citations to evidence supporting the findings and subfindings. InEnTec’s petition is without
12 merit, and should be dismissed.

13 **II. THE STANDARD OF REVIEW FAVORS UPHOLDING THE BOARD’S** 14 **ACTION**

15 This case is governed by the highly deferential standard of review set out by the
16 Supreme Court in *Topanga Assoc. for a Scenic Community v. County of Los Angeles* (1974)
17 11 Cal.3d 506, 514 (“*Topanga*”). InEnTec has not met its burden of showing there is no
18 evidence to support the Board’s findings, and this Court should uphold the Board’s exercise
19 of its broad discretion, supported by substantial evidence.

20 **A. The Trial Court Must Apply The Substantial Evidence Test When** 21 **Reviewing The Findings of the Hearing Board**

22 The Court reviews the decision of the Hearing Board for an abuse of discretion,
23 which is “established if the court determines that the findings are not supported by substantial
24 evidence in the light of the whole record.” Code Civ. Proc. §§ 1094.5(b), 1094.5(c).

25 “Substantial evidence” means that the evidence is reasonable, credible and of solid value.

26 *Kuhn v. Dep’t. of Gen. Services* (1994) 22 Cal. App. 4th 1627, 1633. “The ultimate

27 ¹ The CEQA Guidelines are found at 14 Cal. Code of Regulations § 15000 *et seq.* They will be cited as
28 “Guidelines” in this brief.

² All further statutory references will be to the Public Resources Code unless otherwise specified.

1 determination is whether a *reasonable* trier of fact could have found for the respondent based
2 on the *whole* record.” *Id.* (emphasis original). While “inferences that are the result of mere
3 speculation or conjecture cannot support a finding,” if a reasonable trier of fact could have
4 found as the Board decided, the decision should not be overturned. *Id.* As the Board’s
5 findings here are supported by substantial evidence, a reasonable trier of fact, based on the
6 whole record, must find for the Board.

7 Furthermore, a Court, in assessing the entire record – including evidence that detracts
8 from the Board’s findings – should “indulge all presumptions and resolve all conflicts in
9 favor of the board’s decision. Its findings come before us with a strong presumption as to
10 their correctness and regularity. We do not substitute our own judgment if the board’s
11 decision is one which could have been made by reasonable people.” *California Youth*
12 *Authority v. State Personnel Board* (2002) 104 Cal. App. 4th 575, 584 (citing *Camarena v.*
13 *State Personnel Bd.* (1997) 54 Cal. App. 4th 698, 701) (quotations omitted). Additionally,
14 the Supreme Court has reaffirmed that the reviewing court, when applying the substantial
15 evidence test, must “resolve reasonable doubts in favor of the administrative findings and
16 decision.” *Topanga, supra*, 11 Cal.3d at 514; *see also Desmond v. County of Contra Costa*
17 (1993) 21 Cal. App. 4th 330, 335 (presumption that the agency’s findings are supported by
18 substantial evidence).

19 **B. InEnTec Failed To Meet Its Burden Of Showing That There Was No**
20 **Substantial Evidence From Which The Board Could Have Made Its**
21 **Findings**

22 The party seeking a writ of mandamus has the burden of proving that there was no
23 substantial evidence supporting the decision. *Sierra Club v. County of Napa* (2004) 121 Cal.
24 App. 4th 1490, 1497; *Young v. Gannon* (2002) 97 Cal. App. 4th 209, 225. The evidentiary
25 burden is further elevated by the deference accorded to the agency’s findings: “[t]he
26 decisions of the agency are given substantial deference and are presumed correct. The parties
27 seeking mandamus bear the burden of proving otherwise, and the reviewing court must
28 resolve reasonable doubts in favor of the administrative findings and determination.” *Sierra*

1 *Club*, 121 Cal.App. 4th at 1497. InEnTec, in seeking the writ, has the burden of proving that
2 there is *no* substantial evidence in light of the whole record to support the findings of the
3 Board. *Id.* Here, it has failed to meet that burden.

4 **C. The Board Has Broad Discretion**

5 The scope of the Board’s review of the APCO’s decision is not narrowly limited:
6 “administrative boards and officers are vested with a high degree of discretion in working out
7 the problems confronting them.” *Snow v. City of Garden Grove* (1961) 188 Cal. App. 2d
8 496, 503. Furthermore, an “abuse of that discretion must be clear and manifest before the
9 courts will interfere.” *Id.* In *Snow*, the Court affirmed the decision of the City Council and
10 the Planning Commission to deny the petitioner’s request for a permit, stating that the “court
11 is not authorized to judge the intrinsic value of evidence considered by an administrative
12 agency, nor weigh it, if the record discloses substantial evidentiary support for the decision.”
13 *Id.* Similarly, the Board here is vested with broad discretion in making its determination,
14 including its decision to revoke a permit granted by the APCO, and the Court should not
15 interfere unless there is clear and manifest evidence of an abuse of discretion.³

16 **III. STATEMENT OF FACTS**

17 **A. The Proposed InEnTec Facility**

18 The issue on appeal concerned two permits issued by the APCO.⁴ The “facts” as set
19 forth by InEnTec bear little relation to the actual evidence in this case. Because of this,
20 Citizens must necessarily spend time correcting gross misstatements and improper
21 argumentation found in InEnTec's description of its facility and its description of the Hearing

22 ³ In reviewing the Board’s determination that the APCO failed to consider and comply with CEQA, it is
23 important to note the following: “when an *agency* fails to proceed as required by CEQA, harmless error
24 analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material
25 necessary to informed decisionmaking and informed public participation. Case law is clear that, in such cases,
26 the error is prejudicial.” *Sierra Club v. County of Napa*, 121 Cal. App. 4th at 1497 (citing *Protect the Historic*
Amador Waterways v. Amador Water Agency (2004) 116 Cal. App. 4th 1099, 1106) (quotations omitted)
(emphasis added). Here, the APCO had the legal obligation to proceed in a manner required by CEQA, which it
27 failed to do. This failure affected the effectiveness of the public’s participation and the decisionmaking process.

28 ⁴ Each district board shall appoint an air pollution control officer for the district. H&S § 40750. The air
pollution control officer shall observe and enforce all of the following: (a) Part 3 and Part 4 (commencing with
Section 41500); (b) all orders, regulations, and rules prescribed by the district board; (c) all variances and
standards which the district hearing board has prescribed; and (d) all permit conditions imposed pursuant to
Sections 42301 and 42301.10 H&S § 40752.

1 Board's action.

2 InEnTec claims that "IET's proprietary PEM system builds on well-established
3 technologies for plasma arc gasification and glass melting." OB at 3, n. 4. This statement is
4 the source of dispute, as evidenced in the administrative record. For example, the president of
5 InEnTec's parent company, Jeffrey Surma, testified under oath that InEnTec's claim that
6 several of the facilities using the PEM technology were "already successfully operating" in
7 fact was not correct. *Compare* Administrative Record ("AR") 2270-71 with Transcript
8 ("Tr.") 2051:14-19, 2052:8-18, 2053:4-6, 2057:11-14, 2058:14-16. Specifically, several of
9 the facilities InEnTec claimed were "already successfully operating" were closed, Tr.
10 2050:12-2053:6 (Richland, Washington) and Tr. 2057:11-14 (Okinawa, Japan), one was not
11 yet built, Tr. 2059:8-9 (Biopure, Malaysia) and serious problems existed at another, Tr.
12 2177:16-2185:2 (Honolulu, Hawaii).

13 InEnTec claims that "[t]he record shows there will be no air emissions from the PEM
14 itself during normal operations." OB at 3:18. However, InEnTec's claim here is
15 contradicted by substantial evidence, including the fact that Authority to Construct #550
16 issued by the District lists, on page 2, in Permit Condition #1 that the "Emission unit(s)"
17 include "One (1) Plasma Enhanced Melter (PEM)." AR 1784. In addition, the record shows
18 that the gases resulting from the heating of the waste are directly emitted to gensets, where
19 the gases are burned, AR 2607, 1667, Tr. 2030:19-2031:21, resulting in the emissions of
20 toxic chemicals including dioxin and other pollutants into the air, Tr. 2175:18-2177:15 (Mr.
21 Surma identifies five output exhaust spots); Tr. 2197:17-2198:12 (emissions of dioxins).
22 InEnTec's claim of no emissions from the PEM itself during normal operations is further
23 contradicted by the InEnTec document entitled "InEnTec Medical Services Tehama LLC,
24 Air Permit Application – Supplemental Information. AR 2348. Table 8 of this document is
25 entitled "Flare Emissions Under Normal Operation" and includes emissions of criteria
26 pollutants of NO_x, CO, SO_x, HC/VOC and PM₁₀. *Id.* In addition, there are potential
27 fugitive emissions within the PEM and facility during normal operations. Tr. 2127:24-
28 2128:10 (Mr. Surma testified that there would be fugitive emissions from loading of the

1 medical waste into the chamber). In addition, InEnTec conveniently fails to disclose that
2 there would also be emissions resulting from upset conditions and other off-normal
3 operations, emissions that the record shows were not fully evaluated by the APCO. Tr.
4 1331:20-1334:7 (Assistant Air Pollution Control Officer Gary Bovee testified that the facility
5 would emit various criteria pollutants and dioxin during off-normal operations); AR 2349-51
6 (emissions would be released during off-normal operations).

7 **B. The Permitting Process**

8 On September 16, 2004, InEnTec Medical Services, LLC applied to Tehama County
9 Planning Department (the "Planning Department") for a conditional use permit ("CUP") for a
10 proposed facility to be built at either 11425 or 11500 Reading Road in Red Bluff, CA. AR 2-
11 4. Pursuant to the California Environmental Quality Act ("CEQA"), the Planning Department
12 served as "lead agency," assuming responsibilities for preparing an environmental impact
13 report ("EIR") or negative declaration. Guidelines §15050(a); AR 2491.

14 On October 4, 2004, upon initiation of the CEQA review process, the Planning
15 Department sent notice to the District seeking comments on the proposed facility. AR 1.
16 On October 8, 2004, the District responded that it would defer its CEQA analysis and
17 review the air impacts of the proposed facility upon application by InEnTec to the District
18 for Authority to Construct permits ("ATCs"). AR 2263. The October 8 letter was the
19 only written comment from the District on the proposed Negative Declaration. Tr.
20 1105:3-10. The brief letter contained no substantive or technical comments, saying the
21 "District will require: 1. The developer to obtain an Authority to Construct permit from
22 the Tehama County Air Pollution Control District prior to construction of the Plasma
23 Enhanced Melter facility." AR 12, 2263.

