Digest: Communities for a Better Environment v. South Coast Air Quality Management District

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Opinion by Werdegar, J., with George, C.J., Baxter, Chin, Moreno, JJ., and Pollak, J.[1] and Premo, J.[2]

Issues

1. Whether a governmental agency may use the maximum emissions allowed under a pre-existing government issued permit as the baseline in determining if an Environmental Impact Report is required to be produced.

2. Whether the use of the actual environmental conditions as a baseline during the examination of a proposed project's environmental impact will deprive the permit holder of his or her vested rights.

3. Whether subsequent review of the approved proposed project will violate the permit's statute of limitations.

4. Whether an exception should be made for a company's proposed project if that proposed project consists of using equipment already installed and subject to government permits.

5. Whether a government agency must use a specific formula in its calculation of the baseline.

Facts

Real party in interest, ConocoPhillips, operates a refinery in Wilmington, CA, which produces chemical products such as diesel fuel, gasoline, and jet fuel.[3] The defendant, South Coast Air Quality Management District (District), is a government agency responsible for the regulation of "nonvehicular air

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1 Associate Justice of the Court of Appeal, First Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

2 Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

3 Cmtys. for a Better Env't v. S. Coast Air Quality Mgmt. Dist. 226 P.3d 985, 990 (Cal. 2010).

pollution in the South Coast Air Basin . . . ."[4] The plaintiffs include various labor organizations, individuals who live in the area near the refinery, and an environmental organization.[5] In order to comply with federal and state environmental regulations mandating a reduction of sulfur content in diesel fuel, ConocoPhillips developed a plan entitled the Ultra Low Sulfur Diesel Fuel Project (the Diesel Project).[6] Under the Diesel Project, ConocoPhillips planned to replace certain equipment and increase the use of four boilers it had maintained.[7] These boilers were subject to permits issued prior to the state and federal environmental regulations and, according to the permits, were allowed to operate at certain maximum levels.[8] ConocoPhillips sought approval from the District to obtain a new permit for the Diesel Project.[9] According to the California Environmental Quality Act (CEQA), any project that may have significant environmental effects "requires a public agency to prepare an environmental impact report (EIR) . . . ."[10] In order to determine if a project will significantly affect the environment, the government agency must compare the conditions of the environment prior to the project's implementation with the conditions of the environment post-implementation.[11] The environment's state prior to the project's implementation is referred to as the "baseline," which consists of "the physical environmental conditions in the vicinity of the project, as they exist at the time . . . environmental analysis is commenced . . . ."[12] Furthermore, CEQA guidelines permit government agencies to publish certain threshold levels; if a certain chemical emission surpasses that level, the proposed project will be deemed to have a significant impact on the environment.[13] In its initial report, the District concluded that the Diesel Project would not have a significant impact on the environment, and thus did not require production of an EIR.[14]

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4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.* at 989 (citing CAL. PUB. RES. CODE §§ 21100(a), 21151(a) (West 2010)). "The purpose of an EIR is to inform decision makers and the public of the potential environmental impacts of a project and to identify feasible alternatives to the project and measures to mitigate or avoid the adverse effects." Fed'n of Hillside & Canyon Ass'ns. v. City of L.A., 83 Cal. App. 4th 1252, 1258 (2000).

11 *Cmtys. for a Better Env't*, 226 P.3d at 989.

12 *Id.* (quoting CAL. CODE REGS. tit. 14, § 15125(a) (2010)).

13 *Id.* at 990 n.2.

14 *Id.* at 990.

