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Back To CEQA Basics: Second District Teaches That CEQA Requires Judicial Deference To Lead Agency's Chosen Baseline, Failure To Administratively Exhaust "Exact Issue" Results In Forfeiture, And An EIR Is Not Faulty For Omitting Immaterial Information

By Arthur F. Coon on April 21, 2020

In a published 2-1 majority opinion filed April 7, 2020, written by Justice Wiley and joined by Presiding Justice Bigelow, the Second District Court of Appeal (Div. 8) affirmed a judgment upholding the EIR for Tesoro's "Los Angeles Refinery Integration and Compliance Project." *Communities for a Better Environment v. South Coast Air Quality Management District (Tesoro Refining and Marketing Company, LLC, Real Party in Interest)* (2d Dist. 2020) ____ Cal.App.5th ____. The project involved Tesoro's adjacent Carson and Wilmington oil refining facilities, which date from the early 1900s, and sought (1) to better *integrate* those facilities to increase flexibility in output ratios (e.g., of gasoline and jet fuel) to respond to market demands, and (2) to increase regulatory *compliance* by reducing air pollution.

Plaintiff CBE argued the FEIR – which had a 180-page index and consisted of a 1700-plus page DEIR and more than 6,000 pages of comments and responses, exclusive of technical appendices – was faulty in four respects. Specifically, CBE argued the EIR: (1) employed a legally flawed "baseline" for air pollutant emissions; (2) omitted information about the pre-project composition of crude oil processed; (3) failed to explain how a potential 6,000 barrel-per-day throughput increase in one refinery process unit (the Coker) was calculated; and (4) omitted information about the refinery's pre-project volume and unused capacity. The trial court and Court of Appeal, by its majority opinion, rejected each of these arguments.

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Relevant Facts And The Court Of Appeal's Holdings And Analyses On Issues Presented

Baseline

Reducing air pollutants from combustion from the facilities' burners (part of heaters) that are used to heat petroleum in the refining process was a major project goal. The more heat used in the process – measured in millions of British thermal units (Btus) per hour – the more combustion emissions and air pollutants are produced. The project would completely shutter one major pollutant source – the Wilmington Fluid Catalytic Cracking Unit that converted heavy to lighter hydrocarbons – and thus eliminate 687 million Btus per hour of a pre-project total from all modified facility combustion sources of 1310.4 million Btus per hour. It would also increase refinery storage tank capacity, and thus decrease shipping costs and associated air pollution.

As most relevant to CBE's arguments, the project would change the thermal operating limit of a particular heater with 36 burners ("H-100") in the Wilmington facility that heats petroleum going into the Coker. Specifically, H-100's *maximum* heat rate is 302.4 million Btus per hour and its manufacturer's *guaranteed* heat rate is 252 million Btus per hour; the change would rewrite Tesoro's federal air pollution operating permit to use the 302.4 maximum figure (in line with standard industry and agency practice), while imposing a new limitation ensuring air pollution levels would not exceed those that would be generated if H-100 never operated above the lower 252 rate. However, this increase in H-100's thermal operating limit could potentially result in the Coker *either* being able to process a heavier crude oil blend (heavier crude requiring more heat to break down) *or* increasing throughput by 6,000 barrels per day, but not both.

CBE argued the agency (SCAQMD) used a wrong "baseline" in its EIR's air pollution analysis because it used a *peak* (i.e., "worst case") baseline, rather than an *average* baseline, to measure the pre-project pollutant emissions of concern. SCAQMD's "98th percentile" or "near-peak" baseline was derived from collecting data on the refinery's worst air pollution emissions during the two-year period before the project, excluding the top 2% of those as unrepresentative outliers, then using the remaining 98% of worst-day data as the baseline. This 98th percentile baseline analysis, which followed the federal EPA's practice, determined the project would have the beneficial effect of reducing air pollution.

The Court rejected CBE's attacks on SCAQMD's baseline based on governing law and logic. It distilled the governing case law as follows:

> The agency must select a baseline based on actual conditions rather than hypothetical possibilities. There is, however, no single fixed method for measuring actual conditions. Measuring peak impacts can be appropriate under the right circumstances. The agency enjoys discretion to decide how best to measure actual conditions. Courts will review that choice for support from substantial evidence. An environmental impact report cannot, without explanation, present inconsistent and contradictory information on an important issue, or else it will fail on review.