24 On November 11, 2004, the Planning Department released a Revised Initial Study
25 and negative declaration concluding that the proposed facility would not have a significant
26 adverse effect on the environment. AR 2454, 2495. On December 16, 2004, the Tehama
27 County Planning Commission adopted the negative declaration and issued Use Permit #04-
28

1 31 for the proposed facility. The following day, the Planning Department filed a Notice of
2 Determination as required under CEQA. AR 1462; § 21152(a).

3 On January 26, 2005, InEnTec Medical Services, LLC and InEnTec Energy Services,
4 LLC submitted separate applications to the District for ATCs. AR 833-840. Application No.
5 550, by InEnTec Medical Services, LLC (“InEnTec Medical”) requested authorization to
6 construct a PEM unit, one genset, and related equipment at 11425 Reading Road. AR 837-
7 840. Application No. 553, by InEnTec Energy Services, LLC (“InEnTec Energy”) requested
8 authorization to construct a second genset at a separate location at 11500 Reading Road. AR
9 833-35.

10 On July 13, 2005, the District issued two permits, this time to another entity which
11 had not applied for either permit, InEnTec Medical Services California, LLC (the Petitioner
12 here). AR 1610-17; AR 1783-1802. On August 12, 2005, Citizens and Greenaction timely
13 filed appeals of the two permits. AR 811-832. Tehama County notified the Hearing Board it
14 had earlier empaneled under Health & Safety Code (“H&S”) § 40800.

15 **C. The Hearing Board’s Actions**

16 The Board first met on September 8, 2005, and subsequently held hearings on the
17 appeal on that date and on 12 others: October 11, November 7, November 14, November 15,
18 November 16, November 18, November 22, December 20, and December 21. *See generally*
19 Tr. 1-2500; AR 1415. The Board heard testimony from legions of people over the course of
20 dozens of hours of hearings.

21 The Hearing Board extensively discussed many of the issues later embodied in its
22 findings before taking its vote. InEnTec’s claim that the Hearing Board “essentially
23 rubber-stamped” the proposed findings submitted by Appellants and “did not discuss or
24 vote on any of the Findings individually,” OB at 10:13-16, is contradicted by the record.
25 The Hearing Board heard testimony on all of the issues during the marathon
26 administrative appeal process that included ten hearings over a three month period, and
27 before their final vote discussed many of the proposed findings.

28 During the deliberations the Hearing Board extensively discussed the changes and

1 new information in project, the lack of an EIR and the many failures in the APCO's
2 review. Tr. 2492:3-9, 2492:16-22, 2493:1-25. The Board's deliberations take up a full
3 106 pages of the transcript. Tr. 2492-2598. Additional examples of thoughtful
4 deliberation on the proposed findings include the Board's concerns about the failure to
5 evaluate the possible treatment of non-medical wastes, Tr. 2493:10-2494:6, and concerns
6 about the big change in proposed tons per day that would be treated at the facility between
7 what the Planning Commission approved and what the APCO approved. Tr. 2495:14-
8 2496:1, 2497:22-2498:15; 2532:14-19, 2492:20-22. Board member Dr. Henderson
9 discussed her concerns about the lack of testing on the PEM Model 500 and also about the
10 problems with even the smaller units. Tr. 2528:23-25, 2530:5-6.

11 The Board further deliberated about the change from one to two gensets and other
12 permit process irregularities: Board member Mr. Richelieu stated "Well, I know it's been
13 covered numerous times, but the Use Permit also says that the electric power will go
14 through 'an gen set,' and... I mean, we, we – we've gone from one gen set to two or
15 three. We've gone to debate over 6 tons to 20. We've gone to different name changes in
16 the company. We've gone to moving the building and the site around. We've gone to
17 different stack diameters... I have not seen one fact from any test by any agency,
18 independent testing lab or anybody that shows the PEM 500. It does not exist." Tr.
19 2542:18-2543:11.

20 Mr. Richelieu continued his summarization of the evidence and proposed findings
21 by discussing concerns about fugitive emissions that were not considered by the APCO:

22 And the other thing that bothers me is the fugitive emissions.
23 We're not talking about, you know, processing walnuts or
24 prunes or some type of commodity that's grown here in the, in
25 the county, we're talking about contaminated medical waste.
26 And yesterday's diagram that was shown on, to us on the
27 presentation, I questioned the fact that when the bins go up and
28 they're, the gate's open, they dump the product, testimony that
would, the bags would drop out of there, we all know that
there's needles and whatever in those bags and they're subject
to puncture, otherwise, they wouldn't be in a, another container.

1 It, it just seems logical to me, and I grew up on a farm like a lot
2 of the rest of us here, and handling materials. When you open
3 a door to something, the, the fine particles have to come out...
4 in my opinion, you don't have a real air lock. And those
5 fugitive emissions can be dispersed not only into the, to the
6 building, but their heating and air conditioning that makes the
7 building comfortable for workers to work in, you have to have
8 so much fresh incoming air, and those particles are gonna be
9 dispersed out of the building and then Lord knows where they
10 go.... That diagram that we saw yesterday, in my opinion, is
11 new information. It does not agree with any of the documents
12 or the evidence that's been submitted to date until yesterday.
13 And it, that's another change... This was never presented, in
14 my opinion, to the Air District to review the fugitive emissions
15 because the PEM diagram that I saw yesterday was new
16 information...

17 Tr. 2543:19-2545:15. Mr. Richelieu summarized the Board's frustration throughout the
18 long hearing process: "It just, it seem[s] like every day, every week, that we get new
19 information that this is a work in progress. So how can anybody, when, in an authority
20 position, review and approve something when it keeps changing." Tr. 2546:8-12.

21 On December 21, 2005, after extensive deliberation, the Board voted to grant the
22 appeal and adopt findings. AR 1415-1416.

23 On January 6, 2006, the Board issued findings, AR 1398-1406, and then on January
24 27, 2006, issued amended findings, AR 1408-1416. The amended findings are the final
25 action by the Board.

26 InEnTec filed this Petition on February 1, 2006, challenging the January 6, 2006
27 findings.

28 **IV. ARGUMENT**

Faced with the daunting task of showing there is no substantial evidence to support
the Board's decision, in the face of thousands of pages of evidence in the record to the
contrary, InEnTec creates straw-man legal arguments and evidentiary red herrings in an
apparent attempt to distract this Court. The effort is fruitless. InEnTec's factual citations
and legal histrionics cannot obscure the substantial evidence in the administrative record

1 supporting the Board’s findings and its ultimate decision to revoke the permit. As a
2 preliminary matter, however, InEnTec is not properly before this Court.

3 **A. InEnTec, in its Petition, has not challenged the final permit, as required**
4 **by Section 1094.5**

5 Under Health & Safety Code § 40864(a), the Board’s decision may be reviewed by
6 this Court through a petition for writ of mandate filed in accordance with §1094.5 of the
7 Code of Civil Procedure. Section 1094.5 only allows the review of a final agency action.
8 *Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050, 1055. The final
9 agency action here is the issuance of Amended Findings on January 27, 2006. AR 1408-
10 1416. Here, InEnTec in its Petition – filed February 1, 2006 – did not challenge the final
11 action of the Board of January 27, 2006, but instead petitioned for review of an action taken
12 by the Board on January 6, 2006. *See* Verified Petition for Writ of Administrative
13 Mandamus, filed February 1, 2006, ¶¶ 5, 23 (referring only to Board’s action of January 6,
14 2006). The preliminary findings, filed January 6, 2006, AR 1398-1406, are not the Board’s
15 final decision. InEnTec’s petition is thus not proper and must be dismissed. It is axiomatic
16 that the Court can only review the final action of the agency, rather than an interim action.
17 *Bollengier v. Doctors Medical Center* (1990) 222 Cal. App. 3d 1115, 1125 (“a writ of
18 mandate under section 1094.5 may be issued to review an administrative decision only if that
19 decision is final”). Because InEnTec did not challenge the final agency action, its petition is
20 thus not properly before this Court under § 1094.5 and Health & Safety Code § 40864, and
21 must be dismissed.⁵

22 InEnTec attempts to glide past this fatal pleading defect by only citing to the final
23 agency action in its Opening Brief (“OB”), but this clever citation at the *briefing* stage cannot
24 salvage its failure, in its *petition*, to challenge the final agency action. Nor can InEnTec
25 salvage its suit through amendment to challenge the final agency decision: the statute of
26 limitations for such challenge is 30 days under Health & Safety Code § 40864(a); this statute

27 _____
28 ⁵ Citizens raised this pleading defect as one of its affirmative defenses. *See* Verified Answer (filed March 3,
2006), at 11:23-24.

1 ran on February 26, 2006, 30 days after the final decision was rendered on January 27, 2006.
2 AR 1408-1416.

3 Should this Court choose to hear this case despite InEnTec’s failure to challenge the
4 Board’s final action, InEnTec still fails to demonstrate – as it must to prevail – that every
5 single one of the Board’s findings and subfindings was not supported by substantial
6 evidence. Indeed, as Citizens demonstrate below, every finding of the Board *was* supported
7 by substantial evidence, and thus InEnTec’s petition must fail.

8 **B. Board Finding I: The APCO’s Issuance of the ATCs Violated the Rules**
9 **and Regulations of the District**

10 **1. The APCO Consolidated the Permits Without Knowing the**
11 **Precise Location of the New Source and Without A Project**
12 **Design**

13 The Board’s Finding I stated that “[s]ubstantial evidence has shown and proved that
14 the TCAPCO erred in issuing permits to InEnTec Medical Services California LLC in
15 violation of the rules and regulations of the Tehama County Air Pollution Control District.”
16 AR 1409. This finding is supported by evidence as set forth in more detail in Findings I.A,
17 I.B and I.C. AR 1409-1411.