One of the plaintiffs' experts opined that the Diesel Project would greatly affect the environment by increasing nitrogen oxide emissions to as much as 661 pounds per day.[15] The District's published threshold for nitrogen oxide emissions is 55 pounds per day.[16] The District itself concluded the Diesel Project would increase nitrogen oxide levels by between 237 and 456 pounds per day, but, since the bulk of this increase—between 201 and 420 pounds per day—would be caused directly by the increased usage of the four boilers (an increased usage within the maximum allowed by their permits), the District regarded the emissions output as below the 55 pounds per day threshold.[17] Thus, in determining the baseline, the District argued that because ConocoPhillips already had permits to use the boilers, its baseline should be the level of emissions that would occur at the boilers' maximum permitted use.[18] In their petition for writ of mandate, plaintiffs argued that the District erred in using this as a baseline, that substantial evidence existed to conclude that the Diesel Project would have a significant impact on the environment, and that the District should have prepared an EIR to determine if any measures could be taken to mitigate the environmental impact of the Diesel Project.[19]

The trial court denied the plaintiffs' petition and entered judgment for ConocoPhillips and the District.[20] On appeal, the Court of Appeal agreed with the plaintiffs, holding that the proper baseline should be determined by the actual physical conditions, as opposed to potential conditions.[21] The Court of Appeal further held that if the proper baseline had been used, there would have been sufficient evidence to show that the Diesel Project would have a significant impact on the environment.[22] Therefore, the Court of Appeal remanded with orders that an EIR be prepared by the District.[23] The District and ConocoPhillips petitioned the California Supreme Court for review.[24] In their argument, ConocoPhillips and the District contended that: (1) as ConocoPhillips had an entitlement to use its boilers at a certain level, the proper baseline should be those

15 *Id.*
16 *Id.* at 990 n.2.
17 *Id.* at 990–91.
18 *Id.* at 991.
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*

emissions created by the boilers' maximum allowable level of usage; (2) if the maximum emissions allowed under the permit were not used as a baseline, ConocoPhillips would be deprived of its vested rights under the permit; (3) in allowing a challenge to the District's determination, the court would violate the permit's statute of limitations; (4) regardless of the above arguments, an exception should have been made for ConocoPhillips because its proposed project was simply a modification of a pre-approved project; and (5) the Court of Appeal's order that an average annual emissions level be used as the baseline was improper.[25]

Analysis

1. What is the proper standard to establish a baseline for purposes of determining if a proposed project will have a significant impact on the environment?

To determine if the District used an improper baseline, the court first turned to the relevant statutory law, particularly section 15125(a) of the California Code of Regulations, which states:

> An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published . . . . This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.[26]

The court next examined Court of Appeal decisions ruling under this statute and concluded that they held that the proper baseline is to be established by a determination of "*actual* environmental conditions existing at the time of CEQA analysis," not the conditions that *could* exist under an existing permit.[27] However, in its determination, the District used as its baseline the emissions that would occur if the boilers were running at the maximum capacity allowed under their permits.[28] Furthermore,

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25 *Id.* at 989.

26 *Id.* at 992 (emphasis omitted) (quoting CAL. CODE REGS. tit. 14, § 15125(a)).

27 *Id.* at 992–93 (emphasis added) (citing Fat v. Cnty. of Sacramento, 97 Cal. App. 4th 1270, 1277–78 (2002); Envtl. Planning Info. Council v. Cnty. of El Dorado, 131 Cal. App. 3d 350, 354, 357–58 (1982); City of Carmel-by-the-Sea v. Bd. of Supervisors, 183 Cal. App. 3d 229, 246–47 (1986); Cnty. of Amador v. El Dorado Cnty. Water Agency, 76 Cal. App. 4th 931, 955 (1999); Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors, 87 Cal. App. 4th 99, 121 (2001); San Joaquin Raptor Rescue Ctr. v. Cnty. of Merced, 149 Cal. App. 4th 645, 658 (2007); Woodward Park Homeowners Assn., Inc. v. City of Fresno, 150 Cal. App. 4th 683, 693 (2007)). These cases included factual scenarios in which a permit or regulatory framework allowed for higher increased activity than what was actually occurring. *Cmtys. for a Better Env't*, 226 P.3d at 993.

28 *Id.* at 993.

the District admitted that, normally, no one boiler ran at its maximum capacity allowed under the permit.[29] Thus, the court held that the District erred in using as the baseline the conditions that could exist if the boilers were simultaneously being used at full capacity.[30] The court reasoned that using the boilers' maximum capacity emissions is not an accurate reflection of the established, existing, and actual environmental conditions prior to the Diesel Project's implementation, but is only a hypothetical determination of what could exist at any given time under the permits.[31] By using this baseline, the court further reasoned, the District was producing an illusory comparison that would only serve to mislead the public and subvert the true intentions of CEQA.[32]

2. Does disallowing a government agency from using the maximum emissions allowed under a pre-existing permit as the baseline in its CEQA analysis violate that permit holder's vested rights?

