



## **First District Rejects Numerous CEQA Challenges To RFEIR For Propane Recovery Project At Phillips 66 Company's Rodeo Oil Refinery, Affirms Judgment Issuing Limited Writ**

By [Arthur F. Coon](#) on April 20, 2018

In an opinion filed March 20, and later certified for publication on April 12, 2018, the First District Court of Appeal (Division 3) affirmed a limited peremptory writ of mandate issued by the Contra Costa County Superior Court requiring the County to set aside an EIR and land use permit for Phillips 66 Company's "Propane Recovery Project" at its oil refinery in the City of Rodeo, pending County's correction of specified inadequacies in the EIR's air quality analysis. *Rodeo Citizens Association v. County of Contra Costa (Phillips 66 Company, Real Party in Interest)* (2018) \_\_\_\_\_ Cal.App.5th \_\_\_\_\_. Unsatisfied with the trial court's grant of limited relief and denial of its additional CEQA challenges to the EIR (based on an allegedly defective project description and deficient GHG and hazard analyses), plaintiff/appellant Rodeo Citizens Association ("RCA") appealed as to those issues, but the Court of Appeal rejected its arguments and affirmed the writ as issued by the trial court.

As relevant background, Phillips has a Santa Maria refinery facility that processes mainly heavy crude oil, and a 1,100-acre Rodeo refinery that processes a wide variety of crude oil feedstocks (from heavy to light) into finished petroleum products. The Rodeo refinery receives semi-refined product via a 200-mile pipeline from Santa Maria, and receives other crude oil from domestic and foreign sources by ship at its San Pablo Bay terminal; it ships finished products by rail from the refinery. The crude oil refining process produces a byproduct called "refinery fuel gas," from which most refineries recover commercial quantities of propane and butane for sale. In the case of Phillips' Rodeo refinery, it recovers butane and propane from only a portion of its refinery fuel gas, and uses the rest to provide heat input needed for refinery processes. The Propane Recovery Project at issue would modify and add Rodeo refinery facilities to allow it to recover and sell significantly more butane and propene, while replacing its heat input with cleaner-burning natural gas from PG&E.

Following recirculation of the Project EIR in a version including additional GHG and health risk analyses to address the Bay Area Air Quality Management District's (BAAQMD) concerns, the County Board certified the Recirculated Final EIR (RFEIR) and approved the Project's land use permit and mitigation

monitoring reporting program (MMRP). RCA then sued, arguing that the Project RFEIR's description was inaccurate, and that its analyses of accident risk, health, air quality and GHG impacts and cumulative impacts were inadequate. Apart from finding certain deficiencies in the air quality analysis requiring correction, the trial court rejected RCA's remaining arguments, and RCA appealed. In affirming the trial court's judgment in full, the Court of Appeal soundly rejected all of RCA's arguments, ruling as follows:

- As a matter of law, the RFEIR did not lack the “accurate, stable and finite project description” encompassing the “whole of [the] action” that is required by CEQA. As consistently confirmed by the description presented to the County since the Project's 2012 inception, the Project did not seek or require a change in Phillips' current crude feedstocks, and would utilize the existing Rodeo refinery fuel gas stream to extract propane/butane without changing refinery throughput or modifying other parts of the refinery. A master response in the RFEIR's responses to comments addressed in detail commenters' concerns that the Project would implement a “covert change” to more corrosive and polluting imported crudes, such as Canadian tar sands and Bakken crudes from North Dakota; it noted that refinery fuel gas data included in the RFEIR, and which formed the basis for the Project design, showed that no change in feedstocks was needed to support the proposed level of propane and butane recovery, which would be achieved by the refinery's baseline condition. Moreover, the BAAQMD permit would limit liquid propane gas extraction to the 14,500 barrels per day presented in the RFEIR, and refinery economics which favor production of gasoline and diesel over propane due to market demand would determine feedstock selection. Per the Court: “Accordingly, substantial evidence supports the County's conclusions that the project is designed to maximize recovery of butane and propane from current refinery operations and that it is not intended to generate additional quantities of commercial propane and butane.”
- The Court noted that while RCA's citation to public statements of Phillips executives, and to evidence of Phillips' seeking permits for infrastructure projects enabling tar sands and Bakken crude deliveries to its Santa Maria and Rodeo facilities, “certainly supports the inference that Phillips intends to modify its crude oil feedstocks, it fails to draw any connection between the proposed project and any intended change.” RCA abandoned its trial court argument that a single EIR should have addressed all of these projects, and argued on appeal only that the foreseeable change in crude quality should have been included in the Propane Recovery Project description. In rejecting this argument, the Court summarized the relevant factors as follows: “None of the [evidence] cited establishes that the project is dependent on a change in feedstock or, more importantly, that the intended change in feedstock is dependent on approval of the project. By approving the project, the County is not expressly or implicitly approving a change in crude oil feedstocks. Nor is such an approval necessary in order to approve the project. . . . [¶] In short, the RFEIR demonstrates that the proposed project to enable Phillips to recover for sale butane and propane from its refinery gas will not increase its present capacity to process heavy crude. And although more butane and propane can be extracted from the heavier crude, this fact does not incentivize Phillips to process more heavy crude because the selection of feedstock is governed by the determination of the crude oil that will yield the more profitable gasoline and diesel products. Accordingly, substantial evidence establishes that the project, as described in the RFEIR, is unrelated to a potential change in crude oil feedstock.” (In so holding, the Court distinguished the case of *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, which held a refinery modification project EIR's project description inadequate, misleading and conflicting regarding whether the project would facilitate heavier crude processing.)