18 The Board properly found, based on substantial oral testimony and documentary
19 evidence, that the District approved the consolidation of the project permits from two sites to
20 one site on October 25, 2005, after just one day of review, without knowing the precise
21 location and without any project design whatsoever, in violation of Regulation II, Rule 2:1A.
22 AR 1409. Regulation II, Rule 2:1A states that “[n]o person shall cause or permit the
23 construction or modification of any new source without first obtaining an authority to
24 construct or modify from the Air Pollution Control Officer as to the location and design of
25 such new source to comply with applicable rules and regulations and ambient air quality
26 standards.” District Regulation II, Rule 2:1A; AR 1409. The Board’s finding is supported by
27 substantial evidence.

28 On October 24, 2005, InEnTec’s attorneys submitted a letter to the APCO requesting

1 a transfer of project location. AR 2257. The letter did not include any information stating
2 where the project would now be located within the large site area. *Id.* Testimony given
3 during the hearings further confirmed that the APCO approved the consolidation of permits
4 from two sites to one site without knowing the location of equipment.⁶ Tr. 1641:11-1642:15;
5 1645:11-15. In addition, the October 24, 2005 letter lacked any mention of a project design
6 whatsoever, despite the change in location from two sites to one site, which would
7 necessarily require changes to the project design to accommodate the consolidation to one
8 site. AR 2257. Testimony given during the hearings further confirmed that the APCO
9 approved the consolidation of permits from two sites to one site without any project design.⁷
10 Tr. 1641:11-1642:15, 1645:11-15. Substantial evidence thus supports the Board’s conclusion
11 that the APCO erred in transferring the permits and changing the project without the
12 information required in the District’s own regulations.

13 **2. The APCO Did Not Determine the Applicant Had Demonstrated**
14 **It Could Comply With All Applicable State, Federal and Local**
15 **Regulations**

16 In Finding I.B, the Board found, based on substantial evidence, that the APCO did not
17 determine InEnTec had demonstrated it could comply with all applicable state, federal and
18 local regulations, despite the specific legal mandate to do so. AR 1409. This determination
19 is supported by substantial evidence in the record (*see* discussion *infra* in Sections B.1, B.3a-
20 g, C.2, D, E and F) and, as a matter of law, is the proper legal conclusion.

21 Despite the substantial evidence supporting the Board’s finding, InEnTec makes
22 numerous assertions to support its contention that the Board inappropriately relied upon

23 _____
24 ⁶ InEnTec attempts to trivialize the importance of Finding I.A by creating an “implication” that the District is
25 not required know the placement of the equipment within a “matter of feet or inches.” OB at 16:8-11. InEnTec
26 speculates, without support or citation, that the sole reason for this rule “is to ensure that operators of equipment
27 that have air emissions have in fact obtained permits for their equipment.” OB at 16:14-16. InEnTec’s
28 assertions are beside the point. Simply put, the Board’s determination that the District did not know the
“location” of the project within the large site area is supported by substantial evidence. Tr. 1641:11-1642:15;
1645:11-15.

⁷ InEnTec asserts that the APCO knew the design of the genset and the consolidation from two locations to one
did not change the design of the new source. OB at 17:3-13. Contrary to InEnTec’s assertion, the generic
identification of the type of equipment does not a project design make. Consolidating a project that was spread
across two sites into one site necessarily resulted in a change in design. AR 1409.

1 inapplicable state, federal and local regulations to support Finding I.B. These arguments fail
2 both legally and factually. First, rather than address the evidence in the record that
3 demonstrates the APCO’s failure to determine whether InEnTec could comply with all
4 applicable provisions of state, federal and local law, InEnTec creates a straw-man argument
5 that it then attempts, unsuccessfully, to debunk. Finding I.B simply concludes that the APCO
6 violated Rule 2:1B by “approving the permits (both on July 13, 2005 and October 25, 2005)
7 without determining that the applicant had demonstrated to the satisfaction of the Air
8 Pollution Control Officer that the new source can be expected to comply with all applicable
9 state, federal and local regulations.” AR 1409. The Finding rests on the APCO’s failure to
10 determine compliance with applicable law, of which there are many examples in the record,
11 *see discussion infra* in Sections B.1, B.3a-g, C.2, D, E and F.

12 Nonetheless, InEnTec asserts, without support, that “all applicable state, federal and
13 local regulations” pertains only to those provisions related to air quality. Not only is this
14 argument legally wrong, it misses the mark here: the question is not the scope of applicable
15 rules and regulations, but instead is whether the APCO made a critical determination as to
16 whether InEnTec demonstrated to the APCO’s satisfaction that it could, in fact, comply with
17 all applicable state, federal and local regulations. The Board found that the APCO erred
18 because InEnTec had not so demonstrated.⁸ InEnTec seeks to substitute its own
19 interpretation of the District’s rules and regulations for the specific language and
20 requirements of Rule 2:1B, the plain language the Board relied upon.

21 Second, InEnTec claims that the findings are insufficient. In this regard, the amended
22 findings specifically identify testimony of District officials as supporting evidence. Rather
23 than address the testimony the Board relied on, which is substantial evidence, InEnTec

24 ⁸ InEnTec spends a fair amount of time discussing the scope of “all applicable state, federal and local
25 regulations.” Contrary to InEnTec’s unsupported claim, the Board did not construe Rule 2:1B as requiring the
26 District to evaluate “every law that could conceivably apply to the Project.” OB at 18. At no point did the
27 Board construe Rule 2:1B in that manner. InEnTec makes the misleading argument that implies that Citizens
28 believed the District should be the regulator for things completely unregulated to air pollution, but the Citizens
never made such an argument. The Board did agree, however, that the language of Rule 2:1B must be complied
with and was not complied with by the APCO. AR 1409. As a matter of law, however, CEQA and its
regulations fall within the ambit of “all applicable federal, state and local regulations” under Regulation II, Rule
2:1B.

1 asserts that the findings lacks specificity. To the extent that InEnTec argues lack of
2 specificity, the findings clearly “bridge the analytic gap between the raw evidence and
3 ultimate decision or order.” *Topanga, supra*, 11 Cal.3d at 515.

4 InEnTec’s attack on the specificity of the findings is misplaced. The purpose of
5 administrative findings is to aid courts to “enable the parties to determine whether and on
6 what basis they should seek review and, in the event of review, to apprise a reviewing court
7 of the basis for the board’s action.” *Topanga*, 11 Cal.3d at 514; *see also Swars v. Council of*
8 *City of Vallejo* (1949) 33 Cal.2d 867, 871; *San Francisco Ecology Center v. City and County*
9 *of San Francisco* (1975) 48 Cal.App.3d 584, 596. In addition, there is a presumption that the
10 necessary facts were ascertained and found due to the fact that an administrative board took
11 certain actions or recommendations. *Swars*, 33 Cal.2d at 871-872. Thus administrative
12 findings are to be liberally construed to support rather than defeat the order under review.
13 *Fair Employment Practice Com. v. State Personnel Bd.* (1981) 117 Cal.App.3d 322, 329.
14 Findings may even “incorporate matters by reference and even omissions may sometimes be
15 filled by such relevant references as are available in the record.” *Craik v. County of Santa*
16 *Cruz* (2000) 81 Cal.App.4th 880, 884. Furthermore, findings of fact need not include the
17 express language of the involved statute. *Feather River Trailer Sales, Inc. v. Sillas* (1979) 96
18 Cal.App.3d 234, 243.

19 InEnTec cites *Topanga*, where the petitioners challenged an administrative
20 adjudication granting of a zoning variance. *Topanga*, 11 Cal. 3d at 510. The *Topanga* court
21 concluded that the lower court could not effectively review the adjudicative determination
22 because the agency had failed to make findings to pertinent facts and also failed to apply the
23 standards to the facts. *Id.* at 520. *Topanga* sets forth the general rule that findings must be
24 sufficient for an interested party’s understanding of the basis of that administrative action.
25 *Id.* at 513-514. The court in *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374,
26 389 even summarized the holding of *Topanga* to be “that in the total absence of findings in
27 any form on the issues supporting the existence of conditions justifying a variance, the
28 granting of such variance could not be sustained.” The general rule of non-formal sufficient

1 inadequate environmental review and inadequate scrutiny of data submitted by InEnTec, the
2 APCO improperly granted the ATCs when, in fact, InEnTec could not show that it may be
3 expected to operate without causing to be emitted air contaminants in violation of applicable
4 state and local regulations. AR 1409-1410. The Board found numerous examples,
5 constituting substantial evidence, that District’s inadequate review of the proposed facility
6 resulted in a violation of Regulation II, Rule 2:5A. AR 1409-1414.

7 **a. The Board Properly Found That Uncombusted Waste**
8 **Could Be Emitted For An Indeterminate Amount of Time**

9 The Board found that InEnTec failed to show – and the APCO failed to properly
10 evaluate – that possible releases of uncombusted waste for an indeterminate amount of
11 time would not cause violations of all applicable state and local regulations. AR 1410.
12 This finding is supported by substantial evidence. The InEnTec document “InEnTec
13 Medical Services Tehama LLC, Air Permit Application – Supplemental Information,”
14 page 2, Section 3.2.3, entitled “Idling Vent during Off-Normal Operations,” states that
15 “[t]he idling vent will release uncombusted syngas when two simultaneous system failures
16 occur.... [t]he time duration for this event is indeterminate but is expected to be less than
17 30 minutes.” AR 2350. The Board specifically mentioned admissions by District officials
18 in finding a violation of Regulation II, Rule 2:5. AR 1410. The District’s Air Pollution
19 Specialist Joseph Sunday testified that, according to InEnTec, the idling vent can release
20 uncombusted syngas under certain conditions and that pollution will be emitted directly
21 into the atmosphere. Tr. 1617:19-1618:13; *see also* AR 2350. Mr. Sunday testified under
22 oath that he could not define how long “indeterminate” was, except to say it was an
23 “indefinite period of time” and that “there’s no time limit to it, I guess.” Tr. 1616:24-
24 1617:4. Accordingly, substantial evidence supports the Board’s determination that the
25 APCO violated Regulation II, Rule 2:5A.