Despite the established case law, the District and ConocoPhillips argued that an exception should be made because ConocoPhillips possessed an entitlement to use the boilers at their maximum allowable capacity under the permit.[33] To rule otherwise, according to the District and ConocoPhillips, would deprive ConocoPhillips of its vested rights and conflict with the permit's statute of limitations.[34] Under the doctrine of vested rights, a property owner who has been issued a government permit, and has substantially developed his or her property in reliance on the permit, has a vested right to complete construction and use the property consistent with the permit.[35] The court dismissed this argument, holding that any order by the District could not deprive ConocoPhillips of its right to use its boilers at their maximum allowable level.[36] As the court reasoned, the issue is not whether ConocoPhillips has a right to use its boilers at their allowable level, but rather what impact ConocoPhillips' proposed project, including the use of new and

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29 *Id.* In fact, a boiler would only run at full capacity if another boiler happened to be shut down. *Id.*

30 *Id.*

31 *Id.* at 994 (citing *San Joaquin Raptor Rescue Ctr.*, 149 Cal. App. 4th at 658).

32 *Id.* (citing *Envtl. Planning Info.*, 131 Cal. App. 3d at 538).

33 *Id.*

34 *Id.*

35 *Id.* (citing Russ Bldg. P'ship. v. City and Cnty. of S.F., 44 Cal. 3d 839, 845–46 (1988)).

36 *Id.* at 995.

modified equipment, would have on the environment.[37] Even if, using the proper baseline, the District determines that enough adverse environmental effects will result from the Diesel Project that it would not be approved without limits on the boilers' emissions output, this would not deprive ConocoPhillips of a vested right because ConocoPhillips has "no vested right to *pollute the air* at any particular level."[38] Merely conditioning approval of a new project on controlled nitrogen oxide emissions in no way deprives ConocoPhillips of a vested right and does not contradict the terms of its permits.[39] The court also stressed that it is always within the District's power to simply deny permits to be issued for the Diesel Project if it determines that nothing could successfully mitigate the effects of the increased nitrogen oxide production, which would clearly result in no interference with ConocoPhillips' rights under the permits.[40] Furthermore, even if mitigation would require interference with ConocoPhillips' vested rights, as long as the District's initial investigation determined that the Diesel Project would result in a significant environmental impact on the area, CEQA would still require an EIR to be produced.[41] Thus, the court concluded, even if an applicant's vested rights may be interfered with, it is not an excuse to forgo an EIR.[42]

3. Does review of an order approving a proposed project which entails the use of equipment subject to pre-existing permits violate the statute of limitations?

ConocoPhillips and the District also argued that by allowing judicial review of the boiler permits the courts have violated the statute of limitations for such review, which is 30 or 180 days, depending on the type of challenge.[43] The court quickly dismissed this argument for the same reasons stated above: (1) plaintiffs did not challenge the previously issued boiler permits, but rather they challenged the District's approval of the Diesel Project; (2) challenging the type of baseline used to assess the Diesel Project's environmental impact could not result in an order interfering with the permits; and (3) even if an order were

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37 *Id.* at 994.

38 *Id.* (citing Sherwin-Williams Co. v. South Coast Air Quality Mgmt. Dist. 86 Cal. App. 4th 1258, 1273 (2001); Mobil Oil Corp. v. Superior Court, 59 Cal. App. 3d 293, 305 (1976)).

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.* at 995–96.

given to modify the permits, that still would not preclude the duty the District has to produce an EIR.[44] The court therefore held that the statute of limitations on the *permits* does not affect the rights of the plaintiffs in this case to challenge the District's approval of the Diesel Project.[45]

4. Should an exception be made for a company's proposed project if it will require the use of equipment already subject to government issued permits?