(Citing *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310 ("*ConocoPhillips*"); *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70; *Rodeo Citizens Assn. v. County of Contra Costa* (2018) 22 Cal.App.5th 214.)

In response to CBE's arguments that CEQA compelled use of an "average" baseline, the Court stated, as a matter of logic, that:

> [A] baseline is simply a measure of some situation before it changes. There is no "true," "normal," or "natural" baseline. You decide what you want to measure, and then you select a baseline appropriate to your goal. What one wants to measure is a policy question, as is the choice of a baseline.

The Court observed that one's "analytical objective determines [one's] choice of a baseline method"; that "baselines" are *human* constructs that "did not exist in the pre-human natural world"; and that "humans determine which of the various baselines – peak or average – will better accomplish the specific objective at hand." As an illustrative example, it noted that if one wanted to measure one's car's pre-tune up gas mileage per gallon to determine the effect of the tune up, one could choose from numerous conceivable baselines – e.g., total miles baseline, freeway miles baseline, city miles baseline – all of which would be fully real and actual, depending on the specific effect one chose to measure. Similarly, "focusing on peaks rather than averages can be a superior way to think in many situations" – such as planners concerned with the 100-year flood, engineers concerned with peak earthquake magnitude, and hikers hoping to wade across a river who "want to know its maximum depth is 10 feet" and "are less interested to know its average depth is two feet."

Applying law and logic, the Court reasoned that it "was rational for air pollution regulators to care most about the worst effects of air pollution, which occur when emissions hit their highest levels and the weather makes the perfect storm." Peak pollution days represent the "biggest health danger" that the agency seeks to measure and control; smog peaks endanger the most vulnerable, and "[s]mog alerts are the days of greatest health concern." Per the Court: "Reducing smog alerts is the same logical goal as reducing peak or near-peak levels of air pollution. That was what the agency was trying to do – obviously. It was not sinister or wrong to focus on reducing smog alerts and protecting public health."

The Court held that "[s]ubstantial evidence supports the agency's [98th percentile] baseline choice" which was "selected . . . to follow the practice of the federal EPA, which uses the 98th percentile baseline approach to regulate air pollution at the national level." CBE's argument that the federal regulatory purpose differs from California's failed "because the federal and state goals are identical: to protect public health and welfare." (Citing *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 519-520 in support of proposition that "[p]rotecting public health and welfare is an overarching goal of [CEQA].") Further, the 98th percentile standard does not ignore existing conditions; rather, it measures the air pollution that actually existed on the 15 worst days in the 730-day review period, which were "the days that matter most to human health." Moreover, the federal EPA's approach was not immaterial to a California law analysis, but was a "free, substantial, and conventional resource" which it was rational for state regulators to utilize. Finally, CBE's suggestion that a "normal" baseline *must* be an "average" and not a "peak" or "near-peak" analysis was unsupported by CEQA case law, which is to the contrary; additionally, it ignored that the competing definitions of "average" – mean, median, and mode – themselves belied the existence of a "normal" baseline divorced from the purpose of the measurement and nature of the data (which, as discussed above, are policy driven).

The Court thus upheld SCAQMD's baseline choice as one "for the agency in the first instance" and held that "federal use of the same 98th percentile baseline method is substantial evidence validating the agency's approach." (Citing *ConocoPhillips, supra*, 48 Cal.4th at 327-328.)

Exhaustion Of Issues

CBE also argued CEQA's informational purpose was undermined by the EIR. It claimed those who did not engage in the administrative process could not understand and critique the EIR's assertion that the H-

100 heater's increased thermal operation limits could potentially allow 6,000 additional barrels per day in the Coker's throughput. But the Court held CBE forfeited its argument that the EIR was required to show exactly how the 6,000-barrels figure was calculated because they failed to raise that "exact issue" before SCAQMD. The "exact issue rule" springs from CEQA's statutory requirement barring litigants from raising factual issues not timely presented to the agency in the administrative proceedings (Pub. Resources Code, § 21177(a)), and its rationale is "fairness and efficiency" – i.e., that "[t]he agency is entitled to learn the contentions of interested parties before litigation so it can gain the opportunity to act and to render litigation unnecessary" and that, accordingly, an objector must present the "exact issue" to the agency.

Here, nowhere in the 1,716 pages of comments submitted by CBE and another law firm was there to be found any claim that the EIR was inadequate because it did not provide the detailed calculation for the 6,000 barrels number. While CBE claimed it made broader and more general comments that *encompassed* the issue, that was inadequate to comply with the "exact issue rule." Per the Court: "Making "broad" requests that "encompass" an issue raised on appeal is not raising the "exact issue" during the administrative process." The issue was thus forfeited on appeal.