- While RCA did not challenge on appeal the RFEIR's finding that the Project would achieve a net decrease in operational GHG emissions, it argued the RFEIR improperly omitted analysis of GHGs resulting from ultimate combustion of the captured butane/propane sold to downstream users. While the RFEIR acknowledged such use would result in GHG emissions, it noted that propane and butane also have "non-fuel" uses (such as butane blending with chemicals and gasoline) that generate negligible (or reduce overall) GHG emissions, and the dynamic marketplace and uncertainty regarding use rendered any attempted quantification of downstream emissions speculative and inappropriate for inclusion in an EIR under CEQA Guidelines § 15145. In addressing the nature of downstream GHG emissions impacts, the RFEIR observed that to the extent downstream propane use displaced use of other fuels such as coal, home heating oil, fuel oil, diesel, kerosene, gasoline and ethanol, it would also partially displace GHG emissions otherwise resulting from use of those fuels; it also included examples, such as the fact that propane barbeques produce only one-third the GHG emissions of charcoal barbeques. Per the Court: "Contrary to Citizens' argument, the failure to quantify the greenhouse gas emissions from the downstream uses of the recovered propane and butane under these circumstances does not violate CEQA . . . . Here, the county reasonably concluded that quantification of downstream emissions would be speculative and thus no further analysis was required." (Citing *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 937.) Buttrressing this conclusion, the Court also noted that BAAQMD, an agency with "substantial expertise in air emissions," was satisfied that the RFEIR's response on this issue adequately addressed its previously expressed GHG analysis concerns that had led to recirculation.
- With respect to the RFEIR's analysis of public and environmental hazards from the Project's handling and transportation of hazardous materials, the RFEIR adopted standards of significance addressing whether the Project would create a significant hazard to the public or environment through routine transport of hazardous materials, or reasonably foreseeable upset and accident conditions involving a release of hazardous materials, or would emit hazardous emissions or handle hazardous materials within one-quarter mile of an existing or proposed school. The County performed a Quantitative Risk Analysis ("QRA") that accounted for the frequency of accidental releases and computer-modeled their consequences, to provide a complete picture of the risk profile for current and proposed rail transport of butane and propane. The QRA resulted in the RFEIR's conclusion that "the overall increase in risk due to the additional transport of butane and propane by rail is not materially higher than the current (baseline) risk associated with the current transport of butane and is less than many of the risks the general public is commonly exposed to . . . ." It concluded the proposed risk was less than significant and not cumulatively considerable, without addressing cumulative impacts related to transportation risks, and its "risk zone" calculations showed a childcare center 500 feet from the tracks was safely beyond the zone, absent the occurrence of a highly improbable "boiling liquid expanding vapor explosion" ("BLEVE").
- In rejecting RCA's cumulative oil transportation hazard risk arguments, the Court found "not unreasonable" – and thus adequate under CEQA – the County's explanation why the RFEIR did not address such "cumulative impacts." Because most of the other projects that commenters pointed to as increasing rail traffic on the same rail lines were located substantial distances from the refinery, and involved processing or refining crude oil, but not transporting liquid propane gas (butane and propane), a meaningful comparison of hazards was not possible. (Citing *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 525 ["discussion of cumulative impacts should be guided by the standards of practicality and reasonableness."].)

- Finally, in rejecting RCA's challenges to the RFEIR's "comparative worst case scenario" analysis and conclusions regarding the Project's potential hazards from routine operations, the Court found RCA misread the RFEIR in claiming it *only* compared new risks to existing risks rather than the existing environment. Explaining RCA's error, the Court of Appeal stated: "[T]he DEIR did not determine the [hazard] impacts to be less than significant because they were all "low" consequence. Rather, the determination was based on the conclusion that none of the potential impacts exceeded the standard of significance which required that impacts have both "moderate" to "high" consequence of release and frequent (more than once per year) or periodic (once per decade) probability of release. The comparative worst case scenario analysis conducted in the RDEIR reasonably considered only those impacts that had moderate or high consequence of release. Accordingly, there was no error in the analysis of hazard impacts in the RFEIR."
- This decision reaffirms that a lead agency has substantial discretion in designing a project EIR, and in selecting thresholds of significance for measuring impacts, and that its analyses and determinations will be upheld if they are not unreasonable and are supported by substantial evidence.

This decision reaffirms that a lead agency has substantial discretion in designing a project EIR, and in selecting thresholds of significance for measuring impacts, and that its analyses and determinations will be upheld if they are not unreasonable and are supported by substantial evidence.

*Questions? Please contact [Arthur F. Coon](#) of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real estate law. "The Book" is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit [www.msrllegal.com](http://www.msrllegal.com).*