26 **b. The Board Properly Found that the District Did Not**
27 **Evaluate or Consider Potential Fugitive Emissions**

28 The Board found that the APCO erred because all potential fugitive emissions

1 were not fully evaluated. AR 1410; Tr. 2543:20-2545:4. This finding is based on
2 substantial evidence in the form of District testimony. The District’s Mr. Sunday admitted
3 that the District did not specifically consider fugitive emissions in its analysis. Tr. 1605:7-
4 15. In fact, when questioned whether there was “any place in writing in the record of [the
5 District’s] evaluation of the permit applications that shows where and when maximum
6 possible fugitive emissions were quantified,” Mr. Sunday responded “No ... we don’t do
7 maximum pos – How can you call it maximum possible or fugitive emissions when we
8 have no idea what fugitive emissions will actually be?” Tr. 1609:25-1610:7. Mr. Sunday
9 further admitted that the Health Risk Analysis done with the HARP program he relied on
10 to evaluate the proposed facility did not consider potential fugitive emissions, testifying
11 that “[w]e do not look at fugitive emissions as part of it... it’s not done as part of the
12 analysis. There’s no place in HARP that I’m aware of that asks for potential fugitive
13 emissions.” Tr. 1613:16-20. The President of InEnTec’s parent company admitted there
14 would be fugitive emissions from the PEM unit. Tr. 2127:24-25. Therefore, the Board’s
15 finding that the District failed to require the applicant to demonstrate that the proposed
16 facility may be expected to operate without causing air contaminants to be emitted in
17 violation of all applicable state and local regulations is supported by substantial evidence.

18 **c. The Board Properly Found That The District Failed to**
19 **Consider Serious Problems at Facilities in Hawaii and**
20 **Washington**

21 The Board properly found, based on substantial evidence, that the APCO failed to
22 consider possible serious problems with the plasma arc technology and equipment from
23 InEnTec's parent company at the Hawaii Medical Vitrification Facility and the Allied
24 Technology Group (ATG) facility in Washington. AR 1410. The Board relied on substantial
25 evidence including the testimony of Jeffrey Surma, president of IET, the parent company of
26 InEnTec. Mr. Surma testified at length and admitted problems at the Hawaii facility,
27 including the breakdown of the plasma equipment. Tr. 2177:17-2183:16; 2042:16-2048:11;
28 2056:14-19; 2157:24-2158:4; 2158:18-2159:10; 2234:19-2235:12; 2250:7-12; 2251:4-

1 2252:3; 2258:20-2259:13; 209:4-11. Mr. Surma admitted that the ATG facility had been
2 closed for since 2002 and was not “already successfully operating” as his company had
3 claimed in writing. Tr. 2182:15-19, 2184:2-6 (“it was not successfully operating”), 2184:24-
4 2185:2. Mr. Surma further testified that the enforcement action described in the Hawaii
5 Department of Health Notice and Finding of Violation, AR 2326, occurred during the time
6 Mr. Surma claimed the facility was successfully operating. Tr. 2181:17-20. Mr. Surma
7 testified that his company had removed the claims that these companies were “already
8 successfully operating” from its website. Tr. 2182:9-14. This testimony and other evidence
9 provided substantial evidence to support the Board's finding that the APCO failed to
10 reasonably consider these problems. The District had received information about some of
11 these problems from Appellant Greenaction, AR 2292-2320, but issued the permits just two
12 days later. AR 1610-1617, 1783-1802.

13 The Hearing Board further considered testimony from Wilkie Talbert,⁹ who testified
14 about his knowledge of problems with IET’s technology at the Hawaii Vitrification Facility
15 and the closed Allied Technology Group facility in Richland, Washington. Mr. Talbert
16 testified about damage to the refractory in the kiln at the Hawaii facility, Tr. 920:15-921:22,
17 as well as other problems at the facility, Tr. 920:1-11, and discussed the problems at the ATG
18 facility in Washington, including the fact that it had not operated since 2002, Tr. 929:3-5.

19 In addition to Mr. Surma’s damaging admissions and Mr. Talbert’s testimony, the
20 record also includes documentary evidence of problems with equipment at the ATG facility.
21 AR 2310-2316. Moreover, the record includes evidence from the Hawaii Department of
22 Health documenting additional shutdowns of the Hawaii facility due to refractory damage in
23 the plasma arc. AR 2317-2319, 2326-2343. In sum, the Board’s finding is supported by
24 substantial evidence, and must be upheld.

25 **d. The Board Properly Found That the District Failed to**
26 **Adequately Scrutinize Emissions Data**

27 The Board found that the APCO failed to properly scrutinize the accuracy of

28

⁹ Mr. Talbert’s technical professional background is found at Tr. 889:10-891:25.

1 emissions data submitted by InEnTec. Uncontroverted evidence in the record shows that
2 InEnTec claimed, in writing, that its technology was “pollution free” when documentary
3 evidence and oral testimony demonstrated that this statement was not accurate. Tr. 2176:10-
4 2177:1, 2177:14-15, 2185:3-10, 2185:17-25. Evidence shows that the APCO knew that
5 InEnTec also represented that the used a “closed loop process” for waste treatment, although
6 Mr. Surma admitted in his sworn testimony that “It’s not a closed loop process from the
7 standpoint of emissions.” Tr. 2176:10-2177:1, 2177:14-15. InEnTec’s claim that the
8 technology was “pollution free” was not true. Tr. 1586:21-1587:18. In light of InEnTec’s
9 exaggerated claims, the Board found that the APCO failed to properly scrutinize whether --
10 and InEnTec failed to show that -- the facility “may be expected to operate without causing
11 to be emitted air contaminants in violation of all applicable state and local regulations.” AR
12 1409-1411.

13 InEnTec incorrectly claims that its use of the term “pollution free” was in materials
14 “unrelated to its ATC applications.” OB at 27:6-9. The record shows that the term
15 “pollution free” was used in a key Planning Department permit document that was part of the
16 CEQA review relied on by the District. AR 1810. In addition, as the APCO must evaluate
17 potential air emissions, InEnTec’s claims that its technology was “pollution free” are directly
18 relevant to that evaluation and should have raised questions about the accuracy of other data
19 submitted and claims made by InEnTec. The Board’s finding is supported by additional
20 substantial evidence that the APCO failed to properly scrutinize the accuracy of emissions
21 data. AR 1410, 2350; Tr. 1605:7-15, 1616:24-1617:4, 1617:19-1618:13, 2543:20-2545:4;
22 *see also* the evidence cited immediately below in sections IV.B.3.e, IV.B.3.f and IV.B.3.g.

23 **e. The Board Properly Found That the District Relied on a**
24 **Test of Waste Improperly Characterized As Medical Waste**

25 The Board’s Finding I.C.5 concludes that InEnTec submitted, and the APCO relied
26 upon, tests that mischaracterized the waste stream. AR 1410-1411. Here, the Board found
27 that the APCO violated Rule 2:5A by relying on tests submitted by InEnTec of sterilized
28 material InEnTec described as “medical waste” in order to grant the ATCs. However, under

1 Health & Safety Code §§ 117695 and 118215(a)(2), medical waste that has been sterilized
2 “shall thereafter be considered solid waste . . . and not medical waste.” The tests, conducted
3 by InEnTec to determine potential emissions from treatment of medical waste, were
4 performed on material that was not medical waste under California law – no tests were
5 performed on actual unsterilized medical waste. Tr. 2107:11-25, 2493:10-2494:6; AR 2589
6 n. 7. Considering all of the facts in the record, even including the assertion by InEnTec that
7 the use of decontaminated waste does not effect emissions, Tr. 2108:1-12, the Board
8 concluded that the APCO failed to properly deny InEnTec’s permit in part because InEnTec
9 offered tests on waste that was not medical waste (despite claiming that it was), and did not
10 offer tests on waste that was medical waste. AR 1410-11. Because of this, the Board found
11 InEnTec had failed to affirmatively demonstrate that the proposed facility could be expected
12 to comply with all applicable state and local regulations, further evidence of the District’s
13 “inadequate scrutiny of data submitted by” InEnTec.¹⁰ AR 1410-1411. Furthermore,
14 because the Board has the responsibility to review the APCO’s decision based on all of the
15 available evidence, Finding I.C.5 was not an abuse of its discretion.¹¹

16 **f. The Board Properly Found That the District Improperly**
17 **Relied on Tests From a Different Model of the PEM**

18 Substantial evidence supports the Board’s finding that the APCO improperly relied
19 on tests done on completely different models of the PEM than were permitted for this
20 facility. AR 1411. The lack of documentary evidence demonstrated – and oral testimony
21 confirmed – that InEnTec submitted no data from any tests done on the same model
22 equipment InEnTec hoped to use in Tehama County. In fact, under questioning by Board
23 member Richelieu, IET President Surma testified that the PEM 500 unit proposed for
24 Tehama County had never been built – let alone tested – anywhere. Tr. 2091:4-6. Under

25 ¹⁰ See, e.g., H&S §§ 117690, 117695 (defining medical waste).
26 ¹¹ Additionally, contrary to InEnTec’s assertion, it is irrelevant that the Board did not identify an air law that
27 would preclude the District from considering InEnTec’s test data or an air law that would be violated by the
28 Project’s emissions. OB at 28. The Board is not required to identify such a law. *Feather River Trailer Sales, Inc. v. Sillas*, 96 Cal.App.3d at 243. The Board must only ensure that the APCO denies a permit if an applicant does not show that the project will operate without causing to be emitted air contaminants in violation of state and local regulations. Regulation II, Rule 2:5A.

1 questioning by Board member Christensen, Mr. Surma admitted that the capacity of the
2 PEM model 500 unit proposed for Tehama County would be between five to six times that of
3 the equipment used in the tests submitted to the District. Tr. 2082:3-6; 2095:1-3 The
4 Board’s finding reflected its legitimate concern that there was thus inadequate data upon
5 which to base permit decisions upon. AR 1411 (“It was improper to rely on tests from a
6 model different from that proposed for use in the current project, especially since **no data**
7 **was presented** from any tests done on the same model InEnTec hopes to use in Tehama
8 County” (emphasis original)); Tr. 2528:23-25, 2530:5-6.