ConocoPhillips and the District argued that a long line of Court of Appeal decisions hold that using the maximum allowable emissions as a baseline is an exception to the general rule of using existing conditions where the proposed project is merely a modification of a previously approved project.[46] The court relied on the fact that the Diesel Project would require the installation of new equipment, in addition to increased use of existing equipment, when it held that this was not merely a modification of a pre-existing project.[47] Furthermore, ConocoPhillips applied for a new permit, and the District treated the project as a new one that was not exempt under the California Code of Regulations.[48]

5. What is the proper method to accurately calculate the baseline to be used during CEQA analysis?

Finally, the Court addressed the issue of how to properly calculate the baseline.[49] ConocoPhillips disagreed with the Court of Appeal ruling that required the District to use the annual average nitrogen oxide emission level as its baseline.[50] The court turned to the CEQA guidelines in section 15125, which state: "[T]hat the lead agency 'normally' use a measure of physical conditions 'at the time the notice of preparation [of an EIR] is published, or if no notice of preparation is published, at the time environmental analysis is commenced.'"[51]

The court expressed concern about using a rigid date for

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44 *Id.* at 996.

45 *Id.*

46 *Id.* For a discussion on the applicability of the rule which ConocoPhillips argued should apply here, see Bloom v. McGurk, 31 Cal. Rptr. 2d 914, 916 (Cal. Ct. App. 1994) (noting that where a new permit involves no change in operations "the project falls squarely within [CEQA's] categorical exemption").

47 *Cmtys. for a Better Env't*, 226 P.3d at 996.

48 *Id.* *See also* CAL. CODE REGS. tit. 14, §§ 21166, 15162, 15301 (2010).

49 *Cmtys. for a Better Env't.*, 226 P.3d at 997.

50 *Id.*

51 *Id.* (quoting CAL. CODE REGS. tit. 14, § 15125(a)).

establishing the baseline because conditions will often change and emissions may fluctuate rapidly.[52] Additionally, according to the Court, using a rigid date may encourage companies to artificially increase their emissions use in order to establish a higher baseline during the review process.[53] Ultimately, the court relied on the absence of CEQA guidelines mandating a precise formula be used to determine that the District (or other responsible governmental agency) has discretion to determine how the proper baseline should be calculated, as long as it is supported by "substantial evidence."[54] The court ordered that the District is not necessarily to use any exact formula, but in whatever formula it does use, it must compare the existing environmental conditions before the Diesel Project with the environmental conditions after the Diesel Project.[55]

Holding

The court affirmed the Court of Appeal.[56] The court held that maximum emissions limits allowed under a permit do not constitute a proper baseline.[57] Next, the court held that a company is not deprived of its vested rights under a permit it holds by an order to mitigate emissions created by a proposed project.[58] A review of a proposed project, even if that review determines the project should be denied, in no way will affect any vested rights in pre-existing permits.[59] Additionally, as the proposed project will require the installation of new equipment, the proposed project is not simply a modification of a prior implemented project and thus is not subject to an exception to the rule that an EIR be produced for any new project that will significantly affect the environment.[60] Finally, the court held that an EIR must be produced because the Diesel Project will likely significantly affect the environment.[61] As long as the District compares existing environmental conditions with those after implementation of the proposed project, however, it is in the

52 *Id.* (citing Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors, 87 Cal. App. 4th 99, 125 (2001)).
53 *Id.* at 997.
54 *Id.* at 997–98.
55 *Id.* at 998.
56 *Id.*
57 *Id.* at 993.
58 *Id.* at 995.
59 *Id.*
60 *Id.* at 996.
61 *Id.* at 992.

District's discretion to determine how the baseline should be calculated.[62]

Legal Significance

The Court's decision prevents a governmental agency from using the maximum emissions allowed under a permit as the baseline in its determination of whether or not an EIR is to be produced. Thus, governmental agencies must use actual existing environmental conditions when determining whether an EIR need be produced. The mere fact that a company has a right to produce a certain level of emissions under an existing permit does not mean it has the right to produce a comparable level of emissions in a *new* project. The two projects are distinct, and any government agency contemplating the production of an EIR must treat them accordingly.

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62 *Id.* at 998.