Omitted Information

CBE made, and the Court rejected, two additional arguments that the EIR omitted necessary information. The first of these was that the EIR was inadequate because it lacked information about the pre-project composition of the crude oil the refinery processes, but instead merely found the input would remain within the refinery's "operating envelope" – i.e., the specific range of crude blends (by hydrocarbon weight and sulphur content) that the refinery was engineered and constructed to be able to process. For reasons explained in some detail in the Court's opinion, a refinery cannot tolerate or process blends of crude oil that fall outside its operating envelope, and therefore must blend incoming crude into an acceptable mixture before it can be refined and distilled into products such as gasoline, diesel and jet fuel. Because the project would do nothing to modify the refinery process units to enable them to produce a significantly different crude oil blend, CBE's complaint that the EIR lacked necessary information regarding pre-project crude oil input composition rested on a false premise. Per the Court: "Because the [EIR] disclosed the project would make no such changes, more information about crude oil composition was immaterial. Physical constraints boxed in the crude operating envelope. The project would not change that." The Court noted that the EIR consistently and logically explained this point, and its analysis was adequate without the immaterial information sought by CBE.

CBE's second omission-of-information argument was that the EIR failed to disclose: (1) the existing volume of crude processed by the refinery facilities as a whole; and (2) the refinery's unused capacity. But the first number – total pre-project throughput – was immaterial to the EIR's analysis because the EIR concluded the project will *decrease* overall refinery throughput (despite the potential 6,000-barrels per-day increase through the Coker, which would be more than offset by a 10,000-barrels-per-day decrease of feedstock from shuttering of the Wilmington Cracking Unit). Per the Court: "No law requires a report to include unnecessary data."

The second number sought by CBE – a quantification of "unused capacity" – was based on an argument that was merely a meritless variant of its argument about the first number. This information was also immaterial, and substantial evidence supported the EIR's analysis.

The Dissent

Dissenting Justice Stratton opined, in her 3-page dissenting opinion, that using the U.S. EPA's 98th percentile methodology as the baseline violated CEQA because, as CBE argued, she believed it ignored

existing conditions: "By using pollution measured only on the 15 worst days, the agency has not set a realistic baseline of existing conditions so that the public and decision makers can project the most accurate picture practically possible of the project's likely impacts. Instead, by using the 15 worst days as the baseline, the project's potential future negative environmental impact is, at worst, diluted and reduced, and is, at best, inaccurate." She believed SCAQMD "should have analyzed environmental conditions representing the entire period, or explained in the EIR why this was not possible, realistic, or informative" and that "[w]hether the [U.S.] EPA uses a percentile approach is immaterial to what the agency should have done under California law."

Takeaways and Implications

The majority opinion, written in a very unique, straightforward, informative and persuasive style, applies a number of important and familiar CEQA rules: setting an "existing conditions" baseline is for the lead agency to do based on substantial evidence, and that policy-driven choice should be given substantial judicial deference; CEQA litigants may not pursue issues in court unless they have raised, and given the agency an opportunity to respond to, the "exact issue" in the administrative proceedings; and an EIR is not faulty for omitting information that is not material to an adequate environmental analysis of the project at issue. The majority's thoughtful analysis of the baseline issue is a significant contribution to the legal literature warranting the opinion's publication, and those lay-persons with an interest in the technical operation of oil refineries will have much to gain from reading the opinion.

Because the project and air quality issues analyzed by the EIR at issue in this case were highly technical in nature, I find the dissenting justice's opinion particularly unsettling in its proposed lack of judicial deference to the expert lead agency SCAQMD and its own experts. It has long been well established law that "in technical matters requiring the assistance of experts and the study of marshaled scientific data as reflected herein, courts will permit administrative agencies to work out their problems with as little judicial interference as possible." (*Western States Petroleum Assn. v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012, 1018.) As our Supreme Court has repeatedly reaffirmed since CEQA's infancy, the judicial deference owed the lead agency when an EIR has been prepared is quite substantial, and courts will not second-guess factually based conclusions and determinations based on their own view of conflicting evidence: "We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so." (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283.) Future courts would do well to keep such principles firmly in mind when reviewing lead agency choices of an existing baseline for purposes of technical impact analysis, and to review the majority opinion's baseline analysis in this case.

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