9 **g. The Board Properly Found That the District Impermissibly**
10 **Relied on EvTEC Test Data**

11 The Board relied on substantial evidence, particularly the disclaimers in the EvTEC
12 study, to find that the reliance by APCO on the EvTEC study was improper. AR 1411.
13 InEnTec’s claim that the EvTEC tests proved the technology’s effectiveness was called into
14 question by the express disclaimers and other warnings contained in that report. The Hearing
15 Board had substantial evidence for its finding faulting the APCO’s reliance on the EvTEC
16 report, including that the very first page of the EvTEC test report states, “ASCE and
17 CERT/IEEC make no representation or warranty of any kind, whether expressed or implied,
18 concerning the accuracy, completeness, suitability, or utility of any information, apparatus,
19 product, or process discussed in this publication, and assumes no liability thereof.” AR 1864.
20 On the following page, there is a “Disclaimer” in large font and bold type which states in
21 relevant part: “EPA and EvTEC make no expressed or implied warranties as to the
22 performance of the PEM system.” AR 2418. Pages later is another disclaimer: “Because of
23 these relatively short-duration tests, test data was insufficient for such evaluation criteria as
24 reliability, availability, and maintenance (RAM), lifecycle costs, and hazard exposures to
25 workers from operations and maintenance.” AR 2419. And yet another warning was
26 included on page 2: “Such criteria as reliability, maintainability, and economics of the PEM
27 were not included in the evaluation because the verification tests did not provide sufficient
28 data to address these criteria.” AR 1882.

1 Despite these disclaimers, District Senior Air Pollution Specialist Curtis Wentworth
2 testified, “To be truthful with you, I don't remember reading it. I read everything through
3 those documents from front to back, but I don't recall reading that” and he admitted never
4 evaluating the disclaimers. Tr. 1875:22-1876:3. The Board also heard testimony from
5 District official Joseph Sunday admitting he did not remember seeing a disclaimer but that he
6 relied on the study anyway. Tr. 1653:7-1654:19. The Board’s finding I.C.7 is supported by
7 substantial evidence.

8 **C. Board Finding II: Substantial Changes to the Project Triggering Further**
9 **Environmental Review**

10 The Board found (in Finding II), based on substantial evidence, that there were
11 several significant changes to the project, triggering the need for further environmental
12 review under the California Environmental Quality Act, Pub. Res. Code §§ 21000 *et seq.*
13 Before citing to this evidence, Citizens address immediately below InEnTec’s assertion that
14 the Board did not have jurisdiction to review the District’s compliance with CEQA. In short,
15 the Board has broad jurisdiction under the Health & Safety Code to review the District’s
16 actions, including its CEQA compliance. InEnTec’s arguments thus fail both factually and
17 legally.

18 **1. The Board Has Jurisdiction to Review Whether the APCO**
19 **Determined InEnTec Could Comply With All Applicable Laws**
20 **and Regulations**

21 The Board is a quasi-judicial panel authorized under California law to hear
22 applications for variances, requests for abatement orders, and permit appeals. H&S § 42300,
23 42350, 42450. The Health & Safety Code directs that there shall be in each district one or
24 more hearing boards each consisting of five members. H&S § 40800. One member shall be
25 a lawyer, one a licensed professional engineer, one a medical doctor who has specialized in
26 environmental, community or occupational-toxicologic medicine, and two shall be public
27 members. H&S § 40801. In reaching a decision on permit matters, the Board’s jurisdiction
28 extends to review of the duties and responsibilities of the APCO. H&S § 40752. As shown

1 below, the Health & Safety Code grants broad jurisdiction to the Board to determine whether
2 a permit was properly issued and in compliance with applicable provisions of state law,
3 including applicable provisions of the CEQA.

4 First, the plain language of the statute and its implementing regulations clearly allow
5 denial of a permit for a violation of any applicable law. H&S § 40001(a) (“the districts shall
6 adopt and enforce rules and regulations to achieve and maintain the state and federal ambient
7 air quality standards in all areas affected by emission sources under their jurisdiction, and
8 shall enforce all applicable provisions of state and federal law”); District Regulation II, Rule
9 2:1B (in order to obtain a permit, a new source must be “expected to comply with all
10 applicable state, federal and local regulations”).¹² The mandate is unambiguous. As an
11 initial matter, districts must enforce rules related specifically to the air quality standards
12 promulgated pursuant to the Clean Air Act. At the same time, districts have the
13 responsibility to ensure compliance with other applicable provisions of state and federal
14 law.¹³

15 Second, the Health & Safety Code establishes the Board and instills it with broad
16 discretion to revoke a permit after a hearing. After a hearing, the Board may grant a permit
17 denied by the air pollution control officer, reinstate an existing permit or revoke a permit.
18 H&S § 42309. The Board may “revoke an existing permit if it finds any of the following”:

- 19 ...
- 20 (2) A refusal of a permit would be justified.
 - 21 (3) Fraud or deceit was employed in the obtaining of the permit.
 - 22 (4) Any violation of this part, or of any order, rule, or regulation of the district.
- 23

24 ¹² InEnTec selectively quotes from H&S § 40001(a), omitting the clause requiring that the districts “shall enforce all applicable provisions of state and federal law.” OB at 19.

25 ¹³ For example, the Brown Act regulates public meetings of local public agencies. Government Code §§ 54950
26 *et seq.* Under the Brown Act, the District and Hearing Board are required to follow certain procedures to ensure
27 the public’s right to be informed and participate in the permit decisions and proceedings. Another example is
28 CEQA, which requires public agencies to review the environmental impacts of a proposed project, feasible
alternatives and feasible mitigation measures. Under CEQA, the District may be required to prepare a
subsequent environmental impact report under Guidelines § 15162(a), if it is the lead agency, and Guidelines §
15162(c), if it is a responsible agency. Both the Brown Act and CEQA, as applicable provisions of state law,
create duties that fall squarely on the District, as a public agency.

1 H&S § 42309. The plain language of § 42309 grants jurisdiction to determine whether a
2 refusal of the permit is justified, in which failure to conform to relevant CEQA provisions
3 would be a consideration. Moreover, the explicit language of §42309(e)(4) grants to the
4 Board the authority to determine compliance with any order, rule, or regulation of the
5 district, which includes District Rule 2:1B’s requirement that in order to obtain a permit, a
6 new source must be “expected to comply with all applicable state, federal and local
7 regulations.” Questions of compliance with applicable provisions of state law are properly
8 before the Board.
9

10 Third, CEQA and its implementing regulations plainly confer duties on responsible
11 agencies to make CEQA-related determinations on facilities that fall within their jurisdiction.
12 CEQA embodies our state's policy that “the long-term protection of the environment ... shall
13 be the guiding criterion in public decisions.” § 21001(d); *see Davidon Homes v. City of San*
14 *Jose* (1997) 54 Cal.App.4th 106, 112. As courts have observed, “the overriding purpose of
15 CEQA is to ensure that agencies regulating activities that may affect the quality of the
16 environment give primary consideration to preventing environmental damage.”¹⁴ *See, e.g.,*
17 *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87
18 Cal.App.4th 99, 117. This may include requiring a supplemental or subsequent
19 environmental impact report. *See* Guidelines §§ 15162-15164. As plainly contemplated by
20 CEQA:

21 If after the project is approved, any of the conditions described
22 in subdivision (a) occurs, a subsequent EIR or negative
23 declaration shall only be prepared by the public agency which
24 grants the next discretionary approval of the project, if any. In
this situation no other responsible agency shall grant approval
for the project until the subsequent EIR has been certified or
subsequent negative declaration adopted.

25 Guidelines § 15162(c); *see also Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467,
26 1477-1481 (upholding application of §15162 to projects originally approved with negative
27

28 ¹⁴ Together, the statute and accompanying regulatory guidelines protect a variety of environmental values.
Human health is among them. *See* Guidelines § 15065(a)(4).

1 declarations rather than EIRs).

2 Once an EIR has been certified or a negative declaration adopted for a project, a
3 further EIR or negative declaration shall only be prepared if certain exceptions apply.
4 Guidelines § 15162(a). In those instances, either the lead agency or responsible agency with
5 discretionary approval shall prepare a subsequent EIR or negative declaration if one of three
6 circumstances is supported by substantial evidence in the record. Guidelines §§ 15162(a),
7 15162(c). Here, the Board found that a subsequent EIR was required under two of these
8 three exceptions: there were substantial changes proposed to the project¹⁵ and new
9 information of substantial importance was introduced.¹⁶ Guidelines §§ 15162(a)(1),
10 15162(a)(3); AR 1411-1414.

11 Finally, InEnTec cannot be heard here to claim that the Board lacks jurisdiction to
12 consider CEQA-related issues, OB at 10:8-25, as its own counsel John T. Hansen repeatedly
13 informed the Board during the hearings that it did have that jurisdiction if certain criteria
14 were met. Tr. 557:2-563:4; 631:10-639:7. InEnTec even prepared draft findings for the
15 Board detailing the exceptions (and concluding that they did not apply). Tr. 631:10-639:7.
16 The Board found the exceptions Hansen and InEnTec cited to did apply. AR 1411-1414

17
18 ¹⁵ To trigger an agency to review proposed project changes to determine if a subsequent EIR or negative
19 declaration is required, the proposed changes to the project must differ significantly from those evaluated in the
20 project EIR or negative declaration. *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1079. There
21 must be new or more severe significant environmental impacts resulting from changes in the project to trigger
22 an (or another) EIR. *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1544.
23 An agency should compare the incremental difference between the original approved project and the modified
24 projects to determine any new significant impacts, and the review is limited to new effects not previously
25 considered. *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1484; *Temecula Band of Luiseno*
26 *Mission Indians v. Rancho Cal Water District* (1996) 43 Cal. App. 4th 425, 437.

27 ¹⁶ To trigger an agency to review new information of substantial importance to determine if a subsequent EIR is
28 required, the new information must become available after the certification of the EIR. The information must
have not been known or could not be known with reasonable diligence to satisfy the new information trigger for
subsequent or supplemental EIR. § 21166(c); Guidelines § 15162(a)(3); *see also Eller Media Co. v. Community*
Redevelopment Agency (2003) 108 Cal.App.4th 25, 43 (requiring a supplemental EIR because the final EIR
failed to address billboard impacts on visual, aesthetic, and historic environment that could not have been
identified when the final EIR was certified 13 years earlier). Decisions of the agency – including judging the
“reasonable diligence” of that agency – are reviewed with deference, “in favor of the administrative finding and
decision.” *A Local & Regional Monitor v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1793. In addition,
a subsequent EIR may be required if the new information questions key assumptions of the previous negative
declaration. *Security Env't Systems v. South Coast Air Quality Mgmt. Dist.* (1991) 229 Cal.App.3d 110, 118
(requiring a subsequent EIR after new data demonstrating greater risk became available after a prior negative
declaration on a hazardous waste incinerator).

1 (Findings II and III). InEnTec has unclean hands in urging the Board that it could consider
2 CEQA-related issues if exceptions applied – even preparing findings for the Board to that
3 effect – and now arguing to this Court that the Board’s action, perhaps taken in reliance on
4 InEnTec’s representations, was not within its jurisdiction. InEnTec cannot have it both ways.
5 The Board had jurisdiction under CEQA because it found certain exceptions were met, and
6 its decision is supported by substantial evidence.

7 The Board properly considered the APCO’s failure to ensure compliance with all
8 applicable provisions of state and federal law, including relevant portions of CEQA.

9 **2. The Board’s Findings Identified Numerous Substantial Changes**
10 **to the Project Requiring Further Environmental Review**

11 As a threshold matter, if an agency chooses to require a subsequent EIR, such a
12 decision will be upheld if supported by substantial evidence in the administrative record. *See*
13 *Security Environmental Systems, Inc. v. South Coast Air Quality Management District,*
14 (1991) 229 Cal. App. 3d 110, 129, 132; *Oro Fino Gold Mining Corporation v. County of El*
15 *Dorado* (1990) 225 Cal.App.3d 872, 881-885. As shown above, InEnTec has failed to meet
16 its burden of showing there is no substantial evidence in the record to support the Board’s
17 findings.

18 The Board found, and supported with substantial evidence, seven substantial changes
19 to the project: (1) a 15% baseline increase for the tons of medical waste permitted to be
20 processed per day; (2) a permit condition doubling the size of the stack from 20 to 40 feet;
21 (3) the physical relocation of project from two distinct sites to one site; (4) the physical
22 change in project design required to consolidatge the project from facilities on two sites to
23 one site; (5) the change in the purpose of the project from generation of electricity to medical
24 waste treatment; (6) a baseline change from one to two combustion engines (“gensets”); and
25 (7) the issuance of the permits to InEnTec rather than to InEnTec Energy and InEnTec
26 Medical, the two companies that applied for the permits. Citizens address each finding, and
27 its supporting substantial evidence, in turn.

28 In Finding II.A, the Board found that there was at least a 15% increase in tons per day

1 projected to be treated at the proposed facility between the ATC applications and the ATC
2 permit. AR 1411. Indeed, the Board found an even bigger change between what the
3 Planning Commission considered and the District’s permit, from six tons per day to 20 tons
4 per day. AR 1411. In support of this conclusion, the Board heard testimony, reviewed
5 permit documents regarding the amount of waste, discussed at length and ultimately found
6 that there was a significant change in the tonnage that would be treated. Tr. 2490:17-24-94;
7 2495:14-2496:1; 2497:22-2498:15; 2532:14-19.

8 Counsel for InEnTec repeatedly challenged this conclusion,¹⁷ yet the Board members
9 reiterated their finding that there was a significant change in tonnage. Board member
10 Christensen summarized the Board’s view that the Planning Commission only approved a
11 unit with a total capacity of six tons per day and rejected InEnTec’s argument that the
12 Planning Commission approved more than 20 tons per day. Citing the Use Permit, Board
13 member Christensen stated, “You go one paragraph up, and it, and it states clearly here:
14 Initial processing is estimated at 2 to 4 tons per day and it may take six months to reach full
15 system capacity of 6 tons a day. That... just says it’s a 6-ton a day machine... I mean, to me,
16 this is what makes the most sense here. If the Use Permit doesn’t agree with the air quality
17 permit, I mean, I think we have a problem.” Tr. 2497:22-2498:15. Later, Mr. Christensen
18 reaffirmed the Board’s position by noting the “[i]nitial processing is estimated at... full
19 capacity of the system at 6 tons a day, that means it’s a 6 ton a day full capacity[.]” Tr.
20 2536:23-2537:5. Documentary evidence, too, reveals this discrepancy, further substantiating
21 this finding, as evidenced by the Planning Commission’s Environmental Checklist and the
22 District’s permit: *compare* AR 1603 (CEQA checklist listing six tons as “full system
23 capacity”) *with* AR 1783 (Authority to Construct #550 with 20 ton permit limit).

24 Because InEnTec’s permit application to the District requested a 17 ton per day
25 capacity, AR 1828, the Board concluded, based on substantial evidence, that there was at
26

27 ¹⁷ InEnTec selectively presents evidence to claim that the CEQA determination was that the project would
28 process up to 40 tons per day, OB at 36:5, but this is contradicted by substantial evidence including the
Planning Department’s Environmental Checklist, which lists six tons as “full system capacity.” AR 1603. The
Board is entitled to rely on the Planning Department document, which is substantial evidence.

1 least a 15% increase in tons per day projected to be treated at the proposed facility from the
2 permit application to the permit actually granted, and a significantly larger increase from the
3 project considered in the initial CEQA negative declaration. AR 1411.

4 In Finding II.B, the Board found that the doubling of the stack size in terms of both
5 height and diameter from the time of the Negative Declaration to the District’s permit
6 decision was a significant change. AR 1411-1412. Undisputed evidence shows that the
7 permits issued by the APCO are for a facility with two 40 foot stacks, AR 1214 (ATC # 550,
8 condition 39) and AR 1226 (ATC #553, condition 20), while the project presented to the
9 District was originally for one 20 foot stack, AR 2423 (Permit Application Form identifying
10 no stack); AR 2426 (Permit Application Form identifying one stack). In response to the
11 question as to the stack’s stated height in the permit application, Assistant Air Pollution
12 Control Officer Gary Bovee testified that it was “twenty (20) feet.” Tr. 1826:21-1827:13. In
13 response to the question of whether the stack’s height was increased to 40 feet, Mr. Bovee
14 testified, “[b]y the District ... after the permit application was received, yes.” Tr. 1826:21-
15 1827:13. The Board concluded, based on substantial evidence, that the doubling in stack
16 height from 20 to 40 feet was a substantial increase in height and diameter resulting in a
17 significant change to the project, triggering the need for further environmental review under
18 CEQA.¹⁸ AR 1411-1412.

19 In Finding II.C, the Board found that the change in location and design of the project
20 resulting from the October 25, 2005 action by the APCO – consolidating the project from
21 two separate sites to one site – was a significant and substantial change triggering the need
22 for further review under CEQA. AR 1412. This finding is supported by substantial
23 evidence. This evidence includes the fact that the District initially granted ATCs for the
24 project on two distinct sites – 11425 Reading Road, AR 1204, and 11500 Reading Road, AR
25 1223 – and then approved the consolidation of the entire project onto one site, AR 2258. The
26

27 ¹⁸ It is noteworthy that InEnTec concedes that the “Planning Department never evaluated the Project based on
28 any particular height or diameter for the genset stacks.” OB at 38:19-21. This admission illustrates the lack of
proper evaluation and environmental review of potential air emissions at the Planning Department CEQA
review level and the significance of the increase in the size of the stack.

1 change was significant enough to result in the APCO performing a new “Health Risk
2 Analysis” that contained approximately 26,000 pages of data and information. Tr. 1314:13-
3 17. The Board heard testimony from Joseph Sunday of the District admitting that no one,
4 including himself, had actually read all the document to verify its accuracy, providing
5 additional evidence that further environmental review should have been required. Tr.
6 1621:2-7.

7 In Finding II.D, the Board found that InEnTec's recent withdrawals of the claims to
8 be successfully operating five commercial systems and to be “pollution free” were significant
9 changes in the assumptions relied on by the Planning Commission. AR 1411-1412. This
10 finding was based, in part, on a comparison of the statement in a Planning Department
11 document, “Development Project Description Form,” dated September 17, 2004, that referred
12 to InEnTec's technology as “pollution free,” AR 2262, and the sworn testimony of Jeffrey
13 Surma, president of InEnTec's parent company, who testified that InEnTec's website no
14 longer made the “pollution free” claim, and even admitted that the claim was not accurate.
15 Tr. 2176:10-2177:1; 2177:14-15; 2185:3-10; 2185:17-25. The Board found these were
16 significant changes. AR 1411-1412.

17 In Finding II.E, the Board found that the proposed facility changed from electricity
18 generation to medical waste treatment without full environmental review. AR 1412-1413.
19 The Board reviewed evidence including the Planning Department's Environmental
20 Significance Checklist, Revised Initial Study (of November 9, 2004), which discusses the
21 project as an electric power generation facility, AR 2491, and the Planning Department's
22 December 8, 2004 letter to the Planning Commission, which states “[t]he applicant proposes
23 to establish an electric power generating plant as provided by the Tehama County Zoning
24 Code.” AR 2461. In addition, the Board reviewed the permit applications submitted to the
25 APCO by InEnTec Energy Services LLC and InEnTec Medical Services LLC, both of which
26 described the “General Nature of Business or Agency” as “Electric Power Production using
27 Natural Gas and Syngas from InEnTec Medical Service located at 11425 Reading Road.”
28 AR 2422, 2425. While there may be conflicting descriptions of the project – InEnTec

1 selectively cites places in the record where medical waste is discussed – the Board’s finding
2 was based on substantial evidence and is thus entitled to deference.

3 In Finding II.F, the Board found that the increase from one genset to at least two
4 gensets was a significant change. The Planning Commission approved the project as a single
5 genset – “an internal combustion engine powered electric generator.” AR 1462. Yet the
6 APCO approved two permits (#550 and #553), each with a genset, thereby doubling the
7 source of the majority of emissions of toxic chemicals and other pollutants from the project.
8 AR 1203; AR 1223. Therefore, the Board had substantial evidence to support its finding that
9 doubling the number of gensets that would emit toxic pollution into the air was a significant
10 change. Tr. 2542:23-24; AR 1413.

11 In Finding II.G, the Board found that ownership of the project changed without
12 proper approval. AR 1413. Based on the permit applications, AR 2421-23, 2424-27, and
13 ATC permits issued by the APCO, AR 1203-22, 1223-30, the Board found that the APCO
14 improperly issued ATC #553 to InEnTec Medical Services LLC in light of the fact that
15 another company, InEnTec Energy Services LLC, applied for the permit. A company cannot
16 properly receive or transfer a permit it never applied for. AR 1413. In an attempt to correct
17 this serious problem in permitting the project, the Assistant Air Pollution Control Officer
18 later claimed the District verbally authorized the transfer of the permit from InEnTec Energy
19 Services, LLC to InEnTec Medical Services California, LLC. Tr. 832:19-22. The Board
20 found that the APCO’s informal approval of the “transfer” was improper as InEnTec Energy
21 Services LLC was not the permit holder and thus did not have the right to transfer this
22 permit. AR 1413.

23 In sum, the Board had substantial evidence to support its findings for each of the
24 seven substantial changes to the Project that the Board identified. AR 1411-1413.

25 **D. Board Finding III: New and Significant Information Regarding the**
26 **Project Requires Further Environmental Review**

27 Substantial evidence supports the Board’s Finding III; the Board thus properly found
28 that “[s]ubstantial evidence has shown that there is new and significant information regarding

1 this project that requires further environmental review.” AR 1413. The Board cites specific
2 evidence supporting this finding – InEnTec testimony and State of Hawaii documents
3 concerning problems with InEnTec’s PEM technology at a Hawaii facility.¹⁹ AR 1414. Like
4 the internal changes to the project detailed above in Section C, the Board also found that
5 there were significant external events that called into question the adequacy of the Planning
6 Commission’s earlier environmental review.

7 InEnTec asserts that the Board’s finding is deficient for failure to make findings
8 required by the subsections of Guidelines §15162(a)(3) and for lack of adequate evidentiary
9 support, as required under Guidelines §15162(a)(3). OB at 43-45. Both arguments fail.

10 As an initial matter, there is no requirement – in CEQA, in the Health & Safety Code,
11 or in the District’s own rules – that the Board’s findings must include findings responding to
12 each subsection of the regulation on which the finding is based. The Board’s finding –
13 “Substantial evidence has shown that there is new and significant information regarding this
14 project that requires further environmental review” (AR 1413) – and its accompanying
15 evidence easily meet the requirements of Guidelines §15162(a)(3), which allows further
16 environmental review if:

17 new information of substantial importance, which was not known and
18 could not have been known with the exercise of reasonable diligence
19 at the time the previous EIR was certified as complete or the Negative
20 Declaration was adopted, shows ... (A) The project will have one or
21 more significant effects not discussed in the previous EIR or negative
22 declaration; [or] (B) Significant effects previously examined will be
23 substantially more severe than shown in the previous EIR[.]

24 Here, the Board specifically found that new information warranted environmental
25 review: Hawaii Department of Health documents and InEnTec testimony. AR 1413-14. The
26 Board heard significant testimony, comprising substantial evidence to support its decision, on
27 the problems at the Hawaii facility from the President of InEnTec’s parent company, Jeffrey
28 Surma, Tr. 2177:17-2183:16; 2042:16-2048:11; 2056:14-19; 2157:24-2158:4; 2158:18-

¹⁹ Citizens do not address the Board’s Findings III.B and III.C as they concern matters the Board Chair held to be “not relevant.”

1 2159:10; 2234:19-2235:12; 2250:7-12; 2251:4-2252:3; 2258:20-2259:13; 209:4-11, as well
2 as others, Tr. 195:7-8 (Hawaii facility fined \$600,000). Surma’s testimony was the basis for
3 the statement in Finding III.A that “InEnTec did not challenge the accuracy of [the Hawaii]
4 information, and in fact admitted that there have been problems at the Hawaii facility.” AR
5 1414; *see also* Tr. 2178:18-2183:16. The testimony expanded on, and supported, the
6 substantial documentary evidence in the record cited to by Finding III.A concerning the
7 Hawaii facility built by InEnTec’s parent company, which includes a six-count Finding of
8 Violation, AR 2326-2334, an Amended Findings, AR 2335-2337, and a Settlement
9 Agreement, AR 2338-2343, all from the Hawaii Department of Health, and other evidence
10 showing that the Hawaii facility was closed for eight months due to damage to the plasma
11 unit. AR 2264. This substantial evidence supports the finding that there were significant
12 environmental effects which were not discussed in the Negative Declaration. Guidelines
13 §15162(a)(3).

14 Moreover, during the environmental review prior to adoption of the Negative
15 Declaration, InEnTec can point to no evidence that the Planning Commission knew, or could
16 reasonably have known, of all of the problems with the Hawaii facility, which indicate
17 potentially far more serious environmental impacts from the Red Bluff facility than the
18 Planning Commission examined. OB at 44. InEnTec certainly did not make this information
19 known to the Planning Commission. *See, e.g.*, Tr. 2182:1-19, 2177:17-2181:24 (testimony
20 by President of InEnTec’s parent company that InEnTec represented to the public that the
21 Hawaii facility was “successfully operating” when there were in fact numerous permit
22 violations and enforcement actions at the facility). Nor was this information even available
23 at the time of the Planning Commission’s review. Communications from the Hawaii
24 Department of Health dated May 17 and 18, 2005 reveal that the extent of the problems with
25 the plasma unit built by InEnTec’s parent company could not have been known. The Hawaii
26 facility was closed for eight months, including approximately four months after the Planning
27 Commission approved the Negative Declaration. AR 2264. Although InEnTec claims “that
28 the alleged problems at the Hawaii facility occurred prior to the time the Planning

1 Commission adopted the Negative Declaration on December 16, 2004,” OB at 44:1-3, there
2 is no way the closure of the Hawaii facility for four months after that decision could have
3 been known to the Planning Commission. AR 2264, 1413-1414.

4 Further, the Board based its finding in part on extensive testimony by InEnTec
5 witness Jeffrey Surma during the appeal hearings on December 20, 2005, more than a year
6 after the Planning Commission’s decision. Tr. 2177:17-2183:16; 2042:16-2048:11; 2056:14-
7 19; 2157:24-2158:4; 2158:18-2159:10; 2234:19-2235:12; 2250:7-12; 2251:4-2252:3;
8 2258:20-2259:13; 209:4-11. Such testimony is not information that was before the Planning
9 Commission nor does InEnTec offer any evidence that the Planning Commission could have
10 discovered the information with the exercise of reasonable diligence. Guidelines
11 §15162(a)(3).

12 On this record, the Board did not abuse its discretion when it found that the APCO
13 “should have investigated this problem to ascertain what caused the refractory damage to the
14 PEM, and what if any relevance that might have for the permit evaluation in Tehama
15 County.” AR 1414; *Snow v. City of Garden Grove* (1961) 188 Cal. App. 2d 496, 503 (“court
16 is not authorized to judge the intrinsic value of evidence considered by an administrative
17 agency, nor weigh it, if the record discloses substantial evidentiary support for the decision”).

18 **E. Board Finding IV: Air Pollution Control Officer’s Interpretation Was**
19 **Not Fair and Reasonable**

20 The Board properly exercised its discretion in making Finding IV, which states
21 “[s]ubstantial evidence shows that the issuance of permits was not fair or reasonable.” AR
22 1414. The finding cites to five supporting examples that prove the issuance of the permit was
23 not fair or reasonable. AR 1414. These five issues are not an exhaustive list of the reasons
24 the Board overruled the ATC permits, however, as the Board noted that there were numerous
25 additional problems and defects in the permitting that were considered in overruling the
26 issuance of the ATC permits. AR 1414.

27 Considering the specifically enumerated five, “InEnTec acknowledge[d], the function
28 of the Board is to determine whether the [APCO] . . . made a fair and reasonable

1 interpretation of the applicable legal requirements. If the APCO’s interpretation was not
2 reasonable, it must be reversed and the permits rescinded.” AR 1414. But InEnTec now
3 asserts that the Board could only overturn the APCO’s issuance of the permits if the APCO
4 “violated an applicable regulation governing air quality.” OB at 46. This does not accurately
5 reflect the law, or the Board’s charge. As noted above, the Board may “revoke an existing
6 permit if ... A refusal of a permit would be justified,” H&S § 42309, or when the permit was
7 not “properly” issued, H&S § 42302.1; *see also* OB at 32:9-12. The Board’s broad discretion
8 under the Health and Safety Code is not limited by InEnTec’s unsupported assertions.²⁰

9 InEnTec asserts that each of the subfindings (IV.A through IV.E) is deficient for both
10 failing to identify “an ‘applicable legal requirement’ that the District did not reasonably
11 interpret” and lacking any substantial evidence. OB at 46. This argument fails legally and
12 factually. First, legally, the Board is not required by any statute or regulation to identify an
13 “applicable legal requirement” in its Findings; InEnTec has pointed to no legal support for
14 this assertion, and it cannot. *Feather River Trailer Sales, Inc. v. Sillas* (1979) 96 Cal.App.3d
15 234, 243 (findings of fact need not include the express language of the involved statute).
16 Second, factually, each finding is supported by substantial evidence, as is detailed below.

17 The Board’s Finding IV.A is supported by substantial evidence. Here, the Board
18 decided the issuance of permits was unreasonable because the APCO’s failure to “accurately
19 consider the cumulative impacts from existing sources of air pollution with projected
20 emissions from InEnTec’s project [] prevented an accurate risk analysis from being
21 conducted.” AR 1414. The legal requirement to adequately consider cumulative impacts is
22 found in CEQA § 21083(b) and Guidelines §15130. While InEnTec claims the APCO “*did*
23 ... assess the potential health risk presented by emissions from the Project together with
24 emissions from other sources,” OB at 47, the Board found that the APCO’s *inaccurate*
25 assessment “prevented an accurate risk analysis from being conducted.” AR 1414. This

26 _____
27 ²⁰ InEnTec also cites to a single page in the record, AR 2450, which it represents as “guidance” from the
28 California Air Resources Board. OB at 11:17. Even if the document is authentic – which is not clear from the
face of the document itself – such “guidance” does not trump the statutory authority the Legislature gave to the
Board in H&S § 42309.

1 finding was based on the testimony of the District’s Joseph Sunday and Dr. Amy Kyle, a
2 research scientist in Environmental Health Sciences at the School of Public Health at the
3 University of California Berkeley, Tr. 1913:17-24.

4 Mr. Sunday, the District’s Air Pollution Specialist who performed the health risk
5 analysis and worked on the permit, admitted that the District’s risk analysis did not fully
6 consider all relevant aspects of cumulative impacts, including mobile sources. Tr. 1566:11-
7 19; 1558:1-8. As part of the permit evaluation, Mr. Sunday relied on test data which was
8 “insufficient for [permit] evaluation” according to EPA and EvTEC. Tr. 1646:16-21,
9 1653:16-1654:19; *see, supra*, Section IV.B.3.g. He admitted there could potentially be
10 serious air quality violations. Tr. 1611:10-13. Mr. Sunday also testified that there could be
11 fugitive emissions from the facility, but that the District’s health risk evaluation did not
12 evaluate fugitive emissions. Tr. 1574-1575, 1605, 1609:14-15. He also testified that
13 sensitive receptors such as St. Elizabeth Hospital, 1.85 miles from project site, were not
14 included in the risk study. Tr. 1559.

15 As further evidence of the flaws in the cumulative impacts analysis already identified
16 by Mr. Sunday, Dr. Kyle noted several additional fatal flaws. For example, Dr. Kyle testified
17 on the importance of evaluating cumulative impacts in assessing risks accurately and about
18 the impact of certain pollutants on public health, particularly for young children. Tr.
19 1913:25-1923:23. Dr. Kyle testified that it would be appropriate, from a scientific
20 standpoint, for a scientist to take into account levels of dioxin and other persistent
21 bioaccumulative toxins when evaluating and determining risks. Tr. 1936:6-24. Lastly, as it
22 relates to cumulative impacts analysis, Dr. Kyle testified that there may be no safe levels of
23 incremental exposure to dioxin, Tr. 1940:23-1941:5, the issue of proximity to food and
24 agricultural production is a concern with dioxin, Tr. 1943:6-13, and dioxin can adversely
25 affect fetal development even from a one-time dose, Tr. 1945:14-22. Separately or taken as a
26 whole, Mr. Sunday and Dr. Kyle’s testimony support the Board’s finding that the APCO did
27 not accurately consider the cumulative impacts from existing sources of air pollution with
28 projected emissions from InEnTec’s project. AR 1414.

1 The Board's Finding IV.B is supported by substantial evidence. The Board found
2 that issuing the permits after the APCO failed "to evaluate potential emissions from the
3 possible treatment of certain non-medical waste, such as contraband" was unreasonable. AR
4 1415. In reaching its conclusion, the Board noted that the failure to evaluate potential
5 emissions from treatment of non-medical waste "resulted in an incomplete analysis of
6 potential emissions." AR 1415. The evidence supporting this finding includes a document
7 from the State Department of Health Services stating that the Medical Waste Offsite
8 Treatment Permit does not prohibit solid waste. AR 2352. Further evidence is the testimony
9 of Wilkie Talbert of a meeting with Darice Bailey, Chief of the State Department of Health
10 Services Waste Management Branch, who explained how certain non-medical waste could
11 legally be treated as medical waste and end up in a medical waste facility. Tr. 932:13-
12 933:15. The Board's finding that the failure to do such an evaluation resulted in an
13 incomplete analysis of potential emissions is supported by substantial evidence.

14 The Board's Finding IV.C that the permit issuance was unreasonable due to the
15 failure to evaluate potential impacts on archaeological or cultural sites and resources within
16 the area that could be impacted by air pollution from the project is likewise supported by
17 substantial evidence. AR 1415. Here, the Board cited the fact that Native peoples have lived
18 in the area for thousands of years as evidence that it was unreasonable for the APCO to find
19 that there would be no impact without even evaluating the potential impacts. AR 1415. This
20 finding is supported by evidence including the admission of the District that it did not
21 evaluate such impacts, Tr. 1590:11-15, and the testimony of Fred Mankins, Director of the
22 Tasman Koyom Indian Sanctuary Foundation. Mr. Mankin, a member of the Maidu tribe,
23 Tr. 997:3-5, testified that the Maidu People inhabit the Sacramento River area in Red Bluff
24 and Tehama County, Tr. 1005:24-1006:7, and, based on artifacts found in the area, Native
25 peoples have done so for 6,000 to 7,000 years. Tr. 1003:13-16. Mr. Mankin testified to the
26 particular significance of the Sacramento River to the Maidu people, for the fish they get
27 from the river and the watercress, elderberry, and blackberries from the surrounding area. Tr.
28 1003:17-22; Tr. 1004:2-6; Tr. 1004:7-13. Noting the possibility of significant cultural

1 resources in and around the proposed site, Tr. 1006:12-15, Mr. Mankin testified to the
2 potential significant impact on Native people in the area, Tr. 1005:13-19; potential for
3 significant impact on Native American cultural resources, Tr. 1008:3-6; and potential for
4 significant adverse change in a significant historical resource, Tr. 1009:4-7. Mr. Mankin
5 further testified that Tehama County officials are aware of existence of Mankin’s tribe. Tr.
6 1011:1-4. Despite this, no archeological or cultural resources report was made available
7 because no analysis was ever performed. Tr. 1014:5-22. This substantial evidence supports
8 the Board’s Finding IV.C.

9 The Board’s Finding IV.D is supported by substantial evidence. The Board heard
10 extensive testimony, and received extensive documentary evidence, on the facility’s potential
11 environmental impacts that were not taken into account during the County’s Negative
12 Declaration process, *see, supra*, Section D, including evidence of problems with InEnTec’s
13 technology at a Hawaii facility, Tr. 2177:17-2183:16; 2042:16-2048:11; 2056:14-19;
14 2157:24-2158:4; 2158:18-2159:10; 2234:19-2235:12; 2250:7-12; 2251:4-2252:3; 2258:20-
15 2259:13; 209:4-11; 195:7-8), and testimony by InEnTec witness Jeffrey Surma during the
16 appeal hearings on December 20, 2005, Tr. 2177:17-2183:16; 2042:16-2048:11; 2056:14-19;
17 2157:24-2158:4; 2158:18-2159:10; 2234:19-2235:12; 2250:7-12; 2251:4-2252:3; 2258:20-
18 2259:13; 209:4-11. (Additionally, we refer the Court to our argument in Section IV.B,
19 above, and IV.F, below, for argument on why the Board had authority to address CEQA
20 issues.)

21 Finally, the Board’s Finding IV.E is supported by substantial evidence. The Board
22 explained that there are “many monolingual Spanish-speakers who live and go to church near
23 the project site.” AR 1415. In support of this finding, the Board heard statements that
24 nearby residents included monolingual Spanish speakers, Tr. 516:20-517:9, that the Board
25 should not take action with a discriminatory impact, TR. 519:17-25, and a formal request for
26 translation “due to the fact that there are many Spanish-speaking people . . . living and
27 working in the immediate proximity,” Tr. 543:13-18. One member of the public who
28 testified did so half in Spanish and half in English, Tr. 542:21-25, requiring an interpreter

1 from the audience to step forward so the Board could understand the testimony, Tr. 543:4-
2 546-9. This substantial evidence supports the Board’s finding.

3 **F. Board Finding V: Substantial Evidence Supports the Conclusion That**
4 **This Project Is an Incinerator Under CEQA Requiring Further**
5 **Environmental Review**

6 CEQA requires that a lead agency “shall prepare . . . an environmental impact report
7 ... for any project involving ... [t]he burning of municipal wastes, hazardous waste, or
8 refuse-derived fuel[.]” § 21151.1(a). The Board found the APCO issued permits for this
9 project in violation of the CEQA requirement that incinerator permit applications require an
10 EIR. AR 1415. InEnTec asserts, without support, that the Board lacked jurisdiction to make
11 this finding, and that there is no evidence the PEM technology is an incinerator. OB at 49-
12 50. As explained above at Section B.1, the Board had the authority to undertake CEQA
13 review. Further, InEnTec’s assertion that its disposal system is not an “incinerator” within
14 the meaning of CEQA fails.

15 InEnTec’s technology involves the burning of waste, and thus qualifies as an
16 incinerator under § 21151.1(a). According to InEnTec witness Jeffrey Surma, the plasma arc
17 process involves heating the waste, Tr. 2022:6-8, and then combusting the waste gases that
18 result. Tr. 2030:19-21.

19 The Board based its conclusion that the project was an incinerator technology that
20 should have been subjected to an Environmental Impact Report on the testimony and
21 admissions that combustion of waste gases would occur in the gensets, and also on the
22 document from the U.S. Environmental Protection Agency, “Terms of the Environment,”
23 that defines “Plasma-Arc Reactor” as “An incinerator that operates at extremely high
24 temperatures; treats highly toxic wastes that do not burn easily.” AR 2298.

25 The Board’s finding that InEnTec’s plasma arc melter qualifies as an incinerator
26 under CEQA is therefore proper as a matter of law, and supported by substantial evidence.

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CITIZENS FOR REVIEW OF MEDICAL
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INTO TEHAMA COUNTY and
GREENACTION FOR HEALTH AND
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PROOF OF SERVICE BY HAND DELIVERY

STATE OF CALIFORNIA)
)
COUNTY OF _____)

I am over 18 years of age, not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 450 Geary Street, Suite 500, San Francisco, CA 94102.

On July 10, 2006, I served a true copy of the document entitled: REAL PARTIES IN INTEREST’S OPPOSITION TO PETITIONER’S MEMORANDUM OF POINTS AND AUTHORITIES and OPPOSITION TO REQUEST FOR JUDICIAL NOTICE on the interested parties in this action by placing the document in sealed envelopes addressed to the following:

Ronald E. Van Buskirk, Esq. Peter M. Bransten, Esq. Pillsbury Winthrop Shaw Pittman LLP 50 Fremont Street San Francisco, CA 94105 Post Office Box 7880 San Francisco, CA 94120-7880	Karen J. Nardi, Esq. Bingham McCutchen LLP Three Embarcadero Center San Francisco, CA 94111
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I had delivered such envelopes by hand to the above-noted addresses.

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

Executed on July 10, 2006 at San Francisco, California.

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PROOF OF SERVICE BY HAND DELIVERY

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am over 18 years of age, not a party to this action. I am employed in the County of Tehama, State of California. My business address is 741 Main Street, Suite 112, Red Bluff, CA 96080.

On July 10, 2006, I served a true copy of the document entitled: REAL PARTIES IN INTEREST'S OPPOSITION TO PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES and OPPOSITION TO REQUEST FOR JUDICIAL NOTICE on the interested parties in this action by placing the document in sealed envelopes addressed to the following:

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I had delivered such envelopes by hand to the above-noted addresses.

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

Executed on July 10, 2006 at Red Bluff, California.
